

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

10/12/2018

CLERK OF THE COURT

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Hatfield

Deputy

FILED: 11/29/2018

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: Navajo Nation's Motion
for an Order Requesting ADWR to Include Uses
from Wells in its *De Minimis* Investigation

MINUTE ENTRY

Courtroom: CCB 301

9:38 a.m. This is the time set for hearing before Special Master Susan Ward Harris re: Oral Argument on Navajo Nation's Motion for an Order Requesting ADWR to Include Uses from Wells in its *De Minimis* Investigation.

The following parties and attorneys appear in-person: Carrie Brennan and Kevin Crestin on behalf the Arizona State Land Department; Erin Byrnes and Lee Storey on behalf of the City of Flagstaff; Colin Campbell and Grace Rebling on behalf of the Hopi Tribe; Judith Dworkin, Kathryn Hoover, Jeffrey Leonard and Evan Hiller on behalf of the Navajo Nation; Andrew Guarino on behalf of the United States Department of Justice; R. Jeffrey Heilman and Mark McGinnis on behalf of Salt River Project; Brian Heiserman on behalf of the LCR Coalition; and Kimberly Parks and Donna Calderon on behalf of Arizona Department of Water Resources (ADWR).

The following parties and attorneys appear telephonically: David Brown on before of the LCR Coalition; Cody McBride and M'Leah Woodard on behalf of the United States Department of Justice; and Jay Tomkus on behalf of the Pascua Yaqui Tribe and Yavapai-Apache Nation.

Court reporter, Marylynn Lemoine, is present and a record of these proceedings is made digitally.

Mr. McGinnis states SRP's position. SRP believes that the Claimants should quantify specific uses to prove up their rights and that the Claimants should be entitled to the same *de minimis* standards that all the state users receive. The United States must prove specific uses and specific quantities from specific sources.

Ms. Parks states that ADWR is unable to provide a *de minimis* analysis based on the information that it has received from the Navajo Nation. Ms. Parks also states that there are not individual claims but the claims are reservation-wide.

The Court stated that its intent in the earlier order was to have ADWR include in their preliminary HSR the analysis of whether a *de minimis* approach was appropriate for stock watering and stockponds. The first step in making a determination of whether a specific type of use is *de minimis* is to calculate the cumulative impact of that uses on downstream users of surface water. The Court notes that ADWR received from the Navajo Nation information about all of its stockponds and stockwatering claims.

Ms. Parks represented that additional information and time is needed to perform the requested analysis. The Claimants have not provided individual usage information and some of the sources provide multiple uses. Ms. Parks said that they have received enough information to provide a cumulative analysis.

Ms. Hoover responds that the Navajo Nation has provided a list of all spring and all wells with yield data where available. Navajo Nation's DCMI past and present claims are not an aggregate claim. There is a table in the Statement of Claimant that shows amount produced by different wells and water systems and water hauling claims. Information has been provided for stockponds in terms of capacity, dimensions, and regression analysis. With respect to wells, Ms. Hoover said that at least 50% of the Nation's wells may be *de minimus* and suggested that the appropriate standard may be a pumping rate different than the maximum pump capacity.

Ms. Parks respond to questions from the Court regarding the information ADWR has received from the Navajo Nation.

Mr. Heiserman states that whether or not *de minimis* rights can apply to federal reserve water right is an important issue that should be addressed now because this issue may cause enforcement issues later.

Ms. Brennan states that the State has been supportive of *de minimis* rights but in a State law context.

Mr. Guarino states the United States position is that a *de minimis* analysis does not work with federal reserved water rights and agrees with ADWR. He emphasized that this proceeding is at the quantification stage and the use of *de minimis* analysis does not advance quantification of the water right. He stated that the United States has listed all impoundments which are predominately used for stock watering.

Ms. Storey makes the argument that enforcement considerations are essential and need to be considered now if categorical uses are allowed for different claims.

Mr. Campbell indicates that the Hopi Tribe joins with the United States' position.

IT IS ORDERED denying the Navajo Nation's Motion for an Order Requesting ADWR to Include Uses from Wells in its *De Minimis* Investigation.

