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5

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

7 IN AND FOR THE COUNTY OF MARICOPA

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

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
(Consolidated)

11 **Contested Case No. W1-11-1174**
12 **(Consolidated)**

13 SPECIAL MASTER'S REPORT ON ISSUES
14 OF BROAD LEGAL IMPORTANCE
REGARDING SUPPLEMENTAL
15 CONTESTED CASE HYDROGRAPHIC
SURVEY REPORTS FILED IN THE SAN
PEDRO RIVER WATERSHED

16
17 CONTESTED CASE NAME: *In re PWR 107 Claims.*

18 HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

19 DESCRIPTIVE SUMMARY: The Special Master submits a report to the Superior Court under
20 Rule 53, Ariz. R. Civ. P., and Section 12.04, Rules for Proceedings Before the Special Master,
which contains recommended determinations for two designated issues of broad legal importance.
21 Objections to this report must be filed with the Superior Court on or before **February 21, 2003**.
Responses to the objections shall be filed by **March 21, 2003**, and replies shall be filed by **April 11,**
2003. The hearing on any objections will be held at a time and place to be set by the Superior Court.

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23 DATE OF FILING: Original delivered to the Clerk of the Court on January 24, 2003.
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1 **I. INTRODUCTION**

2 This contested case addresses the objections to forty statements of claimant that the Bureau of
3 Land Management (Safford District), part of the United States Department of the Interior, filed in the
4 San Pedro River Watershed, claiming federal reserved water rights in thirty-nine springs and one
5 dam pursuant to Public Water Reserve No. 107.¹ On May 2, 2002, the Special Master consolidated
6 all the objections and initiated this case.²

7 Following a prehearing conference, the Special Master issued an order on June 26, 2002,
8 designating two issues of broad legal importance for determination in accordance with Section 12.00
9 of the Rules for Proceedings Before the Special Master.³ The Special Master concluded that these
10 issues “must be addressed at this early stage because they relate to the first procedural steps to take
11 after [the Arizona Department of Water Resources (“ADWR”)] files a supplemental contested case
12 [hydrographic survey report (“HSR”)], and their determinations will apply to other contested cases.”

13 The issues of broad legal importance are:

- 14 1. Which claimants or parties should ADWR notify that a supplemental contested case HSR
15 has been filed, and which claimants or parties should be allowed to file written objections?
16

17 ¹ Public Water Reserve No. 107 (“PWR 107”) is an Executive Order of President Calvin Coolidge issued on
18 April 17, 1926. The order is reprinted in *United States v. State*, 131 Idaho 468, 470, 959 P.2d 449, 451 (Idaho
19 1998), *cert. denied sub nom. Idaho v. United States and Hoagland v. United States*, 526 U.S. 1012 (1999).
Between 1979 and 1983, the Solicitor of the United States Department of the Interior interpreted PWR 107 in
four opinions. Some of the backgrounds of PWR 107 and of these Solicitor’s opinions are described in the
Final San Pedro River Watershed Hydrographic Survey Report in Vol. 1, at 376-380 (1991).

20 ² The original pleadings and orders are available at the office of the Clerk of the Maricopa County Superior
21 Court, 601 West Jackson Street, Phoenix, Arizona 85003, under the docket of Contested Case No. W1-11-
1174 (Consolidated). The Special Master’s orders are posted at <<http://www.supreme.state.az.us/wm/>> on the
Gila River Adjudication page.

22 ³ Section 12.00 of the Rules for Proceedings Before the Special Master (November 1, 1991) provides
23 procedures for raising and determining issues of broad legal importance. Section 12.01 states in pertinent part,
24 “A motion or objection raises an issue of broad legal importance if the issue is one of procedural or
substantive significance that is similar to issues in other contested cases and that, if decided in the instant
contested case, may establish a precedent for other contested cases in that river system adjudication and,
possibly, in another river system adjudication.”

1 2. How much time should claimants or parties have to file written objections after ADWR
2 files a supplemental contested case HSR?

3 The Special Master set a schedule for parties interested in participating in the determination
4 of the issues to file notices of intent to appear; make certain disclosures specified in Rule 26.1, Ariz.
5 R. Civ. P.; make limited discovery; file motions, responses, and replies; and present oral arguments.
6 The order provided that “the claimants and persons listed on the Court-approved mailing lists for the
7 Gila River and the Little Colorado River Adjudications may participate in the determination of the
8 issues of broad legal importance,” and a copy of the order was sent to all persons appearing on the
9 Court-approved mailing lists for both adjudications.⁴

10 The following parties filed motions: San Carlos Apache Tribe, Tonto Apache Tribe, and
11 Yavapai-Apache Nation (collectively the “Apache Tribes”); Arizona Public Service; Phelps Dodge
12 Corporation; Arizona Water Company; State of Arizona Agency Claimants; Bella Vista Water
13 Company; Pueblo Del Sol Water Company; Cities of Chandler, Glendale, Mesa, and Scottsdale; Gila
14 River Indian Community; City of Phoenix; Salt River Project; and the United States.

15 ADWR filed comments. The Special Master’s order provided that “ADWR may submit
16 comments about administrative or procedural points that would be beneficial for the litigants to
17 know.” The Arizona Supreme Court has described the assistance that ADWR is to provide to the
18 Superior Court.⁵ Because ADWR does the service of process and has expertise with adjudication
19 notifications, the Special Master believed that it would be appropriate, in this briefing, for ADWR to
20 comment “about administrative or procedural points” that could aid in the discussion and

21 _____
22 ⁴ See Section 12.03, Rules for Proceedings Before the Special Master.

