

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: August 17, 2009

CIVIL NO. W1-11-3342

CASE INITIATION ORDER
AND DESIGNATION OF
INITIAL ISSUES FOR BRIEFING

CONTESTED CASE NAME: *In re Aravaipa Canyon Wilderness Area.*

HSR INVOLVED: San Pedro River Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master organizes a contested case to resolve the objections arising from the Final Hydrographic Survey Report for the San Pedro River Watershed concerning the Aravaipa Canyon Wilderness Area, designates seven issues for initial briefing, and sets times for disclosure statements, discovery, and briefing.

NUMBER OF PAGES: 10; Attachment A - 1; total 11 pages.

DATE OF FILING: August 17, 2009.

The Special Master has reviewed all comments regarding the organization of a contested case for the Aravaipa Canyon Wilderness Area. The United States, Freeport-McMoRan Corporation (“Freeport-McMoRan”), and Salt River Project (“SRP”) submitted comments.

The United States suggested briefing seven legal issues following a process similar to that implemented in *In re San Pedro Riparian National Conservation Area*

(“*SPRNCA*”). SRP supports establishing a contested case and the United States’ formulation of “foundational legal questions” for resolution.

Freeport-McMoRan opposes organizing a contested case because the United States has not fully defined its water rights claims, and the factual evidence to determine if unappropriated waters were available at the time of the area’s designation is currently not available. The company objects to a proposed issue, namely, if unappropriated waters were reserved for the purposes of the reservation, did Congress intend to reserve all unappropriated waters at the time of designation of the wilderness area?

We have successful experience with this situation.¹ In the *SPRNCA* and *In re Fort Huachuca* contested cases, we initially briefed reserved rights issues that were not dependent on updated technical information. Likewise, the issues suggested by the United States can be determined while the United States completes the technical work to update its claims. A contested case will be organized, and the issues suggested by the United States will be set for briefing.

Second, at this point, we are as in the *SPRNCA* and *Fort Huachuca* cases - in the progressive process of determining whether all the attributes of a reserved water right exist for the Aravaipa Canyon Wilderness Area. When the initial briefing concludes, we will not have reached a full decision, but we will have taken steps toward that outcome.²

The objection concerning the final issue proposed by the United States raises a question as to the economy of briefing an issue that appears was decided by the Idaho Supreme Court in *Potlatch Corp. v. United States*, 12 P.3d 1260 (Idaho 2000). However, because the Aravaipa Canyon Wilderness Area came about as the result of Executive designations and at least two Congressional acts, the parties will be asked to brief the issue in order to develop fully the enactment history of the wilderness area. In this regard, the Special Master wants to hear if, and how, these different actions might affect priority dates of claimed reserved water rights.

SRP suggested the Redfield Canyon Wilderness Area be included in any contested case organized to resolve these issues because both wilderness areas “raise the same or similar legal issues” of reserved water rights. The suggestion appeals but is not implemented because the Final Hydrographic Survey Report for the San Pedro River Watershed (“San Pedro HSR”) does not present as much information about the Redfield Canyon area as it does for the Aravaipa Canyon area,³ and determinations of the issues involving Aravaipa Canyon could be adopted as precedent for the Redfield Canyon area.

¹ This statement focuses on the trial experience gained in other federal non-Indian reserved rights cases where the initial steps taken were similar to those in this new contested case.

² See *In re SPRNCA*, Order Determining Initial Issues Designated for Briefing 7-8 (Mar. 4, 2009) and Scheduling Order 2 (June 28, 2007).

³ The reason may be that the Redfield Canyon Wilderness Area was established shortly before the San Pedro HSR was published. Compare Vol. 1, Hydrographic Survey Report for the San Pedro River Watershed 447-56 (Aravaipa Canyon) and 464-5 (Redfield Canyon).

Furthermore, the Special Master appreciates that in the next two years parties will be engaged in other equally important matters in the watershed.

