

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/07/2018

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER
SUSAN HARRIS

A. Hatfield

Deputy

In re: Bayless & Berkalew
Contested Case No. W1-11-2696

FILED: 12/6/2018

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 re: Motion to Stay

MINUTE ENTRY

Courtroom: CCB 301

8:48 a.m. This is the time set for Oral Argument before Special Master Susan Ward Harris on the Motion to Stay filed by Bayless & Berkalew Co.

The following attorneys and parties appear in-person: David A. Brown on behalf of Bayless & Berkalew Co.; Andrew Smallhouse and Stefanie Smallhouse on behalf of Bayless & Berkalew Co.; Michael Foy and R. Jeffrey Heilman on behalf of Salt River Project; and Joe Sparks on behalf of the San Carlos Apache Tribe and the Tonto Apache Tribe.

The following attorneys are present telephonically: John Burnside on behalf of BHP Copper; Charles Cahoy on behalf of the City of Phoenix; Kevin Crestin on behalf of the Arizona State Land Department; Kimberly Parks on behalf of the Arizona Department of Water Resources; Bradley Pew on behalf of ASARCO; and Jay Tomkus on behalf of the Pascua Yaqui Tribe and the Yavapai-Apache Nation.

Court reporter, Celeste Paxton Jones, is present and a record of the proceedings is also made digitally.

The Court addresses Bayless & Berkalew's Motion to Stay the case in regard to irrigation claims until August 31, 2019. Mr. Sparks has no objections to the stay.

Mr. Brown responds to the Court's questions regarding Markham Irrigation District and the substitution of parties.

IT IS ORDERED GRANTING the Motion to Stay the irrigation claims until **August 30, 2019**.

IT IS FURTHER ORDERED directing Mr. Brown to file amended Statement of Claimants for Bayless & Berkalew Company and Markham Irrigation District by **August 30, 2019**. The other parties are to review and file any objections to the Statements of Claimant by October 1, 2019.

Discussion is held regarding the map prepared by ADWR showing that all the wells are located within the subflow zone and the buffer zone. The Court would like Mr. Brown to consider how he would propose handling the wells in the buffer zone that may, in time, affect the boundary of the subflow zone.

The Court addresses the oral Motion to Strike made by Bayless & Berkalew Company, joined by the Arizona State Land Department, to the proposed corrections filed by the Tribes to the draft abstracts for *de minimis* water uses issued June 1, 2018. The Court understands the Tribes' position with respect to the abstract concerning domestic use because there was no priority date in the Watershed File Report. The Court will review that abstract.

The remainder of the objections filed by the Tribes dealt with abstracts for stock watering claims where creeks and in-stream flow provided the water sources. The objections too many of the claims are based on an assertion that the stockpond identified by the Tribe was not built until a date after the claimed priority date.

In regard to Watershed File Report 113-12-004, Tribes objected to the five stock watering claims (SW002-006) because the record does not support the claims. The Court states that there was a Certificate of Water Right issued for one claim for stock watering and Statements of Claim supported the priority dates for the other proposed uses.

Mr. Sparks states that it was a mistake on their part and will file a withdrawal of the correction to the claim supported by the Certificate of Water Right. He informs the Court that there was a well drilled on the Turkey Springs site and another well and pond is located near a home that had been constructed and therefore there was also a domestic claim. He further argues that the basis for the priority date reported by the Arizona State Land Department in its filings was based on a general proposition from a book that has never been in evidence and should not be considered authoritative. The State did not list any permits or water rights that support their claims in the case files. He objects to the claims as being too general and lacking specificity. Discussion is held.

Mr. Crestin states that the since the proposed abstracts have been filed, the corrections should have been clerical in nature. In terms of evidentiary objections, the time to file those was before they were entered into the WFR's.

Mr. Sparks states that the Tribes only goal is that the Decree entered by this Court is supported by the record and is defensible.

Mr. Brown addresses Master Thorson's Order in regard to Sheep Camp Ranch (WFRs 113-12-003-SW002 and 113-09-018-DM001). Discussion is held.

The Court clarifies with Bayless and Berkalew Co. and ASLD that their oral Motion to Strike dealt with the Tribe's corrections and not the Tribe's original objections to the watershed file report.

