

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 7, 2004

CIVIL NO. W1-103

ORDER GRANTING IN PART
AND OVERRULING IN PART
SALT RIVER PROJECT'S
OBJECTIONS TO THE CITIES'
EXHIBITS ATTACHED TO THE
CITIES' OPENING BRIEF

CONTESTED CASE NAME: *In re Subflow Technical Report, San Pedro River Watershed.*

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master grants in part and overrules in part the Salt River Project's objections to the exhibits attached to the post-hearing opening brief of the Cities of Chandler, Glendale, Mesa, and Scottsdale.

NUMBER OF PAGES: 5 pgs.

DATE OF FILING: Original filed with the Clerk of the Court on April 7, 2004.

ORDER

The Salt River Project ("SRP") objected to 11 of 12 exhibits attached to the post-hearing opening brief filed by the Cities of Chandler, Glendale, Mesa, and Scottsdale ("Cities") and requested expedited consideration of its objections. Pursuant to the Special Master's order

taking up the motion for expedited consideration, the Cities filed a response. Arizona Public Service and Phelps Dodge Corporation filed a joint response. SRP filed a reply.

SRP argues that ten of the exhibits were not premarked and copies were not provided to other parties in accordance with the Special Master's prehearing order, and were not offered for admission at the October 21 and 22, 2003, hearing. One exhibit was premarked but was not offered during the hearing. Furthermore, the eleven exhibits are not complete copies, are hearsay, lack proper foundation, and are irrelevant. SRP moved for the removal of the eleven exhibits and any related discussion.

The Cities argue they were not required to premark or offer the exhibits because the attachments were not properly a part of the October 2003 hearing which dealt with the cross-examination of witnesses who had submitted expert declarations; the exhibits are already part of the record in this case; the Special Master must take judicial notice of the exhibits; and SRP's objections are untimely and lack merit.

A telephonic conference was held on October 10, 2003, "to consider any matters that will facilitate the orderly and efficient conduct of cross-examination at the [October 21 and 22, 2003] hearing."¹ On October 14, 2003, the Special Master issued an order directing parties who intended to participate in the hearing (1) to premark "all their exhibits," (2) to "provide copies of their proposed exhibits to the other parties participating in the hearing and to any party or counsel who requests copies," and (3) to reintroduce "as a new exhibit for the upcoming hearing" any exhibit that was used in a prior hearing.²

The parties briefing SRP's motion have argued about the scope of this order as subflow issues have been extensively litigated since 1987, creating a voluminous record of motions, technical reports, orders, appellate decisions, and transcripts. On September 8, 2003, the Special Master issued four proposed rulings after considering all the objections filed in June 2002. The majority of the exhibits to which SRP objects were incorporated as exhibits in the objections filed by the Cities, Arizona Public Service, and Phelps Dodge Corporation. Those exhibits, which were not then objected to, were read and considered for the proposed rulings made prior to the October 2003 hearing.

But SRP's objections point to an issue that will come up again as individual contested cases are litigated, namely, the scope and integrity of the evidentiary record of a contested case. Contested cases, where the litigants may be few or many, will address specific legal and factual issues, but the Gila River Adjudication has a nearly 30-year record. The Special Master is sensitive to the challenges of assuring a fair and proper proceeding, avoiding wasteful papering of a record, and leaving a useful record not only for appeal but also for future trials.

A. Exhibit 2

Prior to the hearing, the Cities' counsel premarked Exhibit P4-72 (the Clerk's designation), which was a report prepared by the Arizona Department of Water Resources ("ADWR") titled *Technical Assessment of the Arizona Supreme Court Interlocutory*

¹ Minute Entry 1 (October 14, 2003).

² *Id.* 5.

Appeal Issue No. 2 Opinion (December 15, 1993). The report was Exhibit 10 in the February 1994 subflow hearing held by retired Judge Stanley Z. Goodfarb. Exhibit P4-72 was not offered for admission during the October 2003 hearing.

The Cities' Exhibit 2, to which SRP objects, consists of pages 44, 45, and 71 of ADWR's report. The Special Master has already considered these pages which were attached as Exhibit F to the objections filed by Arizona Public Service and Phelps Dodge Corporation on June 17, 2002. Exhibit F was not objected to by any party before the Special Master considered it prior to issuing his proposed rulings on September 8, 2003.³ The objection to Exhibit 2 will be overruled.

B. Exhibits 1, 3, 6, 7, 8, and 9

All or portions of these six exhibits were attached either to the Cities' Response to ADWR's Subflow Technical Report San Pedro River Watershed, filed on June 17, 2002, or to the objections filed by Arizona Public Service and Phelps Dodge Corporation on the same day. These six exhibits were not objected to by any party before the Special Master considered them prior to issuing his proposed rulings on September 8, 2003. As these exhibits have already been considered in this proceeding, the objections will be overruled.

