

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

11/21/2017

CLERK OF THE COURT
Form V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

L. Stogsdill
Deputy

W1-103

FILED: 12/12/17

Contested Case No:

W1-103

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

In re: Oral Argument on Motion in Limine filed by SRP
Re: Subflow Technical Report, San Pedro River Watershed

MINUTE ENTRY

Courtroom CCB - 301

3:00 p.m. This is the time set for an oral argument before Special Water Master Susan Harris regarding the Motion in Limine filed by SRP.

The following attorneys appear telephonically: William H. Anger on behalf of the Cities of Avondale, Chandler, Glendale, Mesa and Scottsdale; F. Patrick Barry and Yosef Negose on behalf of the United States Department of Justice; David A. Brown and J. Albert Brown on behalf of the City of Cottonwood, GVID and FID; Cynthia J. Haglin on behalf of the City of Chandler; Laurel A. Herrmann on behalf of the San Carlos Apache Tribe and Tonto Apache Tribe; Susan B Montgomery on behalf of the Pascua Yaqui Tribe and Yavapai-Apache Nation; Thomas L. Murphy on behalf of the Gila River Indian Community; Kimberly R. Parks on behalf of the Arizona Department of Water Resources; Clyde Halstead on behalf of the City of Prescott; Patrick P. Sigl and Sharon Morris on behalf of the Salt River Project.

The following attorneys appear in-person: Carrie J. Brennan on behalf of the Arizona State Land Department; John D. Burnside on behalf of the Arizona Public Service (APS) and BHP Copper; Monique Coady on behalf of the City of Phoenix; Mark

A. McGinnis, John B. Weldon, Jr. and R. Jeffrey Heilman on behalf of the Salt River Project; Sean T. Hood and Brad Pew on behalf of Freeport Minerals; L. William Staudenmaier on behalf of APS; Joe P. Sparks on behalf of the San Carlo Apache Tribe and Tonto Apache Tribe and William P. Sullivan on behalf of Pueblo Del Sol Water Company and the City of Sierra Vista.

Court reporter Scott Coniam is present and a record of the proceedings is also made digitally.

Oral argument is presented on the motion by Mark McGinnis on behalf of the Salt River Project (SRP) who outlines the reasons SRP filed the motion and discusses a previous ruling by Judge Ballinger.

Further oral argument is presented by the following counsel: Thomas L. Murphy on behalf of the Gila River Indian Community; F. Patrick Barry on behalf of the United States Department of Justice; Joe P. Sparks on behalf of the San Carlo Apache Tribe and Tonto Apache Tribe; Sean T. Hood on behalf of Freeport Minerals, John D. Burnside on behalf of APS and BHP Copper; William P. Sullivan on behalf of Pueblo Del Sol Water Company and the City of Sierra Vista and Carrie J. Brennan on behalf of the Arizona State Land Department.

For the reasons stated on the record,

IT IS ORDERED taking the matter under advisement.

4:39 p.m. Matter concludes.

LATER:

The motion in limine filed by SRP seeks a ruling to preclude the admission of evidence concerning whether steady state modeling should be rejected in favor of transient state modeling in ADWR's proposed Cone of Depression Test.

Background

During the course of this general adjudication, the court will determine rights to withdraw water from wells located outside the subflow zone that have cones of depression which cause the wells to pump subflow and deplete the stream.¹ *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 175 Ariz. 382, 391, 857 P. 2d 1236, 1245 (1993) ("*Gila II*"). A strong initial presumption

¹ The general adjudication will also adjudicate those wells located within the subflow zone. This specific proceeding, however, only pertains to wells located outside the subflow zone and all discussion in this minute entry are limited to those wells located outside the subflow zone and no statement or omission of a statement should be interpreted as reflecting on the status of or rules relating to wells within the subflow zone.

