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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

7
8 IN RE THE GENERAL ADJUDICATION OF
ALL RIGHTS TO USE WATER IN THE GILA
9 RIVER SYSTEM AND SOURCE

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
(Consolidated)

10
11 CIVIL NO. W1-105

12 REPORT OF THE SPECIAL MASTER
13 RECOMMENDING (1) DEFERRING THE
ORGANIZATION OF A CONTESTED
14 CASE AND (2) ADOPTING DIRECTIVES
TO THE ARIZONA DEPARTMENT OF
WATER RESOURCES

15
16 CONTESTED CASE NAME: Not yet organized.

17 HSR INVOLVED: None.

18 DESCRIPTIVE SUMMARY: The Special Master submits a report to the Court under Arizona
19 Rule of Civil Procedure 53. The Special Master recommends that (1) the organization of a
contested case to fashion standards for identifying non-domestic *de minimis* water uses be
20 deferred until such time as the Court has approved the subflow zone map for the San Pedro
River Watershed in accordance with the Court's order dated September 28, 2005, and (2) the
21 Court direct the Arizona Department of Water Resources to implement several actions to
expedite this matter. Objections to or motions to adopt or modify the Special Master's report
22 may be filed on or before **Monday, April 17, 2006**.

23 NUMBER OF PAGES: 18.

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25

1 This report addresses the Court’s directive to the Special Master “to seek input from the
2 [Arizona Department of Water Resources] and claimants and take such other necessary steps to
3 fashion standards for identifying non-domestic *de minimis* water uses.”¹ The Special Master
4 recommends that the organization of a contested case to consider the Court’s directive be
5 deferred until such time as the Court has approved the subflow zone map for the San Pedro
6 River Watershed in accordance with the Court’s order dated September 28, 2005. That would
7 be the most appropriate time to proceed with this matter.

8 Currently, three petitions are before the Arizona Supreme Court seeking interlocutory
9 review of five issues concerning subflow analysis. As of now, the Arizona Department of Water
10 Resources’ (“ADWR”) budget for adjudications remains limited.² The Special Master has
11 considered these factors and believes that the Court can at this time direct ADWR to implement
12 several actions that will significantly aid crafting *de minimis* guidelines. Accordingly, the
13 Special Master recommends actions that the Court can direct ADWR to implement.

14 **I. BACKGROUND**

15 In its September 28, 2005, order, the Court stated:

16 Some claimants suggest that the Court direct ADWR to propose
17 guidelines for determining when non-domestic water uses (*e.g.*, agricultural,
18 municipal, industrial, and other uses) have a *de minimis* effect on a watershed.
19 They believe the Department should propose a set of *de minimis* criteria that
20 apply irrespective of the type of water use. The Court agrees with these parties
21 that a prime consideration when determining if a water use has a *de minimis*
22 effect on a watershed is its quantifiable impact on the subflow zone. Until
23 ADWR proposes an accurate and reliable method for determining quantifiable
24 impacts, its *de minimis* proposal will be deficient.

25 The Special Master’s Report and some comments indicate that the parties
did not extensively brief this issue, and it may “best be considered at such time

¹ Order 42 (Sept. 28, 2005) (“Sept. 2005 Order”).

² At the hearing, ADWR stated that its requests for additional or new funding for adjudications work were not contained in the budgets that both the Governor and the Joint Legislative Budget Committee had presented earlier last month. *See* ADWR’s Status Report 12-13 (Jan. 31, 2006).

1 as ADWR and the parties have more new or updated data.” The Special Master
2 will be directed to seek input from the Department and claimants, and conduct
3 such proceedings as he deems necessary to craft a workable, reasonably accurate
4 *de minimis* standard that can be applied to non-domestic water users. (Footnotes
5 omitted.)³

6 On October 20, 2005, the Special Master set a conference on December 15, 2005, “to
7 receive comments and discuss the organization of a contested case to establish standards and
8 guidelines for identifying agricultural, municipal, industrial, and other water uses that can and
9 should be summarily adjudicated as *de minimis* water rights.”⁴ The Special Master requested
10 comments regarding the (1) scope of the Court’s directive, (2) scope of the final determinations,
11 (3) potential legal issues and technical problems, (4) the role of ADWR, (5) timeline for filing
12 disclosure statements, (6) timeline for completing discovery, (7) timelines for motions and
13 briefing schedules, (8) scope of evidentiary hearing(s), and (9) use of expert evidence. The Gila
14 River Adjudication Steering Committee and ADWR were invited to submit comments.

