

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: August 16, 2011

CIVIL NO. W1-11-232
(Consolidated)

ORDER CONCERNING THE
COMPLIANCE OF THE UNITED
STATES WITH THE SPECIAL
MASTER'S JULY 14, 2010 ORDER

CONTESTED CASE NAME: *In re San Pedro Riparian National Conservation Area.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master rules on the compliance of the United States with the July 14, 2010 order.

NUMBER OF PAGES: 5.

DATE OF FILING: August 16, 2011.

ASARCO LLC ("ASARCO") asked the Special Master to determine whether the United States' Notice of Submission of Third Amended Statement of Claimant and Accompanying Exhibit 1 ("Notice") filed on April 19, 2011, complies with the Special Master's July 14, 2010 order. The United States and the Salt River Project ("SRP") filed responses to ASARCO's motion. The San Carlos Apache Tribe and Tonto Apache Tribe joined in SRP's response. Freeport-McMoRan Corporation joined in ASARCO's replies to the responses of the United States and SRP.

I. Compliance of the United States with the July 14, 2010 Order

ASARCO claims that the United States should have:

A. Amended the federal reserved right claim to account for the State of Arizona's Certificate of Water Right No. 90103.0000 and, second, conform to the federal purposes of the conservation area determined in the March 4, 2009 order,

B. Amended its claims to state law based rights with current information,

C. Limited the amount of water claimed for the reserved right to unappropriated water when the conservation area was established or when lands acquired after November 18, 1988 ("after-acquired lands"), were incorporated within the area, and

D. Identified the dates on which after-acquired lands were incorporated within the conservation area.

Concerning the first alleged shortcoming, the Special Master has not ruled that the state certificated water right knocks out or trumps the claimed reserved water right. The Special Master determined that the certificated right "must be considered a water right available to the United States to serve the federal purposes of the SPRNCA."¹ Both water rights remain in cue for adjudication.

The issues of water quantities, water uses, and federal purposes raised by the existence of the certificated right and the federal reserved water right claim will either be litigated or resolved by agreement. The Arizona Department of Water Resources ("ADWR") is tasked with "evaluating the methodologies used by the United States to quantify its federal claims, and evaluating the quantities claimed for the state law water rights and claims through field investigations."² Evidence and briefing will be required to resolve these issues which promise to be complex.

Concerning the second alleged deficiency, in its Notice, the United States stated that it will provide to ADWR "all necessary technical information enabling it to report the amount of water necessary to meet federal purposes on or before April 16, 2012."³ As the report is due on that date, it is expected that the United States will provide the information with sufficient time for ADWR to analyze it and prepare its report.

The United States also stated in the Notice that "the information supporting the United States' Statements of Claimant for its state law based claims as well as its reserved right claim will be made available to ADWR in order that the Department may

¹ Special Master's Order Determining the Second Set of Issues Designated for Briefing 2 (March 19, 2010).

² Special Master's Order (full title omitted) 5 (July 14, 2010).

³ Notice 3 (April 19, 2011).

issue its report in compliance with new statutory requirements.”⁴ These avowals were repeated in the response of the United States as follows:

[T]o the extent ADWR needs any information from the United States supporting these claims, assistance will certainly be provided [to] the Department....

The July 2010 Order, at 3-4, directed ADWR “both to prepare a report consistent with A.R.S. § 45-256(B) and undertake the specific work ADWR indicates it can do.” The United States is prepared to assist the Department in this task....

The United States contacted the Department and informed its counsel that it will share information necessary for the Department to report and recommend the SPRNCA claim, and to do so on or before the April 16, 2012 deadline.⁵

The Special Master is concerned that ADWR’s investigatory process not be derailed or disrupted by excessive hovering over it. Taking up arguments concerning the need for and compliance with providing information, on a rolling basis, will delay, if not stymie, this case. General stream adjudications will succeed if claimants live up to their avowals, and unnecessary litigiousness is curtailed. However, intervention will be made if appropriate.

Concerning the third alleged shortcoming, the Special Master agrees with ASARCO that “[u]ntil the state law-based rights existing on November 18, 1988 (or later, for after-acquired lands) are evaluated and taken into consideration, there is no way to know how much unappropriated water (if any) was available to be reserved.”⁶ We will be in a stronger position to resolve this issue after ADWR files its report, and the adjudication of state law rights begins.

