

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN
THE GILA RIVER SYSTEM AND SOURCE

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
Consolidated

IN RE SANDS GROUP OF CASES

Contested Case
W1-11-19
(Consolidated)

A hearing was held on September 27, 2001, to consider whether the court should approve and adopt as an order of this court, the findings and conclusions set forth in Special Master John E. Thorson's November 14, 1994 Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases Involving Stockwatering, Stockponds, and Domestic Uses, as modified by order dated February 23, 1995 (collectively referred to as "Special Master's *De Minimis* Report"). Special Master Thorson concluded that stockwatering and certain stockpond and domestic water uses constitute *de minimis* depletions of water within the San Pedro River Watershed of the Gila River system and source whose characteristics or attributes should be summarily adjudicated. Numerous parties filed objections to the report in 1995, and in 2000 and 2001, parties filed responses, replies, and supplemental briefs on objections.

The Special Master's *De Minimis* Report arose in response to an invitation by the Arizona Supreme Court to "adopt a rationally based exclusion for wells having a *de minimis* effect on the river system." *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 394, 857 P.2d 1236, 1248 (1993) ("*Gila II*"). The Court held that:

A properly crafted *de minimis* exclusion will not cause piecemeal adjudication of water rights or in any other way run afoul of the McCarran Amendment. Rather, it could simplify and accelerate the adjudication by reducing the work involved in preparing the hydrographic survey

reports and by reducing the number of contested cases before the special master. *Id.*¹

The Arizona Supreme Court's goal of insuring that the adjudication court devotes the proper level of resources to determining small water claims, while not requiring claimants to engage in unproductive litigation, supports the Special Master's conclusion that summary adjudication should be extended to all types of *de minimis* claims (as opposed to only claims involving wells). In his report, Special Master Thorson succinctly summarized the balance between claimants' needs for specification of water rights and the efficient use of resources. The court agrees with Special Master Thorson's conclusion that no one is aided by expensive litigation that does not provide meaningful results.

In this proceeding, summary adjudication is appropriate to determine the attributes and characteristics of water uses that do not individually affect the water supply available to other claimants. This perspective guides this order.² The purpose of this order is not to finally adjudicate the amount of water flow available to any claimant or whether those holding a water right of higher priority will be able to enforce their right at times when water supply is insufficient to satisfy all users. This order is limited to identifying water right claims that should be summarily adjudicated in accordance with the principles expressed in *Gila II*.

With certain limitations, the court agrees with Special Master Thorson's conclusion that stockwatering, stockpond, and many domestic water uses do not require a detailed adjudication because it is likely that a significant number of these water rights will not be administered after a final decree is entered.

¹ In *Gila IV*, the Supreme Court stated that this is "an approach we continue to endorse." *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, 342, 9 P.3d 1069, 1081 (2000), *cert. denied sub nom. Phelps Dodge Corp. v. U.S.*, 533 U.S. 941 (2001) ("*Gila IV*").

² For purposes of this order, the court adopts the Special Master's definitions of the terms "de minimis water use," "summary adjudication," and "proposed water right characteristics." Special Master's De Minimis Report 5.

As to the question of what qualifies as a *de minimis* use of water within the San Pedro River Watershed, the Special Master considered the following factors in making this determination:

1. The amount of water available to downstream users;
2. The number of stockwatering, stockpond, and domestic uses;
3. The number and impact of each of these uses; and
4. The relative costs and benefits of summary versus complete adjudication of these three types of water uses.

With respect to the first issue, the amount of available water supply, Special Master Thorson had to decide on a method of measurement that would reflect the reliably available flow of a river system that is not harnessed by dams or other mechanisms designed to regulate or store water flow. After reviewing the Special Master's *De Minimis* Report and the memoranda filed in support and in opposition to his findings and conclusions, the court has concluded that the Special Master adopted an appropriate statistical analysis that provides the most reasonable determination of water flow reliably available from the San Pedro River Watershed to downstream users.

The analysis regarding the remaining factors considered by the Special Master is adequately set forth in his report. However, several of the parties' objections deserve special mention.