C. Exhibits 4 and 5

Rule 403, Ariz. R. Evidence, states in pertinent part:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by...considerations of...needless presentation of cumulative evidence."

Exhibits 4 and 5 present cumulative evidence in this proceeding. The points made in these two exhibits have been presented in other exhibits, documents, and papers which were not objected and which the Special Master has already considered. The objections to Exhibits 4 and 5 will be granted.

D. Exhibits 10 and 11

Exhibits 10 and 11 are selected pages of appellate briefs the Cities filed with the Arizona Supreme Court in 1992 and 1995, respectively. The Cities present these exhibits to show that "the issue of applying current, not predevelopment stream conditions to the ephemeral stream subflow exclusion was presented to...the Arizona Supreme Court."⁴

The objections will be overruled, but consideration of these two exhibits will be limited to the specific assertion the Cities make, namely, that "the issue of applying current, not predevelopment stream conditions to the ephemeral stream subflow exclusion was presented

³ Ariz. R. Evidence 103(a)(1) regarding the timeliness of an objection. The dispositive point is, however, that the exhibit has already been considered in this proceeding.

⁴ Cities' Subflow Post-Hearing Opening Brief 6.

to...the Arizona Supreme Court.”⁵ No other consideration will be given to the statements made in the selected pages of the two briefs.

E. Exhibit 12

SRP does not object to Exhibit 12.

IT IS ORDERED:

1. Exhibit 1: Objection overruled. The Special Master has considered this exhibit which was attached as Exhibit 4 to the Cities’ Response to ADWR’s Subflow Technical Report San Pedro River Watershed filed on June 17, 2002, and as Exhibit B to the objections filed by Arizona Public Service and Phelps Dodge Corporation on June 17, 2002.

2. Exhibit 2: Objection overruled. The Special Master has considered this exhibit which was attached as Exhibit F to the objections filed by Arizona Public Service and Phelps Dodge Corporation on June 17, 2002.

3. Exhibit 3: Objection overruled as to page 5 and a portion of page 4. Objection granted as to page 1 and the portion of page 4 preceding the beginning of the section titled “Exclusions.” The Special Master has considered page 5 which was attached as Exhibit 3 to the Cities’ Response to ADWR’s Subflow Technical Report San Pedro River Watershed filed on June 17, 2002. Page 1 and the excluded portion of page 4 are cumulative evidence in this proceeding.

4. Exhibit 4: Objection granted. This exhibit presents cumulative evidence in this proceeding.

5. Exhibit 5: Objection granted. This exhibit presents cumulative evidence in this proceeding.

6. Exhibit 6: Objection overruled. The Special Master has considered this exhibit which was attached as Exhibit 7 to the Cities’ Response to ADWR’s Subflow Technical Report San Pedro River Watershed filed on June 17, 2002, and as Exhibit D to the objections filed by Arizona Public Service and Phelps Dodge Corporation on June 17, 2002.

7. Exhibit 7: Objection overruled. The Special Master has considered this exhibit which was attached as Exhibit E to the objections filed by Arizona Public Service and Phelps Dodge Corporation on June 17, 2002.

8. Exhibit 8: Objection overruled. The Special Master has considered this exhibit which was attached as Exhibit C to the objections filed by Arizona Public Service and Phelps Dodge Corporation on June 17, 2002.

9. Exhibit 9: Objection overruled. The Special Master has considered this exhibit which was attached as Exhibit 8 to the Cities’ Response to ADWR’s Subflow Technical Report San Pedro River Watershed filed on June 17, 2002. This exhibit, however, will be considered

⁵ Cf. Ariz. R. Evidence 105.

only for the assertion that “the issue of applying current, not predevelopment stream conditions to the ephemeral stream subflow exclusion was presented to...the Arizona Supreme Court.”

10. Exhibit 10: Objection overruled, but the exhibit will be considered only for the assertion that “the issue of applying current, not predevelopment stream conditions to the ephemeral stream subflow exclusion was presented to...the Arizona Supreme Court.”

11. Exhibit 11: Objection overruled, but the exhibit will be considered only for the assertion that “the issue of applying current, not predevelopment stream conditions to the ephemeral stream subflow exclusion was presented to...the Arizona Supreme Court.”

12. Parties may submit arguments on whether “the issue of applying current, not predevelopment stream conditions to the ephemeral stream subflow exclusion was presented to...the Arizona Supreme Court.”

DATED: April 7, 2004.

/s/ George A. Schade Jr.

GEORGE A. SCHADE, JR.

Special Master

The foregoing delivered this 7th day of April, 2004, to the Distribution Center, Maricopa County Superior Court Clerk’s office, for copying and mailing to those parties who appear on the Court-approved mailing list for Case No. W-1, W-2, W-3, and W-4 (Consolidated) dated October 6, 2003. The office of the Special Master also served a copy of this order by facsimile upon the parties for which it has a facsimile number.

/s/ KDolge

Kathy Dolge