

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

10/14/2021

SPECIAL WATER MASTER SUSAN WARD HARRIS

In re: St. David Irrigation District
Contested Case No. W1-11-1675

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: Oral Argument

CLERK OF THE COURT

L. Brown

Deputy

FILED: 12/06/2021

MINUTE ENTRY

Central Court Building- Courtroom 301

1:30 p.m. This is the time set for an Oral Argument regarding St. David Irrigation's Motion for Summary Judgment re: Points of Diversion before Special Master Susan Ward Harris.

The following attorneys and parties appear via Court Connect/ Microsoft Teams:

- Rhett Billingsley on behalf of ASARCO, LLC
- Thomas Murphy on behalf of Gila Indian River Community
- David Brown and John Burnside on behalf of BHP Copper and St. David Irrigation District
- Mark McGinnis, John Weldon and Michael Foy on behalf of Salt River Project ("SRP")
- Joe Sparks and Laurel Herrmann on behalf of the San Carlos Apache Tribe
- Kimberly Parks on behalf of Arizona Department of Water Resources ("ADWR")

- Lauren Mulhern on behalf of the Tonto Apache Tribe
- Sue Montgomery on behalf of the Yavapai-Apache Nation (and observing on behalf of the Pascua Yaqui Tribe)
- Charles Cahoy on behalf of the City of Phoenix
- Bill Anger on behalf of the City of Mesa
- Patrick Barry and David Gehlert on behalf of the United States Department of Justice
- Sean Hood on behalf of Freeport Minerals Corporation

The Court addressed Mr. McGinnis and requested him to explain his understanding of the scope of the requested ruling and the limitations and implications of the ruling.

Mr. McGinnis addressed the Court. The District wants to have the wells within the district boundaries, including the district wells and the wells owned by private landowners, to be included as potential points of diversion for the rights held by those people within the district. As they stated in their pleadings this does not mean that the land has water rights, which is for Phase II. The subflow issue for St. David has been resolved by their agreement to limit the water duty for each acre to nine acre feet of water regardless if it is subflow or not. SRP does not oppose the relief because it just adds points of diversion all within the same geographic area. There are no right holders between the various points of diversion. SRP is not opposing the motion for that reason.

The Court asks if a decision is issued that all the wells on Exhibit A are points of diversion, what else has been decided other than acknowledging a physical presence of a well at a particular point.

Mr. McGinnis stated nothing, other than any of the rights on any of the lands in the district can be diverted or withdrawn either from the surface diversion or any of the wells.

Mr. Burnside addressed the Court. He stated that Mr. McGinnis accurately characterized the motion. It needs to be looked at within the context of Phase 1 and they tried to explain that in the motion and the reply. The opponents were critical that they had not established the appropriate rights to the water, but that is a Phase II issue. The Phase I issue was to identify the points of diversion. Identification of the points of diversion was the issue for Phase I and they moved for summary judgement to identify those points of diversion. They presented undisputed evidence that the wells owned by the St. David Irrigation District as well as the wells of individual members landowners in the district are points of diversion along with the original surface diversion. The evidence presented both the fact that the wells are points of diversion and also the legal rights for the district or its members to use those wells as points of diversion relating back to the diversion of the surface water or the pre-1919 diversion of surface water from the San Pedro River. The order that was requested is essentially referring to the wells that were identified on the exhibit attached to their motion. And then to the extent that it becomes necessary to tie those points of diversion to specific water rights of specific members or the district then that is a Phase II issue. This is a simple identification of the

points of diversion, the facts of those points of diversion and the legal basis to use those points of diversion.

The Court asked Mr. Burnside if it is his position that the St. David wells plus the 100 other wells have the same priority date.

Mr. Burnside addressed the Court. He stated the priority date is to be determined in Phase II. Priority date is going to take a case by case analysis of the claims of the individual members. There is nothing in this motion that relates to priority date and they are not taking a position as to the priority date as part of this motion or as part of Phase I.

The Court addressed Mr. Burnside and asked whether the recognition that these wells are valid points of diversion tacks St. David Irrigation District priority date to individual wells.

Mr. Burnside addressed the Court. He stated that is correct. There would be nothing in the motion that requests that determination and that is not a part of the motion.

Mr. Burnside stated that it is important to consider this motion within what they are trying to do in Phase I, which is to establish the identification of the points of diversion. They have done that through demonstrating that there are undisputed facts based on the declaration of Lincoln Dahl as to what those points of diversion are. There are the original surface water points of diversion from the San Pedro River and the St. David Irrigation District ditch and the Pomerene ditch and the wells that belong to the St. David District as well as the individual wells that belong to the members and the water users of the district. That's the factual basis that is undisputed. The opponents focused primarily on the impairment standards of *Fritsche* and claimed that the District has not made a case with respect to the impairment standard. The basic facts as to what the wells are and what the diversions are there is no dispute there. That is the factual part of it. Then the legal basis that entitles them to partial summary judgment based on those undisputed facts. The legal basis for the validity of the alternative points of diversion comes from the intersection of two principles of Arizona law. They have not found a case where an Arizona court dealt specifically with the change of a point of diversion from a surface water diversion to a well pumping subflow. The validity of such a change arises from two well established principles of Arizona law.