Disclosures, discovery, and briefing shall be limited to these issues. Because the United States likely has the majority of the documents relevant to these issues, it will be directed to file its disclosure statement before the other parties are required to file their disclosures and will be allowed more time to file its disclosures than the other parties.

The Arizona Department of Water Resources (“ADWR”) will be directed to develop and maintain an electronic data base and index of disclosed documents similar to those it created in other contested cases. Until further order, ADWR will not be directed to update or conduct technical work related to the Aravaipa Canyon Wilderness Area.

I. MOTION OF THE UNITED STATES FOR EXTENSION OF TIME TO FILE AMENDED STATEMENTS OF CLAIMANT

On July 21, 2009, the United States requested an extension of time until December 31, 2011, “to complete the detailed data collection and analysis required [and] to file amendments to its federal reserved water rights” claim for the Aravaipa Canyon Wilderness Area. No objections to the motion were received. The request is reasonable given the extent and nature of data the United States plans to obtain.

Accordingly, IT IS ORDERED, granting the request of the United States for an extension of time to file amendments. On or before **December 31, 2011**, the United States shall file amendments to Statement of Claimant No. 39-68704, and other statements, to show the extent of its claims to federal reserved water rights for the Aravaipa Canyon Wilderness Area.

II. DESIGNATION OF CONTESTED CASE

A contested case is organized to address the objections and issues related to the adjudication of the water rights claimed for the Aravaipa Canyon Wilderness Area. The following procedures and timelines shall apply.

1. Contested Case. This case is designated *In re Aravaipa Canyon Wilderness Area*, Docket No. W1-11-3342.

2. Litigants. At this time, the litigants in this case are the United States of America, Bureau of Land Management, Arizona Game and Fish Department, The Arizona Nature Conservancy, ASARCO LLC, Cities of Benson and Sierra Vista, Philip Denormandie, Gila River Indian Community, Porter House Station, L.L.C., Salt River Project, Kathy Sergent, San Carlos Apache Tribe, Tonto Apache Tribe, and the Yavapai-Apache Nation. These litigants are the landowner, current livestock grazing permittees previously named by the United States, and claimants who objected to all or portions of Watershed File Report No. 115-5-19 of the San Pedro HSR.

3. Motion to Intervene. Any claimant in the San Pedro River Watershed may request to intervene in this case pursuant to Arizona Rule of Civil Procedure 24. The

initial deadline to file motions to intervene shall be **November 19, 2009**.

4. Court Approved Mailing List. The mailing list for this case shall include all the litigants named in Paragraph 2, the Clerk of the Maricopa County Superior Court, the Arizona Department of Water Resources, and the Special Master. Judge Eddward P. Ballinger, Jr. will not be included in the mailing list.

A. The initial mailing list is set forth in Attachment A. Parties allowed to intervene will be added to the mailing list. The list may be modified from time to time, and litigants are responsible for using the current Court approved mailing list.

B. A copy of any pleading filed with the Clerk of the Maricopa County Superior Court shall be served upon all persons listed on the mailing list.

C. Claimants wishing to be added or removed from the mailing list shall file a motion with the Special Master.

D. Inform the Special Master if a name or address is incorrect.

5. Filings.

A. Date of Filing. Papers submitted to the Clerk of the Maricopa County Superior Court shall be considered timely filed if postmarked by the deadline specified in an order issued in this case.

B. Signature Page. In papers joined by numerous parties, in lieu of separate signature pages, the Special Master will accept as sufficient an avowal by the lead counsel that includes a listing of the attorneys and the parties each represents who join in the pleading. This allowance is made pursuant to Arizona Rule of Civil Procedure 1 that the rules “shall be construed to secure the ... inexpensive determination of every action.” If a party has concerns related to Rule 11(a), that party may request or provide an individual signature.

6. Initial Issues. The following issues shall be initially briefed:

A. Did Congress in enacting the legislation establishing the Aravaipa Canyon Wilderness Area expressly intend to reserve unappropriated waters to accomplish the purposes of the reservation?