The Tribe's original objections to the watershed file report are not before the Court as part of the Motion to Strike and the Court will make no decision with respect to the original objections in the context of this motion.

IT IS ORDERED taking the oral Motion to Strike under advisement.

9:15 a.m. Matter concludes.

LATER

This phase of the contested case involves claims for water rights filed by the Arizona State Land Department (WFR 113-09-017 and WFR 113-12-003) and by Bayless and Berkalew Company, an Arizona corporation incorporated in 1907 (WFR 113-12-004). Proposed abstracts have been prepared for the potential water rights identified by ADWR and distributed to the parties. The San Carlos Apache Tribe and Tonto Apache Tribe (the "Tribes") filed suggested corrections to a proposed abstract for a domestic use and a proposed abstract for a small reservoir. They also submitted corrections to 15 proposed abstracts for stock watering as follows:

Proposed Water Right No.	Reported Source of Water	Reported Priority Year	Suggested Corrections to Sources of Water and Priority Date
113-09-017-SW005	Instream flow from North Dam Wash	1884	Stockpond constructed in 1938
113-12-003-SW004	Instream flow from Aguja Canyon	1900	Well constructed in 1950
113-12-003-SW005	Instream flow from Redfield Canyon	1884	Stockpond constructed in 1938
113-12-003-SW006	Redfield Canyon Wash	1884	Stockpond constructed in 1938
113-12-003-SW009	Redfield Canyon Spring	1884	Cement troughs constructed in 1934

113-12-004-SW009	Redfield Canyon Spring	1884	Stockpond constructed in 1937
113-12-003-SW015	Lower Mesa Wash	1884	Stockponds constructed in 1948 and 1961
113-12-003-SW016	Markham Canyon	1884	Stockpond constructed in 1969
113-12-003-SW022	Redfield Canyon Wash	1884	No alternative date submitted
113-12-003-SW024	Pipeline Wash	1884	Stockpond constructed in 1971
113-12-004-SW002	Stone Cabin Spring	1900	Tank built in 1969
113-12-003-SW004	Instream flow from Bollen Wash	1900	No alternative source of water provided, 1952
113-12-004-SW004	Wilson Spring ¹	1924	No alternative source of water provided, 1938
113-12-004-SW005	Redfield Canyon	1900	No alternative source of water provided, 1952
113-12-004-SW006	Sheep Canyon Wash	1900	No alternative date submitted

A. *Procedures for Corrections and Objections to Proposed Abstracts*

At issue is a motion made pursuant to Ariz. R. Civ. Pro. 7.1(f) that authorizes a motion to strike any part of a filing on the “ground that it is prohibited, or not authorized, by a specific statute, rule, or court order.” Here, the question is whether the suggested corrections are authorized by the *Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases involving Stockwatering, Stockponds, and Domestic Uses*, W1-11-19, dated November 14, 1994, amended February 23, 1995, approved and modified September 27, 2002 (“*Decision*”).²

In considering appropriate procedures for adjudicating water rights for *de minimis* water uses, the *Decision* assessed the amount of water involved in stock watering, stockponds and domestic uses and balanced the costs and benefits of a detailed adjudication of water rights for those uses. With respect to stock watering in particular, the Special Master found that stock watering uses identified in the San Pedro HSR result in “virtually unnoticeable amounts of water consumed by stock animals, and the few benefits that would result from a detailed adjudication all combine to support summary treatment.” *Id* at 31. The reasoning in the *Decision* clearly recognized that the expenditure of judicial, administrative and litigant resources that would be necessary to undertake a complete adjudication of stock watering uses was not warranted. As a result, summary procedures were adopted to adjudicate those claims as well as claims for stockponds and domestic uses.

¹ A Certificate of Water Right was issued to Charles H. Bayless to certify a stock watering right with a priority date of September 10, 1924.

² The claims for stockwatering and stockponds were originally consolidated under *In re Sands Group of Cases (W1-11-19)*.