1) The *Southwest Cotton* principle from a 1931 Supreme Court decision which held that a well can serve as a point of diversion for the surface stream if that well is pumping subflow from the stream because the basic principle is that subflow is part of the stream.

2) The second principle is from the principle of the *Fritsche v. Hudspeth*, a 1953 Arizona Supreme Court decision that acknowledges the right of an appropriative right holder to change the point of diversion. By changing the point of diversion from a surface water stream diversion to a well pumping subflow is through the principles under *Southwest Cotton* and *Fritsche*. It is simply changing the point of diversion from one place to another on the same stream. Arizona law under *Fritsche* is relatively permissive regarding the right of an owner to change the points of diversion as distinct from a severance and transfer where the place of use and the purpose of use might need to be changed.

A.R.S. §45-172 deals specifically with severance and transfer and requires that such transfers be approved by ADWR and the statute includes specific requirements. There is nothing in §45-172 which deals with a change limited to points of diversion. The other statute cited in the brief is §45-156 that requires ADWR approval for changes in purpose of use relating to power generation. Nothing in that statute requires ADWR approval of a change that is limited to a change in a point of diversion. These statutes are silent as to requirements for changes in points of diversion, so they are looking to the common law which is under *Fritsche v. Hudspeth* “general rule is that given a right to the capture and use of water in an amount and the right to change the place of storage or diversion as long as other users’ rights are not impaired.” That is the relatively permissive standard under Arizona law for changing points of diversion. In this case, the undisputed facts provide no basis to conclude that the rights of other users are impaired as a result of this change. As Mr. McGinnis referred to, the wells are within a contiguous area in the St. David Irrigation district. This is not a situation where points of diversion and or use are being moved such that some users that were previously upstream of those uses and diversions are now downstream or vice versa. The change in diversion is occurring in the same contiguous area of the stream and means that the rights of particular senior downstream appropriators are unaffected. They have the same rights to call out upstream water users whether those uses are occurring as a result of a diversion of surface water or subflow. Our opponents in their responses really focused their arguments in trying to say that they have not established the lack of impairment to other users and that is the wrong way to look at it. They are asking us to prove a negative. Their burden is to come forward with facts to the contrary showing that some party, themselves for example, is impaired as a result of this change. They have come forward with nothing but unsupported speculation, no evidence whatsoever. They rely heavily on the 9th Circuit decision in the 2017 ruling in the Gila Valley Irrigation District case which addressed severance and transfer applications specifically applying principles outlined in the Globe Equity Decree and import those decisions interpreting what is required of the establishment of a severance and transfer under the Globe Equity Decree and not applying Arizona law. Most importantly, that decision came after a trial where the opponents presented expert testimony regarding changes that they believed would have impaired rights of other users. Our opponents are incorrect in arguing that we have the burden of proof on this issue. The opponents are the ones arguing that their rights have been impaired even though there is no evidence of that. They are the party making affirmative statements, and they are the parties that bear the burden of proof on that.

The Court asked Mr. Burnside about the *Zannaras v. Bagdad Copper* case.

Mr. Burnside stated the 9th Circuit case decision is not binding on this Court on a point of Arizona law. The thing to recognize in that case is that it did not deal with a change in the point of diversion. In that case the upstream water user, Bagdad Copper, was a junior appropriator, and a senior downstream appropriator brought the suit because Bagdad Copper had changed its water use and was using more water, and argued that even though the downstream senior appropriator wasn’t getting any water, Bagdad Copper was in its right to continue doing that because even if they allowed the water to flow by, it would not have reached the downstream senior appropriator anyway. The 9th Circuit Court held that it was improper for the trial court to put the burden on the downstream senior appropriator to prove that the water would have reached it in the absence of the changes in Bagdad Copper’s water

use. That is an entirely different principle that what we have here. That was an appropriator expanding its use and taking water from the downstream senior appropriator and under those circumstances it was improper to put the burden of proof on the senior appropriator to prove it would have gotten the water if the junior appropriator had stopped pumping.

The Court stated that in that case, defendant was supposed to have the burden of proof regarding the change in its diversion and that is what the Court held applying Arizona law.

Mr. Burnside stated that is the language that the Court used, but that is not what was at issue in the case. The language in that case was about the diversion and use of water the junior appropriator was diverting and using. It changed the way it was diverting water because it was taking more water. It was making a new appropriation. The Court was not talking about the situation where a junior appropriator changes its point of diversion and takes the same amount of water. The St. David Irrigation District is not going to be taking more water as a result of changing the point of diversion because the stipulation is nine acre feet of water per acre. The quantity is what it is. It does not matter if the water is from the surface or from the well, that right does not change. r.

Mr. Anger addressed the Court and stated he supported the comments made by Mr. Burnside,

The Court asked Mr. Anger what limitation would he put in the ruling if it said that these wells on the attachment are points of diversion? Would he put limitations such as what SRP said that this ruling does not decide priority dates and this ruling does not decide who owns the water rights?

