

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

10/18/2017

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

T. DeRaddo

Deputy

FILED: 11/9/17

In re: The General Adjudication of All rights to Use
Water in the Little Colorado River System

CV6417-201

In re Hopi Priority
Contested Case No. CV6417-201

Central Court Building – 301

1:00 p.m. This is the time set for Oral Argument on the Hopi Tribe's Motion for Order to Adopt Summary Adjudication Procedures for *de minimis* Water Uses on the Tribe's Off-Reservation Properties and on Salt River Project's Motion to Designate an Issue of Broad Legal Importance.

Appearances are as follows:

Attorneys appearing in person:

- David A. Brown and Gregory Adams appear on behalf of the LCR Coalition
- Mark A. McGinnis appears on behalf of Salt River Project (SRP)
- Joseph P. Mentor, Jr., Phil Londen and Grace R. Rebling appear on behalf of the Hopi Tribe
- James Meza appears on behalf of the Arizona State Parks and Trails
- Meagan H. Tracy appears on behalf of APS
- Monique Coady appears on behalf of the City of Phoenix
- Jaclyn Foutz appears on behalf of the City of Flagstaff
- Edwin W. Slade, III appears on behalf of the Arizona State Land Department
- Kathryn M. Hoover, Jeffrey S. Leonard and Judith M. Dworkin appear on behalf of the Navajo Nation
- Susan B. Montgomery appears on behalf of the Pascua Yaqui Tribe and the Yavapai-Apache Nation
- Joseph P. Sparks appears on behalf of the San Carlos Apache Tribe and the Tonto Apache Tribe
- Alexandra Arboleda appears on behalf of the City of Flagstaff

Attorneys appearing telephonically:

- Scott B. McElroy and Stanley M. Pollack appear on behalf of the Navajo Nation
- Cody L.C. McBride appears on behalf of the U.S. Department of Justice
- Kimberly R. Parks appears on behalf of the Arizona Department of Water Resources (ADWR)

Court reporter Linda Lopez is present. A record of the proceedings is also made digitally.

Discussion is held and the parties argue both motions.

Joseph Mentor Jr. addresses the Court regarding the Hopi Tribe's Motion, especially as it relates to streamlining the adjudication process for *de minimis* claims. Mr. Mentor outlines three issues discussed in meetings of the parties: (1) the definition of *de minimis* uses; (2) the procedures necessary to streamline the adjudication; and (3) a stipulation as to the impact of those smaller uses, both individually and cumulatively.

Mr. Mentor reported that the parties could not reach an agreement regarding the *de minimis* claims and stated that the Hopi Tribe is uniquely facing adjudication of its state law water rights in the 3 Canyons Area.

Mr. Mentor outlines the issues most immediate to the Hopi Tribe: (1) preparing the Hopi updated Statements of Claimant for the off-reservation properties; (2) consideration of the Hydrologic Survey Report that will follow from submittal of the updated statement of claimant; and (3) suggesting procedures for adjudication of claims. Mr. Mentor asks that the Court hold its consideration of the Hopi motion at this time in order to consider SRP's Motion.

Mark McGinnis addresses the Court regarding the Motions, and requests that this Court issue a notice to inform the parties that this *de minimis* issue is an Issue of Broad Legal Importance. Mr. McGinnis further contends that the *de minimis* standards should be set for all parties clearly and equally. Mr. McGinnis requests that ADWR generate a report for the court on the issue of extending Special Master Thorson's Silver Creek ruling to the entire Little Colorado River (LCR) watershed and submit the ruling to Judge Brain for approval.

Further discussion is held regarding the four sub-watersheds and whether the Silver Creek standards are appropriate for all four sub-watersheds, or does Special Master Thorson's analysis apply with equal force in the other three watersheds? Mr. McGinnis suggests that the Hopi small claims not be adjudicated until the *de minimis* standards are set forth, at least, in that particular watershed.

David Brown addresses the Court and suggests that ADWR produce data on all four watersheds at once for efficiency. Mr. Brown informs the Court that ADWR has created a report on all the wells in the entire basin. He also stated that the Hopi Tribe

needs to go through the established process for filing its Statements of Claimant. Counsel also argues that Special Master Thorson's 1994 Memorandum Decision not be sent to Judge Brain because the report is invalid in many categories.

Kathryn Hoover addresses the Court and asserts that Special Master Thorson's 1994 Memorandum Decision provides procedures, standards and definitions regarding what the *de minimis* uses are, which cannot be applied across the basin without factual information, as outlined in an Arizona Supreme Court decision. However, the procedures can be applied. Discussion is held regarding stockponds and stock watering uses. Ms. Hoover suggests that the Court follow the direction that Special Master Thorson provided in his Memorandum Decision and ask ADWR to do abstracts consistent with his decision. Ms. Hoover suggests that ADWR process the data prioritizing their reports consistent with the case movement. Discussion is held regarding ground water usage from wells that affects the Navajo Nation.

