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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 WATER
24 RESOURCES' COMMENTS ON SRP's
25 MOTION FOR PARTIAL SUMMARY
26 JUDGMENT ON NUMBER OF USES
FOR SUMMARY ADJUDICATION
DETERMINATION (THORSON
FACTOR 2)**

Assigned to the Hon. Scott Blaney

Referred to Special Master Sherri Zendri

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

HSR INVOLVED: None

DESCRIPTIVE SUMMARY: The Arizona Department of Water Resources hereby provides comments in response to SRP's Motion for Partial Summary Judgment regarding the number of self-supplied domestic uses in the Verde River watershed.

1 **NUMBER OF PAGES:** Nine

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

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

12
13 **I. Summary of Positions**

14 As SRP noted in its motion, “Neither SRP nor any other party objected to ADWR’s
15 estimate of the number of stockponds or the number of stock and wildlife watering uses.”³

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19 ¹ 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,
24 adjudication of the uses. Memorandum Decision, Findings of Fact, and Conclusions of
25 Law for Group 1 Cases Involving Stockwatering, Stockponds, and Domestic Uses, filed
26 November 14, 1994 in Contested Case No. W1-11-19, In re Sands Group of Cases (W1-
11-19) and Other Related Cases (Consolidated) at 12.

² See Salt River Project’s Motion for Partial Summary Judgment on Number of Uses For
Summary Adjudication Determination (Thorson Factor 2) filed April 12, 2024.

³ *Id.* at 3, fn. 4.

1 Therefore, ADWR agrees with SRP’s position that “the Special Master should rule that
2 the number of stockpond and stock and wildlife watering uses are those found in the *De*
3 *Minimis* Report.”⁴

4 SRP argues that “the undisputed facts relating to Thorson Factor 2 demonstrate that
5 the methodology proposed by Harvey Economics should be used to identify the number of
6 self-supplied domestic uses”⁵ because it is “the most rational and reasonable estimate of
7 the number of self-supplied domestic uses in the Verde River Watershed.”⁶ SRP further
8 argues that “the Harvey Economics methodology is reasonable and that ADWR’s
9 preferred methodology is not.”⁷ This is untrue, as ADWR’s methodology is reasonable
10 and appropriate. While ADWR acknowledges that Harvey Economics’ methodology for
11 estimating the number of domestic uses is also reasonable and appropriate, ADWR
12 contests that it is the *only* reasonable method for estimating the number of domestic uses,
13 as detailed below, and as supported by the facts described herein.

14 15 **II. Summary Judgment Standard**

16 Rule 56 of the Ariz. R. Civ. P. authorizes this Court to grant summary judgment
17 when there is no genuine dispute as to any material fact and the moving party is entitled to
18 judgment as a matter of law.⁸ Accordingly, the moving party must establish that no such
19 issue remains for trial, even if the evidence is viewed in the light most favorable to the
20 non-moving party. *Thompson v. Better-Bilt Aluminum Prod. Co., Inc.*, 171 Ariz. 550, 558,
21 832 P.2d 203, 211 (1992). Additionally, this Court is authorized to grant summary
22 judgment for a non-moving party, grant summary judgment on grounds not raised by a

23 ⁴ *Id.*

24 ⁵ *Id.* at 14.

25 ⁶ *Id.* at 4.

26 ⁷ *Id.* at 3.

⁸ Ariz. R. Civ. P. 56 (a).

1 party or consider summary judgment on its own after identifying for the parties material
2 facts that may not be genuinely in dispute. Ariz. R. Civ. P. 56(f).

3 As a threshold matter, ADWR is not a party to the general stream adjudication.⁹
4 ADWR serves as technical advisor to the Court.¹⁰ Therefore, ADWR offers these
5 comments regarding the motion for the Court’s consideration.

