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11 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
12 **IN AND FOR THE COUNTY OF MARICOPA**

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

17 W-1 (Salt)  
18 W-2 (Verde)  
19 W-3 (Upper Gila)  
20 W-4 (San Pedro)  
21 (Consolidated)

22 Contested Case No. W1-106

23 **ARIZONA DEPARTMENT OF**  
24 **WATER RESOURCES' COMMENTS**  
25 **ON SRP's MOTION FOR PARTIAL**  
26 **SUMMARY JUDGMENT**  
**REGARDING WATER**  
**AVAILABILITY FOR SUMMARY**  
**ADJUDICATION DETERMINATION**  
**(THORSON FACTOR 1)**

Assigned to the Hon. Scott Blaney

Referred to Special Master Sherri Zendri

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

28 **HSR INVOLVED:** None

1 **DESCRIPTIVE SUMMARY:** The Arizona Department of Water Resources hereby  
2 provides comments in response to SRP’s Motion for Partial Summary Judgment regarding  
3 water availability in the Verde River watershed.

4 **NUMBER OF PAGES:** Twelve

5 **DATE OF FILING:** May 31, 2024

6 In August of 2022, the Arizona Department of Water Resources (“ADWR”) filed its  
7 Technical Report on *De Minimis* Domestic, Stockpond, and Stock and Wildlife Watering  
8 Uses in the Verde River Watershed (“*De Minimis* Report”). On April 12, 2024, the Salt  
9 River Valley Water Users’ Association and the Salt River Project Agricultural Improvement  
10 and Power District (collectively, “SRP”) filed three separate motions seeking partial  
11 summary judgment on three of the four “Thorson Factors”<sup>1</sup> used to determine whether a  
12 particular category of uses is *de minimis* and eligible for summary adjudication. These  
13 comments address water availability in the Verde River watershed, which is the subject of  
14 SRP’s motion on “Thorson Factor 1.”<sup>2</sup>

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19 <sup>1</sup> The four “Thorson Factors” used previously by Special Master Thorson in determining  
20 whether a particular category of water uses is *de minimis* and eligible for summary  
21 adjudication are 1) the amount of water available in the watershed, 2) the number of uses  
22 being considered for summary adjudication, 3) the impacts of those uses on the available  
23 water supply, and 4) the costs and benefits of a complete, rather than summary, adjudication  
24 of the uses. Memorandum Decision, Findings of Fact, and Conclusions of Law for Group  
25 1 Cases Involving Stockwatering, Stockponds, and Domestic Uses, filed November 14,  
26 1994 in Contested Case No. W1-11-19, In re Sands Group of Cases (W1-11-19) and Other  
Related Cases (Consolidated) at 12.

<sup>2</sup> See Salt River Project’s Motion for Partial Summary Judgment Regarding Water  
Availability For Summary Adjudication Determination (Thorson Factor 1) filed April 12,  
2024.

1           **I.       Summary of Positions**

2           SRP argues that the “undisputed facts”<sup>3</sup> show that the amount of available water should  
3 be calculated based on median June streamflows at the Tangle Creek, Camp Verde, and  
4 Paulden gages for the period of 2006-2022.”<sup>4</sup> ADWR disputes this contention. Indeed,  
5 SRP’s proposed methodology is based on the work of their expert, Andrew Case (LRE  
6 Water, hereinafter “LRE”), who admitted during his deposition that he focused on median  
7 June streamflows because LRE’s goal was to show the highest percentage of impact of  
8 domestic uses on the water supply;<sup>5</sup> this admission alone is enough for the Court to  
9 invalidate SRP’s proposal for determining water availability.

10          While ADWR does not dispute that it is reasonable to consider all available data for the  
11 stream gages<sup>6</sup> during the overlapping period of record, ADWR disputes that the amount of  
12 available water should be calculated based solely on the median June streamflows as  
13 measured at each gage, as discussed below and as supported by the facts cited herein.

