

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: April 25, 2003

CIVIL NO. W1-103

ORDER SETTING BRIEFING  
SCHEDULE AND HEARING

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

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master sets a briefing schedule for legal issues and schedules a hearing on October 21 and 22, 2003, for the cross-examination of witnesses who have made sworn declarations.

NUMBER OF PAGES: 5; Attachment A - 4 pages: Total - 9 pages.

DATE OF FILING: Original filed with the Clerk of the Court on April 25, 2003.

**ORDER**

A conference was held on April 10, 2003, to determine the scope of the Special Master's report to the Superior Court and the procedures to resolve the issues presented by the Arizona Department of Water Resources' ("ADWR") Subflow Technical Report, San Pedro River Watershed ("Subflow Report"), and the responses and objections filed by claimants.

The Special Master has considered the positions expressed at the conference and in the papers filed by the parties. Certain legal issues merit briefing, and rebuttal declarations as well as

cross-examination of the experts who made sworn declarations and rebuttal declarations would be helpful. The Special Master has identified four legal issues whose determinations will focus the cross-examination of witnesses and will set a briefing schedule. The Special Master will rule on these issues before any witnesses are cross-examined.

Parties will be allowed to file sworn rebuttal declarations whose scope shall be limited to rebutting the declarations filed on or before June 17, 2002. After the Special Master determines the legal issues, and rebuttal declarations are filed, a hearing will be held in October 2003, over two consecutive days, for parties to cross-examine witnesses.

The Superior Court has ruled that:

“The declarations submitted by the parties will serve as the direct testimony at any hearing scheduled by the Special Master. The only testimony to be received at any scheduled hearing will be by way of cross-examination (and, perhaps, some limited redirect examination).”<sup>1</sup>

The following parties and witnesses submitted sworn declarations:<sup>2</sup>

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| 1. Arizona Public Service Company<br>and Phelps Dodge Corporation       | Eric J. Harmon, P.E.<br>Mark R. Palumbo  |
| 2. BHP Copper, Inc.   | Errol L. Montgomery, Ph.D., P.G.<br>Thomas W. Anderson, P.H.                     |
| 3. Cities of Chandler, Glendale, Doug Toy, P.E.<br>Mesa, and Scottsdale |  |
| 4. Gila River Indian Community  | T. Allen J. Gookin, P.E., R.L.S., P.H.<br>Peter A. Mock, Ph.D., R.G.             |
| 5. Gila Valley and Franklin<br>Irrigation Districts                     | Kirk C. Anderson, Ph.D.<br>W. Gerald Matlock, P.E., Ph.D.                        |
| 6. Salt River Project   | Jon R. Ford  |
| 7. United States  | Oliver S. Page, R.G.<br>Peter M. Pyle, R.G., C.Hg.<br>Jean M. Moran, R.G., C.Hg. |
| 8. Verde Valley Water Users, Inc.                                       | Philip C. Briggs, P.E.   |

The Special Master has identified issues that cross-examination should address, and although cross-examination will not be limited to these matters, it should focus on the specified matters. The need for redirect examination will be determined later.

Parties raised other matters. A technical committee will not be appointed because it could unreasonably delay this matter, and ADWR will not be directed to use the professional

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<sup>1</sup> Minute Entry 3 (January 22, 2002).

<sup>2</sup> Other parties either submitted comments or joined in comments that did not contain sworn declarations of witnesses.

services of a particular source. The Special Master believes that ADWR's legal counsel is in a better position than the Master to conduct the examination of ADWR's witnesses.

The Apache Tribes moved to strike the papers filed by several parties, between April 1 and 9, 2003, regarding listings of issues. The motion will be denied, but in other proceedings such filings might be struck.