Mr. Anger stated he agrees with what Mr. McGinnis said and thought that Mr. Burnside had previously said the same. This is not a case that is going to be deciding those issues that will come in another phase.

The Court proposed a hypothetical to Mr. Anger. We have a new homeowner that puts a well in in 1970, and he claims he has a right to appropriate water from 1970 and claims as his priority date and legal basis the priority date and legal basis asserted by St. David Irrigation District.

Mr. Anger stated if St. David Irrigation District has the right to be connected to that well then that would be appropriate that the priority date can go back to the district's priority date.

The Court asks Mr. Anger does the ruling that these wells are appropriate points of diversion constitute the connection between a private landowner and the St. David Irrigation District?

Mr. Anger stated that would be decided later.

Mr. Cahoy stated his understanding of the scope of the request by the District was specifically what they set out in their conclusion in their original motion in this matter which was for a judgment confirming the wells used by the District and its members may serve as points of

diversion for the appropriate rights to the extent that they pump subflow. He agrees with the legal points that were set out to establish that and he agrees with the comments made by Mr. McGinnis and supports the motion.

Mr. Billingsly stated he joins in the comments of Mr. McGinnis and Mr. Burnside.

Mr. Hood stated he joins in the comments of Mr. Burnside and Mr. McGinnis. No one in good faith can complain about these changes in points of diversion, this isn't going to hurt anybody. If it was going to hurt one of the opposing parties, you would have gotten some evidence on that point and there is no evidence because it is not going to happen. The bottom line is Arizona law is that you can change the point of diversion if there is not an injury to another. The Globe Equity change in use rules do not apply to these proceedings. That change in use rule is 180 degrees different than Arizona law on this point. It specifically requires an application and litigation process to get a change in point of diversion. That is not the *Fritsche* case, that is not Arizona law, it is not the Arizona statutes that Mr. Burnside described. I think it is worth underscoring Mr. Burnside's point on *Zannaras*. That case is about an increase in junior upstream appropriation, it is not simply a change in point of diversion and does not apply to these circumstances.

The Court commented, you have a 1990 well that has been put on a piece of property, the landowner says they are entitled to irrigation and the point of diversion is that well that they put in 30 years ago. Does that landowner, because of this ruling, have the benefit of St. David's legal basis or priority date?

Mr. Hood stated the whole point of this is whatever priority dates are established in Phase II will apply to the original points of diversion and the supplemental points of diversion. That is the whole point of this. If you have a valid right which is an 1860 right and you used to divert off one of these ditches and over time the supplemental wells were put in and there is zero evidence of harm and we get summary judgment on this issue, then that 1860 priority date applies to the supplement wells to the same extent as the ditch.

Mr. Murphy stated he will go back to the question that was asked of the parties in the beginning. What is the District attempting to do here? They are an irrigation district. They serve members and they currently utilize three or four points of diversion. As we understand this motion, they are seeking to add 109 additional points of diversion without reference to a specific water right parcel or landowner. They do not own any of these wells and these wells may or possibly are used to support water rights for single or individual landowners in the district. If this motion only seeks a ruling that a well within the district can be a point of diversion, then summary judgment proceedings are not needed for what would essentially be a hypothetical or a conditional outcome. Mr. Burnside mentioned that to the extent it becomes necessary to tie a well to a specific right that can be done in Phase II. We all know the rights will all need to have points of diversion which means that it necessarily will involve doing this in Phase II and this proceeding is not necessary. Again, our understanding of this motion is the District is seeking to have the Court essentially declare that these 109 wells are points of diversion that they can mix and match with any of the landowners who need water. They acknowledge and admit that they are seeking to change or transfer these points of diversion

within the District. They are seeking to do this when we don't even know what the proposed changes in the points of diversion are and they are seeking to do this when the rights of these landowners have not been determined by the Court which makes this proceeding premature at best. And in its pleadings, the District admits that even if this motion is granted many of these issues will necessarily be re-litigated. For example, individualized determinations of specific attributes for a water right, which includes the point of diversion for a water right, have to be addressed in Phase II. The District also admits that a ruling in the District's favor would not preclude a future determination that specific points of diversion are attributes of individual water rights in this case. What this ruling means is that any ruling that you are making on this motion will by its nature necessarily be conditioned on future litigation and subsequent rulings in the case. This is well illustrated by the issue raised that some of these 109 wells are for lands that have not been irrigated and water rights have presumably forfeited and in one case, the Driggs case, the District itself has a pending motion to forfeit the water rights for a portion of the Driggs property and they have identified that well on the list of 109 wells. We will not know what specific rights are forfeited until those claims are litigated. Again, this is in Phase II. The District attempts to casually write this off in the footnote in its reply brief, claiming that it is immaterial that these wells do not serve water rights on the San Pedro, because they plan to appeal that issue but unless you know what water rights are tied with what points of diversion, this becomes a hypothetical exercise.

The Court asks Mr. Murphy if he disputes that wells can serve as points of diversion.