The summary procedures set forth in the *Decision* list the water right characteristics that are to be included in proposed abstracts for stock watering, stockponds and domestic uses and the process for establishing those characteristics. It also provides the procedures to challenge the proposed abstracts and the conditions precedent that must be satisfied to assert a challenge. The *Decision* states: “Once the proposed water right abstracts have been prepared, the litigants will be provided an opportunity to suggest the correction of mistakes in the proposed abstracts.” *Id.* at 47. The correction opportunity is not a forum in which to relitigate the *Decision*, which was the subject of years of briefing and has now been affirmed for more than 16 years. It is simply a forum in which to correct clerical and other inadvertent errors found in the proposed abstracts. Once the proposed abstracts have been completed and corrected where necessary, the Special Master will assemble them in a catalog of proposed water rights. The objectors will have a 60-day period to file permissible objections to the proposed water rights in the catalog after which the Special Master will resolve objections to the original watershed file reports and the permissible objections when the objector can show that the resolution of the objection will demonstrably protect or improve the objector’s own water right and resolution of the objection will provide relief that could otherwise not be obtained in a post-final decree enforcement proceeding. *Id.* at 39.

B. Priority Date

The Tribes suggested corrections to the priority dates that also, in some cases, seek to change the applicable sources of water identified in the proposed abstracts. The changes to water sources occurred because the Tribes associated a portion of the stock watering uses that ADWR linked to springs, washes and instream flows with constructed water sources such as stockponds, tanks, and wells. They used the construction dates for those structures, which are in every instance decades after the priority dates recorded in the watershed file report, as the priority dates for the stock watering uses. Thus, the specific issue presented here is whether the Tribes’ corrections fit within the scope and types of permitted corrections, which shall “not be requests for reconsideration of the basic rulings set forth in this decision,” that are properly asserted at this stage of the proceedings. *Id.* at 47.

The ruling with respect to establishing a priority date, as the Tribes correctly state, is as follows:

The priority dates for these uses will be determined by use of the apparent dates of first use as listed in the potential water right section of the watershed file report. If the watershed file report is incomplete or ambiguous, then the priority date will be determined in the following sequence: (1) the earliest date set forth in a judicial decree or Water Rights

Registration Act filing; (2) the earliest date set forth in any other preadjudication filing, adjudication filing or other admissible credible evidence.

Id. at 46.

The Tribes challenge the priority dates in the proposed abstracts that were based on the apparent dates of first use listed in the potential water right sections of the watershed file reports. With the exception of the claim for domestic use, the watershed file reports included the year of the apparent date of first use for each potential water right. The Tribes argue that the appropriate procedure is to look through the watershed file report and the sworn Statement of Claim filed by a Claimant, an adjudication filing, in order to examine whether admissible evidence exists to support the date stated in the watershed file report. In the absence of such admissible evidence in ADWR's records, the Tribes contend that the priority date in the watershed file report is rendered either incomplete or ambiguous. Effectively, the Tribes would require a Claimant to incur the time and expense of creating and attaching a complete evidentiary record sufficient to establish a priority date in formal litigation to either a Statement of Claimant or a Statement of Claim before a proposed abstract could incorporate the apparent date of first use set forth in the watershed file report.

The Tribe's approach cannot be accepted for two reasons. First, the approved procedure requires an examination of the watershed file report to determine whether the priority date is incomplete or ambiguous. With the exception of the domestic use, the watershed file reports provide a year of first apparent use for each claimed use listed above. In those cases, the year of the priority date is not incomplete or ambiguous. No reason exists to move beyond the watershed file report to determine the year of the priority date. The *Decision* further provides that if a date is incomplete or the watershed file report makes the priority date ambiguous, the uncertainty can be resolved based on a list of filings, including the sworn Statements of Claim. The *Decision* clearly authorizes a priority date to be determined based on the statutorily-authorized forms filed with ADWR. Second, the Tribe's approach would undermine the basic rationale for the adoption of summary procedures. Instead, of allowing *de minimis* water rights to be adjudicated in an expedited fashion, the litigants and the court would be required to spend time and resources in extended litigation over thousands of *de minimis* uses. The court has already decided that the costs of such an approach outweigh the benefits.

Based on the governing procedures in this case, a suggested correction of a proposed abstract that has not yet been included in a catalog of water rights based on an allegation that admissible evidence does not support the priority date provided in a watershed file report is inconsistent with the purpose of the summary proceedings adopted for the issuance of proposed abstracts and is not authorized by the *Decision*.

Accordingly,

IT IS ORDERED denying the proposed corrections and granting the motion to strike.

A copy of this minute entry is mailed to all persons listed on the Court-approved mailing list for Contested Case No. W1-11-2696.