

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER JOHN E. THORSON
Presiding

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
GILA RIVER SYSTEM AND SOURCE

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
Consolidated

Contested Case No. W1-203

Date: June 1, 2000

CONTESTED CASE NAME: *In re the Water Rights of the Gila River Indian Community*

DESCRIPTIVE SUMMARY: The Special Master issues a comprehensive pretrial order to govern preparation for and trial of the purposes for which lands were withdrawn or designated for the Gila River Indian Reservation. A schedule for motions and proceedings is announced. Subsequent pretrial orders will be issued as needed.

NUMBER OF PAGES - 10 pgs.; Attachment A - 2 pgs.; Attachment B - 7 pgs.:
Total - 19 pgs.

DATE OF FILING: Original delivered to the Clerk of the Court on June 1, 2000.

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MINUTE ENTRY

PRETRIAL ORDER

It is ORDERED:

1. **Background.** This pretrial order has been prepared for the possible trial to determine the purposes for which lands were withdrawn or designated by the federal government to establish the Gila River Indian Reservation. This trial is one phase in Contested Case No. W1-203 to determine the water rights claimed for the Gila River Indian Reservation. The litigants in this case may file final pretrial statements closer to trial, and the Court may issue a final pretrial order to revise or supplement the procedures established herein.

2. **Definitions.**

a. "Litigants" means those persons who have previously expressed an intent to take an active part in this contested case (and who are entitled to take an active part in this trial), as listed below, and their respective attorneys:

[1] **Tribal and Federal Litigants.**

- (a) Gila River Indian Community
- (b) Silas Kisto
- (c) United States
- (d) San Carlos Apache Tribe
- (e) Tonto Apache Tribe
- (f) Yavapai Apache Nation

[2] **State Litigants.**

- (a) Jeffrey H. Altschul
- (b) Mark Anderson
- (c) Arizona as a claimant
- (d) Arizona Public Service Co.
- (e) Arlington Canal Co.
- (f) ASARCO Incorporated
- (g) BHP Copper Inc.
- (h) Buckeye Irrigation Co.
- (i) Church of Jesus Christ of Latter-day Saints
- (j) City of Benson
- (k) City of Chandler
- (l) City of Glendale
- (m) City of Globe
- (n) City of Goodyear

- (o) City of Mesa
- (p) City of Phoenix
- (q) City of Safford
- (r) City of Scottsdale
- (s) City of Sierra Vista
- (t) City of Tempe
- (u) The Willis R. Dortch Revocable Trust
- (v) William and Claire Fennelly
- (w) Franklin Irrigation District
- (x) Gila Valley Irrigation District
- (y) Lone Mountain Ranch, Inc.
- (z) Maricopa County Municipal Water Conservation District No. 1
- (aa) Kenneth and Mary McCarty
- (bb) Phelps Dodge Corporation
- (cc) Roosevelt Water Conservation District
- (dd) Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association (Salt River Project or SRP)
- (ee) San Carlos Irrigation and Drainage District
- (ff) Town of Mammoth
- (gg) Town of Patagonia

The Court-approved mailing list for this case is set forth as Attachment A. Counsel for the above-described litigants shall confer with their client and ascertain that the client desires to continue as a litigant in this contested case. Counsel shall notify the Court in writing, on or before **June 30, 2000**, if a client **does not** desire to continue as a litigant. Any such withdrawing litigant will be bound by the results of this contested case to the same extent as all other Gila River adjudication claimants who are not litigants herein.

b. "Court" is used interchangeably to mean the superior court judge to which this adjudication is assigned and the special master to whom all or part of this contested case may be referred.

c. "Document Repository" means the collection of documents previously submitted to the Office of the Special Master by the litigants, marked with "OSM" numbers, and indexed.

d. "Schedule" means the schedule of proceedings set forth at Attachment B to this order.

3. Issues to be Litigated. The issues to be litigated in this "purposes" phase of the contested case are summarized in this section 3. The purpose of this summary is to provide early notice of the issues to be litigated and the probable alignment of the litigants. This summary does not preclude a more exact and complete specification of the issues, and the alignment of the litigants on the

issues, in the final pretrial statements. The summary of the issues is as follows:¹

a. Does the “primary-secondary” purposes distinction, as announced by the U.S. Supreme Court in *United States v. New Mexico*, 438 U.S. 696 (1978), apply to the water rights claimed for the Gila River Indian Reservation?