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16          <sup>3</sup> Some of the “facts” in SRP’s Consolidated Statement of Facts in Support of its Motions  
17 for Partial Summary Judgment Regarding Water Availability, Number of Uses, and Impact  
18 of Uses (Thorson Factors 1-3) for Summary Adjudication Determination filed April 12,  
19 2024 appear to have been elicited from questions that were objected to during deposition.  
20 *See, e.g.*, “Fact” No .128 on p. 19 reads, “If a large portion of those registered domestic  
21 wells are supplying domestic uses, ADWR’s methodology for calculating the number of  
22 self-supplied domestic uses would be unreliable. Ex F, at 77-78.” Counsel for ADWR  
23 objected to this question. That objection has not been resolved by the Court. “Fact” No. 50.  
24 On p. 9 reads, “Some direct diverters in the Verde Watershed have decreed rights to use  
25 water from the Verde. Ex. G, at 254-55.” Counsel for ADWR and two other parties objected  
26 to this question. The objections have not been resolved by the Court.

<sup>4</sup> *Id.* at 17.

<sup>5</sup> Case Dep. 41:14- 42:15.

<sup>6</sup> There are other stream gages in the Verde River watershed that are not being considered  
in SRP’s proposed analysis. If the Court adopts the proposal to use data from multiple gages,  
then the Court should use all available information as appropriate. Hadder Dep. 288:5-22,  
February 27, 2024.

1           **II. Summary Judgment Standard**

2           Rule 56 of the Ariz. R. Civ. P. authorizes this Court to grant summary judgment  
3 when there is no genuine dispute as to any material fact and the moving party is entitled to  
4 judgment as a matter of law.<sup>7</sup> Accordingly, the moving party must establish that no such  
5 issue remains for trial, even if the evidence is viewed in the light most favorable to the non-  
6 moving party. *Thompson v. Better-Bilt Aluminum Prod. Co., Inc.*, 171 Ariz. 550, 558, 832  
7 P.2d 203, 211 (1992). Additionally, this Court is authorized to grant summary judgment  
8 for a non-moving party, grant summary judgment on grounds not raised by a party or  
9 consider summary judgment on its own after identifying for the parties material facts that  
10 may not be genuinely in dispute. Ariz. R. Civ. P. 56(f).

11           As a threshold matter, ADWR is not a party to the general stream adjudications.<sup>8</sup>  
12 ADWR serves as technical advisor to the Court.<sup>9</sup> Therefore, ADWR offers these comments  
13 regarding the motion for the Court’s consideration.

14           **A. Neither ADWR’s nor SRP’s proposed methodologies provide the Court with a**  
15           **complete representation of surface water in the Verde River watershed.**

16           To get an estimate of the total surface water supply in a watershed, all inputs and outputs  
17 to the watershed should be accounted for<sup>10</sup>, such as streamflows, flood flows,<sup>11</sup> baseflows,  
18 return flows, evapotranspiration, storage, consumptive uses, and other components.

19 \_\_\_\_\_  
20 <sup>7</sup> Ariz. R. Civ. P. 56 (a).

21 <sup>8</sup> See Order With Regard To The Fifth Set of Issues Submitted for Decision filed in the Gila  
22 River adjudication on July 27, 1989, W-1, W-2, W-3, W-4.

23 <sup>9</sup> Arizona Revised Statutes § 45-256.

24 <sup>10</sup> Typically, this also includes both groundwater and surface water inputs and outputs,  
25 which is not possible given the legal constraints.

26 <sup>11</sup> SRP has argued that a water availability analysis should not account for flood flows  
because flood flows are generally not available to users upstream of reservoirs. See SRP’s  
Motion at 7-9; however, flood flows recharge the aquifers, fill stockponds, and generally  
reduce demand in a watershed for certain types of uses. Hadder Dep. 196:25- 197:17,  
February 26, 2024.

1 Determining impact for a particular category of water use involves looking at the total  
2 amount of surface water that exists in the watershed and calculating how much of that water  
3 is being put to the specific use in question. In other words, what percentage of surface water  
4 in the Verde River watershed (or its subwatersheds) is attributable to domestic uses, and is  
5 that percentage *de minimis*?

6 Water availability analyses are dependent on the data available and the purpose of the  
7 analysis itself.<sup>12</sup> For the *De Minimis Report*, ADWR chose to focus on median annual flow  
8 measured at the Tangle Creek gage because the purpose of the Report was *not* to show the  
9 largest possible impact on the water supply, as SRP's expert aimed to do. Rather, the  
10 purpose of the Report was to use the data available to accurately reflect the impact certain  
11 uses have on the overall water supply. As ADWR acknowledged in the *De Minimis Report*  
12 and during deposition,<sup>13</sup> ADWR's analysis of water availability in the Verde River  
13 watershed is really a representation of the quantity of water measured at various gages after  
14 all beneficial uses upstream of the gages have occurred.<sup>14</sup> Any water that is being used  
15 (whether legally or not) reduces natural streamflow; thus, any amount consumed upstream  
16 will not pass by or be measured at the gage. In other words, what ADWR presented as the  
17 available water in the watershed is the amount of water left over after everyone who is  
18 currently using water in the watershed has already used it. The amount of water left over  
19 and measured at the gages is the amount of water available for new uses that aren't already

