

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: June 28, 2007

CIVIL NO. W1-11-232  
(Consolidated)

SCHEDULING ORDER  
DESIGNATING INITIAL  
ISSUES FOR BRIEFING

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 issues a Scheduling Order designating six issues for briefing, setting timelines for disclosure statements, discovery, and motions, and removing parties from the Court approved mailing list.

NUMBER OF PAGES: 8.

DATE OF FILING: June 28, 2007.

The Special Master agrees with the majority of the parties that pending the completion of a supplemental contested case hydrographic survey report (“supplemental HSR”) for the San Pedro Riparian National Conservation Area (“SPRNCA”), certain issues, whose determinations will be important in this contested case, can be addressed.

**A. Issues, Disclosures, and Discovery**

Because the SPRNCA was established by a Congressional act which contains provisions dealing with “water rights,” at the outset it should be addressed whether

Congress in enacting the legislation made an express reservation of water. If a reserved water right exists, is it express or implied? Although the act and the Congressional report provided by the United States in its comments may lead one to conclude that an express reservation was made,<sup>1</sup> this case will benefit by clarifying the nature of a reserved water right, if one exists.

The issues of what are the purposes to be served by the reservation and is water necessary to accomplish those purposes can be addressed next.

There was much discussion concerning the issue of whether Congress expressly or the United States impliedly reserved “all unappropriated waters” as of the date of the reservation. Until a supplemental HSR is completed, we will not know the extent of unappropriated waters as of November 18, 1988, the date the Congress said was the “date of priority of such reserve rights” for the SPRNCA. However, we can address whether Congress or the United States intended to reserve unappropriated waters to accomplish the purposes of the reservation.

In light of the Congressional legislation specifying a date of priority, the priority of a reserved water right, whether express or implied, can be addressed at this time.

The United States has submitted as an issue “what legal standards should be applied to determine the quantity of water reserved?” Establishing such standards might help the Arizona Department of Water Resources (“ADWR”) in its technical investigations, but the effort might unnecessarily stir a dormant hornets’ nest resting somewhere on the San Pedro subflow tree,<sup>2</sup> delay ADWR’s investigations, and could divert this briefing into technical issues which at this time should be left to ADWR’s expertise.<sup>3</sup> The quantification of a reserved water right for the SPRNCA must wait until a supplemental HSR is completed.

Phelps Dodge has submitted an issue concerning the existence and offsetting use of other water rights that might be sufficient to accomplish the purposes of the reservation. Until a supplemental HSR is completed, the full factual dimensions of this issue will not be clear, and hence the issue should wait until the HSR is filed.

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<sup>1</sup> The legislation states that “Congress reserves for the purposes of this reservation, a quantity of water sufficient to fulfill the purposes of the San Pedro Riparian National Conservation Area created by this title.” 16 U.S.C. § 460xx-1(d). Phelps Dodge Corporation (“Phelps Dodge”) believes that “Congress’ intent to reserve unappropriated waters for the SPRNCA is express within Section 102(d) of the legislation establishing the SPRNCA.” Comments 5 (June 4, 2007).

<sup>2</sup> The Congressional report provided by the United States stated the following concerning the background of 16 U.S.C. § 460xx-1(d): “[p]rior to asserting its reserved right, the [Bureau of Land Management] shall make a determination regarding the extent to which hydrologically connected groundwater is necessary to maintain the flows described above.” U.S. Comments 3 and Exhibit 1 at 4 (May 8, 2007).

<sup>3</sup> ADWR is “a provider of expert and administrative assistance....” *San Carlos Apache Tribe v. Bolton*, 194 Ariz. 68, 72, 977 P.2d 790, 794 (1999).

Disclosures, discovery, and briefing shall be limited to these issues. Because the United States likely has the majority of the documents relevant to these issues, it will be directed to file its disclosure statement before the other parties are required to file their disclosures and will be allowed more time to file its disclosures than the other parties.

The Arizona Department of Water Resources will be directed to develop and maintain an electronic data base and index of disclosed documents similar to those it created for *In re State Trust Lands* and *In re Fort Huachuca*.

## **B. Court Approved Mailing List**

Any “person who has filed a statement of claimant in this adjudication shall notify” ADWR of a change of mailing address, an assignment of a statement of claimant, or a transfer of land or claimed water right within thirty days of the change.<sup>4</sup> ADWR has a form for this purpose. Copies of orders sent to the following persons have consistently been returned undeliverable with no forwarding address: Jack K. Hughes, Edward and Ethelyn A. Lehner, and Ted. R. and Rose A. Clinton Smith. Accordingly, these persons will be removed from the Court approved mailing list for this case.