Edwin Slade III addresses the Court and asserts that the State Land Department requests that all parties be treated equally, and avows that the State Land Department would approve *de minimis* in the entire LCR watershed. Mr. Slade requests that the data and reports from ADWR be concluded all at one time. Mr. Slade further requests that to the extent that the findings in the Silver Creek *de minimis* report can be used, State Land Department urges that approach, and suggests that ADWR produce an addendum regarding outdated ownership. The State Land Department argues that abstracts should not be done in advance of the data being produced.

Cody McBride addresses the Court and agrees that Summary Adjudication procedures need to be established for *de minimis* water uses. Mr. McBride asserts that the Navajo Nation's proposal satisfies the Arizona Supreme Court's requirement efficiently.

Mr. Mentor again addresses the Court. He agrees with SRP that there should not be a different standard for each different water user. He reminds the Court that the Hopi Nation is the only claimant in the instant adjudication that is facing trial dates for the adjudication of its claims. Further, the Hydrographic Survey Report that is being prepared is the only report associated with one claimant. Mr. Mentor asserts that the Hopi Tribe would support the Navajo Nation's approach to wrapping the issue of *de minimis* uses into the Hydrographic Survey Report, however limited utility it may have.

Discussion is held regarding filing Statements of Claimant.

Mr. Mentor withdraws his Proposed Form of Order and requests that the Court hold his Motion in abeyance until after the Court decides SRP's Motion to Designate an Issue as Broad Legal Importance.

Mr. McGinnis addresses the Court and responds to Mr. Mentor's arguments. He requests that ADWR give a preliminary report to answer the question on whether it is more efficient to produce data on all four areas (as discussed), all at one time, or

separately. Mr. McGinnis re-urges his Motion to designate an issue as having Broad Legal Importance.

Mr. Mentor addresses the Court and requests that the same standards apply to all parties equally.

Ms. Hoover addresses the Court regarding the designation of an issue as one of Broad Legal Importance.

The Court addresses the parties regarding the subwatersheds related to the *de minimis* issue, the standards to be set forth and the process for dealing with objections.

2:04 p.m. Matter concludes.

LATER:

As counsel for the Hopi Tribe correctly stated at oral argument, the Hopi Tribe's Motion has initiated consideration of the use of summary procedures to adjudicate the water rights for *de minimis* water uses. Specifically, the Hopi Tribe urges the adoption of summary procedures to adjudicate the following water uses: stock and wildlife watering, stockponds, domestic uses and exempt wells. *Hopi Tribe's Motion for Order to Adopt Summary Adjudication Procedures for De Minimis Water Uses on the Tribe's Off-Reservation Properties*, filed July 20, 2017, p. 4.

Summary adjudication procedures are intended to efficiently and economically adjudicate water rights that utilize relatively small amounts of water or capture water that would not otherwise reach downstream appropriators when the costs of adjudicating such rights outweigh the public and private benefit of a complete adjudication. The Navajo Nation generally concurs with the benefits of adopting appropriate summary adjudication procedures:

The Navajo Nation agrees with the Hopi Tribe that the development of standards for *de minimis* uses that can be summarily adjudicated has the potential to streamline the adjudication, reduce the demands on the resources of DWR, the parties and the Court, and result in a determination of these small uses of water with attributes reasonably related to actual use

Navajo Nation's Response to Hopi Tribe's Motion for Order to Adopt Summary Adjudication Procedures for De Minimis Water Uses on the Tribe's Off-Reservation Properties, filed September 5, 2017, p. 18.

Similarly, SRP confirmed that "the adoption of summary adjudication procedures for *de minimis* water uses for the Little Colorado River Watershed ("LCR") would help streamline the Adjudication, reduce the burden on the Arizona Department of Water Resources ("ADWR") and this Court, and reduce costly litigation between the parties." *Salt River Project's Response to Hopi Tribe's Motion to Adopt Summary Adjudication*

Procedures for De Minimis Water Uses and Salt River Project's Motion to Designate an Issue of Broad Legal Importance, filed August 22, 2017, p. 2 (“SRP Motion”). The LCR Coalition and the Arizona State Land Department joined in the SRP Motion. Although the parties support the development and adoption of summary procedures to adjudicate *de minimis* water uses, disagreement exists as to the methods by which the standards and procedures should be adopted.

