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4 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
5 IN AND FOR THE COUNTY OF MARICOPA
6

7 **IN RE THE GENERAL**
8 **ADJUDICATION OF ALL RIGHTS**
9 **TO USE WATER IN THE GILA**
10 **RIVER SYSTEM AND SOURCE**

W-1 (Salt)
W-2 (Verde)
W-3 (Upper Gila)
W-4 (San Pedro)
(Consolidated)

11 Contested Case No. **W1-106**

12 **ORDER GRANTING PARTIAL**
13 **SUMMARY JUDGEMENT RE**
14 **OBJECTIONS TO SUBFLOW**
15 **DELINEATION REPORT FOR**
16 **VERDE MAINSTEM AND**
17 **SYCAMORE CANYON**
18 **SUBWATERSHED**

19 **CONTESTED CASE NAME:** *In re Subflow Technical Report, Verde River*
20 *Watershed*

21 **HSR INVOLVED:** None

22 **DESCRIPTIVE SUMMARY:** Order granting partial summary judgment regarding
23 the Arizona Department of Water Resources' Subflow Zone Delineation Report for
the Verde Mainstem and Sycamore Canyon Subwatershed and ordering a revised
subflow delineation for Horseshoe and Bartlett Reservoirs by **February 23, 2024.**

NUMBER OF PAGES: 22

On November 27, 2017, Special Water Master Harris ordered the Arizona
Department of Water Resources ("ADWR") to prepare a map and report of the
subflow zone of the Verde River Mainstem and Sycamore Canyon Subwatershed

1 ("Mainstem Report"). On December 30, 2021, ADWR filed the Mainstem Report.
2 After the period for filing objections had passed, on June 15, 2023, the Salt River
3 Valley Water Users' Association and the Salt River Project Agricultural Improvement
4 and Power District (collectively, "SRP"), Freeport Minerals Corporation ("Freeport"),
5 and the Arizona State Land Department ("ASLD"), requested and were granted leave
6 by the Court to file a motion for summary judgement¹ on their objections to the
7 Mainstem Report pursuant to Rule 56(a) of the Arizona Rules of Civil Procedure.
8 The Moving Parties (SRP, Freeport, and ASLD collectively) object to ADWR's
9 delineation of the proposed subflow zone in the vicinity of Horseshoe Lake and
10 Bartlett Lake, two reservoirs that SRP operates on the lower reach of the Verde
11 River.

12 The Moving Parties claim the law is "well-established" that the subflow zone
13 may not generally extend beyond the saturated Holocene alluvium, and that ADWR
14 is required to base its delineation of the subflow zone on conditions prior to
15 construction of the two reservoirs, or "predevelopment conditions." Motion for
16 Summary Judgment re Objections to the Subflow Delineation Report for Verde
17 Mainstem and Sycamore Canyon Subwatershed ("Motion") at 3 (June 15, 2023).

18 The Moving Parties claim it is uncontested that (1) ADWR's delineation in the
19 vicinity of the two reservoirs extends far more broadly than the saturated floodplain
20 Holocene alluvium ("SFHA") of the Verde River; and (2) ADWR based its

21 ¹ The Special Master set a trial date of August 17, 2023, for adjudicating objections to the Mainstem
22 Report, but did not set a deadline for filing dispositive motions. Minute Entry at 3 (June 10, 2021).
23 The Court subsequently amended the trial schedule during a July 14, 2023, status conference with
the hearing date set for July 17, 2024. Minute Entry at 5 (July 17, 2024).

delineation upon conditions that existed after the two reservoirs were constructed rather than predevelopment conditions.² The Court finds that there is insufficient evidence to conclude ADWR's delineation of the two reservoirs is in fact beyond the saturated floodplain Holocene alluvium ("SFHA").³ However, it is substantiated that ADWR did not consider predevelopment conditions when proposing the subflow delineation; therefore, the Court rules on the predevelopment issue only.⁴

BACKGROUND

Subflow Definition

"Subflow" is a legal construct developed over the years to work with Arizona's bifurcated water law: surface water, governed by the doctrines of prior appropriation and beneficial use, versus groundwater, subject to the doctrine of reasonable use. *In re General Adjudication of All Rights to Use Water in the Gila River System and Source* ("Gila River II"), 175 Ariz. 382, 386, 857 P.2d 1236, 1240 (1993); *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953). To ensure that wells pumping groundwater adjacent to appropriable surface water systems are properly accounted

² The Moving Parties also claim it is indisputable there is credible evidence of predevelopment conditions of the Verde River in the vicinity of the two reservoirs exists; and that ADWR did not account for that evidence in preparing the Mainstem Report. Motion at 3. Neither of those facts are relevant for this decision.

