

SUPERIOR COURT OF ARIZONA
APACHE AND MARICOPA COUNTY

06/18/2013

CLERK OF THE COURT
FORM V000

HONORABLE MARK H. BRAIN

A. Melchert
Deputy

W-1, W-2, W-3, W-4(Consolidated)

Civil No. 6417

FILED: 07/02/2013

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

W-1, W-2, W-3, W-4 (Consolidated)

In Re the General Adjudication
of All Rights to Use Water in
The Little Colorado River System and Source

CV 6417

MINUTE ENTRY

This matter came before the Court for a hearing on April 25, 2013 to discuss potential improvements to the adjudications. Since then, the Court has spent a fair amount of time mulling over the parties' various comments and arguments, a daunting task given the history and complexity of the litigation. The Court has also discussed the matter with Special Master Schade. Without attempting to address everything raised at the hearing, the Court offers the following thoughts and comments.

It is clear that the parties are frustrated with the pace of the adjudications. The Court shares that sentiment; the cases have gone on longer than most thought possible at their inception. This Court's perception is that law surrounding "subflow" has proven to be the root cause of the delay—whatever one might think of that concept from a philosophical perspective, it has proven to be extraordinarily difficult to apply in practice. But at this juncture, there is no going back.¹ The good news is that we appear to be

¹ *E.g. In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993), and *In re the General Adjudication of All Rights to Use Water in the Gila*

making substantial progress in finally determining the subflow zone of the San Pedro River, and that having done so, there is reason to believe that mapping the subflow zone of the remaining rivers will be easier (things always being more difficult the first time).² The Court believes that the framework provided in Pretrial Order No. 1 continues to be valid.

The parties have indicated that they want more of the Court's time. They will get it. A number of the parties have also indicated they wish to avoid the current "two-step" process, through which they incur significant fees (and the attendant delays) by litigating issues before the Special Master and then the Court. The Court is sympathetic to this concern, and believes that it would be proper for the Court to take the lead on various issues.³ In particular, it appears appropriate to transfer the Fort Huachuca, SPRNCA and Aravaipa Canyon cases to the Court in the near future. The parties are encouraged to submit a specific proposal for transferring Fort Huachuca to the Court, so that the Court can set aside time to hold hearings in that matter, including an evidentiary hearing. The Court requests a proposal by **August 15, 2013**.

There appears to be a broad consensus, and the Court agrees, that the Hydrographic Survey Reports (HSRs) should be cut back to the minimum requirements of the existing statutes. ADWR is invited to submit a proposal to the extent it believes (or is concerned that) the statutes are unclear.

The Court appreciates the parties' input, but does not believe that the following suggestions are meritorious:

- Updating the 1990 Final Silver Creek HSR. The Court does not believe this is the appropriate time to revisit Silver Creek. Indeed, the Court believes that the litigation should first focus on parties who likely have priority, including the tribal and governmental claims. In that regard, it is appropriate for ADWR to continue finalizing the Hopi HSR as a priority matter.
- Deconsolidate the Gila River Adjudication. For better or worse, the Gila River and its tributaries are one system, and the Court does not see how deconsolidating that system into components will accomplish anything valuable.

River System and Source, 198 Ariz. 330, 9 P.3d 1069 (2000), *cert. denied sub nom. Phelps Dodge Corp. v. U.S.*, 533 U.S. 941 (2001).

² In addition, the Court notes that finally identifying the subflow zone will go a long ways towards adjudicating a number of claims along the San Pedro, as it will allow the parties to turn their attention to whether the wells along that zone are pumping subflow (and exclude those claimants whose wells are not pumping subflow).

³ Some parties indicated that the Court should take the lead on issues of broad legal significance. The problem, of course, is in identifying those issues. The Court is open to suggestion.

- Have the parties submit their own expert reports regarding such things as the subflow zone. If ADWR thought it would be useful to it, the Court would be more amenable to considering such an idea, but ultimately, ADWR has to submit its own report, and as the Court now understands it, ADWR does not believe that such input would be useful.
- Holding a hearing on whether the Gila River is “overappropriated.” Perhaps it is, but there are more valuable ways to spend time (and to the extent it is, new claimants are still entitled to establish priority for excess water and/or for water rights that are later available due to abandonment or forfeiture by those with priority).

The Court does not believe it appropriate (and indeed, views it as presumptuous) to comment on suggestions that require legislative changes.

A copy of this order is mailed to all persons listed on the Court approved mailing lists for the Gila River Adjudication, W-1, W-2, W-3, and W-4 (Consolidated), and the Little Colorado River Adjudication, Civil No. 6417, both dated January 10, 2013.