

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

January 9, 2024

CLERK OF THE COURT
S. Ortega
Deputy

SPECIAL WATER MASTER
SHERRI ZENDRI

FILED: January 22, 2024

In Re: Subflow Technical Report, Verde River
Watershed, Contested Case No. W1-106

In Re: The General Adjudication
of All Rights to Use Water in the
Gila River System and Source W-1, W-2, W-3,
and W-4 (Consolidated)

MINUTE ENTRY

Courtroom: CCB 301

10:00 a.m. This is the time set for Oral Arguments regarding Arizona Department of Water Resources' "Subflow Zone Delineation and associated Report for the Remainder of the Verde River Subwatershed," filed April 28, 2023, before Special Water Master Sherri Zendri.

The following attorneys/parties appear via Court Connect:

- Carrie Brennan on behalf of Arizona State Land Department ("ASLD")
- Eli Ancharski observing on behalf of Arizona Water Company ("AZ Water")
- Charles Cahoy on behalf of the City of Phoenix
- Sean Hood on behalf of Freeport Minerals Corporation ("Freeport")
- Mike Foy on behalf of Salt River Project ("SRP")
- Lee Storey on behalf of Town of Prescott Valley ("Prescott")
- Sue Montgomery on behalf of the Yavapai Apache Nation (and observing on behalf of the Pascua Yaqui Tribe) ("Yavapai")
- Kimberly Parks and Karen Nielsen on behalf of Arizona Department of

- Water Resources (“ADWR”)
- Michael Rolland on behalf of Cities of Avondale, Glendale, Mesa, Scottsdale, and Tempe
 - William L. Staudenmaier on behalf of Town of Chino Valley (“Chino”)
 - Carlos D. Ronstadt on behalf of Chino Grande LLC (“Chino Grande”)
 - Jeremiah D. Weiner and Brett Stavin on behalf of Tonto Apache Tribe
 - John LeMaster on behalf of City of Chandler
 - Laurel A. Herrmann and Joe P. Sparks observing on behalf of San Carlos Apache Tribe
 - Daniel McCarl observing on behalf of the United States
 - Brian J. Heiserman observing on behalf of the City of Cottonwood
 - Bradley Pew and Rhett Billingsley observing on behalf of American Smelting and Refining Company LLC (“ASARCO”)
 - Carla A. Consoli on behalf of the AZ Chapter of the Nature Conservancy
 - Tony Gioia, former Mayor of Camp Verde, AZ observing on behalf of Friends of the Verde River, Verde River and Verde Valley
 - Chris Resare on behalf of the City of Prescott
 - Andrew Guarino “Guss” observing on behalf of United States Department of Justice

A record of the proceedings is made digitally in lieu of a court reporter.

The Court will hear comments and opinions from counsel/parties that filed official responses to the questions in this Court’s Order of December 1, 2023.

Carrie Brennan for ASLD. In response to question no. 1, she does not see any reason to treat the instream lakes on the Upper Verde River differently from the instream lakes on the Lower Verde River. As to question no. 2, the Court has ADWR’s expertise in which to opine on not only the accuracy and reliability of the material, but the applicability of the situation. The parties will also bring in their own experts from time to time to give their views. The Court can then take all of that information into account. As to question no 3, ASLD has no further information. As to question no. 4, ASLD believes that when mapping subflow for a particular stream or river and to the extent that flow continues, then it should be mapped. If it turns to ephemeral before it reaches the Verde, then it is not subflow.

Eli Ancharski for AZ Water states that they are relying on their previously filed comments and the expertise of others to answer the Court’s specific questions.

Charles Cahoy for the City of Phoenix answers “no” to the Court’s question no. 1 and believes there is no reason to treat the instream lakes on the Upper Verde River differently from the instream lakes on the Lower Verde River with respect to pre-development subflow delineation. On the Court’s question no. 2, Mr. Cahoy suggests an evidentiary hearing be held on the issue of the Big Chino Wash so the Court can hear from all parties and have the expert witnesses examined thoroughly. With regard to

question no. 3, the City has not yet engaged an expert in this matter. In researching the matter, varying opinions can be found. Mr. Cahoy again suggests having an evidentiary hearing on this matter. As to question no. 4, Mr. Cahoy's opinion is that the existing subflow criteria should be applied and those streams that are found to be having subflow under the existing criteria should be fully delineated and not based on where mapping simply ends. As far as developing criteria for such a stoppage, Mr. Cahoy would not be in favor of reopening that criteria unless there would be a sound reason to do so.

