

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

01/18/2018

CLERK OF THE COURT

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Hatfield

Deputy

FILED: 01/26/2018

In re: the General Adjudication
of All Rights to Use Water in the
Little Colorado River System and Source

CV 6417-201

In re: Hopi Priority
Contested Case No. CV6417-201

In re: Oral argument re: Salt River Project's
Motion to Designate an Issue of Broad Legal
Importance

MINUTE ENTRY

Courtroom: CCB 301

10:30 a.m. This is the time set for hearing before Special Master Susan Ward Harris re: Oral Argument on: Salt River Project's Motion to Designate an Issue of Broad Legal Importance.

The following attorneys and parties appear in-person: Gregory L. Adams and David A. Brown on behalf of the LCR Coalition; Grace Rebling, Colin F. Campbell, and Phillip Londen on behalf of the Hopi Tribe; Cody McBride on behalf of the United States Department of Justice; M. Kathryn Hoover, Judith M. Dworkin, Evan F. Hiller and Jeffrey S. Leonard on behalf of the Navajo Nation; Carrie J. Brennan on behalf of the Arizona State Land Department; Kimberly R. Parks, and Jeff Trembly on behalf of the Arizona Department of Water Resources (ADWR); Jaclyn D. Foutz and Alexandra Arboleda on behalf of the City of Flagstaff; Mark A. McGinnis, R. Jeffrey Heilman and Patrick Sigl on behalf of the Salt River Project (SRP).

The following attorneys and parties appear telephonically: Susan B. Montgomery and Jay Tomkus on behalf of the Pascua Yaqui Tribe and Yavapai-Apache Nation; Stanley M. Pollack on behalf of the Navajo Nation Department of Justice; Joe P. Sparks

on behalf of the San Carlos Apache Tribe and Tonto Apache Tribe; Megan H. Tracy on behalf of APS; and Vanessa Boyd Willard on behalf of the United States Department of Justice, Indian Resources Section.

Court reporter, Mike Benitez, is present and a record of the proceedings is made digitally.

Jeff Trembly provides clarification on the time schedule for the completion of technical reports and Hydrographic Survey Reports (HSRs) listed on pages 7 and 8 of the ADWR report.

Discussion is held and the parties argue the motion.

Mark McGinnis states SRP's position on ADWR's report and agrees with ADWR's recommendations to prepare separate technical reports and HSRs for the two subwatersheds: the Upper Little Colorado River (ULCR) and Lower Little Colorado River (LLCR). He suggests the initiation of two contested cases: *De minimis* usage for the LLCR and another for the ULCR. ADWR would complete two separate reports.

The Court states there are procedural issues associated with initiating a contested case. The Court has no issue with creating a separate case to consider technical reports but Rule 12 procedures anticipate the existence of a contested case. The Court inquires if SRP has any proposals to deal with due process issues in regards to the technical reports.

Mr. McGinnis asserts the most efficient way to comply with Due Process is to create a new case for each of the two subwatersheds for the purpose of setting standards for *de minimis* usage within the subwatersheds and use the general mailing list for the Little Colorado River adjudication as the mailing list for the individual cases.

The Court states its inclination to limit the technical reports to an analysis of stockponds and stock watering uses and not include domestic uses given the complexities raised by ADWR in its report.

David Brown requests that consideration of stock watering, stockponds and domestic uses claimed by the Hopi Tribe be stayed with respect to its ranches and adjudicate the water rights based on federal law. He further recommends undertaking the LLCR first. He also clarified his position on the Silver Creek decision.

Discussion is held concerning the potential amendment of claims by claimants.

Carrie Brennan responds to the Court's question regarding the Hopi's claims for water on its ranches which is checkerboarded with State Lands and the amount of time it would take the State to do an assessment of the ownership issues for purposes of determining ownership of water rights on leased land.

Kathryn Hoover states the position of the Navajo Nation in regards to HSRs, Technical Reports and *de minimis* standards. She states her concerns regarding Due Process as it relates to HSRs and the Technical Reports.

Grace Rebling addresses the Court. The Hopi Tribe off-reservation claims should be adjudicated with all the other claims within the subwatershed. They do not see the need for a separate Hopi HSR. Discussion is held regarding claims for aboriginal water rights for religious/ceremonial uses on off-reservation land.

Cody McBride states that the United States is in agreement with the Hopi Tribe and Navajo Nation. He addresses Mr. Brown's arguments regarding a separate HSR for the Hopi Tribe claims.