23 ⁵ The Arizona Supreme Court has held that ADWR’s “duties are confined to factual analysis and
24 administrative aid,” and ADWR “is to decide no contested fact or issue of law, nor any legal issue of any
kind.” *United States v. Superior Court*, 144 Ariz. 265, 280, 697 P.2d 658, 673 (1985). ADWR is “a provider
of expert and administrative assistance, and an identifier of issues.” *San Carlos Apache Tribe v. Bolton*, 194
Ariz. 68, 72, 977 P.2d 790, 794 (1999).

1 implementation of the required notice. The “actual adjudicatory process - the resolution of contested
2 issues of fact or law”⁶ will be for the parties.

3 **II. DETERMINATION OF THE ISSUES OF BROAD LEGAL IMPORTANCE**

4 The issues of broad legal importance were addressed in pleadings and oral arguments. An
5 evidentiary hearing was not held. Therefore, findings of fact and conclusions of law are not
6 submitted, but determinations of the issues are recommended.

7 The following events contributed to these issues being raised: (1) the passing of almost
8 twelve years since ADWR filed the 1991 Final San Pedro River Watershed HSR,⁷ (2) the
9 Legislature’s amendments, in 1995, to the general stream adjudication statutes,⁸ (3) the stay of the
10 contested cases being litigated in the San Pedro River Watershed pending the determination of
11 constitutional challenges to many of the 1995 legislative provisions,⁹ (4) the Arizona Supreme
12 Court’s five interlocutory opinions between 1992 and 2001,¹⁰ and (5) ADWR’s reduced capability to
13 undertake a complete “one-time” updating of the 1991 Final HSR.¹¹

14 The term “supplemental contested case HSR” is not found in any statute, but the term
15 “supplemental HSR” is used in Pre-Trial Order No. 1 ¶ 12(F)(1 and 2), which state:

17 ⁶ *United States v. Superior Court*, 144 Ariz. at 281, 697 P.2d at 674.

18 ⁷ ADWR published a preliminary HSR for the San Pedro River Watershed in February, 1987, and in August,
19 1990. The final HSR was filed in November, 1991. The statements of claimant that ADWR investigated were
20 filed, in accordance with various deadlines, between July 11, 1980, and September 16, 1985.

21 ⁸ 1995 Ariz. Sess. Laws, ch. 9 (effective Mar. 17, 1995).

22 ⁹ The contested cases were stayed in 1995 and 1996. After constitutional challenges were made to many of the
23 new provisions, in January, 1999, the Arizona Supreme Court upheld some and found others invalid. *San
24 Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179 (1999).

¹⁰ The opinions are referred to as *Gila I*, 171 Ariz. 230, 830 P.2d 442 (1992); *Gila II*, 175 Ariz. 382, 857 P.2d
1236 (1993); *Gila III*, 195 Ariz. 411, 989 P.2d 739 (1999), *cert. denied sub nom. Phelps Dodge Corp. v.
United States and Salt River Valley Water Users' Assn. v. United States*, 530 U.S. 1250 (2000); *Gila IV*, 198
Ariz. 330, 9 P.3d 1069 (2000), *cert. denied sub nom. Phelps Dodge Corp. v. United States*, 533 U.S. 941
(2001); and *Gila V*, 201 Ariz. 307, 35 P.3d 68 (2001).

¹¹ See ADWR’s Report Concerning the Preparation of New and Updated Hydrographic Survey Reports and
Related Matters (filed on December 5, 2002), Gila River Adjudication Docket No. 3023.

1 (1) If, after the master has held an evidentiary hearing or hearings on an HSR and
2 filed a report on the HSR with the Court...a decision or order of the Court makes it
3 necessary to include information in an HSR that was not included in the HSR as filed
4 with the Court and the master or changes the criteria used by the DWR to determine
one or more facts contained in an HSR, the Court or master hearing the matter may
require DWR to prepare a **supplemental HSR** containing any necessary additional
information.

5 (2) The Court may determine that additional evidentiary hearings are necessary on a
6 **supplemental HSR**. The hearing if ordered shall be held at such a time as to promote
7 the just, speedy and inexpensive determination of the facts contained in the
supplemental HSR. The procedures set forth in subsections C and D, above, shall
apply to **supplemental HSRs**. (Emphasis added.)¹²

8 Judge Susan R. Bolton's minute entry of September 28, 2000, states:

9 Rather than order the Department to undertake to update all its watershed file reports
10 for all of the statements of claimant in the San Pedro River Basin, the Court adopts the
11 proposal of the Department [ADWR]. As contested cases are scheduled, the
12 Department will be ordered to update and **supplement** the watershed file reports to
include recommendations of water right attributes and also to advise the Court
concerning new uses and any new or amended statement of claimants. Objections will
be allowed as the updates are published. (Emphasis added.)¹³

13 These orders of the Court provide for supplementing an HSR and filing objections to a supplement.

14 **A. Which claimants or parties should ADWR notify that a supplemental contested**
15 **case HSR has been filed, and which claimants or parties should be allowed to file written**
16 **objections?**

17 The briefing of this issue raised two related matters: first, should a preliminary supplemental
18 contested case HSR be prepared, and second, should a 120-day notice be sent.

19 1. Should a preliminary supplemental contested case HSR be prepared?

20 A.R.S. § 45-256(H) requires ADWR to prepare "a preliminary report," which after comments
21 by claimants and revisions by ADWR, is filed as a final HSR. In the San Pedro River Watershed, two
22 preliminary HSRs preceded the 1991 Final HSR.

