

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
GILA RIVER SYSTEM AND SOURCE

DATE: November 23, 2010

CIVIL NO. W1-11-3423

ORDER DETERMINING THE
ISSUE OF IRRIGATION AND
STOCKWATERING USES

CONTESTED CASE NAME: *In re Powers Garden Administrative Site.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master determines the issue designated for briefing concerning the Coronado National Forest's use of water for irrigation and stockwatering at the Powers Garden Administrative Site.

NUMBER OF PAGES: 8.

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I. CHRONOLOGY OF PROCEEDINGS

After considering comments from the parties, on November 12, 2009, the Special Master set for briefing the issue whether the United States is entitled to a federal reserved water right that includes the use of water for irrigation and stockwatering purposes at the Powers Garden Administrative Site in the Coronado National Forest.

Litigants were required to file disclosure statements and had the opportunity to conduct discovery limited to the issue. The United States filed a Motion for Partial

Summary Judgment. The Salt River Project (“SRP”) filed a Motion for Summary Judgment. The United States and SRP filed responsive memoranda and replies. No other parties filed motions or briefs.

For the reasons previously stated, the Special Master will issue an order and not an Arizona Rule of Civil Procedure 53(g) report at this time.¹

II. IS THE UNITED STATES ENTITLED TO A FEDERAL RESERVED WATER RIGHT THAT INCLUDES THE USE OF WATER FOR IRRIGATION AND STOCKWATERING PURPOSES AT THE POWERS GARDEN ADMINISTRATIVE SITE IN THE CORONADO NATIONAL FOREST?

A. Withdrawal and Reservation of Powers Garden Administrative Site

The Special Master makes the following findings of fact concerning the withdrawal and reservation of public lands for the Powers Garden Administrative Site.²

Finding of Fact No. 1. The Powers Garden Administrative Site is located on Rattlesnake Creek, approximately twenty miles south of Klondyke, Arizona, within the boundaries of the Coronado National Forest and the Galiuro Wilderness Area.

Finding of Fact No. 2. On September 26, 1910, President William H. Taft issued Proclamation No. 1089, 36 Stat. 2747 (1910), which enlarged the boundaries of the existing Crook National Forest. The Powers Garden Administrative Site is located within the lands added to the Crook National Forest.

Finding of Fact No. 3. President Taft withdrew and reserved the lands described in Proclamation No. 1089 “by virtue of the power vested in” the President by the Organic Administration Act of June 4, 1897, 30 Stat. 34 (1897), 16 U.S.C. § 471 *et seq.* (2010) (“Organic Administration Act”).³

Finding of Fact No. 4. The Organic Administration Act, as passed, stated that:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States;...⁴

Finding of Fact No. 5. Effective July 1, 1953, the Crook National Forest was

¹ See Order Determining Initial Issues Designated for Briefing, § I(A) at 2-3, *In re San Pedro Riparian National Conservation Area*, No. W1-11-232 (Mar. 4, 2009).

² The documents SRP submitted on November 19, 2010, show some of the interesting history of administrative sites dating to 1911.

³ Procl. No. 1089, 36 Stat. 2748. See SRP’s Appendices to Statement of Facts in Support of Its Motion for Summary Judgment, App. 4 (July 2, 2010). The appendices are hereinafter designated the “SRP App. or Apps.”

⁴ 30 Stat. 35 (current version at 16 U.S.C. § 475 (2010)). See SRP App. 6.

abolished, and its lands were divided among the Coronado, Gila, and Tonto National Forests.⁵ The lands containing the Powers Garden Administrative Site came under the jurisdiction of the Coronado National Forest.

Finding of Fact No. 6. Following the passage of the Wilderness Act of 1964, certain lands in the Coronado National Forest were designated as the Galiuro Wilderness Area, Pub. L. No. 88-577, 78 Stat. 890 (1964). The Powers Garden Administrative Site was not included in this wilderness designation.

Finding of Fact No. 7. On August 28, 1984, the Congress passed the Arizona Wilderness Act, Pub. L. No. 98-406, § 101(a)(8), 98 Stat. 1485 (1984). The Act increased the size of the Galiuro Wilderness Area. The lands added to the Galiuro Wilderness Area included the Powers Garden Administrative Site. The addition included the 120 acres of land described in Public Land Order 1080 which is discussed in subsection D below.