Alexander Arboleda addresses the Court. The City of Flagstaff agrees with the LCR Coalition and Arizona State Land Department's approach in adjudicating the claims for federal reserved water rights first. Discussion is held.

Mr. McGinnis again addresses the Court regarding the Groundwater Impact Analysis mentioned in the ADWR report. Discussion is held concerning a sub-flow analysis of the LCR watershed.

Mr. Brown again addresses the court.

Ms. Hoover again addresses the court concerning groundwater analysis.

Mr. Trembly responds to the Court's question regarding scheduling of the Technical reports and HSRs for the ULCR and LLCR.

Discussion is held regarding the benefits of doing the technical reports of the two subwatersheds.

11:30 a.m. Matter concludes.

LATER:

The Hopi Tribe and the United States, on behalf of the Hopi Tribe, assert claims for water rights in the Upper Little Colorado River subwatershed and the Lower Little Colorado River subwatershed pursuant to their Fourth Amended Statements of Claimant (SOCs) filed December 15, 2017. Both SOC's include multiple claims for stock watering and stockponds uses. All parties agree that the development of appropriate *de minimis* standards for stock watering and stockpond uses will streamline the adjudication of those claims and reduce the burden on all parties submitting claims within these two subwatersheds in these two categories. Thus, the issue with respect to the preparation of technical reports regarding *de minimis* uses is not whether ADWR should prepare the reports, but the timing of the preparation of the reports.

The Hopi Tribe, the Navajo Nation and the United States propose that the technical reports be prepared as part of the HSRs for the two subwatersheds and that proceedings regarding *de minimis* standards and procedures be conducted after the issuance of the HSRs. The primary advantage to the preparation of a technical report before and separate from an HSR is the creation of the opportunity to establish standards and procedures for *de minimis* uses which, if completed in a timely manner, will permit ADWR to prepare proposed abstracts for *de minimis* uses as part of the HSR. As demonstrated by its report filed December 22, 2017, ADWR has the technological capacity to generate abstracts for *de minimis* water uses that list water right characteristics identified in its watershed file reports and the decisions of the court. By adopting this approach, a claimant asserting *de minimis* claims would have the benefit upon completion of the HSR of a watershed file report that analyzed his or her claims and drafts of the proposed abstracts. The distribution of draft abstracts may assist claimants and objectors better assess the water rights at issue and lead to a more efficient resolution of *de minimis* claims.

At oral argument, it appeared that the Navajo Nation's primary reason for advocating that a technical report should only be prepared as part of an HSR arose from a concern that the notice process for the *de minimis* proceedings would be less comprehensive than that used for an HSR and, thus would not constitute sufficient due process. To assure due process is provided, notice of the issuance of a technical report and an opportunity for objection from water users will be provided similar to the notice and objection procedure applicable to the issuance of a final HSR.

After the expiration of the 180-day objection period that will be allowed with respect to the technical report, proceedings will commence to determine if summary adjudication procedures are appropriate for the water uses analyzed in the technical report and will include consideration of the individual and cumulative impact of the proposed uses on the subwatershed. The water uses for which summary adjudication is appropriate will be subject to abbreviated procedures to identify only those characteristics necessary for proper water rights administration. Procedures similar to those developed by the Special Master in the Memorandum Decision, dated April 20, 1994, in the adjudication of the Silver Creek HSR, including those limiting the scope of objections, will be considered as part of the proceedings.

The next issue concerns the appropriate scope of the HSR to analyze the amended SOCs filed by the Hopi Tribe and the United States on behalf of the Hopi Tribe. The Hopi Tribe, Navajo Nation, the United States and SRP argue that efficiency, avoidance of additional delays and due process considerations dictate that the Hopi Tribe's claims should be analyzed and adjudicated as part of HSRs for the Upper Little Colorado River subwatershed and the Lower Little Colorado River subwatershed. The Arizona State Land Department, the LCR Coalition and the City of Flagstaff contend that these claims

should be the subject of a separate HSR due to legislative intent that an “early quantification and prioritization of Indian and non-Indian federal claims are prudent objectives in order to plan for the impact that the federal water rights may have on the welfare of this state.” 1995 Ariz. Sess Laws, Ch 9 Sec 25(c) (March 17, 1995). Before a separate Hopi HSR should be undertaken, with its attendant costs and objection periods, consideration should be given to whether the 1995 legislative intent can be accomplished in the context of two HSRs.

