

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: August 13, 2002

CIVIL NO. W1-11-605

CONTESTED CASE NAME: *In re Fort Huachuca.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master gives directions to the Arizona Department of Water Resources regarding preparation of the supplemental contested case HSR with a status report due on March 7, 2003. The law firm of Cox & Cox and Silas Kisto are requested to advise regarding their inclusion in the Court-approved mailing list of this contested case.

NUMBER OF PAGES: 8 pages; Attachment A - 2 pages; total: 10 pages.

DATE OF FILING: Original delivered to the Clerk of the Court on August 13, 2002.

ORDER

The United States on behalf of Fort Huachuca ("Fort"), Bella Vista Water Co., Inc. ("Bella Vista"), and the Arizona Department of Water Resources ("ADWR") filed comments in response to the Special Master's December 2, 2001, order. The order identified legal and procedural issues related to the steps to be taken after ADWR files its report on Fort Huachuca's updated statements of claimant. Earlier, ADWR filed a report regarding the amount of time required to prepare its report.

A. Comments

The United States submitted two issues for consideration: (1) “whether new objections should be allowed following the filing of ADWR’s” supplemental contested case HSR (the “HSR” or the “Fort’s HSR”), and (2) “whether new or existing parties have standing to object.” Bella Vista asked that ADWR submit another report giving a timeline for the completion of the HSR, indicating what ADWR intends to include in the HSR, and describing the process ADWR “proposes for noticing, allowing objections and resolving the objections” to the HSR. Bella Vista asked that parties be allowed to respond to ADWR’s report. ADWR’s comments raise similar procedural issues.

The issues of who should be notified of ADWR’s completion of the HSR, who can or should be allowed to file objections, and the time frame for filing objections will be determined in the contested case *In re PWR 107*. The Special Master has started the process that will determine these issues.¹ The process will involve the briefing of designated issues of broad legal importance, and the opportunity to participate in that briefing has been given to all parties on the Court-approved mailing lists for both adjudications.

B. ADWR’s Legal Issues

ADWR raised six issues that relate to what it should investigate and report in the HSR. For purposes of preparing the HSR, ADWR’s questions can be answered without briefing, or they call for legal conclusions that can only be decided after facts and data are reported in the HSR.

Setting all or some of ADWR’s issues for determination as issues of broad legal importance is appealing, but outweighing that appeal are concerns that such a process could (1) last two to three years, (2) create time consuming discovery and disclosure disputes, and (3) become a basis to postpone technical work. The proper, most efficient, and promising direction for this contested case is to proceed with the completion of the HSR. Technical investigations and factual analyses must move to the forefront for this case to succeed.

The Arizona Supreme Court has held that ADWR “is to decide no contested fact or issue of law, nor any legal issue of any kind,”² but the Court has recognized that “DWR has considerable expertise in the investigation and reporting of water rights, claims, and uses,”³ and ADWR’s “most important task with respect to the adjudication proceedings involves ‘technical analysis’.”⁴

¹ Special Master’s Order, *In re PWR 107*, June 26, 2002.

² *United States v. Superior Court* (“*San Carlos II*”), 144 Ariz. 265, 280, 697 P.2d 658, 673 (1985).

³ *San Carlos Apache Tribe v. Superior Court* (“*San Carlos III*”), 193 Ariz. 195, 214, 972 P.2d 179, 198 (1999).

⁴ *San Carlos II*, 144 Ariz. at 279, 697 P.2d at 672; see *San Carlos III*, 193 Ariz. 195, 214, 972 P.2d 179, 198.

While ADWR wishes to have as much direction as possible, not every question or nuance can be determined in advance of an HSR. ADWR has nearly seventeen years of experience in preparing HSRs. Both the trial court and the Arizona Supreme Court have given much guidance. In 1989, the Superior Court found that, “Both United States v. Superior Court, [citation omitted; see footnote 2], and A.R.S. § 45-256 and § 45-257 indicate a broad role for DWR in assistance to this Court in the areas of investigation [and] analyses ...”⁵ That finding remains applicable for this adjudication.

The Fort’s HSR should be a compilation of relevant and material technical, historical, hydrological, and other information, facts, and data whose purpose is to assist the trial court, the Special Master, and the parties determine the Fort’s reserved water rights.

ADWR’s questions are answered as follows:

Issue 1. Which water rights attributes should be used for the Fort’s claimed federal reserved water rights? The attributes that ADWR suggested in its May 2, 2002, report are proper and should be reported. ADWR should report any other factors that were used or reported in the 1991 Final San Pedro River Watershed HSR.

Should the water rights attributes be the same for groundwater-based uses and surface water-based uses? Yes.

If the claim involves groundwater use, should the water rights attributes include the date the well was completed and the flow rate/volume? Yes. ADWR should also report any other information, facts, or data that may be helpful for the adjudication of water rights associated with wells.

