

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

02/20/2019

CLERK OF THE COURT
Form V000

SPECIAL WATER MASTER SUSAN WARD HARRIS

L. Stogsdill
Deputy

Contested Case No. W1-103

FILED: 2/28/19

W-1, W-2, W-3, W-4 (Consolidated
cases)

W1-103

In re: General Adjudication of All Rights to Use
Water in The Gila River System and Source

In re: San Pedro River Subflow Technical Report

MINUTE ENTRY

Courtroom CCB - 301

9:00 a.m. This is the time set for a Status Conference before Special Water
Master Susan Ward Harris

The following attorneys appear telephonically: Carla A. Consoli on behalf of the
Arizona Chapter of Nature Conservancy; Patricia Gerrotte, on her own behalf, and
Megan Tracy on behalf of BHP Cooper.

The following attorneys appear in-person: Kimberly R. Parks on behalf ADWR
and Jeffrey Trembley and Frank Corkhill accompany Ms. Parks; Mark A. McGinnis and
R. Jeffrey Heilman on behalf of the Salt River Project (SRP); Joe P. Sparks on behalf of

the San Carlos Apache Tribe and Tonto Apache Tribe; Sean T. Hood on behalf of Freeport Minerals Corporation; John D. Burnside on behalf of the Arizona Public Service (APS) and BHP Copper Inc.; L. William Staudenmaier on behalf of Arizona Public Service Company (APS); Carrie J. Brennan and Kevin Crestin on behalf of the Arizona State Land Department; David A. Brown on behalf of the Gila Valley Irrigation District, the Franklin Irrigation District and the City of Cottonwood; Charles L. Cahoy on behalf of the City of Phoenix; Alexandra Arboleda on behalf of the City of Tempe; William P. Sullivan on behalf of the City of Sierra Vista and the Pueblo Del Sol Water; William H. Anger on behalf of the Cities of Avondale, Chandler, Glendale, Mesa, and Scottsdale; Thomas L. Murphy on behalf of the Gila River Indian Community; Yosef Negose on behalf of the United States Department of Justice and Jenny Winkler on behalf of the City of Chandler;

A record of the proceedings is also made digitally.

Jeffrey Trembley and Frank Corkhill outline the results of their study conducted on behalf of ADWR and distribute flow charts to Court and counsel for review.

9:12 a.m. LET THE RECORD REFLECT that the Court reporter, Lori Thielmann is now present.

The following counsel address the Court's four questions as outlined in the January 22, 2019 order.

Mark McGinnis advises the Court that his position is that the subflow depletion test should be completed prior to the issuance of a decree. He discussed a hypothetical well drilled on property that constitutes the first use of water on that property that is included in the adjudication under the jurisdictional test. A determination must be made as to what portion of the water pumped is appropriable water to establish a surface water right. He discussed a second type of well which was drilled to replace a diversion from the San Pedro that may be pumping groundwater and subflow. He proposed that the Court set a date in 6 months for the parties to submit a demonstration report for a subflow depletion test. After the 6 month period, ADWR would have two months to conduct a technical review of the parties' proposals. Thereafter there would be a hearing to determine the appropriate test.

Yousef Negose states that it is premature to conduct formal proceedings on ADWR's buffer zone report before a decision is made with respect to the final Cone of Depression Report. He further outlines his position with regard to the Court's four questions and suggests that the parties form a committee to pool their expert resources to set parameters and have the experts and the parties work together on implementing one model to present to ADWR. He referenced the limitations noted by ADWR in its report and suggested that ADWR be given additional time to address the model limitations described on page 28 of Appendix 4 to the report.

Joseph P. Sparks, on behalf of the San Carlos and Tonto Apache Tribes addresses the Court and advises the Court he generally agrees with Mr. McGinnis' recommendations. He does not expect that there will be a proliferation of models and suggests that if there is a substantial disagreement among the parties, the parties could present an amendment that deals with the modeling process in dispute. He agreed with the United States that it would be helpful to have the limitations identified by ADWR narrowed down and proposed solutions offered. He reminds that Court that his position has always been that there are not any wells that will not ultimately change the flow of the river. He further states that the subflow depletion test should not await the enforcement stage because it is part of the identification of the water rights to be included in a final decree.