15 On November 10, 2005, the City of Phoenix requested a change of hearing date. On
16 November 21, 2005, the Special Master granted the request, changed the date of the conference
17 to January 19, 2006, and extended the time to file comments to December 23, 2005.

18 ADWR and the following claimants or groups filed comments:

19 1. Arizona Public Service (“APS”), Phelps Dodge Corporation (“Phelps Dodge”), and
20 Roosevelt Water Conservation District (“RWCD”).

21 2. The Cities of Cottonwood, Casa Grande, and Sedona, the Towns of Clarkdale and
22 Jerome, the Gila Valley and Franklin Irrigation Districts, and the Central Arizona and
23 Maricopa-Stanfield Irrigation and Drainage Districts joined in the comments filed by
24 APS, Phelps Dodge, and RWCD.

25 ³ Sept. 2005 Order 39-40.

⁴ Order Setting Conference 1 (Oct. 20, 2005). In this report, the term “non-domestic water uses” includes agricultural, municipal, industrial, and other uses.

- 1 3. ASARCO LLC (“ASARCO”) and Tucson Electric Power Company (“TEP”).
- 2 4. Bella Vista and Pueblo Del Sol Water Companies and the City of Sierra Vista.
- 3 5. Salt River Project (“SRP”).
- 4 6. San Carlos Apache Tribe, Tonto Apache Tribe, Yavapai-Apache Nation, and Pascua
- 5 Yaqui Tribe (collectively “Tribes”).
- 6 7. United States Department of Justice (“U.S.”).

7 A hearing was held on January 19, 2006. Counsel who filed comments and counsel for
8 other claimants presented their positions and arguments. No exhibits were presented. The
9 Special Master has considered all the written comments and arguments. Because an evidentiary
10 hearing has not been held, and this matter does not yet involve the adjudication of specific water
11 claims, no findings of fact or conclusions of law are made. The Special Master believes that it is
12 appropriate to file a report with the Court before proceeding with this matter.

13 **II. COMMENTS AND POSITIONS**

14 The comments and positions presented show agreement on the following points:

15 1. The adoption of any standard or standards fashioned in this proceeding to adjudicate
16 non-domestic *de minimis* water uses should be limited to the San Pedro River Watershed. It
17 follows that the technical, hydrological, and water rights data used to fashion those standards
18 should be obtained from the San Pedro River Watershed.

19 2. A body of technical and hydrological data is needed to fashion *de minimis* standards
20 for non-domestic water uses.

21 3. It is premature to set prehearing procedures for disclosures of information, discovery,
22 motions, and evidentiary hearings.

23 The Special Master agrees with these points.

24 The main difference among the parties is whether the needed technical and hydrological
25 data should be obtained from a series of representative test wells or whether it should be

1 presented in the Supplemental San Pedro River Watershed Hydrographic Survey Report
2 (“Supplemental San Pedro HSR”). The former approach to obtain data, it is argued, can be
3 started now,⁵ while the latter calls for a later start of this proceeding. The consensus is that a
4 Supplemental San Pedro HSR should be prepared before the Special Master begins to address
5 the Court’s directive regarding non-domestic *de minimis* water uses.⁶

6 The Tribes argued that if *de minimis* standards for other water uses are to be fashioned,
7 that process should start after ADWR prepares and the Court approves the map delineating the
8 subflow zone within the San Pedro River Watershed. The Tribes want ADWR to move speedily
9 to delineate the subflow zone.

10 The consensus and the Tribes’ position share a common view, namely, it is premature to
11 initiate a contested case to fashion *de minimis* standards for non-domestic water uses. The
12 Tribes raised several legal issues they believe are associated with any crafting of *de minimis*
13 standards. However, the first issue is whether the Special Master should proceed now or later.

