

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
GILA RIVER SYSTEM AND SOURCE

DATE: July 14, 2010

CIVIL NO. W1-11-232
(Consolidated)

ORDER DIRECTING THE
UNITED STATES TO AMEND
ALL ITS STATEMENTS OF
CLAIMANT, DIRECTING THE
ARIZONA DEPARTMENT OF
WATER RESOURCES TO
COMPLETE TECHNICAL WORK,
AND DESIGNATING A
STEERING COMMITTEE

CONTESTED CASE NAME: *In re San Pedro Riparian National Conservation Area.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master directs the United States to amend its statements of claimant to identify all claimed water rights and their attributes, including reserved and state law rights, for the San Pedro Riparian National Conservation Area, directs the Arizona Department of Water Resources to complete certain technical work concerning the claims of the United States, and designates a steering committee.

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The Special Master invited the parties to submit comments and recommendations concerning the next phase of this case. The Special Master has considered all the comments in crafting the following steps to advance this case.

A. Amendments to the Claims of the United States

The 1991 Final Hydrographic Survey Report for the San Pedro River Watershed (“San Pedro HSR”) provides a 31-page report and two primary watershed file reports describing the water right claims of the United States for the conservation area.¹ The Special Master believes the information is not only limited in light of subsequent statutory amendments to A.R.S. §45-256 but also is likely outdated in large part.

The legislature amended A.R.S. §45-256 in 1995. The amendments direct ADWR to provide information that was not required for the 1991 San Pedro HSR. The information in the HSR is at least 20 years old. Proceeding on the basis of incomplete and outdated information does not fulfill the objectives of a general stream adjudication.

On February 1, 2006, the United States filed a second amendment to its Statement of Claimant No. 39-13610 “quantify[ing] the federal reserved water right” for the San Pedro Riparian National Conservation Area (“SPRNCA”).² The amendment lists dams, ponds, seeps, springs, tanks, and wells. The Arizona Department of Water Resources (“ADWR”) has not reported on this information.

Since then, the Special Master has determined issues of federal law withdrawal, reservation, uses, and priority and the status of a vested state law water right. This case has progressed to a point where the quantification of claimed rights must be addressed.

A common thread running through the majority of the comments is the need to have a comprehensive updated statement of all the water rights and their attributes, including reserved and state law rights, which the United States claims for the SPRNCA. Furthermore, the updated information should allow ADWR to prepare a report consistent with A.R.S. § 45-256.

The United States suggests an evidentiary hearing process while other parties suggest the filing of comprehensive updated claims and their review by ADWR. An evidentiary hearing process might speed this case, but it would entail jumping over steps required by the adjudication statutes, thereby injecting potentially fatal elements into this case.³

The Special Master will request the United States to amend its statements of

¹ Vol. 1, Hydrographic Survey Report for the San Pedro River Watershed 465-96 (Nov. 20, 1991); vol. 3, 2-45 (WFR 111-23-AAA-001) and 2-52 (WFR 111-24-CCB-011).

² Letter of Patrick Madigan, Field Manager, Arizona Bureau of Land Management, to ADWR (Jan. 31, 2006). The letter is part of the amendment submitted to ADWR.

³ Although not adopted, the suggestion of the United States is inventive which the Special Master asked the parties to be in their comments.

claimant for all water rights and their attributes for the conservation area, including claimed reserved and state law rights, taking into consideration the determinations made in the two rounds of issue briefing. The Special Master will provide the United States nine months to file its amendments, but earlier compliance is strongly encouraged.

B. ADWR Technical Report

The majority of the comments suggest that ADWR prepare a report consistent with A.R.S. § 45-256. The legislature amended A.R.S. § 45-256(B) to require that an HSR contain certain information that was not required when the 1991 San Pedro HSR was prepared. For example:

“The report shall list all information that is obtained by the director and that reasonably relates to the water right claim or use investigated. The report shall also include the director's proposed water right attributes for each individual water right claim or use investigated as prescribed by this article.”

The 1991 HSR does not contain information regarding ADWR’s “proposed water right attributes for each” claimed right. This information should be compiled at this time, as the adjudication is subject to the amended statutes.⁴

ADWR indicates it can complete the following technical work:

“(1) summarizing the federal claims as amended, as well as the current state-based water rights and claims, (2) evaluating the methodologies used by the United States to quantify its federal claims, and (3) evaluating the quantities claimed for the state-based water rights and claims through field investigations.”⁵

Some parties commented that ADWR does not have the expertise to analyze the quantification of federal reserved rights.⁶ ADWR is charged with providing the requisite technical studies and investigations.⁷ Examining the attributes of reserved water rights is within the scope of its statutory duties set forth in A.R.S. § 45-256. It is premature to assume it is not within its competency. Moreover, the adjudication of reserved water claims is a crucial task Arizona has undertaken. Until proven otherwise, the expectation is that ADWR can do its job.