Sean Hood for Freeport Minerals addresses the Court with regard to the ADWR report which he feels represents progress and that ADWR is on the right track. He further indicates that ADWR should continue with the development of the test, noting that it is difficult, but needs to be accomplished and that the surface water components of the system need to be addressed as well. He argues that *Gila IV* requires the test to be developed by the Department and not by the parties. He does not feel 6 months is sufficient time for the parties to determine and develop a model. He also stated that 2 months is not sufficient time to review any proposed models. He notes that Freeport's expert has been involved in other matters and has not been involved in this case since March of 2018. He stated that it will take time and effort to adequately account for the surface water components, i.e., a streamflow routing package will take time. The subflow depletion process must be conducted pre-decree.

Thomas Murphy for the Gila River Indian Community offers his position in response to the Court's four questions. He does not believe that separate, formal proceedings are needed with respect to the buffer zone report. He advises the Court that his client has a major difference with the other parties. Mr. Murphy states his client's understanding was that step 2 was a jurisdictional test. Step 3 is a test to determine if a particular well's cone of depression is drawing from the subflow zone and that well is pumping subflow. Once it is determined that well is pumping from the subflow zone, the Court does not need additional testing because the water is included in the adjudication. He further states that once ADWR has a MODFLOW model for the San Pedro River it will be able to determine if particular wells are pumping subflow from the wells' cones of depression. Mr. Murphy does not feel that Mr. McGinnis' approach is necessary at this point.

Kevin Crestin for the Arizona State Land Department provides his responses to the Court's questions and further advises the Court he is generally in agreement with Mr. McGinnis' proposal in that the test needs to be completed pre-decree. He indicates his client does not have the resources to develop proposed tests to submit to ADWR and that under *Gila IV*, ADWR should develop those tests.

John Burnside on behalf of BHP and APS advises the Court that he agrees that generally ADWR is on the correct path. He states that it makes sense to allow the parties to submit comments which may help resolve the technical issues identified by ADWR. He states that the zone budget may only need two zones for a water budget: the regional aquifer and the subflow zone. It is his position that the Subflow Depletion Test should be completed prior to the decree because without a depletion test that overcomes the presumption there is no basis to include any well outside the subflow zone in the decree. He agrees with Mr. Hood's comments that there are reasons not to move forward with proceedings on the buffer zone.

William Sullivan on behalf of the City of Sierra Vista and the Pueblo Del Sol Water Co. agrees that no action is necessary at this time on the buffer zone report because it is an alternative to the Cone of Depression Report. If the numerical test is to be the jurisdictional, then the issue is what refinements, such as the river package, need to be added to the jurisdictional test to create a depletion test. It is primarily the responsibility of ADWR to run the model. He suggests that more of a peer review approach should be taken. After a meeting of experts or a series of meetings of experts, ADWR would then submit a report. He stated that his client regards the subflow depletion test as an enforcement tool but can see its utility prior to the entry of the decree.

Discussion is held.

LET THE RECORD REFLECT that sometime during the status conference, Carla A. Consoli and Patricia Gerrodette disconnected from the telephone call.

The Court further suggests describing the parameters of a potential model.

Mr. McGinnis, Mr. Burnside and Mr. Sullivan further address the Court.

Charles Cahoy on behalf of the City of Phoenix and Megan Tracy on behalf of the City of Tempe both support Mr. McGinnis' position and offer no additional comments.

The Court suggests a meet and confer with counsel and their respective experts to arrive at a suggested proposal on how to proceed to obtain the most information.

The technical issues are discussed by Mr. Hood and Mr. McGinnis.

Mr. Negose suggests an efficient use of resources.

Mr. Sparks advises the Court that a meeting of experts without counsel would not work for his clients as they do not have the financial resources to spend additional money for the expert's time.

