

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

03/20/2019

CLERK OF THE COURT  
FORM V000

SPECIAL WATER MASTER  
SUSAN HARRIS

A. Hatfield

Deputy

In re: Arizona Chapter of the Nature  
Conservancy – Agro Land  
Contested Case No. W1-11-3382

**FILED: 04/08/2019**

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)

In re: Scheduling Conference

**MINUTE ENTRY**

**Courtroom: CCB 301**

11:00 a.m. This is the time set for a scheduling conference before Special Master Susan Ward Harris.

The following attorneys appear in-person: Mark McGinnis and John Weldon on behalf of SRP; Charles Cahoy on behalf of the City of Phoenix; Carla Consoli on behalf of the AZ Chapter of the Nature Conservancy (TNC); and Joe Sparks on behalf of the San Carlos Apache Tribe and the Tonto Apache Tribe (the Tribes).

The following attorneys and parties appear telephonically: John Burnside on behalf of BHP Copper; Bradley Pew on behalf of ASARCO; and Jay Tomkus on behalf of the Pascua Yaqui Tribe and the Yavapai Apache Nation.

Court reporter, Brigid Donovan, is present and a record of these proceedings is made digitally.

The Court notes that TNC has filed amended abstracts that include the maximum rates of diversion and maps that identify the location and acreage of the land on which water is claimed for irrigation use.

The Court further states that the Yavapai Apache Nation had filed a statement that withdrew their objections and asks if there are any further objections. Discussion is held.

Ms. Consoli addresses typographical errors in proposed water rights (PWR) 115-05-AC-003-IR002 and 115-05-AC-DM002. In 115-05-AC-003-IR002, the additional place of use should include section 36 in the legal description so that the additional legal description should read: NWSE 36 T6S R19E. In 115-05-AC-DM002, the basis of right should be 36-37261 instead of 36-3726.0001.

Ms. Consoli further addresses comments from Mr. Sparks regarding five PWR's with no basis of right listed. TNC offers to file amended abstracts with the basis of right documents.

Mr. Sparks states that based on TNC's clarification regarding the typographical errors and basis of right, he has no further objections to the abstracts, but the Tribes still maintain that there is inadequate proof to justify the original priority date. Mr. Sparks further states that the Tribes' original objections still stand in regards to priority date.

Mr. McGinnis states that TNC's oral clarification this morning has resolved SRP's objections. SRP has no issues with the priority dates.

Mr. Burnside has no objections to the proposed abstracts for the purpose of settlement. Mr. Pew joins with BHP Copper's position.

Ms. Consoli argues that that the priority dates have not changed since the March 2018 filing and the Tribes have waived their objections to the priority dates.

Mr. Sparks state that the Tribes have not waived any objections and they have not entered into any settlement agreement.

Mr. McGinnis points out that it is the objector's burden to prove the basis of its objection.

Mr. Tompkus corrected the Court's earlier statement with respect to the status of his clients' objections and stated that the Pascua Yaqui Tribe and the Yavapai Apache Nation have not withdrawn their objections. Mr. Tompkus also stated that the proceedings in this case have been confusing and a procedure should be followed that requires the parties to file stipulated settlements.

11:23 a.m. Matter concludes.

LATER:

The Nature Conservancy has filed forms of abstracts for the following potential water rights:

<b>Potential Water Right (PWR)</b>
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115-05-AC-003-IR001
115-05-AC-003-IR002
115-05-AC-003-IR003
115-05-AC-003-DM001 (3)
115-05-AC-004-IR001
115-05-AC-004-DM001
115-05-AC-005-DM001
115-05-AC-005-DM002
115-05-AC-005- DM003

As reported above, SRP, ASARCO, BHP Copper stated at the scheduling conference that for the purposes of settling their objections to the watershed file reports at issue they are willing to accept the proposed abstracts filed by TNC as orally corrected by TNC’s counsel. The Pascua Yaqui Tribe and the Yavapai Apache Nation stated that they are willing to work with TNC to resolve their objections but did not indicate their position with respect to the abstracts. The United States and the Gila Indian Community did not appear at the scheduling conference.

