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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
7 IN AND FOR THE COUNTY OF APACHE  
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10 IN RE THE GENERAL ADJUDICATION  
11 OF ALL RIGHTS TO USE WATER IN  
12 THE LITTLE COLORADO RIVER  
SYSTEM AND SOURCE

Civil Case No. 6417-033-9005R  
Consolidated

13 REPORT OF THE SPECIAL MASTER ON  
14 SUMMARY PROCEEDINGS IN THE SILVER  
CREEK WATERSHED  
15

16  
17 CONTESTED CASE NAME:

*In re Reporting of Diversion Information and  
Other Objections*

18  
19 DESCRIPTIVE SUMMARY:

20 Final Report with Findings of Fact, and  
21 Conclusions of Law concerning stockponds, stockwatering uses, and wildlife uses issued  
22 pursuant to Ariz. R. Civ. P. 53 recommending the implementation of summary  
23 procedures to adjudicate claims to surface water for stock and wildlife watering and for  
stockponds with a surface area of two acres or less. Objections to the Final Report shall  
be filed with the Clerk of Court for the Superior Court – Apache County by **February  
20, 2023**.

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26  
27  
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1 Stock and wildlife watering is a beneficial use of appropriable water for which a person  
2 or entity may obtain a water right. A.R.S. §45-151. This Final Report addresses the procedures  
3 to adjudicate claims for water rights in the Silver Creek Watershed for stock and wildlife  
4 watering including water for stockponds. Specifically, the issue is whether claims made under  
5 state law for stock and wildlife watering uses including stock and wildlife watering from  
6 stockponds should be summarily adjudicated and, if so, the appropriate types of procedures.  
7

8  
9 Summary adjudication will not cause these classes of water rights to be excluded from  
10 the adjudication process; instead, the rights will be adjudicated using more streamlined  
11 procedures. One of the primary purposes of the adjudication is to ensure that the owners of  
12 adjudicated water rights have complied with the applicable state laws to obtain those rights, have  
13 made the necessary adjudication filings, and have historically put the water to beneficial use.  
14 Thousands of objections have been filed to watershed file reports prepared by the Arizona  
15 Department of Water Resources (“ADWR”) that investigated claimed water uses in the Silver  
16 Creek Watershed. If the court is to use a summary procedure for these uses, the court must  
17 ensure that the abbreviated adjudication of these claims appropriately addresses the objections  
18 filed by other claimants that affect the fundamental aspects and requirements of a valid water  
19 right.  
20  
21

22 Summary procedures have been adopted in the San Pedro Watershed<sup>1</sup> and the Lower  
23 Little Colorado River Watershed<sup>2</sup> to adjudicate claims for water rights for the types of beneficial  
24 uses at issue here. These procedures were approved based on factual findings and legal  
25

26 <sup>1</sup> Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases involving  
27 Stockwatering, Stockponds, and Domestic Uses, Civil No. W1-11-19 filed November 14, 1994, amended  
February 23, 1995, approved and modified September 27, 2002 (“San Pedro Decision”)

28 <sup>2</sup> Report of the Special Master on Summary Proceedings in the Lower Little Colorado Subwatershed, CV  
6417-400, October 30, 2020, approved May 28, 2021.

1 conclusions that stock and wildlife watering and certain stockponds in the watersheds constitute  
2 “*de minimis*” uses. A *de minimis* determination is fundamentally a case management decision by  
3 a court that the benefits of resolving certain types of claims are substantially outweighed by the  
4 costs that must be incurred by the parties and the court. Thus, the purpose of this Report is to  
5 determine whether stock and wildlife watering and stockponds constitute *de minimis* water uses  
6 in the Silver Creek Watershed.  
7

### 8 9 **I. Procedural Background**

10 Pursuant to Case Management Order No. 2, filed April 6, 1992, eight Special  
11 Consolidated Cases were further consolidated into a single case known as *In re Reporting of*  
12 *Diversion Information and Other Objections*, CV 6417-33-9005. At the direction of Special  
13 Master Thorsen, ADWR prepared a technical assessment of stock and wildlife watering and  
14 stockpond uses in the Silver Creek Watershed, titled “Technical Report on *De Minimis*  
15 Adjudication of Stockpond and Stockwatering Uses in the Silver Creek Watershed” dated  
16 September 1, 1993 (“Technical Report”). While there was no opposition to a summary  
17 adjudication for these types of water uses, there was disagreement about how a summary  
18 adjudication should be accomplished. A trial on this issue was held on November 16, 1993. The  
19 Technical Report was admitted into evidence as Ex. No. DWR-001. Special Master Thorson  
20 issued a Memorandum Decision on April 20, 1994. The Adjudication Court has not approved,  
21 adopted, or rejected the Memorandum Decision.  
22  
23  
24

25 This Final Report only addresses the issues in the Memorandum Decision related to the  
26 procedures to adjudicate claims for uses of water for stock and wildlife watering and stockponds  
27 considered in the Memorandum Decision. Although the Memorandum Decision included  
28

1 proposed abstracts in an Appendix, those proposed abstracts are not issued in connection with  
2 this Final Report. Subsequent to the issuance of the Memorandum Decision, A.R.S. 45-  
3 257(A)(1) was amended to generally bar the adjudication of claims for stock and wildlife  
4 watering and stockpond uses until other claims in a subwatershed, such as claims for rights to  
5 water for irrigations, mining, and municipal, have been fully adjudicated. Exceptions to the new  
6 procedure do not apply in this case. Accordingly, the proposed abstracts attached to the  
7 Memorandum Decision will be revised to reflect the current landowner and conform to the  
8 decision of the Adjudication Court that accepts, modifies, or rejects this Final Report. The  
9 proposed abstracts will be issued in the individual contested cases as permitted by A.R.S. §45-  
10 257(A)(1).  
11  
12