23 ¹² Pre-Trial Order No. 1 (Re: Conduct of Adjudication) ¶ 12(F)(1 and 2) (Re-Opening HSRs) (May 29, 1986).
24 ¹³ Minute Entry 2 (September 28, 2000); available online at <www.supreme.state.az.us/wm/> on the *Gila River Adjudication* page.

1 The need for a supplemental contested case HSR will arise after both preliminary and final
2 HSRs have been published, and if objections to the final HSR were filed. Furthermore, the scope of a
3 supplemental contested case HSR will be narrower than that of a final HSR because contested cases
4 will address specific claims and objections. The litigation of a supplemental HSR will involve fewer
5 claimants and parties than that of a final HSR. Lastly, the parties who participated in the briefing do
6 not believe that a preliminary supplemental contested case HSR is required.

7 **Recommendation 1:** The Special Master recommends that a preliminary supplemental
8 contested case HSR not be required prior to the filing of any supplemental contested case HSR.

9 If the Superior Court adopts this recommendation, the Court should clarify that the
10 procedures set forth in Pre-Trial Order No. 1 ¶ 12(D)(1 and 2) do not apply to supplemental
11 contested case HSRs. Pre-Trial Order No. 1 ¶ 12(F)(2) states, “The procedures set forth in [¶ 12] C
12 and D...shall apply to supplemental HSRs,” and subsections 12(D)(1 and 2) state:

13 (1) Pursuant to A.R.S. § 45-256.C, the DWR shall adopt such rules as may be
14 necessary to ensure that adequate notice is given to each party that a preliminary HSR
15 is available for inspection and comment and that the parties have a reasonable
16 opportunity to inspect and comment on the preliminary HSR.

17 (2) After expiration of the period for filing comments on the preliminary HSR, the
18 DWR shall revise the preliminary HSR as may be appropriate and shall file the HSR
19 with the Court and the master.

20 These subsections indicate that parties will have an opportunity to comment on a
21 “preliminary” supplemental HSR before a final supplemental HSR is filed. The supplemental HSRs
22 described in Pre-Trial Order No. 1 are supplements prepared and filed after the Special Master has
23 held evidentiary hearings on an HSR and filed a report with the Superior Court.

24 Supplemental contested case HSRs, on the other hand, will be prepared and filed before the
Special Master files a report with the Superior Court. Therefore, the procedures described in Pre-
Trial Order No. 1 ¶ 12 (D)(1 and 2) should not be applicable to supplemental contested case HSRs.

1 **Recommendation 2:** The Special Master recommends that the procedures set forth in Pre-
2 Trial Order No. 1 ¶ 12(D)(1 and 2) not be adopted for supplemental contested case HSRs.

3 2. Which claimants or parties should be notified?

4 A.R.S. § 45-256(B) requires that the “technical assistance rendered by [ADWR] shall be set
5 forth...in a report...which shall...be available for inspection **by any claimant.**” (Emphasis added.)
6 The Superior Court issued Pretrial Order No. 5 “concerning the notice to be given by [ADWR] of the
7 issuance or filing of” preliminary and final HSRs and directed that upon ADWR filing a final HSR,
8 ADWR “shall send a copy of the objection notice by first-class mail to those persons included on the
9 court-approved mailing list, to each claimant and nonclaimant water user in the geographic area
10 covered by the final HSR, and to every other claimant in the Gila River adjudication.”¹⁴ The general
11 stream adjudication statutes and Superior Court orders are, however, silent about the notice
12 requirements for a supplemental contested case HSR.

13 The parties disagree on the extent of notice that should be given when a supplemental
14 contested case HSR is filed. A majority argues that due process requires all claimants in the Gila
15 River Adjudication to be notified every time a supplemental contested case HSR is filed. On the
16 other side, one party argues that a more limited number of claimants need to be notified (namely, the
17 claimants and objectors in the contested case and the landowners where the contested water use is
18 located) because all the claimants in the San Pedro River Watershed were notified of the 1991 Final
19 HSR and had the opportunity to object.¹⁵

20 Since the Final San Pedro River Watershed HSR was filed in 1991, the Arizona Supreme
21 Court has issued five interlocutory opinions, and the Legislature has amended the general stream
22 adjudication statutes. The Supreme Court has clarified or determined matters that ADWR must report

23 ¹⁴ Pretrial Order No. 5 (Re: Notice of Hydrographic Survey Reports) 1 (March 29, 2000).

24 ¹⁵ The last day to file objections to the 1991 Final San Pedro River Watershed HSR was May 18, 1992.

1 and should consider when preparing an HSR. Principal matters addressed by the Court include the
2 determination of the subflow zone, cone of depression tests, and *de minimis* water uses.¹⁶

3 In 1995, the Legislature amended A.R.S. § 45-256(B)¹⁷ adding these requirements for an
4 HSR:

5 The report shall list all information that is obtained by [ADWR] and that reasonably
6 relates to the water right claim or use investigated. The report shall also include
7 [ADWR's] proposed water right attributes for each individual water right claim or use
8 investigated.... If no water right is proposed in connection with an individual water
9 right claim or use, [ADWR's] recommendations shall so indicate.

8 Furthermore, the Superior Court recently adopted standards and procedures for *de minimis*
9 stockwatering and certain stockponds and domestic water uses in the San Pedro River Watershed.¹⁸
10 These will be reflected in supplemental contested case HSRs in the San Pedro River Watershed.

