

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

10/21/2021

SPECIAL WATER MASTER SUSAN WARD HARRIS

In re: Lower Little Colorado River Subwatershed
Contested Case No. CV-6417-400

In Re: The General Adjudication of all Rights to Use Water in the Little Colorado River System and
Source
CV 6417

In Re: ADWR Motion for Clarification

CLERK OF THE COURT

L. Brown

Deputy

FILED: 11/09/2021

MINUTE ENTRY

Central Court Building- Courtroom 301

3:16 p.m. This is the time set for a Status Conference regarding the manner and method of inclusion of water uses from wells in the Hydrographic Survey Report for the Lower Little Colorado River subwatershed before Special Master Susan Ward Harris.

The following attorneys and parties appear via Court Connect/ Microsoft Teams:

- Carrie Brennan on behalf of the Arizona State Land Department
- Brian Heiserman on behalf of LCR Coalition
- William Staudenmaier on behalf of APS
- Phillip Londen on behalf of the Hopi Tribe
- Maurine Heissdorfer
- Thomas Murphy on behalf of Gila Indian River Community
- Mark McGinnis on behalf of Salt River Project (“SRP”)
- Kimberly Parks on behalf of Arizona Department of Water Resources (“ADWR”)
- Richard Palmer observing on behalf of the Tonto Apache Tribe
- Charles Cahoy observing on behalf of the City of Phoenix

- David Negri on behalf of the United States Department of Justice
- Kathryn Hoover, Judith Dworkin, Michelle Brown Yazzi, and Evan Hiller on behalf of Navajo Nation
- Robin Interpreter on behalf of the Pascua Yaqui Tribe
- Lee Storey on behalf of the City of Flagstaff

The Court addressed the parties regarding the history of the preparation of the Preliminary Hydrographic Survey Report for the Lower Little Colorado River watershed (“Preliminary HSR”) requested in 2018. In its September 2021 motion, ADWR stated that the absence of a subflow report means it cannot recommend water uses for the vast majority of the water users in the Lower Little Colorado River watershed (“the Lower LCR”).

The Court outlines its proposal: ADWR will issue the Preliminary HSR and put an asterisk or note on all the watershed file reports where a well is a source of water and a statement that it is unknown whether the well is in the subflow zone. The Preliminary HSR will include an explanation of subflow. Once the Preliminary HSR is issued, ADWR will prepare a subflow report and when completed and approved, the subflow information will be added to the final hydrographic survey report. If the subflow zone report becomes significantly delayed either because the work cannot get done for whatever reason or it is delayed in the adjudication process then it may be necessary to come back and reconsider SRP’s proposal about whether we can issue the final HSR and begin working on the water claims that are solely the result of diversions of surface water.

The Court asks Ms. Parks what steps have been taken to start work on the subflow report. Ms. Parks states that ADWR has not taken any steps to begin working on the subflow report for the Lower LCR. If they do a separate report for the Lower LCR, it is going to require mapping by AZGS and they would prefer that AZGS not do any subflow mapping in the Lower LCR until they have completed mapping in the Verde, so they can maintain those time lines. The Court asks Ms. Parks what kind of timeframes they are looking at to complete this report. Ms. Parks states if the subflow mapping does not begin until they are done with the Verde work, which would be next summer, they would need time to incorporate that work into a preliminary report. Ideally ADWR thinks it can have a subflow report issued if the subflow report is a separate report mid-2024, and that would not affect the current deadline for the Verde or the Navajo report.

Ms. Parks states that some of the parties suggested that ADWR issue the subflow delineation report as part of the preliminary HSR. The Court proposes that ADWR issue the preliminary HSR, issue the subflow report separately, and then issue a final HSR. Ms. Parks states that we can do that but has concerns because we want to give the Court the most useful product. If we issue the preliminary HSR without the subflow information you will be missing some information about some of those water uses. There are different groups of parties that receive notice of the reports and it seems like there is going to be a point where we will have to go back and do additional work on some of these water uses that could be done if we issue the subflow report first.

Mr. McGinnis states we tried to make clear in our filing that SRP wholeheartedly agrees with Ms. Parks that this work in the Lower LCR should not take away from the department's efforts in the Verde. We are farther down the road on the Verde and it makes sense to get that done. So our proposal, to the extent you want to move forward, we do think it is possible to move forward with the preliminary even the final HSR without a subflow report, it is just not the best approach. We don't really know how many surface only claims there are. If you did a preliminary HSR, we would at least know if there were enough WFRs that did not involve wells that it would be worth moving forward or not. It is hard to say without that preliminary HSR being done. We do think there are subflow issues in that Lower LCR, but think there will be a lot less of them in some ways than the San Pedro. He assumes there would be a comment period under the Court's proposal as there normally is for a preliminary HSR, and there would be a subflow report and hopes there would be a separate comment period for that so that we are not dealing with subflow issues for the first time in objections to the final HSR. With that being said he think the Court's proposal works and we might get through the preliminary HSR point and have a status conference and decide there are not enough surface water only uses to go forward so we would have to stop and wait for the subflow report.

The Court raises the issue of notice requirements and mailing costs for the two different reports.

Mrs. Brennan states she likes the idea of looking at the preliminary HSR to see if there are enough WFRs with just surface water uses with impoundments to go forward, and then revisiting to see if it would be a better idea to just wait for the subflow report. She was concerned because ADWR in their request for clarification said that without the subflow report it would not have enough information to recommend proposed water rights for the vast majority of water uses.

Mr. Heiserman states based on the comments from Ms. Parks if ADWR feels it would be more effective to wait to get the preliminary HSR until after the subflow report is completed, then he would lean in that direction. He also feels the approach that the Court laid out of a preliminary HSR with the ability to comment on that HSR, could also work.

