

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: May 1, 2009

CIVIL NO. W1-11-232
(Consolidated)

ORDER DESIGNATING
ISSUES 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 designates two issues for briefing and schedules consideration of the Arizona Department of Water Resources' report due September 11, 2009.

NUMBER OF PAGES: 3.

DATE OF FILING: May 1, 2009.

A telephonic conference was held on April 23, 2009, to discuss future proceedings in this case.

I. ISSUES FOR BRIEFING AND REQUEST FOR CLARIFICATION

The Special Master wants to move this case forward, an objective that must take into account the limited extent of updated information. At this point, we are unable to address whether existing water rights and claims held by the United States are sufficient

to fulfill the purposes of the San Pedro Riparian National Conservation Area (“SPRNCA”) because we do not have updated information concerning all such rights. According to the Final Hydrographic Survey Report for the San Pedro River Watershed (“San Pedro HSR”), the United States claims water rights based on pre-June 12, 1919, claims, prior decrees, appropriative rights, stockpond registrations, and wells.¹

However, there is evidence in the record made during the recently concluded briefing concerning the vested appropriative water right, issued by ADWR pursuant to state law, held by the United States “to the use of the waters flowing in the San Pedro River ... for recreation and wildlife, including fish” with a priority of August 12, 1985.² This vested right appears to be what is commonly termed an instream flow right.

We can brief whether Certificate of Water Right No. 90103.0000 must be considered as a water right that is available to the United States for the expressed purposes of the conservation area. We cannot address if this vested right is sufficient to accomplish those purposes, but we can brief if this right must be included in the inventory of water rights available to the United States to serve those purposes.

Secondly, the Special Master has found that “the 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.” The beneficial uses of the certificated water right are “recreation and wildlife, including fish.” Arizona’s surface water code does not include as beneficial uses most of the purposes listed in the legislation that established the SPRNCA.

The geographic and hydrologic extent of the certificated water right and Congressional statements, made during consideration of the SPRNCA legislation, on the use of State law water rights for the SPRNCA raise an issue regarding water uses. The issue is whether the beneficial uses of the certificated water right are distinct and separate uses or do they fulfill the purposes of the conservation area. This issue merits briefing.

At the conference, a request was made that the Special Master clarify the March 4, 2009, order. The Special Master does not see a need to do so and denies the request.

II. ADWR’S REPORT DUE SEPTEMBER 11, 2009

ADWR was directed to file by September 11, 2009, a report concerning the size of the SPRNCA. At the conference, ADWR’s representatives stated the report is on target to be timely filed. Parties inquired about the opportunity to comment on the report before the Special Master considers it. Parties will have the opportunity to comment on the report. The Special Master will consider all comments at the time of oral argument on motions filed in this round of briefing.

¹ Vol. 1, San Pedro HSR 468-479 (Nov. 20, 1991).

² Certificate of Water Right No. 90103.0000. *See* Exhibit No. 23 in ASARCO LLC’s appendix to its motion for partial summary judgment filed on June 27, 2008.

IT IS ORDERED that:

1. The following two issues are designated for briefing and oral argument:
 - 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 SPRNCA?
 - 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?
2. On or before **Monday, August 31, 2009**, parties may file appropriate motions or statements of position on these issues.
3. Responses shall be filed on or before **Monday, November 30, 2009**.
4. Replies shall be filed on or before **Friday, January 15, 2010**.
5. On or before **Monday, November 30, 2009**, parties may file comments to ADWR's report due September 11, 2009.
6. On or before **Friday, January 15, 2010**, parties may file responses to comments submitted concerning ADWR's report. And,
7. Oral argument on all motions shall be held on **Thursday, February 18, 2010, at 9:00 a.m.**, in a courtroom to be announced later. The Special Master will also consider at the hearing all comments and responses filed to ADWR's report.

DATED: May 1, 2009.

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

On May 1, 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 Contested Case No. W1-11-232 dated January 23, 2009.

/s/ Barbara K. Brown
Barbara K. Brown