

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 7, 2003

CIVIL NO. W1-103

ORDER CLARIFYING THE  
SCOPE OF DISCOVERY

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

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master clarifies the scope of formal and informal discovery for the hearing set on October 21 and 22, 2003.

NUMBER OF PAGES: 4 pgs.

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**ORDER**

The United States has asked for clarification of the Special Master's April 25, 2003, order and has requested that no additional discovery, other than the disclosure of expert witness declarations and rebuttal declarations, be permitted. The motion for clarification regarding discovery was prompted by a party's informal request, in a letter dated May 22, 2003, to the United States for copies of forty documents listed by the United States' expert witnesses in their credentials.

The Upper Valley Irrigation Districts, Verde Valley Communities, and Central Valley Irrigation Districts (collectively and respectively, the Gila Valley and Franklin Irrigation Districts; the Cities of Cottonwood and Sedona and the Towns of Clarkdale and Jerome; and the Maricopa-Stanfield and Central Arizona Irrigation and Drainage Districts) oppose the request for clarification. The Salt River Project, Gila River Indian Community, and the Apache Tribes (collectively, the San Carlos Apache Tribe, Tonto Apache Tribe, and the Yavapai-Apache Nation) join or support the request for clarification.

The Special Master will clarify the scope of discovery in this proceeding and not wait for a reply to be filed by the United States in order to give the litigants an early clarification. Formal discovery other than the disclosure of initial expert witness and rebuttal declarations is neither required for the actual needs of this proceeding nor was it anticipated by the parties, but limited informal discovery should be encouraged. Counsel may initiate and participate in limited informal discovery, but the Special Master does not contemplate allowing formal discovery.

### Reasoning

The purpose of the hearing in October is to cross-examine the expert witnesses who submitted sworn declarations and, as the Superior Court stated in its January 22, 2003, order, allow “perhaps, some limited redirect examination.” The objective is to determine methodologies to locate the subflow zone and conduct a cone of depression test that comply with *Gila IV*.<sup>1</sup> The relative water rights of claimants will not be adjudicated in this proceeding; rather methodologies will be determined.

The Rules for Proceedings Before the Special Master (“Rules”) do not directly address discovery in proceedings like this one. The scope and means of discovery allowed by the Rules are based on the publication of preliminary and final hydrographic survey reports and the organization of contested cases to resolve objections.<sup>2</sup> The Superior Court’s Pre-Trial Orders Nos. 1 and 3 set up that construct.<sup>3</sup>

The Arizona Supreme Court has held that it is “a common principle that the rules of discovery are to be broadly and liberally construed to facilitate identifying the issues, promote justice, provide a more efficient and speedy disposition of cases, avoid surprise, and prevent the trial of a lawsuit from becoming a ‘guessing game.’ ”<sup>4</sup>

The April 25, 2003, order listed nine issues, related to location of the subflow zone and a cone of depression test, that cross-examination should focus on. At the conference held on

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<sup>1</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*”).

<sup>2</sup> Section 9.00 (Discovery), Rules for Proceedings Before the Special Master (1991); *see* section 12.00 regarding motions raising issues of broad legal importance.

<sup>3</sup> Pre-Trial Order No. 1 ¶ 11 (May 29, 1986); Pre-Trial Order No. 3 (March 22, 1988).

<sup>4</sup> *Cornet Stores v. Superior Court*, 108 Ariz. 84, 86, 492 P.2d 1191, 1193 (1972); *U-Totem Store v. Walker*, 142 Ariz. 549, 691 P.2d 315 (App. 1984).

April 10, 2003, parties expressed the view that identifying the important, but not exclusive, issues for cross-examination would be efficient and helpful, and that was done.

Because their sworn declarations will serve as the direct testimony of the witnesses, parties already know the positions of the designated expert witnesses. Awareness of those positions facilitated the preparation of sworn rebuttal declarations, which parties have filed. “The discovery rules are intended to provide a vehicle by which one party may be fairly apprised of the other’s case and be prepared to meet it if he can.”<sup>5</sup> The possibilities of surprise in this proceeding or of it becoming a “guessing game” have been removed. Parties have been fairly apprised of the others’ cases.