³ ADWR states in the Subflow Technical Report that "ADWR mapped the HCAF (historic composite active floodplain) to the high-water mark in aerial imagery." Mainstem Report at 26. However, neither party provided geologic evidence that mapping to the high-water mark would necessarily extend the delineation beyond the SFHA generally, or in the specific case here.

⁴ ADWR used aerial imagery starting in the 1940's, (Mainstem Report, Appendix D – HCAF Imagery Sources), however Bartlett Dam was completed in 1939 and Horseshoe Dam completed in 1945. Motion at 7. *See also* Separate Statement of Facts in Support of Motion for Summary Judgment re Objections to Subflow Zone Delineation Report for Verde Mainstem and Sycamore Canyon Subwatershed ("SSOF"), pp 1-4.

1 for, the Arizona Supreme Court defined “appropriable subflow” in 1931 as follows:

2 The underflow, subflow or undercurrent, as it is variously called, of a
3 surface stream may be defined as those waters which slowly find their way
4 through the sand and gravel constituting the bed of the stream, or the lands
5 under or immediately adjacent to the stream and are themselves a part of
6 the surface stream. It is subject to the same rules of appropriation as the
7 surface stream itself.⁵

8 To determine whether subsurface waters constitute subflow, the *Southwest Cotton*
9 court set forth the following test:

10 Does drawing off the subsurface water tend to diminish appreciably and
11 directly the flow of the surface stream? If it does, it is subflow, and subject to
12 the same rules of appropriation as the surface stream itself; if it does not,
13 then, although it may originally come from the waters of such stream, it is
14 not, strictly speaking, a part thereof, but is subject to the rules applying to
15 percolating waters.⁶

16 In *Gila River II*, the Arizona Supreme Court reaffirmed the rationale of *Southwest*
17 *Cotton* and distinguished between subflow and tributary groundwater, holding:

18 Whether a well is pumping subflow does not turn on whether it depletes a
19 stream by some particular amount in a given period of time. As we stated
20 above, it turns on whether the well is pumping water that is more closely
21 associated with the stream than with the surrounding alluvium.⁷

22 **Subflow Delineation**

23 Arizona courts have continually worked to craft a defensible and practical
subflow definition. The Arizona Supreme Court in 1993 started with a description of
certain principles, such as elevation, gradient, chemical makeup, direction of flow,

⁵ *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 39 Ariz. 65, 96-97, 4 P.2d 369, 380-81 (1931).

⁶ 39 Ariz. at 96-97, 4 P.2d at 380-381

⁷ 175 Ariz. at 392, 857 P.2d at 1246.

1 and differences in geology and hydrology that could be used by the Adjudication
2 Court to develop criteria to separate appropriable subflow from percolating
3 groundwater.⁸

4 Recognizing that each watershed will have geologic variations within the 1993
5 *Gila River II* principles, the Arizona Supreme Court in 2000 again reaffirmed the
6 principles in *Gila River II* adding, “our various descriptions of subflow in *Gila River*
7 *II* and *Southwest Cotton* should not serve as a straitjacket that restricts us from
8 reaching in the direction of the facts and, so far as possible under those decisions,
9 conforming to hydrological reality.” *In re Gen. Adjudication of All Rights to Use*
10 *Water in Gila River System and Source (“Gila River IV”)*, 198 Ariz. 330, 340 9 P.3d
11 1069, 1079 (2000).

12 In 2002, the Adjudication Court directed ADWR to prepare a report
13 “specifically identifying and describing the procedures and processes it proposes to
14 use to establish the limits of the subflow zone within the San Pedro River watershed.”
15 See W1–W4, Minute Entry at 1 (Jan. 22, 2002). After extensive hearings and
16 evidentiary review, a 53(b) report⁹ was filed July 16, 2004, by Special Master George
17 Schade (“Schade Report”)¹⁰ which specifically addressed the following question:
18 “Should ADWR’s subflow analysis consider predevelopment or current stream flow
19

20 ⁸ “Percolating” was first used to describe the movement of groundwater through a porous subsurface
in *Howard v. Perrin*, 8 Ariz. 347, 76 P. 460 (1904).

21 ⁹ See Ariz. R. of Civ. P. 53(e) (“A master must report to the court as required by the appointing order.
22 The master must file the report and promptly serve a copy on each party, unless the court orders
otherwise.”)

