

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

08/23/2011

CLERK OF THE COURT
FORM V000

HONORABLE EDDWARD BALLINGER, JR.

L. NEVENHOVEN
Deputy

W-1, W-2, W-3, W-4
(Consolidated)

Contested Case No. W1-11-605

FILED: September 7, 2011

In re the General Adjudication
of all Rights to Use Water in the
Gila River System and Source

In re Fort Huachuca

In re Report of the Special Master and Motion
for Adoption of Report filed April 4, 2008

**Order Granting the Special Master's Motion for Adoption of the
April 4, 2008 Report Regarding Fort Huachuca**

On April 4, 2008, the Special Master filed his report dealing with the question of whether federal reserved water rights exist for the Fort Huachuca military installation (the "Report"), which is situated in southeastern Arizona.

As a preliminary matter, the Court notes that Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association filed a Motion to Strike the May 19, 2010, statement of facts and accompanying exhibits filed by ASARCO LLC. After due consideration,

IT IS ORDERED GRANTING the motion and striking the cited materials.

On January 28, 2010, and July 15, 2010, the Court held oral argument on the Special Master's request to approve the Report. In the Report, the Special Master addressed four issues:

1. Whether, and to what extent, did the United States withdraw land from the public domain and reserve the property comprising Fort Huachuca for federal purposes?

2. The purposes to be served by the reservations assuming land was withdrawn and reserved?

3. Did the United States intend to reserve unappropriated water to accomplish the purposes for which land was withdrawn and reserved?

4. If water rights were reserved what is/are the date(s) of priority of reserved water rights?

The Report concludes that federal reserved water rights exist for the areas referred to in Executive Orders issued by President Chester A. Arthur during the 1880's. The Special Master rejected the United States' request that he go further and resolve two additional disputed issues. The first was the federal government's request that the Special Master find that its water rights extend to groundwater. The Court agrees it cannot determine whether the federal government possesses valid groundwater claims related to its operation of the Fort Huachuca facility at this time.

At the initial hearing, the Court focused much of its attention on the United States' second request: that the Special Master (or this Court) undertakes to define in detail the scope of the federal government's water rights beyond the Report's generic acknowledgement of uses related to "military purposes." This question is a precursor to what may be the difficult task of quantifying water rights claims that are upheld. The Court continued oral argument to consider the parties' positions and then determine, assuming water rights are found to exist, if an accurate delineation of the extent of these rights could be announced. Consideration of whether a legally supportable resolution of this issue is now possible has delayed issuance of this order.

The Court has reluctantly concluded that it is impossible to craft an unambiguous order that would provide meaningful guidance to the parties. For example, the Court is convinced that the Fort Huachuca reservation for "military uses" is not static and includes water rights required to satisfy contemporary, direct, indirect and quasi-municipal needs that arise in conducting military and military-related functions important to local and national security. But the current record and cited authorities do not permit the Court to craft a definition of "military purposes" that would provide practical guidance to the parties with respect to the myriad of activities (some of which were unknown at the time of the initial reservations) that are ongoing on land not surveyed at the time of withdrawal from public use. For example, would a ruling that "military purposes" includes water required to satisfy the needs of those military and non-military personnel reasonably required to fulfill the current defense needs of the federal government be helpful? What if crucial, non-military personnel can only be enticed to reside near the Fort Huachuca area if there are adequate recreational facilities such as a golf course? After reviewing the authorities cited by the parties, as well as the current record, the Court declines to supplement the report with rulings relating to the scope of the reserved water rights upheld below. The specific quantity of water dedicated to the rights acknowledged herein must await future proceedings.

After considering the memoranda and arguments filed by the various claimants, the Court has determined that the relief requested in the Special Master's motion should be granted, as modified by this order. Accordingly,

This Court approves and adopts the findings of fact and conclusions of law contained in the Report, except as modified as follows:

Conclusion of Law No. 1. This conclusion is comprised of a mixed finding of fact and law. There were no objections to the finding, and the conclusion is approved.

Conclusion of Law No. 4. The Court approves this conclusion, but does not adopt congressional acquiescence as the sole potential justification for the conclusion.

Conclusion of Law No. 5. This conclusion sets forth the Special Master's determination that Executive Orders entered by President Chester A. Arthur on October 29, 1881, and May 14, 1883, effectively withdrew land from the public domain. Some parties challenged this result by pointing out that at the time the orders were issued the relevant real property had not been surveyed. The Court agrees with the Special Master that this fact does not affect the validity of withdrawals when the federal government retains title to the withdrawn land. This conclusion also supports the Court's determination that now is not the time to attempt to quantify any federal reserved water right situated at Fort Huachuca.

Conclusion of Law No. 9. This conclusion is affirmed, but the Court acknowledges some may find the reasoning supporting this conclusion to be contrary to the reasoning supporting Conclusion of Law No. 4. The Court finds significant that Conclusion of Law No. 4 involved a situation not applicable to consideration of Conclusion of Law No. 9, the affirmative assertion of the United States, as part of relevant transactions, of an intention to withdraw and reserve land for a federal purpose. This distinction is supported by Finding of Fact No. 36.

Conclusion of Law No. 21. The conclusion is affirmed, but the Court takes no position as to the Special Master's analysis of the date of priority of water rights held by the United States as a result of reacquisition of Fort Huachuca.

Conclusion of Law No. 23. The holding of the conclusion, which is set forth in its first sentence, is affirmed. The remainder of the narrative is dicta.

Based upon the foregoing,

IT IS ORDERED:

- A. Approving and adopting, as modified above, the Special Master's Report as an order of this Court;

- B. Affirming the Special Master's disposition of the parties' requests for summary relief to the extent consistent with this order;
- C. Directing the Arizona Department of Water Resources to implement the findings and conclusions adopted by this order in preparing future technical reports relating to Fort Huachuca;
- D. Directing the parties to submit to the Special Master, on or before Tuesday, November 1, 2011, issues for resolution in the next phase of this matter; and,
- E. Signing this minute entry as a formal written order of the Court.

/s/ Eddward P. Ballinger, Jr.
JUDICIAL OFFICER OF THE SUPERIOR COURT

A copy of this order is mailed to all parties on the Court-approved mailing lists for the Gila River Adjudication, W-1, W-2, W-3, W-4 (Consolidated), and Contested Case No. W1-11-605, both dated July 25, 2010.