6
7 **A. Although ADWR and Harvey Economics used two completely different**
8 **methods for estimating domestic uses, the results of each analysis were within**
9 **1,000 of the other.**

10 ADWR’s method for estimating the number of self-supplied domestic uses in the
11 Verde River watershed involved using the 2020 Census data of the total number of
12 housing units by census block to determine the number of housing units within each
13 subwatershed and then distinguishing housing units served by municipal or other service
14 providers’ service areas.¹¹ Harvey Economics’ method for estimating the number of self-
15 supplied domestic uses involved using data on well registrations from ADWR’s Wells 55
16 database and filtering out various entries based on a set of criteria developed by Harvey.¹²
17 The total number of self-supplied domestic uses estimated by ADWR was 20,972,¹³ and
18 the number estimated by Harvey was 20,149,¹⁴ a difference of 823 uses. Notably,
19 ADWR’s estimate was more conservative than the estimate provided by Harvey
20 Economics.

21 _____
22 ⁹ See Order With Regard To The Fifth Set of Issues Submitted for Decision filed in the
23 Gila River adjudication on July 27, 1989, W-1, W-2, W-3, W-4.

24 ¹⁰ Arizona Revised Statutes § 45-256.

25 ¹¹ ADWR’s *De Minimis* Report at 11-15.

26 ¹² “Review of Approaches to Determining De Minimis Domestic Water Uses In the Verde
River Watershed” October 27, 2023 by Harvey Economics at 3-1 -3-7 (“Harvey Report”).

¹³ ADWR’s *De Minimis* Report at 15.

¹⁴ Harvey Report at 3-5.

1 SRP argues that ADWR's method isn't reasonable because it excludes 6,000
2 registered domestic wells within the boundaries of water suppliers' service areas which
3 SRP believes should invalidate ADWR's methodology;¹⁵ but, that argument fails because
4 the difference between the total number of self-supplied domestic uses estimated by
5 ADWR and Harvey was only 823. In fact, Harvey's estimate, which SRP urges this Court
6 to adopt, was less than the estimate provided by ADWR.

7 The estimates provided by Harvey at the subwatershed level were also close to the
8 numbers provided by ADWR, and ADWR's estimate was higher than Harvey's in three of
9 the five subwatersheds:

Subwatershed	Harvey No. Wells	ADWR No. Wells	Difference
Big Chino	2453	3117	664
Little Chino	8755	7425	1330
Lower Verde Valley	6556	6471	85
Sycamore	459	1223	764
Verde Canyon	1926	2736	810

18
19 **B. The facts demonstrate that both ADWR's method and Harvey Economics'**
20 **method for estimating the number of domestic uses are very likely**
21 **overestimating the number of uses.**

22 ADWR used the number of housing units reported in the 2020 Census for its
23 methodology; this number included vacant houses, non-permanent residences, and
24 secondary residences.¹⁶ When ADWR included these residences in the calculation, it thus
25 overestimated both the number of self-supplied domestic uses and the impact of those

26 ¹⁵ SRP's Motion at 3.

¹⁶ ADWR's *De Minimis* Report at 13.

1 uses. Additionally, as ADWR noted in its *De Minimis* Report and in its expert testimony,
2 assuming that every domestic well in the watershed is pumping appropriable surface water
3 is an extreme assumption.¹⁷ However, neither ADWR nor Harvey Economics excluded
4 wells from their respective estimates of domestic uses regardless of the distance of the
5 domestic wells from the river because the proposed subflow zone delineation for the
6 Verde River watershed has not been approved by the Court.¹⁸ Therefore, both methods
7 are likely overestimating the total number of self-supplied domestic uses.

8 **C. Both ADWR’s method and Harvey Economics’ method for estimating the**
9 **number of domestic uses are reasonable even though both approaches have**
10 **the potential for error.**

11 The manner in which SRP has presented ADWR’s opinions on the two methods
12 implies that ADWR agrees that the method used by Harvey Economics is the only
13 reasonable method. *See e.g.*, SRP’s Motion at 3, “ADWR acknowledges that the Harvey
14 Economics methodology is reasonable, to the point that ADWR no longer favors its own
15 methodology” and SRP’s Motion at 9, “ADWR no longer is confident that its proposed
16 methodology is most accurate.” This is a misrepresentation of ADWR staff’s deposition
17 testimony.