Issue 2. Is it necessary to establish the purpose of the federal reservation prior to determining the water right attributes for the Fort’s claims? How should the minimal [water] needs of the Fort be determined?

No. The Arizona Supreme Court held in *Gila III* that, “[t]o determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably **fact-intensive inquiries** that must be made on a reservation-by-reservation basis.”⁶ (Emphasis added.) In *Gila V*, Chief Justice Zlaket wrote, “[w]e still adhere to [this] belief”⁷

ADWR is directed to report in the HSR relevant and material information, facts, and data that will assist in determining the purpose of this military reservation and its minimal water needs. The answers to these issues will be clearer after the HSR is published. The Arizona

⁵ Order With Regard to the Fifth Set of Issues Submitted for Decision, 10, August 2, 1989.

⁶ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source* (“*Gila III*”), 195 Ariz. 411, 420, 989 P.2d 739, 748 (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).

⁷ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source* (“*Gila V*”), 201 Ariz. 307, 318, 35 P.3d 68, 79 (2001).

Supreme Court recognized the broad scope of investigation when it stated that, “DWR conducts an extensive historical review of all water right claims and uses ... and reviews appropriate treaties, filings, and all other documentation of the water right, claim, or use.”⁸

This approach will enable all litigants to benefit from ADWR’s research and investigations. If the purpose-of-the-reservation and the minimal-needs issues were determined through summary judgment motions in a separate proceeding, it would place the initial burden of collecting and disclosing information upon the current litigants in this case, a burden that some litigants would be able to afford and carry better than others. Further, by presenting an overall look at a claimant’s water rights or a set of claims, the HSR will help to focus the litigants’ efforts and resources.

Should the availability of effluent be considered? Yes. Effluent has been identified as a source of water that, at a minimum, should be investigated for an HSR. In *Gila I*, the Arizona Supreme Court held that the summons served upon potential claimants “was sufficient to put effluent users on notice that the right to use effluent was subject to this adjudication and that such users should file their claims.”⁹ Recently, the trial court directed ADWR to include effluent in its technical analysis of subflow.¹⁰ Lastly, one of the two claims that the Fort filed includes effluent as a water source (Statement of Claimant No. 39-10775).

How should future uses be quantified? The Superior Court addressed this issue in its July 16, 2002, order entered in the Little Colorado River Adjudication ruling as follows:

G. [A]DWR will not be required to report proposed water right attributes for proposed future water uses.

H. The Hopi HSR shall contain adequate descriptive and technical information about proposed future uses of water on both the Tribe’s reservation lands and non-reservation lands. Pursuant to Pretrial Order No. 2 (August 15, 1988) and as modified in Pretrial Order No. 3 (January 27, 1994), ADWR shall not include descriptions or opinions of the feasibility, profitability or practicability of future uses of water for irrigation or other uses, but ADWR may survey the already existing literature on that issue and list what previous studies have been done. The information shall be adequate to, as stated in Pretrial Order No. 2, “serve as a basis for evaluating claims of future uses.”¹¹

⁸ *San Carlos III*, 193 Ariz. at 214, 972 P.2d at 198.

⁹ *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 238, 830 P.2d 442, 450 (1992).

¹⁰ Order, 2, January 22, 2002 (“Effluent fed streams are also to be included as part of ADWR’s analysis.”).

¹¹ Order, 8 - 9, July 16, 2002.

This direction for the preparation of the Hopi Tribal Lands HSR is adequate guidance for the preparation of the Fort's HSR.

Issue 3. Should the federal reserved water rights claims for the Fort be quantified separately for groundwater and surface water? Yes. This information will assist with the determination of the Fort's reserved water rights.

Is it necessary to quantify the "other waters?" Yes, because quantification will assist in applying the holding in *Gila III* that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation."¹²

Do the "other waters" include subflow? Yes. It is reasonable to conclude that when the Arizona Supreme Court, in *Gila III*, used the phrase "other waters,"¹³ it intended to include the waters that are the subject of this adjudication, which include subflow.

Is it necessary to conduct cone of depression tests for the Fort's wells in order to determine whether the wells are pumping subflow or groundwater? Yes. The HSR should contain sufficient information, facts, and data to assist the trial court, Special Master, and the parties in determining the Fort's reserved water rights.

Is this an enforcement issue or a decree issue? This is a decree issue, and the question is answered more fully in Issue 4.

Issue 4. Should the supplemental contested case HSR for the Fort's amended claim include a "significant diminishment" analysis?