B. If so, what were the purposes of the reservation?

C. If Congress did not expressly intend to reserve water, does the evidence establish that the United States withdrew land from the public domain and reserved the Aravaipa Canyon Wilderness Area for federal purposes?

D. If the land was withdrawn and reserved, what were the purposes of the

reservation?

E. If the land was withdrawn and reserved, did the United States impliedly reserve unappropriated waters to accomplish the purposes of the reservation?

F. If unappropriated waters were reserved for the purposes of the reservation, what is the date or dates of priority of the reserved water rights?

G. If unappropriated waters were reserved for the purposes of the reservation, did Congress intend to reserve all unappropriated waters at the time of designation?

7. Disclosure Statements.

A. Scope. Disclosure statements shall be limited to matters concerning the issues designated for briefing in this case initiation order.

B. Filing Date for the United States. On or before **February 16, 2010**, the United States shall file its initial Arizona Rule of Civil Procedure 26.1 disclosure statement.

C. Filing Date for All Other Parties. On or before **March 19, 2010**, all other parties shall file their initial Rule 26.1 disclosure statements.

D. Contents. All disclosures shall include information and data in the possession, custody, and control of the disclosing party as well as that which can be ascertained, learned, or acquired by reasonable inquiry and investigation. The disclosure statement shall set forth:

(1). The factual basis of a party's claim concerning each of the designated issues.

(2). The legal theory upon which each claim is based including, where necessary for a reasonable understanding of the claim, citations of pertinent legal or case authorities.

(3). The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call to substantiate its claims with a fair description of the substance of each witness' expected testimony.

(4). The names and addresses of all persons whom the disclosing party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to each claim, and the nature of the knowledge or information each such individual is believed to possess.

(5). The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6). The name and address of each person whom the disclosing party expects to call as an expert witness, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness, and the name and address of the custodian of copies of any reports prepared by the expert.

(7). The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the party plans to use to support its claims.

(8). A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by the disclosing party to exist whether or not in its possession, custody, or control and which that party believes may be relevant to any of its claims concerning the designated issues, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection and copying. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the document and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

E. Continuing Duty. All parties shall have a continuing duty to disclose as required by and in the manner provided in Rule 26.1(b)(2).

F. Service of Disclosures. All disclosing parties shall provide a notice of filing and a listing of the disclosed documents and electronically stored information to all persons appearing on the Court approved mailing list for this case. Paper copies of disclosed documents need not be served upon the other parties in this case, as copies can be obtained from ADWR.

G. Service of Lengthy Listing of the Disclosed Documents: If a party's listing of its disclosed documents or electronically stored information, not the disclosure statement, exceeds twenty-five pages, that party shall so

state in its disclosure statement and shall provide a copy of the complete listing to the Special Master, ADWR, and to those parties who request from the disclosing party a copy of the complete listing.

8. Electronic Data Base and Index Provided by ADWR. ADWR is directed to create and maintain an electronic data base and index of all disclosed documents which shall be available on ADWR's Internet site. ADWR may confer and work with any of the parties in this case to implement the electronic data base and index.

A. Electronic Format. A disclosing party shall submit to ADWR a copy of all documents disclosed and an index of the documents in accordance with the following requirements:

(1). Number each document in numeric sequence with a unique alpha identifier that is related to the name of the disclosing party.

(2). *Counsel who has prior experience with these data bases should note the changes made in subsections a, b, c, e, i, and j, and new subsection k.* Complete a Disclosure Input Form in Microsoft Excel format for each disclosed document containing the following searchable index fields:

a. Title or description of document. The verbatim title of the document shall be used. If a document does not have a title, a brief description in square brackets shall be provided.

b. Unique identifying number created by the disclosing party for each document. The unique identifying number shall be limited to ten alpha numeric characters.

c. Date of publication or preparation of document. The format shall be YYYY/MM/DD. Where a date is not identified in a document, the format shall be YYYY/MM/00. Where neither a date nor a month is identified, the format shall be YYYY/00/00.

d. Document type (article, book, letter, map, report).

e. Recipient. The format shall be Last Name, First Name.

f. Number of pages of document.

g. Disclosing party.

h. Date of submittal of document.

i. Subject matter of document (up to three categories). To

the extent a party wishes to use the subject matter field, information already entered in any other field shall not be repeated in the subject matter field.

j. Author. The format shall be Last Name, First Name.

k. Recipient Title Position. The format shall be Position Title, Employee Entity.

