

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

August 14, 2024

CLERK OF THE COURT
T. DeRaddo
Deputy

SPECIAL WATER MASTER
SHERRI ZENDRI

In re: *Orie Alvin Owens, Sr. et al.* (W1-11-2081)
In re: *Norman G. and Barbara Y. Crawford* (W1-11-2697)
In re: *Hope Iselin Jones* (W1-11-2708)
In re: *Valley National Bank* (W1-11-2089)
In re: *William and Esther Taylor* (W1-11-2090)
In re: *Ruth B. Singer* (W1-11-2111)
In re: *San Pedro Investments* (W1-11-2119)
In re: *Robin L. and Linda M. Richey* (W1-11-2128)

In re the General Adjudication of
All Rights to Use Water in the
Gila River System and Source
W-1, W-2, W-3, W-4 (Consolidated)

FILED: 8/30/2024

HSR Involved: San Pedro River Watershed

MINUTE ENTRY

Central Court Building – Courtroom 301

This is the time set for Oral Argument(s) regarding the Motions to Preclude Participation of Gila River Indian Community and United States Pursuant to the Gila River Indian Community Water Rights Settlement Agreement (“Motion to Preclude”), filed by St. David Irrigation District, and C-Spear LLC (“Movants”).

All parties appear virtually or telephonically. Appearances are as follows:

- John Burnside on behalf of St. David Irrigation District
- Brian Heiserman on behalf of C-Spear LLC (in the Hope Jones case) and on behalf of Krili Land, LLC and Bodie 9, LLC, aka the Brown Estate (in the Barbara Crawford case)

- Brian Hartman, the landowner and claimant is observing (Hope Jones case)
- Merrill Godfrey on behalf of the Gila River Indian Community
- Guss Guarino on behalf of the U.S. Department of Justice, Indian Resources Section, as trustee for the Gila River Indian Community
- Joseph Sparks and Laurel Herrmann on behalf of the San Carlos Apache Tribe
- Alexander Ritchie and Jana Sutton, from the San Carlos Apache Tribe Attorney General's Office, observing for the San Carlos Apache Tribe
- Sue Montgomery on behalf of the Yavapai-Apache Nation and observing for the Pascua Yaqui Tribe
- Charles Cahoy observing on behalf of the City of Phoenix
- Mark McGinnis and Katrina Wilkinson on behalf of Salt River Project ("SRP")
- Sean Hood on behalf of Freeport Minerals
- Brett Stavin on behalf of the Tonto Apache Tribe
- Kimberly Parks and Karen Nielsen on behalf of the Arizona Department of Water Resources ("ADWR")
- Neil Gintz, President of the St. David Irrigation District, is observing
- Rhett Billingsley and Kaitlin Smith observing on behalf of American Smelting and Refining Company ("ASARCO")
- Jenny Winkler observing for the City of Chandler
- Kevin Crestin observing for the Arizona State Land Department
- Emmi Blades observing on behalf of the Dept. of Justice
- Also present are Brad Pew, Rodney Held, Sunshine Manuel and Charmayne Staloff

LET THE RECORD REFLECT that today's Oral Argument Hearing involves the following three groups of related Contested Cases:

(1) *In re Norman G. and Barbara Y. Crawford* (W1-11-2697)

(2) *In re Hope Iselin Jones* (W1-11-2708)

(3) St. David Consolidated Cases: *In re Orie Alvin Owens, Sr. et al.* (W1-11-2081); *In re Valley National Bank* (W1-11-2089); *In re William & Esther Taylor* (W1-11-2090); *In re Ruth B. Singer* (W1-11-2111); *In re San Pedro Investments* (W1-11-2119); and *In re Robin L. and Linda M. Richey* (W1-11-2128).

John Burnside, on behalf of the Movants, presents argument on St. David's Motion to Preclude.

Mr. Burnside addresses the Court stating that the Gila River Indian Community Settlement Agreement is a complex document that contains 370 pages, 50 signature pages and 3,000 pages of attachments. He asserts that St. David Irrigation District's Motion to Preclude focuses on one subparagraph: 28.1.3. There, the Gila River Indian

Community promised not to challenge or object to claims for uses of water from the Gila River or its tributaries. Settlement ¶ 28.1.3 (Oct. 21, 2005).

Mr. Merrill Godfrey, on behalf of the Respondents, presents argument.

Gus Guarino, on behalf of the U.S. as respondent, presents argument.

Water Master Zendri asks questions to Mr. Guarino and Mr. Godfrey.