Concerning the fourth alleged deficiency, the United States claims it submitted with the Third Amended Statement of Claimant the information it asserts to be the dates of incorporation of after-acquired lands. ASARCO points to ADWR’s supplemental report filed on April 19, 2011, to show inconsistencies between the United States’ information and ADWR’s report regarding the dates of incorporation.

It appears that when ADWR filed the supplement it had not received the information the United States submitted with the third amendment. In its supplemental report, ADWR stated it had:

⁴ *Id.*

⁵ U. S. Response to ASARCO’s Motion 3, 6, and 7 (July 5, 2011).

⁶ ASARCO’s Reply to U.S. Response 10 (July 18, 2011).

“requested additional information from BLM, but no further documentation was provided. By email, counsel for BLM asserted that the deed signing date is the date of formal incorporation into SPRNCA.”⁷

ADWR now has additional information which ADWR will be directed to review and, if deemed needed and useful, include in the upcoming report. ADWR’s further analysis might resolve the discrepancies. If data discrepancies or legal arguments concerning incorporation remain, these can be taken up at a future time.

In its Notice, the United States indicated that:

“Land parcels within the SPRNCA acquired since the 1991 HSR may contain claims to water rights that were subsequently assigned to the BLM. The BLM is reviewing these parcels and will provide information on these claims, if any, that will assist ADWR in its reporting.”⁸

The relevant date is November 18, 1988. The United States should use that date in its review rather than the November 1991 date of the Final San Pedro River Watershed Hydrographic Survey Report.

II. Disclosure of Information to ADWR and Litigants

ASARCO argues that the United States is obligated, pursuant to Arizona Rule of Civil Procedure 26.1(b)(2), to disclose to the litigants in this case the information supporting the government’s water right claims that will be provided to ADWR.

The June 28, 2007 order directed that “[d]isclosure statements shall be limited to matters concerning the issues designated for briefing.”⁹ The order designated six issues for briefing. It is argued that subsequently the scope of disclosures was expanded when the Special Master ordered the United States to amend its statements of claimant in order to proceed with the quantification phase.

The Special Master disagrees. So far in this case, disclosure statements and the continuing duty to disclose run when specific issues are designated for briefing. The directive to amend the claims, taking into consideration the rulings previously made, neither expanded the scope of disclosures nor triggered the continuing duty to disclose.

This framework assures efficiency, economy, and timeliness, important considerations in adjudications. In order to produce useful and timely reports, ADWR’s investigation of water right claims - a continuously moving process with many parts - must have a an appropriate and reasonable degree of freedom from litigiousness.

⁷ ADWR’s Supplement to Report Entitled “Land Ownership Within the San Pedro Riparian National Conservation Area” 3 (April 19, 2011).

⁸ Notice 3-4, fn. 2.

⁹ Scheduling Order Designating Initial Issues for Briefing 4, ¶ 2(A) (June 28, 2007).

ASARCO avows it did not receive a copy of the read-only CD-ROM that the United States submitted to ADWR with the Third Amended Statement of Claimant (part of Attachment D). The Special Master will direct the United States to provide a copy of the CD-ROM to ASARCO, and upon request, to any other litigant in this case.

III. Correction of the September 26, 2006 Case Management Order

ASARCO correctly notes that Watershed File Report No. 111-17-063, listed on the first page of Attachment A, no. 11, of the September 26, 2006 Case Management Order, should be Watershed File Report No. 112-17-063. The order will be corrected.

IT IS ORDERED:

1. Directing the United States to provide ASARCO a copy of the read-only CD-ROM that was part of the Third Amended Statement of Claimant. Upon request, the United States shall provide a copy of the CD-ROM to any other litigant in this case.
2. Directing the United States to work with ADWR in a timely and responsive manner to provide information for ADWR's report due on April 16, 2012.
3. Directing ADWR to review the land ownership information submitted by the United States in the Third Amended Statement of Claimant and supplement ADWR's land ownership reports if deemed needed and useful.
4. Denying ASARCO's motion consistent with the foregoing determinations.
5. Correcting nunc pro tunc the September 26, 2006 Case Management Order to show Watershed File Report No. 112-17-063 listed on page 1 of Attachment A.

DATED: August 16, 2011.

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

On August 16, 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 list for Contested Case No. W1-11-232 dated July 25, 2011.

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