IT IS FURTHER ORDERED directing ADWR to provide a status report advising the Court and the parties about ADWR's ability to complete a *de minimis* analysis of stockponds, stock watering and wildlife watering solely from surface water at specific locations within ten days. In its report, ADWR is to specify the methodology it would adopt and define the boundaries of the relevant sub-basins.

ADWR's report will provide additional information that can be used to make decisions about completing a *de minimis* analysis of stockponds, stock watering and wildlife watering from surface water sources.

Discussion is held on the procedure to be adopted by Court to resolve related issues such as whether *de minimis* uses can be the subject of federal reserved water rights.

Mr. McGinnis inquires if these issues can be designated as Issues of Broad Legal Importance.

The Court is to prepare a list of proposed issues which will include the question if this case can be considered an Issue of Broad Legal Importance.

10:38 a.m. Matter concludes.

LATER

The broader issue raised during the course of the oral argument beyond the limited subject of the motion filed by the Navajo Nation is whether *de minimis* procedures similar to those set forth in the Special Master's Decision concerning the Silver Creek Watershed should be adopted for the purpose of adjudicating the claims asserted by the Navajo Nation and the United States for federal water rights for stock and wildlife watering and stockpond uses.

1. Background

The purpose of this General Adjudication is to establish the extent and priority of the rights of all persons to the water in the Little Colorado River system and source. A.R.S. §45-251(2). The determination of the “extent and priority” of a water right in an Arizona general adjudication has included the following water right characteristics: legal basis, priority date, the source of the water, point of diversion, place of use, type of use, and quantity. Determination of each of the characteristics can result in extended litigation with its attendant costs in time and resources.

In 1994 the Special Master developed a set of procedures to adjudicate numerous claims for water rights for stockponds and stock and wildlife watering in the Silver Creek watershed, which is included in the Little Colorado River Watershed. *Memorandum Decision, Findings of Fact and Conclusions of Law for Group 1 Cases Involving Stockponds, Stock-Watering, and Wildlife Uses* (Civil No. 6417-033-9005) (April 20, 1994) (“*Decision*”).¹ The impetus for the *Decision* was the need to “resolve objections to many small water uses and remove them from active litigation.” *Decision* at 7.

The *Decision* dealt with the question of whether water rights for stockponds and stock watering uses could be adjudicated in a summary fashion due to their possible *de minimis* impact on other water uses. A *de minimis* impact occurs when the individual and cumulative impact of the uses on other water uses is so small that the expenditure of judicial, administrative and litigant resources which would be necessary to undertake a complete adjudication of those uses is not warranted. *Decision* at 8. In the Silver Creek watershed, the Special Master determined that stock watering, stockponds in closed basins and stock ponds with a volume of 4.0 acre feet or less can be summarily adjudicated because of their *de minimis* impact on downstream watersheds. *Decision* at 17.

