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MAR 11 1991  
By Ethel Bouton, Clerk  
Deputy

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Attorney for Defendant Davis

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF YAVAPAI

GEORGE W. HANCE, et al.,	)	No. 4772
Plaintiffs,	)	Division 3
vs.	)	DEFENDANT DAVIS' RESPONSE
WALES ARNOLD, et ux.; et al.,	)	TO MOTION FOR RECONSIDERATION
Defendants	)	

Although Rule IV(f) does not require a responsive pleading on a motion for reconsideration absent an express order, which this Court has not given, Defendants Davis is submitting this memorandum to assist the Court on the oral argument set for today at 2:30.

This memorandum raises no new evidence, however, it does reference documents that were already in the Court file in this case which were not introduced at the initial hearing, as the ditch commissioners requested that the Court take judicial notice of the file at the first hearing.

1 The documents on file clearly show that the Verde Ditch  
2 Company acquired no easement rights on the Davis' land, with the  
3 exception of an easement right for the ditch itself. The  
4 documents also clearly show that the longstanding policy of the  
5 ditch commissioners was that maintenance was to be performed from  
6 the low side of the ditch (the Davis' land is on the high side),  
7 and that both sides of the ditch were not necessary for the  
8 maintenance of the ditch.

9 The documents and pleadings also show that this litigation  
10 was intended to bind shareholders only, as the original purpose  
11 of the litigation was merely to settle a dispute regarding water  
12 rights and the cost of the delivery of that water. The original  
13 decree itself, entered in 1909, stated only that the defendants  
14 (the Davis' predecessor in title) were enjoined from interfering  
15 with the use and enjoyment of the original plaintiff. Nothing in  
16 the original decree establishes the easement rights that the  
17 ditch commissioners now assert.

18 Further, the court file shows that the 1989 amendments to  
19 the Verde Ditch regulations, which were promulgated a few years  
20 after the Davis' purchased their land were ineffective as to any  
21 non-shareholders in the ditch. The regulations were not noticed  
22 to any non-shareholders, no non-shareholders were served with any  
23 petitions or proposed orders, and there is no affidavit of  
24 publication in the files to show that any kind of general public  
25 notice was intended. This Court might recall that these are the

1 only regulations which purport to create an easement on both  
2 sides of the ditch.

3 Easements may be created by express agreement, by  
4 prescription, or by implication. The Court file and evidence  
5 raised at the hearing of this matter fail to show that the  
6 requirements for any of the three have been met.

7 I. No Express Easement In Favor Of The Verde Ditch Company  
8 Exists With Respect To The Davis' Land

9 There are no deeds, contracts for sale or other written  
10 documents which reference any sort of easement in favor of the  
11 Verde Ditch Company by either the Davis themselves, or any of  
12 their predecessors in title.

13 Further, no evidence was brought before the Court to show  
14 the existence of an oral grant of easement.

15 In fact, no express easement even exists with respect to the  
16 Verde Ditch itself.

17 Even the original judgment itself (Exhibit 4 to the  
18 Commissioner's Motion For Reconsideration), which was never  
19 appealed, did not create any easement rights. It merely  
20 referenced the entitlement to use of the water, and created no  
21 specific easement rights whatsoever. It also failed to provide  
22 for the appointment of any particular ditch commissioner, as the  
23 ditch commissioners now claim.

24 In fact, the whole focus of the original litigation was that  
25 Mr. Hance felt that his neighbors were going to cut off his water  
after he had aided them in building a ditch. He did not want to

1 pay any funds to them unless he could be guaranteed that he would  
2 continue to receive water. Toward that end, he sought the  
3 appointment, of a third person to be appointed as water  
4 commissioner.

5 Accordingly, Norval N. Cherry was appointed as the Water  
6 Commissioner in July 1910 (Exhibit A attached hereto). He also  
7 had no power to create easements. His role was to "...  
8 personally apportion and supervise the use of all of said water  
9 and not permit any tap boxes to be opened by any one except  
10 yourself" and to "see to it that plaintiffs have the water for a  
11 full day every fifth day, ..."

12 No easement rights were set forth, and in fact there is no  
13 testimony to suggest that the Verde Ditch bordered what is now  
14 Jim Davis' land in the same precise location as the original  
15 ditch.

16 The 1963 Rules and Regulations also did nothing to create  
17 any easements rights on the lands of non-shareholders. The first  
18 paragraph of the 1963 Rules and Regulations states that

19 "... the within rules and regulations are promulgated  
20 and placed in effect by the shareholders with the  
approval of the superior court ..."