Mr. Murphy stated as a general proposition that a well can be a point of diversion. But the District in its papers basically hedge on the issue of we don't even know of these 109 wells whether they are pumping subflow or ground water because that issue has not been determined by the Court. That is another kick the can issue to the next phase of the litigation. They are presumably asking you to designate 109 wells as points of diversion for appropriate water rights but won't commit to whether they are pumping appropriate water.

The Court asks Mr. Murphy what is the harm in a determination that these 109 wells can serve as points of diversion?

Mr. Murphy stated the basic harm is that it is a hypothetical ruling, an unnecessary ruling. Without narrowing the scope of what the motion seeks. They want to use the ruling to mix and match any of the 109 wells with any water right in the District. even though they are not going to identify which goes with which at this point or which may go with which in the future. We don't have to prove any impact to this to other water right holders. There is not any authority that allows them to do that. If the scope is unclear, the Court should deny the motion and move the matter into Phase II because as the District says, they are going to have to relitigate all these issues again in Phase II. If they have to litigate these issues in the scope of the individual water rights, then it is unnecessary to engage in this exercise today.

The fourth point is that the District ignores the Arizona law on what they must present in terms of a prima facie case of no injury to other water rights holders. Arizona law is clear, and he disagrees with Mr. Hood's characterization of the change in use rule in the Globe Equity proceedings. The injury component of the change in use rule is based on Arizona law. As the

Court noted as stated in the Zannaras case, it is pretty clear that a party seeking a change in the point of diversion or its use must present a prima facia case that there was no injury to the other water rights holders.

The Court asks Mr. Murphy wasn't that a case involving people who already had established water rights as opposed in this case when we are still in a decree stage?

Mr. Murphy stated that raises an additional question that the District says that they are changing points of diversion but don't even know what points of diversion go with which properties - those have not been adjudicated. They do not know what the proposed changes are. We will have to speculate what any injury might be. The Gila Valley Irrigation District case and the appeal from the 9th Circuit illustrates for us is that there are a number of particular components that may play into whether or not parties are injured. Mr. Hood characterized it as conditions specific to the Gila River, but they don't know there may be conditions specific or unique to the San Pedro River that create conditions that might injure other parties. But frankly, you can't begin to address the issue of injury to other water right holders because we have not established what points of diversion are being applied to what particular properties or more importantly what changes the District is willing to make to those points of diversion. Until you know those facts, anything about injury would be speculative and it illustrates this is a premature exercise in the Adjudication. The Court might consider looking at the footnote that *Zannares* cites because it cites to at least one Arizona case on the issue of the showing necessary to demonstrate injury. The prima facie showing and likewise in the Gila Valley Irrigation appeal, it was clear that where there are senior priorities on a river or watershed and that there are no changes in the quantities in use, without anything else is insufficient to meet the burden that there was no injury to other water rights users. The Community is unaware of any Arizona authority that allows a floating point of diversion for an irrigation use which identifies additional or supplemental points of diversion or that allows use of privately owned wells as points of diversion for an irrigation district where the places of use are not specified. All of these issues are necessarily tied in what is described in the next phase of this particular litigation. The Court should deny the District's motion, conclude this phase of the case, and move on to the next phase of the case.

Mr. Gehlert states they take no position on the case and he has no comments.

Lauren Mulhern states they join in the comments made by Mr. Murphy.

Ms. Montgomery states they do not take a position on this motion.

Mr. Sparks states the interest of the United States as trustee for Gila River Indian Community and the San Carlos Apache Tribe and other tribes would be represented today by Mr. Barry.

The Court asked Mr. Sparks his understanding of the scope of the requested ruling and the limitation and implications of that ruling.

Mr. Sparks states the scope of the ruling that the District is seeking is a wholesale potpourri of points of diversion that they can mix and match in the future and assert a common initial

irrigation priority date of pre-1919, namely 1881 in some of their documents. The word that is really troubling in the request is “valid” point of diversion. There are no water rights adjudicated whatsoever for the St. David water or irrigation district. None of the claimants of the 109 wells have any water rights adjudicated at this stage.

The Court asks Mr. Sparks what if the ruling was limited by the factors listed by SRP - that this is not a ruling with regard to priority dates, it does not determine who owns water rights, and does not determine that an irrigation district can own a water right on behalf of an individual? The ruling is simply an acknowledgement that the 109 wells exist.

Mr. Sparks states that they do not need a decree from the Court to acknowledge that those wells exist. They have claims that they are making and they will need to provide proof in the proceedings that those rights were earlier perfected and were perfected according to Arizona law for appropriations. The hypothetical idea is that these are points of diversion is unnecessary. A hole in the ground with water in it is a point of diversion, but that does not mean that it is valid point of diversion under Arizona laws for appropriation. We cited to the Court that the territorial law that always required the acquisition of a water right by prior appropriation to be made in deference to the rights of prior appropriators and that they do no harm to another appropriator. We cited territorial and other Supreme Court cases that has always been the law of the territory since its acquisition through the Treaty of Guadalupe Hidalgo and the Gadsden Treaty, and then with the 1919 water code on how one would acquire appropriative water rights in Arizona. The United States on behalf of the tribes and the tribes themselves filed objections to every one of the claims that are inherent in the St. David application to the Court. They are pending since 1992 and they have yet to have their day in Court against those claimants. We are not there, these claimants are not there and St. David isn't there. This is not the time to grant St. David's motion to give legal validity to these holes in the ground with well numbers on them as valid points of diversion for any prior appropriation purpose. They should not have the grace of a valid point of diversion. That must be determined under the law for each one of these claimants whether the diversion was correct, has been acquired appropriately under Arizona law, and is a valid point of diversion. They are going to have to show that they began this appropriation on the river and were able to or required to move it to another location. This is not an appropriate motion to grant and will not advance the case.

