

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: July 25, 2011

CIVIL NO. W1-11-19  
(Consolidated)

ORDER EXTENDING TIME TO  
FILE RESPONSES AND INVITING  
COMMENTS CONCERNING  
REQUEST TO BE ADDED TO  
THE COURT APPROVED  
MAILING LIST FOR THIS CASE

CONTESTED CASE NAME: *In re Sands Group of Cases.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master extends the time to file responses to the request of Freeport-McMoRan Corporation to be added to the Court approved mailing list for this case and invites comments on any other issues concerning the use of mailing lists.

NUMBER OF PAGES: 5.

DATE OF FILING: July 25, 2011.

On July 15, 2011, Freeport-McMoRan Corporation (“Freeport-McMoRan”) requested to be added to the Court approved mailing list (“CAML”) for this case.

**I. The Request**

The Court and Special Master have been liberal in granting requests to be added to CAMLs. There has been a strong inclination to safeguard due process notice requirements and facilitate the education of parties and public. Claimants have accepted

this approach as the Special Master cannot remember seeing an opposition filed to a request to be added to a CAML.

On the other hand, there are rules for placement on a CAML, the maintenance of CAMLs takes up resources and time, and a desire to be economical has consistently been expressed and favored. This is a good time to review the practices that have developed around CAMLs, and in this spirit the Special Master is allowing responses to Freeport-McMoRan's request and inviting comments on other issues raised by CAMLs.

We believe Arizona pioneered the use of CAMLs in general stream adjudications.<sup>1</sup> Pretrial Order No. 1, issued on May 30, 1986, addresses placement on a CAML. The Arizona Supreme Court approved the CAML process as satisfying constitutional due process guarantees.<sup>2</sup>

Paragraph 6 (SERVICE OF PLEADINGS AND OTHER PAPERS FILED) of Pre-Trial Order No. 1 states in its entirety that:

Each party shall mail a copy of any document other than a Statement of Claimant Form to all parties listed on the Court's approved mailing list. Each party who is currently on the Court's mailing list in this action shall serve a copy of any pleading or paper filed with the Clerk or the Court upon all other parties currently on the mailing list.

All parties desiring to remain on or be placed on the Court's approved mailing list may do so by filing a written request with the Court, within 30 days of the effective date of this Order. Copies of the request shall be mailed to all persons then on the mailing list, **stating the intention to take an active part in the litigation, its need to be on the approved mailing list and to receive all copies, and an agreement to serve on such steering committees as shall hereafter be formed.**

Any person making such a request shall thereafter be obligated to provide copies of any document or pleading it files in this action to all other persons on the mailing list.<sup>3</sup> (Emphasis added.)

The request does not comply with the highlighted requirements. Concededly, these requirements have been honored more by omission than compliance which can happen when procedures are set forth in now a 25-year old court order.

Second, on October 30, 1991, the Hon. Stanley Z. Goodfarb (Ret.) approved the Rules for Proceedings Before the Special Master ("Rules") which became effective on November 1, 1991.<sup>4</sup> Former Special Master John E. Thorson developed the Rules.

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<sup>1</sup> For a review of notice issues raised by adjudications, see John E. Thorson, Ramsey L. Kropf, Andrea K. Gerlak, Dar Crammond, *Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II*, 9 U. DENV. WATER L. REV. 299, 378-84 (2006).

<sup>2</sup> *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 240-41, 830 P.2d 442, 452-53 (1992) (the opinion is available on the internet at [http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/\\_pdfs7-01/opin31992.pdf](http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/_pdfs7-01/opin31992.pdf)).

<sup>3</sup> Pre-Trial Order No. 1 Re: Conduct of Adjudication, ¶ 6 at 9-10 (May 30, 1986) (text available at [http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/\\_gila/gpto1.pdf](http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/_gila/gpto1.pdf)).

A fundamental scheme of the Rules is the organization of contested cases to resolve objections to a hydrographic survey report (“HSR”). The organization of contested cases is based upon the objections filed to a watershed file report (“WFR”) contained in an HSR.

When organizing a contested case, the Special Masters have begun by determining which parties objected to a WFR associated with a unique water user. The claimant (often the water user) or assignee, landowner, and objectors to the WFR are designated case litigants. In cases involving public lands, lessees, permittees, and allottees are designated litigants. Other litigants are designated depending on case consolidations and orders allowing intervention or participation as *amicus curiae*.

This procedure is found in Section 7.01[6] (Persons Who Can Participate in Contested Cases) of the Rules which states in pertinent part as follows:

Only the following persons may participate in proceedings in a contested case involving an objection to an HSR: (1) the claimant or the transferee of the claimant who filed a timely Statement of Claimant which has been identified in the Watershed File Report subject to objection; (2) the person or the transferee of the person who has been identified as the landowner in the Watershed File Report subject to objection, regardless of whether the person filed a Statement of Claimant in the adjudication (the participation of this person may be questioned by other litigants in a preliminary motion); (3) any objectors to the Watershed File Report; (4) the litigants in other contested cases that have been consolidated with the instant contested case; (5) parties in either adjudication who participate pursuant to an order of the Master issued in an effort to resolve similar issues of law or fact, typical claims or defenses, or objections raising issues of broad legal importance (*see* Section 12.00); and (6) counsel for any of the foregoing persons.

