

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

IN CHAMBERS ( X ) IN OPEN COURT ( )

SPECIAL MASTER GEORGE A. SCHADE, JR.

Presiding

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

DATE: April 17, 2012

CIVIL NO. W1-11-3342

ORDER CONCERNING THE  
REQUESTS OF THE UNITED  
STATES FOR (1) ADDITIONAL  
TIME TO SUBMIT INFORMATION  
AND (2) THE SUBMISSION OF A  
SPECIAL MASTER'S REPORT

CONTESTED CASE NAME: *In re Aravaipa Canyon Wilderness Area.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master grants the request of the United States for a period of ninety days to investigate and report concerning the transmittal of maps and legal descriptions to Congress and the acreage contained within the Aravaipa Canyon Wilderness Area. The request of the United States for the Special Master to file a report with the Court concerning the Special Master's order dated November 2, 2011, is denied. The Special Master sets an evidentiary hearing to consider five issues and requests a joint pre-hearing statement.

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The United States made two requests related to the Special Master's order filed on November 2, 2011. The first request is for a period of ninety days to investigate and

report concerning the transmittal of maps and legal descriptions of the Aravaipa Canyon Wilderness Area to congressional committees. The second request is for the Special Master to submit an Arizona Rule of Civil Procedure Rule 53(g) report (“Rule 53(g) report”) to the Court for purposes of review of the November 2, 2011, order.

## **I. REQUEST FOR NINETY DAYS TO PROVIDE INFORMATION**

In the November 2, 2011, order, the Special Master noted that the “briefs and arguments raised questions as to whether the United States Department of the Interior has filed the required maps and legal descriptions with the congressional committees [and] the true acreage of the Aravaipa Canyon Wilderness Area.”<sup>1</sup> The United States has requested ninety days to investigate and report on the information it obtains concerning both matters. The request has not been opposed. It will be granted.

## **II. REQUEST FOR SUBMISSION OF A RULE 53(g) REPORT TO THE COURT**

This request is based on a desire to obtain Judge Ballinger’s guidance on, at least, the two issues which the Special Master found raised genuine issues of material fact for which no evidence had been presented, and hence, summary relief was precluded. It is argued that the Court’s guidance “will eliminate uncertainty concerning the legal parameters related to the quantity of water reserved and result in a more expedited decree, potentially saving the parties and the Court substantial time and expense.”<sup>2</sup>

The opposition argues that the two issues are not ripe for review absent a factual record, and second, consideration of a Rule 53(g) report will unreasonably delay this case.

The applicable law was set forth in the November 2, 2011, order. First, a non-Indian federal reserved water right is limited to unappropriated water. The United States Supreme Court “has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.”<sup>3</sup>

Second, a congressional reservation of water reserves “only that amount of water necessary to fulfill the purpose of the reservation, no more.”<sup>4</sup> The “allocation [of water]

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<sup>1</sup> Order Determining the Initial Seven Issues Briefed at 19 (Nov. 2, 2011).

<sup>2</sup> U. S. Response to Order Determining the Initial Seven Issues and Motion for Rule 53(g) Report at 7 (Feb. 10, 2012).

<sup>3</sup> *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (“*Cappaert*”); see *United States v. New Mexico*, 438 U.S. 696, 698 (1978) (“*New Mexico*”) and *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 417, 989 P.2d 739, 745 (1999), cert. denied sub nom. *Phelps Dodge Corp. v. U.S. and Salt River Valley Water Users’ Assn. v. U.S.*, 530 U.S. 1250 (2000).

<sup>4</sup> *New Mexico*, 438 U.S. at 700 (citing *Cappaert*, 426 U.S. at 141); see *Arizona v. California*, 373 U.S. 546, 600-01 (1963).

must be tailored to the ‘minimal need’ of the reservation. (footnote omitted).”<sup>5</sup>

The Special Master has determined that the Congress both explicitly and impliedly intended to reserve water for the Aravaipa Canyon Wilderness Area. However, we must determine how much unappropriated water existed when different public land parcels were designated wilderness in 1984 and 1990. The answer requires a factual record of hydrologic and technical evidence.