In response to the Court's question no. 1, Mr. Hood ("Freeport"), states that as to Watson Lake, there is no relevant difference and that Watson Lake was the lake that was delineated. Under no circumstances should any of the human created impoundments form the basis for the delineation. As to question no. 2, Freeport believes this to be an issue that is disputed on an evidentiary basis. As to question 3, Freeport has no additional evidence to provide. As to question no. 4, Freeport believes with the comments already made.

Michael K. Foy for SRP agrees with the comments made by several others as to the Court's question no. 1 and thinks that the next step and the appropriate process is for ADWR to submit an amended delineation report around the reservoirs and believes a similar direction by the Court for the parties to provide relevant evidence to ADWR regarding Horseshoe and Bartlett. As to the Court's second question and for the reasons stated, SRP believes the Court should set this for an evidentiary hearing in order to hear from the authors of those reports directly and has some ideas he can share for a litigation schedule if the Court is interested. As to the Court's third question, and again, believes that an evidentiary hearing is necessary to flush these matters out. SRP gives the Court a preview as to what Mr. Ford would testify to at the evidentiary hearing. As to question no. 4, SRP believes that there is already criteria which is that ADWR needs to map the full extent of the intermittent or perennial reach. Mr. Foy presents a screenshare to further illustrate his point.

Lee Storey for Town of Prescott ("Prescott") states that Prescott joined with the ASLD with respect to the situation regarding pre-development conditions with lakes and reservoirs and is pleased to hear that all parties agree so far that that should be consistent. With respect to the Court's other questions, Prescott did not submit an expert report or opinion in this case. Mark Nichols was asked by Prescott to gather and collect data including a collection of photographs. The data was then provided to ADWR for the sole purpose of making sure ADWR had the information with respect to the USGS reports. Ms. Storey explains the reasons why ADWR is the technical advisor to the Court—cost and neutrality. Prescott does not believe it is proper for SRP to provide an expert report in the form of an affidavit as part of its objections. Prescott would like the opportunity to present an expert report if the Court holds an evidentiary hearing. Collectively as to question nos. 2 and 3, Prescott's perspective is that the criteria has already been

established. Prescott did not anticipate that an evidentiary hearing would be requested. As to question no. 4, Prescott agrees with the comments made by ASLD and Freeport on the tributaries and the mapping. If there are going to be changes with respect to this, Prescott believes there are other parties that will need to have notice and participate.

Sue Montgomery for Yavapai joins with SRP's objections. Yavapai also joins SRP as to question 1. As to questions 2, 3, and 4, Yavapai joins with the comments of SRP, ASLD, Freeport, and City of Phoenix. Further comments are made on Mr. Nichols' report filed by Ms. Storey, the need for an evidentiary hearing, and the submission of an affidavit in support of one's objections.

Chris Resare for the City of Prescott's position is similar to the Town of Prescott Valley. The City of Prescott disagrees with a lot of SRP's objections and agrees that an evidentiary hearing might be best in helping the Court make the final determination. Discussion is held regarding Mr. Holmes' report and the City of Prescott's intention in requesting same.

Kimberly Parks for ADWR states that ADWR did not request documentation from the parties. ADWR was contacted and told that there was some information that they could consider and so ADWR took that information. ADWR addresses the Court's questions outlined in the Order. As to question no. 1, ADWR states that they recently filed a response relating to question no. 1. ADWR's plan is to revise the mapping and believe the reservoirs should be treated consistently between the two reports. The only reservoir ADWR believes Mr. Hood's comments apply to is the Willow Creek Dam. It did not have a subflow zone, and it was not mapped by ADWR. ADWR plans on mapping the other zones except Sullivan Lake. Sullivan Lake has been mapped based on the summary judgment proceedings. As to question no. 2, ADWR agrees with most of what the other parties have said on this question. ADWR already had a number of materials they used to determine which streams were ephemeral, intermittent or perennial. The information provided to ADWR appeared to further support what ADWR already used and what they already had. As to question no. 3, ADWR staff disagrees with Mr. Ford's interpretations of the documents that ADWR used to classify the streams. ADWR discusses the information in their report regarding the determinations of the streams. As to question no. 4, ADWR has legitimate criteria for making those determinations, but it is not new criteria. Their technical report will be revised going forward so that there are no questions about what criteria ADWR looked at in making the determinations.

