

1
2
3
4
5
6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF MARICOPA
8

9
10 IN RE THE GENERAL ADJUDICATION
11 OF ALL RIGHTS TO USE WATER IN
12 THE GILA RIVER SYSTEM AND
13 SOURCE

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
(Consolidated)

14 Contested Case No. W1-11-1675

15 ORDER GRANTING ST. DAVID
16 IRRIGATION DISTRICT'S MOTION
17 FOR CLARIFICATION

18 CONTESTED CASE NAME: *In re St. David Irrigation District*

19 HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

20 DESCRIPTIVE SUMMARY: Order excluding United States' expert report.

21 NUMBER OF PAGES: 4

22 DATE OF FILING: March 31, 2020
23
24

25
26 On January 17, 2020, the United States filed a Notice that it had mailed a copy of its
27 Expert Witness Reports. On February 25, 2020, St. David Irrigation District ("the District") filed
28

1 third methodology, maximum potential amount, calculates the amount of water needed to irrigate
2 the highest water-using crop, i.e., alfalfa in the San Pedro HSR. Vol. 1 San Pedro HSR at 141-
3 142. Objections filed to the watershed file reports at issue in this case range from objections to
4 elements of these methodologies to the entirety of a particular methodology.

5 The U.S. Report is a survey of the initiation of water uses and the number of acres
6 historically irrigated within the current boundaries of the St David Irrigation District. It appears
7 to provide a wealth of information about the settlement dates of the land, the number of cultivated
8 acres, and, in some cases, the source of water used for irrigation. It also provides information
9 about the types of crops that were historically grown in the area. A typical description of
10 historical use is as follows:
11

12 Thomas Marmont was the first patentee to settle in Section 4, taking
13 residence on there on August 1, 1877. He filed a homestead claim for the
14 SW1/4 NW1/4 and NW1/4 SW1/4 of Section 4 and SE1/4NE1/4 and
15 NE1/4 SE1/4 of Section 5, totaling 160 acres. Testifying for his final proof
16 on September 11, 1882, Mamont listed his improvements as a house, milk
17 house, corral, shade trees, and garden. He reported that he had cultivated
18 “about 6 acres, raised corn, beans, pumpkins, potatoes, and small
vegetables” [sic]. (footnote omitted). He made no claims regarding water
work improvements, however one of his witnesses, Michael Murphy,
stated that Mamont had “opened out 3 springs.” [footnote omitted].

19 U.S. Report at 28.

20 While priority dates, the identification of place of use, and the source of water are crucial
21 elements of a water right, in this phase of the litigation the issue is on the quantity of water used
22 for irrigation and the proper methodology to be used to determine quantity. The U.S. Report
23 does not provide information relevant to the determination of the proper methodology to quantify
24 irrigation use. Expert testimony which does not relate to the issue in the case is not relevant and,
25 therefore not admissible. *State ex rel. Montgomery v. Miller*, 234 Ariz. 289, 298, ¶ 21, 321 P.3d
26 454, 463 (App. 2014).
27
28

1 a motion seeking an order that it is not required to provide a rebuttal report to the report titled "An
2 Assessment of the Historically Irrigated Acreage within the St. David Irrigation Boundaries,
3 1877-1923, and the Pre-1919 Forfeiture Provisions of Arizona's Water Code" dated January 13,
4 2020 ("U.S. Report"). The District argued that the survey of water use from 1877 to 1923 is not
5 relevant to any of the three issues designated for trial and the discussion of the law governing pre-
6 1919 forfeiture is not an appropriate topic of expert testimony. The reason that the District elected
7 to present its motion as a Motion for Clarification as opposed to filing a Motion in Limine to
8 preclude the use of the U.S. Report in this phase of the proceeding is not clear. No response to
9 the Motion has been received.

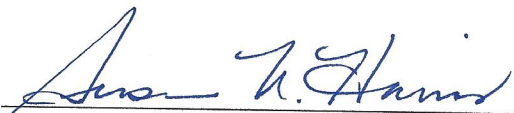
11 The three issues that are the subject of the scheduled trial are:

- 12 (1) The correct methodology to quantify the amount of appropriative water used for
13 irrigation;
- 14 (2) Whether water rights with a priority of date prior to 1919 are subject to forfeiture; and
- 15 (3) The identification of the points of diversion.

17 The first issue arises from the legal requirement that the quantity of an appropriative right
18 depends upon beneficial use which "shall be the basis, measure, and limit to the use of water."
19 A.R.S. §45-141(B). Arizona Department of Water Resources ("ADWR") developed three
20 methodologies to estimate the amount of water used for irrigation provided in the watershed file
21 reports. Specifically, ADWR reported for each irrigation use involving more than two acres: a
22 maximum observed amount, a regional amount, and a maximum potential amount. It based the
23 maximum observed quantity amount on field investigation and a combination of factors that
24 results in the highest amount of water used in any one year of ADWR's investigation. The
25 regional amount is based on typical farm conditions in an area found during ADWR's five-year
26 investigation period and includes only those crops that are irrigated for maximum yield. The
27
28

1 The U.S. Report also contains a four-page argument based on a compilation of statutory
2 language and case law concerning the second issue of whether water rights with a priority of date
3 prior to 1919 are subject to forfeiture. The District does not argue that the information provided
4 is irrelevant. Instead, it argues that an expert opinion cannot be properly admitted on a question
5 of law. To the extent that the author offers opinions on legislative history to explain the proper
6 interpretation of the Arizona statutes governing water rights, the opinion is improper. *Bacchi v.*
7 *Massachusetts Mut. Life Ins. Co.*, 12-CV-11280-DJC, 2016 WL 1170958, at *3 (D. Mass. Mar.
8 23, 2016). Accordingly,

10 **IT IS ORDERED** that the U.S. Report shall be excluded from this first phase of the
11 proceedings and the St. David Irrigation District need not file a rebuttal to Sections 1.2 and 2 of
12 the U.S. Report until deadlines for disclosure and discovery are set in a subsequent phase of this
13 case where the information in the U.S. Report is relevant to the issues to be determined.
14

17
18 
19 Susan Ward Harris
Special Master

20 On March 31, 2020, the original of the
21 foregoing was delivered to the Clerk of the
22 Maricopa County Superior Court for filing
23 and distributing a copy to all persons listed
24 on the Court-approved mailing list for this
25 contested case.
26
27
28