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COOPERATIVE EXTENSION

Natural Resource Users Law & Policy Center

A collaboration between the
James E. Rogers College of Law and
the College of Agriculture & Life Sciences

January 16, 2019

Memorandum

To: George Ruyle
University of Arizona, School of Extension
Director, Center for Natural Resource Users Law and Policy Center

From: Jeff Eisenberg, Consultant

Subject: Summary of Center Assistance for Duncan Valley “Hot Land” Producers

Background

The Center for Natural Resource Users Law and Policy Center was contacted by producers in Duncan Arizona asking for help with water and property issues stemming from the Gila River adjudication. A representative of the Center met with a group of 20 producers and their families in Duncan in early September 2018 to discuss the issue.

The adjudication involves the Gila River Indian Community, the San Carlos Indian Tribe, the U.S. Departments of the Interior and Justice, a number of local irrigation districts and farmers. The issue for which the producers sought help from the Center is much narrower than that presented by the general adjudication.

The State of Arizona had created a map showing the impact zone showing which underground, sub-flow waters were hydrologically connected to the surface waters of the Gila River watershed, and were therefore presumably implicated in the adjudication. A small number of producers in the Duncan Valley, representing hundreds of acres of irrigated farmland out of a total of more than 25,000 acres at stake in the adjudication, purchased additional land after some of them were told by a representative of the Graham Irrigation District that they would be able to pump water from outside the impact zone and use it to irrigate crops inside the zone. After making the purchases, they were told that in fact they would not be able to pump the water from their newly-acquired land. As a result, hundreds of thousands of dollars were spent for land that could not be used to farm, which is the reason the purchase was made.

Discussion

The question the producers presented to the Center is whether they have legal recourse for the harm they suffered and whether the Center could help them pursue the remedy. The answer is there is no legal recourse for which the Center can provide assistance.

The civil wrong committed here is the producers were led to believe they could pump water for irrigation from the land they purchased. There were conceivably misrepresentations of fact by the realtors or owners who sold them the land. Determining whether there was a breach of a duty of disclosure is a matter of state law and would require a fact-intensive investigation into what the various parties to the transactions actually knew or should have known at the time of the sales.

The Center limits its involvement to issues that have implications for a broader set of Arizona stakeholders. Unravelling the facts of a few sales transactions is outside the scope of its activities. Additionally, and more generally, it does not conduct litigation on behalf of stakeholders.

Consequently, the Center contacted the Pacific Legal Foundation (PLF), a well-known, successful public interest law firm that litigates high-profile cases in support of individual freedom. PLF's interest in the case was on whether the Duncan Valley producers had their property (groundwater) taken from them without just compensation by the Graham Irrigation District and the State of Arizona. PLF declined to take the case for two reasons.

First, the Arizona Supreme Court has indicated that landowners have a very limited property interest in groundwater in the state, separate from the overlying surface water. See In re Adjudication Gila Water System, 9 P.3d 1069 (Ariz. 2000). This means the Duncan Valley producers had no property taken from them when they were told they could not pump groundwater for their crops, and they have no cause of action for compensation for a takings.

Their larger and real legal issue is shared with all producers that irrigate their crops in the Gila River watershed: rights to the water in the Gila River system. The producers are being represented by a large team of very prominent, accomplished lawyers in litigation that has been ongoing for 44 years. The Indian tribes are making competing claims on the same waters. The lawyers are working very hard to secure the very best deal possible for the Gila River producers. PLF recognized that it would not have much value to add to this already full and complicated legal picture.

The Center fully recognizes and appreciates the hardship suffered by some of the Duncan Valley producers in not being able to irrigate their crops from their relatively recently acquired land. Water law and stream adjudications are not easy processes. Difficult allocations of water are made between parties that have been using the water for a long time. There are always winners and losers in the process.

On a somewhat brighter note, the Center was able to help the producers gain access to the operation of the Franklin County Irrigation District (FID), which serves the Duncan Valley and is one of the named parties to the Gila River adjudication. FID was providing no information to District members about what was happening in the adjudication and the producers could not understand what was happening to their right to use water which they believed was theirs. A representative of the producers that the Center has been working with is now on the board of the FID. He will have access to information about the legal proceedings in the adjudication and is in a position to keep the community informed.