exists that the wells located outside the subflow zone are pumping groundwater and not appropriable subflow. *In re General Adjudication of All Rights to Use Water in Gila River System and Source*, 198 Ariz. 330, 343, 9 P.3rd 1069, 1082 (2000) (“*Gila IV*”). Due to this presumption, the conclusion that a well’s cone of depression causes it to pump subflow and deplete the stream must be demonstrated by clear and convincing evidence that must be provided by ADWR “using the pertinent criteria.” *Id.* To meet its burden, ADWR will have to separately evaluate each well using a proper test to ascertain whether each well is pumping subflow by reason of its cone of depression. *Id.*

Thousands of wells exist in the San Pedro River watershed. The spatial distribution of the wells located outside the subflow zone ranges from the boundary of the subflow zone to at or near the boundary of the watershed. Judge Ballinger focused on devising a valid method to identify those wells that should be subject to the testing contemplated by the *Gila IV* court. He determined that wells whose cones of depression have a “current or prospective depletive effect on the stream” of at least 0.1 foot would be included in the adjudication. Order Re: Report of the Special Master on the Arizona Department of Water Resources’ Subflow Technical Report, San Pedro River Watershed and Motion for Approval of Report (Sept. 28, 2005) (“2005 Order”), p. 36. The 2005 Order formulated an intermediary test to identify the wells that would be subject to the application of the test required by the *Gila IV* court.

Based upon its understanding of the 2005 Order, ADWR submitted a proposed methodology for a Cone of Depression Test to be used for the stated purpose of identifying wells subject to the court’s jurisdiction. *Minute Entry*, dated March 15, 2017, p. 2. Counsel for the Arizona Department of Water Resources further elaborated that the proposed test will not determine whether a particular well is currently pumping subflow as a result of its cone of depression. The parties have variously referred to ADWR’s Cone of Depression Test as the Phase 2 or the Jurisdictional Test. At the specific urging of the State Law Parties², the purpose of the test now at issue was specifically addressed during a subsequent hearing. All parties had the opportunity to speak and no objections were made during that hearing to the conclusion that the purpose of ADWR’s Cone of Depression test would be limited to the identification of wells within the court’s jurisdiction and that the test would not be used to determine whether any particular well was pumping subflow through its cone of depression. *Minute Entry*, dated September 13, 2017. Thus, ADWR’s Cone of Depression Test will not deprive the owner of a well included in the adjudication of the presumption that the well is pumping groundwater.

² The State Law Parties are: Arizona Public Service Company, BHP Copper, Inc., Freeport Minerals Corporation, the Arizona State Land Department, the City of Cottonwood, Franklin Irrigation District and Gila Valley Irrigation District.

Transient vs. Steady State Modeling

Evidence is relevant if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Rule 401, Ariz. R. Evid. A clear recitation of the fact at issue is critical to a determination of relevancy. The State Law Parties contend that the proposed evidence goes to the fact of whether “the cone of depression test . . . satisfies the Arizona Supreme Court’s requirements for accuracy and reliability” set forth in the *Gila IV* decision and thus should not be excluded. *State Law Parties’ Joint Response to Salt River Project’s Motion in Limine*, filed November 16, 2017, (“State Law Response”) p. 11. The *Gila IV* cone of depression test determines whether a well owner is pumping subflow and in so doing eliminates the presumption that the well is pumping groundwater. The *Gila IV* cone of depression test is not the intermediary test crafted by Judge Ballinger that governed the methodology used by ADWR in its proposed test. The fact at issue here is the reliability and accuracy of the test to ascertain whether a well may have a current or prospective depletive effect on the stream for the purpose of setting the court’s jurisdiction over wells in the San Pedro River watershed.

While an appropriator of water may forfeit water rights due to nonuse over a set period of time, Arizona law generally does not impose a time limitation on an appropriator’s continuous beneficial use of water.³ As the duration of appropriable water rights can be perpetual, the methodology to identify those wells that may impact those water rights should not be constrained by an arbitrary time period. Time is an integral component of transient state modeling. Counsel for Freeport Mineral Corporation correctly stated that transient state modeling can produce results for an array of different time periods. Judge Ballinger also acknowledged that “if a more accurate result is desired with respect to relatively narrow timeframe, transient state modeling is preferable, but if long-term accuracy is needed, the steady state model will, over time, be more useful.” 2005 Order at 33. The court concluded that only a test using steady state modeling of a well’s cone of depression would adequately identify the wells subject to the court’s jurisdiction. *Id.* at 36. Appropriable water rights generally do not expire with time and this court’s jurisdiction must include those wells that are reasonably determined to impact those appropriable water rights over the relevant time frame, which in this case is perpetual. Thus, results provided by transitory state modeling concerning a well’s pumping of subflow and depleting the stream over a lesser time period such as one year, five years or even 50 years are not relevant to the evaluation of ADWR’s Cone of Depression Test.