According to the amended SOC's filed by the United States and the Hopi Tribe, the land held in trust for the Hopi Tribe involves five ranches (Aja, Clear Creek, Drye, Hart, and Twin Arrow) and the Hopi Industrial Park. The United States and Hopi assert claims pursuant to the Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3549 for the ranch lands. Federal reserved water rights are claimed for the 200-acre Hopi Industrial Park. The Hopi Tribe also claims aboriginal water rights for its off-reservation land, other than the 26 Bar Ranch, to support pilgrimages to shrines and ancestral archeological sites and water rights under the Treaty of Guadalupe Hidalgo. It does not, however, claim any specific quantity of water under either legal theory. In its amended SOC, the Hopi Tribe asserts water rights under state law for land that it owns in fee. With the exception of the 26 Bar Ranch, all of the property identified by the Hopi Tribe and the United States is located in the Lower Little Colorado River subwatershed.

The 1995 legislative intent to prioritize Indian claims based on federal water rights can be accomplished by directing that ADWR focus its efforts on the Lower Little Colorado River subwatershed. Upon completion of the HSR, the court can prioritize the initiation of contested cases to resolve objections to proposed federal water rights for and on behalf of the Hopi Tribe. The HSR for the Lower Little Colorado River subwatershed will include all claims for water rights asserted under federal law. Neither the United States nor the Hopi Tribe make claims based on federal reserved water rights, the 1996 Settlement Act or aboriginal water rights for the 26 Bar Ranch.

The final issue concerns whether the process to initiate and consider technical reports for both subwatersheds should be undertaken at this time. In its motion, SRP argued that both technical reports should be prepared due to the likelihood that legal issues raised by one technical report may be the same or similar in the second report. This position is quite reasonable and could aid in the resolution of certain legal issues involved in both subwatershed more efficiently in terms of court resources. The decision to request that ADWR to prepare both technical reports at this time could, however, result in requiring water users in the Upper Little Colorado River subwatershed to undertake the burden of objecting to a technical report and potential decisions and procedures that will not be applied to their water rights for a number of years. Not only will it take ADWR several years to prepare the HSR for the Upper Little Colorado River subwatershed, but under the recently amended law, the very water uses that would be the subject of the

technical report are the claims for water uses that must be adjudicated after all other claims have been adjudicated unless that water user also has a claim for water use that is not considered a “small claim”. Given this consideration and the need to prioritize the adjudication of claims for water rights arising from federal law, ADWR will be requested to focus its efforts on providing a technical report for the Lower Little Colorado River subwatershed and an HSR for the Lower Little Colorado River subwatershed. Once the objection period for the Lower Little Colorado River subwatershed technical report has expired, at the request of the parties, consideration can be given to the scheduling of reports for the Upper Little Colorado River subwatershed consistent with the need to expedite the resolution of the claims made under federal law in the Lower Little Colorado River subwatershed.

Accordingly,

IT IS ORDERED:

1) Pursuant to A.R.S. section 45-256(a), ADWR shall prepare a Technical Report for the Lower Little Colorado River subwatershed that investigates and analyzes the claimed stock and wildlife watering and stockpond uses and their respective impact on the water. The Technical Report shall be filed with the Clerk of the Apache County Superior Court on or before **May 31, 2019**. Objections to the Technical Report shall be filed with the Clerk of Apache County Superior Court within 180 days of the date that ADWR files the report.

2) In addition to the Technical Report, ADWR shall:

- a) File an Objection Notice with the Clerk of the Apache County Superior Court that shall specify:
 - (i) where the Technical Report will be available for inspection or purchase;
 - (ii) the deadline and place for submitting objections to the Technical Report;
 - (iii) the procedures for obtaining additional information; and
 - (iv) a statement that ADWR is currently preparing an HSR for the Lower Little Colorado River subwatershed that will analyze statements of claimant on file or as subsequently amended as of a specified date for the purpose of proposing water right attributes for each individual water right claim or use investigated.
- b) Issue a press release containing the information in the Objection Notice to newspapers of general circulation throughout the Lower Little Colorado River adjudication area;
- c) Publish the press release on its internet web site; and

d) Send a copy of the Objection Notice by first class mail to those persons included on the court-approved mailing list for the Little Colorado River Adjudication, to each claimant in the Little Colorado River Adjudication and to each nonclaimant water user in the Lower Little Colorado River subwatershed.

3) Pursuant to A.R.S. section 45-256(a), ADWR shall prepare an HSR for the Lower Little Colorado River subwatershed. The preliminary HSR shall be filed no later than **May 31, 2021**.