The Tribes stated that for settlement purposes it will accept the maps and water right characteristics listed in the abstracts except for the priority dates because TNC had not proved the priority dates included in the abstracts. The Nature Conservancy argued that the Tribes had waived their objection to the priority dates citing to the Court’s April 19, 2018 order and the Tribe’s Response filed on March 20, 2018. At issue is whether the Tribes have waived their objections filed to the WFRs and, thus, its right to have a fair and reasonable opportunity to present evidence at a hearing on its objections to the WFRs under A.R.S. §45-256(B).

**A. Background**

In 1992, the Tribes filed objections to Watershed File Reports 115-05-AC-003, 115-05-AC-004, and 115-05-AC-005 (“WFRs”). These WFRs were prepared to report the results of ADWR’s investigation of the Statements of Claimant filed by TNC and its predecessors-in-interest. As required by A.R.S. §45-256(B), these consolidated cases were initiated to resolve the objections to the WFRs and to give the claimants and objectors “a fair and reasonable opportunity to present evidence in support of or in opposition to the recommendations of the director [of ADWR].”

Following the initiation of these consolidated cases, TNC reviewed the relevant statements of claimant and determined that they contained “outdated information and claims.” *Status Report and Proposal*, dated May 3, 2017. It proposed that it be given a period of time to submit amended statements of claimant and work with the parties that had previously filed objections to determine if the objections could be resolved or

withdrawn. The Nature Conservancy's request was granted. On December 15, 2017, a status conference was held at which TNC reported the state of its efforts to amend its statements of claimant. Following the status conference, in an effort to clarify the issues that would need to be resolved with respect to the amended claims, the Court set a date by which the Objectors were to file Responses to TNC's amended statements of claimant.

On February 15, 2018, TNC filed a table that summarized its claims for water rights. It listed each potential water right which it intended to pursue along with its associated statement of claimant, basis of right, point of diversion, place of use, quantity of water, use, priority date, claimant, landowner and owner of the water right. On March 22, 2018, TNC filed an amended table of claimed water rights. The Nature Conservancy also withdrew a number of statements of claimant.

On March 30, 2018, SRP timely filed a Response to TNC's tables stating that if the water right characteristics included in the tables were adopted, those revisions would resolve SPR's objections to the WFRs. *SRP Response to Summary Abstract Table*, dated March 30, 2018. The Tribes joined SRP's Response and similarly stated that "the information in the revised March 22<sup>nd</sup> table, if adopted as part of amended WFRs, would resolve the Tribes' objections to those WFRs." *San Carlos Apache Tribe's Response and Notice of Joining Salt River Project's Response to Summary Abstract Table*, dated March 30, 2018. The Response filed by BHP Copper Inc. and ASARCO LLC stated that they were willing to reach an agreement with TNC but that they reserved their objections filed in 1992 in the event the matter did not settle. The United States, the Gila Indian Community, the City of Phoenix, the Pascua Yaqui Tribe, and the Yavapai Apache Nation did not file Responses to TNC's tables.

On April 4, 2018, a status conference was held for the purpose of determining the Objectors' positions to TNC's amended table summarizing its claimed water rights. Represented at status conference were the following Objectors: SPR, the Tribes, BHP Copper, Inc., ASARCO LLC, City of Phoenix, the Pascua Yaqui Tribe, and the Yavapai Apache Nation. No appearance was made on behalf of the United States or the Gila Indian Community. Based on the results of the status conference and papers filed, draft abstracts were prepared using the information from TNC's tables and provided to ADWR for review. Arizona Department of Water Resources issued reports on May 21, 2018, and June 29, 2018. Thereafter amended abstracts were distributed to the parties for comments and objections. Objections were filed by TNC to ADWR's report and the revised abstracts. The Tribes objected to the abstracts on the grounds that additional specificity was required with respect to the places of use, points of diversion and a maximum rate of diversion had to be included in the abstracts for irrigation water uses. No other Objectors filed any comments or objections to the abstracts.

