

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: October 14, 2003

CIVIL NO. W1-103

MINUTE ENTRY

CONTESTED CASE NAME: *In re Subflow Technical Report, San Pedro River Watershed.*

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master reports on a telephonic conference held on October 10, 2003, and enters orders to facilitate the orderly and efficient conduct of cross-examination of witnesses.

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MINUTE ENTRY

A telephonic conference was held on Friday, October 10, 2003, at 10:00 a.m. (MST), to consider any matters that will facilitate the orderly and efficient conduct of cross-examination at the hearing set on October 21 and 22, 2003. All present could hear and be heard. The conference adjourned at 11:39 p.m.

The following persons participated in the telephonic conference: R. Lee Leininger and F. Patrick Barry for the United States; Thomas Shedden, Jr. from the Arizona Attorney General's office; Janet L. Ronald from the Arizona Department of Water Resources ("ADWR"); Mark A.

McGinnis and John B. Weldon, Jr. representing Salt River Project; William H. Anger representing the Cities of Chandler, Glendale, Mesa, and Scottsdale; John C. Lacy and Michael R. Urman representing BHP Copper, Inc.; John C. Lemaster and Michele Lee Lorenzen representing Arizona Public Service Company and Phelps Dodge Corporation; L. Anthony Fines representing the Upper Valley Irrigation Districts, Verde Valley Communities, and Central Valley Irrigation Districts (collectively and respectively, the Gila Valley and Franklin Irrigation Districts; the Cities of Cottonwood and Sedona and the Towns of Clarkdale and Jerome; and the Maricopa-Stanfield and Central Arizona Irrigation and Drainage Districts), and the City of Casa Grande; M. James Callahan for the City of Phoenix; L. Richard Mabery for Verde Valley claimants, Mary Margaret and John Kovacovich and Ray Wrobley; K. Russell Romney representing Bella Vista Water Company and Pueblo del Sol Water Company; John T. Hestand for Gila River Indian Community; Steven L. Wene for City of Safford, Paloma Ranch Investments, Inc., Rio Rico Properties, Inc., and Tonopah Irrigation District; Joe P. Sparks and John H. Ryley for the Apache Tribes (collectively, the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation). Kathy Dolge of the Special Master's office was present for the call.

The pretrial conference was recorded on audio tape (SF-02). Contact Kathy Dolge at (602) 542-9600 for information about obtaining a copy of the tape or a transcript.

The Special Master advised that the docket number of this proceeding is W1-103.

Discussion ensued on the motion filed by Arizona Public Service ("APS") and Phelps Dodge Corporation ("Phelps Dodge") to allow additional time to analyze and submit expert testimony on ADWR's notice of recently published soil survey maps for Cochise County. The soil survey maps (hereinafter, the "soil surveys") were prepared under the leadership of the Natural Resources Conservation Service. BHP Copper, Inc., the Upper Valley Irrigation Districts, the Verde Valley Communities, and the City of Casa Grande filed joinders in the motion. Although the time to file responses has not passed, parties spoke both in opposition to and in favor of allowing the expert witnesses to review ADWR's proposal and submitting sworn declarations and possibly rebuttals.

Mr. McGinnis opposed the motion and stated that parties will have an opportunity later to object to ADWR's proposed delineation of the subflow zone. Mr. Lemaster argued that parties should be given 45 days to file sworn declarations and 30 days to file rebuttal declarations. Mr. Barry suggested 20 and 10 days, respectively. Mr. Fines stated that another hearing on the proposed use of the soil surveys would be costly for parties. Mr. Hestand stated that while the upcoming hearing should not be continued, parties should be allowed to have their experts review ADWR's proposed use of the soil surveys. Mr. Sparks and Mr. Mabery stated they did not want more delays. The Special Master stated that if sworn declarations are allowed, a hearing may or may not be necessary.

Mrs. Ronald described the soil surveys ADWR plans to use and the extent of their potential use in the San Pedro River Watershed, and explained the reasons why ADWR recently advised the Court and parties of the soil surveys and their proposed use. Mrs. Ronald stated that Mr. Richard T. Burtell would be available to testify at the upcoming hearing about the work ADWR has done and the proposed use of the soil surveys.