The first source of disagreement among the parties concerns the evidentiary foundation necessary to classify a claim for a water right as a *de minimis* claim. The Hopi Tribe advocates the use of statutory definitions to classify uses as *de minimis*. It suggests that the following water uses should be classified as *de minimis*: exempt wells as defined by A.R.S. §45-454, stockponds subject to the Stockpond Registration Act, and water uses that qualify as “Small Water Use Claims” under A.R.S. §45-182. The use of statutory definitions to define a *de minimis* use would prevent “the presentation of evidence regarding what would be a true *de minimis* use given the amount of water actually available.” *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 212, 972 P.2d 179, 196 (1999). As Salt River Project points out, the purpose of the statutory term “Small Water Use Claims” is to set their priority for consideration. SRP Motion, p. 17. Legislative definitions cannot be substituted for an examination of the facts and circumstances of the watershed in which the water uses are claimed.

The Hopi Tribe also argues that *de minimis* uses can be identified using definitions from decisions issued in adjudication proceedings in the Silver Creek and San Pedro River watersheds: Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases Involving Stockponds, Stockwatering, and Wildlife Uses, Contested Case No. 6417-033-9005 (“Silver Creek Decision”) and Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases Involving Stockponds, Stockwatering, and Domestic Uses, Contested Case No. W1-11-19, dated November 14, 1994, amended February 23, 1995, approved and modified September 27, 2002 (“San Pedro River Decision”). The Navajo Nation also takes the position that a set of *de minimis* uses can be created using some of the definitions in the Silver Creek Decision as well as ADWR’s 1994 technical report about wells in the Little Colorado River System.

Importantly to the consideration of this argument is the fact, confirmed at oral argument by counsel for the Hopi Tribe, that none of the Hopi Tribe’s off-reservation land is located in the San Pedro River or the Silver Creek watersheds. The Hopi Tribe’s and the Navajo Nation’s suggested approach rests on the implicit assumption that watersheds and water uses within the watersheds in Arizona are the same or substantially similar. The Silver Creek Decision demonstrates that hydrological conditions, even within a single watershed, can materially differ. For example, in some parts of the Silver Creek watershed stockponds with a volume of less than four acre feet are considered *de minimis*. In other parts of the watershed, all stockponds, regardless of size, are treated as *de minimis* water uses. Silver Creek Decision, p. 13. Given the importance of water rights, the court has the duty to hear the evidence offered by the parties and determine *de*

minimis uses in the context of each watershed. *San Carlos Apache Tribe*, 193 Ariz. at 212, 972 P. 2d at 196.

The Arizona Department of Water Resources divided the lands located outside the Indian Reservations in the Little Colorado River watershed into three watersheds separated by the United States Geological Survey stream gauging stations. *Hydrographic Survey Report for the Silver Creek Watershed*, November 30, 1990, Vol. 1, p. 2. The three subwatersheds, as shown in *figure 1* below, are known as the Lower Little Colorado River, Silver Creek and the Upper Little Colorado River. The Hopi Tribe and the United States, on behalf of the Hopi Tribe, own land in the Upper and Lower Little Colorado subwatersheds. *De minimis* water uses must be determined based on a technical report and an evidentiary hearing on water uses in the Lower Little Colorado River and the Upper Little Colorado River watersheds in which the Hopi Tribe's off-reservations claims for water use are located.



Figure 1. Subwatersheds of the Little Colorado River watershed as shown in Figure 1-1 of the 1991 Silver Creek Hydrographic Survey Report, p. 3.

Although SRP states that the Silver Creek Decision, once approved and adopted, can only be applied to the adjudication of *de minimis* claims within the Silver Creek watershed, it suggests that the Silver Creek Decision combined with a technical report from ADWR could provide the necessary factual basis for a determination of *de minimis* water uses within the LCR. Specifically, it proposes that ADWR determine if the standards for *de minimis* uses within the Silver Creek watershed can be applied throughout the LCR. This approach may create potential issues that do not need to be resolved to determine whether any of the Hopi Tribe's claimed water uses are *de minimis* uses. First, an issue may exist that the Silver Creek Decision is flawed. Counsel for the LCR took that very position at oral argument. Thus, time and expense could be incurred litigating objections to the Silver Creek Decision that are unrelated to the watersheds in which the Hopi Tribe's off-reservation land is located. Such a proceeding could also cause Silver Creek claimants to spend time and resources now on claims for which there is no immediate plan to adjudicate and, in any event, will be considered after all other claims in the Silver Creek watershed are adjudicated pursuant to amended A.R.S. 45-257. Second, parties may object to ADWR's analysis comparing the Silver Creek and the LCR watersheds raising the specter of litigation that focuses on the validity of the methodology and results of the comparison report. In accordance with the *San Carlos Apache Tribe* decision, the focus should remain on the watersheds in which the claims are being made and determine the *de minimis* uses in those particular watersheds.

