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11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
12 **IN AND FOR THE COUNTY OF APACHE**

13 IN RE THE GENERAL ADJUDICATION
14 OF ALL RIGHTS TO USE WATER IN
15 THE LITTLE COLORADO RIVER
16 SYSTEM AND SOURCE

Civil Case No. 6417-033-9005R
(Consolidated)

**ARIZONA DEPARTMENT OF WATER
RESOURCES' COMMENTS ON THE
REPORT OF THE SPECIAL MASTER
ON SUMMARY PROCEEDINGS IN
THE SILVER CREEK WATERSHED**

Assigned to the Hon. Mark H. Brain

(Special Master Susan Ward Harris)

17 **CONTESTED CASE NAME:** *In re Reporting of Diversion Information and Other*
18 *Objections*

19 **DESCRIPTIVE SUMMARY:** The Arizona Department of Water Resources hereby
20 submits its comments to the Report of the Special Master on Summary Proceedings in the
21 Silver Creek Watershed filed August 23, 2022.

22 **NUMBER OF PAGES:** Eight

23 **DATE OF FILING:** February 17, 2023
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1 The Arizona Department of Water Resources (“the Department” or “ADWR”) hereby
2 submits its comments to the Report of the Special Master on Summary Proceedings in the
3 Silver Creek Watershed filed August 23, 2022 (“Report”).

4 I. Summary of ADWR’s Position

5 ADWR generally agrees with the Special Master’s findings and believes that summary
6 proceedings are appropriate for certain stockponds, stockwatering, and wildlife watering
7 uses in the Silver Creek watershed because those uses do not cause a significant impact to
8 other water users or the available water supply. ADWR disagrees with three specific
9 recommendations in the report. First, ADWR disagrees that a stockwatering use from an
10 artificial storage facility where the use is solely for stock and wildlife watering and the
11 capacity is not more than 15 acre-feet should be adjudicated as a stockpond use.¹ ADWR
12 believes that such uses should be adjudicated as stockwatering uses. ADWR also
13 disagrees that the legal descriptions for *de minimis* stock and wildlife watering uses and
14 stockponds should be described to the quarter-quarter section in which the use occurs,
15 with certain exceptions.² ADWR believes that stock and wildlife watering uses and
16 stockpond uses should be located specifically when it is feasible to do so. ADWR’s
17 position on these recommendations is detailed more fully in the paragraphs below.

18 II. Stockwatering uses from artificial storage facilities with less than 15-acre feet
19 capacity should be adjudicated as “stockwatering” beneficial uses.
20

21 In the Report, the Special Master recommended that a stockwatering use from an
22 artificial storage facility where the use is solely for stock and wildlife watering and the
23 capacity is not more than 15 acre-feet should be adjudicated as a “stockpond” use.³
24

25 ¹ Report of the Special Master on Summary Proceedings in the Silver Creek Watershed at
26 20.

² *Id.* at 22- 23.

1 ADWR believes that such uses should be adjudicated as stockwatering uses because
2 stockponds are a legally distinct type of water right.

3 Stockponds are defined in Arizona Revised Statutes (A.R.S.) § 45-251 (9) as
4 follows:

5 “Stockpond” means an on-channel or off-channel impoundment of any size that
6 stores water that is appropriable under section 45-141, subsection A and that is for
7 the sole purpose of watering livestock and wildlife.

8 A stockwatering use is defined in A.R.S. § 45-251 (10) as follows:

9 “Stock watering use” means the consumption of water by livestock and wildlife,
10 either: (a) Directly from a naturally occurring body of water, such as an
11 undeveloped spring, cienega, seep, bog, lake, depression, sink or stream; (b) From
12 small facilities, other than a stockpond, that are served by a diversion of water that
13 is appropriable under section 45-141, subsection A.

14 Based on these definitions, stockponds are legally distinguished from
15 stockwatering uses occurring at artificial storage facilities, such as drinkers or troughs,
16 and should be treated as separate beneficial uses.