## 13 **II. *De Minimis* Determination**

14

15 Summary adjudication procedures have been adopted in watersheds in the General  
16 Adjudication based upon a determination that a particular set of beneficial uses constitute *de*  
17 *minimis* uses. A *de minimis* finding is not simply a function of the amount of water required for  
18 a particular use, either individually or cumulatively. It requires consideration of four factors:  
19

- 20 (1) the amount of water available in the watershed;
- 21 (2) the number of stock and wildlife watering and stockpond uses;
- 22 (3) the scope and impact of these uses on the water supply; and,
- 23 (4) the costs and benefits of a complete, rather than summary, adjudication of the  
24 claims for rights to water for these types of uses.  
25

26 *See San Pedro Decision at 12.*  
27  
28

1  
2           **A.     Water and Water Uses in the Silver Creek Watershed**  
3

4           Arizona Department of Water Resources prepared a water budget for the Silver Creek  
5 Watershed that considered all sources of water and water uses. Technical Report at 7. It  
6 quantified the total surface water in the watershed as 48,000 acre-feet per year. Irrigation and  
7 reservoirs accounted for the largest uses of surface water at 13,770 and 10,710 acre-feet per year,  
8 respectively. After natural diversions of 4,020 acre-feet from evaporation and  
9 evapotranspiration, and diversions by the people and entities in the watershed, net of recharge to  
10 aquifer from those uses, the surface water outflow from the watershed is 13,350 acre-feet per  
11 year.  
12

13  
14           Arizona Department of Water Resources found 120 stock and wildlife watering uses that  
15 rely on instream flow and springs. *Id.* at 12. It did not include a separate entry in the water use  
16 section of the water budget for diversions for stock and wildlife watering. It did include an entry  
17 in the water budget stating that the Pinetop-Lakeside aquifer springs supply 10,560 acre-feet of  
18 water annually. *Id.* at 7. There are 762 stockponds in the Silver Creek Watershed that divert  
19 2,550 acre-feet of water from surface water supplies, primarily from spring snowmelt and direct  
20 precipitation. *Id.* at 6, 7. There are no stockponds located on perennial or intermittent streams.  
21 *Id.* at 4.  
22  
23

24           **Finding of Fact No. 1.** The total surface water supply of the Silver Creek Watershed is  
25 48,000 acre-feet.

26           **Finding of Fact No. 2.** The diversion of surface water in the Silver Creek Watershed  
27 totals 34,650 acre-feet per year of which 30,630 acre-feet per year are diversions by the people  
28 and entities in the Watershed and 4,020 acre-feet per year are natural diversions.

1           **Finding of Fact No. 3.** The total outflow of surface water from the Silver Creek  
2 Watershed into lower watersheds is 13,350 acre-feet per year.

3  
4           To determine whether stock and wildlife uses and stockponds are *de minimis* uses and  
5 candidates for summary adjudication, the following discussion addresses the impacts of these  
6 uses in the Silver Creek Watershed in general and the special case of these types of uses in  
7 hydrologically closed basins within the Watershed.

### 8 9           **B.     Impacts of Water Uses**

10           The adverse impact of stock and wildlife watering and stockponds results when the use  
11 affects another valid water right in a manner contrary to law. The prior appropriation doctrine  
12 recognizes that water uses on the same stream affect one another but the adverse impact of the  
13 senior water use on the junior use is permitted if the senior water use is taken in order of priority.  
14 The prior appropriation doctrine applies to rights established under both state and federal law.  
15 *See, e.g., Arizona v. California*, 373 U.S. 546, 555 (1963) (“the one who first appropriates water  
16 and puts it to beneficial use thereby acquires a vested right to continue to divert and use that  
17 quantity of water against all claimants junior to him in point of time. ‘First in time, first in right’  
18 is the shorthand express of this legal principle.”) Water use unlawfully affects or impacts  
19 another use if the first use has no legal basis or is junior to the affected use. Thus, it is important  
20 in a summary adjudication to require evidence that a legal basis exists for the claimed right.  
21  
22  
23

24           The Technical Report reported 110 stockwatering uses of which 15 are located in three  
25 closed basins, 77 are instream uses and 18 are supplied by springs. Technical Report at 12.  
26 Arizona Department of Water Resources found that the consumptive use of livestock is small,  
27 typically 0.011 acre-feet per year per cow/calf pair and offered its opinion that the grazing of  
28 livestock is a low density use in the Silver Creek Watershed. *Id.* at 12. Deer, antelope, and elk

1 consume between 0.0005 and 0.0034 acre-feet per year. *Id.* at 16. Arizona Department of Water  
 2 Resources also concluded that wildlife uses are negligible. *Id.* The Technical Report stated that  
 3 wildlife and stockwatering from streams and springs in the Watershed have no measurable  
 4 impact on surface water outflow from the Watershed. *Id.* at 12.

6 **Finding of Fact No. 4.** There are ten wildlife water uses within the Silver Creek  
 7 Watershed and these uses are negligible.

