

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

05/07/2021

CLERK OF THE COURT

SPECIAL WATER MASTER  
SUSAN HARRIS

L. Brown

Deputy

In re Magma Copper – Mining  
Contested Case No. W1-11-2428

In re Magma Copper – Irrigation  
Contested Case No. W1-11-2503

In re Arizona Water Company San Manuel  
System Contested No. W1-11-2411

FILED: 5/11/2021

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

**MINUTE ENTRY**

- Mark McGinnis and John Weldon on behalf of Salt River Project
- Meghan Grabel on behalf of the Arizona Water Company
- John Burnside on behalf of BHP Copper fka Magma Copper Co.
- Kimberly Parks, on behalf of ADWR
- Rhett Billingsley on behalf of ASARCO LLC
- Charles Cahoy on behalf of the City of Phoenix
- Joseph Sparks and Laurel Herrmann on behalf of the San Carlos Apache Tribe
- Lauren Mulhearn on behalf of the Tonto Apache Tribe
- Jay Tomkus on behalf of the Yavapai Apache Nation and the Pasqua Yaqui Tribe
- Bill Taebel on behalf of the City of Mesa
- Patrick Berry on behalf of the United States

A record of the proceedings is made digitally in lieu of a court reporter.

The purpose of today's hearing is to discuss potentially staying the cases and consolidating them. The Court states that objections to the amended WFR have been received from ASARCO LLC, Salt River Project, BHP Copper, City of Phoenix and the San Carlos Apache Tribe.

Mr. Burnside states that the Magma Copper Irrigation Case should be stayed because of the issue that is pending in the St. David Irrigation District case regarding whether statutory forfeiture provisions of the 1919 code apply to pre-1919 water rights. He also states that two of the three wells were installed after 1919 so those wells will be subject to the issue that is being resolved in the Town of Huachuca City contested case. This case is also complicated because of the different uses at issue. Between the two Magma cases and then the Arizona Water Company case, there are five separate uses. The breakdown of those uses and where they are at issue does not fall neatly among the three cases. As a result, Mr. Burnside concludes that it is appropriate to stay the entirety of the case until the two issues mentioned are resolved as well as the development of the subflow depletion test in the W1-103 case.

Mr. Sparks addresses the Court and states that there may be reasons to delay the case and consolidate it with the Arizona Water Company case but those reasons would stand alone from what counsel for BHP is saying now. The fact is that pre-1919 water rights can be forfeited by non-use after 1919 is a settled matter of law in Arizona. The law in Arizona is not in flux now and is what it is since 2000, and so that is not a reason to grant a stay. The other recitals about changing a point of diversion are not a reason to delay it either, each of those cases will stand on its own. If there is a reason to change a point of diversion, the right to change or the fact of change is a point on its own. Those new claims that have been listed in recent revisions that started out to be Magma claims are not a reason to delay. In the cases about to be heard and the case for the Arizona Water Company, the claims overlap, and the counsel is correct that they do not fall neatly in these categories.

Mr. McGinnis addresses the Court and states that he would agree with Mr. Burnside to the extent that all three cases are so interrelated that at least the discovery and pre-trial activities need to be done together. He stated, as an example, one objection in the Mining case was that the municipal use PWR for San Manuel should be in BHP's name and not in Arizona Water Company's name. He also stated that, as a general matter, starting one of these cases with the other two sitting, is probably not the most efficient way to do it. He argues that the cases should be stayed until the Cone of Depression test is approved, but is not sure the cases should be stayed until the subflow depletion test is approved but agrees the depletion test needs to be done before the cases can be finished. He does agree with Mr. Burnside if he is suggesting that the three cases should be consolidated and moved together at least once the Town of Huachuca City case is decided and the Cone of Depression test has been approved because the Cone of

Depression test will have to be run on these wells because they are outside the sub ozone.

Mr. Berry addresses the Court and states they do not have a position at this time.

Mr. Billingsley addresses the Court and states they would support a stay and consolidation of the cases for the reasons stated by Mr. Burnside.

Mr. Cahoy addresses the Court and states he would support the stay per the reasons stated by Mr. McGinnis.

Ms. Mulhearn addresses the Court and states they support the stay as well per the reasons given by Mr. McGinnis.

Mr. Tomkus addressed the Court and stated he had nothing to add.

Mr. Taebel addressed the Court and stated they also support a stay per the reasons stated by Mr. McGinnis.

Mr. Burnside addressed the Court and recommends that the Magma Mining, Magma Irrigation and the Arizona Water Company cases should be consolidated. He proposes a stay of the mining use, the industrial use, municipal use, and wildlife use until the resolution of the post-1919 subflow appropriation issue in the Town of Huachuca City and stay consideration of the irrigation use until resolution of the pre-1919 forfeiture issue in the St. David Irrigation District case. At the point that either one of those stays should expire by resolution of the underlying issue then hold another status conference at which time consideration can be given to whether a further stay is necessary as a result of the subflow depletion test and the status of that test. If it makes sense to proceed on one or more of the uses, then put together an appropriately phased Case Management Order.