The Special Master will direct ADWR both to prepare a report consistent with

⁴ See *In re Dos Cabezas Power Dist.*, 17 Ariz. App. 414, 420, 498 P.2d 488, 494 (1972).

⁵ ADWR’s Response to Comments Regarding the Next Phase of this Contested Case 2 (May 7, 2010).

⁶ The position is based on A.R.S. § 45-256(A) which states that “the master shall request technical assistance from [ADWR] in all aspects of the general adjudication with respect to which [ADWR] possesses hydrological or other expertise.”

⁷ *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 214, 972 P.2d 179, 198 (1999).

A.R.S. § 45-256(B) and undertake the specific work ADWR indicates it can do.

The United States commented regarding the Court's October 21, 2003, order concerning the notice requirements for a contested case supplemental HSR. The United States posits that ADWR does not have the staff and funds to generate and distribute the report as the order directs. While understandable, this issue does not have to be addressed now because circumstances could change by the time ADWR's report is due.

C. Contested Case Steering Committee

This case presents substantive legal and procedural issues whose resolution would benefit by having a formal process that facilitates litigation management. Pre-Trial Order No. 1 Re: Conduct of Adjudication encourages the use of steering committees.⁸ The Special Master will designate a steering committee consisting of the parties who have so far actively participated in this case to discuss proper and feasible ways to resolve legal and procedural issues that exist currently or may arise in the future. The committee can submit recommendations to the Special Master that concern briefing of issues, completion of technical work by ADWR, and other matters that will advance this case.

The steering committee is not expected to function strictly in accordance with all the requirements set forth in Paragraph 9 of Pre-Trial Order No. 1 as modified, as this committee is limited to acting in this contested case. The committee is neither a settlement nor a trial committee. It is intended to foster discussions, generate ways to resolve disputed legal and procedural issues, and manage litigation as the issues become more complex, and we undergo a period of limited resources. A party may decline, without explanation, to participate on the committee. A replacement will be appointed. The Special Master will not appoint a chair leaving that decision and selection to the members. The committee's meetings shall be open to all claimants.

D. ADWR Land Status Report

On July 2, 2010, ADWR filed its Land Ownership Within the San Pedro Riparian National Conservation Area Report that will help to determine the land size and ownership status of the area. Depending on the comments parties may file concerning the report, further hearings may be held.

IT IS ORDERED:

1. Designating a steering committee consisting of the following parties: United States Bureau of Land Management, ASARCO LLC, Babacomari Ranch Company, LLLP, Freeport-McMoRan Corporation, Salt River Project, San Carlos Apache Tribe and Tonto Apache Tribe, and the Sierra Vista Parties. Each party shall have one representative on the committee. A party may decline, without explanation, to be a member of the committee. The Special Master will appoint a replacement.

⁸ Pre-Trial Order No. 1 Re: Conduct of Adjudication ¶ 9 (May 30, 1986), modified (Apr. 14, 2010).

On or before **October 15, 2010**, the steering committee shall meet initially to discuss proper and feasible ways to resolve legal and procedural issues that exist currently or may arise in the future. The committee is not expected to function strictly in accordance with all the requirements set forth in Paragraph 9 of Pre-Trial Order No. 1 as modified.

The committee shall meet as often as the members deem appropriate. Meetings shall be open to all claimants. The committee can present recommendations that concern issue briefing, completion of technical work by ADWR, and other matters that will advance this case.

2. On or before **April 15, 2011**, the United States shall amend its statements of claimant to identify all claimed water rights and their attributes, including reserved and state law rights, for the conservation area. The amendments shall provide information and data that will allow ADWR to prepare a report consistent with A.R.S. § 45-256. The amendments shall take into account the determinations made in the Special Master's orders dated March 4, 2009, and March 19, 2010.

3. On or before **April 16, 2012**, ADWR shall review the amended claims and file a report consistent with A.R.S. § 45-256. The report shall include summarizing the amended claims for reserved and state law water rights, evaluating the methodologies used by the United States to quantify its federal claims, and evaluating the quantities claimed for the state law water rights and claims through field investigations.

4. The foregoing deadlines for the United States and ADWR are maximum timelines. If feasible, earlier compliance is strongly encouraged.

5. The Special Master may schedule telephonic conference as requested.

DATED: July 14, 2010.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On July 14, 2010, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-232 dated January 20, 2010.

/s/ Barbara K. Brown
Barbara K. Brown