11 At least thirteen years have passed since ADWR completed its investigations in the San Pedro
12 River Watershed that were reported in the 1991 Final HSR. This passage of time is significant. Judge
13 Bolton ruled that ADWR would be directed "to advise the Court concerning new uses and any new
14 or amended statement of claimants."¹⁹ A supplemental contested case HSR in the San Pedro River
15 Watershed will contain new information about water uses that claimants will need to review.

16 A supplemental contested case HSR will update matters reported in the 1991 Final HSR, and
17 will cover subjects or aspects, such as subflow and ADWR's water right recommendations, that were
18 not addressed in the final HSR and will be new. The new information may be important or even vital
19 for the determination of a claimant's relative water rights.

21
22 ¹⁶ See *Gila II* and *Gila IV*, *supra*. *Gila III* and *Gila V*, *supra*, are important for the preparation of Indian HSRs.

23 ¹⁷ 1995 Ariz. Sess. Laws, ch. 9, § 19 (effective Mar. 17, 1995). The Arizona Supreme Court did not find this
24 provision invalid. *San Carlos Apache Tribe v. Superior Court*, *supra*.

¹⁸ Minute Entry (September 26, 2002); available online at <www.supreme.state.az.us/wm/> on the *Gila River Adjudication* page.

¹⁹ See *infra* note 13.

1 In *Gila I* (Feldman, C.J.), the Arizona Supreme Court considered whether the procedures the
2 Superior Court had adopted in the Gila River Adjudication for service of summons and filing and
3 service of pleadings comported with due process under the United States and Arizona Constitutions.
4 Regarding due process in general stream adjudications, the Court held:

5 The issue of due process arises because those persons who did not receive actual
6 notice of the adjudication may, under § 45-254(E), lose claims to water rights without
7 having an opportunity to defend their claims. Water rights are property rights.
8 (citations omitted). Consequently, holders of water rights are constitutionally entitled
9 to due process in any adjudication that could deprive them of those rights. *Mullane v.*
10 *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 656-57 (1950)
11 (“deprivation of...property by adjudication [must] be preceded by notice and
12 opportunity for hearing appropriate to the nature of the case”); *Mervyn's Inc. v.*
13 *Superior Court*, 144 Ariz. 297, 300, 697 P.2d 690, 693 (1985) (“[A]ny procedure
14 which deprives an individual of a property interest must satisfy due process.”).

15 Notice is sufficient for due process purposes if it is “reasonably calculated, under all
16 the circumstances, to apprise interested parties of the pendency of the action and
17 afford them an opportunity to present their objections” or claims. *Mullane*, 339 U.S. at
18 314, 70 S. Ct. at 657.²⁰

19 A supplemental contested case HSR to the 1991 Final San Pedro River Watershed HSR could
20 contain the technical information, findings, and recommendations to adjudicate or deny a claimant’s
21 water right relative to other claimed water rights. If claimants are not notified of a supplemental
22 contested case HSR in the San Pedro River Watershed, they could “lose claims to water rights
23 without having an opportunity to defend their claims.”²¹ Moreover, because decisions made in the
24 San Pedro River Watershed can set precedent for claimants and objectors in other watersheds and
cases,²² all claimants should be notified of the filing of any supplemental contested case HSR.

20 *Gila I, supra*, 171 Ariz. at 235-236, 830 P.2d at 447-448.

21 *Id.* 171 Ariz. at 235, 830 P.2d at 447.

22 “Generally, the decisions reached by the Master in each contested case will be binding upon the litigants involved, but will only be of precedential value for other contested cases and other litigants.” Notice of Commencement of Adjudication of Water Rights Claims and Objections in the San Pedro River Watershed 3 (March 12, 1993). *See also infra* note 3.

1 **Recommendation 3:** The Special Master recommends that all claimants in the Gila River
2 Adjudication be notified of the filing of supplemental contested case HSRs in the San Pedro River
3 Watershed.

4 Although all claimants in the Gila River Adjudication should be notified of the filing of
5 supplemental contested case HSRs in the San Pedro River Watershed, “[d]ue process requires that
6 interested parties be given notice ‘reasonably calculated, **under all the circumstances**, to...afford
7 them an opportunity to present their objections’.” (Emphasis in original.)²³ In *Gila I*, the Arizona
8 Supreme Court recognized that, “Due process is not a static concept, but must account for ‘the
9 practicalities and peculiarities of the case’,”²⁴ quoting *Mullane’s* holding that there must be “[d]ue
10 regard for the practicalities and peculiarities of the case.”²⁵ In approving procedures involving
11 subscriptions to a monthly docket sheet and a Court-approved mailing list for service of pleadings,
12 the Supreme Court held that the unique procedures for notifying claimants, adapted for the
13 complexities of general stream adjudications, comported with constitutional due process.

14 Some of the “practicalities and peculiarities” of supplemental contested case HSRs, including
15 those related to the 1991 Final San Pedro River Watershed HSR, are clear. First, a supplemental
16 contested case HSR follows the publication and notification of both a preliminary and a final HSR.
17 Second, all claimants in the general stream adjudication are notified of the filing of a final HSR and
18 commencement of the objection period. Third, notices of the filing of a supplemental contested case
19 HSR will be published in newspapers of general circulation throughout the Gila River Adjudication
20 area. Fourth, the availability of monthly docket subscriptions, ADWR’s and the Special Master’s
21 Web sites, physical distribution of copies of supplemental contested case HSRs, and the *Online*

22
23 ²³ *Gila I, supra*, 171 Ariz. at 240, 830 P.2d at 452.