[1] The Tribal and Federal Litigants take the position that the “primary-secondary” purposes distinction does not apply to Indian reservations.

[2] The State Litigants take the position that the distinction does apply.

b. If the “primary-secondary” purposes distinction does apply to the Gila River Indian Reservation, what were the primary and secondary purposes for each withdrawal or designation of land for the Gila River Indian Reservation? May the Reservation have more than one “primary” purpose?

[1] Regardless of the “primary-secondary” purposes distinction, the Tribal and Federal Litigants take the position that the federal government withdrew or designated reservation land for the principal purpose of establishing a permanent tribal homeland for the Gila River Indian Community and where members could grow, prosper, and make maximum use of their land. The Gila River Indian Community also takes the position that the Reservation has more than one primary purpose.

[2] The State Litigants take the position that the federal government withdrew or designated land to protect existing agriculture, create a buffer between the community and non-Indians who were settling in the area, provide substitute agricultural lands when non-Indians encroached on existing Indian agricultural lands, and provide for other specific economic activities such as grazing.

[3] The Apache Tribal Litigants take the position that the agricultural purpose of this and all other Indian reservations within this adjudication was determined by the Court in its minute entry of September 9, 1988, and constitutes the “law of the case.”

¹ At the May 2, 2000, pretrial conference, I discussed with counsel the desirability of reaching, at the end of the “purposes” phase of this contested case, a general determination of the methodologies to be developed and presented during the later quantification phase of the case. After considering counsels’ remarks, I believe that the identification of the appropriate methodologies should be made in early pretrial proceedings during the quantification phase of the case, following the conclusion of the “purposes” phase. An early decision on the appropriate quantification methodologies is important for preparing the expert testimony to be offered during the quantification trial.

4. Resolution of Preliminary Issues. The litigants have identified certain issues that may be promptly resolved: (a) the admissibility of certain already submitted expert reports; (b) whether the Gila River Indian Community may file additional opening expert reports; and (c) the order and burden of proof (burden of going forward, burden of persuasion) at trial. The period for briefing these issues is set forth in the Schedule.

5. Discovery. Discovery will commence and conclude according to the Schedule. Unless otherwise ordered, no witness will be deposed more than once unless supplemental documents or reports are disclosed that may affect that witness' earlier testimony. Unless otherwise ordered or agreed to by the litigants, each deposition will be held in the Phoenix metropolitan area and will not exceed eight (8) hours or extend beyond one day.² The litigants have agreed, and it is hereby ORDERED, that the litigant offering a witness shall bear the cost (travel, per diem, and any fee) of making that witness available for a deposition and for trial.

6. Exhibits.

a. Designation of Exhibits. On the date specified in the Schedule, each litigant shall file and serve a designation of all exhibits expected to be offered by that litigant at trial. The exhibit will be identified by the "OSM" number and title. Demonstrative exhibits, *i.e.*, those whose content has been derived from one or more "OSM" documents (*e.g.*, enlargements, illustrative charts or maps) shall be provided to or made available for inspection by other litigants no later than the final pretrial conference. The "OSM" documents from which information has been derived for the preparation of demonstrative exhibits shall be identified at the same time the demonstrative exhibits are provided or made available for inspection.

Except for good cause shown, the litigants will be precluded from offering in evidence, using as demonstrative evidence, or examining any of their witnesses concerning any exhibit not so designated. The designation of an exhibit does not commit the listing litigant to using it. Subject to any objections that have not been waived under paragraph 6(b), any litigant may use any exhibit designated by another litigant.

b. Objection to Exhibits. Any litigant having a basis for filing a motion or objection under ARIZONA RULES OF EVIDENCE 104, or for any other then-existing reason, shall do so by the date specified in the Schedule. Responses and rebuttals to any motion will also be filed by the dates specified in the Schedule.

² I earlier agreed that there be no time limit for depositions. I have reconsidered and believe an eight hour period, not extending beyond one day, should be ordered. I have allowed counsel to stipulate for longer depositions or ask the Court for more time.

c. Stipulation to Exhibits. Unless a litigant files a motion or objection by the date specified in the Schedule, the litigants shall be deemed to have agreed (for purposes of this contested case only) that:

[1] The originals of the exhibits designated by the litigants are authentic within the meaning of ARIZONA RULES OF EVIDENCE 901 or 902.

[2] Duplicates, as defined in ARIZONA RULES OF EVIDENCE 1001, of the exhibits designated by the litigants are admissible to the same extent as originals of the exhibits.