The Special Master’s research did not show that either Freeport-McMoRan or its predecessor Phelps Dodge Corporation (“Phelps Dodge”) objected to a WFR involved in this matter or otherwise qualified to be a litigant in the initial phase of this contested case.

On March 11, 1994, Special Master Thorson issued “the pretrial order for the trial of the first phase” of this case. That trial led to Special Master Thorson’s report in 1994, modified in 1995, and approved and modified by the Court in 2002. At the outset, he identified the litigants. Phelps Dodge was not listed. ASARCO Incorporated (“ASARCO”) was listed but as one of two “*amici curiae*,” a separate category of “persons who have been permitted to file briefs on important legal issues, and their respective attorneys.”<sup>5</sup> The CAMLs dated March 11, 1994, March 17, 1999, July 19, 1999, and November 8, 2000, did not include Phelps Dodge but listed ASARCO.

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<sup>4</sup> The complete text of the rules is available at [http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/\\_pdfs/RulesRev053105.pdf](http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/_pdfs/RulesRev053105.pdf) on the internet.

<sup>5</sup> Special Master’s Order at 2 (Mar. 11, 1994).

On May 15, 1995, the attorneys for Phelps Dodge and ASARCO filed objections to Special Master Thorson's report. At that time, the same law firm but separate counsel represented these parties. Thereafter, Phelps Dodge is not mentioned in this case's orders or CAMLs but ASARCO continued as an "amici curiae."

The Special Master concluded that Phelps Dodge is not a litigant in this matter and, hence, did not include it in the current CAML for the case. This conclusion is subject to change upon further relevant evidence or persuasive argument presented.

Third, the request involves the placement on a CAML of two sets of attorneys for the same party. The Special Master wishes to hear the reasons for and benefits of this practice as well as the situations in which it is be merited.

## **II. Other Issues**

Parties have spoken of the often high costs of distributing copies. In recent years, the litigation has revolved around briefing complex legal issues that at times have generated voluminous documents. It is likely that this focus will continue, and cost concerns will persist. On the other hand, good litigation can be expensive. Where should the best balance be struck?

Electronic mail and fax machines offer inexpensive and quick ways to distribute documents. The Special Master wishes to hear if parties are using these technologies among themselves, if these means offer potential efficiencies, and if their use can assist adjudications.

Pre-Trial Order No. 1 created a monthly docket subscription service which is intended to provide information of proceedings to claimants who do not wish to be placed on a CAML.<sup>6</sup> The Arizona Department of Water Resources administers the service. The Arizona Supreme Court described how the service functions as follows:

The clerk of the trial court assigns a docket number to each document filed by any party to the adjudication. The clerk then adds the docket number, the title of the document, and any descriptive summary contained in the document to the docket sheet. On the first day of each month, the clerk provides a copy of the docket sheet identifying all documents filed during the preceding month to the clerk of the superior court in each county except Mohave County. (footnote omitted) The clerk of each of these superior courts must post, in a conspicuous location in the clerk's office, either the complete docket sheet or a notice indicating the location in the clerk's office of the complete docket sheet available for inspection. The docket sheet, or a notice indicating where the complete docket sheet is available for inspection, is also to be posted in [A]DWR's Phoenix office and the Pinal, Prescott and Tucson Active Management Area offices. In addition, the Pretrial Order [No. 1] mandated the establishment of a subscription system, through which any party that has appeared can

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<sup>6</sup> Pre-Trial Order No. 1, ¶ 5 at 5-8.

receive a copy of the Pretrial Order and of each month's docket sheet in the mail by paying a fee to cover actual expenses.<sup>7</sup>

Usage of this service appears to have declined in recent years. One possible reason for the decline may be the fact that since January 2001, the Clerk has posted the monthly sheet on its web site. Can this service be improved and how?

The Special Master invites comments on these and any other issues in order to improve the use of CAMLs.

IT IS ORDERED:

1. The litigants in this contested case may submit responses on or before **Friday, September 9, 2011**, to the request of Freeport-McMoRan to be added to the mailing list for this case. Replies will not be necessary.

2. Any interested party and ADWR may submit comments on or before **Friday, September 9, 2011**, on any other issues concerning the use of CAMLs.

3. Parties submitting responses and comments shall provide a copy to the persons listed on the CAMLs for both the Gila River Adjudication, Nos. W-1, W-2, W-3, and W-4 (Consolidated), and this contested case dated July 25, 2011.

DATED: July 25, 2011.

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

On July 25, 2011, 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 lists for both the Gila River Adjudication, Nos. W-1, W-2, W-3, and W-4 (Consolidated), and this contested case dated July 25, 2011.

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

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<sup>7</sup> *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. at 240, 830 P.2d at 452.