24 ²⁴ *Id.* 171 Ariz. at 241, 830 P.2d at 453.

²⁵ *Mullane*, 339 U.S. at 314.

1 *Arizona General Stream Adjudication Bulletin* will provide ongoing information about supplemental
2 contested case HSRs and the adjudicatory process. Lastly, a supplemental contested case HSR will
3 cover a fewer number of claims and objections than a watershed or federal reservation HSR.

4 At the oral argument on the issues of broad legal importance, there was discussion regarding
5 Special Master Thorson's "Notice of Commencement of Adjudication of Water Rights Claims and
6 Objections in the San Pedro River Watershed" sent to all claimants, objectors, landowners, allottees,
7 and permittees in the San Pedro River Watershed in March, 1993. A copy of the notice is attached to
8 this report as Attachment B. The "notice provides information about how the Special Master for the
9 Arizona General Stream Adjudication will begin to adjudicate water rights and resolve objections in
10 the San Pedro River watershed."²⁶ The notice was not an order initiating any specific contested case.

11 The procedures for participating in contested cases described in the informational notice were
12 intended to apply to contested cases begun after the 180-day objection period to the 1991 Final HSR
13 had ended on May 18, 1992. Now almost ten years after this notice, given the intervening statutory
14 amendments, Supreme Court opinions, and Superior Court orders, those procedures cannot be used
15 to limit notice of supplemental contested case HSRs and participation by claimants in contested cases
16 in the San Pedro River Watershed.

17 The following recommendations address the notice of the filing of a supplemental contested
18 case HSR that should be given to claimants and others in the San Pedro River Watershed and to all
19 other claimants in the Gila River Adjudication. Due process requires that all claimants in the San
20 Pedro River Watershed and all objectors to the 1991 Final San Pedro River Watershed HSR be given
21 notice of all supplemental contested case HSRs filed in the San Pedro River Watershed.

22
23
24 ²⁶ Notice of Commencement of Adjudication of Water Rights Claims and Objections in the San Pedro River
Watershed 2 (March 12, 1993).

1 But due process for all other claimants outside the San Pedro River Watershed is satisfied by
2 informing those claimants, upon the filing of the first supplemental contested case HSR, about the
3 preparation and filing of supplemental contested case HSRs, but without having to send a copy of the
4 objection notice by first-class mail to those claimants every time a supplemental contested case HSR
5 is filed thereafter. The recommended procedures for notice to claimants and others are “reasonably
6 calculated” to afford them “an opportunity to present their objections” while accounting for the
7 “practicalities and peculiarities” of supplemental contested case HSRs.

8 **Recommendation 4:** The Special Master recommends that upon filing the first supplemental
9 contested case HSR in the San Pedro River Watershed, ADWR be directed to send a copy of the
10 objection notice by first-class mail to the persons included on the mailing list for the contested case,
11 to persons appearing on the Court-approved mailing list, to each claimant and nonclaimant water
12 user in the San Pedro River Watershed, to all persons who filed objections to the 1991 Final HSR,
13 and to every other claimant in the Gila River Adjudication.

14 **Recommendation 5:** The Special Master recommends that upon ADWR filing the first
15 supplemental contested case HSR in the San Pedro River Watershed, the Superior Court direct the
16 Special Master to send a notice informing all claimants in the Gila River Adjudication that other
17 supplemental contested case HSRs will be filed in the San Pedro River Watershed, but notice of
18 future supplemental contested case HSRs filed in the San Pedro River Watershed will be sent by
19 first-class mail only to the persons included on the mailing list for the contested case, to persons
20 appearing on the Court-approved mailing list, to each claimant and nonclaimant water user in the San
21 Pedro River Watershed, and to all persons who filed objections to the 1991 Final HSR. This notice
22 should include, if available, a description and filing schedule for future supplemental contested case
23
24

1 HSRs in the San Pedro River Watershed and other relevant information about the Gila River
2 Adjudication.

3 **Recommendation 6:** The Special Master recommends that for subsequent supplemental
4 contested case HSRs filed in the San Pedro River Watershed, ADWR be directed to send a copy of
5 the objection notice by first-class mail to the persons included on the mailing list for the contested
6 case, to persons appearing on the Court-approved mailing list, to each claimant and nonclaimant
7 water user in the San Pedro River Watershed, and to all persons who filed objections to the 1991
8 Final HSR.

9 a. Other Procedures

10 The Superior Court has adopted procedures for notice, distribution, and availability of
11 preliminary and final HSRs that should be adopted for all supplemental contested case HSRs. Pretrial
12 Order No. 5 ¶ 3 states:

13 After the Department [ADWR] has completed a preliminary HSR for a watershed or
14 reservation, or any portion of such watershed or reservation as specified by the Court,
15 the Department shall make copies of the preliminary HSR available for inspection and
16 purchase in the following manner:

17 A. The Department shall file a copy of the preliminary HSR with the clerk of the
18 court.

19 B. The Department shall provide copies of the preliminary HSR to county court clerks
20 and public libraries located throughout the Gila River adjudication area.

21 C. The Department shall make copies of the preliminary HSR available for purchase
22 at the Department's main office. The Department shall also make copies of the
23 preliminary HSR available for inspection at each of the Department's active
24 management area offices.