14 Several claimants noted that in September 2002, the Court adopted *de minimis* standards
15 for stockwatering, certain stockponds, and residential domestic water uses in the San Pedro
16 River Watershed.⁷ Those standards were adopted following the publication of the Final San
17 Pedro River Watershed HSR (1991), a technical report prepared by ADWR addressing *de*
18 *minimis* water rights, a seven-day hearing held by Special Master John E. Thorson, and the
19 Court’s consideration of objections to Special Master Thorson’s memorandum decision.

20 APS, Phelps Dodge, and RWCD commented that “[t]his same sort of detailed technical
21 analysis is essential before the Court adopts any *de minimis* standards applicable to a broader

22 ⁵ One proposed timeline would begin next month. ASARCO and TEP Comments 4.

23 ⁶ APS, Phelps Dodge, and RWCD who initially suggested obtaining the data from “a series of
24 representative ‘test wells’ within the San Pedro watershed,” at the hearing changed their views in favor
25 of ADWR preparing a Supplemental San Pedro HSR. APS, Phelps Dodge, and RWCD Comments 7-8
and 10-11.

⁷ Order (Sept. 26, 2002).

1 class of water uses supplied by wells in the San Pedro River watershed.”⁸ Other parties
2 commented that the earlier process should serve as guidance in this matter.⁹

3 SRP commented that “a separate standard for each type of *de minimis* use” should not be
4 crafted but rather “a standard that would govern all” non-domestic water uses is what the Court
5 intended.¹⁰ In other words, should a uniform or a use-specific standard be fashioned?

6 The Court has listed agricultural, municipal, and industrial uses. The adjudication
7 statutes,¹¹ the Other Uses Statement of Claimant form, the Final San Pedro River Watershed
8 HSR, and ADWR’s 1993 Technical Report describe various categories of water uses. ADWR
9 should be guided concerning what is included under the term “non-domestic water uses.”

10 **III. DEFERRING THE ORGANIZATION OF A CONTESTED CASE**

11 The Special Master recommends that the organization of a contested case be deferred
12 until the Court approves the subflow zone map for the San Pedro River Watershed.

13 **A. The Need for Technical Data and Other Information**

14 In September 2002, the Court approved in part Special Master Thorson’s decision
15 recommending summary adjudication for stockwatering, certain stockponds, and residential
16 domestic water uses in the San Pedro River Watershed.¹² The Court approved the four factors
17 that Special Master Thorson examined in “determining whether certain San Pedro River water
18 uses are *de minimis* in the Gila River system,” namely:

- 19 1. water availability in the watershed,

21 ⁸ APS, Phelps Dodge, and RWCD Comments 5-6.

22 ⁹ “The Special Master should now build upon this earlier set of facts and conclusions of law in
23 determining what procedures are appropriate for the adjudication of *de minimis* agricultural, municipal,
24 industrial, and other water uses.” U.S. Comments 2; *id.* at 3. *See* SRP Comments 5.

25 ¹⁰ SRP Comments 3.

¹¹ *See* A.R.S. §§ 45-251(1), (8), (9), and (10) and 45-254(C)(5).

¹² Memorandum Decision, Findings of Fact, and Conclusions of Law for Group 1 Cases Involving
Stockwatering, Stockponds, and Domestic Uses (Nov. 14, 1994) (“Special Master’s 1994 San Pedro *De*
Minimis Memo. Dec.”).

- 1 2. the number of water uses being considered for *de minimis* adjudication,
- 2 3. the extent and impact of these uses, and
- 3 4. the costs and benefits of a complete, rather than abbreviated, adjudication of these
- 4 uses.¹³

5 When he formulated these factors, Special Master Thorson (and the parties) had the
6 benefit of ADWR’s Final San Pedro River Watershed HSR, a selection of six groups of
7 watershed file reports (six individual contested cases) associated with objections filed to the
8 HSR, and ADWR’s 107-page *Technical Report on De Minimis Adjudication of Domestic,*
9 *Stockpond, and Stockwatering Uses in the San Pedro River Watershed.*¹⁴ When he took up the
10 issue of *de minimis* water rights in the Silver Creek Watershed, Special Master Thorson also
11 had the benefit of the Final Silver Creek Watershed HSR (1990), which provided the starting
12 point for ADWR’s subsequent *de minimis* technical report in that adjudication.

