

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 5, 2006

CIVIL NO. W1-11-605

ORDER GRANTING IN PART
AND DENYING IN PART THE
MOTION OF THE UNITED
STATES FOR A PROTECTIVE
ORDER AND THE MOTION OF
PHELPS DODGE CORPORATION
TO COMPEL PRODUCTION OF
DOCUMENTS

CONTESTED CASE NAME: *In re Fort Huachuca.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master grants in part and denies in part the motion of the United States for a protective order and the motion of Phelps Dodge Corporation to compel production of documents.

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This matter involves the United States' Motion for a Protective Order from Phelps Dodge Corporation's ("Phelps Dodge") First Set of Requests for Production of Documents to the United States and Phelps Dodge's Motion for Order to Compel Production of Documents.

The United States seeks a protective order from Phelps Dodge's requests to:

- 1. Produce any and all documents and information, including but not limited to any groundwater models, reports, studies or other technical work, relating to the analysis of the water supply for Fort Huachuca ("Fort").*
- 2. Produce any and all documents, models or other information used to analyze, or relating to, the impact of groundwater pumping on and off the Fort on the San Pedro River or the relationship between groundwater pumping on and off the Fort in San Pedro River Watershed, including but not limited to any and all documents, models or other information used or relied upon in the preparation of the "Model and Capture" power point presentation prepared by the United States Geological Survey ("USGS").*
- 3. For all groundwater models or other similar information produced pursuant to Requests for Production/Inspection Nos. 1 and 2, produce any and all documents and information relating to the development of such models or needed to reproduce such models, including but not limited to the model input files and information regarding the assumptions made under such models.*

The United States argues that this discovery is outside the scope of, and is irrelevant to, the four issues being heard, will not lead to admissible evidence relevant to those issues, and if Phelps Dodge had complied with the Rules for Proceedings Before the Special Master ("Special Master's Rules"), it would have discovered several readily and publicly available groundwater models, reports, and studies relating to the impacts of groundwater pumping in the Sierra Vista area. The United States claims that the requested discovery deals with the quantity of water necessary for the Fort's claimed reserved groundwater right and the impact of the Fort's water uses on other natural resources or on other water users, matters outside the issues being briefed.

The United States, however, does not object if Requests for Production/Inspection Nos. 1 and 3 are "limited to documents or information identifying the supply or source of water necessary to meet the Fort's military purposes as groundwater, but not the amount necessary or the impacts of groundwater pumping."¹ The United States has disclosed fifteen documents that may relate to groundwater being the source of water for the Fort.

Phelps Dodge claims it conducted an Internet search "for publicly available studies referencing water uses and supply of the Fort" and "inadvertently excluded" a certification of the results in its requests.² Parties must comply with all discovery rules, engage their best efforts to resolve discovery matters, and make the most use of the

¹ U.S. Motion for a Protective Order 7 (May 18, 2006).

² Phelps Dodge's Response to U.S. Motion for a Protective Order 11 (June 6, 2006) ("Response").

repository at the Arizona Department of Water Resources. The discovery process in contested cases relies heavily on the repository.

A. Sources of Groundwater and Surface Water

The Arizona Supreme Court, after reviewing the *Winters, Arizona v. California* (1963), and *Cappaert*³ opinions of the U.S. Supreme Court, held that those cases:

[l]ead us to conclude that if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.⁴ (Emphasis added.)

The United States agrees that “[t]he source of water may, arguably, have some relevancy to the United States’ entitlement to a federal reserved water right to groundwater.”⁵ But because an implied intent “must have intended [the] reservation of water to come from whatever particular sources each reservation” has, the Special Master finds that the United States should provide discovery concerning the supply or sources of surface water, including appropriable subflow, as well as groundwater, necessary to meet the Fort’s purposes.⁶ Because the subflow zone in the watershed has not been delineated, the United States should provide, for purposes of this discovery, the information concerning what it believes to be appropriable subflow sources.

B. Quantities of Water Necessary for the Fort’s Purposes

Cognizant that “[t]o determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitable fact-intensive inquiries”⁷ and that a supplemental hydrographic survey report for the Fort will be delayed, the Special Master and the parties elected to split those fact-intensive inquiries and determine those issues that can be addressed given these circumstances. The quantification of the Fort’s reserved and unreserved water rights was left for a subsequent phase.