Second, after the Superior Court’s referral, the Special Master held a conference “to discuss...the procedures to resolve the issues raised by the Subflow Report [of the Arizona Department of Water Resources] and the claimants’ responses and objections.”<sup>6</sup> An item set for discussion was “[a]ny other issues that would expedite this matter.”

As counsel for the Salt River Project noted, although at the conference “all parties had an opportunity to raise procedural issues with the Special Master, no party suggested the need for any discovery at that time” (Joinder 2). The Gila River Adjudication is too complex that the Special Master does not believe in strict restrictions because an issue was not raised at a prehearing conference. On the other hand, prehearing conferences are held to discuss procedures and their nuances, and weight must be given to the conference discussions. Formal discovery was not anticipated to occur in this proceeding, and the parties have prepared with this assumption.

A limited form of informal discovery, however, is merited in order to take a further step to “promote justice.” Although this matter involves narrow issues related to methodologies, judicial notice is taken of the fact that subflow has been a subject of prominent litigation since at least 1987.<sup>7</sup> If a party believes that reviewing reports prepared by an expert witness, who listed those reports in a sworn declaration or in the credentials, would make that party’s cross-examination of the witness more effective, a reasonable opportunity should be given to obtain copies of those reports.

The Superior Court’s Pre-Trial Orders Nos. 1 and 3 and the Rules provide for the “informal exchange of properly discoverable information.”<sup>8</sup> The United States’ designated expert witnesses worked on or participated in the reports listed in their credentials submitted with their declaration.

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<sup>5</sup> *Kott v. City of Phoenix*, 158 Ariz. 415, 418, 763 P.2d 235, 238 (1988).

<sup>6</sup> Special Master’s Order 2 (February 24, 2003), available online at <[www.supreme.state.az.us/wm/](http://www.supreme.state.az.us/wm/)> on the *Gila River Adjudication* page in the section for this case.

<sup>7</sup> See n.1.

<sup>8</sup> Pre-Trial Order No. 1 ¶ 11(C); Pre-Trial Order No. 3 ¶ II(A); Rules, section 9.04.

Counsel is encouraged to exchange information without formal discovery. Counsel in this proceeding are experienced and of high caliber. It is reasonable to expect that informal discovery can succeed in a cooperative and honorable manner.

IT IS ORDERED:

1. Formal discovery of other than the disclosure of expert witness declarations and rebuttal declarations, by means of depositions, interrogatories, production of documents or things, inspections, examinations, and requests for admission are not contemplated in this proceeding.

2. Parties may initiate and obtain informal discovery of reports as follows:

A. The reports are described or listed in the sworn initial or rebuttal declarations or in the credentials prepared by the designated expert witnesses.

B. The reports are not privileged and are relevant to subflow or related evaluations and methodologies. Simple relevance is sufficient.

C. The number of reports that may be requested from a single party by informal discovery shall not exceed eight reports.

D. If the reports requested informally are voluminous, costly to reproduce, unreasonably duplicative or cumulative, or unavailable, counsel shall resolve these matters, and any others that may arise, through personal consultations and good faith efforts.

3. Parties with similar positions shall coordinate informal discovery efforts so as to minimize the time and expense of discovery and avoid duplication of effort.

4. Informal discovery pursuant to the foregoing limitations shall be completed by Tuesday, October 7, 2003.

5. Counsel for the United States and the parties who requested informal discovery from the United States shall meet and discuss which eight reports out of the forty listed in the May 22, 2003, letter will be requested and produced informally.

DATED: August 7, 2003.

/s/ George A. Schade, Jr.

GEORGE A. SCHADE, JR.

*Special Master*

The foregoing delivered this 7th day of August, 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 May 6, 2003, as modified.

/s/ George A. Schade, Jr.

George A. Schade, Jr.