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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

State of Arizona, *ex rel*, Henry R. Darwin,
Director, Arizona Department of
Environmental Quality,

Plaintiff,

v.

International Boundary and Water
Commission, United States Section;
Edward Drusina, in his official capacity
as Commissioner of the International
Boundary and Water Commission, United
States Section,

Defendants and Third-
Party Plaintiffs,

v.

City of Nogales, Arizona,

Third-Party Defendant.

No. CV 12-644 TUC-FRZ

ORDER

The factual and procedural history of this action are set forth in detail in the Court's previous Orders ruling on motions for partial summary judgment (Docs. 35, 85 and 127) and the Reports and Recommendations of Magistrate Judge D. Thomas Ferraro addressing Plaintiff State of Arizona's Motion for Partial Summary Judgment: Liability for Counts 2, 5, 6, 7, 8, and 9 (Doc. 68); the Amended Motion of the City of Nogales for Summary Judgment on Third Party Claim (Doc. 102); and the present Report and Recommendation – addressing (I) The City of Nogales' Motion for Summary Judgment

1 Regarding Count II of Third Party Plaintiff USIBWC’s Third Party Claim (Doc. 166);
2 (II) USIBWC’s Motion for Partial Summary Judgment on Liability on Count 9 of the
3 State’s Amended Complaint (Doc. 168); and (III) Plaintiff State’s Motion for Partial
4 Summary Judgment – Count 9 (Doc. 170) – now before the Court for consideration (Doc.
5 198).

6 This matter has been referred to the United States Magistrate Judge for all pretrial
7 proceedings and report and recommendation in accordance with the provisions of 28
8 U.S.C. § 636(b)(1) and LRCiv 72.1 and LRCiv 72.2, Rules of Practice of the United
9 States District Court for the District of Arizona.

10 Before the Court for consideration is the Report and Recommendation (Doc. 198)
11 of Magistrate Judge D. Thomas Ferraro recommending that this Court:

12 (I) grant the State’s motion for summary judgment on Count 9 of the First
13 Amended Complaint and hold that there is no genuine dispute of material fact that the
14 USIBWC is at least partial owner or operator of the International Outfall Interceptor
15 (“IOI”), based in part on the USIBWC having admitted partial ownership of the IOI –
16 from which wastewater is continuously discharged into the Nogales Wash in violation of
17 Ariz. Rev. Stat. § 49-255-01 – and further based on the finding that the IOI is one
18 continuous 8.8 mile pipeline and there is no physical distinction in the portions of the IOI
19 at issue, and thus, the undisputed evidence establishes that the IOI is the entire 8.8 mile
20 pipeline that runs from the international border to the current Nogales International
21 Wastewater Treatment Plant (“NIWTP”) site;

22 (II) Enter summary judgment in favor of the USIBWC on a discrete subpart of
23 Count 9 of the Amended Complaint – and find that there is no evidence that untreated
24 wastewater is released through cracks in the IOI; and

25 (III) Enter summary judgment in favor of the City of Nogales on the Second Claim
26 of the Third Party Complaint – based on the finding that there is no evidence that Nogales
27 is at fault for the discharges from the IOI; and therefore, the USIBWC cannot recover
28 from Nogales under the fault-based contribution theory of liability.

1 Magistrate Judge Ferraro issued the Report and Recommendation at issue on April
2 4, 2017, following briefing and oral argument, setting forth the relevant factual
3 background and analysis of Count 9 of the First Amended Complaint and Second Claim
4 for relief of the Third Party Complaint under the relevant provisions of the Clean Water
5 Act, 33 U.S.C. § 1251 *et seq.* – and the Arizona Pollutant Discharge Elimination System
6 (“AZPDES”) permit program a federally approved National Pollutant Discharge
7 Elimination System (“NPDES”) – administered by the Arizona Department of
8 Environmental Quality (ADEQ) and approved under the Equal Protection Agency
9 (“EPA”), 33 U.S.C. § 1342(a).

10 The parties were advised that, pursuant to Rule 72(b)(2), Fed.R.Civ.P., any party
11 may serve and file written objections within 14 days of being served with a copy of the
12 Report and Recommendation, and a party may respond to the other party’s objections
13 within 14 days therefrom.

