



MEMORANDUM

Date: May 10, 2022

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: Jan Leshner 
County Administrator

Re: **City of Tucson Differential Water Rate Lawsuit Update**

I provided you with a status update yesterday indicating that the Court schedule was still forthcoming. Please find attached the proposed scheduling order (Attachment 1) as well as the Rule 16 joint report (Attachment 2) as required by the federal rules of civil procedures.

JKL/dym

Attachments

c: Carmine DeBonis, Jr., Deputy County Administrator for Public Works
Yves Khawam, PhD, Assistant County Administrator for Public Works

ATTACHMENT 1

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12 *Attorneys for Plaintiff Pima County*

13
14 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
15 IN AND FOR THE COUNTY OF MARICOPA

16 PIMA COUNTY, a body politic in the State
17 of Arizona,

18 Plaintiff,

19 v.

20 CITY OF TUCSON, a municipal
corporation of the State of Arizona, et al.,,

21 Defendants.

No. CV2022-001141

**[PROPOSED] SCHEDULING
ORDER**

(Assigned to Hon. Randall Warner)

22
23 Upon consideration of the parties Rule 16(c) Joint Report, the Court orders as
follows:

- 24
25 1. **Initial disclosure:** The parties will exchange Initial Disclosure Statements
on **May 27, 2022.**
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27 2. **Expert Witness Disclosure:**
- 28 • The parties shall either [selected by the Court]:

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- Simultaneously disclose areas of expert testimony by **July 15, 2022**; *or*
 - Plaintiff shall disclose areas of expert testimony by **July 15, 2022** and Defendant disclose areas of expert testimony by **August 1, 2022**
 - Plaintiff shall disclose identity and opinions of experts by: **September 15, 2022**
 - Defendants shall disclose identity and opinions of experts by: **October 17, 2022**
 - Rebuttal expert opinions shall be disclosed by: **November 15, 2022**
3. **Lay (non-expert) Witness Disclosure:** The parties shall disclose all lay witnesses by: **October 15, 2022**
4. **Final Supplemental Disclosure:** Each party shall provide final supplemental disclosure by: **January 31, 2023** This order does not replace the parties’ obligation to seasonably disclose Rule 26.1 information on an on-going basis and as it becomes available. **No party shall use any lay witness, expert witness, expert opinion, or exhibit at trial not disclosed in a timely manner, except upon order of the court for good cause shown or upon a written or an on-the-record agreement of the parties.**
5. **Discovery Deadlines:** Tier 3 cases are permitted 240 days in which to complete discovery. The time to complete discovery runs from the date of the Early Meeting. The parties will propound all discovery undertaken pursuant to Rules 33 through 36 by **September 30, 2022**. The parties will complete the depositions of parties and lay witness by **November 18, 2022** and will complete the depositions of expert witness by **December 31, 2022**. The parties will complete all other discovery by **January 31, 2023**. (“Complete discovery” includes conclusion of all depositions and submission of full and final responses to written discovery.)

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- 6. **Private Mediation:** The parties shall participate in mediation using a private mediator agreed to by the parties. The parties shall complete the mediation by: **November 11, 2022.**
- 7. **Dispositive Motions:** The parties shall file all dispositive motions by: **February 21, 2023.**
- 8. **Trial setting conference:** On _____ [the Court will provide this date], the Court will conduct a telephonic trial setting conference. Attorneys and self-represented parties shall have their calendars available for the conference. Plaintiff will initiate the conference call by arranging for the presence of all other counsel and self-represented parties, and by calling this division at _____ promptly at the scheduled time.
- 8. **Firm Dates:** No stipulation of the parties that alters a filing deadline or a hearing date contained in this scheduling order will be effective without an order of this court approving the stipulation. Dates set forth in this order that govern court filings or hearings are firm dates, and may be modified only with this court's consent and for good cause. This court ordinarily will not consider a lack of preparation as good cause.
- 11. **Further Orders:** The Court further orders as follows:

DATED: _____

The Honorable Randall Warner

ATTACHMENT 2

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12 *Attorneys for Plaintiff Pima County*

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14 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
15 IN AND FOR THE COUNTY OF MARICOPA

16 PIMA COUNTY, a body politic in the State
17 of Arizona,

18 Plaintiff,

19 v.

