

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: March 19, 2010

CIVIL NO. W1-11-232
(Consolidated)

ORDER DETERMINING THE
SECOND SET OF ISSUES
DESIGNATED FOR BRIEFING

CONTESTED CASE NAME: *In re San Pedro Riparian National Conservation Area.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master determines the second set of issues designated on May 1, 2009, for briefing.

NUMBER OF PAGES: 7.

DATE OF FILING: March 19, 2010.

Two rounds of briefing of legal issues have been held. The first round concluded with an order issued on March 4, 2009. This order concerns the second round of briefing.

I. CHRONOLOGY OF PROCEEDINGS

After considering comments from the parties, on May 1, 2009, the Special Master set for briefing the following issues:

A. Must Certificate of Water Right No. 90103.0000 be considered a water

right available to the United States to serve the stated purposes of the San Pedro Riparian National Conservation Area (“SPRNCA”)?, and

B. Are the beneficial uses of Certificate of Water Right No. 90103.0000 distinct and separate uses or do they fulfill the stated purposes of the SPRNCA?

ASARCO LLC (“ASARCO”) filed a Motion for Partial Summary Judgment. The Salt River Project (“SRP”) filed a Motion for Summary Judgment. The United States filed a Supplemental Briefing Regarding the Effect of the State Law Instream Flow Right on the Federal Reserved Water Right. The Bella Vista Water Company, Inc., Pueblo Del Sol Water Company, and the City of Sierra Vista (collectively “Sierra Vista Parties”) filed a Statement of Position.

ASARCO, Freeport-McMoRan Corporation (“Freeport-McMoRan”), Babacomari Ranch Company, LLP (“Babacomari”), SRP, San Carlos Apache Tribe and Tonto Apache Tribe (collectively “Apache Tribes”), Sierra Vista Parties, and the United States filed responsive memoranda. ASARCO, SRP, Sierra Vista Parties, and the United States filed replies. The Special Master heard argument on all motions on February 18, 2010.

For the reasons stated in the March 4, 2009, order that are incorporated in this ruling, the Special Master will issue an order and not an Arizona Rule of Civil Procedure 53(g) report at this time.

II. MUST CERTIFICATE OF WATER RIGHT NO. 90103.0000 BE CONSIDERED A WATER RIGHT AVAILABLE TO THE UNITED STATES TO SERVE THE STATED PURPOSES OF THE SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA?

The Special Master determines that Certificate of Water Right No. 90103.0000 (“CWR No. 90103.0000”) must be considered a water right available to the United States to serve the federal purposes of the SPRNCA.

A. Certificate of Water Right No. 90103.0000

The Special Master makes the following findings of fact concerning CWR No. 90103.0000:

Finding of Fact No. 1. On August 12, 1985, the Huachuca Audubon Society, Chiricahua Sierra Club, and Defenders of Wildlife filed with the Arizona Department of Water Resources (“ADWR”) an application to appropriate instream flows of the San Pedro River.

Finding of Fact No. 2. ADWR docketed the application as number 33-90103.

Finding of Fact No. 3. On May 22, 1986, the Huachuca Audubon Society, Chiricahua Sierra Club, and Defenders of Wildlife assigned Application No. 33-90103 to the Bureau of Land Management (“BLM”), an agency within the United States

Department of the Interior.

Finding of Fact No. 4. On April 3, 1992, ADWR issued to the United States Department of the Interior, BLM, Safford District Office, CWR No. 90103.0000. Permit to Appropriate No. 33-90103.0000 preceded the certificate.

Finding of Fact No. 5. CWR No. 90103.0000 grants the United States “a right to the use of the waters flowing in the San Pedro River ... for recreation and wildlife, including fish.”

Finding of Fact No. 6. The quantities of water granted by CWR No. 90103.0000 are based on the seasonal stream flow rates requested by the United States.

Finding of Fact No. 7. CWR No. 90103.0000 states that “the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed an amount expressed as specified flow rates and cumulative totals” based on stream flows measured at two identified gages of the United States Geological Survey. The certificate enumerates the flow rates in cubic-feet per second.

Finding of Fact No. 8. CWR No. 90103.0000 states that “[t]he beneficial use will occur instream along the meandering course of the San Pedro River” and provides a general description of the main stem of the river and the lands under such right and to which the water right is appurtenant and put to beneficial use.

Finding of Fact No. 9. The date of priority of the water right vested by CWR No. 90103.0000 is August 12, 1985, the date ADWR received the application.

Finding of Fact No. 10. CWR No. 90103.0000 specifies several conditions concerning the physical use of the water right.

Conclusion of Law No. 1. ADWR granted CWR No. 90103.0000 pursuant to the surface water laws codified in title 45, chapter 1, Arizona Revised Statutes (2003).

