

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

07/13/2020

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

L. Stogsdill
Deputy

In re: Mercer Group of Cases
Contested Case No. W1-11-2401

FILED: 7/31/2020

In Re: The General Adjudication
of all Rights to Use Water in the
Gila River System and Source
W-1, W-2, W-3 and W-4 (Consolidated)

In re: Status Conference

MINUTE ENTRY

Central Court Building – Courtroom 301

1:30 p.m. This is the time set for a Status Conference before Special Water Master Susan Ward Harris.

The following attorneys and parties appear telephonically: Carrie Brennan on behalf of the Arizona State Land Department, John Burnside on behalf of BHP Copper, Mia A. Hammersley on behalf of the Yavapai-Apache Nation and observing on behalf of the Pascua Yaqui Tribe, Laurel A. Hermann and Joe P. Sparks on behalf of the San Carlos Apache Tribe, Mark McGinnis on behalf of the Salt River Project, Richard Palmer on behalf of the Tonto Apache Tribe, Kimberly R. Parks on behalf of ADWR, Michael J. Pearce on behalf of the Mercer family, Mercer Ranch Land Holdings, LLC, and Sombrero Butte Cattle LLC, Michael J. Mercer, Bradley Pew on behalf of ASARCO and James Meza on his own behalf

A record of the proceedings is made digitally in lieu of a court reporter.

The Court addresses issues raised in ADWR's report beginning with the sufficiency of identifying stock watering by where the watercourse enters property. A legal description may be needed.

Further discussion is held regarding the description of stock watering claims and their location. Ms. Brennan and Mr. Pearce offer suggestions to identify their location by the use of the available legal description along with utilizing a map prepared by ADWR.

Counsel has no objections to the proposal.

The issue of undefined locations raised by ADWR's report is discussed by Ms. Brennan, Mr. Pearce and Ms. Parks. Mr. Pearce stated that there are a few water right claims where the locations are incorrect or suspect. He reported that his clients are living on the ranch and know the locations. He has spoken with Ms. Brennan about using the locations as determined by his client would allow them to identify those areas where there is a true mistake of fact in location and address those locations with ADWR and the Court as necessary to obtain corrections. The Court outlines various options to resolve the issue of accurately defining locations of stock watering use.

Ms. Parks suggests that Mr. Pearce and Ms. Brennan meet with ADWR to go over their changes and then ADWR will provide a supplemental report before proposed abstracts are issued for suggested corrections.

The Court inquires whether Ms. Brennan will respond to ADWR's report in the report currently due from Arizona State Land Department and Mercer Ranch Land Holdings, LLC and Sombrero Butte Cattle LLC on August 3, 2020. ADWR will review the parties' changes and file an amended report. Based on the amended report, the Court will send out revised abstracts.

Counsel has no objections to the proposal.

LET THE RECORD REFLECT that report due from Arizona State Land Department and Mercer Ranch Land Holdings, LLC and Sombrero Butte Cattle LLC, shall be filed on August 3, 2020 and it shall include the places of use and points of diversion about which disagreement exists either between the parties or between the parties and ADWR.

IT IS ORDERED that ADWR shall file a supplemental report by **August 31, 2020** regarding the places of use and points of diversion for stock watering uses included in the proposed abstracts.

1:54 p.m. Matter concludes.

LATER:

On July 6, 2020, the Arizona Department of Water Resources filed a Report with its comments on drafts of proposed abstracts of water rights for uses that were investigated in Watershed File Report 113-05-001 ("WFR"). The Report posed two issues about potential rights for stock watering uses and one issue regarding the

priority dates about which ADWR seeks additional guidance for purposes of abstract review in future cases.

Claims for water rights for stock watering were the subject of years of litigation that culminated in a determination that these uses are *de minimis*. Specifically, the Special Master found that “[t]he consumption of water by livestock at instream locations with no physical improvements or at unimproved springs has minimal impact on the water outflow from the San Pedro River watershed.” Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases involving Stockwatering, Stockponds, and Domestic Uses, dated November 14, 1994, amended February 23, 1995, approved and modified September 27, 2002 (“Decision”) at 23. A *de minimis* characterization “is fundamentally a case management determination by a court that the benefit of resolving certain types of dispute are substantially outweighed by the cost of doing so.” *Id.* at 8. Thus, to avoid litigation that exhausts the resources of the parties, the court, and ADWR with no appreciable resulting benefit, the Decision required summary adjudication of stock watering uses in the San Pedro River watershed in accordance with the rules set forth in the Decision.

