

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

02/12/2020

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

S. Ortega
Deputy

In Re: Subflow Technical Report
Verde River Watershed, Case No. W1-106

FILED: 3/4/2020

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

3:00 p.m. This is the time set for a Status Conference before Special Water Master Susan Ward Harris.

The following attorneys appear in person: F. Patrick Barry for U.S. Department of Justice, Indian Resources Section; David A. Brown for City of Cottonwood; Charles L. Cahoy for City of Phoenix; Kevin P. Crestin for Arizona State Land Department; John B. Weldon, Jr., Michael K. Foy and Patrick Sigl for Salt River Project (“SRP”); David Gehlert and R. Lee Leininger for U.S. Department of Justice; Clyde P. Halstead for City of Prescott; Susan B. Montgomery for Yavapai-Apache Nation; Bradley Pew and Sean Hood for Freeport Minerals; and Megan Tracy for City of Tempe.

The following attorneys appear telephonically: Carla A. Consoli for Arizona Chapter of the Nature Conservancy; Tony Gioia for Camp Verde; Major Mike Davis for U.S. Army; Richard L. Mabery for Verde Ditch Co.; Ted Mariscal for City of Peoria; Jeremiah D. Weiner for Tonto Apache Tribe; and Steven L. Wene for City of Safford and Town of Huachuca.

Court reporter, Diane Donoho, is present and a record of the proceedings is made digitally.

Discussion is held. The Court hesitates to start the hearing until a representative from the Arizona Department of Water Resources (“ADWR”) is present as ADWR will be giving a presentation on its position regarding this matter.

3:04 p.m. Court stands at recess.

3:32 p.m. Court reconvenes. The following attorneys appear in person: F. Patrick Barry for U.S. Department of Justice, Indian Resources Section; David A. Brown for City of Cottonwood; Charles L. Cahoy for City of Phoenix; Kevin P. Crestin for Arizona State Land Department; John B. Weldon, Jr., Michael K. Foy and Patrick Sigl for SRP; David Gehlert and R. Lee Leininger for U.S. Department of Justice; Clyde P. Halstead for City of Prescott; Susan B. Montgomery for Yavapai-Apache Nation; Bradley Pew and Sean Hood for Freeport Minerals; Megan Tracy for City of Tempe; and Kimberly Parks for ADWR.

The following attorneys appear telephonically: Alexandra Arboleda for City of Tempe; Carla A. Consoli for Arizona Chapter of the Nature Conservancy; Tony Gioia for Camp Verde; Major Mike Davis for U.S. Army; Richard L. Mabery for Verde Ditch Co.; Ted Mariscal for City of Peoria; Richard Palmer for Tonto Apache Tribe; Jeremiah D. Weiner for Tonto Apache Tribe; and Steven L. Wene for City of Safford and Town of Huachuca.

Court reporter, Diane Donoho, is present and a record of the proceedings is made digitally.

The Court has read the pleadings in this matter. Discussion is held regarding subflow. The court notes ADWR’s intention to have the subflow report finished by next summer.

The Court orders that a subflow report will be issued by June 1, 2021.

Court and counsel address subflow and the hydrographic survey report (“HSR”) that will be prepared for the Verde River watershed.

Ms. Parks states her position on the HSR and subflow boundary issues and believes that work can be done on both simultaneously. She recommends that the preliminary subflow zone report be completed before moving forward with the initial investigations for the HSR.

Ms. Montgomery, Mr. Gehlert, and Mr. Foy agree with ADWR’s position going forward.

3:41 p.m. Joseph Sparks, counsel for San Juan Apache Tribe, appears in the courtroom.

Mr. Barry believes that a subflow zone technical report is needed before beginning the HSR. For the reasons stated and as it relates to subwatershed #4 (Lower Verde Valley) in the Lower Verde Valley, the United States anticipates claiming subflow as a part of the federal reserved water right and needs to know where the subflow line is in general before it can finalize the claim. Mr. Barry’s position is that the subflow issues can be finalized while the ADWR is working on its preliminary HSR. If the subflow zone is not done before a final HSR is issued, ADWR will have to amend its HSR because it has to identify the wells inside the subflow zone because it is part of ADWR’s statutory duties to identify who is taking appropriable water. The

Court asks if it is Mr. Barry's position that the subflow zone does not have to be finalized until federal reserved water rights are considered, at which time subflow should be complete. Mr. Barry said that the technical subflow report should be done before tribal water rights are considered. Mr. Gehlert states that the subflow zone report does not need to be completed before the United States' claims are considered but could create some awkwardness.

Mr. Brown states that the City of Cottonwood generally agrees with what was filed by SRP and believes it will be two or three years from now to get all of the information needed for the preliminary HSR, and that it should be done simultaneously with the subflow zone. He believes that the adjudication should begin in the Lower Verde Valley.

LET THE RECORD REFLECT that there are no objections to ADWR starting the HSR process before the subflow zone process is completed.