23 ¹⁰ W1-103, Report of the Special Master on ADWR’s Subflow Technical Report, San Pedro River
Watershed (“Schade Report”) (July 16, 2004).

1 conditions?" Schade Report at 43.¹¹ Special Master Schade concluded that
2 "predevelopment conditions are the most consistent and fairest reference point for
3 subflow analysis," thus recommending that "[t]he Court should direct ADWR to use
4 predevelopment stream flow conditions for subflow analysis."¹²

5 Judge Ballinger's 2005 approval with modifications of the Schade Report
6 addressed both Special Master Schade's recommendation regarding delineation issues
7 specific to the San Pedro watershed, as well as procedures that are relevant to
8 subflow delineation generally regardless of watershed. *See* WI-103, Order re Report
9 of the Special Master on ADWR's Subflow Technical Report ("2005 Subflow
10 Order") at 18–24 (Sept. 28, 2005). Judge Ballinger again provided direction
11 regarding subflow delineation for the San Pedro in a 2012 Minute Entry ("2012
12 Order") that addressed several deficiencies in the 2009 San Pedro Subflow
13 delineation report.¹³

14 In a November 2017 order initiating proceedings in the Verde River Watershed
15 ("2017 Order"), Special Master Harris directed ADWR to "develop a map of and a
16 technical report regarding the subflow zone of the perennial and intermittent streams
17 in the Verde River Watershed."¹⁴ The 2017 Order directed ADWR to develop a
18 subflow zone with specific criteria including, but not limited to, instructions
19

20 ¹¹ The three other issues included in the Schade Report are no less important, however they are not at
21 debate here, so they are not discussed.

21 ¹² *Id.* at 52.

22 ¹³ WI-103, Minute Entry ("2012 Subflow Order") at 5 (Oct. 12, 2012).

23 ¹⁴ *See* WI-106, Order for Production of a Subflow Zone Delineation Technical Report for the Verde
River Watershed ("2017 Subflow Order") at 2 (Nov. 27, 2017).

1 regarding mapping of ephemeral reaches of perennial and intermittent streams,
2 assumptions regarding the lateral extent and saturation value of the entire floodplain
3 Holocene alluvium, geologic features not to be included, setbacks, and a separate
4 instruction regarding use of conditions “prior to regular, discernible diversion or
5 depletion of stream flows resulting from human activity.”¹⁵
6

7 **ISSUE**

8 The question before the Court is whether ADWR is *required* to delineate the subflow
9 zone for the Verde Mainstem and Sycamore Canyon Subwatershed according to
10 “predevelopment” conditions.
11

12 **ANALYSIS**

13 **Was ADWR required to use predevelopment conditions for subflow analysis?**

14 The 2005 Order creates the “predevelopment conditions” standard requiring
15 that conditions “immediately prior to regular, discernable diversion or depletion of
16 stream flows resulting from human activity”¹⁶ must be used to both (1) determine
17 which reaches of streams have a subflow zone, and (2) delineate the lateral extent of
18 the subflow zone once that initial determination has been made.

19 ADWR argues the predevelopment conditions apply only for a threshold
20 inquiry regarding stream or tributary flow duration and not for delineating the
21

22 ¹⁵ 2017 Subflow Order at 4.

23 ¹⁶ 2005 Subflow Order at 21.

1 subflow zone. Arizona Department of Water Resources' Comments on SRP,
2 Freeport, and ASLD's Motion for Summary Judgment re Objections to Subflow Zone
3 Delineation Report for Verde Mainstem and Sycamore Canyon Subwatershed
4 ("Comments") at 6–9 (July 24, 2023). This is simply incorrect. The discussion over
5 the course of 7 pages when read as a whole clearly address predevelopment
6 evaluation at the watershed level, not at the stream or tributary level.¹⁷

7 With respect to the reaches of the Verde Mainstem containing Bartlett and
8 Horseshoe Reservoirs, the requirements in the 2012 Order to include the “active
9 channel” and the “Historical Composite Active Floodplain” within the boundaries of
10 delineation¹⁸ can only be fulfilled using the conditions existing prior to
11 impoundment. The terms “active channel” and “active floodplain” refer to two
12 different, broad lateral areas covered by the movement of a typical watercourse. The
13 active channel includes the lateral limits of the streambed scour formed by stream
14 cuts as the water meanders back and forth across the entire stream valley during
15 normal flow. The active floodplain refers to the lateral extent of land adjacent to the
16 stream, that is **subject to periodic flooding**. Where the stream flow is blunted due to
17 damming, the normal processes for active channels and active floodplains do not
18 occur, therefore in the case of Horseshoe and Bartlett reservoirs, neither term makes
19 sense when referring to current conditions.