The Decision directs that abstracts will be prepared for “[a]ll stockwatering uses, meaning the instream watering of stock at unimproved or improved locations on a stream, creek, spring, or similar surface area.” *See* Decision at 38. Where ADWR has identified a potential water right in a WFR for stock watering, the determination whether to prepare an abstract will not depend on whether the use is associated with a stockpond. There may be reasons that an abstract is not prepared for a potential stock watering right, such as the failure to file a statement of claimant, but the association of the potential right with a stockpond is not a reason to not prepare an abstract.

The rules established in the Decision heavily rely on the WFRs to define certain characteristics of a water right for a *de minimis* use. The Arizona Department of Water Resources prepared the WFRs as part of its statutory duty under A.R.S. §45-256 to investigate water claims and uses. In its Report, ADWR explained that potential stock watering uses included in the WFR as potential water rights were confirmed by aerial imagery of a watercourse. Report at 1. Focusing on the information provided in the WFR, the Decision requires that an abstract shall identify the location of a stock watering use as follows:

For stockwatering uses, the information set forth in the watershed file report under the “uses” section will be utilized for determining this characteristic. The place of use will be described to the quarter-quarter (1/4-1/4) section in which the use occurs. In cases of two or more stockwatering uses within the same quarter-quarter section, the rights will be described to the nearest quarter-quarter-quarter section (1/4-1/4-1/4).

Decision at 43.

The purpose of the requested review by ADWR of the abstracts, which incorporates the information from the relevant WFR, is to allow ADWR to use its advanced mapping capabilities to verify or correct, if necessary, the descriptions of the places of use previously found and reported in the WFR. According to ADWR, the methodology employed to record the place of use in the WFR was to locate the land where the relevant watercourse entered the boundary of the property that was the subject of the WFR. It explained that this approach was taken due to the limited electronic mapping capacity available in the late 1980s. In its Report, ADWR identified several instances where this methodology has created issues and it offered several possible methods to identify and map the places of use for stock watering. In keeping with the reasoning underlying the use of a summary adjudication, additional investigation should not be required to describe the place of use unless the description in the WFR is clearly erroneous. In this case, ADWR shall map the stock watering use based on the description in the WFR and its evaluation of the information provided by the parties where the parties have identified locations they believe are clearly erroneous. The map shall identify the watercourse with line segments from the boundary location identified in the WFR, along the length of the downstream watercourse to the closer of the place of use identified in the Statement of Claimant or the location of a stockpond described in the WFR that is associated with the stock watering use.

The final issue raised in the Report concerned Priority Dates. The issue is whether the date December 31, 1883 should be used when the WFR identified 1884 as the date of apparent first use and the underlying documents state the date of prior first use as “prior to 1884”. The Decision states:

The priority date for these uses will be determined by use of the apparent dates of first use as listed in the potential water right section of the watershed file report. If the watershed file report is incomplete or ambiguous, then the priority date will be determined in the following sequence: (1) the earliest date set forth in a judicial decree of Water Rights Registration Act filing; or (2) the earliest date set forth in any other preadjudication filing, adjudication filing, or other admissible credible evidence.

If the information is available, the priority date will be assigned as the day, month, and year. If the day is not available, the priority date will be the last day of the month and the year. If neither a day nor month is provided, the priority date will be the last day of the year.

Decision at 42.

In this particular case, the Watershed File Report is neither incomplete nor ambiguous. It states a year, which is consistent with the format used throughout the

HSR to identify the date of apparent first use. Pursuant to the Decision, the appropriate priority date to be entered in the abstract is December 31, 1884. The Arizona Department of Water Resources suggests that the priority date should be December 31, 1883. While that proposal is reasonable, the Decision requires deference to the date in the WFR and the underlying documents in this case do not warrant finding an earlier priority date than would be accorded by the rules set forth in the Decision.

A copy of this order is mailed to all parties listed on the Court approved mailing list.