13 A final HSR and a focused technical report provided much and important water rights
14 information, technical data, and hydrological findings. Even though Special Master Thorson
15 had selected six groups of watershed file reports, ADWR indicated that its technical report
16 “does not focus on the watershed file reports selected by the Special Master.... Rather, it
17 focuses on the watershed as a whole.”¹⁵ The Special Master agrees that “[t]his same sort of
18 detailed [and comprehensive] technical analysis is essential before the Court adopts any *de*
19 *minimis* standards applicable to a broader class of water uses.”¹⁶

20 In reaching his *de minimis* determinations, Special Master Thorson considered both the
21 individual and cumulative impacts of water uses. Both impacts were essential components of

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23 ¹³ *Id.* at 12.

24 ¹⁴ TECHNICAL REPORT ON DE MINIMIS ADJUDICATION OF DOMESTIC, STOCKPOND, AND STOCKWATERING USES IN
THE SAN PEDRO RIVER WATERSHED, ADWR (Nov. 19, 1993) (“ADWR’s 1993 Technical Report”).

25 ¹⁵ *Id.* at 4.

¹⁶ *See* n.6., *supra*.

1 his conclusions. At a minimum, when the Special Master considers *de minimis* uses, evidence
2 should be available that allows looking at both their individual and cumulative impacts.

3 When considering *de minimis* issues, the Special Master and the Court must consider the
4 entire watershed. Special Master Thorson’s four factors involve an entire watershed, and the
5 hydrological information needed cannot be reliably obtained from a select group of test wells.

6 Furthermore, it is necessary to investigate many water uses. In its comments, ADWR
7 reported that it had found 1,097 statements of claimant that claim an irrigation use, but 309 of
8 these claims do not state an amount of water, and 583 out of 3,054 statements of claimant for
9 Other Uses do not state an amount. Without further investigation, the extent and impact of these
10 uses and the costs and benefits of their adjudication cannot be determined.¹⁷

11 The information in the Final San Pedro River Watershed HSR is at least 15 years old. It
12 is reasonable to believe that many water uses have changed - increased, reduced, abandoned,
13 forfeited, or severed and transferred. There are also new water uses begun after the publication
14 of the HSR. The extent and impact of all these changes and new water uses must be established
15 in order to craft “an accurate and reliable method for determining quantifiable impacts.”¹⁸

16 Special Master Thorson attributed importance to the fact that other claimants in the San
17 Pedro River Watershed had not objected to the stockwatering, stockponds, and domestic water
18 uses under his consideration. ADWR’s 1993 Technical Report found this fact “significant.”¹⁹
19 When the Supplemental San Pedro HSR is published, claimants might object on various
20 grounds to non-domestic water uses that might be proposed for *de minimis* adjudication. The
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23 ¹⁷ These statements are based on information reported through November 2005. ADWR Comments 2-4.
24 It is reasonable to believe that when ADWR conducts field investigations for a supplemental HSR that
25 additional water uses will be found.

¹⁸ Sept. 2005 Order 39.

¹⁹ ADWR’s 1993 Technical Report 2.

1 nature and extent of objections should be known before a particular water use is considered for
2 summary *de minimis* adjudication because the claimed right might be denied for other reasons.

3 In discussing *de minimis* guidelines, the Court has used the terms “accurate and reliable”
4 and “reasonably accurate.”²⁰ A *de minimis* standard “should be grounded in the bedrock of the
5 facts.”²¹ The conclusion is that only a supplemental watershed HSR can provide the water rights
6 information, technical data, and hydrology required to fashion or reject a *de minimis* standard
7 for non-domestic water uses.

8 **B. The Court’s September 28, 2005, Order - Subflow Zone**

9 In its September 28, 2005, order, the Court stated that “a prime consideration when
10 determining if a water use has a *de minimis* effect on a watershed is its quantifiable impact on
11 the subflow zone,” and “[u]ntil ADWR proposes an accurate and reliable method for
12 determining quantifiable impacts, its *de minimis* proposal will be deficient.”²²

13 The Court ruled that a well has a quantifiable impact on appropriable water, and will be
14 included in the adjudication, if its cone of depression has reached the edge of the subflow zone,
15 and drawdown at that point is greater than or equal to 0.1 foot (1.2 inch). The key question in
16 this proceeding is which, if any, drawdown greater than or equal to 0.1 foot from the subflow
17 zone “is sufficiently small that the use at issue can be considered *de minimis*.”²³ The answer
18 requires knowing where the edge of the subflow zone is.

