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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

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

W-1, W-2, W-3, W-4 (Consolidated)
Contested Case No. **W1-106**

**ORDER DENYING MOTION FOR
PARTIAL SUMMARY JUDGMENT ON
LEGAL STANDARDS FOR SUBFLOW
DELINEATION ON VERDE
TRIBUTARIES and
DENIAL OF MOTION *IN LIMINE***

CONTESTED CASE NAME: *In re Subflow Technical Report, Verde River Watershed*
TECHNICAL REPORTS INVOLVED: *Subflow Zone Delineation Technical Report for the Remainder of the Verde River Watershed, April 2023.*
DESCRIPTIVE SUMMARY: Order DENYING Motion for Partial Summary Judgment on Legal Standards for Subflow Delineation on Verde Tributaries and DENYING Motion *In Limine*.
NUMBER OF PAGES: 14

On April 28, 2023, the Arizona Department of Water Resources (“ADWR”) filed the *Subflow Zone Delineation Technical Report for the Remainder of the Verde River Watershed* (“Tributaries Report”), which delineated the proposed subflow zone for the tributaries in the Verde River Watershed. In addition to work by ADWR and the Arizona Geological Survey (“AZGS”), information from documentation submitted to ADWR

1 from Mark Holmes and from Mark Nicholls was included in the Tributaries Report.¹
2 Objections were required to be filed by October 27, 2023.

3 Timely objections from the Yavapai-Apache Nation, Freeport Minerals, and SRP
4 specifically claimed the Tributaries Report failed to delineate the subflow zone for
5 certain streams that were intermittent under predevelopment conditions, including the
6 Big Chino Wash, Partridge Creek, and Williamson Valley Wash.² Hydrogeological and
7 anthropological technical information from Richard Burtell and John Ford were included
8 in the filings by Freeport Minerals and SRP respectively.³ Many of the opinions from
9 Burtell and Ford conflicted with ADWR conclusions; therefore, an evidentiary hearing is
10 scheduled to begin August 21, 2024. As part of the Minute Entry filed January 22, 2024,
11 which set the August hearing, the Special Master presented three questions to limit the
12 scope of the testimony and maintain focus on the pertinent issues:

- 13 1. Were portions of the Big Chino Wash and Partridge Creek intermittent
14 under predevelopment conditions?
- 15 2. Was all of the Williamson Valley Wash intermittent under predevelopment
16 conditions?
- 17 3. Was the subflow mapping of certain tributary streams, including inter alia
18 Camp Creek, Dry Beaver Creek, Ellison Creek, and Granite Creek,
19 inappropriately terminated?

20 On May 21, 2024, the Salt River Project Agricultural Improvement and Power
21 District and Salt River Valley Water Users' Association (collectively "SRP") filed a
22

23 ¹ Mark Holmes provided information to ADWR on behalf of the City of Prescott
24 and the Town of Chino Valley. Mark Nicholls provided information on behalf of the
25 Town of Prescott Valley.

26 ² Timely objections were also received from Arizona Water Company, Arizona
27 State Land, Chino Grande LLC, City of Phoenix, and Sandy DuBois, however none of
28 those objections are pertinent to the issues here.

³ No determinations have been made as to whether any of the third-party technical
information provided to ADWR or the Court meets the requirements of Rule 702 of the
Arizona Rules of Evidence.

1 Motion for Partial Summary Judgment on Legal Standards for Subflow Delineation on
2 Verde Tributaries and Alternatively, Motion *In Limine* (“SRP Motion”) requesting
3 preclusion of certain evidence SRP claims is not relevant to the subflow delineation.

4 On June 20, 2024, ADWR filed Comments on SRP’s Motion for Partial Summary
5 Judgment on Legal Standard for Subflow Zone Delineation on Verde Tributaries and,
6 Alternatively, Motion In Limine (“ADWR Comments”). The Court notes that ADWR is
7 not a party to the general stream adjudication; however, as the Court’s technical advisor,
8 such comments from ADWR are appreciated.

