

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: June 9, 2014

CIVIL NO. W1-11-3342

ORDER GRANTING THE UNITED  
STATES' MOTION CONCERNING  
ISSUES NOS. 2 AND 4 OF THE  
SECOND PHASE OF THIS CASE

CONTESTED CASE NAME: *In re Aravaipa Canyon Wilderness Area.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master grants the motion of the United States, but not summary judgment, concerning the availability of unappropriated water on August 28, 1984, and November 28, 1990.

NUMBER OF PAGES: 4.

DATE OF FILING: June 9, 2014.

The United States filed a motion for partial summary judgment requesting that the Special Master apply the analysis adopted in another contested case “to decide as a matter of law that determining how much unappropriated water was available on August 28, 1984, or November 28, 1990, is not necessary for a determination of the quantity of water reserved.”<sup>1</sup> The motion is based on the order of October 17, 2013, entered in *In re*

<sup>1</sup> Mot. for Ptl. S. J. at 3 (Mar. 11, 2014).

*San Pedro Riparian National Conservation Area, No. W1-11-232 (“SPRNCA”).*<sup>2</sup>

## **I. Request for Oral Argument**

In its response opposing the motion, Freeport Minerals Corporation requested oral argument. Arizona Rule of Civil Procedure 7.1(c)(1 and 2)<sup>3</sup> state in pertinent part as follows:

(1) The judge at any time or place and on such notice, if any, as the judge considers reasonable may make orders for the advancement, conduct, and hearing of actions.

(2) To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Resolution of the motion should be advanced because discovery is ongoing until October 31, 2014, and second, the motion can be properly and fully considered without oral argument. Accordingly, the motion will be resolved without oral argument.

## **II. Lack of Compliance with Arizona Rule of Civil Procedure 56(c)(3)**

Freeport Minerals argues that the motion for partial summary judgment should be denied for failing to comply with Rule 56(c)(3)’s requirement that a “party filing a motion for summary judgment shall set forth, in a statement separate from the memorandum of law, the specific facts relied upon in support of the motion.” The United States’ motion is devoid of a supporting separate statement of facts.

The Salt River Project counters that under *Wieman v. Roysden*, 166 Ariz. 281, 282, 802 P.2d 432, 433 (App. 1990), failure to file a separate statement of facts is not grounds for dismissal of a motion for summary judgment, but the motion may be treated as one for other relief such as judgment on the pleadings. It is further argued that “the Motion is based on one single undisputed fact,” which is clear, namely, that the Special Master issued the October 17, 2013, order in the *SPRNCA* contested case.<sup>4</sup>

A proper motion for summary judgment includes a separate statement of facts. This clearly specified requirement in Rule 56(c)(3) cannot be overlooked.

Based on *Wieman*, the Special Master will not dismiss the motion for partial summary judgment but neither will the motion be treated as one for summary relief or

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<sup>2</sup> The text of the order is available at <http://tinyurl.com/m4s2sbj> (the analysis is found on page 9; “We can quantify the reserved right without first determining the existence of unappropriated water.”).

<sup>3</sup> A.R.S. § 45-259 provides that the “general adjudication is governed in all respects by the ... Arizona rules of civil procedure” except where a conflict exists between the adjudication statutes and the rules. No conflict exists here.

<sup>4</sup> SRP’s Reply in Supp. of the U.S. Mot. for [Ptl.] S. J. at 2-3 (May 30, 2014).

judgment on the pleadings. The motion will be considered as a pre-evidentiary hearing motion to adopt the analysis made in the *SPRNCA* order dated October 17, 2013, that the Court can quantify a federal reserved water right without first determining the availability of unappropriated water on the date of the reservation.

### **III. The “Then Unappropriated” Requirement of a Reserved Water Right**

Freeport Minerals is concerned that the federal motion impermissibly attempts to narrow or even eliminate the issues set for determination in this phase of the case in such a way that the “then unappropriated” standard for a reserved water right is displaced.

The Special Master made it clear in the October 17, 2013, *SPRNCA* order that:

A federal reserved water right is limited to unappropriated water available when a reservation is established. The United States Supreme Court has held that “when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation,” and in “so doing the United States acquires a reserved right in unappropriated water...”. (footnote omitted).<sup>5</sup>

In fact, it was stated in the order entered *in this case* on November 2, 2011, that, “[b]ecause the question has arisen in other contested cases, the Special Master reiterates that a non-Indian reserved water right is limited to unappropriated water. This point need not be briefed.”<sup>6</sup>

The United States’ motion cannot eliminate the requirement that a federal reserved water right for the Aravaipa Canyon Wilderness Area is limited to unappropriated water existing on the dates of the reservation in 1984 and 1990.

We are dealing with how to determine the attributes of a reserved water right given the limitations we have. The limitations are the lack of a subflow zone delineation map and an A.R.S. § 45-256(B) report. Freeport Minerals’ expert has studied the extent of unappropriated water flowing within the Aravaipa Canyon Wilderness Area. However, an A.R.S. § 45-256(B) report should more fully account for water sources lost or reduced by drought, management actions, or other factors; state law based water rights that have been abandoned or forfeited; and hydrological events that have impacted water flows.

The dispositive point is “that it is necessary to determine the quantity of unappropriated water available for use as of the dates of reservation, but it is not required to do so prior to quantifying the reserved water right.”<sup>7</sup>

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<sup>5</sup> See Order *supra* n.2 at 8.

<sup>6</sup> Order Determining the Initial Seven Issues Briefed at 9 (Nov. 2, 2011). The order cited the holding of the U.S. Supreme Court in *Cappaert v. United States*, 426 U.S. 128, 138-9 (1976).

<sup>7</sup> See Order *supra* n.2 at 7.

It is reiterated “that a ruling in favor of the United States is not a reason to end discovery on the two issues concerning the existence of unappropriated water,” and [d]iscovery can continue on the existence of unappropriated water on August 28, 1984, and November 28, 1990.”<sup>8</sup> As this case proceeds to an evidentiary hearing on the quantification of the claimed reserved water right, circumstances might change such as a subflow zone delineation map becomes available, an A.R.S. § 45-256(B) report is completed, or in the interest of concluding this case, the Water Court deems it proper to hear evidence of available unappropriated water.

Accordingly, IT IS ORDERED:

1. The United States’ Motion for Partial Summary Judgment on Issues Proposed for Evidentiary Hearing is not considered to be a motion for summary judgment because it does not contain the required separate statement of facts.

2. The motion is deemed to be a pre-evidentiary hearing request to adopt the analysis made in the *SPRNCA* order dated October 17, 2013, that the Court can quantify a federal reserved water right without first determining the availability of unappropriated water on the date of the reservation. As such, the motion is granted.

3. This ruling does not preclude discovery on the availability of unappropriated water on the dates of reservation of the wilderness area.

DATED: June 9, 2014.

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

On June 9, 2014, 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. W1-11-3342 dated January 9, 2014.

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

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<sup>8</sup> Order at 2 (Apr. 3, 2014).