

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

July 28, 2023

CLERK OF THE COURT  
A. Parmar  
Deputy

SPECIAL WATER MASTER  
SHERRI ZENDRI

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)

FILED: August 1, 2023

In re: Ruth M. Ryan  
Contested Case No. W1-11-0384

**MINUTE ENTRY**

Courtroom 301 – Central Court Building

10:00 a.m. This is the time set for Status Conference before Special Water Master Sherri Zendri.

The following parties/attorneys appear virtually:

- Kimberly Parks on behalf of Arizona Department of Water Resources (“ADWR”)
- Joe Sparks and Alex Ritchie on behalf of the San Carlos Apache Tribe
- Anthony Proano on behalf of the Tonto Apache Tribe
- Robyn Interpreter on behalf of the Yavapai Apache Nation (and observing on behalf of Pascua Yaqui Tribe)
- Robert Manteufel, landowner, present on his own behalf
- Thomas Manteufel, landowner, present on his own behalf
- Terry Filloon, landowner, present on her own behalf with her realtor, Ann Cassady of Long Realty
- Katrina Wilkinson observing on behalf of Salt River Project (“SRP”)

- Maggie Woodward on behalf of the U.S. Proprietary Agencies

A record of the proceedings is made digitally in lieu of a court reporter.

**LET THE RECORD REFLECT** that all participants appear virtually through Court Connect.

Ms. Filloon addresses the Court regarding her questions. She inquires what due diligence was done by ADWR to inform landowners of unsettled claims. She also notes that when she bought her home, she was informed that water rights had already been established and would remain with the property.

Mr. Sparks offers to confer with the landowners with ADWR and help them understand this adjudication process.

Ms. Parks addresses the parties regarding the history of what ADWR had done to inform well owners of this adjudication process.

The Court addresses the parties regarding why they are required to go through this adjudication process. Ms. Filloon inquires as to the cases that have determined this process. The Court will include information regarding the cases in today's final Minute Entry.

Ms. Parks addresses the parties regarding the \$1,000.00 fee. She states that the fee is set by Arizona Administrative Code and if the entire fee is not used, the remaining amount is refunded to the filing party. ADWR is trying to incorporate a process to assist claimants with the fee but that is projected to take about six months and not guaranteed to be implemented.

Ms. Filloon inquires if she should wait six months. ADWR cannot advise the parties when to file, but the priority date would be based on the date the application is filed.

Ms. Cassidy addresses the Court. She is concerned that realtors are not informed of these regulatory requirements for surface water and believed transferring the title of the well was sufficient.

Discussion is held with parties regarding their concerns with the costs of these proceedings.

Ms. Filloon inquires how to obtain an electronic recording of these proceedings. The parties may order copies by contacting Electronic Records Services at [ERS@jbazmc.maricopa.gov](mailto:ERS@jbazmc.maricopa.gov) or calling 602-506-7100.

The Court will set a Status Conference in a few months to confer with the landowners regarding how they would like to proceed.

Ms. Filloon indicated she had inquired with ADWR regarding any possible information available for realtors. The parties may request public documents from ADWR by filing a request at <https://new.azwater.gov/public-records-request>.

10:58 a.m. Matter concludes.

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

**LATER:**

Section 1.2, “History of Proceedings” from the ADWR, June 2009, “San Pedro River Watershed Subflow Zone Delineation Report,” is included as Attachment A to this Minute Entry to provide claimants a brief history of subflow delineation and adjudication.

**IT IS ORDERED** setting a Status Conference for **Wednesday, February 28, 2024, at 10:00 a.m.** to address the following:

- 1) ADWR will be prepared to discuss fee options, if any, for claimants with respect to ADWR’s Application for Certificate of Water Right (Proof of Appropriation).
- 2) Claimants will be prepared to state if they will be moving forward with their claims for potential water rights.

The Status Conference will be held using the Court Connect program. Instructions for Court Connect are attached as Attachment B. If you receive this Order by email, click on the red box “Join Court Connect Hearing” on the attached instructions to make an appearance. If you do not receive this Order by email, log into the Court Connect program on the internet by typing <https://tinyurl.com/specialwatermaster>. If you do not have access to the internet, you may attend telephonically using the telephone number and access code included in the instructions for Court Connect.

# Attachment A

## 1.2 HISTORY OF PROCEEDINGS

Pursuant to A.R.S. §§ 45-251 to 264, the adjudication court must determine the extent and priority of the rights of persons to use waters of the Gila River system and source, which includes all appropriable water and water subject to claims based on federal law. Appropriable water includes surface water and certain subsurface water referred to as subflow. This technical report is part of the litigation to identify those wells in the San Pedro River Watershed that are subject to the adjudication.