B. Reserved Water Rights Existing for National Forests

The doctrine of implied non-Indian federal reserved water rights has been amply covered in prior reports and orders.⁶ The answer to the question before the Special Master begins with the United States Supreme Court's decision in *United States v. New Mexico*, 438 U.S. 696 (1978), where the Court defined the extent of implied federal reserved water rights for national forests.

The Court held that:

While many of the contours of what has come to be called the “implied-reservation-of-water doctrine” remain unspecified, the Court has repeatedly emphasized that Congress reserved “only that amount of water necessary to fulfill the purpose of the reservation, no more.” [Citations omitted] Each time this Court has applied the “implied-reservation-of-water doctrine,” it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water, the purposes of the reservation would be entirely defeated (footnote omitted)....

The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes - “[t]o conserve the water flows, and to furnish a continuous supply of timber for the people” (footnote and citations omitted)....

⁵ Pub. Land Order No. 924 (dated Oct. 23, 1953), 18 Fed. Reg. 6822-23 (Oct. 29, 1953). *See* SRP App. 5.

⁶ *See* the Special Master's reports filed in the contested cases *In re State Trust Lands*, No. W1-104 and CV 6417-100 (Sept. 28, 2007, approved Oct. 7, 2010) and *In re Fort Huachuca*, No. W1-11-605 (Apr. 4, 2008, pending consideration). *See also* Order Determining Initial Issues Designated for Briefing, *In re San Pedro Riparian National Conservation Area*, *supra*.

Congress intended that water would be reserved only where necessary to preserve the timber or to secure favorable water flows for private and public uses under state law.⁷

Conclusion of Law No. 1. The purposes for which the Congress intended that water would be reserved on lands of the public domain withdrawn and reserved for national forests are to preserve the timber and secure favorable water flows for private and public uses under state law.

Accordingly, the Special Master finds that the United States does not have separate primary reserved water rights for irrigation and stockwatering at the Powers Garden Administrative Site.

C. Reserved Water Rights for the Powers Garden Administrative Site

The United States concedes it “is not claiming a reserved water right to stockwatering and irrigation separate and apart from administrative uses at the Powers Garden Administrative Site.”⁸ The question becomes whether the United States has a reserved right for these water uses so that its personnel can carry out the purposes for which national forests are established.

The United States argues that reserved water rights extend to the periodic domestic use of water by its employees, watering of transport animals, occasional irrigation of pasture for the animals, and firefighting. The argument posits that these uses are related to the administration of national forests in carrying out the purposes of these reservations.

The Special Master makes the following findings of fact concerning the Powers Garden Administrative Site.

Finding of Fact No. 8. The cabin presently occupying the Powers Garden Administrative Site was constructed by the Forest Service in 1936 or 1937 for use as a fire guard cabin.

Finding of Fact No. 9. The Powers Garden Administrative Site is used by Forest Service employees and volunteers as a shelter and base of operations while performing their duties. In 1993, it was reported that Forest Service personnel and volunteers used the site “approximately 150 person days per year.”⁹

Finding of Fact No. 10. Employees and volunteers of the Forest Service travel to and from the Powers Garden Administrative Site by means of government-owned animals such as horses and mules.

⁷ 438 U.S. at 700, 707, and 718.

⁸ United States Reply 1-2 (Sept. 24, 2010).

⁹ Wilderness Implementation Schedule, Galiuro Wilderness 3 (approx. Sept. 1993). *See* United States Exh. 9 attached to Statement of Undisputed Material Facts in Support of Motion for Partial Summary Judgment (July 2, 2010) (hereinafter designated “U. S. Exh.”).

The Special Master notes that the account of Mr. Tom Dollar and a friend, “experienced backcountry travelers,” in trying to reach the Powers Garden Administrative Site by motor vehicle shows the trip is about impossible.¹⁰ The trail is primitive and hazardous. After hiking the last six miles to the site, Mr. Dollar wrote “[m]ore of an outback today than ever, this place is remote, unpopulated, difficult to get to and seldom visited.” The cabin is “used only now and then by hunters or Forest Service workers.”

Finding of Fact No. 11. A spring located at the site has been developed to provide water for livestock and irrigate pasture land at the administrative site. The spring is named the Powers Garden Spring.

