

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

02/01/2021

CLERK OF THE COURT  
Form V000

SPECIAL WATER MASTER  
SUSAN WARD HARRIS

S. Motzer  
Deputy

In re: Town of Huachuca City and  
Whiting Ranches  
Contested Case No. W1-11-0245

FILED: 3/2/2021

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)

Re: Status Conference on Salt River Project's Motion to Vacate Tentative Trial Date

**MINUTE ENTRY**

Courtroom CCB - 301

11:00 a.m. This is the time set for telephonic Status Conference before Special Water Master Susan Ward Harris regarding Salt River Project's Motion to Vacate Tentative Trial Date.

The following attorneys telephonically appear:

Thomas Murphy for Gila River Indian Community;  
Robin Interpreter for Yavapai-Apache Nation and observing for Pascua Yaqui Tribe;  
David Gehlert and F. Patrick Barry for United States Department of Justice, Environment and Natural Resources Division;  
Mark McGinnis for Salt River Project ("SRP");  
Sean Hood for Freeport Minerals Corporation;  
John D. Burnside and L. William Staudenmaier on behalf of BHP Copper and Arizona Public Service ("APS");

David A. Brown and J. A. Brown for Michael and Susan Cavender, Gila Valley Irrigation District, Franklin Irrigation District, and City of Cottonwood;  
Rhett Billingsley for ASARCO;  
Carrie J. Brennan for Arizona State Land Department;  
Joe P. Sparks and Laurel A. Herrmann on behalf of San Carlos Apache Tribe;  
Steven L. Wene and Josh Greer for Town of Huachuca;  
Charles L. Cahoy for City of Phoenix;  
William H. Anger for City of Mesa;  
Lucas T. Christian observing for Tonto Apache Tribe;

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

Counsel for SRP addresses the Court regarding the April trial date, which he states was set about a year ago. He describes seven reasons while the trial date should not happen in April. He focused on the seventh reason which is that two of the Town's wells are located outside the lateral boundaries of the subflow zone. According to Mr. McGinnis, if the ruling on the two issues is in favor of SRP, then no trial is necessary. He does not see how trial can proceed in April without approval of the cone of depression and subflow depletion tests. In response to the Court's question about determining water rights for the Town's wells located within the subflow zone, Mr. McGinnis explained that a municipal right is not created well by well.

Counsel for Freeport Minerals Corporation addresses the Court and states that he opposes SRP's Motion to Vacate Tentative Trial Date. Mr. Hood argues that the purpose of the trial is to resolve material facts that the parties presented in connection with the resolution of the two issues that are being briefed.

Counsel for Arizona State Land Department addresses the Court and states that she agrees with Mr. Hood. Ms. Brennan states that the purpose of the trial was to resolve these two legal issues in the context of the associated facts and it was not to determine all of the parameters of the two claimants' water rights. She is ready to move forward in April, and she is ready for pretrial deadlines to be set for the joint pre-trial statement, exhibits, and status conference prior to trial. Ms. Brennan estimated that the trial would only be a few days.

Discussion occurs about the need for a joint pretrial statement. Ms. Brennan states that a joint pretrial statement could be used to set forth disputed facts.

Counsel for BHP Copper and APS addresses the Court and states that he is in agreement with Mr. Hood and agrees with Ms. Brennan. Mr. Burnside said that the joint pretrial statement would be helpful in a more limited format to focus on the factual issues that are disputed. Mr. Burnside said that he expected that facts will be disputed.

Counsel for the Cavenders addresses the Court. Mr. Brown says that the Cavenders are not expecting to have a trial on their particular water rights, but to the extent the scope

of the trial would be limited to the issues of broad legal importance, they oppose vacating the trial date.

Counsel for ASARCO agrees with Mr. Hood, Ms. Brennan, and Mr. Burnside. He opposes the motion to vacate and states that it was his understanding that the purpose of the trial was to address the issues of broad legal importance.

Counsel for United States Department of Justice addresses the Court and supports the motion filed by SRP.

Counsel for the Gila River Indian Community addresses the Court and states that he is in agreement with Mr. McGinnis. He adds that this is not a summary judgment proceeding and was intended to brief two legal issues.

Counsel for Yavapai-Apache Nation states that she has nothing to add and that she supports the motion filed by SRP.

Counsel for San Carlos Apache Tribe addresses the Court and states that he agrees with Mr. McGinnis and Mr. Murphy. Mr. Sparks states that he thought that the issues were ones of law and law and equity and did not think that there would be factual determinations made.

