

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

06/14/2018

CLERK OF THE COURT
Form V000

SPECIAL WATER MASTER SUSAN WARD HARRIS

S. Ortega
Deputy

Contested Case No. W1-103

FILED: 06/28/18

W1-103

In re: General Adjudication of All Rights to Use
Water in The Gila River System and Source

In re: San Pedro River Subflow Technical Report

Oral Argument on Objections to the Ground Report
In the Cone of Depression Methodology

MINUTE ENTRY

Courtroom CCB - 301

1:30 p.m. This is the time set for oral argument before Special Water Master Susan Ward Harris to discuss the objections and corrections to the draft report on Arizona Department of Water Resources (ADWR) Demonstration Project Re: Cone of Depression Test Methodology.

The following attorneys appear telephonically: Yosef Negose on behalf of the United States Department of Justice, Indian Resources Section; Susan B. Montgomery and Jay Tomkus on behalf of the Yavapai-Apache Nation and the Pascua Yaqui Tribe; Sharon Morris on behalf of Salt River Project; Thomas L. Murphy on behalf of the Gila

River Indian Community; and Richard L. Mabery on behalf of the Verde Ditch Company.

The following attorneys appear in-person: Kimberly R. Parks and Donna Calderon on behalf ADWR; Mark A. McGinnis, R. Jeffrey Heilman, and Patrick Sigl on behalf of the Salt River Project (SRP); Joe P. Sparks on behalf of the San Carlos Apache Tribe and Tonto Apache Tribe; Sean T. Hood, Brad Pew and Gary Gold on behalf of Freeport Minerals Corporation; John D. Burnside on behalf of the Arizona Public Service (APS) and BHP Copper Inc.; Carrie J. Brennan on behalf of the Arizona State Land Department; David A. Brown on behalf of the Gila Valley Irrigation District, the Franklin Irrigation District and the City of Cottonwood; Charles L. Cahoy on behalf of the City of Phoenix; Alexandra Arboleda on behalf of the City of Tempe; William P. Sullivan on behalf of the City of Sierra Vista and the Pueblo Del Sol Water; William H. Anger on behalf of the Cities of Avondale, Chandler, Glendale, Mesa, and Scottsdale; Cynthia J. Haglin on behalf of the City of Chandler;

Court reporter Hope Yeager is present and a record of the proceedings is also made digitally.

The Court addresses counsel with her suggested approach for moving forward with the adjudication of water rights for wells located outside the subflow zone. The Court suggests finalizing the draft report on the appropriate jurisdictional test, submitting it for review and appeal as the parties determine so that the appropriate jurisdictional test can be finally determined while proceeding to develop the test to determine which wells are currently pumping subflow and adjudicating water rights associated with those wells. The Court proposed focusing time and resources on the adjudication of wells currently pumping subflow rather than on identifying those wells that may not be subject to the adjudication.

Mark McGinnis on behalf of SRP addresses the Court regarding his suggested approach moving forward. Mr. McGinnis does not accept the pumping threshold of 1.86 gallons per minute as the definition of a small well. He also urges the Court to move forward using the Jacob Equation and asks the Court to have ADWR conduct a study to determine a small volume well exclusion as some wells are pumping such small volumes that they should not be considered in the adjudication for purposes of state law. Mr. McGinnis also proposes that any well pumping less than the standard volume be excluded from the adjudication process, and is in favor of doing step 2 only, and not step 3 with respect to those small wells.

Joe Sparks on behalf of San Carlos Apache and Tonto Apache Tribes addresses the Court regarding the small well issue and how to deal with the large category of them. The Tribes would like to see the small wells stay in and adjudicate them in a separate category where the small wells are summarily adjudicated and establish how the wells impact the water source. The Court should use its jurisdiction to adjudicate the wells and diversions off of the river. Each well owner should have time to object to the

jurisdiction and come in and prove to the court that the water from their well does not impact the river. He also suggests using a zonal approach for the wells.

Charles Cahoy on behalf of the City of Phoenix addresses the Court regarding whether the administrative review standard should be applied with respect to ADWR's report. He indicates, as stated in his pleadings, that ADWR's judgment about reliability and resource intensive testing was a reliable source.

Joe Sparks further addresses the Court. He does not believe that the Court can complete the adjudication if ADWR must use Modflow for every well as opposed to the test advocated by the United States and SRP. He believes the better way to go about this is the simpler and faster way acknowledging there will be exclusions. He believes that hydrologic reality should be used with every opportunity.

Sean Hood on behalf of Freeport Minerals addresses the Court regarding the small well issue. He agrees with the Court regarding the appropriate jurisdictional test. He shares the Court's desire to proceed with both tests in tandem and has a lack of conviction that thousands of wells will be excluded based on a pumping rate. He does not believe there is a jurisdictional problem in terms of moving forward on a step 3 analysis of a well.

John Burnside on behalf of BHP Copper and APS addresses the Court regarding the small well exclusion. He believes this phase of the case should be wrapped up, and then discuss what the consequences will be as to stages 2 and 3. He believes the medium volume wells are the wells that have the most uncertainty as to whether a well will be in or out of the adjudication process under the standard. He believes the Court's draft report correctly recognizes that the reliability of the test is a threshold factor. Mr. Burnside discusses the *res judicata* issue as it relates to performing stages 2 and 3 simultaneously and that the relationship between the two stages should be explored further.

Carrie Brennan on behalf of the Arizona State Land Department addresses the Court regarding how to move forward. Ms. Brennan states that she is in favor with what the Court has suggested with ADWR focusing on wells that are pumping subflow and believes it is a better use of ADWR's resources.