D. The Department shall undertake reasonable efforts to make the preliminary HSR
available in an electronic format.

1 Pretrial Order No. 5 ¶ 5(B)(C)(E) and (F) describes the following procedures for final HSRs:

2 B. Upon filing the final HSR with the clerk of the court, the Department [ADWR]
3 shall also file a notice of commencement of the objection period with the clerk of the
4 court. This objection notice shall specify where the final HSR will be available for
5 inspection or purchase, the deadline and procedure for submitting objections to the
6 final HSR, and the procedures for obtaining additional information. If a special master
7 has been appointed, the notice may be combined with any additional information
8 required by the master.

9 C. The Department shall issue a press release containing the information stated in the
10 objection notice. The Department shall publish the press release on its internet web
11 site and in newspapers of general circulation throughout the Gila River adjudication
12 area.

13 ****

14 E. If the final HSR was prepared for a watershed, the Department shall send with the
15 objection notice to each claimant and nonclaimant water user that portion of the final
16 HSR describing each specific water use or claim by that person.

17 F. If the final HSR was prepared for an Indian reservation, the Department shall
18 provide a copy of the objection notice and the entire final HSR to the tribal
19 representative for the Indian reservation and to the United States in its capacity as
20 trustee for the Indian tribe. If the final HSR was prepared for another federal
21 reservation, the Department shall provide a copy of the objection notice and the entire
22 final HSR to the United States.

23 These procedures should be adopted for all supplemental contested case HSRs.

24 **Recommendation 7:** The Special Master recommends that the procedures set forth in Pretrial
Order No. 5 ¶¶ 3 and 5(B)(C)(E) and (F) be adopted for all supplemental contested case HSRs.

3. Should a 120-day notice be sent?

A.R.S. § 45-256(H) states, “At least one hundred twenty days before the final report is to be
filed, [ADWR] shall file with the court a notice stating the date on which the final report is to be
filed.” This provision was added in 1995.²⁷ Pretrial Order No. 5 ¶ 5(A) describes the information the
120-day notice must contain and the claimants and parties who shall receive the notice:

²⁷ 1995 Ariz. Sess. Laws, ch. 9, § 19 (effective Mar. 17, 1995). The Arizona Supreme Court did not find this
provision invalid. *San Carlos Apache Tribe v. Superior Court, supra*.

1 At least 120 days before the final HSR is published, the Department [ADWR] shall
2 file a notice with the clerk of the court. This 120-day notice shall state the date on
3 which the final HSR is to be filed and the deadlines for filing a new statement of
4 claimant or amendment to an existing statement of claimant as provided by ARIZ.
5 REV. STAT. § 45-254. The Department shall send a copy of this 120-day notice by
6 first-class mail to all persons listed on the court-approved mailing list, all claimants in
7 the geographic area covered by the final HSR, and all non-claimant water users in the
8 geographic area covered by the final HSR.

9 The 120-day notice informs claimants and others of an upcoming HSR in order to provide
10 time to make initial preparations for timely review of the final report. The notice helps claimants and
11 others who did not participate in the review of the preliminary HSR or who wish to file, amend, or
12 assign a statement of claimant or other water right filing. In the San Pedro River Watershed, a 120-
13 day notice prior to the filing of the first supplemental contested case HSR will be the first notice to
14 claimants in that watershed, since 1996, of the commencement of new contested case proceedings.

15 Pretrial Order No. 5 requires that a copy of the 120-day notice be sent to all claimants and
16 nonclaimant water users “in the geographic area covered by the final HSR,” but does not define the
17 term “geographic area.” It is reasonable to conclude that because a final HSR for a watershed, such
18 as the San Pedro River Watershed, covers an entire watershed in the Gila River System, the term
19 “geographic area,” as used in Pretrial Order No. 5 ¶ 5(A), means the entire watershed. The
20 geographic area covered by the 1991 Final San Pedro River Watershed HSR is the entire San Pedro
21 River Watershed described in the HSR. While the boundaries of a major watershed can be identified,
22 the “geographic area” covered by a supplemental contested case HSR may not be amenable to
23 reasonably certain identification.

24 In the 1991 Final HSR, ADWR identified five subwatersheds in the San Pedro River
Watershed, namely, Aravaipa, Benson, Redington, Sierra Vista, and Winkelman. “The

1 subwatersheds are separated at United States Geological Survey (USGS) stream gaging stations.’²⁸
2 The five subwatersheds are part of the San Pedro River Watershed, a watershed in the Gila River
3 System.²⁹ A subwatershed of a major watershed will not only be already identified in the final HSR
4 but also would be a relevant hydrologic area.

5 **Recommendation 8:** The Special Master recommends that at least 120 days before a
6 supplemental contested case HSR is filed in the San Pedro River Watershed, ADWR shall file a
7 notice with the Clerk of the Superior Court. This 120-day notice shall state the date on which the
8 supplemental contested case HSR is to be filed and the deadlines for filing a new statement of
9 claimant or amendment to an existing statement of claimant as provided by A.R.S. § 45-254. ADWR
10 shall send a copy of this 120-day notice by first-class mail to all persons listed on the mailing list for
11 the contested case, to persons appearing on the Court-approved mailing list, and to all claimants and
12 nonclaimant water users in the subwatershed or subwatersheds of the major watershed covered by the
13 supplemental contested case HSR.

14 4. Which claimants or parties should be allowed to file objections?

15 In the San Pedro River Watershed, the passage of twelve years since the final HSR was filed,
16 the holdings of the Arizona Supreme Court in five interlocutory opinions since 1992, the 1995
17 legislative amendments relating to new HSR reporting requirements, and the technical importance of
18 a supplemental contested case HSR in the adjudicatory process, previously described on pages 8 - 10,
19 compel a determination that all claimants in the Gila River Adjudication must be allowed to file
20 objections to a supplemental contested case HSR.

