

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 29, 2013

CIVIL NO. W1-11-232
(Consolidated)

ORDER DESIGNATING THE
ISSUES FOR AN EVIDENTIARY
HEARING ON FEDERAL
RESERVED WATER RIGHTS
CLAIMS AND DETERMINING
RELATED ISSUES

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 the issues for an evidentiary hearing on the quantification of the reserved water rights claims of the United States, determines several issues related to the hearing, and sets certain time lines.

NUMBER OF PAGES: 8.

DATE OF FILING: May 29, 2013.

The Special Master requested recommendations for issues to be considered at an evidentiary hearing concerning the quantification of the reserved water rights claims of the United States for the San Pedro Riparian National Conservation Area (“SPRNC” or

conservation area”). ASARCO LLC; Freeport-McMoRan Corporation (“Freeport-McMoRan”); Salt River Project (“SRP”); Bella Vista Water Company, Inc., Pueblo Del Sol Water Company, and the City of Sierra Vista jointly (collectively “Sierra Vista Parties”); and the United States submitted recommendations.

The Special Master sees three principal issues with subissues whose resolution require an evidentiary hearing that could start within the next 18 months. The three issues would be addressed sequentially as follows:

1. Determination of the boundaries of the conservation area.
 - A. Which lands were included within the conservation area established on November 18, 1988?
 - B. After November 18, 1988, which lands were acquired and when were they formally incorporated within the SPRNCA?
2. Quantification of the federal reserved water rights claims.
 - A. What is the quantity of water needed to fulfill the purposes of the conservation area set forth in the Arizona-Idaho Conservation Act of 1988?¹
 - B. To what extent is groundwater required to meet those purposes?
3. Interaction of Certificate of Water Right No. 90103.0000 with the federal reserved water rights claims.
 - A. Has any portion of Certificate of Water Right No. 90103.0000 been abandoned or forfeited?
 - B. Is Certificate of Water Right No. 90103.0000 additive or complementary to the adjudicated federal reserved water rights?

The Special Master estimates that the evidentiary hearing could last one week. Although it may be appealing to hear the first issue separately and obtain a ruling before considering the next two issues, such a process will unreasonably delay this case even assuming the ruling is not interlocutorily appealed. The capability of the Arizona Department of Water Resources (“ADWR”) to provide technical assistance at this time is

¹ The Special Master has determined that based on the express language of the Arizona-Idaho Conservation Act of 1988, “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.” Order at 8 (Mar. 4, 2009).

limited; we will have to go as far as we can without ADWR.²

I. The “Then Unappropriated” Standard of a Reserved Water Right

A reserved water right is limited to then unappropriated water available when a reservation is created. The United States Supreme Court held in *Cappaert* that “when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation,” so that in “determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water.”³

There is consensus that determining the amount of unappropriated water as of November 18, 1988, will require the adjudication of not only all the claimed water rights of the United States for the conservation area but also the senior claims of other claimants. Adjudicating all these claims will require, at a minimum, a comprehensive report from ADWR and the adoption of a subflow zone map. If this process is chosen, the determination of “then unappropriated” water is not feasible within the next 18 months, if not longer.

SRP and Freeport-McMoRan recommend ways to deal with this concern. SRP argues that “*Cappaert* should not be interpreted to require the adjudication court to determine the quantity of water that actually remained unappropriated at the time of the reservation prior to quantifying a federal reserved right,” and nor should it “be read to limit or reduce a federal reserved right based on estimates of how much water remained unappropriated at the time of reservation.”⁴

ASARCO LLC, Freeport-McMoRan, and the Sierra Vista Parties do not agree. Freeport-McMoRan suggests that after all relevant senior rights have been adjudicated “but before the United States can receive a finally decreed water right, the quantity [of water reserved to the United States] must be re-evaluated and reduced, if necessary, so that it does not exceed the amount of water that was unappropriated on the date of the reservation.”⁵

The record before the Special Master is insufficient to determine this important issue. Parties will be requested to submit briefs, and the issue will be answered as this

² ADWR is mapping the subflow zone of the San Pedro River Watershed, preparing the Final Hopi Indian Reservation HSR, and preparing a report for the contested case *In re Powers Garden Administrative Site*. It is realistic to estimate that ADWR will next year have to prepare a technical report concerning the White Mountain Apache Tribe water rights settlement.