[3] Any designated exhibits purporting to be correspondence were sent by the purported sender and received by the purported recipient(s) on approximately the dates shown or in accordance with customary delivery schedules.

[4] Any disputes regarding the accuracy of any of the designated exhibits that purport to be summaries under ARIZONA RULES OF EVIDENCE 1006 affect only the weight, not the admissibility, of such exhibits.

[5] Any designated exhibits purporting to be records described in ARIZONA RULES OF EVIDENCE 803(6) meet the requirements of that Rule without extrinsic evidence.

[6] Any designated exhibits purporting to be public records or reports described in ARIZONA RULES OF EVIDENCE 803(8) meet the requirements of that Rule.

d. Marking and Presentation of Exhibits. Exhibits in the Document Repository and having an “OSM” number will be marked, identified, and referred to by that number. The courtroom deputy will withdraw these exhibits from the Document Repository and make these exhibits available for trial.

Deposition transcripts will be submitted to the Office of the Special Master for inclusion in the Document Repository and assigned an “OSM” number. Deposition transcripts must be so submitted within fourteen (14) days of the transcription being prepared or signed, but in no event later than the date set for the “identification of trial exhibits by offering litigants” in the Schedule.

Demonstrative exhibits not having an “OSM” number will be submitted to and marked by the courtroom deputy at a time and location to be announced closer to trial.

Each litigant who examines or cross-examines a witness shall prepare three binders containing copies of all exhibits to be used in the examination. One

binder will be provided to the Court, one binder to the witness, and one binder to opposing lead counsel. For good cause shown, the litigant may use other exhibits in the examination.

If an exhibit has been previously designated, the presentation of evidence will not be interrupted for other litigants to examine the exhibit.

7. Other Pretrial Motions. Except for the preliminary issues discussed in paragraph 4, litigants shall file discovery motions, summary judgment or other dispositive motions, motions *in limine*, or any other motions concerning the trial by the date specified in the Schedule.

8. Final Pretrial Conference. The Court will convene a final pretrial conference on the date specified in the Schedule unless no issues or matters need to be decided in advance of trial.

9. Trial. Trial will commence at 9:00 a.m. on the date specified in the Schedule. Unless otherwise ordered by the Court, trial will continue as necessary to complete the trial but will not exceed twenty (20) trial days, trial will be held on Monday through Thursday of each week, and court sessions will be held from 9:00 a.m. to 5:00 p.m. on the days specified.

The trial will be held in at a location to be announced in the Phoenix metropolitan area.

10. Litigants with Similar Positions. When litigants have similar positions in the litigation, they shall designate an attorney with principal responsibility for the conduct of each phase of trial including opening statements, examination of particular witnesses, making and responding to motions and objections, and presenting arguments to the Court. Other counsel or unrepresented litigants shall be permitted to supplement opening statements highlighting any special noncumulative examination of witnesses relevant to the position of that litigant. An objection, motion, or offer of proof by one litigant shall be deemed made on behalf of all similarly situated litigants who do not disclaim it; such litigants may, however, make known any additional grounds or circumstances pertinent to the evidence with respect to them.

11. Allocation of Time. The Court may impose time limitations on the litigants who actively participate in the trial.

12. Order and Burden of Proof. The order of proof and burden of proof for this trial will be specified after the preliminary issues identified in paragraph 4 of this order are resolved.

13. Witnesses. The litigants have identified the following witnesses for trial:

- a. Gila River Indian Community
 - [1] Then-Governor of the Gila River Indian Community
 - [2] Dana Norris, Director, Office of Water Rights
 - [3] Henry Walden, Member of the Community
 - [4] T. Allen J. Gookin
 - [5] Henry F. Dobyms
 - [6] Amadeo M. Rea
 - [7] Eugene Franzoy *
 - [8] Emmett White *
 - [9] John Ravasloot *
 - [10] Peter Bennett *
- b. United States
 - [1] Carla Homstad
 - [2] Daniel Gallacher
- c. Salt River Project
 - [1] Edward Angel
- d. City of Phoenix
 - [1] Douglas E. Kupel
- e. Cities of Chandler, Glendale, Mesa, Scottsdale
 - [1] Richard E. Lynch

* Expert reports have not been filed for these witnesses; may be subject to motion.

Except for rebuttal witnesses or for good cause shown, the litigants will be precluded from offering substantive evidence through a person not so listed. The listing of a witness above does not commit the listing litigant to have such a person available at trial or to offer the testimony of such person. Any litigant

may offer the testimony of a witness listed by another litigant. At trial, witnesses shall not be excluded pursuant to ARIZONA RULES OF EVIDENCE 615.