The Special Master stated that the upcoming hearing for the cross-examination of expert witnesses would not be rescheduled as it would unreasonably delay this proceeding, but the Master will consider allowing additional time to allow expert witnesses to review ADWR's proposal for the use of the soil surveys and submit sworn declarations. Parties were directed to file responses to the motion by October 15, 2003.

Discussion followed regarding the motion in limine filed by the Upper Valley Irrigation Districts, Verde Valley Communities, Central Valley Irrigation Districts, and the City of Casa Grande to exclude T. Allen J. Gookin's rebuttal reports and testimony. A motion to extend the page limit to twenty pages was filed. ASARCO Incorporated filed a joinder in the motion.

Not all parties have received the motion. Several counsel pointed to the difficulty of separating expert opinions on hydrology, geology, and engineering from the legal issues that will be determined in this proceeding. Mr. Hestand moved that if the motion in limine is granted, the ruling should provide for reciprocal treatment of all expert witnesses, their reports, and testimony.

Mr. Sparks stated that objections to expert opinions should go to weight, materiality, and relevance. Mr. McGinnis stated that several of the expert opinions address the legal issues the Special Master set for hearing. The Special Master stated that he wanted to set guidelines that would not delay or confuse the issues while preserving the parties' broadest opportunity to address them.

Discussion was held about the use of email and faxes to send copies of motions and responses. Mr. Sparks expressed concern that this practice might be misused in derogation of the rules for service of pleadings. The Special Master stated that pleadings must be served pursuant to the rules, but courtesy copies may be emailed or faxed.

The Special Master stated that he wants to consider responses to the motion in limine, and a ruling will be made prior to the hearing.

The Special Master explained the procedure for premarking exhibits. Premarking exhibits will expedite the hearing. Parties were advised to call Ms. Gerri Longbein at (602) 506-8938 to make arrangements to premark exhibits not later than 5:00 p.m. on Monday, October 20, 2003. The sworn declarations and rebuttal declarations do not need to be premarked as exhibits as they are part of the record.

Several parties inquired about obtaining copies of proposed exhibits prior to the hearing. The Special Master stated that counsel who will cross-examine witnesses should provide copies of proposed exhibits to other parties participating in the hearing. Copies of exhibits shall also be provided to ADWR, the Apache Tribes, the Arizona Attorney General, and to any other party or counsel who requests copies from the submitter. Parties indicated the number of exhibits each anticipated premarking. The exhibits will be available for inspection at the Clerk's office.

In response to Mr. Lemaster, the Special Master stated that, as a matter of practicality, any exhibits introduced in any of the earlier proceedings in the adjudication (such as the 1994 subflow hearings) should be reintroduced as an exhibit for purposes of the upcoming hearing.

The Special Master has reserved October 23, 2003, as an additional hearing day. Given the number of expert witnesses scheduled to testify, the Special Master concluded that an additional hearing day should be made available. Counsel expressed appreciation for the availability of a third hearing day should it be required.

Discussion was held regarding stipulations about the witnesses being qualified to testify as expert witnesses. Mr. Fines stated he would consider stipulating that a witness is qualified to testify as an expert witness on hydrology, geology, or engineering, but opinions would be subject to objections for weight or relevance. Other counsel stated that this issue would be addressed in the responses due on October 15, 2003.

Discussion was held regarding the proposed schedule for the conduct of cross-examination submitted by counsel on September 26, 2003. Mr. Barry and Mr. Lemaster indicated that the attorneys who will cross-examine witnesses had met and had agreed on which counsel would cross-examine each witness. For convenience, parties have been divided into a groundwater users group and a surface water users group. The information as to the agreed order of cross-examination by counsel within each group will be provided to the Special Master prior to the commencement of the hearing.

Mrs. Ronald stated that ADWR will present two witnesses, namely, Mr. Dale A. Mason, the chief modeler, who will testify on the cone of depression issues, and Mr. Burtell. Mrs. Ronald asked, and Mr. Hestand answered that more than one attorney in each group may cross-examine a witness.

Mr. Sparks asked the Special Master for a prompt minute entry so he could provide a copy to the Court in another matter he has scheduled on October 23, 2003.