19 **C. The Court’s September 28, 2005, Order - Implementation of Procedures**

20 The Court stated it “agrees with the Special Master that ADWR’s proposal of first
21 mapping the subflow zone in a watershed, then identifying *de minimis* uses, and finally

22 ²⁰ Sept. 2005 Order 39 and 40.

23 ²¹ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195
24 Ariz. 411, 422, 989 P.2d 739, 750 (1999), *cert. denied sub nom. Phelps Dodge Corp. v. U.S. and Salt*
River Valley Water Users’ Assn. v. U.S., 530 U.S. 1250 (2000).

25 ²² Sept. 2005 Order 39.

²³ SRP Comments 4.

1 conducting cone of depression tests is appropriate (footnote omitted). The parties generally
2 agree with this plan...”²⁴

3 To the “extent consistent with this Order,”²⁵ the Court approved the Special Master’s
4 Recommendation No. 36(E and F) which stated as follows:

5 E. Using the cone of depression test adopted by the Court, ADWR will
6 analyze all wells located outside the lateral limits of the subflow zone to
7 determine if a well’s cone of depression reaches an adjacent subflow zone, and if
8 continuing pumping will cause a loss of such subflow as to affect the quantity of
9 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.

10 F. ADWR will publish a Supplemental Final San Pedro River Watershed
11 HSR reporting its findings and proposed water right attributes on a claim by
12 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.²⁶ (Emphasis added.)

13
14 This schedule is consistent with the Court’s September 28, 2005, order. Its approval
15 shows the Court’s desire to have ADWR map the subflow zone prior to undertaking an analysis
16 of *de minimis* water uses.

17 In recommending that the organization of a contested case to determine the Court’s
18 directive be deferred until such time as the Court has approved the subflow zone map for the
19 San Pedro River Watershed, the Special Master assures the Court he will diligently undertake
20 all proceedings. Under new Arizona Rule of Civil Procedure 53(d), “[i]t is the duty of the
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²⁴ Sept. 2005 Order 40.

²⁵ *Id.* at 42.

²⁶ Special Master’s Subflow Report 97-98 (July 16, 2004).

1 master to proceed with all reasonable diligence,” and a party “may apply to the court for an
2 order requiring the master to speed the proceedings.”²⁷

3 **Recommendation 1:** The Court should allow the Special Master to defer the
4 organization of a contested case to determine if a standard or standards for identifying non-
5 domestic water uses can or should be fashioned, until such time as the Court has approved the
6 subflow zone map for the San Pedro River Watershed. Upon the Court approving the map, the
7 Special Master will set a hearing to determine the best and most expeditious way to proceed to
8 answer the Court’s directive.

9 **IV. LIMITATION OF A *DE MINIMIS* STANDARD(S)**

10 In his 1994 memorandum decision concerning *de minimis* water uses in the San Pedro
11 River Watershed, Special Master Thorson concluded that “[t]he procedures adopted for small
12 uses in the Little Colorado River system differ from those announced in this decision for the
13 San Pedro River system. These summary procedures must be fashioned to the unique character
14 of each watershed.”²⁸

15 In considering the validity of former A.R.S. § 45-258, a section entitled “summary
16 adjudication of *de minimis* water uses,” the Arizona Supreme Court held that “[b]ecause there
17 were no statutorily prescribed *de minimis* uses prior to enactment of [A.R.S. § 45-258], the
18 water master previously could find different *de minimis* standards for particular watersheds.”²⁹
19 The Court held A.R.S. § 45-258 to be constitutionally invalid. It is reasonable to infer that the
20 Court saw nothing improper in the Special Master crafting and the Adjudication Court adopting
21 *de minimis* standards for each watershed.

22 _____
23 ²⁷ Ariz. R. Civ. P. 53(d)(1) (effective Jan. 1, 2006).