21
22
23 ²⁸ Vol. 1 Final San Pedro River Watershed HSR 3 (1991).

24 ²⁹ In the Gila River System, seven watersheds have been identified, namely, Agua Fria River, Upper Gila River, Lower Gila River, Upper Salt River, San Pedro River, Santa Cruz River, and Verde River.

1 **Recommendation 9:** The Special Master recommends that all claimants in the Gila River
2 Adjudication be allowed to file objections to any supplemental contested case HSR filed in the San
3 Pedro River Watershed.

4 **B. How much time should claimants or parties have to file written objections after
5 ADWR files a supplemental contested case HSR?**

6 1. How much time should claimants have to file objections

7 A.R.S. § 45-256(B) provides that, “Any claimant may file with the court or the master written
8 objections to the report or any part of the report within one hundred eighty days of the date on which
9 the report was filed.” This period clearly applies when a final (but not a preliminary) HSR is filed.
10 Pretrial Orders No. 1 and 5 confirm the 180-day period to file objections to a final HSR.³⁰ A 180-day
11 period for filing objections was allowed when the 1991 Final San Pedro River Watershed HSR was
12 filed.

13 The parties suggest 90 days and 180 days. A 90-day period, it is submitted, would promote
14 expediency and would be sufficient if contested cases are limited to the involved claimants,
15 objectors, and landowners. On the other hand, a majority argues that a 180-day period is required
16 because a supplemental contested case HSR will be the basis for adjudicating the water right claims,
17 and furthermore, supplemental contested case HSRs will cover matters and contain information that
18 was not previously required to be investigated or reported in an HSR, and claimants will need the full
19 statutory period to prepare objections.

20 In 1995, the following sentence was added to A.R.S. § 45-256(B):³¹ “An objection shall
21 specifically address [ADWR’s] recommendations regarding the particular water right claim or use
22 investigated.” The objections that will be filed to a supplemental contested case HSR in the San

23 ³⁰ Pre-Trial Order No. 1 ¶ 12(D)(3)(a); Pretrial Order No. 5 ¶ 7(A).

24 ³¹ 1995 Ariz. Sess. Laws, ch. 9, § 19 (effective Mar. 17, 1995). The Arizona Supreme Court did not find this
provision invalid. *San Carlos Apache Tribe v. Superior Court, supra*.

1 Pedro River Watershed must address, if made by ADWR, recommendations about water claims that
2 were not reported in the 1991 Final HSR. In this respect, objections to a supplemental contested case
3 HSR filed in the San Pedro River Watershed will differ from the objections filed to the final HSR.

4 The passage of almost twelve years since the final HSR was filed; the extent of new matters,
5 information, and recommendations that will be reported; the new requirements for objections; and
6 the likely increase in the number of claimants and water uses since 1991 compel that claimants be
7 allowed a period of 180 days, as statutorily provided for a final HSR, to file objections to any
8 supplemental contested case HSR filed in the San Pedro River Watershed. Furthermore, a 180-day
9 period provides sufficient time for claimants and objectors to engage in technical and settlement
10 discussions and aids the unhurried review of reported findings.

11 **Recommendation 10:** The Special Master recommends that any claimant may file written
12 objections to a supplemental contested case HSR or any part of the report, filed in the San Pedro
13 River Watershed, within one hundred eighty days of the date on which the report was filed.

14 a. Other Procedures

15 Pretrial Orders No. 1 and 5 contain requirements for objections that should be adopted for
16 supplemental contested case HSRs. Pre-Trial Order No. 1 ¶ 12(D)(3)(a)(b) and (c) provide that:

17 a. [A] written objection shall be filed with the Court and the master.

18 b. An objection can be made to the legal or factual basis of the determination made in
19 the HSR regarding the individual claim.

20 c. An objection must be timely filed and state in clear and concise language the
21 particular factual and/or legal reasons for the objection and describe the evidence to
22 support those reasons.

23 These requirements should be adopted for objections filed to all supplemental contested case HSRs.
24

1 **Recommendation 11:** The Special Master recommends that the requirements for objections
2 to a final HSR contained in Pre-Trial Order No. 1 ¶ 12(D)(3)(a)(b) and (c), set forth above, be
3 adopted for objections to all supplemental contested case HSRs.

4 Pretrial Order No. 5 ¶ 7(B) and (C) state as follows:

5 B. The Department [ADWR] shall assist the Court and special master in determining
6 the procedures and preparing the objection forms, instructions, and other documents
7 necessary for filing objections to the final HSR.

8 C. The Department shall provide copies of objection forms and instructions upon
9 request.

10 These procedures should be adopted for all supplemental contested case HSRs.

11 **Recommendation 12:** The Special Master recommends that the procedures set forth in
12 Pretrial Order No. 5 ¶ 7(B) and (C) be adopted for all supplemental contested case HSRs.

13 2. Should objections be limited?

14 Although the Special Master did not raise as an issue of broad legal importance the scope of
15 an objection, some parties suggest that objections to a supplemental contested case HSR be limited to
16 the supplemental data, information, findings, and recommendations and to any impacts they might
17 have on the information contained in an earlier HSR. In other words, objections that were or could
18 have been raised to an earlier HSR should not be allowed to a supplemental contested case HSR.
19 These parties submit that the Special Master can hear arguments regarding permissible objections
20 and strike any that could have been raised earlier, in this case prior to May 18, 1992.

