

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: December 20, 2010

CIVIL NO. W1-103

MINUTE ENTRY AND ORDER
FOLLOWING THE CONFERENCE
HELD ON DECEMBER 14, 2010

CONTESTED CASE NAME: *In re Subflow Technical Report, San Pedro River Watershed.*

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master provides an opportunity for the objectors to supplement their objections on or before January 31, 2011, grants the motion of the San Carlos Apache Tribe to intervene, and adds several parties to the Court approved mailing list of this contested case.

NUMBER OF PAGES: 5.

DATE OF FILING: December 20, 2010.

The Special Master held a conference on December 14, 2010, in Sierra Vista, Arizona. After considering comments and motions, the Special Master enters this order.

I. MINUTE ENTRY: ATTENDANCE AND DISCUSSION

The following attorneys attended the conference in person or by telephone: Gregory L. Adams representing ASARCO LLC; Harlan C. Agnew representing Pima County, Arizona; William H. Anger representing the Cities of Avondale, Chandler, Glendale, Mesa, and Scottsdale; David A. Brown representing various claimants; Charles L. Cahoy representing the City of Tempe; M. James Callahan representing the City of

Phoenix; Stephen C. Cann representing The Nature Conservancy; Cynthia M. Chandley representing Freeport-McMoRan Corporation; Theresa M. Craig representing the Arizona Attorney General's Office; Susan B. Montgomery representing the Pascua Yaqui Tribe and Yavapai-Apache Nation; Margaret B. LaBianca representing BHP Copper Inc.; R. Lee Leininger representing the United States; Mark A. McGinnis and Patrick B. Sigl representing the Salt River Project; Thomas L. Murphy representing the Gila River Indian Community; Joe P. Sparks and Laurel A. Hermann representing the San Carlos Apache Tribe and Tonto Apache Tribe; Lee A. Storey representing the City of Flagstaff; and William P. Sullivan representing the Bella Vista Water Company, Inc., Pueblo Del Sol Water Company, and City of Sierra Vista. Court reporter Denise R. Vaishville attended.

At the beginning of the conference, none of the objectors whose objections were referred to the Special Master were in attendance. Messrs. Agnew, Anger, and Brown, and Mss. LaBianca, Montgomery, and Storey requested to be placed on the Court approved mailing list of this case. The Special Master stated that the requests would be granted, but without a motion to intervene, placement on the mailing list will not grant these parties the status of intervenors. The Special Master stated that the motion of the San Carlos Apache Tribe to intervene would be granted.

Messrs. Adams, McGinnis, Sparks, and Sullivan discussed with the Special Master ways to proceed in this case. It was argued that the current contents of the objections will not facilitate meaningful or substantive briefing.

After the conference was adjourned, it was learned that objector Ms. Carmen J. Miller had arrived late and was present. The conference was resumed on the record. Ms. Miller explained procedural aspects of the objections she filed. The Special Master informed her that all the objectors would be given the opportunity to supplement their objections, and thereafter, the Special Master would determine the merits of the objections as they relate to this phase of the case.

II. ORDER

On August 24, 2010, Judge Eddward P. Ballinger, Jr. referred to the Special Master the task of proceeding in the best manner to organize and determine the twenty objections Richard Donahue, Howard L. Judd, Paul B. Kartchner, Quentin H. Miller and Carmen J. Miller, Marsha L. Thompson, Kevin J. Trejo, and George L. White and Richard B. White filed to the Subflow Zone Delineation Report for the San Pedro River Watershed (June 2009) prepared by the Arizona Department of Water Resources ("ADWR").

On July 16, 2004, the Special Master filed his report concerning the initial phase of this contested case. The report recommended the implementation of a schedule of action. Recommendation No. 36 set the schedule as follows:

The Court should implement the following schedule in the San Pedro River Watershed:

A. After the Court considers the Special Master's report recommending the procedures and processes to delineate the subflow zone within the San Pedro River Watershed and a cone of depression test,

ADWR is directed to prepare a map delineating the subflow zone for the entire San Pedro River Watershed. ADWR shall submit this map and related information in a technical report whose scope shall be limited to delineating the subflow zone and shall not set forth ADWR's proposed water right attributes for any individual water right claim or use.

B. Upon filing the technical report with the Court, ADWR shall send a notice to all claimants in the San Pedro River Watershed and to the persons listed in the Gila River Adjudication Court-Approved Mailing List informing them of the scope and availability of the report and of a claimant's right to file written objections to the report and of the deadline for filing objections.

C. Any claimant in the San Pedro River Watershed may file objections to ADWR's technical report within one hundred and twenty days [modified by Judge Ballinger to 180 days] of the date on which the report is filed. **Objections shall be limited to ADWR's findings regarding the lateral extent of the subflow zone** (emphasis added).

D. After considering the objections, the Court will approve a map that delineates the subflow zone within the San Pedro River Watershed.