At the hearing, some parties raised concerns that use of the abbreviated adjudication procedures suggested by Special Master Thorson might prejudice their enforcement rights in the future. This order approves certain of the Special Master's findings of fact and conclusions of law and authorizes summary adjudication with respect only to declaring the nature and priority of water uses deemed to be *de minimis*. This order does not approve any determination that would adversely affect substantive and

procedural rights in subsequent water right enforcement proceedings.³

Several parties object to the court designating any uses of water drawn from wells as *de minimis* for purposes of this adjudication because the San Pedro River Watershed's subflow zone is yet to be determined and, therefore, the scope of this court's jurisdiction over water drawn from wells remains undecided. The court does not see the prejudice to any well owner or claimant that would result from adoption of the Special Master's recommendations. If a well is determined to be pumping only groundwater that is not within the subsequently determined subflow zone, then the court's determination is of no consequence. If the well is drawing subflow, then the claimant's water right will have been summarily determined, and costly litigation will have been avoided. In addition, when the subflow zone of the San Pedro River Watershed is finally determined, the court can easily enter an order deleting those wells that are not part of this adjudication.

Another objection relates to the Special Master's discussion of procedures relating to the severance and transfer of an adjudicated water right. Some dispute the conclusion that this court's approval is required whenever the Arizona Department of Water Resources authorizes the severance and transfer of an adjudicated *de minimis* water right. The Special Master's report accurately reflects the current severance and transfer process. The fact that this court has final approval of the severance and transfer of these rights eliminates the risk identified by the San Carlos Apache Tribe and others, that those holding multiple adjudicated *de minimis* water rights, can attempt to cumulate or group the water rights and sever and transfer them to fewer points of diversion where the impact on downstream users might be greater than as isolated rights. The court's approval of severances and transfers of adjudicated *de minimis* water rights will insure that the court addresses these concerns before any adverse impacts occur.

³ Because of the limited scope of the water uses to be determined by summary adjudication, the court does not adopt as part of this order several of the Special Master's findings of fact (nos. 42 through 44 and 53 through 58).

To alleviate a concern of some parties, this order does not address the legal ownership of water rights on state's and federal lands, an issue outside the scope of the Special Master's *De Minimis* Report.

Finally, there are objections to certain of Special Master Thorson's findings of fact and conclusions of law. To provide historical clarity, the court has sustained objections relating to findings of fact that are inconsistent with the court's approval and adoption of the Special Master's *De Minimis* report.

The Special Master's *De Minimis* Report addressed only stockwatering and certain stockpond and domestic water uses. In the future, the court or the Special Master may find other water uses that are *de minimis* and subject to summary adjudication.

After considering the positions and objections of all the parties, the court finds that Findings of Fact Nos. 1 through 41, as amended; 7A; 7B; 7C; 45 through 52; and 59 through 64, as amended; and those portions of the Special Master's *De Minimis* Report supporting these findings are not clearly erroneous based on the evidence the Special Master considered, and orders as follows:

1. Findings of Fact Nos. 1 through 41, as amended; 7A; 7B; 7C; 45 through 52; and 59 through 64, as amended; and those portions of the Special Master's *De Minimis* Report supporting these findings are adopted as an order of this court;

2. Without treating the merits of the Special Master's analysis, Findings of Fact Nos. 42 through 44 and 53 through 58; and those portions of the Special Master's *De Minimis* Report supporting these findings are not required for the court's current ruling and, accordingly, are not adopted as part of this order;

3. Conclusions of Law Nos. 1 through 30 and those portions of the Special Master's *De Minimis* Report supporting these conclusions are adopted as an order of this court.

4. Conclusion of Law No. 31 is modified to provide as follows and is adopted as part of this order:

Any purported severance or transfer of a *de minimis* water right that has been summarily adjudicated by this court will only become effective upon entry of an order approving such transfer by this court.

5. The Arizona Department of Water Resources shall prepare subsequent hydrographic survey reports in accordance with the determinations made in this Order.

/s/ Eddward P. Ballinger, Jr. _____
The Honorable Eddward P. Ballinger, Jr.
Judge of the Superior Court
September 26, 2002

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A copy of this order is mailed to all parties on the Court-approved mailing list for W1-11-19 dated July 16, 2002 (Attachment A). It is also mailed to all parties on the Court-approved mailing list for W-1, W-2, W-3, and W-4 dated July 16, 2002.