³ *Cappaert v. United States*, 426 U.S. 128, 138-39 (1976). See Order, *supra*, at 7.

⁴ SRP Recommendations at 4 (Mar. 29, 2013).

⁵ Freeport-McMoRan Recommendations at 5 (Mar. 29, 2013). Freeport-McMoRan calls it a conditional decree of a federal reserved water right.

matter proceeds to an evidentiary hearing.

II. Issues Submitted by the United States

The United States submitted four issues for consideration. This order will rule on three of those issues.

First, the United States requests a ruling that proof of the quantity of water reserved for the conservation area is not based on a showing of “minimal need” because the Congress explicitly reserved “a quantity of water sufficient to fulfill the purposes of the” conservation area.

The Special Master’s March 4, 2009, order stated in pertinent part as follows:

The Congress established the San Pedro Riparian National Conservation Area (“SPRNCA” or “conservation area”) as part of the Arizona-Idaho Conservation Act of 1988 (“the Act”) which became effective on November 18, 1988.

Section 102(d) (16 U.S.C. § 460xx-1) of the Act provides that:

(d) WATER RIGHTS. Congress reserves for the purposes of this reservation, a quantity of water sufficient to fulfill the purposes of the San Pedro Riparian National Conservation Area created by this title. The priority date of such reserve rights shall be the date of enactment of this title. The Secretary shall file a claim for the quantification of such rights in an appropriate stream adjudication....

The Special Master finds that section 102(d) is plain and unambiguous. The Congress “reserve[d] ... a quantity of water sufficient to fulfill the purposes of the” SPRNCA. A reservation of water is expressly intended. Legislative history supports this finding. (Footnotes 6 - 8 omitted.).⁶

The United States argues that the express Congressional language in section 102(d) sets the standard for quantifying the conservation area’s reserved water rights thereby precluding the minimal need standard established by the United States Supreme Court.⁷ It is argued that the minimal need standard is relevant for the implied-reservation-of-water doctrine but not for the express reservation enacted in section 102(d).

This position presents a novel issue on which argument should be heard. Parties may file appropriate pleadings to answer this issue. Oral argument will not be granted.

Second, the United States requests clarification of the role of ADWR in an evidentiary hearing, specifically, can departmental staff be called to testify and what

⁶ Special Master Order, *supra*, at 4-5.

⁷ See 426 U.S. at 141, and *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 316, 35 P.3d 68, 77 (2001) (quoting Cappaert).

probative weight should be afforded to ADWR's *Report Concerning Federal Reserved Water Rights Claims for SPRNCA* (May 2012). ADWR's staff may be deposed and called to testify by any party, and its technical conclusions be subject to discovery. The tribunal will determine the probative weight to be given to ADWR's reports.⁸ This determination will apply to all of ADWR's technical reports thus far submitted in this contested case.

Third, the United States asks if it must present evidence of the quantity of water necessary to fulfill the conservation area's purposes on lands acquired after November 18, 1988.⁹ If these lands have been formally incorporated within the conservation area, and the United States claims a reserved water right to fulfill the purposes of the area on these lands, it should present evidence of water usage on those lands.

Four, the United States wishes to know "how should the quantity of the certificated water right be considered in determining the quantity of water reserved." The Special Master wants to hear if any portion of Certificate of Water Right No. 90103.0000 has been abandoned or forfeited, and what should be the quantity of water adjudicated to that right. The United States is free to choose if it wishes to subtract an amount of water from one right in order to quantify the other right.

III. Other Issues

The recommendations did not address how to consider the streamflow claim for the Babocomari River. The impression is that the parties wish to address this issue at the evidentiary hearing. The parties will be permitted to introduce evidence concerning this issue at the evidentiary hearing or raise it by prehearing motion.

IV. The Land Ownership Information

The Special Master believes that many, if not all, of the disputed issues concerning the land area or boundaries of the SPRNCA can be resolved by mutual agreement. ADWR and the United States will be directed to work on finalizing technical discrepancies that can be resolved.

V. Time Lines for Disclosure Statements, Discovery, Expert Reports, and Prehearing Motions

The Special Master will ask the Contested Case Steering Committee to recommend time lines for filing disclosure statements, commencing and completing discovery, filing expert reports, and filing substantive motions including motions in limine on the issues designated for hearing. A procedural order will promptly follow.