Discussion occurs about the state of the law litigated in the St. David Irrigation District case that led to the Court's September 2020 ruling.

Mr. Sparks stated he supports staying the group of cases pending the Cone of Depression decision.

Discussion occurs about situations where a case involves well located within and outside the subflow zone.

Mr. McGinnis addresses the Court and states he would have a mix of suggestions from Mr. Sparks and Mr. Burnside. The cases Mr. Burnside suggested being stayed pending Town of Huachuca is correct but agrees with Mr. Sparks that all the cases need to be stayed pending the final decision by Judge Brain on the Cone of Depression test. As to the pre-1919 forfeiture issue, the stay gets a little thorny

because no one has decided when something becomes the law of the case. The Cone of Depression test will apply to all the cases. This is going to be a complicated case as seen from all the objections, and the three cases are very much interrelated. It is better to not move forward on one of them until all three are ready to go.

Mr. Burnside addresses the Court and states on the issue that Mr. McGinnis and Mr. Sparks were discussing about staying the case pending a decision on the Cone of Depression test. He understood they were arguing that the stay should persist until the resolution of the Cone of Depression test, which is the jurisdictional phase presently before Judge Brain, as opposed to waiting until there is a sub flow depletion test. Mr. Burnside discusses the Cone of Depression test. He feels that the cases cannot proceed until there is a subflow depletion test.

Mr. McGinnis addressed the Court and stated their position is the stay should be entered now until the Cone of Depression test is approved. He agrees with Mr. Burnside's prior comments that another status conference take place after the Cone of Depression test is done to determine whether there are portions of pretrial activity that they can go forward before the depletion test is done. He believes the subflow depletion test needs to be done before the trial begins.

Mr. Billingsley addresses the Court and stated that he still support the position made by Mr. Burnside.

Mr. Cahoy addresses the Court and stated he has nothing further than what Mr. McGinnis said.

Mr. Sparks addresses the Court and stated he agrees with what Mr. McGinnis said in concluding the timing. He feels Mr. McGinnis did not take a position on the status of the law of the case in terms of whether the depletion test is necessary before the case can proceed to adjudicate rights under the Cone of Depression test. On the Cone of Depression issue, Mr. Sparks states he fundamentally disagrees with Mr. Burnside's view on the law.

The Court addresses the Arizona Water Company San Manuel System W1-11-2411 case regarding SRP's objection.

Ms. Grabel addresses the Court and stated the issue raised by SRP's objection, whether the Water Company should have a water right in its name as opposed to the name of the provider, should be stayed and proceed with the rest of the cases in the manner that Mr. Burnside discussed. It may be a legal issue but it could be affected by the facts in the way the wells play out over the adjudication. Because all of the claims are interrelated, it makes sense to try all of the issues at one time as opposed to taking one issue out independently.

Mr. McGinnis addressed the Court and stated theoretically the issue can be briefed but there will not be a resolution until the two things they are waiting on can happen.

Mr. Burnside addresses the Court and stated he agrees with the position stated by Ms. Grabel and Mr. McGinnis. There are too many factual issues potentially intertwined with a resolution of the issue.

Mr. Billingsley addresses the Court and stated he agrees with Ms. Grabel, Mr. Burnside and Mr. McGinnis.

Mr. Cahoy addresses the Court and stated he agrees as well.

Mr. Sparks addresses the Court and stated there is one issue that can be clarified. It appears that Arizona Water Company is claiming the same rights as Magma and BHP and, who owns those claims to water rights is at issue. The issue clouds the Arizona Water Company's claims. The ownership of those claims and the rights to pursue them could be decided based on a factual inquiry and then the appropriate hearing and motions.

Ms. Mulhearn addresses the Court and stated she agrees with Mr. McGinnis.

**IT IS ORDERED** that the three cases are consolidated.

**IT IS FURTHER ORDERED** staying all three cases and the Court will put together a schedule that will govern that stay.

2:07 p.m. Matter concludes.

LATER:

**IT IS FURTHER ORDERED** granting a stay in *In re Magma Copper – Mining*, Contested Case No. W1-11-2428, *In re Magma Copper – Irrigation*, Contested Case No. W1-11-2503 and *In re Arizona Water Company San Manuel System* Contested Case No. W1-11-2411 until the objections to the Report filed on the Cone of Depression test are ruled upon by Judge Brain. No stay is granted or will be granted based on the absence of a final decision on the issue raised in *In re St. David Irrigation District* regarding statutory forfeiture of pre-1919 water rights. Following the issuance of the Cone of Depression decision, a status conference will be scheduled at which the parties will be expected to identify a proposed schedule.

**NOTE:** All court proceedings are recorded digitally and not by a court reporter. The parties or counsel may request a CD of the proceedings. For copies of hearings or trial proceedings recorded previously, please call Electronic Records Services at 602-506-7100.

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