Although the Silver Creek Decision should not be used to define and quantify *de minimis* uses, it should provide guidance as to the form of a final decision that lists the characteristics of the water rights, the methods for their respective determinations, procedures for the preparation of abstracts, the time allowed for corrections to the abstracts, and time and grounds for objections to the abstracts. The Navajo Nation specifically asserted that "the summary adjudication procedures crafted by Special Master Thorson can be applied throughout the LCR System." *Response of the Navajo Nation to SRP's Motion to Designate an Issue of Broad Legal Importance*, filed October 2, 2017, p. 2. The Hopi Tribe attached to its Motion a proposed form of order based on the Silver Creek Decision that incorporates many of the above procedural elements and could serve as starting point for this process of developing a final order that defines the standards and establishes the procedures for adjudicating *de minimis* water uses.

The second source of disagreement concerns the timing of the application of summary adjudication procedures. Arizona statutes define the process to adjudicate water rights. Potential claimants file statements of claimant on the court-approved form and provide the specified information, where appropriate. *United States v. Superior Court*, 144 Ariz. 265, 697 P. 2d 658 (1985); A.R.S. §45-254. Thereafter the court or the special master requests the necessary technical assistance from ADWR that has typically been delivered in the form of a hydrographic survey report (HSR) (A.R.S. §45-256(A)). Pursuant to A.R.S. §45-256(B), as amended in 1995, the report shall include the proposed water right attributes for each individual water right claim. Any claimant may file written objections to the report. *Id.* Thereafter, the special master shall conduct the hearings necessary to determine the relative water rights of the claimant. A.R.S. §45-257(A). Here, Statements of Claimant have been filed to assert claims for water rights

for the Hopi Tribe's off-reservation land. The Hopi Tribe described those Statements of Claimant as follows:

The Hopi Tribe last made claims for its off-reservation land in its Second Amended Statement of Claimant on November 13, 2009, and in the Hopi Tribe's Amended of Claims Related to the Hopi Industrial Park, filed on March 15, 2010. The Hopi Tribe completed much of the work underlying the 2009 claim between 2000 and 2004. The information in those claims, therefore, is likely incomplete or out of date.

The Hopi Tribe's Statement in Response to the Special Master's April 11th Order Re: Identifying Off-Reservation Properties in the LCR, filed July 6, 2016, p. 2.

Based on this information, the Hopi Tribe and the United States were given 17 months to file amended statements of claimant for water rights for off-reservation land before a report would be requested from ADWR pursuant to A.R.S. §45-256(A). *Order*, dated August 3, 2016. In its Motion, the Hopi Tribe has requested that the Court determine certain water right characteristics for stock and wildlife watering and stockpond water uses prior to its filing its amended Statements of Claimant. *Reply to SRP* p. 3. In its response, SRP sought a designation of broad legal importance on the use of summary adjudication procedures to resolve claims for water use that are *de minimis*. The Hopi Tribe subsequently requested that a ruling be issued on SRP's Motion before a ruling is made on its Motion.

The third area of disagreement among the parties stems from SRP's Motion as to whether an issue of broad legal importance should be designated under §12 of the Rules for Proceeding before the Special Master. The purpose of this rule is to provide notice to other claimants in a watershed of the determination of a significant issue in one contested case in that same watershed that may affect those other claimants. The procedures for the implementation of the rule are set forth in §12.04.

The issues of whether and how to develop summary adjudication standards and procedures for *de minimis* water uses claimed by the Hopi Tribe on its off-reservation land creates an issue of broad legal importance because the resolution of those issues will be of procedural and substantive significance to those claimants asserting claims for the same types of water uses within the same watersheds. As discussed above, the definition of a *de minimis* use must be made on a watershed basis and will be applied on a watershed basis. No dispute exists that due process considerations preclude giving some claimants the benefit of summary adjudication to determine their *de minimis* water rights while requiring other claimants in the same watershed to fully adjudicate their *de minimus* claims. All of the parties agreed that the same procedures and standards should be applied to all claimants seeking water rights determined to be appropriate for summary adjudication within the same watershed. Further, in terms of precedence, the *de minimis*

determinations resulting in the Silver Creek Decision¹ and the San Pedro Decision² were litigated as issues of broad legal importance.