The Court addresses ADWR's request to vacate the February 23, 2024 deadline for the first portion of the subflow delineation report.

Mr. Foy proposes a litigation schedule for initial disclosure statements, expert reports, rebuttal reports, discovery, summary judgment motions, and trial.

Mr. Hood agrees that this matter must be resolved through an evidentiary hearing with an orderly litigation schedule as proposed by Mr. Foy.

Mr. Foy agrees with Mr. Hood's comments.

Ms. Brennan states her position on whether an evidentiary hearing is necessary or not.

Ms. Storey emphasizes that submitting a compilation of source materials is not an expert report or opinion and agrees that if the Court decides to have an evidentiary hearing, due process needs to be made. Ms. Storey does not believe an evidentiary hearing is necessary.

Carlos D. Ronstadt for Chino Grande states his position as it relates to the Court's question no. 3. As the Big Chino Wash and Partridge Creek are on his client's ranch, Mr. Ronstadt is concerned about changes to the subflow zone that could result in wells being included that are not currently included in ADWR's determination of the limits of the subflow zone. Mr. Ronstadt is not convinced the Court needs an evidentiary hearing to resolve these matters.

William L. Staudenmaier for Chino Valley states that Chino Valley does have an interest in the Big Chino Wash as the Town owns land there that have water rights. Mr. Staudenmaier clarifies that Chino Valley did not ask Mr. Holmes to prepare the report although Mr. Holmes is a long-time consultant to Chino Valley. Mr. Staudenmaier has had no feedback from Chino Valley on whether or not it would participate in an evidentiary hearing. Chino Valley has very limited resources and whether or not it participates in an evidentiary hearing will depend on financial ability as opposed to interest. Mr. Staudenmaier proposes that ADWR consider the information prepared by Mr. Ford and complete the report addressing the Court's concern before it is decided whether or not an evidentiary hearing is required.

Mr. Hood agrees with Mr. Staudenmaier's proposal but also believes that the Court cannot make a judicial resolution of the disputed facts based on the party submission without holding an evidentiary hearing and without violating due process.

The Court reminds counsel that the general stream of adjudication is not a process of consensus.

Ms. Parks addresses how pushing this matter off for a full year affects ADWR's reporting and asks the Court to allow a bit of cushion to the schedule Mr. Foy has proposed. Ms. Parks weighs in on Mr. Staudenmaier's suggestion. ADWR requests that

if the matter is resolved on the filings, that ADWR be able to provide the missing piece of the report that describes the stream classifications. As well ADWR would need at least 60 days to respond to the objections and asks the Court what the notice should look like.

Mr. Foy responds to Ms. Parks' scheduling concerns and has no objection to adjusting the proposed litigation schedule to accommodate ADWR but at the same time still move this matter move as quickly as possible. Mr. Fox addresses Mr. Staudenmaier's proposal and also agrees with Mr. Hood's comments regarding due process and believes there is no alternative than to schedule an evidentiary hearing.

Further discussion is held regarding due process issues.

Mr. Staudenmaier responds to Ms. Parks' comments.

Ms. Parks again requests that depending on how the Court will handle this matter, that ADWR be given the opportunity to provide to the Court at the very least the explanation of the stream classification and what ADWR used and considered.

Based on the matters presented to the Court,

IT IS ORDERED vacating the February 23, 2024 deadline for the first part of the Verde report.

IT IS FURTHER ORDERED taking this matter under advisement.

11:35 a.m. Matter concludes.