In its January 31, 2007, report of current lessees, allottees, and permittees associated with the SPRNCA, the United States did not name Sierra Ready Mix and Contracting. Because this entity’s name was obtained from the 1991 Final San Pedro River Watershed HSR, and since then the conservation area has undergone changes of permittees, Sierra Ready Mix and Contracting will also be removed from the mailing list.

The current mailing list includes three offices of the Bureau of Land Management. In order to simplify mailings, the U.S. Bureau of Land Management, Arizona State Office will be removed from the mailing list. Any of these persons may be restored to the mailing list upon written request filed with the Special Master.

### **IT IS ORDERED:**

1. Issues. The following issues shall be briefed at this time:
  - A. Did Congress in enacting the legislation establishing the SPRNCA expressly intend to reserve unappropriated waters to accomplish the purposes of the reservation?
  - B. If so, what were the purposes of the reservation?
  - C. If Congress did not expressly intend to reserve water, does the evidence establish that the United States withdrew land from the public domain and reserved the SPRNCA for a federal purpose(s)?

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<sup>4</sup> Pretrial Order No. 4 Re: Notification and Correction of Address Changes ¶¶ 2(A), (B), and (D) (Jan. 24, 2000).

D. If the land was withdrawn and reserved, what was the purpose(s) to be served by the reservation?

E. If the land was withdrawn and reserved, did the United States intend to reserve unappropriated waters to accomplish the purpose(s) of the reservation?

F. If unappropriated waters were reserved for the purpose(s) of the reservation, what is the date of priority of the reserved water right?

2. Disclosure Statements.

A. Scope. Disclosure statements shall be limited to matters concerning the issues designated for briefing.

B. Filing Date for the United States. On or before **December 27, 2007**, the United States shall file its initial Arizona Rule of Civil Procedure 26.1 disclosure statement.

C. Filing Date for All Other Parties. On or before **February 25, 2008**, all other parties shall file their initial Rule 26.1 disclosure statements.

D. Contents. All disclosures shall include information and data in the possession, custody, and control of the disclosing party as well as that which can be ascertained, learned, or acquired by reasonable inquiry and investigation. The disclosure statement shall set forth:

(1). The factual basis of a party's claim concerning each of the designated issues.

(2). The legal theory upon which each claim is based including, where necessary for a reasonable understanding of the claim, citations of pertinent legal or case authorities.

(3). The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call to substantiate its claims with a fair description of the substance of each witness' expected testimony.

(4). The names and addresses of all persons whom the disclosing party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to each claim, and the nature of the knowledge or information each such individual is believed to possess.

(5). The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6). The name and address of each person whom the disclosing party expects to call as an expert witness, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness, and the name and address of the custodian of copies of any reports prepared by the expert.

(7). The existence, location, custodian, and general description of any tangible evidence or relevant documents that the disclosing party plans to use to support its claims.

(8). A list of the documents or, in the case of voluminous documentary information, a list of the categories of documents, known by the disclosing party to exist whether or not in its possession, custody, or control and which it believes may be relevant to any of its claims concerning the designated issues, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents will be made, or have been made, available for inspection and copying. If production is not made, the name and address of the custodian of the document shall be indicated. Any document produced for inspection shall be produced as it is kept in the usual course of business.

E. Continuing Duty. All parties shall have a continuing duty to disclose as required by and in the manner provided in Rule 26.1(b)(2).

F. Service of Disclosures. All disclosing parties shall provide a notice of filing and a listing of the disclosed documents to all persons appearing on the Court approved mailing list for this case. Paper copies of disclosed documents need not be served upon the other parties in this case, as copies of documents can be obtained from ADWR.

G. Service of Lengthy Listing of the Disclosed Documents: If a party's listing of its disclosed documents, not the disclosure statement, exceeds twenty-five pages, that party shall so state in its disclosure statement and shall provide a copy of the complete listing to the Special Master, ADWR, and to those parties who request from the disclosing party a copy of the complete listing.

3. Electronic Data Base and Index Provided by ADWR. ADWR is directed to develop and maintain an electronic data base and index of all disclosed documents which shall be available on the Internet. If deemed necessary, ADWR may confer and work with any of the parties in this case to implement the electronic data base and index.

A. Electronic Format. The disclosing party shall submit to ADWR all documents and an index of the documents in accordance with the following requirements:

(1). Number each document with a unique alpha identifier and in numeric sequence. The alpha identifier is related to the name of the disclosing party.

