

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: January 28, 2004

CIVIL NO. W1-103

ORDER REGARDING REQUESTS  
TO CROSS-EXAMINE AND TO  
PRESENT LEGAL ARGUMENTS

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

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master denies a request to cross-examine a witness from the Arizona Department of Water Resources and grants a request to present legal arguments on all issues.

NUMBER OF PAGES: 3 pgs.

DATE OF FILING: Original filed with the Clerk of the Court on January 28, 2004.

**ORDER**

The Gila Valley and Franklin Irrigation Districts, Towns of Clarkdale and Jerome, and Cities of Casa Grande and Cottonwood (collectively, the “movants”) have requested “a brief hearing so that Mr. Burtell [of the Arizona Department of Water Resources (“ADWR”)] may be cross-examined about ADWR’s decision to use [National Resources Conservation Service (“NRCS”)] soil survey maps to identify the subflow zone,” and an “opportunity to present legal

arguments regarding ADWR's proposed use of soils maps and the opportunity to orally argue their positions regarding the entire procedure to be used by ADWR to identify the subflow zone in [the] San Pedro [River] watershed."

The Cities of Chandler, Glendale, Mesa, and Scottsdale filed a response in which Arizona Public Service ("APS") and Phelps Dodge Corporation ("Phelps Dodge") joined.

### **I. Request to Cross-Examine Mr. Burtell**

The respondent Cities support both requests "if, contrary to the overwhelming consensus of the experts submitting declarations on December 8, 2003, the Special Master is inclined to adopt ADWR's proposal that the NRCS soil maps be used as the primary method for delineating the floodplain Holocene Alluvium."<sup>1</sup>

Claimants had opportunities to file expert declarations and rebuttal declarations regarding ADWR's proposed use of the NRCS soil surveys. APS, Phelps Dodge, BHP Copper, Inc., respondent Cities, Gila River Indian Community, Salt River Project, and the United States filed expert declarations. Three of these parties filed rebuttal declarations.

The expert witnesses who prepared the declarations had available to them not only ADWR's proposal and Mr. Burtell's testimony but also all the evidence presented over two days of hearing. The declarations point out the positives and negatives of using the soil surveys and make recommendations. The declarations must be considered alongside and together with all the extensive testimony and evidence presented in this matter. Sufficient evidence has been presented regarding the appropriateness of using the NRCS soil surveys as proposed by ADWR.

The Special Master is not inclined to adopt ADWR's proposal as the exclusive or only indicator to delineate the subflow zone. It is clear from the evidence heard that there is no single or exclusive available indicator that delineates the subflow zone as defined in *Gila IV*.<sup>2</sup> Delineating the entire subflow zone in a watershed will require using more than one indicator.

Arizona Rule of Evidence 611(a) provides that the court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to...(2) avoid needless consumption of time..."

Because the sworn expert declarations dissected ADWR's proposed use of the NRCS soil surveys, the Special Master is not inclined to adopt ADWR's proposal as the exclusive indicator to delineate the subflow zone, and in order to "avoid needless consumption of time," the request to cross-examine Mr. Burtell on the proposed use of the soil surveys will be denied.

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<sup>1</sup> Cities' Response 8:5-8. The Cities also stated that "the general consensus of these declarations...does not support using the NRCS soil survey maps as the primary or exclusive tool for delineating subflow boundaries." *Id.* at 2:18-21.

<sup>2</sup> *In re the General Adjudication of All Rights to Use Water in the Gila 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) ("*Gila IV*").

## II. Request to Present Legal Arguments

The Special Master will grant the request for parties to present legal arguments and their positions on all the proposed procedures to delineate the subflow zone. The respondent Cities want an opportunity to present legal arguments on the proposed use of the soil surveys, while the movants want to address “the entire procedure to be used by ADWR.” The broader opportunity requested by the movants would be more productive.

IT IS ORDERED:

1. The request to cross-examine Mr. Burtell is denied.
2. The request to present legal arguments on all issues is granted.
3. On or before **Wednesday, March 3, 2004**, parties may file memoranda containing their legal arguments and positions on any of the issues arising from ADWR’s Subflow Technical Report, San Pedro River Watershed. Parties may state their positions on the four proposed rulings made on September 8, 2003.
4. Responses shall be filed on or before **Monday, April 12, 2004**.
5. Replies shall be filed on or before **Friday, May 7, 2004**.
6. Memoranda and responses shall not exceed forty pages, exclusive of attachments. Replies shall not exceed fifteen pages, exclusive of attachments.
7. Oral argument will be heard on **Thursday, May 20, 2004, at 9:00 a.m.**, in Courtroom 301, Old Courthouse, 125 West Washington, Phoenix, Arizona. The total time for oral argument will not exceed two hours.
8. On or before **Tuesday, May 18, 2004**, counsel who have filed papers shall submit a proposed schedule and time allocation for oral argument.

DATED: January 28, 2004.

/s/ George A. Schade, Jr.

GEORGE A. SCHADE, JR.

*Special Master*

The foregoing delivered this 28th day of January, 2004, 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.

/s/ KDolge

Kathy Dolge