9 Only July 5, 2024, ADWR filed a “Notice of Errata,” noting that subsequent
10 review of the objections received regarding Williamson Valley Wash has led the agency
11 to determine additional mapping in the area is appropriate. At the completion of the
12 August 21, 2024, evidentiary hearing, the Court will issue an order listing all
13 amendments necessary for the Verde River subflow delineation. In that order, the Court
14 will require ADWR to delineate a proposed subflow zone for Williamson Valley Wash.

15 **THEREFORE, IT IS ORDERED**, as a result of ADWR’s Notice of Errata,
16 William Valley Wash will not be a part of the evidentiary hearing in August and further
17 analysis regarding Williamson Valley Wash is removed from this order.

18 On July 10, 2024, Joint Respondents’ Response to SRP’s Motion for Partial
19 Summary Judgment on Legal Standards for Subflow Delineation on Verde Tributaries
20 and a Motion *In Limine* (“Joint Response”) was filed by the Town of Chino Valley, the
21 Town of Prescott Valley, the City of Prescott, the Arizona State Land Department, and
22 Chino Grand LLC. Also on July 10, 2024, SRP filed a Reply to ADWR’s comments.
23 Due to the timing of the Reply, it did not address the Joint Response.

24
25 **MOTION FOR PARTIAL SUMMARY JUDGMENT**

26 SRP claims to be seeking confirmation that “the scope of trial is limited to those
27 three issues [presented in the January 22, 2024, Minute Entry].” SRP Motion at 3.
28 However, SRP’s Motion then requests partial summary judgment on issues that are the

1 very answers needed, arguing the issues are “pure issue[s] of Arizona subflow law.” *Id.*
2 If the intent of the Motion was merely to ascertain if the Special Master truly meant to
3 limit the evidentiary hearing so narrowly, it seems the Motion is quite a big stick for a
4 rather small ball.

6 **Standard of Review**

7 Rule 56 of the Arizona Rules of Civil Procedure authorizes this Court to grant
8 summary judgment when there is no genuine dispute as to any material fact and the
9 moving party is entitled to judgment as a matter of law. The Court will grant summary
10 judgment be only where, “considering all the evidence, reasonable minds could not
11 differ” as to the material facts underlying a claim. *Allstate Indem. Co. v. Ridgley*, 214
12 Ariz. 440 (Ariz. Ct. App. 2007); *Shaw v. Petersen*, 169 Ariz. 559, 560, 563 (Ariz. Ct.
13 App.1991).

14 **Questions Presented**

15 **1. Were portions of the Big Chino Wash and Partridge Creek intermittent** 16 **under predevelopment conditions?**

17 SRP appears to claim in their Motion that since no party presented evidence that
18 Floodplain Holocene Alluvium (“FHA”) did not exist, FHA must therefore exist. And,
19 since FHA exists, as a matter of law the stream reaches must be perennial or intermittent
20 under predevelopment conditions. In their July 10, 2024, Reply, SRP disclaims this
21 characterization,⁴ stating their reason for the Motion was to confirm that “SRP must
22 demonstrate at trial that the Big Chino and Williamson Valley Wash were perennial or
23 intermittent under predevelopment conditions.” Reply at 3. Confirmation of that can be
24 found by reading the January 22, 2024, Minute Entry, which listed the outstanding issues
25 to be included in the evidentiary hearing. Yet SRP continues in their Reply with
26 arguments regarding mapping of FHA as a matter of law, claiming repeatedly that FHA

28 ⁴ SRP implies that only ADWR mischaracterized their arguments, however the
Court independently came to the same summarization of SRP’s arguments.

1 must exist along Big Chino Wash and Partridge Creek because “no party presented
2 evidence that it does not exist.” Motion at 2,5,12, and 13. Reply at 3 and 9. There are a
3 great many things that no party presented evidence do not exist along the Verde River,
4 yet we do not assume their presence.

5 No commentary was presented on FHA existence in the Tributary report because
6 the issue was not ripe for any party to opine. Once ADWR made the determination that
7 the streams were ephemeral during predevelopment, the existence of FHA was rendered
8 irrelevant. The existence of FHA will remain irrelevant unless the portions of the Big
9 Chino Wash and Partridge Creek in question are determined perennial or intermittent
10 under predevelopment conditions. The first step in any subflow delineation is whether
11 the streams in question were in fact perennial or intermittent under predevelopment
12 conditions. Determining if and where the boundaries of the subflow zone are present,
13 through mapping of FHA meeting the appropriate conditions, does not occur until after it
14 has been established that the streams were perennial or intermittent under
15 predevelopment conditions.