20 CITY OF TUCSON, a municipal
corporation of the State of Arizona, et al.,

21 Defendants.

No. CV2022-001141

JOINT RULE 16(C) REPORT

(Assigned to Hon. Randall Warner)

22
23 Pima County (“County” or “Pima”) and Defendants certify that on May 6, 2022, in
24 accordance with Arizona Rules of Civil Procedure 16(c)(1) and 7.1(h), counsel for the
25 undersigned parties met and conferred via video teleconferencing about the subjects set
26 forth in Rule 16(b)(2) and (c). The parties also agree that this case is not subject to the
27 mandatory arbitration provisions of Rule 72. In addition to this Joint Report, the parties are
28 concurrently submitting a proposed scheduling order.

1 **1. *Brief Description of the Case:***

2 Pima’s Statement: This case concerns Tucson City Ordinance No. 11881, which
3 implements differential water rate charges Tucson Water Department (“Tucson Water”)
4 customers living in unincorporated areas—with the exception of Tucson Unified School
5 District campuses and Native American tribal lands. The City has espoused five
6 justifications for Ordinance No. 11881: (1) it will increase annexation; (2) Tucson bears
7 financial risks and liabilities not shared by the unincorporated county; (3) environmental
8 sustainability and water conservation; (4) differential rates are supported by cost of service
9 studies.; and (5) other Arizona municipal water providers have differential rates for
10 customers outside of city limits. But none of these justifications actually support differential
11 water rates imposed on select unincorporated customers.

12 In particular, and broadly speaking, Pima’s position is that Tucson’s policy-based
13 justifications (annexation, sustainability, municipal consistency): (1) are not supported by
14 any research or data; (2) do not justify imposing differential rates based on jurisdiction
15 (rather than consumption); (3) are premised on incorrect assumptions; (4) do not explain
16 the exceptions for Native American Tribes and TUSD; or (5) some combination of all these
17 factors. Tucson’s fiscal-based justifications (financial risk and cost of service studies) also
18 fail for several reasons, including: (1) unincorporated Tucson Water customers actually
19 subsidize in-city customers (2) in-city customers do not face disproportionate financial
20 risks; and (3) the cost of service studies are analytically flawed in many respects — for
21 instance, the studies arrived at their determinations by utilizing a policy-based desired “rate
22 of return” that is not tethered to the actual cost of service.

23 Pima County—which is one of the largest customers of Tucson Water and is subject
24 to the increased differential rates—asserts that the differential rates established in Ordinance
25 No. 11881: (1) are not “just and reasonable” as required by A.R.S. § 9-511.01(A); (2)
26 unreasonably discriminate against similarly situated customers, in violation of the common
27 law governing municipal entities; (3) discriminate against similarly situated customers, in
28 violation of the 14th Amendment of the United States Constitution and Art. II, § 13 of the

1 Arizona Constitution; (4) discriminate on the basis of race, in violation of the 14
2 Amendment of the United States Constitution and Art. II, § 13 of the Arizona Constitution;
3 and (5) constitute a special law, in violation of Art. IV, Pt. 2, § 19 of the Arizona
4 Constitution.

5 Defendants' Statement: Tucson City Ordinance No. 11881, enacted on October 19,
6 2021, adopted a 10% increase in water rates for Pima County's potable water accounts
7 located outside the city limits. The City's water utility has customers located throughout
8 Pima County, both inside and outside the City limits, including customers within the
9 boundaries of Indian reservations. The Ordinance exempted from the new rate all known
10 customers with prior potable water service rate agreements and all customers within other
11 incorporated cities and towns.

12 As a matter of law, the City is entitled to charge "just and reasonable" water rates
13 for its services, and, as a general rule, it may charge more for service outside its incorporated
14 boundaries than it charges customers within the City, especially if it costs more to serve
15 such customers. Before adopting the Ordinance, Tucson's nationally recognized rate
16 consultants conducted two cost of service studies demonstrating that the costs to serve the
17 unincorporated area subject to the new rates exceed the costs of service within the City.