24 ²⁸ Special Master’s 1994 San Pedro *De Minimis* Memo. Dec. 10.

25 ²⁹ *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 211, 972 P.2d 179, 197 (1999). From reviewing the trial court’s ruling, the Supreme Court was informed of Special Master Thorson’s *de minimis* proceedings in both the San Pedro River Watershed and the Silver Creek Watershed.

1 In that discussion, the Supreme Court held that:

2 No provision exists for the presentation of evidence regarding what would be a
3 true *de minimis* use given the amount of water actually available. For example,
4 under § 45-258, one acre-foot would be *de minimis* whether diverted from the
5 Gila River or from a spring with a yearly flow of only two acre-feet.³⁰

6 Two conclusions can be derived from this holding. First, because “the amount of water actually
7 available” differs from watershed to watershed, this holding validates that a *de minimis* standard
8 or standards must be crafted for each watershed in a river system. Second, the holding validates
9 utilizing Special Master Thorson’s first factor - the availability of water in a watershed.

10 The Court then held as follows: “The Legislature took complete control under § 45-258
11 and required the court to decree certain uses as *de minimis*. The court has no power to hear the
12 facts and make the ultimate conclusion in the context of each watershed (emphasis added).”³¹

13 These holdings indicate that a *de minimis* standard or standards for a water use “must be
14 fashioned to the unique character of each watershed,” that is, a statewide standard is not
15 appropriate. Because a final HSR has been published for the San Pedro River Watershed and
16 ADWR has, and is in the process, of completing supplemental and new technical investigations
17 in the watershed, it is only appropriate that a *de minimis* standard or standards that may be
18 fashioned in this proceeding should apply only in that watershed.

19 **Recommendation 2:** The adoption of a standard or standards for identifying non-
20 domestic *de minimis* water uses shall be limited to the San Pedro River Watershed.

21 **V. ACTIONS THAT CAN BE IMPLEMENTED NOW**

22 The Court can direct ADWR to implement several actions that will expedite
23 consideration of standards for identifying non-domestic *de minimis* water uses. These actions
24 are based on prior orders of the Court and Special Master.

25 ³⁰ *Id.*, 193 Ariz. at 212, 972 P.2d at 198.

³¹ *Id.*

1 **A. Prior Orders**

2 **Recommendation 3:** The Court should direct ADWR to implement the methodologies
3 for investigating and reporting *de minimis* water uses set forth in the Court’s order dated
4 September 26, 2002, and as applicable, the Court’s September 28, 2005, order.

5 **B. New Facts, Better Data, and Better Methodologies**

6 The Court’s prior orders and appellate decisions are both precedent and directive
7 guidance for ADWR, but ADWR should not be totally hamstrung if it discovers new facts,
8 better hydrological and scientific data than was previously available, and better methodologies
9 to assess water availability, inflows, outflows, and depletions. The Court and the Special Master
10 will determine the legal ramifications and use of the information to craft *de minimis* standards.

11 **Recommendation 4:** The Court should direct ADWR to utilize and report whenever
12 appropriate newly discovered facts, better hydrological and scientific data it obtains, and if
13 available, better technical methodologies.

14 **C. Categories of Water Uses**

15 Under A.R.S. § 45-256(B), ADWR is required to report “all information” it obtains “that
16 reasonably relates to the water right claim or use investigated” and shall report its
17 recommendations for “proposed water right attributes for each individual water right claim or
18 use investigated....”

19 The Court has stated that non-domestic *de minimis* uses include agricultural, municipal,
20 industrial, and other uses. The term could include various categories of water uses if the
21 adjudication statutes, Court-approved forms, and technical reports are considered.

22 On the Other Uses Statement of Claimant form, a claimant may claim irrigation,
23 municipal, commercial or industrial, mining, recreation, fish and wildlife, and “other uses.”³²

24 _____
25 ³² ADWR Comments 3 and attachment.