Mr. Barry states when somebody stops diverting through a ditch and closes the gate to the river, the impact on the river is instantaneous. When you stop pumping a well through the Cone of Depression, the damage done to the river can carry on for months if not years. They addressed this point in their brief. The time lag effect is significant. The other side keeps saying we did not state any facts, and one of the reasons we did not state what the injuries would be is because they asked you to declare valid points of diversion, but they don't tell us how much those wells are going to pump. You can't calculate an injury from a Cone of Depression or the length of time it will continue to impact a river unless you know how much water that well is going to pump and the other side won't tell us, and they did not tell us, and this is the element of them proving no injury. He does not think that St. David is asking for a change of point of diversion, because as he reads that motion, they want a full discretion to pump from the well this year maybe the river flows enough so they don't have to pump next

year and the point of diversion reverts back to the ditch and then the following if it's a dry year the point of diversion will revert back to the well. When you change the point of diversion then you change the point of diversion and say that I am going to take this much water from this point of diversion and not from the previous point of diversion. The other point that St. David makes is that the 9th Circuit is not binding. However, as this Court knows it has relied upon and analyzed the opinion that the Gila River Indian Community cited to the Court in the forfeiture case. It is not like it is completely irrelevant to the matter. The *Zannaras* case says whether you are junior or senior, the party seeking to make the change in the point of diversion has the burden in the case in chief to show that there was no injury.

The Court asks Mr. Barry what source of water disqualifies a well as a point of diversion? Is it his position that a well could access a particular source of water and by accessing a particular source of water is it no longer a valid point of diversion?

Mr. Barry states St. David has not identified that it is taking subflow. In its statement of facts, it calls it groundwater.

Mr. Burnside states this motion needs to be decided in the context of Phase I and the issues that the Court designated for resolution in Phase I, which is the identification of the points of diversion. We have identified the points of diversion based on undisputed facts established under Arizona law that wells can be points of diversion to the extent that they are pumping subflow and established the applicability of the *Fritsche* standard and we have established on undisputed facts that there is no basis to conclude that others will be injured. With regard to Mr. Murphy's comments, and Mr. Sparks also referred to the use of the word groundwater, and we made it clear that our motion addressed points of diversion to the extent that the wells are pumping subflow, we are not conceding that point, but it does not matter because of the stipulation entered in this case.

2:43 p.m. Matter concludes.

LATER:

St. David Irrigation District ("District") proposed that three issues be resolved in Phase 1 of this consolidated case. It described the third issue as the "identification of the points of diversion" for water rights to be adjudicated within the St. David Irrigation District boundaries. Minute Entry at 3 (August 21, 2019). On August 2, 2021, St. David Irrigation District ("District"), joined by ASARCO LLC and Freeport Minerals Corporation, filed a motion for partial summary judgment "to confirm that wells used by St. David and its members may serve as points of diversion for their appropriative rights to the extent the well pumps subflow of the San Pedro River." Motion for Partial Summary Judgment (Points of Diversion) at 9 (August 2, 2021) ("District's Motion"). The District described the scope of its pleading as follows: "Other than the points of diversion, the existence and attributes of appropriative rights are not the subject of this motion and will be addressed in a subsequent

phase of this contested case.” *Id.*¹ It attached to its Separate Statement of Facts a list of “all currently known groundwater wells within or near the District’s exterior boundaries that may serve as supplemental points of diversion for irrigation by the District’s members.” St. David Irrigation District’s Separate Statement of Fact to Support Motion for Partial Summary Judgment Regarding Points of Diversion at 3 (August 2, 2021). The District further moved for a finding that it has the right to change points of diversion and that the two wells it owns, in addition to 107 additional wells located within the boundaries of the District, constitute points of diversion, alternative points of diversion or supplemental points of diversion for appropriative rights to pump subflow of the San Pedro River. District Motion at 2. The District bears the burden as to each requested ruling to demonstrate the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Ariz. R. Civ. P. 56(a)*; *Sahf v. Lake Havasu City Ass'n for the Retarded & Handicapped*, 150 Ariz. 50, 53, 721 P.2d 1177, 1180 (App. 1986).