9 **Finding of Fact No. 5.** There are 110 stockwatering uses in the Silver Creek Watershed  
 10 of which fifteen are in closed basins.

11 **Finding of Fact No. 6.** Stock and wildlife watering uses have a minimal impact on  
 12 surface water outflow from the Watershed.

14 Arizona Department of Water Resources found 762 stockponds in the Silver Creek  
 15 Watershed. *Id.* at 6; 1 Silver Creek Hydrograph Survey Report at 332 (admitted into evidence,  
 16 Trial Tr. at 11-13). It grouped those stockponds by three characteristics: (1) greater than or  
 17 lesser than two acres of surface area; (2) surveyed or unsurveyed; and (3) location. *See* Table 1.

Stockpond Category	Number	Area (Acres)	Capacity (Acre-Feet)	Excluding Closed Drainages		
				Number	Area	Capacity
Surveyed > + 2 acres	36	196.5	570.2	34	188	542.6
Surveyed < 2 acres	43	56.9	181.7	43	56.9	181.7
Unsurveyed < 2 acres	683	341.5	1,799.70	626	313	1,649.50
Total	762	594.9	2,551.60	703	557.9	2,373.80

26 Table 1. Silver Creek Watershed analysis of stockponds by surface area and capacity.  
 27 Source: Technical Report on De Minimis Adjudication of Stockpond and Stockwatering Uses in the  
 28 Silver Creek Watershed, p. 6 Table 2-1.



1 Focusing on the stockponds outside the closed basin, ADWR determined that 669 out of  
2 703 stockponds, or 95 percent of the stockponds in the areas outside the closed basins, had a  
3 surface area of less than two acres. See Table 1. These stockponds have a mean capacity of  
4 approximately 3 acre-feet of water (1831/669). The remaining 34 stockponds store 542.6 acre-  
5 feet collectively, demonstrating a mean capacity of approximately 16 acre-feet of water. There  
6 are an additional 57 unsurveyed stockponds with a surface area of less than 2 acres in the closed  
7 basins along with 2 stockponds that have surveyed surface areas greater than 2 acres.  
8  
9

10 The "cumulative impact" of stockponds refers to the effect that the totality of this use in  
11 the Silver Creek Watershed will have on downstream water users. Downstream users may be  
12 users within the watershed or users in an adjoining watershed. Here, no stockpond user is known  
13 to have made a call on another stockpond user upstream. Trial Tr. at 137-138 (Brophy). For  
14 purposes of this Final Report, the relevant downstream users are those users outside of the Silver  
15 Creek Watershed. Cumulative impact analysis requires a determination of the amount of water  
16 used for stockponds that would be available to downstream users if none of these upstream  
17 stockpond uses existed. The question of cumulative impacts was also the subject of the trial on  
18 November 16, 1993, although the ADWR's determination of cumulative impacts were not  
19 challenged in any significant way by the litigants.  
20  
21

22 The analysis of the cumulative impact of stockponds on the Watershed required a  
23 calculation of the total capacity of these stockponds. It also required an estimate of how much  
24 water would be available to users in lower watersheds if the stockponds did not exist. This type  
25 of analysis is known as undepleted flow analysis. This analysis determines the cumulative  
26 impact of the stockponds because not all water currently used to fill stockponds would flow to  
27 downstream users in the absence of the stockponds. Some quantity of the water would be lost to  
28

1 evaporation, evapotranspiration by plants, and infiltration.

2  
3 Arizona Department of Water Resources estimated that the total capacity of all  
4 stockponds in the Watershed as 2551.6 acre-feet. Technical Report at 6. The total capacity of  
5 stockponds outside the three closed basins, which are not hydrologically connected to the  
6 remainder of the Silver Creek Watershed, is estimated as 2,374 acre-feet of water. *Id.*  
7 Excluding the 34 stockponds with a surface area greater than two acres, the remaining 669  
8 stockponds have a total capacity of 1,831 acre feet of water. The undepleted flow analysis  
9 demonstrates that if water were not captured in the stockponds outside the closed basins with a  
10 surface area of less than two acres, an additional 290 acre-feet of water would reach downstream  
11 watersheds. *Id.* at 11. The potential additional outflow from that group of stockponds is  
12 approximately 2.2 percent (290/13350) of the annual surface water outflow of the Watershed. *Id.*  
13 at 36.  
14  
15

16  
17 **Finding of Fact No. 7.** The 762 stockponds in the Silver Creek Watershed have an  
18 estimated total capacity of 2,551.6 acre-feet.

19 **Finding of Fact No. 8.** Stockponds outside closed basins have an estimated total capacity  
20 of 2,374 acre-feet of water.

21 **Finding of Fact No. 9.** The use of a water budget and undepleted flow analysis is an  
22 appropriate method for determining the impact of stockponds on the available water supply in  
23 the Watershed.  
24

25 **Finding of Fact No. 10.** For a variety of reasons (including evaporation and infiltration),  
26 total stockpond capacity is not the cumulative impact of stockpond uses on downstream  
27 watersheds. Using undepleted flow analysis, ADWR estimated the volume of water that would  
28

1 leave the Silver Creek Watershed if these stockponds did not exist and the water were allowed to  
2 flow downstream under natural conditions.

3 **Finding of Fact No. 11.** An additional 290 acre-feet per year would reach the surface  
4 water outflow of the Watershed in the absence of the stockponds located outside the closed  
5 basins with a surface area of less than two acres.