21 In fact, any rights to gain access to the ditch were  
22 restricted to shareholders' land. Paragraph 2 of the regulations  
23 stated:

24 "If necessary, private property of shareholders may be  
25 crossed in order to gain access to Ditch work areas.  
Any damage resulting from said crossing will be  
corrected by the Ditch organization."

1           There is, therefore, no evidence to support the grant of an  
2 express easement, either by agreement of the parties, or by  
3 judicial decree.

4           II. No Easement By Prescription In Favor Of The Verde Ditch  
5 Company Has Been Shown To Exist With Respect To The Davis' Land  
6 With The Exception Of The Ditch Itself

7           To acquire an easement by prescription, the Verde Ditch  
8 would have to prove a hostile, open, notorious, exclusive claim  
9 of right for at least ten consecutive years. England v. Ally Ong  
10 Hing 105 Ariz. 65, 459 P.2d 498 (1969)

11           Even with respect to a right of way use, as it now claims,  
12 it would have to show a definite and certain line or path of use.  
13 Krencicki v. Petersen 22 Ariz. App. 1, 522 P.2d 762 (1974)

14           The evidence that was brought forth by the Verde Ditch  
15 Commissioners was that one recalled that he may have gone onto  
16 the Davis property once within the last five or six years. He  
17 did not reference a certain path, or a certain purpose, and he  
18 did not produce and documents or other records of the ditch  
19 commission to support his testimony, which was in direct conflict  
20 with the Davis' and their witnesses, who said that Mr. Davis had  
21 erected a pipe fence line on the same line as an old wooden fence  
22 which had obviously been undisturbed for many years.

23           The Verde Ditch Company has therefore failed to prove the  
24 elements of any sort of easement by prescription.  
25

1           III. No Easement By Implication In Favor Of The Verde Ditch  
2           Company Has Been Shown To Exist With Respect To The Davis' Land  
3           With The Exception Of The Ditch Itself

4           The leading Arizona case on the creation of an easement by  
5           implication was authored by Judge Ogg, the same judge that  
6           drafted the 1963 Rules and Regulations.

7           The case is Porter v. Griffith, 25 Ariz. App. 300, 543 P.2d  
8           138 (1975). The case holds that there are four essential  
9           elements necessary to create of an easement by implication.  
10          There must be a single tract of land arranged so that one portion  
11          of it derives a benefit from the other; which is subsequently  
12          divided by the owner into one or more parcels; before the  
13          separation occurred, the easement use must have been long,  
14          continuous and obvious to a degree which shows permanency; the  
15          use must be essential to the beneficial enjoyment of the parcel  
16          benefitted; and the easement can only be made in connection with  
17          a conveyance.

18          First, Mr. Davis' land is not situated so that it benefits  
19          the land on the lower side of the ditch. The Davis land is  
20          located on the other side of the ditch, and it is not necessary  
21          for irrigation water to run over it to reach the shareholder's  
22          land. It was uncontroverted that the normal operation of the  
23          ditch and irrigation are performed without any access to the  
24          Davis land at all. The uncontroverted evidence also showed that  
25          the ditch is readily accessible for maintenance purposes from the  
            lower side, which is shareholder's land, and that in fact there  
            is a road bordering the ditch on the shareholder's side which is

1 generally used to travel up and down the ditch. It also showed  
2 that it is not necessary to cross Mr. Davis' land to reach the  
3 ditch.

4 Moreover, the longstanding policy of the Ditch Commissioners  
5 was in evidence in the Court file in the form of a letter from  
6 the Verde Ditch Commissioners, dated April 27, 1971 (Exhibit B  
7 attached hereto), which was not introduced in the hearing. The  
8 letter states that the Ditch Commissioners believed in 1971 that  
9 maintenance of the Ditch could be performed by access "along  
10 either side" (not both sides) and that normal maintenance was  
11 performed from the "low side".

12 There was no evidence introduced at the hearing which would  
13 justify any reason why there was now a need to depart from that  
14 policy in this case.