1 ADWR's 1993 Technical Report described 35 "non-residential domestic uses" reported in the
2 Final San Pedro River Watershed HSR. The uses were associated with vineyards, mobile home
3 parks, a volunteer fire department, schools, golf courses, a park, a recreational vehicle park,
4 summer camps, churches, a campground, gravel and sand operations, natural gas pump stations,
5 and a community college.³³ ADWR stated that 31 of these 35 uses "should be individually
6 evaluated" to determine if they could be classified as *de minimis* uses.³⁴ Their total amount of
7 water use was less than 42.1 acre feet per annum ("AFA"). The HSR also reported 72 "Other
8 Irrigation" uses appurtenant to 66.2 acres of land. There is no clear indication that these other
9 irrigation uses should be considered for *de minimis* evaluation, although ADWR reported that
10 their total depletion from the watershed was 150 AFA.³⁵

11 A.R.S. § 45-251(8) defines a "small business use" as one using a total water quantity of
12 not more than three AFA. Although the Arizona Supreme Court held that A.R.S. § 45-258 was
13 invalid, the definition of a small business use, a water use addressed in that section, was not
14 specifically held to be invalid.³⁶ And, of course, the Supplemental San Pedro HSR might report
15 water uses that could only be classified as "other uses." The conclusion is that the term "non-
16 domestic water uses" could include a variety of uses with unique attributes and circumstances.

17 **Recommendation 5:** The Court should direct ADWR to identify all water uses and their
18 attributes within the San Pedro River Watershed, including those for which a statement of
19 claimant has not been filed, which could be considered for summary adjudication as *de minimis*
20 water rights based on prior orders of the Court and decisions of the Arizona Supreme Court.

23 ³³ ADWR's 1993 Technical Report 33-36.

24 ³⁴ *Id.* at 33.

25 ³⁵ *Id.* at 60.

³⁶ *San Carlos Apache Tribe*, 193 Ariz. at 218, 972 P.2d at 202.

1 **D. New Water Uses**

2 Special Master Thorson did not address new water uses in his 1994 memorandum
3 decision because it was undecided how uses begun after publication of the Final San Pedro
4 River Watershed HSR would be taken up. He wrote, “[t]his decision does not necessarily mean
5 that new stockwatering, stockponds, and domestic uses will be afforded the same *de minimis*
6 treatment as described herein.... If new uses are later joined in this adjudication, the Master will
7 then recommend whether they should be adjudicated under the procedures outlined in this
8 decision.”³⁷

9 The Tribes commented that “[s]ince the Special Master issued his 1994 De Minimis
10 decision, approximately 1,400 new domestic wells have been installed in the San Pedro
11 watershed.”³⁸ It is reasonable to believe that many more new uses have likely been begun since
12 1994, and that ADWR will likely find new uses for which a statement of claimant has not been
13 filed.³⁹ A more appropriate mark off date is November 20, 1991, the date of filing of the Final
14 San Pedro River Watershed HSR.⁴⁰

15 A contested case concerning *de minimis* standards in the San Pedro River Watershed
16 will need to consider how to deal with not only stockwatering, stockpond, and residential
17 domestic water uses but also other new uses begun after November 20, 1991. New uses may or
18 may not have a bearing on future *de minimis* determinations.

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³⁷ Special Master’s 1994 San Pedro *De Minimis* Memo. Dec. 34.

³⁸ Tribes Comments 22. The well information is reported through September 2005.

23 ³⁹ ADWR has served over 25,000 new use summonses in both adjudications. ADWR Status Report 4
24 (Jan. 31, 2006). In the 1991 Final San Pedro River Watershed HSR, ADWR reported approximately
25 2,889 domestic uses “although this figure includes uses that were not claimed in the adjudication.”
Special Master’s 1994 San Pedro *De Minimis* Memo. Dec. 17.

⁴⁰ Gila River Adjudication Monthly Docket Item No. 1859 (Nov. 20, 1991).

1 **Recommendation 6:** The Court should direct ADWR to investigate and report the
2 number of new water uses, claimed and found in the San Pedro River Watershed, begun after
3 November 20, 1991.

4 **E. A Uniform or Use-Specific Standard**

5 In its September 28, 2005, order, the Court directed the Special Master to conduct
6 proceedings “to craft a workable, reasonably accurate *de minimis* standard that can be applied to
7 non-domestic water users,” but also directed the master to “take such other necessary steps to
8 fashion standards for identifying non-domestic *de minimis* water uses (emphasis added).”⁴¹ The
9 Court has adopted different quantification standards for stockwatering, stockponds, and
10 residential domestic uses in the San Pedro River Watershed. ADWR should be directed to
11 investigate and report if “a workable, reasonably accurate” uniform *de minimis* standard for all
12 non-domestic water uses in the San Pedro River Watershed can be crafted.