6 **Finding of Fact No. 12.** 290 acre-feet per year is the cumulative impact of all stockponds  
7 with a surface area of two acres or less in the Silver Creek Watershed on water uses in lower  
8 watersheds. This volume is approximately 2.2 percent of the annual surface water outflow of the  
9 Silver Creek Watershed.  
10  
11  
12  
13

### 14 **III. Impacts of Water Uses in Closed Basins**

15  
16 The Silver Creek Watershed contains three closed drainages that ADWR reported as not  
17 contributing any runoff to the main channel of Silver Creek or its tributaries. These closed  
18 basins, which have no surface and no demonstrable underground hydrologic connection with  
19 Silver Creek, are the White Lakes, Long Lake, and The Sinks. 1 Silver Creek HSR at 49. Due to  
20 the lack of hydrologic connection with the remainder of the Silver Creek Watershed, stock and  
21 wildlife watering and stockponds in these closed basins have no impact on surface flow in Silver  
22 Creek. Technical Report at 4.  
23  
24

25 **Finding of Fact No. 13.** There are three closed basins within the Silver Creek Watershed  
26 identified by ADWR. They are: The Sinks, Long Lake, and White Lakes.  
27

28 **Finding of Fact No. 14.** There is no hydrological connection between surface water

1 flowing in these basins and surface water outflow from the Silver Creek Watershed.  
2

3 **Finding of Fact No. 15.** Fifty-nine stockponds and fifteen stockwatering uses are located  
4 in the closed basins.  
5

6 **Finding of Fact No. 16.** Stock and wildlife watering and stockpond uses in the closed  
7 basins do not impact surface flow in Silver Creek.  
8

9 **Finding of Fact No. 17.** Stock and wildlife watering and stockpond uses in these three  
10 closed basins have no direct effect on downstream water users outside the closed basins. Ex. No.  
11 ASLD-023 at 3.  
12

#### 13 **IV. Cost Benefit Analysis** 14

15 The hundreds of stock and wildlife watering uses and stockponds in the Silver Creek  
16 must be subject to a complete adjudication if the public and private benefits of their  
17 adjudications outweigh the associated costs.<sup>3</sup> The benefits of adjudicated water rights are the  
18 establishment of the proper owners of valid rights that contains a sufficient description to allow  
19 the holders of the water rights to either enforce or defend the right when required by the  
20 circumstances. As the final step in a *de minimis* determination, a cost-benefit analysis must be  
21 undertaken to determine whether those benefits justify the burden on judicial, administrative, and  
22 litigant resources to conduct a complete adjudication of each claim for a water right for a stock  
23 and wildlife watering use or a stockpond.  
24  
25

26 In the San Pedro Decision, the Special Master considered the time and expense that the  
27 parties would have to incur to prove, and the court to resolve, each separate characteristic of a  
28

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<sup>3</sup> San Pedro Decision at 26.

1 water right. The set of characteristics included: owner of the water right, the legal basis for the  
2 water right, priority date, beneficial use, source of water, location of the place of use, point of  
3 diversion, and annual volume. Determinations of characteristics such as owner of the water  
4 right, the basis of the right, and the priority date could have required, in addition to factual  
5 findings, lengthy proceedings on legal issues unique to the individual claims that could have  
6 imposed significant costs in time and resources. Characteristics that should not have been in  
7 dispute such as the precise location of the water use could cause the parties to incur expense  
8 because even with advanced mapping capabilities, disputes can arise as to the correct legal  
9 description of the physical location of a stockpond or a stock watering site. The procedures  
10 adopted in the San Pedro Decision were designed to reduce this cost by permitting the physical  
11 locations of the diversion and use of water for stockponds to be identified as located within an  
12 area of 40 square acres or, in some cases, within an area of 10 square acres.

13  
14  
15 The hundreds of claims for water rights for stock and wildlife watering uses and  
16 stockponds with a surface area of two acres or less to be adjudicated in the Silver Creek  
17 Watershed will involve a large number of claimants and objectors. In addition to the time and  
18 resources necessary to initiate, try, and decide the individual cases, administrative time and  
19 resources will be required to manage the numerous cases over an extended period.<sup>4</sup> The  
20 summary procedures designed to streamline the determination of water rights would simplifying  
21 the process so cases can proceed to completion more quickly thereby alleviating a substantial  
22 management burden.

23  
24  
25 It could take the court system at least a year of concentrated effort focused exclusively  
26 on the Silver Creek Watershed to complete a detailed, individual adjudication of each stock and  
27

28 <sup>4</sup> In contrast to the large number of stockponds in the category of two acres or less, there are only 34 stockponds with a surface area greater than two acre. The adjudication of this limited number of claims does not impose an unwarranted burden on either the court or the parties.