16 As explained by ADWR in their comments, every stream, whether perennial,
17 intermittent, or ephemeral carries some sediment load that has been deposited on the
18 floodplain during at least one flood in the past 10,000 years. Thus, traces of “floodplain”
19 alluvium of the Holocene Epoch will always exist to some degree unless a stream is
20 confined in a bedrock canyon with no channel migration. ADWR Comments at 7–8
21 (June 20, 2024).

22 Big Chino Wash and Partridge Creek are not confined to bedrock channels
23 therefore it can be presumed *based upon geologic understanding, rather than lack of*
24 *evidence to the contrary*, that FHA is present to some degree along the portions of the
25 Big Chino Wash and Partridge Creek in question.

26 **2. Was all of the Williamson Valley Wash intermittent under**
27 **predevelopment conditions?**

28 As noted above, based upon ADWR’s Notice of Errata, no further analysis of

1 Williamson Valley Wash is needed at this time.

2 **3. Was the subflow mapping of certain tributary streams, including inter**
3 **alia Camp Creek, Dry Beaver Creek, Ellison Creek, and Granite Creek,**
4 **inappropriately terminated?**

5 The Yavapai-Apache Nation and SRP each presented detailed objections
6 regarding ADWR’s decision to terminate its subflow delineation for Camp Creek, Dry
7 Beaver Creek, Ellison Creek, and Granite Creek. SRP Objections at 2-3; Yavapai-
8 Apache Nation’s Objections to the ADWR’s Subflow Zone Delineation Report for the
9 Remainder of the Verde River Watershed (“Nation’s Objections”) at 3 (Oct. 27, 2023).
10 Both parties questioned the facts used by ADWR to make the determination. The
11 Yavapai-Apache Nation noted “the termination points occur in areas with no apparent
12 changes in geomorphology or vegetation. In several instances, ADWR’s termination
13 point also does not correspond with the actual start or stopping point of the perennial or
14 intermittent reach of the tributary and there is no evidence that the saturated floodplain
15 Holocene alluvium (“SFHA”) does not also continue farther upstream.” Nation’s
16 Objections at 5. SRP also noted “there is no *evidence* or reason to believe that the SFHA
17 ends at ADWR’s proposed cutoff point rather than continuing into the intermittent or
18 perennial reaches of these watercourses that are situated farther upstream.” SRP’s
19 Objections at 14 (emphasis added). In both sets of objections, the issue is a
20 disagreement regarding interpretation of available evidence or lack thereof.

21 Given that the current evidentiary record appears incomplete, reasonable minds
22 could clearly differ regarding the adequacy of ADWR’s mapping of Big Chino Wash,
23 Partridge Creek, and the termination of multiple tributary streams. Therefore, the
24 questions presented cannot be resolved as a matter of law.

25 **THE COURT FINDS** that genuine issues of material fact exist with respect to
26 whether Big Chino Wash and Partridge Creek were intermittent under predevelopment
27 conditions and whether subflow mapping of certain tributary streams, including inter alia
28 Camp Creek, Dry Beaver Creek, Ellison Creek, and Granite Creek, were inappropriately

1 terminated. Therefore,

2 **IT IS ORDERED** that because there are genuine issues of material fact, SRPs
3 Motion for Partial Summary Judgment is DENIED.

4
5 **MOTION IN LIMINE**

6 Having confirmed that genuine issues of material fact exist, and having denied
7 SRP's motion for partial summary judgment, the Court now considers SRP's alternative
8 Motion *in limine* to preclude testimony concerning (1) the saturation level of the FHA
9 and (2) the existence of a current hydraulic connection between the underground and
10 surface water systems in question, both of which SRP claims are "irrelevant as a matter
11 of law." SRP Motion at 13.

12 Respondents' Joint Response noted procedural issues with SRP's Motion *in*
13 *limine*. Because the Court disposes of SRP's Motion *in limine* on substantive grounds,
14 the Court does not address SRP's alleged failure to comply with the "meet and confer"
15 obligations.