Finding of Fact No. 12. The Forest Service’s stock transport animals (horses and mules) are watered from the Powers Garden Spring. The animals graze on pasture land at the site. The pasture grasses have been irrigated by diversion of water from the spring.

Finding of Fact No. 13. The United States filed two statements of claimant asserting reserved water rights for the Powers Garden Administrative Site. Statement of Claimant No. 39-08034 was amended on April 29, 2008, to claim a reserved water right for “[i]rrigation, domestic, livestock, and firefighting...in support of National Forest administration.”¹¹ Statement of Claimant No. 39-08321, which has never been amended, claims a reserved water right for “[a]dministration of National Forest including fire fighting, periodic domestic and stockwater use, and occasional irrigation use.”¹²

The reserved water rights of national forests cannot be expanded beyond the primary purposes held by the United States Supreme Court. Care must be taken not to create categories that improperly amplify reserved water rights. On the other hand, the boundaries of the primary purposes remain undetermined.

Finding of Fact No. 14. The Special Master takes judicial notice of the fact that fires, whether caused by natural forces or human actions, can devastate timber stands, decimate fauna and flora, and desolate water flows and conditions on national forests. These impacts can be extensive and long lasting.

Finding of Fact No. 15. The Special Master takes judicial notice of the fact that water found on national forest lands is often used for firefighting due to its availability and proximity.

Conclusion of Law No. 2. The Secretary of Agriculture which oversees the Forest Service “shall make provisions for the protection against destruction by fire and

¹⁰ T. Dollar, *Roughing It In Rattlesnake Canyon*, Arizona Travel Magazine Archives, Arizona Highways (2010). See SRP App. 7.

¹¹ Other Uses Amend. (filed Apr. 29, 2008) to Statement of Claimant No. 39-08034 (filed Dec. 29, 1981). See SRP App. 1.

¹² Statement of Claimant No. 39-08321 (filed Dec. 29, 1981). See U.S. Exh. 1; see also SRP Apps. 2 and 13.

depredate upon the public forests and national forests.”¹³

The Special Master finds that the reserved water rights of the Powers Garden Administrative Site must be limited to the primary purposes of preserving timber and securing favorable water flows, but a portion of those water rights can be allocated for domestic, irrigation, stockwatering, and firefighting uses as long as the water is used only by Forest Service employees, volunteers, and independent contractors, and the water uses are directly related to and consistent with the primary purposes of national forests. These conditions do not limit or substitute any other requirements imposed by the law of reserved water rights.

D. Reserved Water Rights Under Public Land Order 1080

The briefs raised the existence of Public Land Order 1080. The following findings of fact concern this order.

Finding of Fact No. 16. In Executive Order 10355, President Harry S. Truman “delegate[d] to the Secretary of the Interior the authority vested in the President...to withdraw or reserve lands of the public domain and other lands owned or controlled by the United States...for public purposes....”¹⁴ Such orders were to be designated as “public land orders” and published in the *Federal Register*.¹⁵

Finding of Fact No. 17. On March 4, 1955, “[b]y virtue of the authority vested in the President by [the Organic Administration Act] and otherwise, and pursuant to Executive Order 10355,” Assistant Secretary of the Interior Orme Lewis issued Public Land Order 1080. The order provided that legally described areas aggregating 120 acres known as the Powers Garden Administrative Site “within the Coronado National Forest in Arizona are hereby withdrawn from all forms of appropriation under the public-land laws, including the mining but not the mineral-leasing laws, and reserved for the use of the Forest Service, Department of Agriculture, as campground, picnic, and recreation areas....”¹⁶

During the oral argument the United States indicated it was not claiming reserved water rights under Public Land Order 1080, and that this order concerned primarily the matter of mineral entry. This position differs from that advanced in the response that the “reserved” purposes of Public Land Order 1080 “should be added to the purposes of the administrative site and decreed along with firefighting, periodic domestic and stockwater use, and occasional irrigation use.”¹⁷ SRP disputed the position of the United States.

The question whether the United States is entitled to reserved water rights for the

¹³ 16 U.S.C. § 551 (2010).

¹⁴ Executive Order 10355, § 1(a) (dated May 26, 1952), 17 Fed. Reg. 1487. *See* SRP App. 8.

¹⁵ *Id.* § 1(b).