1 wildlife watering and stockpond claim if no more than 2.5 hours were required for each claim on  
2 average. In that allotted 2.5 hours, the following would have to be accomplished: a review of the  
3 watershed file report, objections, statements of claimant, and any pre-filing documents,  
4 preparation of the order to initiate the case and a distribution list, status conferences, a readiness  
5 conference, a trial, a decision, and preparation of an abstract.  
6

7       Among the purposes of a detailed adjudication is to precisely define a water right to  
8 ensure that the correct amount of water is used in the correct order of priority. Here, intermittent  
9 and ephemeral streams and washes and not the Little Colorado River provide the source of water  
10 for most of these small water uses. Technical Report at 26. As each of these sources do not  
11 meaningfully contribute to river flow, a holder of a senior right to river water would realize little  
12 benefit from an enforcement action involving these rights. Similarly, as each of these sources  
13 have little impact on the outflow of water from the Watershed, senior downstream users would  
14 realize little benefit from a collective enforcement action involving these rights. The expense  
15 and delay of enforcing a call against these hundreds of small uses to block the cumulative use  
16 would be uneconomical save for the most adverse drought conditions.  
17  
18

19       **Finding of Fact No. 18.** It could take the court system at least a year of concentrated  
20 effort focused exclusively on the Silver Creek Watershed to complete a detailed, individual  
21 adjudication of each stock and wildlife watering and stockpond claim if no more than 2.5 hours  
22 were required for each claim on average.  
23

24       **Conclusion of Law No. 1.** Because of the large number of uses, the small amounts of  
25 water involved in each stock and wildlife watering use and stockponds with a surface area of two  
26 acres or less, and the minimal cumulative impact on downstream water users, all stock and  
27  
28

1 wildlife watering uses and stockponds with a surface area of less than two acres are *de minimis*  
2 uses in the Silver Creek Watershed.

3 **Conclusion of Law No. 2.** Individual stock and wildlife uses in the Silver Creek  
4 Watershed can be adjudicated in a summary fashion.  
5

6 **Conclusion of Law No. 3.** Stockponds in the Silver Creek Watershed with a surface  
7 area of two acres or less, taken individually or cumulatively, have minimal impact on  
8 downstream watersheds and can be adjudicated in a summary fashion.  
9

10 **Conclusion of Law No. 4.** Stockponds in the Silver Creek Watershed, outside the  
11 closed basins, with a surface area of more than two acres will not be adjudicated in a summary  
12 fashion, and objections to these stockponds will be resolved in the normal course of the  
13 adjudication.  
14

15 **Conclusion of Law No. 5.** Because stockponds of all sizes in The Sinks, Long Lake,  
16 and White Lakes (which are closed basins) have no direct effect on other water uses in the Silver  
17 Creek Watershed or in lower watersheds, these stockponds, regardless of their size, will be  
18 adjudicated in a summary fashion.  
19

20 **Conclusion of Law No. 6.** Individual stock and wildlife watering uses will be  
21 adjudicated utilizing summary procedures and proposed water right characteristics appropriate  
22 for these uses. The characteristics of these uses will be determined in accordance with the  
23 procedures set forth in part V of this decision.  
24

25 **Conclusion of Law No. 7.** Claims for water rights to stockponds with a surface area of  
26 two acres or less and all stockponds in the closed basins in the Silver Creek Watershed  
27 stockponds will be adjudicated utilizing summary procedures and proposed water right  
28 characteristics appropriate for these uses. The characteristics of these uses will be determined in

1 accordance with the procedures set forth in part V of this decision.

2       **Conclusion of Law No. 8.** Volume, based on the maximum storage capacity of the  
3 existing structure and expressed in acre-feet of water, is the appropriate quantification unit for  
4 stockponds.  
5

6       **Conclusion of Law No. 9.** A uniform volume of "not to exceed ( $\leq$ ) 3 ac-ft with  
7 continuous fill" shall be adjudicated for all stockponds in the Silver Creek Watershed with a  
8 surface area of two acres or less that are located outside the closed basins. Any benefit resulting  
9 from a more exact quantification of these stockponds would be outweighed by administrative,  
10 litigant, and judicial costs.  
11

## 12 **V. Characteristics Included in Adjudicated *De Minimis* Uses**

13  
14       Based on the *de minimis* impact of stock and wildlife watering and stockponds in the  
15 Silver Creek Watershed, these uses will be summarily adjudicated. The water right  
16 characteristics for these uses, as set forth in individual proposed abstracts, will be as follows:  
17

### 18 **A. Characteristics to be Determined**

19  
20       Unless unusual circumstances warrant, the following characteristics and determinations  
21 will be made and set forth in the water right abstracts for all stockpond, stockwatering, and  
22 wildlife uses:  
23

- 24       • Proposed water right number;
- 25       • Statement of claimant associated with proposed water right;
- 26       • Basis of the water right;
- 27       • Owner of the water right;
- 28       • Beneficial use (type of use);
- Priority date;



- 1 • Source of water;
- 2 • Place of use;
- 3 • Point of diversion
- 4 • Quantity; and
- 5 • Facility name

6

7 **B. Proposed Water Right Number**

8 A proposed water right number (PWR No.) will be created for each water right to be  
9 included in the Catalog of Proposed Water Rights. Frequently, the proposed water right will be  
10 the same as the potential water right (PWR) reported in the watershed file report. For each water  
11 right recommended to be included in the final decree, the number will be prepared as follows:  
12

13

14 Watershed file report in which the water use is described +  
15 abbreviation of the type of beneficial use + unique serial number.

16 **C. Statement of Claimant**

17 The number of the Statement of Claimant matched to the proposed water right will be  
18 listed. A Statement of Claimant must be filed for a water right to be recognized and adjudicated  
19 in the general stream adjudication. Arizona law provides as follows:  
20

21 any potential claimant who is properly served and who failed to file a statement of  
22 claimant as prescribed by this article for any water right or whose motion for  
23 permissive intervention was denied by the court is barred and estopped from  
24 subsequently asserting any right that was previously acquired on the river system  
25 and source and that was not included in a statement of claimant and forfeits any  
rights to the use of water in the river system and source that were not included in  
a properly filed statement of claimant.

