

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

3/22/19

CLERK OF THE COURT

SPECIAL WATER MASTER  
SUSAN HARRIS

T. DeRaddo  
Deputy

In Re: Magma Copper – De Minimis,  
Case No. **W1-11-2421**  
In Re: Magma Copper – Mining, Contested  
Case No. **W1-11-2428**  
In Re: Magma Copper – Irrigation, Contested  
Case No. **W1-11-2503**

FILED: 3/26/19

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)

Status Conference

**MINUTE ENTRY**

Central Court Building – Courtroom 301

9:00 a.m. This is the time set for a Status Conference involving three cases as indicated above. Appearances are as follows:

Attorneys appearing in person:

John D. Burnside is present on behalf of BHP Copper; Mark McGinnis is present on behalf of Salt River Project; Joseph Sparks is present on behalf of the San Carlos Apache Tribe and the Tonto Apache Tribe; and Bradley Pew is present on behalf of ASARCO.

Attorneys appearing telephonically:

David Brown on behalf of the St. David Irrigation District; Kimberly Parks on behalf of the Arizona Department of Water Resources; Patrick F. Barry on behalf of the United States Department of Justice, Indian Resources Section; Shelly Cutts on behalf of the City of Tempe; Charles Cahoy on behalf of the City of Phoenix; and Jay Tomkus on behalf of the Pascua Yaqui Tribe and the Yavapai-Apache Nation.

Court Reporter, Debra Carney, is present. A record of the proceedings is also made digitally.

Regarding Watershed File Reports: #1: 113-08-014; #2: 113-08-022; and #3: 113-08-AD-002.

**In Re: Magma Copper – De Minimis Case No. W1-11-2421**

Mr. Burnside states that he has not amended any of the Statements of Claimants for 4 stock ponds, and is standing on the statements of claimants formerly filed. The WFR addresses 4 stock ponds: SP-001, SP-004, SP-005 and SP-006. Mr. Burnside states that the capacity of the stock ponds would put them in the *de minimis* category. Nothing has been filed for SP-002 and SP-002.

Mr. Burnside suggests that abstracts be prepared as in other cases, and believes that BHP should work with ADWR to determine the capacity of the stock ponds and move forward as a *de minimis* claim.

Mr. Burnside avows that he will prepare the draft abstracts, and he will attach to each abstract a map showing the location. Each map shall have township, range, and section so each location can be identified. The abstracts and maps are due within 60 days, or by not later than **May 21, 2019**.

After the Court receives the abstracts, they will be circulated to the parties for corrections.

**In Re: Magma Copper – Mining, Contested Case No. W1-11-2428**

Discussion is held regarding the fact that ADWR reviewed the 9 wells identified and found 5 wells outside and 4 wells inside the lateral boundaries of the subflow zone.

Mr. Burnside suggests that BHP informally confer with ADWR in order to resolve more specifically the location of the well relative to the subflow zone of Wells Nos. P3-R (industrial production well), P-11 and P-12.

Mr. Burnside further reports that for purposes of the amended WFR, the water uses have changed. The mine and the golf course have closed. BPH is providing water to municipalities and maintenance of the mining site, to an airport and the Trans load facility that is near the property. He believes that it is necessary that ADWR prepare a new watershed file report to proceed with the case in a manner that is consistent with the statute.

Discussion is held regarding the most effective way for the parties and/or BHP to provide notice to all parties in the contested cases.

Discussion is held regarding lateral boundaries of the subflow zone. BHP states that it is pumping water below the subflow zone. A cone of depression test is necessary for the wells, as stated on the record, that are inside and outside the subflow zone.

Mr. Burnside addresses the Court regarding implementing a stay in this matter with respect to the wells previously addressed. Mr. Burnside believes that a stay would be helpful as a means of case management and hearing all related issues together. He is amenable to a stay the case with respect to the wells inside the subflow zone until it is determined that the wells outside the subflow zone are going to be included based on the outcome of the cone of depression test. The stay would most likely last for over 3 years.

Mr. Burnside's position: First, ask ADWR to Amend the WFR; give appropriate notice; an objection period would occur; then the case would proceed with a stay on the entire case until a test is approved for cones of depression for wells outside the lateral boundaries outside the subflow zone.

Counsel, Mr. Bradley Pew on behalf of ASARO, LLC, addresses the Court with his position on the issue. He is in agreement with Mr. Burnside. The most efficient way to proceed would be to give notice to everyone on the general adjudication mailing list and that each claimant in the adjudication need not be given notice.

Counsel, Mr. Mark McGinnis on behalf of SRP regarding giving notice, asserts that this is not a due process issue. He agrees with Messrs. Burnside and Pew on how to proceed overall. Discussion is held regarding the possible need for a subflow depletion test.

Counsel, Mr. Joe Sparks addresses the Court regarding the timing of adjudicating certain aspects of the case(s). Due to significant changes, Mr. Sparks feels that the WFRs need to be amended. Regarding the amended WFR, Mr. Sparks believes that notice should be given to all of the W1-W4 parties, and not just parties in the contested case(s). Mr. Sparks reports that he is amenable to provide briefing on the notice issue.

Regarding the subflow issue, Mr. Sparks believes that adjudicating all of the wells together is the best way to proceed.

The following parties concur with Mr. McGinnis: David Brown, Patrick F. Barry, Ms. Cutts, Mr. Cahoy, and Mr. Tomkus.

Accordingly,

**IT IS ORDERED** that BHP and ADWR jointly submit a report on the location of the wells relative to the lateral boundaries of the subflow zone by **March 31, 2020**. If the parties do not agree as to the location of the wells relative to the boundary of the subflow zone, then ADWR will submit its report and BHP shall file its objection on the same date.

**IT IS FURTHER ORDERED** that ADWR shall file an amended watershed file report with respect to the amended statements of claimant filed by BHP by **September 25, 2020**.

**In Re: Magma Copper - Irrigation, Contested Case No. W1-11-2503**

Mr. Burnside reports that BHP is not irrigating at this time, but wants to retain its water rights. There are four irrigation wells are producing water that supports an ecosystem in the area, and recreation and wildlife use. Mr. Burnside reports that BHP's position is that BHP is not depleting the subflow zone.

Discussion is held regarding the pre-1919 forfeiture rights. Mr. Burnside does not want to rely on pre-1919 surface water rights because the issue is ground water.

Mr. McGinnis addresses the Court and reports that all 7 of the wells at issue are within the subflow zone. Mr. McGinnis feels that perhaps the Irrigation case should not go forward together with the other cases.

Mr. McGinnis reports that SRP has filed a petition regarding the pre-1919 forfeiture with the Arizona Supreme Court and is currently waiting for a decision for the Court to take the case and then will wait for the decision. Mr. McGinnis is in favor of waiting for the Arizona Supreme Court decision prior to adjudication of this case.

Mr. Sparks addresses the Court with his position as to how to proceed.

For the reasons stated on the record,

**IT IS ORDERED** that ADWR shall prepare an amended WFR for In Re Magma Copper – Irrigation Case No. W1-11-2503 with respect to the amended statements of claimant filed by BHP by **September 25, 2020**. At that time the Court will review the documents and make its decision as to whether the Irrigation case should continue on hold until the subflow depletion tests are finished.

10:00 a.m. Matter concludes.

A copy of this order is mailed to all parties on the Court-approved mailing lists for Contested Case Nos. W1-11-2421; W1-11-2428 and W1-11-2503