Mr. Staudenmaier states in terms of what Mr. Heiserman stated they are fine with that as long as they get the opportunity to comment on the subflow report in a draft form before it becomes a final report.

Mr. Londen states his client generally agrees with Mr. Heiserman's comments and defers to the expertise of ADWR and if it makes sense to do it all at once, we have no objection to that proposal. Or if the consensus is to adopt the Court's proposal we agree with that.

Ms. Hoover also thinks Mr. Heiserman's proposal makes a lot of sense in terms of what ADWR thinks is the most effective way to proceed and is also very sensitive to the way the Court thinks is the most effective way to proceed.

Mr. Cahoy states the City of Phoenix is observing the proceedings and does not take a position.

Mrs. Interpreter states we are also observing and do not take a position.

Mr. Palmer states Tonto Apache takes no position.

Mr. Negri states the United States Department of Justice take no position.

Mrs. Heissdorfer states that she does have a private well, have paperwork with claim numbers 6417-400 and 6417-300 and said I do not know if I missed that one date or the mail from Navajo County.

The Court states the 6417-400 is the case for the Lower Little Colorado watershed and 6417-300 is the case for the Navajo Nation and land owned by the Navajo Nation. The Court advised Mrs. Heissdorfer that she probably filed an objection to the Navajo report that ADWR did.

Mrs. Heissdorfer states she does not need to be on that mailing list.

The Court states we will not be doing anything about your water right until after 2024 or 2025, so it will be a while.

Ms. Parks states that ADWR prefers to do two separate reports. We prefer to do the subflow report first and the HSR second so we can incorporate the delineation of the subflow zone into the HSR. That makes the most sense and it is the cleanest product for everybody. If we look at the groups of people who typically get notice of the subflow report, for example the Verde order you issued. It is only claimants, it is not all water users like for the HSR. The objections that are permitted for the Verde subflow report are different from the objections for the hydrographic survey report. We also take into consideration the number of calls that we will get about the reports and the questions that will be asked. We try to limit the amount of confusion for landowners and water users and to provide the most complete product that we can to you.

The Court states you will prepare a subflow report and send it to all the claimants, then we would go through the entire litigation process set the subflow zone and then you would issue the preliminary?

Mrs. Parks states that's what we would prefer to do, but I do not know the extent of the geology in the LCR so I don't know how extensive the subflow zone will be. I imagine that the proceedings will not be as extensive as they were for the San Pedro. When we issue our hydrographic survey report water users are at least well informed what we found across the board and are not getting multiple indications of their water use.

Mr. McGinnis states I would agree with Ms. Parks what she just described would be the perfect world. We would like to have the subflow report, have the hearings on the subflow report and get a final decision on the subflow report and then do a preliminary HSR and then a final HSR. That is the way to do it. We have never been able to do it that way in part because the subflow report takes some time to do and we spend years fighting over the subflow issues. I agree that is the proper way to do it in a perfect world. That means we are dealing with the HSR in 2028 or 2030. If that is what you want to do then we can do that but if you want to make progress then the way that you proposed is the best way to do it.

The Court states Mrs. Parks would know how many surface water only claims there are. The Court states when someone says vast majority I think we are leaning more towards 90% than 51%. Ms. Parks states I would agree with that as I am being told that it is the vast majority of water uses. Ms. Brennen states if it is the vast majority of water uses then doing the subflow report first would seem like the way to go. So, given what Ms. Parks has said, then we should do the subflow report first.

Mrs. Storey states the City would like to see the subflow report done first because it will promote a lot of efficiencies.

Mr. Heiserman states I would agree with what Mrs. Brennen has said and if we have a situation where there is consensus where there is a perfect approach, then we should take that approach. I think this is a situation where we can proceed with the recommendation from ADWR.

Mr. Staudenmaier states the previous comments make sense to me. If this is based on Ms. Parks comments that the vast majority fall into this category it seems to swing in the direction let's get the subflow done. My client clearly falls into this category, it sounds like we are approaching a consensus.

Mr. Londen states that he would defer the expertise of ADWR on this issue.

Mrs. Hoover states the same for the Navajo Nation about going forward with the subflow report at this time.

4:04 p.m. Matter concludes.

LATER: Based on the papers filed by the parties and ADWR and their comments at the conference on ADWR's motion for clarification, the better approach is to follow ADWR's recommendation that a technical report for the subflow zone should be completed before a preliminary hydrographic survey report for the Lower Little Colorado River watershed is issued so that a landowner will have a complete analysis of his or her claims for water rights. The Arizona Department of Water Resources will contract with Arizona Geological Survey to begin the necessary work once Arizona Geological Survey completes its work in the Verde River watershed. At this point there is insufficient information to set realistic dates for completion of the subflow report, objections to the subflow report, the completion of the Preliminary HSR, or comments to the Preliminary HSR.

IT IS ORDERED that ADWR shall prepare a technical report to define the subflow zone for the Lower Little Colorado River subwatershed. It shall file a status report on **June 1, 2022** that includes the date the contract was executed between ADWR and AZGS for AZGS to perform work deemed necessary by ADWR to delineate the subflow zone, the dates that AZGS is expected to begin and complete its work, and the anticipated date that ADWR will produce a subflow zone technical report.

IT IS FURTHER ORDERED that the deadline, as previously extended by Order dated December 9, 2020, to file a Preliminary HSR for the Lower Little Colorado River watershed is vacated.

IT IS FURTHER ORDERED that the status conference to address the formatting of the Preliminary HSR for the Lower Little Colorado River watershed scheduled for November 19, 2021 is vacated.

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 parties on the Court-approved mailing list for this case.