(3). Create a portable document format file (.pdf) of each document.

(4). Provide a compact disc to ADWR with copies of the Disclosure Input Forms (Microsoft Excel files) and corresponding disclosure documents in .pdf file format.

(5). Provide to ADWR paper copies of disclosed documents and corresponding Disclosure Input Forms. ADWR will maintain paper copies to satisfy the Public Records Act, A.R.S. §§ 39-101 *et seq.*

B. Internet Access. ADWR shall place a blank copy of the Disclosure Input Form together with format protocols on the Internet at a domain or address made known to all persons who appear on the Court approved mailing list for this case. In order to provide access to the disclosed documents, each index field in the Disclosure Input Form shall be subject to query. To the greatest extent possible, electronic copies of all disclosed documents and completed Disclosure Input Forms shall be made available on the Internet for viewing and copying.

C. Form. To the extent possible, parties shall submit documents in the following form: single-sided, 8.5" x 11" size, no punched holes, no permanent binding (staples excepted), and no tabs.

D. Copies of Disclosed Documents. ADWR shall make available to any claimant, at the claimant's expense, a copy of disclosed documents on a CD-ROM or a paper copy. ADWR shall determine the best and most practical manner for providing copies.

E. Fees. ADWR may collect its standard fees for copies and other services rendered related to the use of the electronic data base and index.

9. Discovery.

A. Scope. Discovery shall be limited to matters concerning the issues designated for briefing in this order.

B. Commencement. Parties may commence formal discovery on or after **March 19, 2010**, but prior thereto may, and are encouraged, to engage in

informal discovery.

C. **Completion.** All discovery including depositions shall be completed by **September 10, 2010.**

D. **Rules.** All discovery related to the designated issues shall be conducted according to Arizona Rules of Civil Procedure 26 through 37, and as applicable, pretrial orders issued in this adjudication and the Rules for Proceedings Before the Special Master.

10. **Expert Reports.** On or before **June 14, 2010**, all parties shall exchange expert reports that a party considers relevant to the issues designated for briefing.

11. **Motions.** On or before **November 15, 2010**, any party in this case may file the appropriate motion that presents the party's position concerning any of the designated issues. Each issue shall be separately addressed in the motion. Parties sharing the same position are encouraged to file joint pleadings.

12. **Responses.** Responses to all motions shall be filed by **January 31, 2011.**

13. **Replies.** Replies to all motions shall be filed by **March 18, 2011.**

14. **Statement of Position.** A party may file a statement of position in lieu of a motion. Responses to a statement and replies shall be subject to the foregoing deadlines.

15. **Page Limitations.** Parties are excused from mandated page limitations for motions, responses, and replies, but reasonableness is expected.

16. **Oral Argument and Hearings.** Oral argument will be held on all the issues. The place, date, and time of oral argument will be announced later. Oral argument and hearings will be held in the Maricopa County Superior Court in Phoenix.

17. **Technical Investigations.** Until further order, ADWR will not be directed to update or conduct technical work related to the Aravaipa Canyon Wilderness Area.

18. **Status Conferences.** At this time, a status conference is not set. Any party may request a conference, which may be held telephonically, to consider any matter including the need for an evidentiary hearing.