### 1.2.1 *Southwest Cotton*

In a seminal case decided in 1931, the Arizona Supreme Court defined subflow as “those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream. It is subject to the same rules of appropriation as the surface stream itself.” The Arizona Supreme Court further held that underground water withdrawn from a well is presumed to be percolating groundwater, and one who asserts that it is subflow must demonstrate that assertion by clear and convincing evidence. *See Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 85, 96, 4 P.2d 369, 376, 380 (1931), *modified and reh’g denied*, 39 Ariz. 367, 7 P.2d 254 (1932) (*Southwest Cotton*).

As for a legal test to determine whether subsurface waters constitute subflow, the *Southwest Cotton* court stated:

The best test which can be applied to determine whether underground waters are as a matter of fact and law part of the surface stream is that there cannot be any abstraction of the water of the underflow without abstracting a corresponding amount from the surface stream, for the reason that the water from the surface stream must necessarily fill the loose, porous material of its bed to the point of complete saturation before there can be any surface flow. Therefore the river bed must continue holding sufficient surface water to support the surface stream, as it were, for otherwise in drawing on the underground flow of the stream it will necessarily draw upon the waters flowing on the surface.

\* \* \*

But considered as strictly a part of the stream, the test is always the same: Does drawing off the subsurface water tend to diminish appreciably and

directly the flow of the surface stream? If it does, it is subflow, and subject to the same rules of appropriation as the surface stream itself; if it does not, then, although it may originally come from the waters of such stream, it is not, strictly speaking, a part thereof, but is subject to the rules applying to percolating waters.

*Id.* at 96-97, 4 P.2d at 380-81. This test is often referred to as the Direct and Appreciable Test.

Many years after the *Southwest Cotton* decision, subflow was identified as an issue in the Gila River Adjudication. In 1987, the adjudication court held hearings on the relationship between surface water and groundwater, after which several parties filed motions to exclude certain wells from the adjudication arguing that they pumped percolating groundwater rather than subflow. In 1988, after hearing argument on the motions, the adjudication court held that certain wells withdrawing water from the younger alluvium of a stream should be presumed to be pumping appropriable subflow if the volume of stream depletion was 50% or more as the result of 90 days of continuous pumping (50%/90-day test). In 1991, as directed by the adjudication court, ADWR relied upon the 50%/90-day test for the preparation of the final San Pedro River Watershed HSR.

### **1.2.2 *Gila II***

In 1993, the Arizona Supreme Court rejected the 50%/90-day test in a case known as *Gila II*. See *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993). The adjudication court held that the 50%/90-day test was arbitrary and inconsistent with *Southwest Cotton's* narrow definition of subflow. The Arizona Supreme Court held that whether a well is pumping subflow “turns on whether the well is pumping water that is more closely associated with the stream than the surrounding alluvium.” *Id.* at 392, 393, 857 P.2d at 1246, 1247. The Court also reaffirmed *Southwest Cotton's* distinction between subflow, which is subject to appropriation, and tributary groundwater, which is not, and set forth certain criteria that could be used to make this distinction. *Id.* at 391-92, 857 P.2d at 1245-46. The Court remanded the case to the adjudication court to “take evidence and,

by applying the principles contained in this opinion, determine the criteria for separating appropriate subflow from percolating groundwater.” *Id.* at 394, 857 P.2d at 1248.

### 1.2.3 1994 Subflow Order

After remand, the adjudication court developed a new subflow test described in an order dated June 30, 2004 (“1994 Subflow Order”), which was 66 pages long with 36 additional pages of exhibits. (**Appendix A-1**). The order was based on evidence presented at a ten-day hearing, during which the adjudication court heard testimony from ten geology and hydrology experts. 1994 Subflow Order, p. 3. The adjudication court also spent an additional two days traveling almost 600 miles and visiting 13 sites in the San Pedro River watershed, accompanied by counsel and experts, followed by a supplemental two-day hearing four months later. *Id.* at pp. 5-6. Based on the evidence presented, and applying the criteria listed in *Gila II*, the adjudication court formulated a new subflow test that turned on the location of a well vis-à-vis an area referred to as the “subflow” zone, which the adjudication court defined as the saturated floodplain Holocene alluvium. *Id.* at p. 56. The adjudication court summarized its conclusions as follows:

1. A “subflow” zone is adjacent and beneath a perennial or intermittent stream and not an ephemeral stream.
2. There must be a hydraulic connection to the stream from the saturated “subflow” zone.
3. Even though there may be a hydraulic connection between the stream and its floodplain alluvium to an adjacent tributary aquifer or basin-fill aquifer, neither of the latter two or any part of them may be part of the “subflow” zone.
4. That part of the floodplain alluvium which qualifies as a “subflow,” beneath and adjacent to the stream, must be that part of the geologic unit where the flow direction, the water level elevations, the gradations of the water level elevations, and the chemical composition of the water in that particular reach of the stream are substantially the same as the water level, elevation and gradient of the stream.
5. That part of the floodplain alluvium which qualifies as a “subflow” zone must also be where the pressure of side recharge from adjacent tributary aquifers or basin fill is so reduced that it has no significant effect on the flow

direction of the floodplain alluvium (i.e., a 200-foot setback from connecting tributary aquifers and a 100-foot setback from the basin-fill deposits).