Mr. Burnside, on behalf of the Movants, presents a final rebuttal.

IT IS ORDERED taking this matter under advisement.

Mr. Sparks addresses the Court and states that the San Carlos Apache Tribe, and certain other Indian Tribes are known as “tribes,” and the Gila River Indian Community is known as the “Community.” He is concerned the interchangeable use of “tribe” in today’s proceedings may be confusing to those not present at the hearing. He also stated his disappointment that the San Carlos Apache Tribe was not given an opportunity to present arguments in this matter.

The Court reminds counsel that Respondents were informed that they were to work together to address their concerns.

The Court also notes Mr. Sparks’s concern regarding the use of “tribe” throughout today’s proceedings and will make editorial adjustments as appropriate.

11:14 a.m. Matter concludes.

A copy of this order is mailed to all persons listed on the Court-approved mailing list.

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Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140 for a half-day and \$280 for a full day.

LATER:

A. Motion to Preclude Participation of the Gila River Indian Community and U.S. as Trustee

1. Background

The Gila River Indian Community (“Community”) has a maze of agreements to secure their water rights.

- The Globe Equity Decree was issued in 1935 by the U.S. District Court for the District of Arizona to adjudicate claims to the mainstem of the Gila River.
- On February 4, 2003, the Community, the U.S., State of Arizona, Salt River Project, Central Arizona Water Conservation District, and a group of Arizona cities, towns, irrigation districts, and other significant Arizona water users entered into the Gila River Indian Community Water Rights Settlement Agreement.¹
- On October 21, 2005, the parties amended and restated the initial settlement. These proceedings interpret only the provisions of the 2005 Amended and Restated Gila River Indian Community Water Rights Settlement Agreement (“Settlement”).
- In 2006 and 2007, the parties subsequently amended the Settlement.
- On September 14, 2007, this Court entered its decree approving the Settlement, "fully, finally and permanently adjudicat[ing]" the Community's water rights within the Gila River System and Source as set out in the Settlement (“2007 Decree”).²

In consideration for the benefits granted by the Settlement, the Community, its members and allottees, and the U.S. on their behalf, released various claims against parties and non-parties to the Settlement. Specifically, they agreed to “neither challenge nor object to claims for use of Water from the Gila River or its tributaries.” Settlement ¶ 28.1.3.

The Community and the U.S. expressly retained from the waivers a limited subset of claims. Subparagraph 28.1.3, cited above, provides that the agreement not to object to claims for use shall not preclude enforcement of the Community’s rights under the Settlement, the Globe Equity Decree, the Arizona Water Settlements Act, and the 2007 Decree, nor shall it preclude claims of injury to those rights. *Id.* ¶¶ 6.2, 6.3, 25.12, 28.1.3, 30.9.³

¹ This settlement was approved by Congress in 2004 as part of the Arizona Water Settlements Act, Pub.L. No. 108-451, 118 Stat. 3478 (2004).

² Pursuant to the Arizona Supreme Court's 1991 Special Procedural Order governing approval of such settlements, Movants in this Adjudication were provided notice of the Settlement, and this Court considered all properly filed objections.

³ Subparagraph 28.1.3 of the Settlement states in pertinent part: “Except as provided in Subparagraphs 6.2, 6.3, 25.12, 25.24, 28.1.4 and 30.9, and subject to Subparagraph 28.1.3.1, the Community and the United

In the nearly two decades since the 2007 Decree, the Community and the U.S. as its trustee have continued to participate in the Gila River Adjudication as objectors to various water rights claims without opposition. Nonetheless, Movants argue today that subparagraph 28.1.3 of the Settlement precludes the Community and the U.S. as trustee for the Community from participating in these proceedings.

2. Movants do not assert a fully justiciable controversy with the U.S.

Finally, the U.S. argues that the Motion to Preclude should be denied in entirety with respect to the U.S. because Movants do not allege a concrete violation by the U.S. of subparagraph 28.1.3. U.S. Response to Motion to Preclude (“U.S. Response”) at 1–2 (June 4, 2024). In particular, the U.S. asserts that Movants did not identify any U.S. objections lodged exclusively in its capacity as a trustee to the Community. *Id.* The Movants reply that “[w]ithout the clarity of an order, the United States *might* otherwise assert arguments based on GRIC’s interests that GRIC itself is precluded from making.” Joint Consolidated Reply in Support of Motion to Preclude (“Movants’ Reply”) at 12 (July 10, 2024) (emphasis added).