14 Defendants USIBWC filed Defendants’ Objection to Report and Recommendation
15 on Plaintiff’s Motion for Partial Summary Judgment (Doc. 199) objecting to the
16 recommendation that the Court grant the Plaintiff State of Arizona’s request for a
17 determination that the IOI is the entire 8.8 mile pipeline that runs from the international
18 border to the current NIWTP, which, if granted, “would constitute a holding that the
19 USIBWC has an ownership interest in the entire pipeline.”

20 The City of Nogales’ Response to the USIBWC’s Objection to the Report and
21 Recommendation on Plaintiff’s Partial Motion for Summary Judgment (Doc. 200) filed
22 on May 2, 2017, opposes USIBWC’s objection and urges the Court to affirm the Report
23 and Recommendation in its entirety.

24 Also filed on May 2, 2017, in response in opposition to USIBWC’s objection, is
25 Plaintiff State’s Response to Defendant USIBWC’s Objections to Magistrate Judge
26 Ferraro’s Recommendation (Doc. 201), substantiating that the State has proven that (1)
27 discharges from the IOI into the Nogales Wash are ongoing; and (2) USIBWC is partial
28 owner of the IOI. The State argues that USIBWC offered no relevant and material facts

1 to dispute the findings that the State has satisfied both elements, and therefore, requests
2 the Court deny USIBWC's objection and uphold the Report and Recommendation.

3 Upon review and consideration of all matters presented and an independent
4 review of the record herein, including the parties' objections, the Court finds that the
5 findings of the Magistrate Judge on the City of Nogales' Motion for Summary Judgment
6 Regarding Count II of Third Party Plaintiff USIBWC's Third Party Claim; USIBWC's
7 Motion for Partial Summary Judgment on Liability on Count 9 of the State's Amended
8 Complaint; and Plaintiff State's Motion for Partial Summary Judgment – Count 9, as set
9 forth in the Report and Recommendation, shall be accepted and adopted as the findings
10 of fact and conclusions of law of this Court. Accordingly,

11 **IT IS HEREBY ORDERED** that the Report and Recommendation of the
12 Magistrate Judge (Doc. 198) is **ACCEPTED and ADOPTED** as the findings of fact and
13 conclusions of law by this Court;

14 **IT IS FURTHER ORDERED** that The City of Nogales' Motion for Summary
15 Judgment Regarding Count II of Third Party Plaintiff USIBWC's Third Party Claim
16 (Doc. 166) is **GRANTED**; accordingly,

17 **IT IS FURTHER ORDERED** that the Clerk of Court enter judgment in favor of
18 the City of Nogales on Claims 1 and 2 of the Third-Party Complaint and dismiss the
19 Third-Party Complaint (Doc. 5) with prejudice;

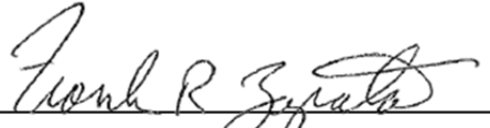
20 **IT IS FURTHER ORDERED** that USIBWC's Motion for Partial Summary
21 Judgment on Liability on Count 9 of the State's Amended Complaint (Doc. 168) is
22 **GRANTED**; notwithstanding the foregoing and in accordance with the Report and
23 Recommendation;

24 **IT IS FURTHER ORDERED** that Plaintiff State's Motion for Partial Summary
25 Judgment – Count 9 (Doc. 170) is **GRANTED**.

26 **IT IS FURTHER ORDERED** – based on the issues of liability having been
27 established in favor of the Plaintiff State of Arizona on remaining Counts One, Three,
28 Five and Nine of the First Amended Complaint – that this matter is referred back to

1 Magistrate Judge Ferraro for pretrial proceedings in accordance with the provisions of 28
2 U.S.C. § 636(b)(1) and Local Rules LRCiv 72.1 and LRCiv 72.2 for purposes of
3 conducting a status conference to determine whether the parties seek to pursue a
4 resolution regarding the injunctive relief and civil penalties sought in the First
5 Amendment Complaint and any award of attorney's fees and costs.

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7 Dated this 20th day of September, 2017.

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11 Honorable Frank R. Zapata
12 Senior United States District Judge
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