18 The rate is also justified by other reasonable policy considerations, including
19 supporting annexation and incorporation, and promoting environmental sustainability and
20 water conservation, particularly in areas outside the City limits. The City has directed that
21 any increased revenue from the differential rate be allocated toward remediation of COVID-
22 19 pandemic-related delinquencies, and water delivery infrastructure and environmental
23 remediation projects within unincorporated Pima County, all reasonable policy goals.

24 **2. Current Case Status:**

- 25 • Every Defendant has been served or dismissed: **Yes**
26 • Every party who has not been defaulted has filed a responsive pleading: **Yes**

27 **3. Amendments:** A party anticipates filing an amendment to a pleading that will
28 add a new party to the case: **Yes**. Pima County anticipates that it may amend its Complaint

1 to add an individual Tucson Water customer living in unincorporated areas as a plaintiff.

2 **4. Settlement:** The parties agree to engage in settlement discussions with a
3 **private mediator.** The parties will be ready for a settlement conference by **November 11,**
4 **2022.**

5 **5. Readiness:** This case will be ready for trial by **June 6, 2023.**

6 **6. Jury:**

- 7 • There is a right to a trial by jury: **Yes**
8 • If there is such a right, it has been waived by the parties: **No**

9 **7. Length of Trial:** The estimated length of trial is **five days.**

10 **8. Summary Jury:** The parties agree to a summary jury trial: **No**

11 **9. Preference:** This case is entitled to preference for trial pursuant to the
12 following statute or rule: **Not applicable.**

13 **10. Special Requirements:** No party will require disability accommodations or
14 an interpreter at a pretrial conference and/or at trial.

15 **11. Scheduling Conference:** The parties do request a Rule 16(d) scheduling
16 conference.

17 **12. Other Matters:** Other matters that the parties wish to bring to the court's
18 attention that may affect management of this case:

19 Discovery Tier: The parties stipulate that this case is logistically and logically
20 complex and should be assigned **Tier 3** under Ariz. R. Civ. P. 26.2(b).

21 Expert Witnesses: The parties anticipate that expert witness testimony will be used
22 in this case.

23 **13. Items Upon which the Parties Do Not Agree:** The parties were unable in good
24 faith to agree upon the following items, and the position as to each item is as follows: While
25 the City and the County have agreed on nearly all scheduling issues, they disagree as to
26 whether the parties should: (1) simultaneously exchange areas of expert testimony, or (2)
27 stagger such an exchange. The County proposes that both parties simultaneously exchange
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1 areas of expert testimony on July 15, 2022. The City proposes that the County exchanges
 2 its areas of expert testimony on July 15, 2022 and that the City exchanges its areas of expert
 3 testimony on August 1, 2022.

4 With this exception, as stated, the parties have agreed on all other case deadlines,
 5 which is reflected in the concurrently filed proposed scheduling order and the below table
 6 (which has been put in chronological order for ease of reference):

Deadline	Agreed Date	Areas Still Disputed
Initial Disclosure Statements	5/27/22	
Both Parties Disclose Areas of Expert Testimony		<i>(Proposed by Pima)</i> 7/15/22
Plaintiffs Disclose Areas of Expert Testimony		<i>(Proposed by Tucson)</i> 7/15/22
Defendants Disclose Areas of Expert Testimony		<i>(Proposed by Tucson)</i> 8/1/22
Plaintiff Discloses Identity and Opinions of Experts	9/15/22	
Propound Discovery Under Rules 33 Through 36	9/30/22	
Lay (non-expert) Witness Disclosure	10/15/22	
Defendants Disclose Identity and Opinions of Experts	10/17/22	
Complete Depositions of Parties and Lay Witness	11/18/2022	
Rebuttal Expert Opinion Disclosures	11/15/22	
Complete Private Mediation	11/11/22	
Complete Depositions of Expert Witness	12/31/22	
Final Supplemental Disclosure Statement	1/31/23	
All Other Discovery	1/31/23	
Dispositive Motions	2/21/23	

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The parties appreciate the Court’s assistance in resolving this good faith dispute.

DATED this 9th day of May, 2022.

SNELL & WILMER L.L.P.

By: /s/ Brett W. Johnson

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1 The foregoing was electronically
2 filed via TurboCourt this 9th day
of May, 2022,

3 COPY of the foregoing e-served this
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