In response to the Tribes' objections, TNC prepared maps and amended abstracts with amounts of irrigated acreage and maximum diversion rates and represented that it distributed the documents to all of the parties on the Court-approved mailing list on December 3, 2019. Thereafter, the Court ordered the parties to either file a statement that all of their objections to the WFRs had been withdrawn based upon an approval of the proposed abstracts prepared by TNC or to attend the March 20, 2019 scheduling conference at which dates would be set to adjudicate the remaining objections.

## **B. Waiver**

Waiver is the intentional relinquishment of a known right. *See Am. Cont'l Life Insur. Co. v. Ranier Const. Co., Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980); *Robert W. Baird & Co. Inc. v. Whitten*, 244 Ariz. 121, 125, ¶ 9, 418 P.3d 894, 898 (App. 2017) (“‘Waiver’ is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right.” *Green v. United States*, 355 U.S. 184, 191, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)). A waiver can also occur when a party's acts are so inconsistent with an intent to enforce a right that an intention to relinquish the right can be inferred. *Salyers v. Metro. Life Ins. Co.*, 871 F.3d 934, 938 (9th Cir. 2017).

To date, the proceedings in these consolidated cases have provided a forum in which the parties could work together to resolve the objections filed to the WFRs. The claimant, TNC, was given time to amend its claims for water rights. Thereafter, the Objectors were given the opportunity to evaluate the amended water claims in the form of TNC's table, TNC's amended table, draft abstracts, ADWR's reports on the draft abstracts, and amended abstracts and maps. The Tribe's Response was filed at an intermediate step in the process of attempting to resolve objections to the WFRs.

The Tribes' Response did not withdraw its objections; instead, it made a conditional statement that the adoption of the water right characteristics in TNC's tables in the WFRs would resolve its objections. While TNC could reasonably believe from the statement that the Tribes accepted the priority dates, the Response did not unequivocally withdraw the objections. Given the rights granted to an objector under A.R.S. §45-256(B), an intention to relinquish the right to assert objections to a watershed file report will not be inferred from a conditional statement in a pleading filed in response to a claimant's summary of water right characteristics for a set of water rights during what was essentially a settlement stage of the case. Accordingly, the Tribes did not waive their rights to object to the priority dates set forth in WFRs 115-05-AC-003, 115-05-AC-004, and 115-05-AC-005.

### **C. Future Proceedings**

These contested cases have now been pending for more than two years. The Nature Conservancy has devoted a substantial amount of time and effort to refine its claims for water rights and prepare forms of abstracts and maps that describe those water rights. The Objectors have participated in this process at varying levels of engagement ranging from meeting all deadlines and attending all proceedings to no appearances. Although the parties may still be able to reach a stipulated settlement of the objections, the time has come to adopt a schedule for the resolution of the objections by the Court.

**IT IS ORDERED** that the parties shall file a Case Information Report for this consolidated, contested case as required by §8.03[1], Rules for Proceeding Before the Special Master by **July 12, 2019**.

**IT IS FURTHER ORDERED** setting a Scheduling Conference at which dates will be set for the completion of discovery, prehearing motions, a Readiness Conference and a trial to resolve the objections to the WFRs. Proposed dates are November 1, 2019, January 15, 2020, April 2, 2020, and April 6, 2020, respectively. The Scheduling Conference shall be held at 3:00 p.m. on **July 24, 2019**, in the Superior Court of Arizona, 201 West Jefferson Street, Courtroom 301, Central Court Building, Phoenix, AZ 85003-2202.

Instructions for telephonic appearance:  
Dial: 602-506-9695 (local)  
1-855-506-9695 (toll free long distance)  
Dial Participant Pass Code 357264#

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