David Brown on behalf of Gila Valley Irrigation District, Franklin Irrigation District and the City of Cottonwood addresses the Court. Mr. Brown concurs with Mr. Hood's and Mr. Burnside's analyses. Mr. Brown states that a small well study can be done but that those wells cannot be adjudicated unless they are affiliated with a larger use.

Susan Montgomery on behalf of the Pascua Yaqui Tribe and Yavapai-Apache Nation addresses the Court. Ms. Montgomery states that the Tribe and Nation have not been active in the case but that they are following the case. She notes for the record that

the Tribe and Nation join in SRP's briefing. She also states that they would need to further consider what their position is on jumping to the third step.

Thomas Murphy on behalf of Gila River Indian Community agrees with Mr. McGinnis' comments today regarding the process of testing and also with what Mr. Sparks stated on the record today.

Mr. McGinnis further addresses the Court. Mr. McGinnis believes that the small well project is not precluded by statute. SRP proposes ADWR come up with a uniform standard to exclude the small wells from adjudication. Mr. McGinnis touches on cumulative impact. He suggests that the small well exclusion process be performed.

Discussion is held regarding briefing on the small well project and the order of steps 2 and 3. Mr. McGinnis requests that the Court not issue her final report until further briefing is complete.

Joe Sparks on behalf of San Carlos Apache and Tonto Apache Tribes addresses the Court further regarding some of counsel's earlier suggestions on how to move forward and believes Mr. Brown's statute needs to be tested.

The Court and counsel discuss briefing on the small well project and stages 2 and 3.

Kimberly Parks on behalf of ADWR addresses the Court regarding their position on the Court's draft report. She emphasizes their position on staff shortages and difficulty hiring individuals with the necessary expertise.

The Court will set a schedule for briefing on the small well project and stages 2 and 3.

3:04 p.m. Matter concludes.

LATER:

The goal of this portion of the adjudication is to develop a test that will determine whether wells located outside the subflow zone (the Wells) are pumping subflow and address the water rights under state law of those Wells that are determined to be pumping subflow. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, ¶48, 9 P.3d 1069, 1083 (2000), *cert. denied sub nom. Phelps Dodge Corp. v. U.S.*, 533 U.S. 941 (2001) ("*Gila IV*") At issue here is the need to adopt an order of proceedings that will make the highest and best use of ADWR's, the Court's and the parties' limited resources to accomplish this goal.

When the proceedings began on ADWR's Cone of Depression Test Methodology, a two-step process was proposed to address the Wells. First, determine an appropriate jurisdictional test to determine which Wells will be subject to the Court's jurisdiction based on their maximum cones of depression developed using steady state pumping. Or, stated in the negative, determine which Wells will never be subject to the Court's jurisdiction for state law purposes. Second, develop a test to address Wells pumping subflow by virtue of their cones of depression.

The high number of Wells in the San Pedro watershed makes the application of any of the proposed forms of a jurisdictional test costly in terms of the thousands of hours required for ADWR to apply any of the proposed tests and the many thousands of hours that the Court and the parties will spend litigating the results of the test for individual Wells when disputes arise as to whether a particular Well's maximum cone of depression as modelled using the jurisdictional test will drawdown the subflow zone boundary by more or less than 0.1 foot.

In its Objections to the Special Master's Draft Report dated May 31, 2018, ADWR sets forth three general categories of wells:

1. Small Wells pumping 1.89 gpm or less;
2. Medium Wells pumping between 1.89 to 31 gpm; and
3. Large Wells pumping more than 31 gpm.

Three proposals have been made to deal with the Small Wells in the pleadings and at the oral argument: exclude the Small Wells from the adjudication; set aside consideration of the Small Wells until a later date; and summarily adjudicate the Small Well. No specific proposals have been made with respect to the Medium and Large Wells. Based on the Demonstration Project, the results from the different proposed tests are least consistent in projecting the maximum, future drawdown of the Medium Wells.

IT IS ORDERED that ADWR shall file by **July 30, 2018**, a report which analyzes the Small Wells as proposed in its Objection at 7. If ADWR determines that the category of the Small Wells should include Wells with a pumping rate greater than 1.89 gpm, it may expand the scope of its report to cover the wells pumping at a rate it determines to be a Small Well that should be excluded from the adjudication. The report or an appendix to the report should include the underlying data used to generate results including distances between the well and the source of recharge and the boundary of the subflow zone, transmissivity and pumping rate. If ADWR determines that 30 days is not sufficient time to complete a Small Well Report, then ADWR shall file by July 9, 2018, the date by which the report shall be submitted.

IT IS FURTHER ORDERED that the parties shall file by **August 6, 2018**, a brief, that does not exceed 25 pages, describing a proposed approach to the adjudication of the Wells. Among the issue that should be addressed with specificity are the following:

1. What is the goal of these proceedings to adjudicate state water rights for the Wells?
2. How does the implementation of the jurisdictional test as the first step of a two-step process advance or delay the goal?
3. How does the implementation of the jurisdictional test as the second step of a two-step process advance or delay the goal?
4. What due process issues are raised in the determination of the appropriate procedure?
5. What processes should be applied to Small Wells, as the term “Small Well” is defined by the party?

IT IS FURTHER ORDERED that a conference to consider the proposals shall be held at 9:30 a.m. on September 14, 2018 before:

Special Master Susan Ward Harris
Superior Court of Arizona
201 West Jefferson Street
Courtroom 301
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 for Contested Case Number W1-103.