18 During the deposition, ADWR clearly and consistently stated that both methods are
19 reasonable methods for estimating the self-supplied uses even though both methods have
20 the potential for error, as shown in the excerpts below:

21 So I think the numbers are close enough that I don’t think -- I think we see --
22 - you know, I understand there’s issues with both methods. And so in that
23 case, I think both are reasonable for calculating self-supplied users.

24 Sutton Dep. 68:12-16, February 26, 2024

25 ¹⁷ADWR’s *De Minimis* Report at 34; Hadder Dep. 213:14-214:1, 305:21- 306:17,
February 27, 2024.

26 ¹⁸ ADWR’s *De Minimis* Report at 33 and 34; Case Dep. 18:14-25.

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It's basically about as close as you're going to get without -- in both instances, the way we did it -- the way it was done in the Harvey report, it's about as close as you're going to get without having to look at everything individually.

- Q. As close as you could get to an accurate number of the number of domestic uses in each of the Verde subwatersheds? Is that what you're referring to?
- A. Yes.

Sutton Dep. 81:4-12, February 26, 2024.

- Q. How would you rephrase it? Or just, I guess, what is your opinion on it now?
- A. Right. I think -- yeah, what I meant by that is -- I think, given the two original methods used, I think we had felt confident about how we had done it in this sense. Since then, kind of reading over other reports and just -- just how close the numbers are and everything, I don't know if I could say -- I don't know if I feel confident that I could say any method is necessarily the most accurate. I think they kind of all have their issues. And unless, you know, you take time and look at every filing or look at every census block, there's no way to know which one is better. So I think that's -- how I feel about that now is that I -- I don't know if it's the most accurate method. I think it's one method, and using the wells is another method. But whether or not it's the most accurate or not, I don't know.

Sutton Dep. 122:19- 123:13, February 26, 2024.

ADWR also pointed to potential errors with the information in ADWR's Wells 55 database that Harvey relied on in his analysis. These potential errors are extensive and include: duplicate filings, registrations that haven't been updated to reflect that a well is dry, cancelled, or abandoned, the accuracy of the information provided by the applicant, and the reality that the locations of wells in the database, even when correctly described, do not plot to the exact location of the wells.¹⁹ These are issues that cannot be resolved without comparing names and locations on the filings or looking at each registration and

¹⁹ Sutton Dep. 95:2-19 and 115:11- 119:1, February 26, 2024.

1 well individually, which Harvey admitted that he doesn't recall doing.²⁰ These facts
2 demonstrate that Harvey's proposed methodology for estimating the number of self-
3 supplied domestic uses also has the potential for error.

4 **III. CONCLUSION**

6 For the foregoing reasons, the Motion should be denied in part. While ADWR is
7 not opposed to using the methodology proposed by Harvey Economics for estimating the
8 number of self-supplied domestic uses in the Verde River watershed, the Court should not
9 find that Harvey's proposed method is the **only** reasonable method for doing so. If the
10 Court adopts the number of self-supplied domestic uses suggested by SRP,²¹ the Court
11 should also find that the estimates provided by both ADWR and Harvey Economics for
12 the number of self-supplied domestic uses are likely over-estimates because both
13 estimates include small domestic wells that are located far away from the stream and are
14 unlikely to be found to be impacting the stream or its subflow.

15 Additionally, the Court should adopt the number of stockponds and stock and
16 wildlife watering uses presented by ADWR in its *De Minimis* Report as recommended by
17 SRP in its Motion.²²

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

25 ²⁰ Harvey Dep. 24:4-18.

26 ²¹ SRP's Motion at 14.

²² *Id.*

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RESPECTFULLY SUBMITTED this 31st day of May, 2024.

ARIZONA DEPARTMENT OF WATER
RESOURCES



Kimberly R. Parks, Deputy Counsel
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ORIGINAL of the foregoing sent by
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