The State Law Parties also contend that the use of steady state modeling renders ADWR’s test overbroad. While apparently acknowledging that the test will exclude *de minimis* domestic wells located outside the subflow zone from this court’s jurisdiction, the State Parties assert that “nearly all” other wells in the watershed will be included

³ There are appropriative rights that are subject to statutory time limits, e.g., water for power use development under A.R.S. 45-162.

within the court's jurisdiction and thus subject to the *Gila IV* test. State Law Response, p. 10. The Project Report submitted by ADWR included the results of its proposed test for a sample of 41 wells. Using its AquiferWin32 Model, 37% of the wells would not be included within the court's jurisdiction based on the combination of the well's distance from the subflow zone and its pumping rate. Assuming that ADWR's sample results are indicative of the results applicable to the entire well population, at this point in the proceedings it does not appear that the proposed test would subject nearly all wells in the watershed to the court's jurisdiction. In any event, the purpose of the trial is to assure that the model provides accurate and reliable results so that the court can properly exercise jurisdiction over wells which will be subject to the *Gila IV* test.

The State Law Parties further contend that the evidence is necessary to support a future horizontal appeal of Judge Ballinger's 2005 ruling. Horizontal appeals waste judicial resources as well of the resources of the parties who had previously litigated, briefed and argued the issues and should not be undertaken unless essential facts or applicable law have substantially changed or the decision is manifestly erroneous or unjust. *Cypress on Sunland Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 296, 257 P.3d 1168, 1176 (Ct. App. 2011). Judge Ballinger's decision was preceded by a full evidentiary hearing before the Special Master in which testimony was received on the issue of transitory versus steady state modeling, a 104-page Report from the Special Master, objections to that Report and arguments before Judge Ballinger. To the extent that the State Law Parties desire to file a horizontal appeal from an order issued 12 years ago, an evidentiary record already exists. No good reason exists to expand the scope of the current hearing to create a second evidentiary record.

The State Law Parties also argue that SPR has phrased its motion too broadly by seeking to preclude all evidence they deemed to be contrary to Judge Ballinger's ruling. They suggested that Judge Ballinger had made specific limiting decision on issues including whether analytical models or numeric models should be used and whether analytical models can be calibrated. While SRP did make a broad claim for relief seeking to generally preclude all evidence "attacking" Judge Ballinger's 2005 Order, it focused its motion and oral argument on its request to exclude evidence regarding transitory state modeling. Accordingly,

IT IS ORDERED granting SRP's motion in limine in part. No evidence will be admitted at trial concerning the use of, benefits of or consequences of not using transitory modeling instead of steady state modeling in the evaluation of ADWR's Cone of Depression Test. To the extent that SRP sought to preclude the admission of other evidence related to the 2005 Order as claimed by the State Law Parties, the motion is denied.

Although Sierra Vista opposed SRP's motion in limine, it requested that if the motion were granted, a ruling should be made that the determination to use steady state modeling rather than transient state modeling should have no precedential value for Phase 3, i.e., the test envisioned by the *Gila IV* court. Given that the purpose of the next test to

be developed in this process differs from the purpose of the current test, which is to identify the wells subject to the Court's jurisdiction,

IT IS FURTHER ORDERED that the decision to use steady state modeling in ADWR's Cone of Depression Test will not be determinative of whether transient state or steady state modeling should be incorporated by ADWR in a test designed to comply with the *Gila IV* standards to determine whether a well is pumping subflow by reason of its cone of depression.

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