

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

12/20/2018

CLERK OF THE COURT

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Hatfield

Deputy

FILED: 12/24/2018

In re: the General Adjudication
of All Rights to Use Water in the
Little Colorado River System and Source

CV 6417-300

In re: Navajo Nation

In re: Oral argument re: Appropriate Issues to be
Resolved

MINUTE ENTRY

Courtroom: CCB 301

1:30 p.m. This is the time set for Oral Arguments re: appropriate issues to be resolved with respect to the potential use of a *de minimis* proceeding to determine water rights based on stock and wildlife watering and stockpond uses.

The following attorneys appear in-person: Carrie Brennan and Kevin Crestin on behalf of Arizona State Land Department; Erin Byrnes on behalf of the City of Flagstaff; Judith Dworkin, Evan Hiller, Jeffrey Leonard, Joe Keene and Kathryn Hoover on behalf of the Navajo Nation; Brian Heiserman on behalf of the LCR Coalition; Grace Rebling and Phillip Londen on behalf of the Hopi Tribe; Mark McGinnis, Patrick Sigl and John Weldon on behalf of Salt River Project; and Kimberly Parks on behalf of ADWR.

The following attorneys appear telephonically: David Brown on behalf of LCR Coalition; John Burnside on behalf of APS; Jay Tomkus on behalf of Pascua Yaqui Tribe and Yavapai-Apache Nation; and Vanessa Willard on behalf of the United States Department of Justice.

Court reporter, Linda Lopez, is present and a record of these proceedings is made digitally.

Ms. Hoover states the Navajo Nation is generally in agreement with the issues identified by the Court for briefing with the exceptions of Nos. 4 and 6. Ms. Hoover states that the question is: what are the attributes that need to be determined if there is going to be a summary adjudication. Discussion is held.

Mr. Heiserman addresses LCR Coalition's position. The Coalition generally agrees with the issues but they have identified additional issues that should be addressed particularly related to enforcement. He notes that enforcement is a threshold issue and it should be addressed first because it may dramatically change how the parties address the rest of the issues on the list. Mr. Heiserman states the issue should not be designated as one of Broad Legal Importance because of the particular factual circumstances involved. Discussion is held.

Mr. McGinnis informs the Court that SRP's position is that some of these issues likely need to be done as broad legal issues but others are potentially fact-specific. He addresses the enforcement issue and how it should be dealt with first.

Ms. Byrne states that the City of Flagstaff shares in LCR's Coalition position in particular with respect to designation of any of these matters as Broad Legal Significance.

Ms. Rebling advises the Court that the Hopi Tribe takes no position on the issues.

Further discussion is held with Ms. Hoover and Mr. McGinnis.

Ms. Willard states that the United States did not identify any additional issues.

Further discussion is held with Mr. Brown regarding other federal agencies that have made claims for water rights in the Little Colorado River watershed.

The Court advises the parties that it will file this minute entry by December 24, 2018 with a list of issues to be briefed.

IT IS ORDERED that by **January 22, 2018**, the parties shall simultaneously file their initial briefing of the issues. Responses from each of the parties shall be due by **February 12, 2018**.

IT IS FURTHER ORDERED that oral argument on the identified issues will be held on **February 21, 2018** at 10:30 a.m. in the Maricopa County Superior Court, Courtroom 301, Central Court Building, 201 West Jefferson, Phoenix, AZ 85003-2202,

Ms. Parks gives a status report about the Preliminary HSR for the Navajo Reservation. ADWR requests a 60-day extension. Discussion is held.

There being no objection,

IT IS FURTHER ORDERED that the deadlines applicable to ADWR's filing of the preliminary hydrographic survey report and the final hydrographic survey report are extended 60 days.

2:12 p.m. Matter concludes.

LATER

The determination of the federal reserved water rights for the Navajo Reservation and allotted land (collectively referred to as the Navajo Reservation), for reasons related to efficiency of proceedings and funding, have been divided into three stages. Each stage is defined by proposed water uses. The first phase includes federal reserved water rights for stock and wildlife watering and stockpond uses. At issue here is whether the determination of federal reserved water rights for an Indian reservation for stock and wildlife watering and stockpond uses can be resolved using a summary procedure based on a finding of *de minimis* use. The resolution of this ultimate issue requires consideration of a host of sub-issues.