B. Legal Analysis

The Order Designating Issues for Briefing explained that “we can brief if [CWR No. 90103.0000] must be included in the inventory of water rights available to the United States to serve” the federal purposes.¹ Diverse arguments were presented, but there is little disagreement, if any, that CWR No. 90103.0000 should be included in the inventory of rights available to the United States to provide water as required for the purposes of the conservation area.

Although the United States argued that the answer to the first issue is “no,” it explained “the state law right is also needed, notwithstanding the federal reserved right,” and “it is important for the BLM to receive water rights based on both state and federal

¹ Order Designating Issues for Briefing 2 (May 1, 2009).

law.... [b]oth of these distinct water rights must be given effect.”² SRP acknowledged that CWR No. 90103.0000 “is ... part of the inventory of water rights available to the United States to satisfy the federal purposes of the SPRNCA.”³ The other parties agreed.

The Arizona Supreme Court has held that vested appropriative water rights “are property rights” of the holder entitled to due process constitutional protections.⁴ CWR No. 90103.0000 is a substantive property right of the United States that cannot be overlooked or disregarded in the analysis of water rights available to serve the purposes of the conservation area.

Conclusion of Law No. 2. CWR No. 90103.0000 is a perfected vested appropriative property right of the United States to surface water.

ASARCO argued that CWR No. 90103.0000 must be considered in order to determine if this water right and others are sufficient to fulfill all the federal purposes of the riparian area. As explained in the analysis of the second issue, there is an overlap between the beneficial uses of CWR No. 90103.0000 and the federal purposes of the SPRNCA.

The certificate’s beneficial uses are recreation and wildlife, including fish. This water right should be examined to determine if it fulfills the federal purposes of protection of “wildlife” and “recreational resources.” No implication or insinuation is made that CWR No. 90103.0000 fulfills any of the other federal purposes of the SPRNCA. However, because the vested beneficial uses and, strictly speaking, two of the federal purposes appear to be similar, this is a reason to include CWR No. 90103.0000 in the inventory of available water rights.

Freeport-McMoRan and Babacomari argued that CWR No. 90103.0000 must be examined to determine if unappropriated water was available for the Congress to reserve when it designated the SPRNCA in November 1988. The United States addressed this argument in its reply. The question of whether unappropriated water existed on the date of the establishment of the SPRNCA will likely be raised in the quantification phase of this case when evidentiary light will be shed on the issue. In this order, the Special Master does not make any findings concerning this issue.

III. ARE THE BENEFICIAL USES OF CERTIFICATE OF WATER RIGHT NO. 90103.0000 DISTINCT AND SEPARATE USES OR DO THEY FULFILL THE STATED PURPOSES OF THE SAN PEDRO RIPARIAN NATIONAL

² U. S. Supplemental Briefing Regarding the Effect of the State Law Instream Flow Right on the Federal Reserved Water Right 2, 3 and 5 (Aug. 31, 2009).

³ SRP’s Reply in Support of Motion for Summary Judgment 10 (Feb. 11, 2010).

⁴ *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992); *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 205, 972 P.2d 179, 189 (1999) (“[T]he water rights of the parties in the Gila and Little Colorado general stream adjudications are vested substantive property rights.”).

CONSERVATION AREA?

The Special Master determines that the beneficial uses of CWR No. 90103.0000 are distinct and separate uses that partially, but not fully, fulfill the federal purposes of the SPRNCA to the extent water is required.

Parties focused on the extent to which CWR No. 90103.0000 fulfills all the federal purposes of the conservation area. In the first briefing round, the Special Master determined that the federal purposes of the SPRNCA “are the protection of the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area.”⁵

On the other hand, the beneficial uses of CWR No. 90103.0000 are “recreation and wildlife, including fish.” These are the beneficial uses authorized in A.R.S. §§ 45-151(A), 45-157(B)(4), and 45-181(1) for the appropriation of surface water.

Arguments posited that the United States planned, as it amended and perfected its Application to Appropriate No. 33-90103, that the beneficial uses of the application were meant to serve the broader purposes of the SPRNCA that Congress subsequently legislated. It was argued that CWR No. 90103.0000 fulfills the federal purposes. One response to this position conceded “there is some overlap” between the beneficial uses of CWR No. 90103.0000 and the federal purposes of the SPRNCA.⁶

ASARCO cited several of the BLM’s reasons in support of the instream flow application reported in the BLM’s *Assessment of Water Conditions and Management Opportunities in Support of Riparian Values* (“Assessment Report”).⁷ ASARCO argued that the “BLM’s justification for this instream flow right also commends an expansive interpretation of the Certificate’s authorized uses.”⁸

Finding of Fact No. 11. The BLM’s Assessment Report is dated May 1987.

Finding of Fact No. 12. By letter dated February 16, 1989, the BLM submitted a copy of its Assessment Report to ADWR to include in the file of Application to Appropriate No. 33-90103.⁹ ADWR received the report on March 1, 1989.

Finding of Fact No. 13. The preface of the Assessment Report states in part that “[w]hereas water resources in the San Pedro River properties provide a useful focal point for many resource values and management issues, the report by no means reflects all of

⁵ Order Determining Initial Issues for Briefing 8 (Mar. 4, 2009).