Yes. ADWR "questions whether it is appropriate to determine 'significant diminishment' issues at this stage of the adjudication," inquiring if the Superior Court's order entered on September 9, 1988, is still pertinent. The trial court held that "it is essential that downstream pumping which significantly diminishes [reserved water rights] be located, prioritized and the amount of diminishment established to provide a basis for **later** enforcement ..." (Emphasis added.)¹⁴ The Arizona Supreme Court held that "once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from **subsequent diversion** to the extent such protection is necessary to fulfill its reserved right." (Emphasis added.)¹⁵ Based on the highlighted words, ADWR submits that the Fort's HSR may do without data of significant diminishment because that would be more pertinent to a later enforcement matter.

While it may appear, as ADWR submits, that the trial court believed that issues of significant diminishment would arise as enforcement matters, nevertheless ADWR was directed

¹² *Gila III*, 195 Ariz. at 420, 989 P.2d at 748.

¹³ *Id.*

¹⁴ Order, 21 - 22, September 9, 1988.

¹⁵ *Gila III*, 195 Ariz. at 422, 989 P.2d at 750.

as part of an initial HSR “to determine all stream users or diversions of either surface water or groundwater which significantly affect those sources reasonably available on, at or near the federal parcel which would be available to fulfill the determined entitlement.”¹⁶ At a minimum, the trial court wanted ADWR to report that information before a reserved water right was determined. In that order, the trial court expressed concern about the tasks that ADWR was undertaking and their costs, yet the court directed ADWR to investigate and report significant diminishment.¹⁷

In *Gila III*, when the Court spoke of a “subsequent diversion,” it was addressing “what level of protection federal reserved right holders may claim against groundwater pumping that depletes their water supply.”¹⁸ The Court was addressing the enforcement of a reserved water right and not the initial determination of that right.

This contested case will greatly benefit if the trial court, Special Master, and the parties can learn at the earliest time what is out there so that the Fort’s reserved water rights can be determined in the best manner possible, particularly, if groundwater in the area has been or is being depleted, or groundwater might possibly become a source of the Fort’s reserved water rights.¹⁹ In *Gila III*, the Supreme Court held that the “standard” of “how imminent a threat to a reservation’s essential waters must be in order to warrant injunctive relief ... should be grounded in the bedrock of the facts.”²⁰ As it prepares the HSR, ADWR will be in an excellent position to obtain information, facts, and data that are relevant to the issue of significant diminishment. That information should be reported in the HSR.

In its comments, the United States suggested that in the interest of economy and efficiency, ADWR could obtain data from the United States Geological Survey about “the effect of off-reservation pumping on the Fort’s water rights.” The Special Master leaves it to ADWR to respond to this suggestion.

Lastly, the Special Master does not have the authority to direct or suggest to ADWR (or a party) to disregard or overlook an order of the Superior Court. Accordingly, ADWR must prepare the Fort’s HSR in accordance with the trial court’s September 9, 1988, order.

Issue 5. How should the priority date for the Fort’s federal reserved rights claims be determined? Related thereto, should the date of the Executive Order establishing the Fort be used as the priority date for the Fort’s federal reserved right? Should subsequent expansions of the reservation affect the priority date? Should the fact that the post was deactivated from 1947

¹⁶ Order, 25, September 9, 1988.

¹⁷ Judge Stanley Z. Goodfarb (ret.) wrote, “For the Department of Water Resources, this has been a long, on-going, expensive and labor intensive process.” *Id.* 5 - 6.

¹⁸ *Gila III*, 195 Ariz. at 422, 989 P.2d at 750.

¹⁹ Although *Gila V* dealt with the quantification of Indian reserved water rights, the Supreme Court held that the trial court “should also consider the tribal land’s ... groundwater availability” as a factor when quantifying those rights. 201 Ariz. at 319, 35 P.3d at 80.

²⁰ *Id.*

to 1951 and for a few months thereafter affect the priority date? Should the same priority date be used for both groundwater-based uses and surface water-based uses?

These questions are legal issues whose answers need facts and historical information. ADWR should report in the HSR relevant and material information that will help to determine the priority date of the Fort's reserved water rights and the answers to the related questions.

Issue 6. Is it necessary to await a ruling on the *de minimis* uses before completion of the supplemental contested case HSR for the Fort?

Not at this time. ADWR "questions whether a decision on *de minimis* uses is relevant to the federal reserved water rights claims filed for the Fort." A ruling from the trial court might affect how ADWR prepares the HSR by reducing the amount of resources used to develop proposed water right attributes, but ADWR can begin working on the HSR.

C. Time Frame for the Completion of the HSR

In an order filed on July 16, 2002, in the Little Colorado River Adjudication, Judge Ballinger stated that he "will direct ADWR to complete HSRs and other tasks by separate order to be issued after reviewing ADWR's report" on agency resources (ADWR filed the report on August 2, 2002). The Special Master believes that the Fort's HSR should be published by September 30, 2003. But until the trial court reviews ADWR's report and issues its order, the Special Master will not set a "brick wall" deadline for the completion of the HSR. ADWR will, however, be directed to submit a status report on March 7, 2003, regarding the progress of the HSR.

