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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

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

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.

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

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

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

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

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

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

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

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

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

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

In fact, the whole focus of the original litigation was that 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

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

Accordingly, Norval N. Cherry was appointed as the Water Commissioner in July 1910 (Exhibit A attached hereto). He also had no power to create easements. His role was to "... 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" and to "see to it that plaintiffs have the water for a full day every fifth day, ..."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

First, Mr. Davis' land is not situated so that it benefits the land on the lower side of the ditch. The Davis land is located on the other side of the ditch, and it is not necessary for irrigation water to run over it to reach the shareholder's land. It was uncontroverted that the normal operation of the ditch and irrigation are performed without any access to the Davis land at all. The uncontroverted evidence also showed that 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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

Respectfully submitted this 11th day of March, 1991.

Douglas G. Wymore
Attorney for Defendant Davis

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

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

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

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 Norval E. 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 decree 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 Ditch Company.
P. O. Box 186
Camp Verde , Arizona. 86322.

April 27th. 1971 .

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

Dear Mr. Roer:

This letter will be your official notice that we the undersigned supervisors of the Verde Ditch 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. Ogg, of Prescott, Yavapai County, Arizona.

Yours truly,
The Verde Ditch Company,

[redacted]