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

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

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
(Consolidated)
Contested Case No. W1-103

ORDER DENYING MOTION IN LIMINE

On February 5, 2018, Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association ("SRP") filed a Motion in Limine to Exclude Expert Reports and Testimony by Robert Harding ("Motion") on the grounds that the testimony is not relevant. Robert Harding is the designated expert witness for the Arizona State Land Department. The Gila River Indian Community, the United States, and the San Carlos Apache Tribe and Tonto Apache Tribe joined in the Motion. On February 26, 2018, the Arizona State Land Department filed its Response, joined by Freeport Minerals Corporation, Arizona Public Service and BHP Copper Inc.

The issue in this case is the reliability and accuracy of the methodology proposed by the Arizona Department of Water Resources ("ADWR Test") to determine whether a well in the San Pedro River watershed may have a current or future depletive effect on the stream for the purposes of the court's jurisdiction over that well to adjudicate water rights based on state law.

1 The proposed evidence is relevant if it has any tendency to make the validity of the ADWR Test
2 more or less probable than would be the case without the evidence and it is of consequence to
3 deciding the issue in dispute. Rule 401, Ariz. R. Evid. "This standard of relevance is not
4 particularly high." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988). The *Oliver*
5 court recharacterized the standard in the negative: "if evidence has no probative value, it is
6 inadmissible under Rule 401." *Id.*

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8 Mr. Harding, according to the pleadings, is expected to opine that using one of the tests
9 proposed by the Arizona Department of Water Resources would require the inclusion within the
10 adjudication of six specific irrigation wells chosen from a well field of more than 80 wells
11 located along the Agua Fria River that were the subject of an injunction action decided in
12 *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz.
13 65, 4 P. 2d 369 (1931), *reh'g denied and opinion modified*, 39 Ariz. 367, 7 P. 2d 254 (1932).
14 The Arizona State Land Department asserts that the *Southwest Cotton* court determined that
15 certain wells included in the case were not pumping subflow.
16

17 Seeking to exclude this testimony, SRP argues that the evidence is not relevant on the
18 narrow grounds that *Southwest Cotton* court did not make a determination that any particular
19 well was not pumping subflow. At oral argument, counsel for SRP represented that his co-
20 counsel had reviewed the historic court records for the case and could find no indication that any
21 particular well had been determined to not be pumping subflow. Based on the language in the
22 decision and research into the court records, SRP contends that *Southwest Cotton* applied to a
23 general class of water and made no factual finding with respect to any particular well. Thus, the
24 results of applying the ADWR Test to any well in the well field are irrelevant.
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26 The Arizona State Land Department and Freeport Minerals Corporation dispute SRP's
27 reading of the *Southwest Cotton* decision. They quote from *Southwest Cotton* as follows:
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1 The waters claimed by plaintiffs may be divided into three classes. First are
2 those pumped from wells not in or immediately adjacent to the bed of the Agua
3 Fria river. To these, as we have stated, plaintiffs can claim no right by reason of
appropriation, whatever may be their rights under the law applying to
percolating waters of the classes we have mentioned in this opinion.

4 39 Ariz. at 101, 4 P.2d at 382.

5 While SRP is correct that there is no language in *Southwest Cotton* court that identifies any
6 particular well with sufficient specificity to locate it within the two well fields located on either
7 side of the river, the court clearly intended to focus on specific sources of water and the wells
8 that pumped from those sources. The court did refer to the “waters claimed by plaintiffs” which
9 removes the class of water from the general to the specific. As to the specific source of the first
10 class of water, one reading of the decision is that the first class on water “was that body of water
11 shown to exist beneath the lands of plaintiffs, and from which they draw by reason of their
12 wells”. 39 Ariz. at 99, 4 P.2d at 381. The court then determined based on the evidence, or lack
13 thereof, that as of 1931 the groundwater located under the surface of plaintiff’s land “does not
14 constitute the subflow of the Agua Fria river for there is not the slightest evidence that their
15 pumping diminishes directly or appreciably the surface flow”. *Id.*


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18 Given that it appears that the court did intend to find that at least one of plaintiff’s wells
19 pumped groundwater that it did not consider subflow almost 90 years ago, the question is
20 whether the Mr. Harding tested the correct well or group of wells. The Arizona State Land
21 Department represents in its Response that Mr. Harding used six wells included in the litigation
22 that are located the farthest from the Agua Fria River. Response, p. 6. Based on these
23 representations that the six wells are within the group of wells at issue in *Southwest Cotton* and
24 constitute wells that are the farthest from the bed of the Agua Fria river, then the specific
25 objection raised by SRP to the relevance of Mr. Harding’s testimony and report must be denied.
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1 In addition to objecting to the evidence as not relevant, SRP also claims that Mr.
2 Harding's testimony is potentially needlessly cumulative evidence and a waste of time and
3 should be excluded under Rule 403, Ariz. R. Evid. To the extent that Mr. Harding has properly
4 applied ADWR's Test to sites for which it was intended, additional information to evaluate
5 ADWR's Test is not needlessly cumulative. Finally, given the limited amount of time that
6 counsel for Arizona State Land Department expects to use during the course of the trial to
7 present this evidence does not rise to the level of a waste of time given the foregoing.
8

9 Accordingly,

10 **IT IS ORDERED** denying the Motion.

11 The denial of the Motion should not be understood as a decision on the merits of any
12 argument that Arizona State Land Department may make based on Mr. Harding's testimony.
13 This decision is simply the exercise of discretion to liberally interpret the standards applicable to
14 Rules 401 and 403, Ariz. R. Evid., to allow Arizona State Land Department several hours in the
15 course of a trial expected to last six days to present its expert in support of its theory of the case.
16 The evidence presented at the bench trial will be granted the weight that it is due.
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Susan Ward Harris
Special Master

23 A copy of this order is mailed to all persons
24 Listed on the Court-approved mailing list
25 (Court) for contested case no. W1-103.
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