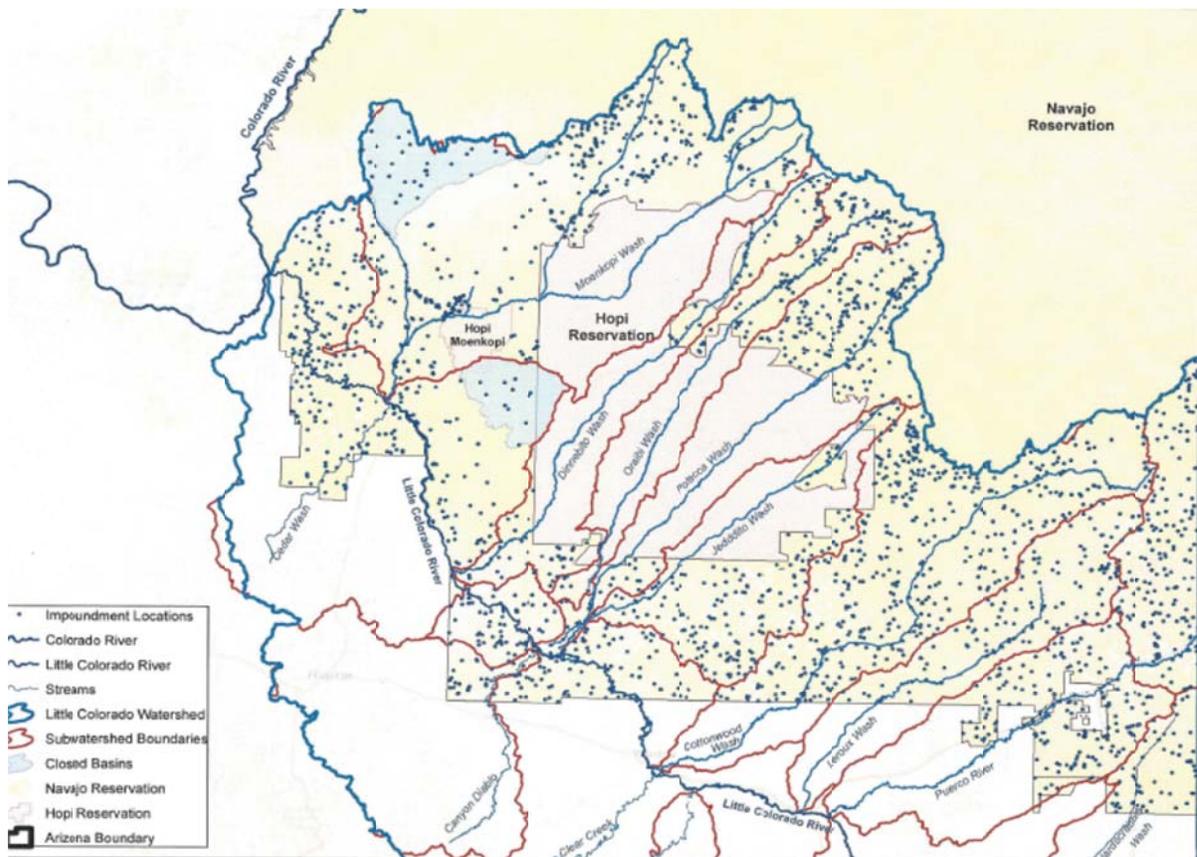
The finding that stock watering constituted a *de minimis* use was based on a finding that there were 110 stockwater uses claimed in the watershed and stock consumed so little water that 12,000 animal units (one cow and one calf) would be required to consume one percent of the available surface water outflow. In its Technical Report, ADWR reported that an animal unit (one cow and one calf) consumed 0.011 acre feet per year or 9.8 gallons of water per day. *Decision* at 14. In addition, the determination to adopt summary procedures for stockwatering uses was based on the finding that administration of stockwatering uses is not feasible. *Id.*

¹ The *Decision* was never formally adopted by the court. The Special Master issued a decision in the Gila River Adjudication regarding *de minimis* uses that was adopted by the court. In that decision, *de minimis* uses were defined for stock watering and certain stockpond and domestic uses.

The finding that certain stockpond uses should be summarily adjudicated included an examination of the cumulative impact of the use. The cumulative impact of a use is based on two calculations: (1) the total amount used for stockponds; and (2) the amount of water available to downstream users in the absence of the use at issue. Arizona Department of Water Resources concluded that the total capacity of all stockponds in the watershed amounted to 0.036 of all cultural diversions, 0.022 of the total water supply in the watershed and less than 0.028 of the annual surface water outflow of the watershed. *Decision* at 12. The Special Master concluded that “a reduction in watershed outflow of approximately 2.2 percent is an insignificant amount.” *Decision* at 15.

2. Navajo Nation

The Navajo Reservation, shown on the map below prepared by ADWR, exists in the northern portion of the Little Colorado River watershed. As pointed out by Navajo counsel, the Navajo Reservation does not consist of a single watershed. Instead, it consists of multiple subwatersheds and closed basins.



In its amended Statement of Claimant, the United States, filed on behalf of the Navajo Nation and allottees, listed 590 springs and 2,806 impoundments with a capacity of 14,625 acre feet of water along with a number of wells as sources of water for livestock and wildlife. It also claimed a water right of 4,083 acre feet of water per annum to support 182,133 head of cattle. *United States Amended Statement of Claimant on Behalf of the Navajo Nation and Identified Allotments*, 12, 18 (filed June 1, 2018). The amended Statement of Claimant 39-91442 filed by the Navajo Nation listed 584 springs, 1,823 wells as sources of water for stock watering. It also claimed 2,608 impoundments with a capacity of 11,326 acre feet of water for livestock and wildlife watering. It claimed 4,864 acre feet of water per annum for stockwatering and wildlife purposes. The location of the springs and impoundments were identified by Universal Transverse Mercator (UTM NAD83) coordinates.