The Court advises counsel that they will not be excluded from any meeting of experts that may occur.

For the reasons outlined on the record,

IT IS ORDERED that ADWR provide the Court with a list of the 443 wells referenced in Table 5-2 on page 13 of ADWR's Initial Subflow Depletion Test Report as San Pedro I Major Uses that are located within the subflow zone. The list will associate each well with a watershed file report, if prepared. If no watershed file report was prepared or if identifying the applicable watershed file report for the well is unduly burdensome given the configuration of the data in ADWR's computer system, then the well will be identified by the information readily available such as the name of the landowner, legal description, and associated statement of claimant, if any.

11:01 a.m. Matter concludes.

LATER:

Pursuant to A.R.S. §45-251(2) this general adjudication requires a judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source. Subflow is part of a river system and source. While there may be a host of different factual issues and presumptions that arise with respect to water pumped from wells located within the subflow zone as compared to water pumped from wells that have cones of depression that intersect the subflow zone, no legal distinction exists between subflow pumped by a well located within the subflow zone and subflow pumped by a well located outside the subflow zone. In both cases the subflow is appropriable water. The Arizona Supreme Court has specifically determined that subflow is considered to be a part of the surface stream and wells that pump subflow are included in this adjudication. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, ¶48, 9 P.3d 1069, 1083 (2000), cert. denied sub nom. *Phelps Dodge Corp. v. U.S.*, 533 U.S. 941 (2001)

Currently, there are contested cases in this adjudication that have been initiated to resolve objections to potential water rights that have been either stayed in whole or in part because no approved test exists to determine whether the cones of depression created by the landowners' wells are pumping subflow. A subflow depletion test must be developed and will be utilized as part of the process of decreeing water rights to appropriable water in this adjudication. While a subflow depletion test will also be used in post-decree enforcement proceedings, its use is not limited to enforcement.

Arizona Department of Water Resources has begun the process of developing a model that will serve as the subflow depletion test. It used MODFLOW as its basic model and, more specifically, the USGS Sierra Vista Sub-Watershed Groundwater Flow Model that included a stream routing package (STR package) to simulate well impact. It then used a second program developed by USGS known as Zonebudget to analyze 15 zones and calculate subregional water budgets. In Appendix 4 to its Report, ADWR identified seven limitations and recommendations. Three of the recommendations

essentially focus on data-related issues (nos. 2, 3, and 7). The remaining four recommendations concern model design.

To create an iterative process that will assist in the development of information for ADWR, the following steps will be adopted:

IT IS FURTHER ORDERED:

1. The Parties shall submit preliminary comments on ADWR's Initial Subflow Depletion Test Report by **April 12, 2019**.
2. Arizona Department of Water Resources shall submit any revisions to its Report based on the comments received and work it undertakes to resolve the issues identified in Appendix 4, particularly items 1 and 4-6, by **May 3, 2019**.
3. Experts retained by the parties and counsel for the parties appearing in this case shall meet with Arizona Department of Water Resources to discuss the Subflow Depletion Test on one or more occasions, as the parties mutually agree, by **June 14, 2019**.
4. Arizona Department of Water Resources shall file a report about the meeting(s) that identifies the model design elements for which there is agreement and lists the issues about which there is no agreement by **June 28, 2019**.
5. Any party desiring to present an alternative approach to the development of a Subflow Depletion Test that will be illustrated by a demonstration project shall file a brief description of the model and proposed methodology by **July 12, 2019**.

IT IS FURTHER ORDERED that a status conference shall be held at 1:30 p.m. on **July 24, 2019** before:

Special Master Susan Ward Harris
Superior Court of Arizona
201 West Jefferson Street
Courtroom 301, Central Court Building
Phoenix, AZ 85003-2202

Instructions for telephonic participation:
Dial: 602-506-9695 (local)
1-855-506-9695 (toll free long distance)
Dial Collaboration (conference) Code 357264#

A copy of this order is mailed to all persons listed on the Court approved mailing list for Contested Case Number W1-103.