The Special Master found that the purposes of the Aravaipa Canyon Wilderness Area designated in 1984 were the following:

1. The protection of the area,
2. The preservation of its wilderness character,
3. The gathering and dissemination of information regarding the area’s use and enjoyment as wilderness,
4. The preservation and protection of the complex of desert, riparian and aquatic ecosystems,
5. The preservation and protection of the native plant, fish, and wildlife communities dependent on the foregoing complex of ecosystems, and
6. The protection and preservation of the area’s scenic, geologic, and historical values.

The purposes of the wilderness additions designated in 1990 were the first three enumerated above.<sup>6</sup> The foregoing purposes frame the scope of evidence for the determination of the minimal needs for reserved water rights.

It is argued that determining the minimal quantity of water to serve each of these purposes will be costly and time consuming. If the Court finds that the Congress intended to reserve all the unappropriated waters for these purposes, that costly undertaking would be avoided.

The rub is we do not yet have relevant and material evidence supporting a finding that the Congress intended to reserve all the unappropriated waters - or “all natural flows, including normal variations and fluctuations”<sup>7</sup> - existing in 1984 and 1990. A factual record is needed to determine as a matter of law that the Congress intended to reserve all natural flows because - as the United States argues - that is required to preserve the Aravaipa Canyon Wilderness Area in its natural, unimpaired condition as mandated by federal legislation. Further review at this time will not overcome this hurdle.

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<sup>5</sup> *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 312, 35 P.3d 68, 73 (2001).

<sup>6</sup> All the purposes are discussed in the November 2, 2011, order at 10-11, fn.1, *supra*.

<sup>7</sup> U. S. Motion for Summary Judgment at 14 (Feb. 14, 2011).

This case has been compared to *Cappaert*. Even in *Cappaert*, where the United States Supreme Court found an explicit reservation of water, the Court adhered to its minimal need standard. The Court held that the reserved water right was limited to the “water sufficient to maintain the level of the pool to preserve its scientific value.”

Thus, as the District Court has correctly determined, the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved. The District Court thus tailored its injunction, very appropriately, to minimal need, curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the Proclamation.

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We hold, therefore, that as of 1952 when the United States reserved Devil's Hole, it acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value and thereby implement Proclamation No. 2961.<sup>8</sup>

### **III. EVIDENTIARY HEARING**

The only proper course at this time is to hold an evidentiary hearing to answer the following five questions:

1. Did the Congress intend to reserve all unappropriated waters within the Aravaipa Canyon Wilderness Area?
2. How much, if any, unappropriated water was available on August 28, 1984?
3. If unappropriated water was available on August 28, 1984, what is the precise quantity of unappropriated water required to fulfill the minimal need of, and satisfy, the primary purposes of the Arizona Wilderness Act of 1984?
4. How much, if any, unappropriated water was available on November 28, 1990?
5. If unappropriated water was available on November 28, 1990, what is the precise quantity of unappropriated water required to fulfill the minimal need of, and satisfy, the primary purposes of the Arizona Desert Wilderness Act of 1990?

The Special Master will consider all efficient and effective ways to ameliorate the costs and challenges of an evidentiary hearing.

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<sup>8</sup> *Cappaert*, 426 U.S. at 141 and 147.

The Arizona Department of Water Resources (“ADWR”) will have a role in the hearing. However, its technical assistance should be integrated with the parties’ presentation of evidence and not be the sole focus of the hearing.

IT IS ORDERED:

1. Granting the request of the United State for a period of ninety days to provide information it obtains concerning the transmittal of maps and legal descriptions to Congress and the acreage contained within the Aravaipa Canyon Wilderness Area. The United States shall file the information on or before **July 20, 2012**.

2. Denying the request that the Special Master submit the determinations made in the November 2, 2011, order in a Rule 53(g) report to the Court.

3. Setting an evidentiary hearing to consider the five issues described above.

4. Requesting the parties to submit a joint pre-hearing statement on or before **June 22, 2012**, setting forth timelines for filing disclosure statements, conducting discovery, exchanging expert reports, filing motions, and completing any other actions that will expedite an evidentiary hearing. Parties may request a telephonic or court conference to consider the matters of a pre-hearing statement.

5. Requesting the parties to submit comments on or before **June 22, 2012**, concerning the scope and timeline of ADWR’s technical assistance in the hearing.

DATED: April 17, 2012.

/s/ George A. Schade, Jr.  
GEORGE A. SCHADE, JR.  
Special Master

On April 17, 2012, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-3342 dated January 31, 2012.

/s/ George A. Schade, Jr.  
George A. Schade, Jr.