3. Form of Proceedings

At issue is whether a summary procedure should be used to determine the water rights for stock watering and stock ponds on the Navajo Reservation and allotted land under federal law. When a *de minimis* approach has been approved, it has been used as an attempt to expedite the adjudication of the water right characteristics that define a water right under state law. Here, the Navajo Nation and the United States represented that they are not asserting claims for water rights under state law. Thus, the first issue that must be addressed is whether a summary procedure using a *de minimis* approach is appropriate when the claims for water rights are made under federal law.

The summary procedure envisioned in the *Decision* was also premised on the concept that the amount of water of claimed is so small that any significant amount of expenditure of judicial, administrative and litigant resources cannot be justified. Here, the ownership, the legal basis of the water right and the priority date would presumably be the same or similar for the water rights claimed on behalf of the allottees and the Navajo Nation. The amount of water affected by those issues is many thousands of acre feet. The next issue is whether a summary procedure should be adopted when the determination of ownership, legal basis and priority date affects a large amount of water over multiple subwatersheds.

Assuming that the answer to the preceding question is negative, the issue arises as to whether a summary procedure can be used to resolve the remaining water characteristics identified in previous *de minimis* procedures: source of water, place of use, type of use, and quantity. Here Claimants have provided spreadsheets that appear to clearly identify the source of the water and place of use, assuming that place of use is the same as source of use. The locations of the impoundments are shown on ADWR's map,

replicated above. In its Report filed October 26, 2018, ADWR raised issues with respect to type of use noting that multiple uses have been assigned to locations and that a portion of the impoundments may be floodwater detention ponds or borrow pits and not stockponds. Thus, another issue is whether a summary proceeding can be applied to a large class of uses, i.e., the claimed impoundments, without a determination that each of the impoundments is in fact a stockpond and used solely for stock watering.

Finally, assuming that each of the issues identified above must be substantively addressed, the remaining issue is whether a summary procedure is appropriate for the sole purpose of determining the quantity of the proposed uses. Arizona Department of Water Resources stated that it would be technically feasible to perform a *de minimis* analysis on stock ponds, stock and wildlife watering provided the Navajo Nation and the allottees granted sufficient access to the impoundments.

Thus, the issues raised by the potential use of a summary proceeding to determine water rights associated with stockponds and stock and wildlife watering include the following:

1. What water right characteristics must be established under federal law to claim water uses for stock ponds, stock and wildlife watering on the Navajo Reservation and allotted lands.
2. 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.
3. Whether a summary procedure should be adopted when the ownership, legal basis and priority date affects a large amount of water.
4. Whether a summary procedure can be used to resolve only a portion of the relevant water characteristics.
5. Whether a summary proceeding can be applied to a large class of uses, i.e., the claimed impoundments, without a determination that each of the impoundments is in fact a stockpond and used solely for stock watering.
6. Whether a summary procedure is appropriate for the sole purpose of determining the quantity of the proposed uses.
7. Whether all or any portion of the issues should be designated as issues of broad legal importance.

IT IS ORDERED that by **December 13, 2018**, the parties shall file a list of any additional issues they believe arise with respect to the potential use of a *de minimis* proceeding to determine water rights based on stock and wildlife watering and stockpond

uses. In addition, they shall file any comments regarding whether any of the issues in the list provided above do not need to be resolved. The parties are not expected to brief issues; instead, this procedure is intended to identify the issues that should be briefed.

IT IS FURTHER ORDERED that oral argument on the appropriate issues to be resolved will be held on **December 20, 2018** at 1:30 p.m. in the Maricopa County Superior Court, Courtroom 301, Central Court Building, 201 West Jefferson, Phoenix, AZ 85003-2202. Arizona Department of Water Resources should be prepared to give a status report about the Preliminary HSR for the Navajo Reservation at the oral argument.

Instructions for telephonic appearance:
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 Contested Case No. CV6417-300.