Ms. Montgomery sought clarification that at least the preliminary subflow zone report should be completed before the HSR process begins. Jeremiah Weiner stated that he shared the position urged by the Yavapai-Apache Nation. The Court stated that the HSR process will not start until the subflow zone report is received.

Discussion is held regarding the initiation of a process to determine *de minimis* water uses prior to the issuance of a final HSR.

Ms. Parks states that she does not believe ADWR will be able to do any substantial work on a technical *de minimis* report or an HSR report until mid-2021 due to ADWR's limited resources. Ms. Parks believes there is a lot of merit to prepare a technical *de minimis* report before the final HSR. It will allow a separate chapter to be added to the HSR which will include the *de minimis* rights in abstract form.

The Court states that ADWR will not be asked to do anything in the Verde River Watershed before June 1, 2021 other than complete the subflow report.

Ms. Parks believes, after consulting with ADWR's adjudication manager, that ADWR prefers to determine *de minimis* uses for the entire watershed rather than on a subwatershed by subwatershed basis.

LET THE RECORD REFLECT that there are no objections to ADWR preparing a technical report on *de minimis* uses before the issuance of a final HSR.

Discussion is held regarding the issue of appointing a steering committee. Counsel state their various positions on the appointment of a steering committee.

Discussion is held regarding the filings on the appropriate order in which the subwatersheds of the Verde River Watershed will be considered.

Ms. Parks proposes starting with Sycamore and the Big Chino as they are less populated and simultaneously begin investigative work for the Lower Verde Valley. Little Chino next and Verde Canyon would be last.

Mr. Foy states no opposition to contemporaneously proceeding with HSRs on Sycamore and the Lower Verde Valley. He believes the addition of Big Chino will strain ADWR resources needed to complete the Lower Verde Valley HSR and the focus should be on the subwatershed that has the most claims.

Ms. Montgomery states her reasons to start with the Sycamore Canyon and Big Chino subwatersheds. She says that the diversity and complexity of claims in the Lower Verde Valley will bog down the Court. Further, her client needs additional time to work toward a settlement of water rights and is concerned that if the Nation is required to litigate its rights and challenge those of others those actions would be disruptive to the settlement process. The Nation also has limited resources that will not permit simultaneous settlement discussions and litigation.

Mr. Gehlert proposes starting with Sycamore and will file claims within the next two and half years and have one of the three wilderness areas done as a test case. The Army claims and the forest service stock claims will be completed first.

Mr. Gehlert further proposes that the parties and the Court reconvene after the completion of the Sycamore subwatershed to discuss how to move forward. Regardless of which basin is done first, he states it will be a learning experience as new issues come up with each basin even on related claims. Mr. Gehlert says that there are another three or four wilderness areas in the Big Chino subwatershed and would need a couple of field seasons for field work and riparian mapping. He also pointed out that in his experience in other states, new issues come up from basin to basin so issues could come up in the Verde that were not present in the San Pedro. He proposed moving forward with Sycamore first and when it is completed, decisions about the next step could be made because all would be more informed about the issues.

Mr. Hood joins in SRP's proposal for the reasons stated in their brief. Freeport Minerals Corporation's viewpoint is that the government needs to put the resources in that are necessary to file the federal claims and that the "we'll do it when we get around to it" approach does not work. Mr. Hood believes the government's claims need to be finished up and put into one HSR, not two.

Mr. Foy says that the adjudication needs to be focused on the Lower Verde Valley subwatershed. He agrees that two HSRs for Sycamore would be an inefficient process and disagrees with the notion offered by the Yavapai-Apache Nation of walking before running. That has been the process for 45 years and believes it is time to do something different. The focus should be on the Lower Verde Valley subwatershed at this point and that work should begin on the HSR as soon as possible.

Ms. Parks appreciates not having to do more than one HSR report per subwatershed. She states it would be easier to include all of the uses for a subwatershed in one report. She noted that it is not beneficial to prepare two HSRs because of the noticing requirements for an HSR.

Discussion is held regarding the number of stock watering and private use claims in the Sycamore subwatershed. Mr. Gehlert states that he is certain that the federal government will have the majority of the claims. As it relates to the issue of doing two HSRs, Mr. Gehlert states that the completion of the three wilderness areas will probably take three years as opposed to the 2-1/2 year time frame to complete one wilderness area as proposed earlier. Mr. Gehlert suggests that it might be helpful for ADWR to require that the parties update their claims before the HSR process.

Ms. Montgomery responds to Mr. Foy's comments by saying that the slow pace of the adjudication process it is not the Yavapai Apache Nation Tribe's responsibility or fault and that there is a lot to be learned from the San Pedro. Ms. Montgomery believes it makes the most sense to have a very steady approach to the Lower Verde Valley Watershed and agrees with SRP's position about putting Verde Canyon last.

Mr. Foy argues that the need is in the Lower Verde Valley.

Mr. Barry states that the U.S.'s map shows a larger Verde River Watershed than what is depicted on ADWR's map. The Court states that she is aware of that issue. Mr. Barry reminds the Court that the U.S. is still on a two-year update to get their claims ready for the Yavapai Apache Nation.