¹⁶ Pub. Land Order 1080 (dated Feb. 28, 1955), 20 Fed. Reg. 1362-63 (Mar. 5, 1955). *See* SRP App. 9.

¹⁷ United States Response to SRP’s Motion for Summary Judgment 3 (Aug. 27, 2010).

uses stated in Public Land Order 1080 was not part of the briefing. Analysis of that question might raise relevant and material facts that have not been presented in this briefing. Furthermore, these water uses have not been claimed in statements of claimant or amendments filed since 1981. Accordingly, the Special Master will not make any determinations concerning the existence of reserved water rights for the use of the Powers Garden Administrative Site “as campground, picnic, and recreation areas.”

III. STATEMENTS OF CLAIMANT OF THE UNITED STATES

During oral argument, the Special Master discussed certain inconsistencies in the Coronado National Forest’s Statements of Claimant Nos. 39-08321 and 39-08034. These are likely due to the existence of numerous documents, amendments, and staff changes.

First, both statements currently claim a reserved water right, although Statement of Claimant No. 39-08034 originally when filed in 1981 referred to Certificate of Water Right No. 1248.¹⁸ Neither statement claims this state law vested water right.

Second, both statements of claimant, Certificate of Water Right No. 1248, and the Final San Pedro River Watershed Hydrographic Survey Report (“HSR”) show differences in the legal description of Powers Garden Spring. The HSR also reports less irrigated acreage than stated on Certificate of Water Right No. 1248.¹⁹

It is recommended that the United States review its claims for the Powers Garden Administrative Site, and if appropriate, file amendments with ADWR.

IV. FUTURE PROCEEDINGS INVOLVING THE ARIZONA DEPARTMENT OF WATER RESOURCES (ADWR)

If an agreement resolving all objections and including proposed abstracts of water rights is executed, the Special Master plans to implement the process used in *In re PWR 107 Claims*, No. W1-11-1174. The process involves timelines for the parties to submit to ADWR the stipulated proposed abstracts of water rights, ADWR to review the stipulations and abstracts in accordance with the following directives and file its recommendations:

1. A comprehensive technical report is not contemplated but rather a review and recommendations regarding the settlement agreement.
2. ADWR’s review shall be limited to the accuracy and completeness of the factual information contained in the stipulated abstracts of water rights. During the course of ADWR’s review, if it would facilitate and expedite, but not delay, the process, ADWR, the United States, and the

¹⁸ Copies of Application No. A-2237, Permit No. A-1499, and Certificate of Water Right No. 1248 are found in SRP Apps. 14 and 15. *See also* U.S. Exh. 5 for a copy of the certificate.

¹⁹ Watershed File Report No. 115-9-1, vol. 6, table 4 at 63 (1991). *See* SRP App. 3 for a summary. *See also* vol. 1, ch. 5 at 380-82. It was noted that ADWR was unable to access and field investigate the Powers Garden Administrative Site when it was preparing the HSR.

objecting parties may discuss and make factual corrections.²⁰

Parties may file objections or comments to ADWR's report. The Special Master will determine the objections and file a report and proposed partial decree. Pursuant to A.R.S. § 45-277(A)(2), claimants will have sixty days to object to the report and decree.

V. DETERMINATIONS OF THE SPECIAL MASTER

The Special Master determines that:

1. The United States does not have separate primary reserved water rights for irrigation and stockwatering at the Powers Garden Administrative Site.
2. The reserved water rights of the Powers Garden Administrative Site must serve the primary purposes of preserving timber and securing favorable water flows, but a portion of those water rights can be allocated for domestic, irrigation, stockwatering, and firefighting uses as long as the water is used only by Forest Service employees, volunteers, and independent contractors, and the water uses are directly related to and consistent with the primary purposes of national forests. These conditions do not limit or substitute any other requirements imposed by the law of reserved water rights. The amounts of each water use will be determined in the quantification phase of this case.

Accordingly, IT IS ORDERED granting and denying the motions for summary judgment of the United States and SRP consistent with these determinations.

DATED: November 23, 2010.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On November 23, 2010, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-3423 dated July 29, 2010.

/s/ Barbara K. Brown
Barbara K. Brown

²⁰ See Order 5-6, *In re PWR 107 Claims*, No. W1-11-1174 (July 19, 2006).