D. Court-Approved Mailing List

The objection that Alfred S. Cox, Esq. verified and filed on behalf of the Gila River Indian Community ("GRIC") on May 18, 1992, neither named nor included Silas Kisto as an objector. But Mr. Cox attended a Scheduling Conference in this contested case (on April 5, 1995), and the minute entry states that he was representing both GRIC and Silas Kisto.

The law firm of Cox & Cox no longer represents GRIC in this adjudication. The Special Master has previously requested Mr. Cox to notify the Superior Court of the firm's current address and telephone number and to advise if Mr. Cox represents Mr. Kisto as an objector. No response has ever been received.

IT IS ORDERED:

1. ADWR is directed to prepare the Fort's HSR in accordance with the directions given above.

2. ADWR is directed to submit a status report on the progress of the Fort's HSR on or before **Friday, March 7, 2003**.

3. The law firm of Cox & Cox and Silas Kisto shall advise the Special Master by **Friday, September 13, 2002**, of the reasons why Mr. Kisto should remain on the mailing list of this contested case. Any changes of mailing address and telephone number should be included. If no response is timely filed, Cox & Cox and Mr. Kisto will be removed from the mailing list of this contested case.

DATED: August 13, 2002.

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

The foregoing delivered this 13th day of August 2002, 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 Contested Case No. W1-11-605 dated July 16, 2002 (Attachment A).

/s/ KDolge
Kathy Dolge

Attachment A
In re Ft. Huachuca
Contested Case No. W1-11-605
Court-approved Mailing List
Revised July 16, 2002
Prepared by the Office of the Special Master
(Alpha by **last name**; 18 names on this list)

Clerk of the Superior Court
Maricopa County
Attn: Water Case
601 W. Jackson Street
Phoenix AZ 85003

U.S. Army Intelligence Center
& Fort Huachuca
Attn: ATZS-JAD (George W. Reyes)
Fort Huachuca AZ 85613-6000

Phelps Dodge Corp.
c/o Ryley, Carlock & Applewhite
Attn: Michael J. Brophy, L.W. Staudenmaier
101 N. First Ave., Suite 2700
Phoenix AZ 85003-1973

Phoenix, City of
City Attorney's Office
Attn: M. James Callahan
200 W. Washington, 13th Floor
Phoenix AZ 85003-1611

ASARCO, Inc.
c/o Fennemore Craig
Attn: Lauren J. Caster
3003 N. Central Ave., Suite 2600
Phoenix AZ 85012

AZ Attorney General's Office
Natural Resources Section
**Graham M. Clark, Jr. & Thomas
Shedden**
1275 W. Washington
Phoenix AZ 85007-2926

Attorney for City of Sierra Vista
James L. Conlogue
P. O. Box 177
Hereford AZ 85615

Attorney for Silas Kisto
Cox & Cox
Alfred S. Cox & Alan J. Cox
2217 N. Evergreen
Phoenix AZ 85006

U.S. Dep't of Justice
Environment & Natural Resources Div.
Attn: R. Lee Leininger
999 18th Street, Suite 945 NT
Denver CO 80202

Salt River Project
c/o Salmon, Lewis & Weldon, P.L.C.
**Attn: M. Byron Lewis, J.B. Weldon, M.A.
McGinnis**
2850 E. Camelback Rd., Suite 200
Phoenix AZ 85016

Gila River Indian Community
Office of Water Rights
Rodney B. Lewis, S. Heeley, J. Hestand
5002 N. Maricopa Rd., Box 5090
Chandler AZ 85226

Phelps Dodge Corporation
Dawn G. Meidinger
Environment, Land & Water
2600 N. Central Ave., Suite 110
Phoenix AZ 85004-3014

Dep't of Water Resources
Legal Division
Janet L. Ronald
500 N. 3rd St.
Phoenix AZ 85004-3903

BHP Copper Inc. (formerly Magma Copper Co.)
c/o Snell & Wilmer
Attn: C. Ronstadt, P. Giancola, J. Crockett
400 East Van Buren
Phoenix AZ 85004-0001

Special Master
Arizona General Stream Adjudication
George A. Schade, Jr.
1501 W. Washington, Suite 228
Phoenix AZ 85007

Apache Tribes
c/o Sparks, Tehan & Ryley, P.C.
Attn: Joe P. Sparks & John H. Ryley
7503 First Street
Scottsdale AZ 85251-4573

Bella Vista Water Co., Inc., et al.
c/o Martinez & Curtis, P.C.
Attn: William P. Sullivan
2712 N. 7th St.
Phoenix AZ 85006-1003

Mesa, City of
City Attorney's Office
Mary P. Wade & Karen Nally
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Mesa AZ 85211-1466