Salt River Project characterizes the District’s motion as requesting limited relief because the District does not request a ruling on other issues such as the owner of the claimed water rights, the priority dates of any water rights or whether the rights exist. Salt River Project’s Response to St. David Irrigation District’s Motion for Partial Summary Judgment Regarding Points of Diversion at 2 (August 31, 2021). The City of Mesa takes a similar approach in its brief response by agreeing with the general legal principles set out in the District’s Motion. In contrast, the parties opposing the District contend that the District’s Motion seeks a broad set of decisions about the claimed rights to water including a determination that valid rights exist to which the points of diversion will attach. Thus, a proper consideration of the District’s Motion necessarily entails an identification of issues implicitly imbedded in the issues explicitly presented.

Identification of Wells as Points of Diversion

The District requests a ruling that 109 wells, to the extent that they pump subflow, may serve as points of diversion. Several parties took issue with the District’s characterization of the wells as groundwater wells. Subflow is groundwater. Groundwater is a scientific term used by hydrologists to classify water found beneath the surface of the ground, and typically, within fully saturated soil. S. Lawrence Dingman, *Physical Hydrology* 325 (2002); R. Allan Freeze & John A. Cherry, *Groundwater* 2 (1979). Unlike the scientific community, Arizona law creates a class of groundwater known as subflow to be distinguished from “percolating groundwater,” which is groundwater not included within the statutory definition of “appropriable water” in A.R.S. §45-141, for the purpose of assigning water rights. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 198 Ariz. 330, 334 -335, ¶¶ 3, 6, 9 P.3d 1069, 1073-1074 (2000). The District’s Motion does not require a finding that the wells are pumping subflow as opposed to percolating groundwater. It conditions its request upon a later determination that the wells pump subflow. In *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953), the Court recognized that a well could serve as a point of diversion without first reaching a decision about whether the water claimed was appropriable water. Thus, the absence of a determination that the wells are pumping subflow neither

¹ The quantity of water has already been established by the parties’ Stipulation Regarding Irrigation Water Duty (September 14, 2020).

precludes a recognition that the wells serve as points of diversion. nor does the recognition of the wells as points of diversion determine that the water pumped is subflow.

Similarly, no finding of a water right or a specific attribute of a water right is a prerequisite to a finding that a well may serve as a point of diversion. *Maricopa County Mun. Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 72, 4 P.2d 369, 372 (1931), *reh'g denied and opinion modified*, 39 Ariz. 367, 7 P.2d 254 (1932). In *Southwest Cotton*, the Court considered claims for water rights with pre-1919 priority dates and found that a well pumping subflow could serve as a point of diversion, but it did not find that the plaintiffs, Southwest Cotton and Valley Ranch Company, had a right to the waters of the Agua Fria River. Instead, it remanded the case to the trial court for the determination of whether plaintiffs had appropriable water rights: “[I]f the evidence shows plaintiffs have applied them to beneficial use and have not since forfeited or abandoned such use in whole or in part, they are entitled to have any rights so acquired protected.” *Southwest Cotton* at 101, 4 P.2d at 382. Effectively, the Court found that no water right could issue until the trial court determined that Southwest Cotton Company and Valley Ranch Company proved legal bases for appropriable water rights as well as the remaining attributes of each of those rights. Thus, a decision that the 109 wells, to the extent that they pump subflow, may serve as points of diversion of appropriable water does not require or imply a decision that a right exists. The decision does not determine the owner of the water right. A determination that a well can serve as a point of diversion does not decide that any other attributes of a claimed water right, including but not limited to, any of the following issues:

1. Whether the water pumped by the wells on the land included in the watershed file reports associated with the contested cases consolidated in this case is appropriable water. If the well is located in the subflow zone, the water is presumed to be appropriable.
2. Whether any portion of the land included in the area investigated by the watershed file report associated with the contested cases consolidated in this case is a place of use.
3. Whether any rights to water that existed on the land included in the watershed file reports associated with the contested case consolidated in this case have been abandoned or forfeited.²
4. Whether St. David Irrigation District has a right to use the wells located on land owned by individual landowners.
5. Whether a priority date established by St. David Irrigation District that applies to diversions from its claimed sources of water and points of diversion applies to any other well located within the boundaries of the St. David Irrigation District.
6. Whether a legal basis established by St. David Irrigation District applicable to diversions from its claimed sources of water and points of diversion applies to any other well located within the boundaries of the St. David Irrigation District.

² The exception to this statement is the decision in the Final Report filed November 18, 2021.

Only the narrow issues that wells may be points of diversion for appropriable water and the identification of the wells that serve as points of diversion, to the extent that they pump subflow, within the boundaries of the St. David Irrigation District will be decided. The District identified 109 wells by well registration number and well owner. The District specified the locations of the wells by tax parcel number and GPS coordinates. It also provided a map to show the locations of the wells stretching for miles along the San Pedro River. *See figure 1.* The opposing parties do not dispute the information provided by the District as to the location of the wells.³ In the absence of a material issue of fact in dispute as to either the existence or location of the wells and, based on Arizona law that a well may serve as a point of diversion, no factual or legal reason exists to deny the first ruling requested by the District that the wells listed on Exhibit A are points of diversion.