Direct examination of any expert witness who has submitted a written report will not exceed two (2) hours.

14. Limits on Evidence. Litigants are expected to be selective in the use of witnesses and exhibits at trial to avoid needless repetition.

15. Proposed Findings of Fact and Conclusions of Law. Litigants must notify the Court before the conclusion of the trial if proposed findings of fact and conclusions of law are to be submitted after the trial. Litigants may submit proposed findings of fact and conclusions of law within 30 days after the conclusion of the trial or within 15 days after all the transcripts of the trial become available, whichever is later.

16. Briefs.

a. Trial Briefs. Any litigant may submit a brief or legal memorandum before or at the time of trial on any legal issue to be litigated at trial.

b. Post-trial Briefs. Those litigants having the burden of persuasion shall file and serve their opening post-trial briefs within 30 days after the conclusion of the trial or within 15 days after all the transcripts of the trial become available, whichever is later. Responsive briefs shall be filed and served within 15 days of service of the opening briefs. Reply briefs shall be filed within 10 days of the service of the responsive briefs.

c. Oral Argument. The Court may order oral arguments after the briefs have been submitted.

17. Administrative Matters.

a. Schedule of Witnesses and Exhibits. Absent unusual circumstances, litigants shall notify the Court and other litigants before calling a witness, using portions of a deposition, or offering (or otherwise using) any exhibit during direct examination. This notice shall be accomplished during trial by daily discussion with the Court about which witnesses are expected to be presented during the next trial day, the identity of any depositions that may be utilized, and the exhibits that are expected to be offered or used during the examination of such witnesses.

b. Site Visit. A site visit of Gila River Indian Reservation may be permitted during the trial at a time ordered by the Court after consultation with counsel.

c. Equipment. The litigants are responsible for providing equipment (e.g., bulletin boards, computers, and projectors) necessary for trial unless prior arrangements have been made with the Office of the Special Master no later than four (4) weeks before trial.

d. Transcripts. The trial will be reported by a court reporter designated by the Court who has the ability to provide transcripts on a daily basis during trial and in an electronic format for possible posting on an internet site. The litigants shall bear the cost of daily and final transcriptions, and for an electronic version thereof, as they may agree or the Court may order. When the final transcription of the trial is complete, the court reporter or the Court Clerk shall file and serve on the Court-approved mailing list for this contested case a notice of availability of the transcripts.

e. Filing and Service. Except where otherwise indicated or otherwise ordered, all documents referred to in this order, including post-trial briefs, must be filed with the Clerk of the Superior Court, Maricopa County, and must be served only on the attorneys for the litigants identified in paragraph 2 and on any unrepresented litigant (with copies to the Adjudications Section, Department of Water Resources, and the Special Master).

Dated this 1st day of June 2000.

JOHN E. THORSON
Special Master

The original of the foregoing delivered this 1st day of June 2000, to the Distribution Center, Maricopa County Superior Court Clerk's Office, for filing, copying and mailing to those parties who appear on the Court-approved mailing list for Case No. W1-203 dated June 1, 2000 (Attachment A).

Kathy Dolge

Attachment A
Court-approved Mailing List*
Case No. W1-203
In re the Water Rights of the Fila River Indian Community
(20 Names)
Prepared by the Office of the Special Master
June 1, 2000

*Please inform the office of the Special Master if there are any corrections or changes to this mailing list.

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Attachment B

SCHEDULE

In re the Water Rights of the Gila River Indian Community
Contested Case No. W1-203

Proceedings re Purposes of Establishing the Gila River Indian Reservation

CURRENTLY
ORDERED DATE

I. Resolution of preliminary issues:

- | | | |
|---|--|---------------|
| A. Burden of proof (<i>i.e.</i> , burden of going forward, burden of persuasion) | (1) Opening pleadings from all interested litigants | Aug. 2, 2000 |
| | (2) Responding pleadings from all interested litigants | Aug. 21, 2000 |
| | (3) Oral argument, if requested or ordered, thereafter | |

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| B. Admissibility (relevance, materiality, and potential overlap ¹) of these expert reports: | (1) Filing of any objections to these reports | Aug. 2, 2000 |
|---|---|--------------|

¹ I believe it is desirable to resolve early the question of any overlap in the anticipated testimony of the Community's expert witnesses. *See* ARIZ. R. CIV. PROC. 43(g).