17 Adjudicating a water right for stockwatering from an artificial storage facility as a
18 “stockpond” may also lead to future problems in administration and enforcement of the
19 right. For example, if the owner of a water right has a permit for “stockwatering,” but
20 their water right is adjudicated as a “stockpond,” it changes what the right holder may be
21 able to do with the right, such as potentially giving the right holder the authority to build a
22 stockpond. Adjudicating a stockwatering use as a stockpond may also change the quantity
23 of water that the right holder would be entitled to. Based on the recommendations in the
24 Report, a right holder would be entitled to 3 acre-feet annually with continuous fill for *de*
25 *minimis* stockponds, as opposed to a quantity of “reasonable use” for a stockwatering
26 beneficial use. It is unclear whether the owner of a stockwatering use that is adjudicated

³ *Id.* at 20.

1 as a stockpond would then have the right to increase their water use based on the
2 adjudicated use.

3 For these reasons, ADWR believes that stockwatering uses from artificial storage
4 facilities with less than 15-acre feet capacity should be adjudicated as “stockwatering”
5 beneficial uses. **ADWR requests the Court to modify Conclusion of Law No. 15 to
6 add the following highlighted language:**

7
8 **Conclusion of Law No. 15. A stock and wildlife watering (SW) beneficial use
9 will be adjudicated for unimproved instream watering, improved instream
10 watering, and watering at an artificial facility having a capacity of not more
11 than 15 acre-feet that is used solely by stock and wildlife.**

12 **ADWR further requests the Court to modify Conclusion of Law No. 16 to strike the
13 words “or artificial storage facility,” as follows:**

14
15 **Conclusion of Law No. 16. A stockpond (SP) beneficial use will be adjudicated
16 for a pond ~~or artificial storage facility~~ having a capacity of not more than 15
17 acre-feet that is used solely for stock and wildlife.**

18 III. Stockwatering and wildlife watering uses should be specifically located when
19 feasible.

20 In the Report, the Special Master recommended that the legal description for *de*
21 *minimis* stock and wildlife watering uses should be listed as the quarter-quarter section in
22 which the use occurs, unless there are two or more uses in the same quarter-quarter
23 section, in which case each use will be located to the nearest quarter-quarter-quarter
24 section.⁴ The Special Master made this recommendation based, in part, on the procedures
25

26 ⁴ *Id.* at 22-23.

1 used for locating *de minimis* uses in the San Pedro River watershed and in consideration
2 of the time and expense that may be required to identify the precise location of these *de*
3 *minimis* water uses or to resolve potential disputes arising therefrom.⁵ It should be noted
4 that the procedures used to describe the location of *de minimis* stockwatering uses in the
5 San Pedro River watershed stemmed from recommendations made by ADWR based on its
6 mapping capabilities in the 1990s and on ADWR's summary of procedures used to
7 identify *de minimis* uses in other western states, many of which used quarter-quarter legal
8 descriptions at the time ADWR's report was issued.⁶

9 ADWR's mapping capabilities have been significantly improved since the 1990s and
10 generally require much less time to identify the precise location of stock and wildlife
11 watering uses. ADWR believes that the legal description for stockwatering and wildlife
12 watering uses should be as specific as possible to avoid future issues in locating these uses
13 should the property be subdivided or other changes occur. Additionally, the Special
14 Master recommended that ADWR "prepare a map for each abstract that identifies the
15 place of use and point of diversion that will include the full reach of the stream or river
16 included in the right."⁷ In order to map the places of use and points of diversion, it will be
17 necessary for ADWR to specifically locate most streamside stock and wildlife watering
18 uses. It may also be necessary for ADWR to specifically locate wells associated with
19 stock or wildlife watering uses as part of a subflow zone determination. Therefore, it is
20 likely that ADWR will acquire precise location information for most, if not all,
21 stockwatering and wildlife watering uses. ADWR believes that any location information it
22 gathers should be provided in the *de minimis* abstracts and that the legal descriptions

23 ⁵ *Id.* at 12-13.

24 ⁶ADWR's Technical Report on *De Minimis* Adjudication of Domestic, Stockpond, and
25 Stockwatering Uses in the San Pedro River Watershed issued November 19, 1993 at 42
and 14-29.

26 ⁷ Report, *supra* note 1, at 23.

1 should not be limited to the nearest quarter-quarter section when ADWR can obtain more
2 specific information.