26 A.R.S. § 45-254(F)

27

28

1 An abstract will not be prepared for a *de minimis* use without a Statement of Claimant  
2 even if no objection is filed to a potential water use identified by ADWR. Instead, the use will  
3 be listed in the “no water right awarded” section of the Catalog of Proposed Water Rights.  
4

5 **Conclusion of Law No. 10.** A Statement of Claimant must be filed for a claim for a  
6 water right to be adjudicated.

7 **Conclusion of Law No. 11.** A Statement of Claimant must be matched to each stock  
8 and wildlife watering use, and stockpond use adjudicated in a summary fashion for inclusion in  
9 the Catalog of Proposed Water Rights.  
10

#### 11 **D. Basis of Water Right**

12 A Statement of Claimant does not provide a legal basis for establishing a water right. The  
13 general stream adjudication is a determination of pre-existing water rights. A.R.S. § 45-254(F).  
14 Thus, there must be a separate legal basis for each water right to be recognized in the  
15 adjudication.  
16

17 The Arizona Legislature has adopted a comprehensive method to establish a legal basis  
18 for a right to use appropriable water in the state. With passage of the 1919 Public Water Code,  
19 the legislature provided an administrative process for obtaining new water rights. Under the  
20 1974 Water Rights Registration Act, persons could register their water rights with the state.  
21 A.R.S. §§ 45-181 to -190. The primary purpose of this legislation was to allow holders of pre-  
22 1919 water rights to secure recognition of these rights. Water rights issued pursuant to a permit  
23 or certificate, rights in the mainstream waters of the Colorado River, contractual rights with the  
24 United States, and rights established in a prior decree or adjudication were exempt from this  
25 registration process. A.R.S. § 45-182(B). The legislature also enacted the 1977 Stockpond  
26 Registration Act that governs the process of obtaining water rights for a stockpond. A.R.S. §§  
27  
28

1 45-271 to -276. No wildlife, stockwatering, or stockpond uses will be adjudicated without  
2 establishing a legal basis for the claimed right.

3  
4 **Conclusion of Law No. 12.** The legal bases for water rights to be recognized in this  
5 adjudication include the following: prior court decrees, filings pursuant to the Water Rights  
6 Registration Act, certificates of water right, and filings pursuant to the Stockpond Registration  
7 Act.

8  
9 **Conclusion of Law No. 13.** A prior court decree, a filing pursuant to the Water Rights  
10 Registration Act, a certificate of water right, or a filing pursuant to the Stockpond Registration  
11 Act must be matched to each stockpond, stock watering, and wildlife uses that will be  
12 adjudicated in a summary fashion for inclusion in the Catalog of Proposed Water Rights.

### 13 **E. Ownership**

14  
15 Generally, the abstract for the water use shall identify the name of the owner of the land  
16 on which the *de minimis* use occurs as the owner of the water right. This rule does not apply to  
17 land owned by or held in trust by the state or federal government. This Report contains no  
18 recommendation to determine the ownership of water rights as between the United States and  
19 any lessee of federal land. The ownership of water rights on state trust land will be determined  
20 in accordance with Ariz. Rev. Stat. §37-321.01.

### 21 **F. Beneficial Use**

22  
23 Stock and wildlife watering are beneficial uses of water in Arizona. A. R. S. § 45-  
24 151(A). The appropriate type of use will be included as an attribute of a proposed water right.  
25 An appropriation of water may be made for the joint watering of stock and wildlife from the  
26 same instream flow or at same pond. A.R.S. §§ 45-151, 45-271. Stockwatering can occur at an  
27 unimproved location on a stream; at an improved location on a stream; or at a drinker, tank, or  
28

1 stockpond receiving water from a stream, well, runoff, or other source. As a practical matter,  
2 wildlife cannot be barred from those locations where water is provided for livestock.  
3 Recognizing this fact, ADWR designated a potential water right as stockwatering (SW) where  
4 both stock and wildlife uses were claimed. 1 Silver Creek HSR at 334. Thus, for purposes of the  
5 Silver Creek adjudication, a stockwatering (SW) beneficial use will be adjudicated for  
6 unimproved and improved instream watering by stock and wildlife. A stockpond (SP) beneficial  
7 use will be adjudicated for a pond having a capacity of not more than 15 acre-feet that is used  
8 solely for stock and wildlife watering. A. R. S. § 45-271. An SP designation will also be made  
9 for an artificial storage facility where the use is solely for stock and wildlife watering and the  
10 capacity is not more than 15 acre-feet.  
11  
12

13 A wildlife (WL) beneficial use will be adjudicated for unimproved instream watering,  
14 improved instream watering, and watering at a pond or artificial facility with a capacity of not  
15 more than 15 acre-feet where the use is solely for wildlife and water has been appropriated for  
16 that purpose.  
17

18 **Conclusion of Law No. 14.** Stockponds, stockwatering, and wildlife uses are beneficial  
19 uses of water.  
20

21 **Conclusion of Law No. 15.** A stock and wildlife watering (SW) beneficial use will be  
22 adjudicated for unimproved and improved instream watering by stock and wildlife.  
23

24 **Conclusion of Law No. 16.** A stockpond (SP) beneficial use will be adjudicated for a  
25 pond or artificial storage facility having a capacity of not more than 15 acre-feet that is used  
26 solely for stock and wildlife.  
27  
28