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22 <sup>12</sup> For example, one type of water availability analysis is the creation of a water budget,  
23 which would take into account all hydrologic inputs and outputs, both surface water and  
24 groundwater. Here, ADWR chose to run an analysis that does not add back in consumptive  
25 uses because there was insufficient data available to do so. Hadder Dep. 225: 18-22; and  
26 301:13-17, February 27, 2024.

<sup>13</sup> ADWR's *De Minimis Report* at 10 and 32; Hadder Dep. 302:9-17, 243:15-20 Feb, 27,  
2024.

<sup>14</sup> Hadder Dep. 254:13-21, 285:15- 286:3, 302:9-17, February 27, 2024.

1 occurring,<sup>15</sup> not the quantity against which current domestic uses should be measured.<sup>16</sup>  
2 ADWR used measurements at the Tangle Creek gage to represent water availability because  
3 1) ADWR does not have the data to determine with confidence how much surface water is  
4 currently being diverted for beneficial uses in the watershed,<sup>17</sup> and 2) ADWR decided to  
5 take a more simplistic approach for this analysis given the limited amount of time ADWR  
6 had to produce the *De Minimis* Report.<sup>18</sup> As ADWR acknowledged in its *De Minimis*  
7 Report, ADWR’s analysis significantly understates the amount of surface water available  
8 in the watershed.<sup>19</sup>

9 SRP’s proposed water availability analysis goes even further in understating the  
10 amount of surface water available in the watershed by focusing solely on June streamflows  
11 as measured at three gages, which is an unreasonably conservative estimate for the purposes  
12 of this analysis. June is typically the hottest and driest month in Arizona, so it is the time of  
13 maximum diversion and maximum riparian consumptive use coupled with less storm  
14 runoff.<sup>20</sup> Thus, there is even less water flowing past the gages after all uses upstream of the  
15 gage have occurred. SRP argues that June stream measurements must be used because it’s  
16 the time of year during which downstream users will feel the biggest impacts<sup>21</sup> and because  
17 only the water passing the gage is actually available because water that is already being  
18 used is not legally available to other users.<sup>22</sup> SRP’s analysis does not show the total amount  
19 of surface water in the Verde River watershed, but rather the lowest amount of water

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20 <sup>15</sup> Hadder Dep. 226:12-14, February 27, 2024.

21 <sup>16</sup> Hadder Dep. 293:14-17, February 27, 2024.

22 <sup>17</sup> Hadder Dep. 225: 18-22; and 301:13-17, February 27, 2024.

23 <sup>18</sup> Hadder Dep. 225: 9-14, February 27, 2024.

24 <sup>19</sup> ADWR’s *De Minimis* Report at 10 and 32.

25 <sup>20</sup> See Hadder Dep. 216: 3-11, February 27, 2024.

26 <sup>21</sup> SRP’s Motion at 11.

<sup>22</sup> *Id.* at 14. It should be noted that SRP’s argument that water currently being used is not “legally available” to other users fails because the water may be legally available to other users if the water has not been validly appropriated.

1 measured at each gage. While SRP’s proposed method shows the amount of water available  
2 in June to serve prospective uses in the Verde River watershed, it does not reflect the total  
3 quantity of surface water available prior to consumptive uses nor the quantity specifically  
4 attributable to domestic uses in the month of June.

5 If the Court were inclined to use gage data during a particular season as a proxy for  
6 water availability in the watershed as SRP suggests, it would be more appropriate to use  
7 winter baseflow, as there is minimal reduction from irrigation uses during the winter;  
8 therefore, the water attributed to irrigation in hotter, drier months is accounted for to a  
9 certain extent in winter baseflows. Winter baseflow also represents the reliable flow  
10 between storm runoff events and does not include flood flows. Although ADWR did not  
11 previously advocate using winter base flows as a proxy for water availability, this rebuttal  
12 to SRP’s proposal to focus on June flows is based on both ADWR’s and Arizona State Land  
13 Department’s (“ASLD”) expert testimony about the absence of the quantification of  
14 consumptive uses in ADWR’s water availability analysis. All parties examined winter base  
15 flow data provided as part of ADWR’s *De Minimis* Report,<sup>23</sup> and which is included in the  
16 Water Atlas used as Exhibit 27 during deposition by SRP.<sup>24</sup>