(2). Complete a Disclosure Input Form in Microsoft Excel format for each disclosed document containing the following searchable index fields:

a. Title or description of document.

b. Unique identifying number created by the disclosing party for each document.

c. Date of publication or preparation of document.

d. Document type (article, book, letter, map, report).

e. Recipient.

f. Number of pages of document.

g. Disclosing party.

h. Date of submittal of document.

i. Subject matter of document (up to three categories).

j. Any other item that would make the disclosed document easy to find and read.

(3). Create a portable document format (.pdf) for each document.

(4). Provide a compact disc to ADWR with copies of the Disclosure Input Forms (Microsoft Excel files) and corresponding disclosure documents (.pdf files).

(5). Provide to ADWR paper copies of disclosed documents and corresponding Disclosure Input Forms. ADWR will maintain the paper copies to satisfy the Public Records Act, A.R.S. §§ 39-101 *et seq.*

B. Internet Access. ADWR shall place a blank copy of the Disclosure Input Form together with format protocols on the Internet at a domain or address made known to all persons who appear on the Court approved mailing list for this case. In order to provide access to the disclosed

documents, each index field in the Disclosure Input Form shall be subject to query. Copies of all disclosed documents and completed Disclosure Input Forms shall be available on the Internet for viewing and copying.

C. Form. To the extent possible, parties shall submit documents in the following form: single-sided, 8.5" x 11" size, no punched holes, no permanent binding (staples excepted), and no tabs.

D. Copies of Disclosed Documents. ADWR shall make available to any claimant, at the claimant's expense, a copy of disclosed documents on a CD-ROM or a paper copy. ADWR shall have the right to determine the best and most practical manner for providing copies.

E. Fees. ADWR may collect its standard fees for copies and other services rendered related to the use of the electronic data base and index.

4. Discovery.

A. Scope. Discovery shall be limited to matters concerning the initial issues designated for briefing.

B. Commencement. Parties may commence formal discovery on or after **February 25, 2008**, but prior thereto may, and are encouraged, to engage in informal discovery.

C. Completion. All discovery, including depositions, shall be completed by **June 13, 2008**.

D. Rules. All discovery related to the designated issues shall be conducted according to Arizona Rules of Civil Procedure 26 through 37, Pre-Trial Order No. 1 Re: Conduct of Adjudication ¶ 11.00, and Sections 9.00 and 11.02 of the Rules for Proceedings Before the Special Master (for purposes of Section 9.00, the United States is a Group 2 litigant).

5. Motions. On or before **June 27, 2008**, any party in this case may file the appropriate motion that presents the party's position concerning any of the designated issues. Each issue shall be separately addressed in the motion. Parties filing motions shall to the greatest extent possible present all their positions in the initial papers so as to keep the need to amend motions to a minimum. Parties sharing the same position are encouraged to file joint pleadings.

6. Responses. Responses to all motions shall be filed by **August 26, 2008**.

7. Replies. Replies to all motions shall be filed by **October 10, 2008**.

8. Page Limitations. Parties are excused from mandated page limitations for motions, responses, and replies, but reasonableness is expected.

9. Oral Argument. Oral argument will be held on all the issues. The court division, date, and time of oral argument will be announced later.

10. Signature Pages. In lieu of numerous pages with individual signatures, the Special Master will accept an avowal by the lead counsel that includes a listing of the attorneys and the parties each represents who join in the particular pleading. This allowance is made pursuant to Arizona Rule of Civil Procedure 1 that the rules “shall be construed to secure the...inexpensive determination of every action.” If a party has concerns related to Rule 11(a), that party may request or provide an individual signature.

11. Location of Oral Argument and Hearings. Unless otherwise set, oral argument and hearings will be held in the Maricopa County Superior Court in Phoenix.

12. Court Approved Mailing List. The following persons are removed from the Court approved mailing list for this case: **Jack K. Hughes, Edward and Ethelyn A. Lehner, Ted. R. and Rose A. Clinton Smith, Sierra Ready Mix and Contracting,** and the **U.S. Bureau of Land Management, Arizona State Office.** They may be restored to the mailing list upon written request filed with the Special Master.

The mailing list for this case shall include all persons listed in the new mailing list dated June 28, 2007. The mailing list will be updated as needed, and a copy will be posted at <http://www.supreme.state.az.us/wm> on the *Court Approved Mailing Lists* page.

13. Status Conference. A status conference is not set at this time. Any party may request a conference, which may be held telephonically.

DATED: June 28, 2007.

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

On June 28, 2007, 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 26, 2007 (revised June 12, 2007).

/s/ George A. Schade, Jr.  
George A. Schade, Jr.