6. Riparian vegetation may be useful in marking the lateral limits of the “subflow” zone particularly where there is observable seasonal and/or diurnal variations in stream flow caused by transpiration. However, riparian vegetation on alluvium of a tributary aquifer or basin fill cannot extend the limits of the “subflow” zone outside of the lateral limits of the saturated floodplain Holocene alluvium.
7. All wells located in the lateral limits of the “subflow” zone are subject to the jurisdiction of this adjudication no matter how deep or where these perforations are located. However, if the well owners prove that perforations are below an impervious formation which precludes “drawdown” from the floodplain alluvium, then that well will be treated as outside the “subflow” zone.
8. No well located outside the lateral limits of the “subflow” zone will be included in the jurisdiction of the adjudication unless the “cone of depression” caused by its pumping has now extended to the point where it reaches an adjacent “subflow” zone, and by continual pumping will cause a loss of such “subflow” as to affect the quantity of the stream.

*Id.* at pp. 64-66.

#### **1.2.4 Gila IV**

On appeal, the Arizona Supreme Court affirmed “the adjudication court’s order after remand in all respects,” including the conclusions listed above. *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, 338, 344, 9 P.3d 1069, 1077, 1083 (2000) (“*Gila IV*”). Citing *Gila II*, the Arizona Supreme Court again reaffirmed the principles set forth in *Southwest Cotton* regarding the definition of subflow and the related Direct and Appreciable Test for determining whether a particular well is actually withdrawing subflow. *Id.* at 341, 9 P.3d at 1080. The Court also held that the new subflow test proposed by the adjudication court “properly applied [the criteria listed in *Gila II*] to the San Pedro River Watershed in order to determine the most appropriate subflow zone, and the weight of the evidence supports the adjudication court’s identification of that zone as the ‘saturated’ floodplain Holocene alluvium.” *Id.* at pp. 341-42, 1080-81. (**Appendix A-2**).



### 1.2.5 Post *Gila IV*

After the decision in *Gila IV*, the adjudication court issued a minute entry dated January 9, 2002 that directed ADWR to propose steps for implementing the 1994 Subflow Order as confirmed by the Arizona Supreme Court. As directed, in March 2002 ADWR issued a subflow report for the San Pedro River Watershed (“2002 Subflow Report”), and the adjudication parties filed objections thereto. The issues were briefed and argued before the Special Master, who subsequently issued 39 recommendations to the adjudication court for its review in July 2004 (“2004 Subflow Decision”). The 2004 Subflow Decision adopted ADWR’s 2002 Subflow Report in large part with certain modifications. (**Appendix A-3**). Following another round of briefing and oral argument, the adjudication court issued an order dated September 28, 2005 (“2005 Subflow Order”), which adopted the 2004 Subflow Decision with certain exceptions. The adjudication court directed ADWR to follow certain procedures to determine the limits of the subflow zone within the San Pedro River Watershed, prepare a map delineating the subflow zone, and submit the map and related information in a technical report (**Appendix A-4**). Two separate petitions were filed with the Arizona Supreme Court seeking review of portions of the 2005 Subflow Order that were subsequently denied.

# Attachment B



## Court Connect Hearing Notice for In re Ruth M. Ryan

*This hearing will be conducted through the new Court Connect program offered by the Superior Court of Arizona in Maricopa County. This new and innovative program allows Court participants to appear online, rather than in a physical courtroom. Hearings are preferably conducted by videoconference but can also be conducted by phone. Lawyers (and self-representing litigants) are responsible for distributing this notice to anyone who will be appearing on their behalf.*

*All participants must use the JOIN COURT CONNECT HEARING button or the dial in information below to participate.*

**Participants:** Please follow the steps below to participate in the remote proceeding.

1. Click the JOIN COURT CONNECT HEARING button below.
2. Enter your full name and role in name field.
3. Wait for the facilitator to admit you to the proceeding.

Remember to keep this email handy so you can use it to participate in the following proceeding.

**Case Name:** In re Ruth M. Ryan, Contested Case No. W1-11-0384

**Start Date/Time:** February 28, 2024 at 10:00 a.m.

**JOIN COURT CONNECT HEARING**

**Dial-in Information:** +1 917-781-4590

**Private Dial-in Information:** for privacy purposes, you can block your phone number by dialing \*67 +1 917-781-4590

**Dial-in Access Code:** 688 970 203#

Tiny URL: <https://tinyurl.com/specialwatermaster>

To ensure an optimal experience, please review the brief Court Connect training prior to the hearing: [Here](#)