1           **Conclusion of Law No. 17.** A wildlife (WL) beneficial use will be adjudicated for  
2 unimproved instream watering, improved instream watering, and watering at a pond or artificial  
3 facility having a capacity of not more than 15 acre-feet that is used solely for wildlife.  
4

5           **G.     Priority Date**

6           The priority date for a *de minimis* use will be the year that ADWR determined as the  
7 apparent date of first use listed in the potential water right section of the watershed file report. If  
8 a month and day for the same year is included in the documents that provide a legal basis for the  
9 claimed use, such as a judicial decree, Water Rights Registration Act filing, or other  
10 preadjudication filing, the priority date shall include the demonstrated month and day. If the day  
11 is not available, the priority date will be the last day of the month in the documents and the year.  
12 If neither a day nor month is provided, the priority date will be last day of the year that ADWR  
13 determined as the apparent date of first use.  
14  
15

16           If the documents that serve as the legal basis for a water right cause, or could reasonably  
17 be interpreted as causing, conflicting priority dates, the conflict will be resolved based on the  
18 limited hierarchy created by the legislature. First, priority dates established in prior judgments or  
19 decrees are afforded a conclusive presumption: "when rights to the use of water or dates of  
20 appropriation have previously been determined in a judgment or decree of a court, the court shall  
21 accept the determination of such rights and dates of appropriation as found in the judgment or  
22 decree unless such rights have been abandoned." A.R.S. § 45-257(B)(1). Thus, notwithstanding  
23 the date of apparent first use in the watershed file report, a *de minimis* use that has a legal basis  
24 established by a judgment or decree of a court, the priority date in the judgment or decree of a  
25 court shall serve as the priority date. If the judgment or decree does not include a specific day,  
26 the priority date will be the last day of the month in the judgment or decree and the year. If  
27  
28

1 neither a day nor month is provided in the judgment or decree, the priority date will be last day  
2 of the year set forth in the judgment or decree.

3  
4 Second, the legislature has provided that statements of claim filed under the Water Rights  
5 Registration Act have presumptive validity. Section 45-185(A) provides that "[e]xcept as to the  
6 appropriability of the claimed water, such claim shall be admissible in evidence as a rebuttable  
7 presumption of the truth and accuracy of the contents of the claim." A priority date asserted in a  
8 properly filed statement of claim is entitled to the rebuttable presumption that it is valid.  
9

10 **Conclusion of Law No. 18.** A priority date will be adjudicated with a day, month, and  
11 year. If the day is not available from the documents or other evidence that establishes the year of  
12 the priority date, the priority date will be the last day of the month and the year. If neither a day  
13 nor month is provided from documents or evidence that establish the year of the priority date, the  
14 priority date will be last day of the year.  
15

16 **Conclusion of Law No. 19.** Unless the litigants otherwise agree, the apparent dates of  
17 first use determined by ADWR for *de minimis* stockponds will be adjudicated as the year of the  
18 priority date for these uses.  
19

## 20 H. Source

21 **Conclusion of Law No. 20.** The "drainage area/water source name" information listed  
22 in a watershed file report for a stock and wildlife watering or stockpond use will be set forth as  
23 the description of the source in the abstracts of proposed water right for these uses.  
24

## 25 I. Place of Use and Point of Diversion

26 For stock and wildlife watering uses, the information set forth in the watershed file report  
27 under the "uses" section will be utilized for determining these characteristics. They will be  
28

1 described to the quarter-quarter (1/4-1/4) section in which the use occurs. In cases of two or  
2 more stock and wildlife watering uses within the same quarter-quarter section, the rights will be  
3 described to the nearest quarter-quarter-quarter section (1/4-1/4-1/4). Arizona Department of  
4 Water Resources shall prepare a map for each abstract that identifies the place of use and point  
5 of diversion that will include the full reach of the stream or river included in the right.  
6

7  
8 For stockponds, the information set forth in the "reservoir" section of the watershed file  
9 report will be utilized to provide the legal description for the place of use. The quarter-quarter  
10 (1/4-1/4) section in which the surface area of the stockpond extends will be utilized for the legal  
11 description. In the case of two or more stockponds in the same quarter-quarter section, each  
12 stockpond will be located to the nearest quarter-quarter-quarter (1/4-1/4-1/4) section. Unless the  
13 watershed file report states to the contrary, the place of use shall also be the point of diversion.  
14

15 **Conclusion of Law No. 21.** For wildlife and stockwatering uses, the place of use will  
16 be described to the quarter-quarter (1/4 1/4) section in which the use occurs. In cases of two or  
17 more stockwatering uses or two or more wildlife uses within the same quarter-quarter section,  
18 the rights will be adjudicated to the nearest quarter-quarter-quarter (1/4 1/4 1/4) section.  
19

20 **Conclusion of Law No. 22.** For stockponds, the quarter-quarter (1/4 1/4) sections in  
21 which the surface area of the stockpond extends will be utilized for the legal description of the  
22 place of use. In the case of two stockponds in the same quarter-quarter section, each stockpond  
23 will be located to the nearest quarter-quarter-quarter (1/4 1/4 1/4) section.  
24  
25  
26  
27  
28

1           **J.     Quantity**

2                   **1.     Stockwatering and Wildlife Uses**

3  
4           As previously discussed, the consumptive use of stock and wildlife that drink water from  
5 surface water excluding stockponds is negligible--whether considered individually or  
6 cumulatively throughout the Silver Creek Watershed. Thus, stock and wildlife uses will be  
7 quantified as "reasonable use."  
8