17 **B. The undisputed facts demonstrate that LRE deliberately selected the**  
18 **methodology that shows the highest possible impact of domestic uses on the**  
19 **water supply.**

20 Rather than presenting an objective analysis of water availability and impact, SRP’s  
21 expert, Andrew Case, stated that LRE’s goal was to show the largest possible impact of  
22 domestic uses on the water supply. To achieve that goal, it was necessary for LRE to focus  
23 its water availability analysis on the month when median streamflows measured at each  
24 gage are at their lowest: during the month of June. LRE’s goal is described below in excerpts

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25 <sup>23</sup> *De Minimis* Report at 8.

26 <sup>24</sup> Hadder Dep. 217:2-25, February 27, 2024.

1 from Andrew Case's deposition on February 16, 2024 in which he describes the contents of  
2 handwritten notes LRE provided pursuant to ASLD's document subpoena:

3 Q. All right. There's a few sentences. It's kind of broken by paragraph. The  
4 second to the last little paragraph there on that first page starts with "Why is  
5 June the lowest and why do we need to focus on it. We want biggest percent  
6 possible when focusing on cost-benefit analysis so that's why we are focusing  
on June - but okay to say June isn't the only month." Do you see that?

7 A. I do.

8 Q. Do you know what she meant by biggest percent possible?

9 THE WITNESS: It's somewhat speculative. I don't know what specifically was  
10 going on in her mind. But if I recall correctly, that discussion was about showing  
11 the -- that June has the lowest water availability and the highest potential impact of  
12 self-supplied domestic use; and so in terms of the cost-benefit analysis that  
ultimately will be done by the Special Master, that that is the month of concern.

13 Q. Did counsel for SRP instruct you to focus on June?

14 A. No.

15 Q. Did counsel for SRP instruct you to find the biggest percentage impact of  
16 self-supplied domestic uses possible?

17 A. No, we came up with that idea on our own.

18 Andrew Case Deposition Transcript, February 16, 2024 at 31-32. Later in the  
19 deposition, Mr. Case further explained LRE's goal:

20 Q. I want to circle back to one of the questions that Mr. Crestin asked you  
21 earlier, which was the note in this Exhibit 5. Let me find the page. It's on  
22 the first page, the note that says "Why is June the lowest and why do we  
23 need to focus on it," and underneath that, "We want biggest percentage  
24 possible when focusing on cost-benefit analysis so that's why we are  
focusing on June - but okay to say June isn't the only month." Do you see  
that?

25 A. I do.

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Q. And do you remember Mr. Crestin asking you about that statement?

A. I do.

Q. I think that your answer to Mr. Crestin's questions was that this was an approach that you came up with on your own; do you remember that?

A. Yes.

Q. How did you come up with that?

THE WITNESS: Well, looking at the water availability, June is easily the lowest month, with no -- and during the overlapping period of record, no high flow events in June, and then after reviewing the water company data, usage also was the highest in June, so that's why we focused on that.

BY MS. PARKS: Q. How did you come up with the plan that you wanted to show the biggest percent possible when focusing on cost-benefit analysis?

THE WITNESS: So one of our disagreements with ADWR is that it's not appropriate for us to do that cost-benefit analysis or provide opinions on the cost-benefit; but one of the aspects of that analysis is what is the benefit of adjudication, and so here we're trying to show that the impact is highest in June. That's what that's referring to.

BY MS. PARKS: Q. So you thought it was appropriate to consider a cost-benefit analysis in your analysis?

A. No. But we're providing the information, to my understanding, that the Court will use as part of that cost-benefit analysis. For example, we don't have any opinions on costs or what it would cost.

BY MS. PARKS: Q. Why did you take the approach of showing the biggest percentage of impact; why was that your focus?

A. Because when assessing water availability, it's necessary to look at the times when water is least available. For example, the March events that we discuss in our report, if you only look at those days there's a lot of water available; but that's only experienced for a day or a week a year. And so we wanted to look at the consistent low flow month.

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Q. But would it be fair to say that this was a goal that you had for your report?