In order to grant Movants’ requested relief against the U.S., a justiciable controversy must exist as to the application of subparagraph 28.1.3 to the United States. For a controversy to be justiciable, the question to be resolved “must be real, and not theoretical.” *Moore v. Bolin*, 70 Ariz. 354, 358 (1950). Further, rights may not be declared “in anticipation of an event that may never happen.” *Id.* at 852.

Movants provide a single concrete scenario to support their requested relief: the possibility that the U.S. will contend that “[c]laimants’ changes in points of diversion are harmful to [the Community].” Movants’ Reply at 11–12. Otherwise, Movants generally assert that the United States might make arguments solely on behalf of GRIC. *Id.*

Although it is likely that the U.S. will argue on the Community’s behalf that changes in points of diversion are harmful to the Community, that is not a violation of the Settlement. *See infra* pp. 6–7. Further, given the U.S.’s varied and sizeable interests in the Gila River and Little Colorado River Basins, the likelihood that the U.S. will pursue other objections solely on behalf of the Community is low. That speculative harm does not establish a justiciable question for the Court to resolve. Therefore, the Court cannot evaluate Movants’ general claim that subparagraph 28.1.3 prevents the U.S. from participating in these proceedings solely on behalf of the Community.

3. The plain meaning of the Settlement prevents the Community from pursuing objections to the Movants’ statements of claimant.

The Community and the U.S. *in its capacity as trustee for the Community* (“Joint Respondents”) argue that Movants misinterpret the Settlement and 2007 Decree.⁴ The

States on behalf of the Community, Members and Allotees shall neither challenge nor object to claims for use of Water from the Gila River or its tributaries.”

⁴ Three responses were filed with the Court on June 25, 2024, for the following contested cases: WI-11-2708- *In re Norman G. and Barbara Y. Crawford*; WI-11-2697 - *In re Hope Iselin Jones*; and consolidated “St. David Irrigation District Cases” WI-11-2081 - *In re Orie Alvin Owens, Sr., et al.*, WI-11-2089 - *In re Valley National Bank*, WI-11-2090 - *In re William & Esther Taylor*, WI-11-2111 - *In re Ruth B. Singer*,

Joint Respondents' primary argument is that the exceptions to subparagraph 28.1.3 allow the Joint Respondents to object to water rights claims that may affect their rights under the Settlement, the 2007 Decree, and the Globe Equity Decree. Settlement ¶ 28.1.3; Joint Response to Motion to Preclude at 4–6 (June 25, 2024).

It is clear that subparagraph 28.1.3 expressly preserves the Community's ability to enforce and assert claims for injury to Globe Equity Decree rights, rights under the Settlement, and rights under the 2007 Decree against competing upstream users of the Gila River's tributaries. *Id.* ¶¶ 6.2, 6.3, 25.12, 28.1.3, 30.9. Therefore, the issue is whether the Community's objections to the quantity, priority date, or other element of Movants' statements of claimant fall within the plain meaning of "enforcement" or "assertion of claim for injury."

At minimum, an action to enforce the Community's water rights or assert a claim of injury to those water rights must probe the effect of another's act on the Community's water use. The Community's objections to the elements of water rights claimed in Movants' statements of claimants simply do not put the Community's water use at issue. Therefore, those objections cannot be construed as an enforcement of water rights.

The Joint Respondents' proposed definition for the term "enforcement" further supports the Court's conclusion. The Joint Respondents state that "enforce" means to "compel observance of." Joint Response at 7. Simply put, objections concerning the priority date or quantity claimed by Movants are not actions to ensure compliance with Joint Respondents' rights. Rather, Joint Respondents' objections comprise an effort to define *Movants'* rights.

4. Movants have not waived their right to enforce subparagraph 28.1.3 of the Settlement.

Joint Respondents also argue that the Movants' belated arguments contradict past conduct in this case and have been waived. Those arguments are unpersuasive.

Joint Respondents cite *Jones v. Cochise County* for the proposition that "[w]aiver is either the express, voluntary, intentional relinquishment of a known right or *such conduct as warrants an inference of such an intentional relinquishment.*" 218 Ariz. 372, 379, 187 P.3d 97, 104 (Ct. App. 2008), (emphasis added) (citing *Am. Continental Life Ins. Co. v. Ranier Const. Co., Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980)). Respondents have identified no acts from which the Court may infer that the Movants intentionally relinquished their right to raise the Community's waivers under the Settlement.