The first sub-issue is the procedural question of whether one or more of the issues should be designated as having broad legal importance.¹ Pursuant to Rules for Proceedings Before the Special Master §12.03, on his own motion, the Master may designate an issue raised by a motion as an issue of broad legal significance. An issue of broad legal importance is defined as one that has procedural or substantive significance that is similar to issues in other contested cases and may establish a precedent for other contested cases in that river system. *Id.* at §12.01. Here, the Hopi Tribe and the United States did not advocate for the implementation of a summary procedure to determine stock and wildlife watering and stockpond uses during the recent trial on past and present uses on the Hopi Reservation, the only other contested case currently active in the Little Colorado River Adjudication. In this case, the United States and the Hopi Tribe have previously taken the position that a summary proceeding is incompatible with the determination of a federal reserved water right. As to the second requirement dealing with potential precedential value, the Arizona Supreme Court has directed that the adjudication of federal reserved water rights for an Indian reservation must be determined on a reservation-by-reservation basis taking into account, among other factors, a tribe's history and culture and the physical location and characteristics of the reservation. *In re Gen. Adjudication of All Rights to Use Water I the Gila River Sys. And Source*, 201 Ariz. 307, 311, 35 P.3d 68, 72 (2001). In other words, federal reserved water rights on Indian reservations have to be determined and defined by the unique facts

¹ As a practical matter, notice of these issues is being given to the court-approved mailing list, which includes ADWR, for the Little Colorado River system because at this time the approved mailing list for this case is the same mailing list.

and circumstances presented by each reservation. Given that the issues at hand do not satisfy the criteria of an issue of broad legal significance,

IT IS FURTHER ORDERED that the issues related to a summary determination of federal reserved water rights for an Indian reservation for stock and wildlife watering and stockpond uses assuming a finding of *de minimis* use will not be designated as an issue of broad legal importance pursuant to Rule 12.03.

Moving to substantive sub-issues, the parties have proposed revisions to suggested sub-issues and submitted additional sub-issues for consideration that could be determinative of the ultimate issue. After consideration of the papers filed and the oral argument,

IT IS FURTHER ORDERED that the following sub-issues shall be briefed:

1. What water right characteristics must be established under federal law to claim water uses for stockponds, stock and wildlife watering on the Navajo Reservation.
2. What water right characteristics are necessary to summarily adjudicate federal reserved rights for stock and wildlife watering and stockpond uses as *de minimis* uses on the Navajo Reservation.
3. Whether a summary procedure using a *de minimis* approach to determine water rights for stock ponds, stock and wildlife watering is appropriate when the claims for water rights are made under federal law for the Navajo Reservation.
4. Assuming that a priority date is a water right characteristic that must be included in a summary adjudication of a federal reserved water right for a *de minimis* stock and wildlife watering or stockpond use, how is the priority date determined under federal law.
5. Assuming that type of use and place of use are water right characteristics that must be included in a summary adjudication of a federal reserved water right for a *de minimis* stock and wildlife watering or stockpond use:
 - a. Can the holder of the right change the type or location of use and still retain a federal reserved water right to the water.
 - b. Can the holder of the right cumulate the federal reserved water and use the aggregate of the federal water rights for the same or different uses.
6. Assuming that a stockpond or a stock or wildlife watering use from a source of water that has a defined maximum volume could be summarily adjudicated as a *de minimis* use, does the fact that the source of water also provides water for other uses preclude the summary adjudication of federal reserved water rights for the stockpond or stock or wildlife watering use from that source.

7. Does the fact that the location of a source of water for a stockpond, stock or wildlife watering use is within a closed basin wholly within the boundaries of the Navajo Reservation affect the resolution of any of the sub-issues listed above.

Assuming that federal reserved water rights for stockponds, stock and wildlife watering uses on the Navajo Reservation can be summarily adjudicated based on a finding of *de minimis* use,

IT IS FURTHER ORDERED that the following sub-issues will also be briefed with respect to summarily adjudicated *de minimis* federal reserved water rights (Rights):

1. Can the Navajo Nation or the United States as trustee of the Navajo Nation enforce the Rights against holders of junior surface water rights or groundwater users.
2. Assuming the answer to issue #5b above is in the affirmative, can the Navajo Nation or the United States as trustee of the Navajo Nation enforce the aggregated Rights against holders of junior surface water rights or groundwater users.
3. Assuming the enforceability of the Rights:
 - a. Can the holder of the right against whom an enforcement action is brought by the United States or the Navajo Nation litigate the attributes of the Right, and if so, what rules govern the time of the filing of the litigation.
 - b. Assuming that the holder of the right against whom an enforcement action is brought by the United States or the Navajo Nation can litigate the attributes of the Right and prevails, will the decree granting the federal reserved water rights be modified to reflect the attributes adjudicated for the particular Right.

Finally, at the request of the Hopi Tribe,

IT IS FURTHER ORDERED that briefing shall be submitted on the question, assuming summary procedures are adopted in this case to define federal reserved water rights for stockponds, stock and wildlife watering uses on the Navajo Reservation based on a finding of *de minimis* uses, what is the extent to which the procedures can be used to determine water rights for the same uses in the same subwatersheds for claimants, including the Hopi Tribe, under state law.

Instructions for telephonic participation in the oral argument scheduled for
February 21, 2018:

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

A copy of this order is mailed to all persons listed on the court approved mailing list for Contested Case No. CV6417-300.