LATER:

There were four issues in controversy for this conference regarding the Subflow Zone Delineation Report for the Remainder of the Verde River Watershed ("Remainder Report"), filed April 28, 2023:

1. Did the subflow zone delineation for Upper Verde River instream reservoirs Watson Lake, Granite Basin Lake, Sullivan Lake, and Willow Creek Reservoir appropriately consider predevelopment conditions?
2. Were portions of the Big Chino Wash and Partridge Creek intermittent under predevelopment conditions?
3. Was all of the Williamson Valley Wash intermittent under predevelopment conditions?
4. Was the subflow mapping of certain tributary streams, including inter alia Camp Creek, Dry Beaver Creek, Ellison Creek, and Granite Creek, inappropriately terminated?

Issue #1 needs no further discussion at this time. All parties acknowledge that the reasoning in this Court's Oct 24, 2023, order regarding Bartlett and Horseshoe Lakes applies to the reservoirs on the upper Verde River reaches as well.

THEREFORE, THE COURT FINDS that ADWR must revise the subflow mapping to consider predevelopment conditions for the following reservoirs: Watson Lake, Granite Basin Lake, Sullivan Lake, and Willow Creek Reservoir. A deadline for those revisions, along with any revisions arising from unresolved objections to the Remainder Report, will be announced in a later order from the Court. That deadline will also apply to the revisions in the Court's October 2023 Order for subflow delineation around Bartlett and Horseshoe Lakes.

IT IS ORDERED that any parties possessing documentation or aerial imagery regarding predevelopment conditions for the Upper Verde instream reservoirs noted above shall provide such data, in a format that can be reasonably used by ADWR, by February 23, 2024.

Issues #2 through #4 remain contested. The disagreement is complicated by ADWR's use of documents prepared by parties to this case. While the documents were not submitted as formal expert reports or opinions, the authors are ostensibly well-versed in the fields of geology, hydrology, and/or geomorphology and the comments are for all intents and purposes the authors' views on the issues at hand.

Various parties maligned the intentions of the party submissions to ADWR. The finger pointing has prompted the Court to inquire into the reliability of such documents. A few, but not all, parties declared that an evidentiary hearing is the only proper method to meet due process requirements for any resolution of these technical issues. A proposed schedule for such a hearing was provided:

- Initial disclosure 30 days
- Expert reports April 2024 (+60 days)
- Rebuttal reports July 2024 (+90 days)
- Discovery September 2024 (+90 days)
- Dispositive Motions November 2024 (+60 days)
- Trial (5 days) February 2025 (+90 day)

Given the fundamental technical and factual disagreements between the parties, the opportunity to present and question evidence is the best approach. The challenge with the schedule recommended, however, is the 13-month minimum delay in a final Verde Subflow report and how that impacts the development and release of not only the Verde River Hydrographic Survey Report, but also the development of the next phase of General Stream Adjudication reports. To expedite a just disposition of the issues and

balance the varying litigants' resources, the Court is setting appropriate limits on the pretrial schedule. Ariz. R. Civ. P. 16(a)(1), (4), (7).

THEREFORE, IT IS ORDERED that an evidentiary hearing will be set for the week of August 19, 2024, (Monday through Thursday) with a schedule as follows:

- Initial disclosure February 22, 2024 (30 days)
- Formal Expert Opinions April 22, 2024 (+60 days)
- Discovery July 22, 2024 (+90 days)
- Pretrial Joint Statement August 5, 2024
- Trial (4 days) August 19 - 22, 2024

IT IS FURTHERED ORDERED that no formal expert opinions or reports are required to be filed and that any statements, opinions, or evaluations of an expert that a party wishes to be considered by the Court must be presented orally at the hearing. If a party will be presenting an expert witness at the hearing, the party must make the disclosures required by Rule of Civil Procedure 26.1(d)(3).

IT IS FURTHER ORDERED that the evidentiary hearing will be conducted as follows:

- There will be no opening or closing statements.
- Each party who timely filed valid objections to the Remainder Report is entitled to 60 minutes of direct testimony in total.
- Each party is entitled to cross-examine each witness for 20 minutes.
- Each party is entitled to 20 minutes of redirect testimony for each witness that they present.
- The guidelines regarding direct, cross, and redirect examination shall apply to ADWR.
- Unless the parties agree on an alternative sequence, the Court will hear parties in alphabetical order, except that ADWR will be permitted to present their evidence last.

IT IS FURTHER ORDERED, that ADWR will not produce any Verde River System Subflow Report amendments prior to the hearing referenced here.