13 **Recommendation 7:** The Court should direct ADWR to propose a uniform standard or
14 a use-specific standard, or if appropriate both, for the following water uses that ADWR
15 investigates and reports in the Supplemental San Pedro HSR: agricultural irrigation, non-
16 agricultural irrigation, municipal, industrial, commercial, mining, recreation, fish and wildlife,
17 small business, and any other water uses that are appropriate.

18 **F. Timeline for ADWR to Report to the Court**

19 Because claimants will have 180 days to object to ADWR’s subflow zone map for the
20 San Pedro River Watershed, the process of approving the subflow zone map will most likely
21 take close to one year. By the time the Court approves the subflow zone map for the San Pedro
22 River Watershed, ADWR should have information about its *de minimis* proposals and the
23 number, extent, and hydrology of water uses that might be considered for *de minimis*

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25 ⁴¹ Sept. 2005 Order 40 and 42.

1 adjudication. That information should be reported to the Court and Special Master to determine
2 the most appropriate time to proceed with the organization of a contested case.

3 **Recommendation 8:** At a time proximate to when the Court takes up ADWR's
4 proposed subflow zone map for the San Pedro River Watershed, the Court should direct ADWR
5 to report on the status of ADWR's proposals and provide information about the number, extent,
6 and hydrology of potential non-domestic *de minimis* water uses in the watershed.

7 **Recommendation 9:** The Court should specify a date by which ADWR shall complete
8 and publish the subflow zone map for the San Pedro River Watershed.

9 **VI. AVAILABILITY OF REPORT**

10 A copy of this report will be mailed to all persons appearing on the Gila River
11 Adjudication Court-Approved Mailing List. An electronic copy will be posted at
12 <http://www.supreme.state.az.us/wm/> on the *Gila River Adjudication* page.

13 **VII. MOTION FOR ADOPTION OF SPECIAL MASTER'S REPORT**

14 The Special Master moves the Court, under Arizona Rule of Civil Procedure 53(h), to
15 adopt each recommendation made in this report. The recommendations are based on prior court
16 orders, appellate decisions, and established schedules in this adjudication. A proposed order of
17 adoption will be lodged as the Court may order upon consideration of the report.

18 **VIII. NOTICE OF SUBSEQUENT PROCEEDINGS**

19 Any claimant in the Gila River Adjudication may file a written objection to or a motion
20 to adopt or modify this report on or before April 17, 2006.⁴² Objections and motions must be
21 filed with the Clerk of the Maricopa County Superior Court, Attn: Water Case, 601 West
22 Jackson Street, Phoenix, Arizona 85003. Copies of pleadings must be served personally or by
23 mail on all persons appearing on the most recent Gila River Adjudication Court-Approved

24 ⁴² A.R.S. § 45-257(A)(2). Because this report does not contain any determinations of the relative water
25 rights of any claimant, the 180-day period prescribed by A.R.S. § 45-257(A)(2) does not apply.

1 Mailing List available at <http://www.supreme.state.az.us/wm>.

2 The hearing on the Special Master’s motion to approve the report and on any objections
3 to the report and motions filed by claimants will be taken up as ordered by the Court. In acting
4 on the report, the Court “may adopt or affirm, modify, wholly or partly reject or reverse, or
5 resubmit to the master with instructions.”⁴³

6 Submitted this 16th day of February, 2006.

7
8 /s/ George A. Schade, Jr.
9 GEORGE A. SCHADE, JR.
Special Master

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11 On February 16, 2006, the original report
12 was filed with the Clerk of the Court and a
13 copy of the report was delivered to the
14 Distribution Center for distribution to all
15 persons listed on the Court-approved
16 mailing list for Case No. W-1, W-2, W-3,
17 and W-4 (Consolidated) dated June 15,
18 2005.

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21
22
23
24 /s/ KDolge
Kathy Dolge

25 ⁴³ Ariz. R. Civ. P. 53(h)(5).