9           **Conclusion of Law No. 23.** The quantity of water for stockwatering and wildlife uses  
10 will be adjudicated as "reasonable use."  
11

12                   **2.     De Minimis Stockponds (Stockponds  $\leq$  3 Acre-Feet)**

13           The determination of the quantity for stockpond uses that are entitled to summary  
14 administration is a more difficult problem. While it is technically possible to survey and thereby  
15 determine the quantity for each of the stockponds, the methodology is time-consuming,  
16 expensive, and defeats the purpose of a summary determination of these small uses.  
17

18           The Arizona Department of Water Resources recommends that stockponds be quantified  
19 on the basis of surface acreage ("maximum controlled capacity") rather than volume. Remote  
20 sensing would be used to determine the original acreage of these ponds and to monitor any  
21 enlargements. Technical Report at 34-35. It has statistically demonstrated that stockponds of  
22 two surface acres or less in the Silver Creek Watershed all have less than 15 acre-feet of volume,  
23 which is also less than the 15 acre-foot threshold recognized in the Stockpond Registration Act,  
24 Ariz. Rev. Stat. §§ 45-271 to -276.  
25

26  
27           Some of the litigants have opposed a uniform quantification scheme in general because  
28 they believe it would result in an exaggerated amount of water being awarded to appropriators,



1 which amount might be unrelated to actual beneficial use. *See* Ariz. Rev. Stat. § 45-141(B)  
2 ("Beneficial use shall be the basis, measure and limit to the use of water"). Other litigants oppose  
3 ADWR's specific recommendation because they fear appropriators will enlarge their stockponds  
4 to capture more water for their own use or to sell or transfer to others.  
5

6 While surface area is an efficient and effective way to monitor whether appropriators  
7 have enlarged their stockponds and are not in compliance with the adjudication decree, surface  
8 acreage should not be the unit of quantification. With limited exceptions, water rights have  
9 historically been quantified by units of volume or flow. Volume, based on the maximum storage  
10 capacity of the existing structure and expressed in acre-feet with a unit of time that specifies  
11 refilling rights is the appropriate method to quantify stockponds.  
12

13  
14 For most stockponds in the Silver Creek Watershed, adjudicating a uniform volume not  
15 to exceed three acre-feet of water, with continuous fill, will result in a quantity determination  
16 that is reasonably related to actual beneficial use for those ponds with a surface area less than  
17 two acres. Rights to water for stockponds with a claimed volume in excess of three acre-feet will  
18 not be adjudicated in accordance with the summary procedures described in this Report.  
19

20 Testimony at the trial has shown that stockponds are usually constructed originally to  
21 provide the maximum storage capacity given the surrounding terrain and gradient. Thus, it is  
22 unlikely that existing stockponds will be enlarged. Trial Tr. at 133-134 (S. Brophy) ("Just  
23 enlarging it for the purpose of hoarding water or something does not make sense in my mind any  
24 more than getting a bigger billfold in hopes that you'll have more money"). Remote sensing by  
25 aerial photography or satellite imagery provides a practical method for ADWR to enforce the  
26 provisions of the adjudication decree.  
27  
28

1 **Finding of Fact No. 19.** Allowing smaller stockponds to be filled on a continuous basis  
2 results in efficient utilization of water. Ex. No. SRP-028 at 2.

3 **Conclusion of Law No. 24.** Volume, based on the maximum storage capacity of the  
4 existing stockpond and expressed in acre-feet, is the appropriate quantification unit for  
5 stockponds.  
6

7 **Conclusion of Law No. 25.** The capacity of stockponds in the closed basins can be  
8 estimated reliably using the statistical methods developed by ADWR that correlates surface  
9 acreage (as determined from field measurements, aerial photography, or satellite imagery) with  
10 volume.  
11


12 **Conclusion of Law No. 26.** Stockponds with a surface area of two acres or less shall be  
13 adjudicated with a quantity as "not to exceed ( $\leq$ ) 3 acre-feet with continuous fill."  
14

15 **Conclusion of Law No. 27.** A uniform volume not to exceed ( $\leq$ ) 3 acre-feet, with  
16 continuous fill, will result in a quantification reasonably related to actual beneficial use for  
17 stockponds in the Silver Creek Watershed with a surface area of two acres or less.

## 18 **VI. Procedure to file written objections to this report**

19  
20 Written objections to this Report must be filed on or before **February 20, 2023**, with the  
21 Clerk of the Apache County Superior Court.  
22

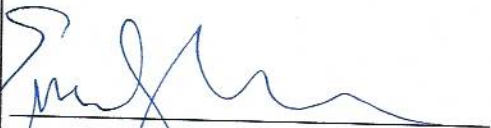
23 DATED this 23rd day of August, 2022.

24  
25 

26 SUSAN WARD HARRIS

27 Special Master  
28

1 The original of the foregoing mailed this 23rd day of  
2 August, 2022 to the Clerk of Apache County Superior  
3 Court for filing; copies of the foregoing delivered to  
4 the Distribution Center, Maricopa County Superior  
5 Court Clerk's office for mailing to those parties who  
6 appear on the Court-approved mailing list for 6417-  
7 033-9005 dated February 19, 1993 and the general  
8 mailing list for CV 6417. (Consolidated).

9   
Emily Natale

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