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ETHEL BOUTON, Clerk

By [Signature]  
Deputy

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Arizona State Bar I.D. No. 005188

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

GEORGE W. HANCE, et al.	)	
	)	No. 4772
Plaintiff,	)	
	)	Division 1
vs.	)	
	)	MEMORANDUM OF LAW
WALES ARNOLD, et ux., et al.	)	
	)	
Defendant.	)	

VERDE DITCH COMPANY, through undersigned counsel, submits the following Memorandum of Law pursuant to Item No. 3 of the Court's Order dated November 1, 1988.

RESPECTFULLY SUBMITTED this 30th day of November, 1988.

[Signature]  
L. Richard Mabery  
101 E. Gurley St., Suite 203  
Prescott, Arizona 86301  
Counsel for VERDE DITCH COMPANY

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1           On or about February 24, 1908, George W. Hance and  
2 Partheny H. Hance, Plaintiffs in this matter, filed their Amended  
3 and Supplemental Complaint in the District Court of the Fourth  
4 Judicial District of the Territory of Arizona. The Complaint  
5 requested that the court establish the rights in and to the use  
6 of water flowing in the Verde Ditch and also requested:

7                   \* \* \* that the court appoint some suitable  
8 superintendent, who shall supervise and super-  
9 intend, under the authority and direction of  
10 the court, the proper appropriation and  
11 distribution of said waters, with power,  
12 conferred by the decree of this honorable  
13 court, to enforce the same; and that the court  
14 determine in what proportion each of said  
15 appropriators shall contribute to the expense  
16 of the care and maintenance of said ditches  
17 and pipe line.

13           On or about March 3, 1908, the Territorial Court entered  
14 its Interlocutory Order appointing the first ditch commissioner.  
15 The Order provided that the commissioner was to "keep the ditch  
16 clean" and "he shall put the ditch in repair from the diversion  
17 from the river to the last farm irrigated." After hearing argu-  
18 ments and testimony, Judge Sloan entered his Conclusions of Law  
19 and Judgment setting forth the respective water rights of the  
20 parties and establishing how expenses and repair would be borne  
21 by those persons entitled to use water flowing in the Verde  
22 Ditch.

23           The Arizona Enabling Act, Section 32, states:

24                   \* \* \* State courts \* \* \* shall \* \* \* be the  
25 successors of \* \* \* the district courts of  
26 said Territory as to all such cases arising  
27 within the limits embraced within the juris-  
28 diction of said courts, respectively, with  
full power to proceed with the same and award  
mesne or final process therein; \* \* \*.

28 \* \* \*

1 Since statehood, the Yavapai County Superior Court has continued  
2 as the Master of the Verde Ditch.

3 As far back as March, 1907, the Supreme Court of Arizona  
4 in Montezuma Canal Co. v. Smithville Canal Co., 11 Ariz. 99, 89  
5 Pac. 512 (1907), recognized the necessity of appointing water  
6 commissioners to carry out a court's decree when it comes to  
7 maintenance and delivery of surface water. The Arizona Supreme  
8 Court stated:

9 \* \* \* To give effect to such decree, it is  
10 necessary that rules and regulations be formu-  
11 lated by such officer, and he must be empow-  
12 ered to make such rules and regulations as are  
13 reasonable and necessary to carry out the pro-  
14 visions of the decree. A commissioner so  
15 appointed by the court for such purpose is an  
16 executive officer of the court, and the power  
17 given by the court to such commissioner is an  
18 administrative discretion, and not a judicial  
19 discretion. It is a proper choice of a method  
20 to carry the decree into effect. \* \* \* Id at  
21 514.

22 Montezuma Canal was appealed from the Arizona Supreme  
23 Court to the United States Supreme Court, 218 U.S. 1074 (1910),  
24 where the case was reversed on grounds other than those pertinent  
25 hereto. As to the procedures adopted at the trial level to  
26 effectuate the decree, the United States Supreme Court held:

27 \* \* \*

28 But because it was within the legislative  
power to provide administrative machinery to  
supervise the common use of water in a flowing  
stream by those having a lawful right to  
appropriate the water of that stream for bene-  
ficial use, it does not result that the decree  
entered by the court below was in excess of  
its authority. On the contrary in view of the  
absence of legislative action on the subject,  
and of the necessity which manifestly existed  
for supervising the use of the stream by those  
having the right to take the water in accord-  
ance with the decree which, undoubtedly to  
that extent, the court was authorized to

1 render, we think the action taken by the court  
2 did not transcend the bounds of judicial  
3 authority, and therefore is not justly amena-  
ble to the attack made upon it. Id at 1080.