20 For such stream features to be properly evaluated, stream conditions prior to
21

22 ¹⁷ 2005 Subflow Order at 18–24.

23 ¹⁸ 2012 Subflow Order at 5.

1 damming the flow of the Verde River must be analyzed. Judge Ballinger did not
2 anticipate that all circumstances would fit neatly into his 2012 definitions by further
3 directing ADWR “to the extent possible, interpret judicial pronouncements in a
4 manner consistent with scientific fact.”¹⁹ Thus a proper analysis of the active channel
5 and the Historical Composite Active Floodplain must necessarily occur prior to dam
6 construction.

7 Irrespective of applicability of the term “active channel,” in the 2017 Subflow
8 Order, the Special Master expressly ordered ADWR to “determine the subflow zone
9 based on conditions existing in the earliest year, or during ‘a range of years
10 immediately prior to regular, discernable diversion or depletion of stream flows
11 resulting from human activity’ for which reliable and reasonably complete data
12 exists.” 2017 Subflow Order at 4. While ADWR claims the Special Water Master’s
13 specific reference to page 21 of the 2005 Order indicates she was referring to stream
14 categorization only is not substantiated. If the Special Master intended
15 predevelopment conditions to pertain only to ephemeral stream categorization, she
16 would have included such instructions with page 1, where she discussed stream
17 categorization, and not listed separately on page 4. The 2017 Order clearly requires
18 ADWR to use predevelopment conditions for mapping the Verde subwatershed
19 subflow zone.

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23 ¹⁹ 2012 Subflow Order at 5.

1 **ADWR SUBFLOW ZONE DELINEATION OF HORSESHOE AND**
2 **BARTLETT RESERVIORS**

3 **ADWR did not consider predevelopment conditions.**

4 Construction of the dams that created Bartlett and Horseshoe Reservoirs was
5 completed in 1939 and 1945, respectively. Motion at 7. ADWR states the delineation
6 was completed using imagery after the construction of the reservoirs with the
7 Historical Composite Active Floodplain ("HCAF") boundary "set at the high-water
8 mark **for each reservoir.**" Mainstem Report at 45 (emphasis added). Furthermore,
9 since ADWR's aerial imagery mostly comprised post-1945 photographs, the HCAF
10 composite mapping would result in a subflow zone based on the modern water level
11 of Bartlett and Horseshoe reservoirs.

12
13 **It is unclear if ADWR's delineation in the vicinity of the two reservoirs may**
14 **extend beyond saturated floodplain Holocene alluvium.**

15 The floodplain Holocene alluvium is the geologic unit surrounding a river that
16 is comprised of sedimentary materials that were deposited by the river during the
17 Holocene period, i.e. the past approximately 10,000 years.²⁰ Under *Gila River IV*,
18 "[t]he subflow zone is defined as the saturated floodplain Holocene alluvium," 198
19 Ariz. 330, 344 (2000). Additionally, "the subflow zone will remain as narrow as the
20 saturated floodplain Holocene alluvium" within the Verde Watershed. 2017 Subflow
21 Order at 3.

22
23 ²⁰ 198 Ariz. at 345 fn. 2, 9 P.3d at 1084 fn. 2.

1 The Moving parties correctly point out that by using post-development aerial
2 imagery only, it was not possible for ADWR to accurately assess current geologic
3 formations beneath all areas of the reservoirs as some locations are over 100 feet
4 deep.²¹ Thus, it is true that ADWR cannot confirm which of the submerged areas
5 contain SFHA. However, just because the river channel is artificially submerged
6 does not **necessarily** mean the SFHA mapping is incorrect. It simply cannot be
7 validated with the post-reservoir construction imagery used by ADWR. While it is
8 reasonable to expect there may be some changes to the SFHA mapping using images
9 from the 1930s, it is not a forgone conclusion. Because there is insufficient
10 information to support either the Moving Parties or ADWR, the Court cannot
11 conclude that ADWR's delineation of the subflow zone is overbroad in the vicinity of
12 Horseshoe and Bartlett reservoirs.