21 As previously reported, the objections that will be filed to a supplemental contested case HSR
22 in the San Pedro River Watershed must address, if made by ADWR, recommendations about water
23 claims that were not reported in the 1991 Final HSR. Limitations to objections are not appropriate for
24 the San Pedro River Watershed due to the passage of almost twelve years since the final HSR was

1 filed, the new information that will be contained in a supplemental contested case HSR, and the new
2 requirements for objections.

3 In other watersheds or contested cases in the future, different circumstances might exist
4 where limiting the scope of objections to a supplemental contested case HSR could promote
5 efficiency, and therefore, the suggestion could be considered. But the circumstances that might arise
6 in other watersheds are unknown, and the affected claimants should be heard on the issue. Moreover,
7 after experience with objections to supplemental contested case HSRs is gained, the Superior Court,
8 Special Master, and claimants will be in a better position to evaluate the suggestion.

9 **Recommendation 13:** The Special Master recommends that objections to supplemental
10 contested case HSRs filed in the San Pedro River Watershed not be limited in any manner to the
11 supplemental information.

12 **III. PREPARATION OF SUPPLEMENTAL CONTESTED CASE HSR**

13 On June 26, 2002, the Special Master directed ADWR to “file on or before Monday, March 3,
14 2003, a supplemental contested case HSR” in this case. Due to the recommendations made in this
15 report, and because the Superior Court will consider them and any objections to the report, the
16 Special Master has issued a separate order today vacating the March 3, 2003, deadline. A new date
17 will be set after the Superior Court takes up this report and any objections filed to the report.

18 **IV. SUBMISSION OF REPORT TO THE SUPERIOR COURT**

19 The Cities of Chandler, Glendale, Mesa, and Scottsdale requested the Special Master,
20 pursuant to Section 12.04, Rules for Proceedings Before the Special Master, to report his
21 determinations of the issues of broad legal significance to the Superior Court under Rule 53, Ariz. R.
22 Civ. P. The request is granted.

1 **V. AVAILABILITY OF REPORT**

2 This report will be filed with the Clerk of the Maricopa County Superior Court. A copy of the
3 report will be mailed to all persons listed on the Court-approved mailing lists for this contested case
4 and for both general stream adjudications.³² A copy will be available at the office of the Clerk of the
5 Apache County Superior Court, and an electronic copy will be posted on the Special Master's Web
6 site (<<http://www.supreme.state.az.us/wm/>>).³³

7 **VI. MOTION FOR APPROVAL OF THE SPECIAL MASTER'S REPORT**

8 Based on the foregoing discussion, the Special Master recommends the determinations of the
9 issues of broad legal importance as set forth in this report. The Special Master moves the Superior
10 Court, under Rule 53(h), Ariz. R. Civ. P., to adopt the recommendations contained in this report.

11 **VII. NOTICE OF SUBSEQUENT PROCEEDINGS**

12 Any claimant in the Gila River Adjudication may file a written objection to this report on or
13 before **Friday, February 21, 2003**.³⁴ Responses to objections must be filed on or before **Friday,**
14 **March 21, 2003**. Replies must be filed on or before **Friday, April 11, 2003**. Objections, responses,
15 and replies must be filed with the Clerk of the Maricopa County Superior Court, 601 West Jackson
16 Street, Phoenix, Arizona 85003, Attn: Water Case. Copies of objections, responses, and replies must
17 be served personally or by mail on all persons appearing on the mailing list for this contested case as
18

19 ³² Section 12.04, Rules for Proceedings Before the Special Master, specifies that the Clerk of the Superior
20 Court "will serve copies of the determination to the Court-approved mailing lists in both adjudications."

21 ³³ See Section 14.03, Rules for Proceedings Before the Special Master.

22 ³⁴ The periods for filing objections to the report, responses, and replies are calculated under Rule 53, Ariz. R.
23 Civ. P. As this report does not contain determinations of the relative water rights of any claimant, the time
24 periods prescribed by A.R.S. § 45-257(A)(2) do not apply. The period for filing objections includes the ten-
day period provided by Rule 53, not including intermediate Saturdays, Sundays, and legal holidays as
specified by Rule 6(a), Ariz. R. Civ. P. The ten-day period for filing responses and the five-day period for
filing replies are specified in Rule 7.1(a), Ariz. R. Civ. P. An additional five-day period when service has been
made by mail is specified in Rule 6(e), Ariz. R. Civ. P. In order to allow time for the distribution of the
monthly docket sheet to subscribers, the Special Master has added seven days to each period.

1 shown in Attachment A to this report and to all persons listed on the Gila River Adjudication Court-
2 approved mailing list.

3 The hearing on the Special Master's motion to approve the report and any objections to the
4 report will be taken up as ordered by the Superior Court. Rule 53(h), Ariz. R. Civ. P., provides that,
5 "The court after hearing may adopt the report or modify it or may reject it in whole or in part or may
6 receive further evidence or may recommit it with instructions."

7 Submitted this 24th day of January, 2003.

8
9
10 /s/ George A. Schade, Jr.
11 GEORGE A. SCHADE, JR.
12 *Special Master*

13 The original report was filed with the Clerk of the
14 Maricopa County Superior Court on January 24,
15 2003, and was delivered to the Distribution Center
16 for copying and mailing to those parties who appear
17 on the Court-approved mailing list for Contested
18 Case No. W1-11-1174 (Consolidated) (Attachment
19 A) and on the Court-approved mailing lists for both
20 adjudications dated December 10, 2002.

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22
23
24
18 /s/ KDolge
19 Kathy Dolge