Counsel for Town of Huachuca addresses the Court and states that he supports the position stated by Mr. Hood. It was always his position that there would be facts and he did not intend to try the case in a purely hypothetical environment.

Counsel for City of Phoenix addresses the Court and states that he concurs with the position of Mr. Sparks.

Counsel for City of Mesa addresses the Court and states that he is in support of the Motion and joins with the arguments of Mr. Murphy.

Counsel for Tonto Apache Tribe addresses the Court and states that he supports the Motion and statements made by Mr. Murphy.

Discussion is held about the scope of the trial. Mr. McGinnis states that the best approach is to complete the briefing on the issues. There will be oral argument at the end of the month and then the Court can determine whether there are factual issues that warrant a trial. SRP was concerned that the trial would be to adjudicate the claims and he does not believe that can happen.

Based on the foregoing,

IT IS ORDERED denying Salt River Project's Motion to Vacate Tentative Trial Date, but the trial will be limited to the two issues that the parties are briefing.

The Court states that it will set dates as outlined by Ms. Brennan and that it will set a pretrial conference in March.

11:26 a.m. Matter concludes.

LATER:

On July 22, 2020, an oral argument was held on Salt River Project's Motion for Clarification with respect to the two issues of broad legal importance. At that proceeding, Mr. Hood argued that a factual record is necessary for the court to determine whether it has equity jurisdiction to determine water rights for well owners. He stated that he wanted to conduct discovery about facts concerning the Southwest Cotton wells, the claimants' water uses and wells in these cases, the physical setting of the wells, the well owners' reliance on the presumption that wells pump groundwater, and the ability of a well owner to obtain an appropriative water right from the state agency. Based on this argument, the discovery deadline was extended as was the time for filing Responses and Replies with respect to the two designated issues.

At the oral argument on the issues held on February 26, 2021, all of the parties did not agree that the facts presented by the State Law Parties that were developed during the discovery period were not in dispute. While there were parties that argued that the issue is strictly a matter of law, other parties took different positions. One party thought the court has equity powers in unique, extraordinary situations, other parties argued there were a broader set of circumstances in which the court may exercise equity powers, and another group of parties contended that the court must use broad equity powers on behalf of the well owners. An analysis of this issue will be improved by its consideration within a factual setting. As one party argued, in the absence of facts, a risk exists that an important legal issue may be decided based on an incomplete analysis of the equities. Thus, the trial scheduled for April 26, 2021 will not be vacated.

A telephonic status conference shall be held on **March 22, 2021** at **2:00 p.m.** to address procedural matters related to the trial scheduled for **April 26, 2021**. Proposed dates for pre-trial deadlines are:

1. Joint Pretrial Statement due **April 12, 2021**. The State Law Parties shall initiate the process no later than **April 2, 2021**.

The only issue that will be tried is whether the adjudication court has equitable powers to decree an appropriative water right for a claimant who began withdrawing water from a well located in the subflow zone after June 12, 1919, but did not comply with the 1919 Arizona Surface Water Code and subsequent versions of that statute. Given that the legal issue has been fully briefed, the contents of the Joint Pretrial Statement can be limited. With respect to the requirements in Ariz. R. Civ. P. 16.1(f)(2)(A), (B), and (C), the joint pretrial statement shall contain stipulations of material fact, contested issues of fact that the parties agree are material, and a separate statement by each party

of other issues of fact that the party believes are material. The Pretrial Statement shall list each party's witnesses in the order that they will be called. At the telephonic status conference, the parties shall be prepared to state their positions about whether the Pretrial Statement must satisfy any other requirements of Ariz. R. Civ. P. 16.1(f)(2)(D), (E), or (F). The Joint Pretrial Statement will not be required to comply with Ariz. R. Civ. P. 16.1(f) (2) (G)-(M).

2. An excel spreadsheet shall be prepared that lists each party's exhibits required by Ariz. R. Civ. P. 16.1(f) (2) (E). The spreadsheet shall be provided to the Clerk of the Court along with an electronic flash drive that contains all of the parties' exhibits by **April 16, 2021**. A copy of the flash drive shall be delivered to the Office of the Special Master no later than **April 16, 2021**.
3. A Readiness Conference shall be held on **April 21, 2021** at **1:30 p.m.**

Instructions for telephonic participation:  
Dial: 602-506-9695 (local)  
1-855-506-9695 (toll free long distance)  
Dial Collaboration (conference) Code 357264#

A copy of this order is mailed to all persons listed on the Court approved mailing list for Contested Case Number W1-11-0245.