E. Using the cone of depression test adopted by the Court, ADWR will analyze all wells located outside the lateral limits of the subflow zone to determine if a well's cone of depression reaches an adjacent subflow zone, and if continuing pumping will cause a loss of such subflow as to affect the quantity of the stream. ADWR will examine all water right claims to determine *de minimis* water rights in the San Pedro River Watershed in accordance with the Court's September 26, 2002, order. ADWR will investigate and supplement, as needed, its findings reported in the Final San Pedro River Watershed HSR.

F. ADWR will publish a Supplemental Final San Pedro River Watershed HSR reporting its findings and proposed water right attributes on a claim by claim basis, in accordance with A.R.S. § 45-256(B), including wells withdrawing subflow, cone of depression analyses, *de minimis* water rights, and all other new or updated information.

G. ADWR shall send a notice of the filing of the Supplemental Final San Pedro River Watershed HSR to all claimants in the Gila River Adjudication, who may file objections within one hundred and eighty days of the date on which the report was filed.¹

In his order dated September 28, 2005, Judge Ballinger considered Recommendation No. 36 and ruled in pertinent part as follows:

¹ Rept. of the Special Master on ADWR's Subflow Technical Report, San Pedro River Watershed at 97-8 (July 16, 2004). The report is available at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/_schade/W1-103FinalRep071604.pdf.

The Court does not challenge the Special Master's analysis of the applicable statutory authority governing the filing of objections, but it will accommodate the desire of claimants requesting a one hundred eighty (180) day period for report. The Court agrees with the remainder of the Special Master's recommendations regarding the implementation of procedures.²

Judge Ballinger "approved and adopted [Recommendation No. 36] to the extent consistent with" his order.³ The only modification to Recommendation No. 36 that he adopted was enlarging the time in section C to file objections from 120 to 180 days.

ADWR's Subflow Zone Delineation Report (2009) describes this schedule in Chapter 1: Introduction, Section 1.4 Notice and Objections, on page 1-7.

The Special Master has reviewed the objections. He stated in his order setting the conference held on December 14, 2010, as follows:

"The majority describe existing wells, some history, and current or planned water uses. Many do not provide supporting technical information. Several objections describe the artesian nature of a well or wells. One objection may be outside the scope of this phase of this case."⁴

The Special Master finds that the contents of the objections referred to him do not address "ADWR's findings regarding the lateral extent of the subflow zone." Some counsel at the conference expressed this position.

The Special Master stated that the objectors would be allowed an opportunity to supplement their objections in order to comply with the requisite scope of objections in this phase. The Special Master points out to the objectors that they will have an opportunity at a future time to file objections that relate to the water right attributes of their wells. We are proceeding through section C of Recommendation No. 36. Reference is again made to sections F and G that provide as follows:

F. ADWR will publish a Supplemental Final San Pedro River Watershed HSR reporting its findings and proposed water right attributes on a claim by claim basis, in accordance with A.R.S. § 45-256(B), including wells withdrawing subflow, cone of depression analyses, *de minimis* water rights, and all other new or updated information.

G. ADWR shall send a notice of the filing of the Supplemental Final San Pedro River Watershed HSR to all claimants in the Gila River Adjudication, who may file objections within one hundred and eighty days of the date on which the report was filed.

² Order at 40-1 (Sept. 28, 2005). The order is available at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/_ballinger/Subfloword92805.pdf.

³ *Id.* at 42.

⁴ Special Master's Order at 2 (Sept. 3, 2010). Its text is available at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/_schade/W1-103ord090310.pdf.

IT IS ORDERED:

1. Allowing objectors Richard Donahue, Howard L. Judd, Paul B. Kartchner, Quentin H. Miller and Carmen J. Miller, Marsha L. Thompson, Kevin J. Trejo, and George L. White and Richard B. White the opportunity to supplement and file their objections on or before **Monday, January 31, 2011**. Objections shall be limited to ADWR's findings regarding the lateral extent of the subflow zone. Supplements shall be filed with the Clerk of the Maricopa County Superior Court. Thereafter, the Special Master will determine whether to hear, grant, or dismiss the objections.

2. Granting the motion of the San Carlos Apache Tribe to intervene.

3. Granting the requests of Arizona Public Service Company, BHP Copper Inc., Cities of Chandler, Flagstaff, Glendale, Mesa, and Scottsdale, Pascua Yaqui Tribe, Pima County, Arizona, Yavapai-Apache Nation, and the various claimants represented by Brown & Brown Law Offices, P.C. to be added to the Court approved mailing list of this case. An updated mailing list will be posted on the Special Master's web site at <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/>.

Absent a granted request to intervene, placement of a party on the mailing list does not grant the status of an intervenor. The placement entitles these parties to receive copies of documents filed with the Clerk of the Maricopa County Superior Court and other documents that may be distributed by means of the mailing list. All parties shall use the mailing list to distribute copies of any documents they file in this case. And,

4. Mr. Harlan C. Agnew and Mr. Stephen C. Cann shall be added to the Court approved mailing list used for the proceeding before Judge Ballinger.

DATED: December 20, 2010.

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

On December 20, 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. W1-103 dated September 3, 2010, and all parties named in this minute entry and order.

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