5. The Community and the U.S., as trustee for the Community, may object to Movants' proposed changes in diversion.

The Community and the U.S., in its capacity as trustee, specifically reserved authority to assert injuries to water rights established by the Settlement, the 2007 Decree,

WI-11-2119 - *In re San Pedro Investments* and WI-11-2128 - *In re Robin L. and Linda M. Richey*. All three Responses are substantially the same expect for references to the actual contested case names and numbers.

and the Arizona Water Settlements Act. Specifically, subparagraph 25.12.1.1 reserves the right to “assert claims for injuries to . . . the rights of the Community and Members under the [Arizona Water Settlements Act] in any court of competent jurisdiction.” Settlement ¶ 25.12.1.1. Subparagraph 25.12.1.2 reserves the right to “assert claims for injuries to . . . the rights of the Community and Members under the judgment and decree entered by the Court in the Gila River Adjudication Proceedings.” Settlement ¶ 25.12.1.2.

Movants argue that these contested cases concern solely objections to attributes of water rights claimed in Movants’ statements of claimant, objections that are not preserved by subparagraph 25.12. The Court agrees that those objections do not fall into any of the categories of claims permitted by subparagraph 25.12, summarized by Movants as efforts to “advance claims for water rights or seek relief for current injuries to water rights, injuries to water quality, or subsidence damage.” Motion to Preclude at 12.

However, the group of contested cases considered here go beyond Movants’ statements of claimant. They will also address changes in points of diversion. The central inquiry when evaluating a change in point of diversion is whether the change will injure the rights of other appropriators. *See 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”).

Because the Community’s challenge to Movants’ proposed changes in points of diversion puts injury to the Community’s rights directly at issue, the Community may participate in these contested cases for that purpose. The U.S. may also pursue objections to Movants’ proposed changes in points of diversion on the basis that they injure the Community’s rights. Practically speaking, for the Court to have complete information regarding the potential impairment of users’ rights by a change, those other users must be permitted to participate in the proceedings.

IT IS ORDERED granting in part and denying in part the Motion to Preclude in these proceedings.

IT IS FURTHER ORDERED that the Community is precluded from pursuing objections to the water rights attributes claimed in Movants’ statements of claimant.

IT IS FURTHER ORDERED that the Community may participate in these proceedings for the purpose of asserting that Movants’ proposed changes in points of diversion are injurious to the water rights of the Community.

IT IS FURTHER ORDERED denying the relief requested against the U.S. in the Motion to Preclude.

B. Motion to Limit the Scope of Requested Entries onto Land

Joint Respondents requested entry onto lands in these contested cases on May 29, 2024. In response, the Movants and the Brown Estate filed objections to the request “to the extent they are being used to generate undisclosed expert opinions.” Objections to the

United States' and Gila River Indian Community's Requests to Permit Entry onto Land and Motion to Limit the Scope of the Requested Entries (“Entry Motion”) at 3 (May 31, 2024). Pending the resolution of the preclusion issue, the Court stayed a decision regarding the Entry Motion on June 4, 2024.

Movants and the Brown Estate appear to have informally agreed to the entry request, but seek an order from the Court preventing “information, photographs, measurements, observations, inspections, surveys, samples, or tests collected during entries to land [from being] used by the U.S. or Gila River Indian Community to generate new expert opinions in any Contested Case that were not disclosed by the U.S. and the Community in their March 2024 expert reports.” Entry Motion at 7–8.

The General Stream Adjudication follows the Arizona Rule of Civil Procedure for matters regarding use and disclosure of information, and the Rules do *not* contain an absolute bar to expert opinions disclosed after the disclosure deadline. Late disclosures are permitted under Rule 37(c)(4) with leave of court. To receive leave of court, the Community and the U.S. will need to meet the requirements of Rule 37(c). The Court cannot speculate that there will be no good cause to allow any new expert opinions generated from the requested entries. In the event that the Community or the U.S. attempt to use the information contrary to the Rules, the Movants and the Court can respond appropriately at that time.

IT IS ORDERED denying Movants’ motion to limit the scope of entries onto land.

Case Management

Pursuant to the June 12, 2024, Order Granting Joint Motion to Modify Case Management Order, a revised joint case management schedule shall be submitted to the Court within seven (7) days of this decision.

IT IS ORDERED that all parties will file a joint revised case management schedule by **September 9, 2024**. The Court notes the current schedule is approximately twelve (12) weeks behind due to the above matters. It is expected that a revised schedule will attempt to absorb those weeks where possible but shall in no way be more than twelve (12) weeks longer than the schedules approved by the Court in July 2023.