IT IS ORDERED:

1. The following legal issues shall be briefed prior to the cross-examination of witnesses:
  - a. Should ADWR's subflow analysis consider predevelopment or current stream flow conditions?
  - b. Should ADWR consider the criteria specified in *Gila IV*<sup>3</sup> to identify the subflow zone or have the criteria already been taken into account in the Arizona Supreme Court's holding that the saturated floodplain Holocene alluvium is the subflow zone?
  - c. In addition to analyzing a well's drawdown at the subflow zone, should ADWR report the cumulative effect of wells or of groups of wells?
  - d. Should ADWR's findings be reported in supplemental contested case hydrographic survey reports (HSRs) ("case-by-case") or in a supplemental San Pedro River Watershed HSR ("the entire watershed"), which identifies the subflow zone, wells reaching and depleting a stream, and *de minimis* water rights?
2. Parties may file memoranda addressing any or all of these issues by **Friday, June 6, 2003**. Parties who believe they have addressed any of these issues in their prior papers do not need to file additional materials.
3. Responses shall be filed on or before **Wednesday, July 16, 2003**.
4. Replies shall be filed on or before **Monday, August 11, 2003**.
5. After reviewing the papers filed, the Special Master will determine the need, if any, for oral argument.
6. Parties may file rebuttal declarations on or before **Friday, June 27, 2003**. Rebuttal declarations shall be under oath and shall be limited to rebutting the opinions or information contained in the declarations filed on or before June 17, 2002, and shall not present any new matters not contained in those declarations.
7. A hearing for the cross-examination of witnesses shall be held on **Tuesday, October 21, 2003**, and on **Wednesday, October 22, 2003, at 9:00 a.m.**, in Courtroom 513, Maricopa County Superior Court, 101 West Jefferson, Phoenix, Arizona.

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<sup>3</sup> *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, 9 P.3d 1069 (2000), *cert. denied sub nom. Phelps Dodge Corp. v. U.S.*, 533 U.S. 941 (2001) ("*Gila IV*").

8. The cross-examination of witnesses shall address, but shall not be limited to, the following matters:

Location of Subflow Zone

- a. Are ADWR's recommendations for locating perennial, intermittent, and effluent-fed streams valid?
- b. Does ADWR's recommendation that the entire lateral extent of the floodplain Holocene alluvium be assumed to be saturated comport with *Gila IV*?
- c. Is ADWR's recommended assumption for effluent-fed streams "that the sediments immediately beneath these reaches are unsaturated due to clogging layers" valid?<sup>4</sup>
- d. Are ADWR's recommendations sufficient to identify and exclude tributary aquifers and basin fill saturated zones?

Cone of Depression Test

- a. Does ADWR's recommended drawdown of greater than or equal to 0.1 foot, where the cone of depression has reached the edge of the subflow zone, comport with *Gila IV*?
- b. Does ADWR's recommended condition that the water level in a well be below the water level in the subflow zone during pumping comport with *Gila IV*?
- c. What is the accuracy and reliability of analytical (THWELLS) and numerical (MODFLOW) models for the cone of depression test?
- d. Is ADWR's recommendation that the impact of a well be measured "*at the time of the modeling*" scientifically valid?<sup>5</sup>
- e. Should ADWR recommend a methodology to evaluate the impact of wells perforated below an impervious formation within the limits of the subflow zone?

9. On or before **Friday, September 26, 2003**, counsel who filed declarations or rebuttal declarations shall submit a proposed schedule for the cross-examination of witnesses and the amount of time allocated for the cross-examination of each witness expected to testify. The Special Master would like to see cross-examination limited to not more than two hours for each witness with the expectation that the hearing can be concluded in two days but wishes to consider counsel's positions. The Special Master may modify counsel's schedule.

10. The need for any redirect examination shall be determined at the hearing.

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<sup>4</sup> Subflow Report 9.

<sup>5</sup> *Id.* at 31.

11. The person or persons who prepared ADWR's Subflow Report may be cross-examined, and ADWR's legal counsel may represent its staff during cross-examination.

12. The motion of the Apache Tribes to strike the papers filed between April 1 and 9, 2003, regarding listing of issues, is denied.

DATED: April 25, 2003.

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

The foregoing delivered this 25th day of April, 2003, to the Distribution Center, Maricopa County Superior Court Clerk's office, for copying and mailing to those parties who appear on the Court-approved mailing list for Case No. W-1, W-2, W-3, and W-4 (Consolidated) dated December 10, 2002, as modified (Attachment A).

/s/ KDolge  
Kathy Dolge