4 A.R.S. §45-103(B) provides that the director of the  
5 Department of Water Resources has general control and supervision  
6 of surface water, "except distribution of water reserved to spe-  
7 cial officers appointed by courts under existing judgments or  
8 decrees."

9 The Arizona Court of Appeals in Allert v. Seedling  
10 Nursery, 1 Ca-Civ 6249 (1984), (Memorandum Decision) (Not for  
11 Publication - Rule 28, Arizona Rules of Civil Appellate Proced-  
12 ure), held that the Verde Ditch Commissioners are "executive  
13 officers" of the court. Id at 5.

14 Clearly, the Verde Ditch Commissioners are and have  
15 functioned as officers of the court, and since 1963 have acted  
16 under the written Rules and Regulations promulgated by Judge Jack  
17 Ogg.

18 Two sections within the existing Rules of Civil Proced-  
19 ure which would appear to be possibly applicable are Rule 53  
20 (dealing with masters) and Rule 66 (dealing with receivers).

21 Rule 53, Arizona Rules of Civil Procedure, specifically  
22 states that the word "master" includes a referee, auditor and  
23 examiner appointed by the court in any action to be tried without  
a jury.

24 Rule 53, Arizona Rules of Civil Procedure, provides:

25 (c) Powers. The order of reference to the  
26 master may specify or limit his powers and may  
27 direct him to report only upon particular  
28 issues or to do or perform particular acts \* \*  
\*. Subject to the specifications and limita-  
tions stated in the order, the master has and  
shall exercise the power to regulate all

1 proceedings in every hearing before him and to  
2 do all acts and take all measures necessary or  
3 proper for the efficient performance of his  
4 duties under the order.

5 Rule 66 provides for the appointment of a receiver who,  
6 absent certain requirements, should not be a person interested in  
7 the action. Subsection (b)(1) thereof specifically provides:

8 [P]rovided, however, that after such notice as  
9 the court shall find is adequate, and if no  
10 party shall have objected, the court may  
11 appoint an employee of a party or an officer  
12 of a corporate party, or a person otherwise  
13 interested in the action, in a case in which  
14 the court finds that the property has been  
15 abandoned or that duties of the receiver will  
16 consist chiefly of physical preservation of  
17 the property (including crops growing there-  
18 on), collection of rents or the maturing,  
19 harvesting and disposition of crops then  
20 growing thereon."

21 The rule further specifically provides for a bond to be approved  
22 by the court in an amount fixed by the court conditioned that the  
23 receiver faithfully discharges the duties of the receiver and  
24 obeys the orders of the court. The rule further provides that  
25 the receiver shall make an oath to the same effect which will be  
26 endorsed upon the bond.

27 Rule 66(d) provides:

28 The practice in the administration of estates  
by receivers or by similar officers appointed  
by the court shall be in accordance with the  
practice heretofore followed. In all other  
respects, the action in which the appointment  
of a receiver is sought or which is brought by  
or against a receiver is governed by these  
rules.

A.R.S. §12-1241 specifically grants to the superior  
court the power to appoint a receiver "in an action pending when  
no other adequate remedy is given by law for the protection and  
preservation of property or the rights of parties therein,

\*\*\*

1 pending litigation in respect thereto." The State Bar Committee  
2 Note to Rule 66 provides that Rule 66 merges and revises the  
3 former Rule 66 on receivers and A.R.S. §12-1242, and that Rule 66  
4 of the Arizona Rules of Civil Procedure "completely replaces the  
5 statutory provision, which hereafter will be of no force and  
6 effect. A.R.S. §12-1241, of course, still remains in effect."

7 A review of the Hance v. Arnold file indicates that the  
8 Verde Ditch Commissioners in the last seventy years have actually  
9 functioned in a mix between a master, a receiver, and an opera-  
10 tions manager-laborer.