A. We had already looked at the data at that point, so yes.

Andrew Case Deposition Transcript, February 16, 2024 at 41-43.<sup>25</sup> Mr. Case admitted on the record that it was LRE’s goal to show the “biggest percentage possible when focusing on cost-benefit analysis,” and because June was the month with lowest measurements at the gages, and also the month with the highest reported domestic usage data, LRE recommends that the focus of the analysis should be solely on the month of June. These statements alone are sufficient reason for the Court to reject SRP’s proposal that water availability should be calculated using only median streamflows during the month of June. Focusing on measurements of water flowing past the gage during the month of June automatically skews the results of the water availability analysis to show gage measurements at their lowest. In considering which methodology it may adopt, the Court should be aware that LRE specifically chose their methodology to show the greatest impact thus decreasing the likelihood that the Court will be able to find that certain domestic uses in the Verde River watershed have a *de minimis* impact on the surface water supply.

**C. If the water availability analysis is going to be based on water measured at the gages after all beneficial uses have occurred, then looking at the measurements on a median annual basis is more appropriate than looking at June gage measurements.**

The Special Master asked ADWR to include **all** of the following in its *De Minimis* Report: “the median flows for May, June, and July at the Paulden, Camp Verde, and the

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<sup>25</sup> It should be noted that Counsel for SRP objected to some of the questions included in this filing, and those objections have not been resolved by the Court. However, as indicated above, in *supra* n. 3, SRP included answers to objected-to questions in their Consolidated Statement of Facts, so Counsel for ADWR felt it appropriate to include this segment in the Comments herein.

1 Tangle Creek gauges and the annual median flows at Tangle Creek.”<sup>26</sup> ADWR found that  
2 after all consumptive uses have occurred, the estimated median annual flow at the Tangle  
3 Creek gage is 281,336.14 AF.<sup>27</sup> While this figure is not an estimate of the quantity of  
4 surface water available in the watershed, it is less of an underestimate than SRP’s proposed  
5 quantities based solely on June gage measurements: 4,813 AF at Tangle Creek, 3,015 AF  
6 at Camp Verde, and 1,101 AF at Paulden.<sup>28</sup>

7 Using the median annual flow allows the Court to account for components, such as flood  
8 flows, seasonal flooding, and periods of no flow, while filtering out extreme high flow or  
9 low flow events.<sup>29</sup> Using only June data would exclude essential streamflow information  
10 available the rest of the year.<sup>30</sup>

### 11 **III. CONCLUSION**

12 For the foregoing reasons, SRP’s Motion for Summary Judgment should be denied.  
13 Specifically, the Court should reject SRP’s proposal that water availability should be based  
14 on measurements of the water flowing past the gages after all uses have occurred and only  
15 during the month of June. While ADWR is not opposed to considering all relevant gage  
16 data for the overlapping period of record, the Court should recognize that SRP’s expert’s  
17 methodology is biased and too restrictive given the already-restrictive nature of both  
18 ADWR’s and LRE’s methodologies. The Court should instead find that the water available,  
19 after all uses have already occurred, is at least 281,336.14 AF based on the estimated median  
20 annual flow provided by ADWR, and that, based on the data available, a water budget  
21 cannot be completed for the purposes of the Verde River watershed *de minimis* proceedings.

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22 <sup>26</sup> June 14, 2022 Minute Entry Order at 12.

23 <sup>27</sup> ADWR’s *De Minimis* Report at 10.

24 <sup>28</sup> SRP’s Motion at 17.

25 <sup>29</sup> ADWR’s *De Minimis Report* at 9; Hadder Dep. 186:17- 187:4, 197:7-17, February 26,  
2024; Hadder Dep. 220:8-23, February 27, 2024; Cook Dep. 341:20- 342:1, February 27,  
2024.

26 <sup>30</sup> *Id.* at 33.

1 If the Court were inclined to use gage data during a particular season as a proxy for water  
2 availability in a watershed, it would be more appropriate to use winter baseflow to attempt  
3 to account for some consumptive uses.

4 ADWR believes that the Court can resolve these issues on the briefs filed, expert  
5 reports, and the deposition transcripts without the need for trial unless the Court needs  
6 additional information.

7 **RESPECTFULLY SUBMITTED** this 31st day of May, 2024.

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ARIZONA DEPARTMENT OF WATER  
RESOURCES

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Kimberly R. Parks, Deputy Counsel  
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Case No. W1-106.