⁶ SRP’s Response to Motions for Summary Judgment 7 (Dec. 7, 2009). The Apache Tribes agreed. *See* Apache Tribes’ Response to Motions for Summary Judgment 4 (Dec. 21, 2009).

⁷ A copy of a portion of the report is provided in ASARCO’s Appendices to its Motion for Partial Summary Judgment (hereinafter designated “ASARCO Appendices”), Vol. 1, Tab 1.

⁸ ASARCO’s Motion for Partial Summary Judgment 14 (Aug. 31, 2009). The citations are provided in ASARCO’s statements of fact nos. 4 - 16 in support of its motion.

⁹ A copy of the letter is provided in ASARCO Appendices, Vol. 1, Tab 3.

the issues and concerns involved in land use planning and management.”

The dates of the Assessment Report, establishment of the SPRNCA, and submission of the report to ADWR occurred within a period of 22 months. The Assessment Report mentioned the “proposed [Congressional] legislation” and quoted provisions concerning the purposes of the SPRNCA that turned out to be correct.¹⁰ The references indicate that when it was preparing the Assessment Report the BLM was aware of proposed Congressional legislation of purposes and management plans.

The Special Master has carefully read the submitted portions of the Assessment Report. The Special Master cannot find that CWR No. 90103.0000 and its history commend “an expansive interpretation” of the authorized uses of recreation and wildlife, including fish to encompass all the purposes of the SPRNCA. Such an interpretation requires a quantum leap of reasoning that cannot be made.

First, although aware of proposed legislation concerning purposes and management plans, the BLM never amended its application to include specifically the protection of archeological, paleontological, scientific, cultural, and educational values. The Assessment Report mentioned some of these terms, but the application to appropriate did not request the protection of these values as proposed beneficial uses.

Finding of Fact No. 14. By letter dated December 3, 1987 (eleven months prior to the establishment of the SPRNCA), the BLM amended the proposed uses of its appropriative application to “wildlife and fisheries including wildlife and riparian habitat protection” and “recreation, including aesthetics.”¹¹

Second, the beneficial uses of CWR No. 90103.0000 are recreation and wildlife, including fish. The certificate is silent about other uses or values.

Reference was made to the definition of “instream flow” articulated in ADWR’s *A Guide to Filing Applications for Instream Flow Water Rights in Arizona* (Dec. 1991) (“ADWR’s Guide”).¹² The guide provided criteria for granting CWR No. 90103.0000.

Finding of Fact No. 15. ADWR’s Guide states on page 1 that “[i]nstream flow, as defined in this report, is the maintenance flow necessary to preserve instream values such as aquatic and riparian habitats, fish and wildlife and water-based recreation in a particular stream or stream segment.”

ADWR’s Guide defines the term “instream flow” and not “instream flow water right.” An instream flow is a maintenance flow that preserves instream values, while a water right possesses discrete attributes and serves approved beneficial uses.

¹⁰ Assessment Report 51 and 52, n.7, *supra*. One reference is to “a management plan” for the “protection of the riparian area and the aquatic, wildlife, archaeological, paleontological, scientific, cultural, educational, and recreation resources and values of the conservation area.”

¹¹ A copy of the letter is provided in ASARCO Appendices, Vol. 1, Tab 2.

¹² A copy of ADWR’s Guide is provided in ASARCO Appendices, Vol. 1, Tab 6.

The Special Master cannot find that ADWR's Guide defines, as expansively as claimed, the uses of recreation and wildlife, including fish when they involve an instream flow water right. Supporting this determination are the facts that (1) the guide refers to recreation and wildlife, including fish on pages 5, 8, and 12, (2) the glossary (page 35) defines a "beneficial use" that can be accomplished without diversion as "fish, wildlife and recreation uses," and (3) Appendix A (page 37) is a sample application that lists only these uses. The definition of instream flow on the first page is not repeated thereafter.

The Special Master finds no reasonable basis to conclude that the authorized uses of CWR No. 90103.0000 include or encompass the protection of archeological, paleontological, scientific, cultural, and educational values. The Special Master further finds, based on the record of this briefing, that CWR No. 33-90103.0000's beneficial uses overlap with some of the federal purposes of the conservation area.

IV. DETERMINATIONS OF THE SPECIAL MASTER

The Special Master finds and determines that:

1. CWR No. 90103.0000 must be considered a water right available to the United States to serve the federal purposes of the SPRNCA, and
2. The beneficial uses of CWR No. 90103.0000 are distinct and separate uses that partially, but not fully, fulfill the federal purposes of the SPRNCA to the extent water is required.

Accordingly, IT IS ORDERED granting and denying all motions for summary judgment consistent with the determinations contained in this order.

DATED: March 19, 2010.

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

On March 19, 2010, 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. W1-11-232 dated January 20, 2010.

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