14 **CONCLUSION**

15 The exercise of drawing a line at which groundwater and surface water are no
16 longer interconnected is a technical and legal challenge. Yet it appears subflow is
17 here to stay. Arizona courts have long endorsed a practical approach so long as such
18 approach remains "hydrologically realistic." *See generally Gila River IV*, 198 Ariz.
19 330, 9 P.3d 1069. In this case, ADWR was required to delineate the subflow zone in
20 the vicinity of Bartlett and Horseshoe reservoirs based on predevelopment
21 conditions. Enormous impoundments, which deplete downstream reaches,

22 ²¹ See Comments at 14 (acknowledging that "in some areas the submerged underlying deposits were
23 not clear" beneath Horseshoe and Bartlett).

1 significantly affect the current conditions of those reaches of the Verde River. As a
2 result, ADWR's delineation of the subflow zone around the Bartlett and Horseshoe
3 Reservoirs, which is based exclusively on current conditions, does not meet the
4 predevelopment standard.

5
6 **IT IS ORDERED** that ADWR will amend the portions of its Subflow Zone
7 Delineation Report relating to reaches in the vicinity of Horseshoe and Bartlett
8 Reservoirs. Specifically, ADWR will revise its delineation of the subflow zone
9 between miles 24 and 55 of the Verde mainstem (as noted in the 2021 Subflow Zone
10 Delineation Map Sheets #3 and #4) as follows:

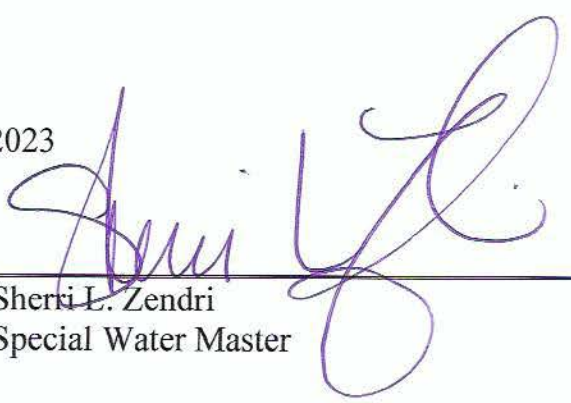
- 11 1. ADWR will map the subflow zone in accordance with predevelopment
12 conditions, i.e., conditions prior to the construction of both Horseshoe and
13 Bartlett Dams.
- 14 2. ADWR will conduct an active channel and historical composite active
15 floodplain analysis and determine the lateral extent of the saturated floodplain
16 Holocene alluvium according to predevelopment conditions.
- 17 3. The amendment will include an explanation of the additional data ADWR
18 used to evaluate the streambed under predevelopment conditions.
- 19 4. The revised delineation shall be clearly explained in the amendment, both
20 where the delineation changed and where it did not.
- 21 5. The report shall be filed with the Court by **February 23, 2024**.

1 **IT IS FURTHER ORDERED** that the Moving Parties will provide ADWR
2 with all aerial imagery and data, in a format that can be reasonably used by ADWR,
3 by **November 17, 2023**.

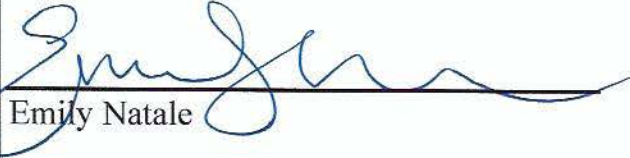
4
5 **IT IS FURTHER ORDERED** that since the motion has been granted on the
6 substance of the issue, requiring ADWR to reevaluate the areas of Horseshoe and
7 Bartlett Reservoirs under predevelopment conditions, pursuant to the Moving Parties
8 Motion, the following objections in this matter are dismissed:

- 9 • Salt River Project's Objections to the Subflow Zone Delineation Report for the
10 Verde River Mainstem and Sycamore Canyon Subwatershed (May 2, 2022)
11 ("SRP Objections");
- 12 • Freeport Minerals Corporation's Objections to Subflow Technical Report for
13 the Verde River Mainstem and Sycamore Canyon Subwatershed (May 2,
14 2022) ("Freeport Objections");
- 15 • Arizona State Land Department's Objection to the Subflow Zone Delineation
16 Report for the Verde River Mainstem and Sycamore Canyon Subwatershed
17 (May 2, 2022) ("ASLD Objections")

18
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20 Signed this 24 day of October 2023

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23 _____
Sherri L. Zendri
Special Water Master

1 The original of the foregoing was
2 delivered to the Clerk of the Maricopa
3 County Superior Court on
4 October 24, 2023. for
5 filing and distributing a copy to all
6 persons listed on the Court Approved
7 Mailing List for this case.

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