19. **Additional Information.** For more information about the Gila River Adjudication, you may contact the following offices, but these offices cannot give you legal advice:

A. For information about the San Pedro HSR, copies of documents, and ordering a monthly docket subscription for the Gila River Adjudication:

Arizona Department of Water Resources
3550 North Central Avenue
Phoenix, Arizona 85012

Tel. (602) 771-8627 (Phoenix area)
Tel. 1-(866) 246-1414 (toll free within the United States)

B. For information about filing papers, reviewing contested case court files, and obtaining copies of court filings:

Clerk of the Maricopa County Superior Court
Attn: Water Case
601 West Jackson Street
Phoenix, Arizona 85003

DATED: August 17, 2009.

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

On August 17, 2009, 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 the Gila River Adjudication Nos. W-1, W-2, W-3, and W-4 (Consolidated) dated July 27, 2009, and to the following persons:

City of Benson
P. O. Box 2223
Benson, Arizona 85602

Phillip Denormandie
12 Marshall Street
Boston, Massachusetts 02108

Kathy Sergent
4700 North Dry Camp Road, Box 5012
Klondyke, Arizona 85643

The Arizona Nature Conservancy
300 East University Boulevard, Suite 230
Tucson, Arizona 85705

Porter House Station, L.L.C.
P. O. Box 228
Tucson, Arizona 85702

U.S. Bureau of Land Management
Safford District Office
711 14th Avenue
Safford AZ 85546

/s/ George A. Schade, Jr.
George A. Schade, Jr.

Court Approved Mailing List
 In re Aravaipa Canyon Wilderness Area
 W1-11-3342 (17 Names)
 Prepared by the Special Master
 August 17, 2009

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| <p>Clerk of the Superior Court Maricopa County Attn: Water Case 601 West Jackson Street Phoenix AZ 85003</p> <p>Porter House Station L.L.C. P. O. Box 228 Tucson AZ 85702</p> <p>U.S. Bureau of Land Management Safford District Office 711 14th Avenue Safford AZ 85546</p> <p>The Arizona Nature Conservancy 300 East University Boulevard, Suite 230 Tucson AZ 85705</p> <p>Fennemore Craig, P.C. Lauren J. Caster 3003 North Central Avenue, Suite 2600 Phoenix AZ 85012-2913</p> <p>Philip Denormandie 12 Marshall Street Boston MA 02108</p> <p>Gila River Indian Community Jennifer K. Giff, R. B. Lewis, J. T. Hestand, R. E. Koester, and A. M. Chischilly 525 West Gu u Ki P. O. Box 97 Sacaton AZ 85247</p> <p>U.S. Department of Justice Environment and Natural Resources Division R. Lee Leininger 1961 Stout Street, 8th Floor Denver CO 80294</p> <p>Montgomery & Interpreter, P.L.C. Susan B. Montgomery and Robyn L. Interpreter 11811 North Tatum Blvd, Suite 3031 Phoenix AZ 85028</p> | <p>Arizona Attorney General's Office Natural Resources Section Kenneth D. Nyman and Theresa M. Craig 1275 West Washington Phoenix AZ 85007-2997</p> <p>Office of the City Attorney Benson, City of P. O. Box 2223 Benson AZ 85602</p> <p>Arizona Department of Water Resources Legal Division Janet L. Ronald 3550 North Central, 4th Floor Phoenix AZ 85012</p> <p>Special Master Arizona General Stream Adjudication George A. Schade, Jr. 201 West Jefferson, CCB 5B Phoenix AZ 85003-2205</p> <p>Kathy Sergent 4700 North Dry Camp Road, Box 5012 Klondyke AZ 85643</p> <p>The Sparks Law Firm, P.C. Joe P. Sparks and Laurel A. Herrmann 7503 First Street Scottsdale AZ 85251-4573</p> <p>Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C. William P. Sullivan 501 East Thomas Road Phoenix AZ 85012-3205</p> <p>Salmon, Lewis & Weldon, P.L.C. John B. Weldon, Jr. and Lisa M. McKnight 2850 East Camelback Road, Suite 200 Phoenix AZ 85016</p> |
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