Mr. Brown agrees with Mr. Foy and Mr. Hood regarding the Court putting most of its attention on the Lower Verde. The City of Cottonwood is 100% behind a settlement in the Verde Valley. He believes the pressure needs to be on the Lower Verde.

Clyde Halstead states that the City of Prescott does not have a preference as to order. He would like to see Little Chino and Big Chino basins done consecutively because they have rights in both and it would be easier to staff them consecutively. It would be helpful to have a set schedule for the order of the basins for funding purposes.

Counsel Barry and Brown address the issue of motions for summary judgment in the Lower Verde. Mr. Barry states that he ought to be able to bring a motion under the Globe Equity Decree as to non-Indian rights. Mr. Brown suggested that legal issues could be identified for the Lower Verde that could be determined before the HSR is completed. Mr. Barry said that motions should be filed in contested case after the HSR is completed. The motion process under the Globe Equity Decree is not finished.

Discussion is held regarding scheduling for the next proceeding and what it should cover. Mr. Barry suggested that the next proceeding should occur after the preliminary HSR is prepared.

Ms. Montgomery would like to hear from ADWR about its progress on the subflow zone and preliminary HSRs. She does not see a need for another status conference before the completion of the subflow report.

In response to the Court's question about whether any party saw the need for another status conference prior to the issuance by ADWR of its subflow report, no party indicated that a status conference should be set earlier.

Ms. Montgomery responds to Mr. Brown's point regarding legal issues. She states that teeing up key legal issues at the election of certain parties gets away from the subwatershed by subwatershed approach and does not benefit any of the solutions the Court is trying to accomplish here.

4:47 p.m. Matter concludes.

LATER:

IT IS ORDERED that Arizona Department of Water Resources shall complete and file a report defining the subflow zone within the Verde River Watershed by **June 1, 2021**. Objections shall be filed by **November 29, 2021**. A status conference shall be set following receipt of the objections.

IT IS FURTHER ORDERED pursuant to Ariz. Rev. Stat. §45-256 that Arizona Department of Water Resources shall begin preparation of separate hydrographic survey reports for the Sycamore and Lower Verde Valley subwatersheds immediately after filing the subflow zone report for the Verde River Watershed.

IT IS FURTHER ORDERED that Arizona Department of Water Resources shall prepare a technical report that investigates and analyzes the claimed stock and wildlife watering and stockpond uses and their impact on the available water sources in the Verde River Watershed. If ADWR reaches a preliminary determination that domestic use is potentially a *de minimis* use, it shall file a report no later than **December 3, 2021**, defining the domestic use that it recommends should be considered for inclusion in the technical report. If ADWR files such a report, the parties shall be given 30 days to provide comments as to whether the domestic use as defined by ADWR should be included in the technical report. The Court will consider the positions of ADWR and the parties and, if necessary, set a status conference for the purpose of providing guidance to ADWR as to the scope of its final technical report. The technical report shall be filed by **June 3, 2022**. Objections shall be filed by **November 30, 2022**.

IT IS FURTHER ORDERED that the United States on behalf of the Yavapai-Apache Nation and the Yavapai-Apache Nation shall file their amended claims for water rights in the Lower Verde Valley subwatershed and, if any, in the Sycamore subwatershed by **January 6, 2023**.

IT IS FURTHER ORDERED that the United States shall file its claims and amended claims for state and federal water rights in the Lower Verde Valley and Sycamore subwatersheds by **January 6, 2023**. It shall file its claims and amended claims for state and federal water rights in the Little Chino subwatershed by **January 5, 2026**.

IT IS FURTHER ORDERED that the subwatersheds will be investigated in the following order:

Lower Verde Valley and Sycamore
Little Chino
Big Chino
Verde Canyon

IT IS FURTHER ORDERED that a preliminary HSR for Sycamore subwatershed shall be filed by **January 5, 2024**. Comments are due by **July 3, 2024**, and a final HSR shall be issued by **January 10, 2025**.

IT IS FURTHER ORDERED that a preliminary HSR for the Lower Verde Valley subwatershed shall be filed by **June 6, 2025**. Comments are due by **December 3, 2025**, and a final HSR shall be issued by **June 3, 2026**.

IT IS FURTHER ORDERED that a preliminary HSR for the Little Chino subwatershed shall be filed by **June 2, 2028**. Comments are due by **November 29, 2028**, and a final HSR shall be issued by **May 29, 2028**.

Deadlines for completion of preliminary and final HSRs for the Big Chino and Verde Canyon subwatersheds shall be set after the final HSRs have been filed for the Lower Verde Valley and Sycamore subwatersheds. Consideration should be given as to whether Verde Canyon should be investigated in conjunction with the adjoining subwatershed in the Salt River watershed due to potential trans-basin issues.

IT IS FURTHER ORDERED that a steering committee will not be formed or members appointed at this time. If the facts and circumstances warrant a re-examination of this issue at a later date, a party may again move for the establishment of a steering committee.

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