A partial summary judgment on the identification of the wells is also warranted because a “laudable purpose of summary judgment [is] to narrow the issues to be tried. *Brady v. Melody Homes Mfr.*, 121 Ariz. 253, 261, 589 P.2d 896, 904 (App. 1978), *disapproved of by Dart v. Wiebe Mfg., Inc.*, 147 Ariz. 242, 709 P.2d 876 (1985) on other grounds. *See also Smith v. Beesley*, 226 Ariz. 313, 319, ¶ 21, 247 P.3d 548, 554 (App. 2011) (purpose of a partial motion for summary judgment is to limit and clarify the issues for trial). Clearly, the District has expended significant time and resources to compile the information about the 109 wells within its boundaries. In an adjudication of an individual case, the claimant, objectors, ADWR, and the court can spend hours to collect the information necessary to correctly identify and locate wells that are the claimed sources of water and points of diversion. A ruling on the

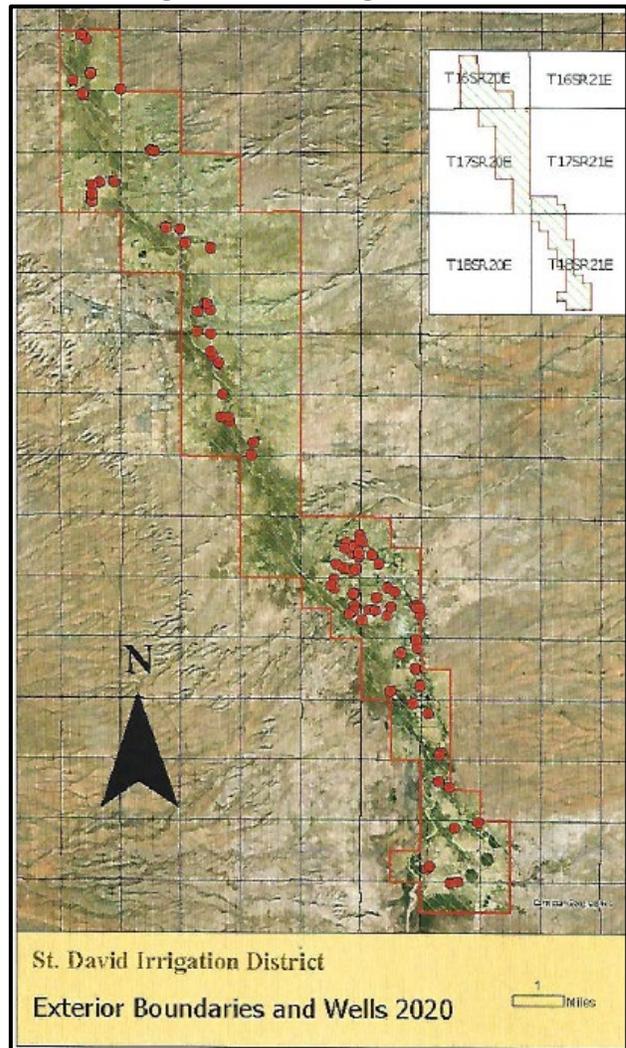


Figure 1. Reported location of wells within the boundaries of the St. David Irrigation District. **Source.** Exhibit B to the District’s Motion.

³ The San Carlos Apache Tribe highlighted two wells located on tax parcel 121-28-017C. San Carlos Apache Tribe’s Response to St. David Irrigation District’s Separate Statement of Fact to Support Motion for Partial Summary Judgment Regarding Points of Diversion at 8 (September 10, 2021). The District provided registration numbers 55-610184 and 55-086764 for the two wells and different GPS coordinates. The San Carlos Apache Tribe did not create a dispute about a material fact.

narrow issues of whether a well can serve as a point of diversion and the physical locations of the wells in the District will narrow the issues to be tried and will conserve resources that the parties, ADWR and the court must devote to the individual consolidated cases.

Replacement, Alternative Or Supplemental Points Of Diversion

Up to this point, the District's Motion conforms to the issue designated for resolution in Phase I on this case. The District moved beyond the designated issue, at least as expressed by the plain words used to describe it, to seek an additional ruling that goes beyond the identification of the physical locations of the wells. The District seeks a ruling that the 109 wells constitute replacement, alternative, or supplemental points of diversion for appropriative rights to irrigate an area in excess of 2,000 acres. It is not clear if the District intends that all wells serve as points of diversion for all water uses within the District boundaries or if a particular landowner's well is intended to be a replacement, alternative, or supplemental point of diversion for water diverted by the District for that owner's land. In either case, the general rule as propounded by the one case issued by the Arizona courts and the proposition of law applicable to prior appropriation by the Ninth Circuit Court of Appeals is that the owner of the right may change the place of diversion so long as other users' rights are not impaired. *Fritsche v. Hudspeth*, 76 Ariz. 202, 204, 262 P.2d 243, 245 (1953); *see also Zannaras v. Bagdad Copper Corp.*, 260 F.2d 575, 577 (9th Cir. 1958) ("It is axiomatic in water law that the appropriator, be he junior or be he senior, always has the burden of establishing that a change in his diversion or in his use of water has not affected the rights of other appropriators").