- Gookin *et al.*, “Hydrologic History of the Gila River Indian Reservation” (2) Responding pleadings Aug. 21, 2000
- Rea, “Phreatophytes, River Pima & Maricopa Mesquite Usage, Destruction of Pima-Maricopa Property” (3) Rebuttal Sept. 1, 2000
- Dobyms, “Creation & Expansion of the Gila River Indian Reservation” (4) Oral argument, if requested or ordered, thereafter
- Angel, “A History of Land & Water Use on the Gila River Indian Reservation” (limited to consideration of potential conflict of interest issues)

- C. Whether as a legal matter the primary-secondary distinction discussed in *United States v. New Mexico*, 438 U.S. 696 (1978), applies to this case
- (1) Any motion for summary judgment filed Aug. 2, 2000
 - (2) Responding pleadings Aug. 21, 2000
 - (3) Replies Sept. 1, 2000

- D. Whether the agricultural purpose of Indian Reservations (and use of the PIA methodology) are the “law of the case” based on the Court’s minute entry of Sept. 9, 1988
- (1) Any motion for summary judgment filed Aug. 2, 2000
 - (2) Responding pleadings Aug. 21, 2000
 - (3) Replies Sept. 1, 2000

II. Motions for summary judgment:

A. Motions for summary judgment or other
dispositive motions

Can be filed up to 90
days before trial;
responses and replies
according to normal
time rules

Feb. 5, 2001
Responses Feb. 27
Replies Mar. 13

III. Expert reports:

A. Request by GRIC to file additional opening
expert reports (including written expert report
by oral historian)

(1) Filing of any
request

June 16, 2000

(2) Responding
pleadings

June 30, 2000

(3) Rebuttal

July 14, 2000

(4) Oral argument, if
requested or
ordered,
thereafter

B. Supplemental reports by experts who have
previously filed expert report

150 days after this
Pretrial Order is
signed and entered

Nov. 1, 2000

C. Rebuttal expert reports

210 days after this Pretrial Order is signed and entered Jan. 8, 2001

IV. Discovery:

A. End of disclosure by submissions to OSM's Document Repository (except for deposition transcripts)

90 days after this Pretrial Order is signed and entered Sept. 1, 2000

B. Depositions

(1) Lay witnesses

Can begin 60 days after this Pretrial Order is signed and entered

July 31, 2000

(2) Expert witnesses

Can begin 150 days after this Pretrial Order is signed and entered

Nov. 1, 2000

C. Other discovery

Can begin when this Pretrial Order is signed and entered

June 1, 2000

D. Conclusion of all discovery	No earlier than 240 days after this Pretrial Order is signed and entered	Feb. 11, 2001
E. Discovery motions	Can be filed up to 90 days before trial; responses and replies according to normal time rules	Feb. 5, 2001 Responses Feb. 27 Replies Mar. 13
V. <u>Final trial preparation:</u>		
A. Identification of trial exhibits by offering litigants (including portions of deposition transcripts to be offered)	6 weeks before trial	Mar. 26, 2001
B. Date for submitting any remaining deposition transcriptions to the OSM's Document Repository	6 weeks before trial	Mar. 26, 2001
C. Cross-designation of any portions of deposition transcripts to be offered	5 weeks before trial	Apr. 2, 2001

D. Final pretrial statements (including any objections to exhibits) and settled statement of facts	4 weeks before trial	Apr. 9, 2001
E. Motions <i>in limine</i>	4 weeks before trial	Apr. 9, 2001
(1) Responses to motions <i>in limine</i>	3 weeks before trial	Apr. 16, 2001
(2) Replies, motions <i>in limine</i>	2 weeks before trial	Apr. 23, 2001
F. Demonstrative exhibits provided or made available for inspection	2 weeks before trial	Apr. 23, 2001
G. Final pretrial conference	2 weeks before trial	Apr. 23, 2001
VI. <u>Trial:</u> Estimated at 20 days (Monday-Thursday) = 5 calendar weeks	Commencing May 7, 2001, with recesses as necessary for Memorial Day, judicial conference, and state bar convention	
VII. <u>Post-trial briefing:</u>		
A. Proposed findings of fact and conclusions of law	30 days after conclusion of trial or 15 days after transcripts are available	

B. Opening post-trial briefs

30 days after conclusion of trial or 15 days after transcripts are available

(1) Responses

15 days after opening briefs

(2) Replies

10 days after responses