11 In 1963 Judge Jack Ogg, then Superior Court Judge and  
12 Master of the Verde Ditch, promulgated Rules and Regulations  
13 which still guide the actions and duties of the ditch commis-  
14 sioners in the operation and maintenance of the Verde Ditch.  
15 This Court has suspended the operation of several provisions of  
16 the existing Rules and Regulations having to do with the appoint-  
17 ment and election of commissioners and the number of commission-  
18 ers, but otherwise the remaining Rules and Regulations continue  
19 in effect.

20 Generally, the authority of a party appointed by the  
21 court by reference (masters, referees and receivers) is derived  
22 from the order of appointment. An appointee has no powers except  
23 those conferred upon him by order of his appointment and no  
24 appointee should proceed a step in the exercise of his duties  
25 without a rule or order in his hands; that this is his commission  
26 and that without it, he should not proceed to act. 76 C.J.S. §76  
27 at 223.

28 \* \* \*

\* \* \*

1           While the present Verde Ditch Commissioners function in  
2 many areas as a receiver envisioned under Rule 66, the qualifica-  
3 tions for the appointment of a receiver under the rule have not  
4 been met. Rule 53, dealing with masters, does not contain the  
5 same language as Rule 66 for bond or an oath, but appears to  
6 envision more of a judicial function as a referee or auditor.  
7 However, the order of reference may be broad enough to encompass  
8 the duties of the Verde Ditch Commissioners.

9           The concept of judicial immunity from civil liability is  
10 rooted deeply into the common law resting upon considerations of  
11 public policy with a purpose to preserve the integrity and inde-  
12 pendence of the judiciary to insure that judges will act upon  
13 their convictions free from the apprehension of possible conse-  
14 quences. Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099, 55  
15 L.Ed.2d 331 (1978).

16           In Drexler v. Walters, 290 F.Supp. 150 (District Court  
17 of Minnesota 1968), the Court provided that a referee and  
18 receiver in a dissolution action is an officer or representative  
19 of the court which appointed him subject to the control of the  
20 court. Citing the long recognized rule of judges and those  
21 acting in judicial or quasi-judicial capacity as immune for civil  
22 liability for damages, the court found that the shield of judi-  
23 cial immunity extended to the referee.

24           The Arizona Supreme Court in Acevedo v. Pima County  
25 Adult Probation Dept., 142 Ariz. 319, 690 P.2d 38, (1984), held  
26 that the doctrine of judicial immunity is not limited to judges,  
27 and that other court officials are also protected by judicial  
28 immunity with the immunity being granted to those who perform  
functions "intimately related to" or which amount to "an integral

1 part of the judicial process." Chief Justice Holohan, speaking  
2 for the court, stated:

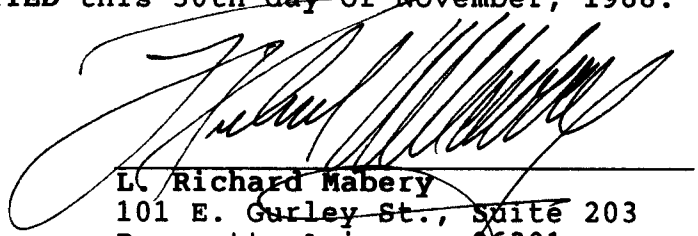
3 Those officials whose special functions or  
4 constitutional status require protection from  
5 suit to carry out their duties are accorded  
6 absolute immunity. As noted previously, the  
7 judiciary, in carrying out its functions, is  
8 entitled to absolute immunity. Those offi-  
9 cers, employees, and agents who assist the  
10 court in the judicial process are also enti-  
11 tled to absolute immunity. Id at 322.

12 As presently existing, the Verde Ditch Commissioners are  
13 not receivers under Rule 66 and perform more functions and  
14 responsibilities than a referee, auditor, or examiner under Rule  
15 53.

16 However, as officers of the court appointed and guided  
17 by orders from the Master of the Verde Ditch, the Verde Ditch  
18 Commissioners should be entitled to immunity for their actions  
19 taken pursuant to the court's direction or the Rules and Regula-  
20 tions.

21 With the promulgation of the new Rules and Regulations  
22 in 1989, clarification of the commissioners' roles under Rules 53  
23 or 66, or perhaps a combination thereof, may be appropriate.

24 **RESPECTFULLY SUBMITTED** this 30th day of November, 1988.

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26 \_\_\_\_\_  
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