

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

09/13/2017

CLERK OF THE COURT

SPECIAL MASTER
SUSAN WARD HARRIS

C. Avena
Deputy

W1-103

FILED: October 9, 2017

W1-103

In re: the General Subflow Zone Delineation
Report for the San Pedro River Watershed Prepared by the Arizona
Department of Water Resources

In re: Consider Procedure Proposals and Initiate a Third Stage.

MINUTE ENTRY

Central Court Building- Courtroom 301

1:30 p.m. This is the time set for a status conference before Special Master Susan Ward Harris to Consider Procedure Proposals and Initiate a Third Stage.

Court reporter, Vanessa Gartner is present. A record of the proceedings is also made digitally.

The following attorneys appear in person:

- John B. Weldon, Mark A. McGinnis and Jeffrey R. Heilman on behalf of the Salt River Project
- John D. Burnside on behalf of BHP Copper
- Cynthia J. Haglin on behalf of the City of Chandler

- William H. Anger on behalf of the Cities of Avondale, Chandler, Glendale, Mesa, and Scottsdale
- Janet L. Miller and Kimberly R. Parks on behalf of the Arizona Department of Water Resources
- Sean T. Hood and Brad Pew on behalf of Freeport Minerals Corporation
- L. William Staudenmaier and Jenny Winkler on behalf of the Arizona Public Service Company
- William P. Sullivan on behalf of the Pueblo Del Sol Water Company and the City of Sierra Vista
- James Meza on behalf of the Arizona State Parks and Trails
- David A Brown on behalf of the Gila Valley Irrigation District, the Franklin Irrigation District, the City of Cottonwood, and the Babocomari Ranch
- Monique Coady on behalf of the City of Phoenix
- Carrie J. Brennan and Edwin Slade on behalf of the Arizona State Land Department
- Thomas L. Murphy on behalf of the Gila River Indian Community

The following attorneys appear telephonically:

- Joe P. Sparks on behalf of the San Carlos Apache Tribe and the Tonto Apache Tribe
- Michael LeBlanc on behalf of Pima County
- Robyn L. Interpreter on behalf of the Pascua Yaqui Tribe and the Yavapai-Apache Nation
- Yosef Negose on behalf of the United States Department of Justice
- Charles L. Cahoy on behalf of the City of Tempe
- Jaclyn D. Foutz on behalf of the City of Flagstaff
- Sharon Morris on behalf of SRP Technical Staff
- Steve Titla on behalf of the San Carlos Apache Tribe

Discussion is held regarding the issue that Freeport Minerals Corporation, et al. put in their motion regarding whether the results from the cone of depression test or the proposed subflow depletion test will constitute the clear and convincing evidence necessary to shift the burden of proof to the groundwater user to show that its well is not pumping subflow.

The court stated that based on the representations of Arizona Department of Water Resources (ADWR) at the prior hearing concerning the cone of depression test that the results of the proposed subflow depletion test will shift the burden of proof.

Mark McGinnis addresses the Court regarding the subflow depletion test and stated that the proposed subflow depletion test would shift the burden of proof. Judge Ballinger's 2005 order leading to the cone of depression test was dealing with jurisdictional issues.

There are no objections to the conclusion that the subflow depletion test and not the cone of depression test will shift the burden of proof. The cone of depression test will determine the wells to be included in this adjudication and subject to the Court's jurisdiction.

Discussion is held regarding the Procedure Proposal.

Janet Miller addresses the Court regarding ADWR's position on the third stage. Ms. Miller mentions that the third stage involves complicated issues and is very fact specific. However, ADWR also has concerns about the timing of the methodologies. It is agreed that this matter needs to be resolved and not delayed until all proceedings at the second stage are concluded, but it is also believed that this impact or depletion analysis also seems to be more suitable for enforcement purposes.

Janet Miller informs the Court that ADWR has two witnesses that will testify in the step two trial. She asks that a due date for any report from ADWR be set at least 180 days after the trial.

IT IS ORDERED taking this matter under advisement.

2:26 p.m. Matter Concludes.

LATER:

A subflow depletion test must be established to provide the clear and convincing evidence required by the Arizona Supreme Court to overcome the "strong initial presumption" that a well located outside the subflow zone is pumping percolating groundwater. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 198 Ariz. 330, 343, ¶41, 9 P.3d 1069, 1084 (2002) (*Gila IV*). The subflow depletion test will be used where necessary prior to the entry of the final decree to define the water rights of claimants to appropriate water and after the issuance of the final decree for enforcement purposes¹ under the continuing jurisdiction of the court.

The process to determine a subflow depletion test that meets the standard set in *Gila IV* will benefit from the information obtained during and the resolution of the issues in the cone of depression litigation. The deadlines for the work necessary to determine an appropriate subflow depletion test will be set accordingly.

All parties appeared to support a process that begins with the preparation of a report by ADWR that is then the subject of comments and objections by the parties. In

¹ Although several parties advocated for the inclusion of injunctions in a final decree to enjoin the use of water from wells based on the results of the test, that procedural issue is not being addressed at this time.

an attempt to identify and resolve, if possible, the issues more expeditiously, ADWR will be required to prepare an initial or preliminary report rather than a comprehensive report on a subflow depletion test. After the initial report is issued, the parties will have an opportunity to comment, ADWR will provide responses and a status conference will be held to determine the process that will most efficiently results in ADWR's preparation of a comprehensive report. The parties will thereafter have a full opportunity to file objections to the comprehensive report.

The initial report from ADWR shall include, but is not limited to, the following information:

1. A description of the data available to ADWR that ADWR will use to develop the test;
2. A description of any additional data that ADWR reasonably believes to be necessary for the development of the test;
3. A description of the field studies, if any, reasonably required to develop or demonstrate the reliability of the test;
4. Material factual and legal assumptions that will be incorporated into the methodology;
5. Identification and categorization of aquifer parameters (for example, what are the expected transmissivities or ranges of transmissivities expected in the aquifers in the San Pedro watershed);
6. Identification and categorization of well parameters (for example, what are the depths, screening or volumes or ranges thereof that will be incorporated in the test to evaluate the wells); and
7. Methods to analyze the data using given parameters and stated assumptions.

In addition, the initial report shall include at least one case study to illustrate the operation of ADWR's proposed subflow depletion test.

IT IS FURTHER ORDERED that ADWR shall file an initial report on a subflow depletion test by November 16, 2018. The parties shall file initial comments to the ADWR report by January 18, 2019. ADWR shall file its response to the comments by February 22, 2019.

IT IS FURTHER ORDERED that a status conference will be held on March 7, 2019, at 10:00 a.m. in the Superior Court of Arizona, Central Court Building, Courtroom 301, 201 West Jefferson Street, Phoenix, AZ, 85003-2202.

Instructions for telephonic participation:

Dial: 602-506-9695 (local)

1-855-506-9695 (toll free long distance)

Dial Participant Pass Code 357264#

A copy of this order is mailed to all persons listed on the Court approved mailing list.