Mr. Callahan stated that any testimony that Mr. Philip C. Briggs may offer could only be presented on behalf of Mr. and Mrs. Kovacovich and Mr. Wrobley, who are claimants in this adjudication, and that the Verde Valley Water Users, Incorporated is not a claimant or party in the Gila River Adjudication. Mr. Callahan stated that the issue of the corporation's participation in judicial proceedings related to this adjudication has previously been raised and ruled upon by the Court. Mr. Mabery stated that the Verde Valley Water Users, Incorporated had retained Mr. Briggs, and Mr. Mabery was aware of the issue Mr. Callahan was raising. Mr. Mabery stated that at this time he did not object to Mr. Briggs' testimony being offered on behalf of Mr. and Mrs. Kovacovich and Mr. Wrobley.

Mrs. Ronald inquired how Mr. Burtell's testimony about ADWR's proposed use of the soil surveys would be treated. The Special Master stated that Mr. Burtell's testimony should be viewed as being direct testimony. Mr. Sparks suggested that ADWR be given an additional twenty minutes to present this testimony. Mr. Barry suggested that ADWR present the testimony at the start of ADWR's presentation.

Mr. Barry stated that counsel who had prepared the proposed schedule for the cross-examination of witnesses had agreed that the total time allocation for redirect examination of expert witnesses would be limited to the agreed five or ten minutes (only for ADWR), and that neither the groundwater users group nor the surface water users group would each have five or ten minutes for redirect testimony.

Mr. Barry stated that it was agreed that if by any chance, the groundwater users group or the surface water users group did not cross-examine a witness that no redirect testimony would be elicited from that witness.

Based upon the foregoing discussions, IT IS ORDERED:

1. Parties shall file responses to the motion for additional time to analyze and submit expert testimony on or before Wednesday, October 15, 2003. No replies shall be necessary or allowed.

2. The hearing set on October 21 and 22, 2003, will not be rescheduled as it would unreasonably delay this proceeding, and the issues set for hearing can be separated from the matters raised in the motion for rescheduling. An order will be issued during or following the hearing regarding additional time to file sworn and rebuttal declarations related to ADWR's proposed use of the soil surveys.

3. Parties shall file responses to the motion in limine on or before Wednesday, October 15, 2003. No replies shall be necessary or allowed.

4. For purposes of this proceeding in consideration of the time constraints, parties may use email or facsimile to serve courtesy copies of responses upon others. The use of these means shall not be construed to be an adoption of these means to accomplish service of pleadings in future proceedings. The rules for service of pleadings are not modified.

5. The motion to extend the page limit to twenty pages for the motion in limine filed by Mr. Fines is granted.

6. Parties shall premark all their exhibits with the Clerk of the Maricopa County Superior Court not later than 5:00 p.m. on Monday, October 20, 2003. The sworn declarations and rebuttals do not need to be premarked as exhibits, but they may be premarked if convenient for counsel's presentation.

7. Parties who will cross-examine expert witnesses and offer exhibits shall provide copies of their proposed exhibits to the other parties participating in the hearing and to any party or counsel who requests copies from the submitter. Copies of exhibits shall be provided to ADWR, the Apache Tribes, and the Arizona Attorney General.

8. Any exhibits that were introduced in a prior hearing in this adjudication shall be reintroduced as a new exhibit for the upcoming hearing.

9. The parties who will participate in the conduct of cross-examination shall advise the Special Master prior to the commencement of the hearing of the proposed schedule of counsel who will cross-examine each expert witness.

10. ADWR is directed to present its testimony regarding the proposed use of soil surveys prior to the initial cross-examination of its witnesses. This testimony will be in the nature of direct testimony, and its purpose is to provide further information about the soil surveys and their proposed use. Not more than twenty minutes shall be allotted to this direct testimony.

The Special Master thanks all counsel and parties for their assistance and cooperation.

DATED: October 14, 2003.

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

The foregoing delivered this 14th day of October, 2003, to the Distribution Center, Maricopa County Superior Court Clerk's office, for copying and mailing to those parties who appear on the Court-approved mailing list for Case No. W-1, W-2, W-3, and W-4 (Consolidated) dated October 6, 2003.

On October 14, 2003, a courtesy copy was emailed or faxed to attorneys who will argue this matter. The list of those attorneys is available upon request from Kathy Dolge.

/s/ KDolge
Kathy Dolge