⁸ The Special Master has determined "that ADWR's May 2012 report cannot be considered to be the report required by A.R.S. § 45-256(B)." Order at 2 (Jan. 24, 2013).

⁹ According to the United States, these lands encompass approximately 2,498 acres.

IT IS ORDERED:

1. Issues for an Evidentiary Hearing. The following issues and subissues are set for an evidentiary hearing:

A. Determination of the boundaries of the conservation area.

1). Which lands were included within the conservation area established on November 18, 1988?

2). After November 18, 1988, which lands were acquired and when were they formally incorporated within the SPRNCA?

B. Quantification of the federal reserved water rights claims.

1). What is the quantity of water needed to fulfill the purposes of the conservation area set forth in the Arizona-Idaho Conservation Act of 1988?

2). To what extent is groundwater required to meet those purposes?

C. Interaction of Certificate of Water Right No. 90103.0000 with the federal reserved water rights claims.

1). Has any portion of Certificate of Water Right No. 90103.0000 been abandoned or forfeited?

2). Is Certificate of Water Right No. 90103.0000 additive or complementary to the adjudicated federal reserved water rights?

2. Issues for Briefing. On or before **Monday, July 22, 2013**, parties may submit motions on the following questions:

A. Is the quantity of water needed to fulfill the purposes of the SPRNCA subject to the standard of minimal need?, and

B. Is it required to determine the quantity of unappropriated water available for use on the conservation area as of November 18, 1988, and second, as of the dates that after acquired lands were incorporated within the SPRNCA?

Responses to all motions are due on **Friday, August 23, 2013**. Replies to all motions are due on **Friday, September 13, 2013**.

Oral argument will not be heard. Parties sharing the same position are encouraged to file joint memoranda.

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

4. ADWR's Report Concerning Federal Reserved Water Rights Claims for SPRNCA (May 2012) and Prior Reports. The staff of ADWR who worked on any of the technical reports ADWR has submitted in this case may be deposed and called to testify by any party. ADWR's technical conclusions are subject to discovery. The tribunal will determine the probative weight to be given to ADWR's reports.

5. Lands Acquired After November 18, 1988. If lands acquired after November 18, 1988, have been formally incorporated within the conservation area, and the United States claims a reserved water right to fulfill the purposes of the area on those lands, the United States will be expected to present evidence of water usage on those lands to fulfill the purposes of the conservation area.

6. Certificate of Water Right No. 90103.0000. Parties may present evidence concerning abandonment or forfeiture of the right, and what should be the quantity of water adjudicated for the certificated right.

7. Time Lines for Disclosure Statements, Discovery, Expert Reports, and Prehearing Motions. On or before **Monday, July 22, 2013**, the Steering Committee shall submit to the Special Master time lines for filing disclosure statements, commencing and completing discovery, filing expert reports, and filing substantive motions including motions in limine on the issues designated for hearing.

The recommended time lines shall permit an evidentiary hearing to commence no later than **December 31, 2014**. Both disclosure statements and discovery shall be limited to matters concerning the issues set for hearing.

8. Electronic Data Base and Index Provided by ADWR. ADWR is directed to maintain the electronic data base and index of all disclosed documents that it created for this case. The data base will be used for the evidentiary hearing.

9. Land Ownership Information. ADWR and the United States are directed to work on finalizing technical discrepancies in their data that can be resolved. Best efforts should be implemented to resolve contested points.

10. Exchange of Documents. Parties can agree to use electronic mail, facsimile, CD-ROM disks, or DVD-ROM disks to exchange copies of documents among themselves. The agreement does not have to be filed with the Special Master. Parties may seek guidance if this procedure can be improved or problems arise.

11. Status Conferences. Any party may request a conference, which may be held telephonically, to consider any matter related to the evidentiary hearing.

12. Settlement. All parties have been encouraged to engage in discussions targeting the resolution of all or most of the issues that will arise in an evidentiary hearing. The Steering Committee is exhorted to exercise leadership in these efforts. This

case has reached a stage where focused negotiations can and should be undertaken with high expectations of success.

DATED: May 29, 2013.

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

On May 29, 2013, 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 10, 2013.

/s/ Barbara K. Brown
Barbara K. Brown