15 The second element of an easement by implication that is  
16 missing is that the easement must have been long, continuous, and  
17 obvious to a degree which shows permanency. This element is  
18 missing because the uncontroverted evidence showed that when Jim  
19 Davis purchased the land, he found no evidence of a well traveled  
20 path along the ditch on his land, but rather found an old wooden  
21 fence which had obviously been undisturbed for many years. The  
22 fact that an easement was alleged to exist was not obvious at  
23 all. Davis replaced that wooden fence with a pipe fence, which  
24 did not intrude on the ditch in any way, and did not extend his  
25 improvement line beyond what was there when he purchased the

1 land. After purchasing the land, he gained no knowledge that an  
2 easement would be required. In fact, the evidence was  
3 uncontroverted that the Davis' land was not used by ditch  
4 personnel while he had owned it. Commissioner Everett was the  
5 only one who testified that Mr. Davis' land had ever been  
6 accessed for any purpose, and he referenced only one  
7 unsubstantiated instance since he had been commissioner, and he  
8 has served since March, 1974 - about 17 years.

9 A third requisite element of an easement by implication that  
10 is absent is the requirement that the easement be essential to  
11 the parcel benefitted, at the time of the original conveyance.  
12 If the necessity does not occur until after the conveyance, then  
13 no easement can be implied. Pugh v. Cook 153 Ariz. 246, 735  
14 P.2d 856 (1987)

15 In this case, there is no evidence whatsoever as to what the  
16 original conveyance was supposed to be, when it occurred, or who  
17 the parties were.

18 The court's files does reflect that the longstanding policy  
19 of the Ditch Commissioners as set forth in the April 27, 1971  
20 letter was to maintain the ditch from the low side.

21 Even if this Court disregards that document, the testimony  
22 at trial was uncontroverted that the ditch could be cleaned out  
23 from the low side using an extendohoe. It was also  
24 uncontroverted that the normal practice in cleaning out ditches  
25 is to excavate from the low side, as the dirt excavated can then



1 used to strengthen the ditches borders on the side that is most  
2 likely to overflow - the low side. It was also uncontroverted  
3 that the Verde Ditch Company owns no equipment, and has to  
4 contract with third parties for maintenance of the ditch  
5 (testimony of former commissioner Dale Harper). Given that  
6 contracting with outside parties is a necessity, the Verde Ditch  
7 would have to prove that it is unreasonably expensive to contract  
8 for a extendohoe in this location, and that their burden in  
9 doing so outweighs the burden of making Jim Davis tear down his  
10 fence, and reduce the use of his property. Alternatively, they  
11 could have alleged that they are unable to contract with a party  
12 who had an extendohoe. They alleged neither.

13 The evidence introduced by the ditch commissioners suggests  
14 that they are totally unable to prove a true case of necessity.  
15 Even under the ditch commissioners' scenario, it would therefore  
16 appear that we are balancing approximately a few hundred dollars  
17 extra expense every 20 years or so with forcing a servient  
18 landowner without prior notice of the easement to incur a few  
19 thousand dollars worth of loss now. This falls far short of  
20 constituting a necessity.

21 Finally, the last requirement is that the easement be given  
22 as part of a conveyance. There was absolutely no evidence on  
23 this point at all. Since there was no testimony of any grantor  
24 in the title chain to the Davis' stating that there was an  
25 easement created by him in connection with a grant, there is no

1 evidence upon which this Court could infer such an intent. That  
2 leaves this Court to guess as to when the easement allegedly  
3 arose, without even being given a time frame, or the identity of  
4 the parties involved in the transaction.

5 Even in water delivery cases, where there is an existing  
6 water pipe going across an servient parcel, which pipe appears  
7 permanent, an easement by implication cannot be granted where  
8 there is no evidence of the original contracting parties' intent.  
9 Koestel v. Buena Vista Public Service Corporation, 138 Ariz. 578,  
10 676 P.2d 6 (1984)

11 The original decree, which was not recorded, and the  
12 subsequent 1963 regulations, which were recorded without legal  
13 descriptions were the only documents referenced by the ditch  
14 commissioners in support of their argument that such an intent  
15 existed. Neither document seeks to bind non-shareholders, or  
16 even references the term "easement", and neither document seeks  
17 to bind any persons not then parties to the litigation.

18 It is uncontroverted that the Davis' land is not land which  
19 has ever had any shareholding rights in the Verde Ditch Company,  
20 as it is on wrong side of the ditch. It is therefore not bound  
21 by either the original decree or the 1963 regulations.

22 The evidence therefore establishes an absence of any intent,  
23 and the easement cannot be implied.

24 The Ditch Commissioners have alleged, at great length, that  
25 they are entitled to a secondary easement to go with their

1 primary ditch easement. These cases are primarily water  
2 diversion cases, and not easement cases, and it is true that they  
3 would be granted a secondary easement if they could prove that  
4 they could not maintain the water way another way, without  
5 intrusion on the servient land, which they obviously cannot prove  
6 in this instance.