3 **ADWR requests that the Court modify Conclusion of Law No. 21 to include**
4 **the following highlighted language:**

5 **Conclusion of Law No. 21. For wildlife and stockwatering uses, the place of**
6 **use will be described to at least the quarter-quarter (1/4 1/4) section in which**
7 **the use occurs. In cases of two or more stockwatering uses or two or more**
8 **wildlife uses within the same quarter-quarter section, the rights will be**
9 **adjudicated to at least the nearest quarter-quarter-quarter (1 /4 1/4 1/4)**
10 **section.**

11 IV. Stockponds should be specifically located when feasible.

12 The Special Master made a similar recommendation with regard to legal descriptions
13 for *de minimis* stockponds, with which ADWR also disagrees. In the Report, the Special
14 Master recommended that the legal description for *de minimis* stockponds should be listed
15 as the quarter-quarter section in which the surface area of the stockpond extends, unless
16 there are two or more stockponds in the same quarter-quarter section, in which case each
17 stockpond will be located to the nearest quarter-quarter-quarter section.⁸

18 Following this procedure is potentially more problematic for stockponds than for
19 stock and wildlife watering uses. First, there are frequently multiple stockponds within a
20 quarter-quarter-quarter section, which will necessitate more specific legal descriptions for
21 each pond. Stockpond water rights are tied to specific parcels and cannot be moved to
22 other parcels, typically, without going through the process of severance and transfer.⁹ If a
23 *de minimis* stockpond water right holder sought to sever and transfer their water right to
24 another parcel, the right holder would be required to specifically locate the place of use
25 and point of diversion, and it would benefit the court and parties to have a specific legal

25 ⁸ *Id.*

26 ⁹ A.R.S. § 45-172.

1 description in the water right abstract. A specific location may also be required for use
2 during future enforcement proceedings which may be initiated by a senior right holder.

3 The Stockpond Registration Act (A.R.S. §§ 45-271- 276) requires ADWR to obtain
4 specific information about each qualifying stockpond, requires the Director to conduct an
5 investigation to verify the material facts made in a claim for a stockpond water right, and
6 requires certificate holders to certify certain facts about each stockpond every five years;
7 thus, ADWR likely possesses specific legal descriptions for such stockponds, and in most
8 cases, has already geolocated the stockponds. ADWR believes that any location
9 information it gathers should be provided in the *de minimis* abstracts and that the legal
10 descriptions should not be limited to the nearest quarter-quarter section when ADWR has
11 obtained more specific information.

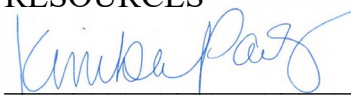
12 **ADWR requests that the Court modify Conclusion of Law No. 22 to include**
13 **the following highlighted language:**

14 **Conclusion of Law No. 22. For stockponds, the quarter-quarter (1/4 1/4)**
15 **sections in which the surface area of the stockpond extends will be utilized for**
16 **the legal description of the place of use unless more precise location**
17 **information is available. In the case of two stockponds in the same quarter-**
18 **quarter section, each stockpond will be located to at least the nearest quarter-**
19 **quarter-quarter (1/4 1/4 1/4) section.**

19 These comments will be posted to ADWR's website's
20 <https://new.azwater.gov/adjudications>.

21 **DATED** this 17th day of February, 2023.

22 ARIZONA DEPARTMENT OF WATER
23 RESOURCES

24 

25 Kimberly R. Parks, Deputy Counsel
26 Kome Akpolo, Deputy Counsel

1 **ORIGINAL** of the foregoing sent by
2 first-class mail on February 17, 2023 to:

3 Clerk of the Superior Court for Apache County
4 ATTN: Water Case
5 P.O. Box 365
6 St. Johns, Arizona 85936

7 **COPY** of the foregoing sent by
8 first-class mail on February 17, 2023 to:

9 Special Master Susan Ward-Harris
10 Maricopa County Central Court Building
11 Central Court Building
12 201 West Jefferson Street, Suite 3A
13 Phoenix, AZ 85003-2205

14 **COPIES** of the foregoing sent by
15 first-class mail on February 17, 2023 to
16 all parties on the court-approved mailing list
17 for Civil Case No. 6417-033-9005R.

18 *Lizette Fuentes*
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