16 **Standard of Review**

17 Pursuant to the Arizona Rules of Evidence, evidence that has no "consequence in
18 determining the action" is irrelevant and must be excluded. Ariz. R. Evid. 401, 402. The
19 trial court is given considerable discretion in resolving those issues, *State v. Duzan*, 176
20 Ariz. 463, 465, 862 P.2d 223, 225 (App.1993). Evidence that has "any tendency to make
21 a fact more or less probable" has relevance. Ariz. R. Evid. 401(a).

22 SRP argues the existence of a current hydraulic connection between the
23 underground and surface water systems of the Big Chino Wash and Partridge Creek, or
24 between those systems and any other streams, is of no consequence to determining
25 whether a subflow zone exists along those streams because the subflow zone must be
26 delineated based on predevelopment conditions and assuming the entire lateral extent of
27 the FHA is saturated. The Court disagrees.

28 Current FHA saturation and a hydraulic connection between groundwater and

1 surface water are strong indications of previous saturation and hydraulic connection.
2 The lack of such indications in the present are not dispositive of anything during
3 predevelopment conditions. However, the data is certainly not “irrelevant.”
4 Furthermore, the reasons for a current lack of FHA saturation and hydraulic connection
5 can be very important in determining anthropologic activity and appropriate
6 predevelopment time periods for study. The disagreements regarding interpretation of
7 available evidence, or lack thereof, of FHA saturation and connection will necessarily
8 include present data to extrapolate past data.

9 It is always possible that relevant evidence can be stretched and twisted to
10 potentially “improperly expand the scope of the proceedings.” Such evidence can be
11 properly objected to in the moment. Where there is discord between what evidence can
12 assist the trier of fact in making a determination, with whether that evidence is beyond
13 the scope of the issue and may be confusing or prejudicial, parties can state their
14 concerns and allow the Court to make prudent evaluations. So far SRP has not presented
15 any rationale why the Special Master will not be able to appropriately review the full
16 spectrum or relevant evidence as such.

17 The questions presented to the parties in the Minute Entry issued January 22,
18 2024, were crafted purposefully narrow. With respect to Big Chino Wash and Partridge
19 Creek, the purpose of the scheduled evidentiary hearing is to evaluate evidence
20 concerning the predevelopment flows, and the reliability of such evidence. Testimony
21 may include historical and current geological and hydrogeological conditions of the
22 areas including saturation levels and hydraulic connectivity.

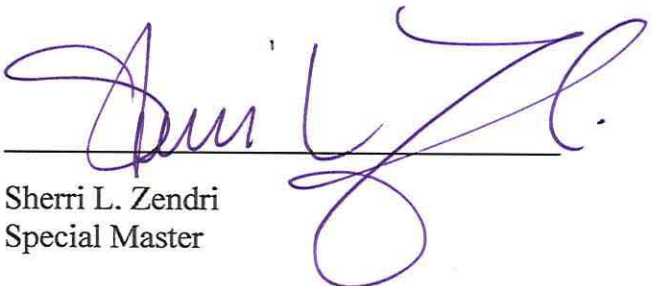
23 Likewise, evidence regarding the appropriate mapping of Camp Creek, Dry
24 Beaver Creek, Ellison Creek, and Granite Creek may need to include current
25 hydrogeological saturation and connection information. Therefore,

26 **IT IS FURTHER ORDERED** that to the extent testimony regarding the extent
27 of saturation levels of FHA, or any matters regarding current hydraulic connection, help
28 answer the questions presented in the January 22, 2024, Minute Entry, such testimony is

1 permitted.

2 All this being said, the parties are reminded this evidentiary hearing is not to
3 litigate the lateral extent of the subflow zone in the areas of Big Chino Wash or Partridge
4 Creek. Delineating the subflow zone will not occur until it has been established that the
5 streams were perennial or intermittent under predevelopment conditions.

6
7 Signed this 17th day of July 2024.

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11 _____
12 Sherri L. Zendri
13 Special Master

14
15 The original of the foregoing was
16 delivered to the Clerk of the Maricopa
17 County Superior Court on
18 July 17, 2024 for filing
19 and distributing a copy to all persons
20 listed on the Court approved mailing list
21 for this contested case.

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30 _____
31 Emily Natale

Court Approved Mailing List
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