7 They cannot, however, enlarge their right of way with  
8 providing just compensation to the landowner. A case on point  
9 involving a ditch is Marjon v. Quintana 82 N.M. 496, 484 P.2d 338  
10 (1971), a case exactly on point. In Marjon, there was a ditch  
11 running across the plaintiff's property, and the ditch  
12 commissioners alleged that they were entitled to a 15' easement  
13 on each side of the ditch. The trial court granted the easement.  
14 The New Mexico Supreme Court reversed and remanded it.

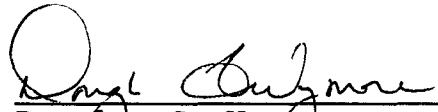
15 The Court held that the fact that a 15' easement is alleged  
16 to have existed in some spots is not enough. The evidence must  
17 show the existence of an easement on the land in question, and  
18 further show that the easement was reasonably necessary. Even a  
19 statutory right to enlarge, extend or reconstruct the ditch would  
20 not give the commissioners the right to take private property  
21 without just compensation.

## 22 Conclusion

23 The Davis' land is not burdened by an easement, other  
24 than an easement for the ditch itself. The ditch commissioners  
25 have not satisfied their burden of proof as to the creation of

1 the easement, including naming the parties, transaction, time  
2 period and intent. They have also failed to prove necessity, and  
3 their allegations as to that element are considerably different  
4 than the longstanding policy of the Verde Ditch Company. Their  
5 Motion for Reconsideration should be denied.

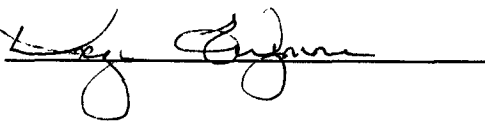
6 Respectfully submitted this 11<sup>th</sup> day of March, 1991.

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8 \_\_\_\_\_  
9 Douglas G. Wymore  
Attorney for Defendant Davis

10 Copies of the foregoing  
11 sent via fax and hand  
12 delivered this 11th day  
13 of March, 1991 to:

14 Hon. James B. Sult  
15 Yavapai County Superior Court  
16 Prescott, AZ 86301

17 L. Richard Mabery  
18 101 E. Gurley, Suite 203  
19 Prescott, AZ 86301  
20 Attorney for Plaintiffs

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IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE TERRITORY  
OF ARIZONA; IN AND FOR THE COUNTY OF YAVAPAI.

GEORGE W. HANCE, et al.,  
Plaintiffs.  
vs.  
WALES ARNOLD, et al.,  
Defendants.

C I T A T I O N.

To Herval B. Cherry,  
Water Commissioner,  
Camp Verde, Arizona.

You are hereby commanded to distribute the water in the Verde ditch under your supervision, and particularly the water reaching farms along the old ditch, below the flume strictly in accordance with the decrees and orders of this Court, and that you personally apportion and supervise the use of all of said water and not permit any tap boxes to be opened by any one except yourself. That you place proper locks upon all the tap boxes and retain the keys yourself. That you see to it that plaintiffs have the water for a full day every fifth day, and failing in any of these matters you will be cited to appear and show cause.

Hereof take due notice.

Witness the Honorable EDWARD M. DOE, Judge of the above entitled Court, with the seal of said Court affixed this \_\_\_\_ day of July, 1910.

\_\_\_\_\_  
Clerk.

The Verde Miteh Company.  
P. O. Box 186  
Camp Verde, Arizona. 86322.

April 27th. 1971 .

Mr. Stephen S. Reer,  
P.O. Box 1321,  
Flagstaff, Arizona. 86001.

Dear Mr. Reer:

This letter will be your official notice that we the undersigned supervisors of the Verde Miteh Company of Camp Verde, are and will hold you, your heirs or assigns or successors, fully responsible for any and all damages whatsoever caused by any break or overflow caused by a break in any manner along the Verde irrigation canal that runs along and thru your property on the East Central part of Camp Verde. In your disregard for the north or low side of this canal you have reduced its width so that it cannot be cleaned or that a machine can travel on the canal bank for that purpose. This canal has an easement right by constant use and practice for many, many years, so it can be kept clean and in good condition by the free and open passage along either side ( normally the low side of the canal) for such equipment as is necessary.

A copy of this letter has been sent to the Supervisors of Yavapai County and to the Superior Court Judge Jack L. Ome. of Prescott, Yavapai County, Arizona.

Yours truly,  
The Verde Miteh Company,

*Walter S. Simons*

*W. J. Thompson*

*Vernon R. Harrison*