The Navajo Nation, joined by the Hopi Tribe and the United States, opposes SRP's Motion generally arguing that it is an unnecessary expenditure of time and resources and that any *de minimis* determinations can be accomplished as part of the HSR and the objection process. Based on the Silver Creek Decision, the *de minimis* process required about five months from the request for the report from ADWR to trial. On or about July 7, 1993, the Special Master requested that ADWR prepare the necessary technical assessment of *de minimis* use in Silver Creek. On September 1, 1993, ADWR filed its report. Trial was held on November 16, 1993. Silver Creek Decision, p. 7. Assuming the efficiencies accomplished more than 20 years ago can be repeated today, the benefits of establishing *de minimis* uses and procedures should far exceed the cost in time and resources of the Rule 12 procedure.

At this point, however, before an issue can be fashioned as one of broad legal significance, additional information must be obtained. On October 24, 2017, the Navajo Tribe filed a *Request for Additional Briefing on Procedures Required to Implement Designation of Issue of Broad Legal Importance* to which SRP filed a response on October 31, 2017. Both parties reiterated the position of the parties at the oral argument that ADWR should provide its assessment of the best approach to collect the data on *de minimis* water uses based on its available resources and technical expertise. More specifically the information needed concerns:

1. Whether ADWR can provide a technical report on stock and wildlife watering, stockponds and domestic use before it prepares a preliminary HSR on the Upper Little Colorado River watershed or the Lower Little Colorado River watershed. If so, an estimate of the amount of time necessary to prepare the technical report.

2. The amount of time reasonably necessary for the preparation of an HSR that reports solely on the Hopi Tribe's and the United States' claims for off-reservation use in the Upper and Lower Little Colorado River watershed and the time reasonably necessary to prepare a complete HSR for each of the Upper and Lower Little Colorado River watersheds.

3. Whether ADWR would realize any efficiencies by preparing technical reports simultaneously on stock and wildlife watering, stockponds and domestic uses on all subwatersheds in the Little Colorado River watershed outside of the Silver Creek subwatershed.

¹ See *Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases Involving Stockwatering, Stockponds, and Domestic Uses*, 6417-033-9005, filed April 20, 1994, p. 5.

² *Memorandum Decision and Order*, W1-11-19, filed December 3, 1993, as amended December 17, 1993.

IT IS ORDERED that ADWR shall file by **December 22, 2017**, a report containing its assessment of the issues listed above. For purposes of its assessment, ADWR should assume that the technical report on *de minimis* uses will be similar in scope and research to Chapter 2 and Section 3.1 of the Technical Report on *De Minimis* Adjudication of Stockpond and Stockwatering Uses in the Silver Creek Watershed, dated September 1, 1993. Any additional material assumptions made by ADWR in preparing its assessment shall be clearly identified in its report. The purpose of the report to be filed on December 22, 2017 is to identify the most efficient method to generate the data necessary to determine *de minimis* standards. In addition, ADWR shall include in its report a brief description of the software it has developed or is in the processing of developing that will efficiently extract the information from completed watershed file reports and generate abstracts with the water right characteristics set forth in a final, approved decision establishing the standards for water uses that qualify as *de minimis* uses.

* * *

The remaining decision that should be made prior to framing the issue as one of broad legal significance is the appropriate scope of the HSR that will be requested from ADWR. At the July 12, 2016 status conference the suggested scope of the HSR ranged from the entire Coronado Aquifer (C Aquifer) to only the claims listed in the Hopi Tribe's and the United States' amended Statements of Claimant. A decision as to the scope of the HSR was held in abeyance at that time pending receipt of more information about the Hopi Tribe's and the United States' claims. *Order*, filed August 3, 2016. That information should be available shortly as the Hopi Tribe and the United States must file Amended Statements of Claimants by December 15, 2017.

IT IS FURTHER ORDERED that the parties shall file by **January 10, 2018**, their comments regarding the ADWR report, their positions on the appropriate scope of the HSR that will include the Hopi Tribe's off-reservation claims, and a list of issues that should be determined in the proceeding that will classify *de minimis* water uses and set the procedures to adjudicate claims for *de minimis* water uses.

IT IS FURTHER ORDERED that oral argument will be held on **January 18, 2018** at 10:30 a.m. in the Superior Court of Arizona, Central Court Building, Courtroom 301, 201 West Jefferson Street, Phoenix, AZ 85003-2202.

If you wish to appear telephonically, please follow these instructions:

Dial: 602-506-9695 (local)

1-855-506-9695 (toll free long distance)

Dial Participant Pass Code 357264#

A copy of this order is mailed to all persons listed on the Court approved mailing list for the Little Colorado River Adjudication Civil No. 6417-201.