³ *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976).

⁴ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 419, 989 P.2d 739, 747 (1999), *cert. denied sub nom. Phelps Dodge Corp. v. U.S. and Salt River Valley Water Users' Assn. v. U.S.*, 530 U.S. 1250 (2000) (“*Gila III*”).

⁵ U.S. Motion for a Protective Order 4.

⁶ The United States refers to “military purposes,” but the legal character of the Fort’s purposes has not yet been established in this case. Likewise, it has not been determined whether the intent of the United States to reserve water for the Fort is explicit or implied.

⁷ *Gila III*, 195 Ariz. at 420, 989 P.2d at 748.

When that phase begins, discovery can be requested as to the quantities of water necessary for the Fort's purposes. This phase does not require it. Accordingly, discovery concerning the quantities of water necessary for the Fort's purposes will not be allowed.

C. Impacts of Groundwater Pumping On and Off the Fort

Phelps Dodge argues that it "is entitled to determine whether the water necessary to accomplish the purposes of the Fort can be protected under existing laws - that is, whether off-reservation pumping of groundwater threatens to deplete groundwater resources in the future."⁸ This is because if there is "a sufficient amount of groundwater available under the reasonable use doctrine to serve the purposes" of the Fort, "*other waters* would exist under state law that would preclude a reserved right to groundwater under Gila III (emphasis in response)."⁹ It is argued that it would preclude a reserved groundwater right because *Gila III* held that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation."¹⁰ The United States disagrees with this analysis of *Gila III*.

The impacts of groundwater pumping on or off the Fort, if any, were not part of the discussions that led to the designation of the issues being heard. The Special Master does not believe that the parties anticipated addressing the issue in this briefing phase. The "implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation."¹¹ That is the focus of this briefing phase.

The discovery allowed by this order will provide information about surface water and groundwater sources that supply water to the Fort, but whether those sources "can be protected under existing laws" from subsequent diversions or pumping is a matter more relevant in the quantification or another subsequent phase of this case. Accordingly, discovery concerning the impacts of groundwater pumping on or off the Fort will not be allowed in this briefing phase.

D. United States Geological Survey Report

Phelps Dodge has requested a copy of the report prepared by the United States Geological Survey entitled *Water Resources of Fort Huachuca Military Reservation, Southeastern Arizona*, USGS Water Supply Paper 1819-D (Brown, S.G. et al., 1966), if the United States has the report in its possession, custody, or control. If such is the case, and this report is within the discovery allowed in this order, the United States shall disclose the report for copying and inspection.

In order to give these parties time to complete the discovery allowed by this order, the time for completing all discovery will be extended one week.

⁸ Phelps Dodge's Response 7.

⁹ *Id.*

¹⁰ *Gila III*, 195 Ariz. at 420, 989 P.2d at 748.

¹¹ *Cappaert*, 426 U.S. at 143.

IT IS ORDERED:

1. The Motion of the United States for a Protective Order from Phelps Dodge's First Set of Requests for Production of Documents to the United States is granted to the extent stated in this order and is otherwise denied.

A. Requests for Production/Inspection Nos. 1 and 3 shall be limited to documents and information that identify the supply or source of water necessary to meet the Fort's purposes as groundwater, surface water, and subflow but not the quantities of water necessary or the on or off the Fort impacts of groundwater pumping.

B. Request for Production/Inspection No. 2 is not subject to discovery.

2. The Motion of Phelps Dodge for Order to Compel Production of Documents is granted to the extent stated in this order and is otherwise denied.

3. If the United States has in its possession, custody, or control the report prepared by the USGS entitled *Water Resources of Fort Huachuca Military Reservation, Southeastern Arizona*, USGS Water Supply Paper 1819-D (Brown, S.G. et al., 1966), and this report is within the discovery allowed in this order, the United States shall disclose the report for copying and inspection.

4. If Phelps Dodge does not have information concerning the location of a document the United States has already produced or disclosed, the United States shall provide the information to Phelps Dodge in accordance with Special Master's Rule 9.10.

5. All discovery shall be completed on or before July 20, 2006.

DATED: July 5, 2006.

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

On July 5, 2006, 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. W1-11-605 dated February 28, 2006.

/s/ KDolge
Kathy Dolge