As the moving party, the District's responsibility to "persuade the court that there is no genuine issue of material fact for a reasonable jury to find is often referred to as the moving party's burden of persuasion or burden of proof." *Nat'l Bank of Arizona v. Thruston*, 218 Ariz. 112, 115-16, ¶¶ 15-17, 180 P.3d 977, 980-81 (App. 2008), as amended (Jan. 23, 2008) *See Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 107 Cal.Rptr.2d 841, 24 P.3d 493, 506 n. 4 (2001). ("On summary judgment, the moving party's burden is more properly labeled as one of persuasion rather than proof. That is because, in order to carry such burden, he must persuade the court that there is no material fact for a reasonable trier of fact to find, and not prove any such fact to the satisfaction of the court itself as though it were sitting as the trier of fact."). The District's burden of persuasion is heavy. *Id.*

Here, the District has offered an affidavit from Lincoln Dahl who is the current water advisor to the board of the St. David Irrigation District. Mr. Dahl's affidavit is limited to information about the location of the wells, the location of the wells relative to the boundaries of the District and dams and points of diversion historically used by the District. In *Templeton v. Pecos Val. Artesian Conservancy Dist.*, 65 N.M. 59, 63, ¶16, 332 P.2d 465, 467 (1958) the court addressed the evidentiary burden associated with a change in a point of diversion. In that case, the appellees moved to change or supplement their points of diversion with wells drilled in the Roswell Shallow Water Basin. One of the factual issues considered was whether the proposed change in diversion would impair existing rights. The trial court found that the new wells constituted a change in the place of diversion and would not impair existing rights or be detrimental to the rights of others having valid existing rights. On appeal, the appellant challenge the factual finding. The appellate court rejected the challenge on the grounds that substantial evidence supported the finding. The record included expert testimony from a

hydrologist and an engineer, both of whom had knowledge about the proposed wells and the neighboring area, that no impairment would result from the change. Unlike *Templeton*, this case involves dozens of separate landowners and parcels of land and more than 100 wells. No evidence was provided about the claimed original points of diversion so no determination can be made about changes in the point of diversion. There is no evidence about which wells are changes in points of use as opposed to an additional or supplemental point of diversion. At this point, there is a dearth of evidence provided by the District to persuade the court that no genuine issue of fact exists as to absence of harm to either the dozens of water users from the replacement, alternative or supplemental points of diversion within the District or to the surrounding users within the watershed. Due to this conclusion, the other arguments raised by the parties opposing the District's Motion are not addressed. Accordingly,

IT IS ORDERED granting the motion for partial summary judgment in part: The wells included on Exhibit A to the District's Motion used by St. David Irrigation District and/or its members are points of diversion to the extent that they pump subflow of the San Pedro River. A copy of Exhibit A is attached to this minute entry. The motion for partial summary judgment is denied as to all other relief requested.

IT IS FURTHER ORDERED that a Status Conference shall be held on **January 10, 2022 at 3:00 p.m.** to begin scheduling Phase II of this case. The Scheduling Conference shall be conducted on Court Connect in accordance with the instructions on the attached notice. If you do not have access to the internet, you may attend telephonically using the telephone number and access code included in the instructions for Court Connect. You may also attend telephonically using the following numbers:

Instructions for telephonic participation:
Dial: 602-506-9695 (local)
1-855-506-9695 (toll free long distance)
Dial Collaboration (conference) Code 357264#

NOTE: All court proceedings are recorded digitally and not by a court reporter. The parties or counsel may request a CD of the proceedings. For copies of hearings or trial proceedings recorded previously, please call Electronic Records Services at 602-506-7100.

A copy of this order is mailed to all parties on the Court-approved mailing list for this contested case.



Court Connect Hearing Notice for In re St. David Irrigation District

This hearing will be conducted through the new Court Connect program offered by the Superior Court of Arizona in Maricopa County. This new and innovative program allows Court participants to appear online, rather than in a physical courtroom. Hearings are preferably conducted by videoconference but can also be conducted by phone. Lawyers (and self-representing litigants) are responsible for distributing this notice to anyone who will be appearing on their behalf.

All participants must use the JOIN COURT CONNECT HEARING button or the dial in information below to participate.

Participants: Please follow the steps below to participate in the remote proceeding.

1. Click the JOIN COURT CONNECT HEARING button below.
2. Enter your full name and role in name field.
3. Wait for the facilitator to admit you to the proceeding.

Remember to keep this email handy so you can use it to participate in the following proceeding.

Case Name: In re St. David Irrigation District Contested Case No. W1-11-1675

Start Date/Time: January 10, 2022 at 3:00 p.m.

JOIN COURT CONNECT HEARING

Dial-in Information: +1 917-781-4590

Private Dial-in Information: for privacy purposes, you can block your phone number by dialing *67 +1 917-781-4590

Dial-in Access Code: 688 970 203#

Tiny URL: <https://tinyurl.com/specialwatermaster>

To ensure an optimal experience, please review the brief Court Connect training prior to the hearing: [Here](#)

