

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

08/29/2019

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

T. DeRaddo
Deputy

CASE NO: CV 6417-203

FILED: September 10, 2019
Case No. CV 6417-203

In re: the General Adjudication
of All Rights to Use Water in the
Little Colorado River System and Source

In re: Hopi Reservation HSR

In re: Hopi Tribe's Motion for a Pretrial
Conference

MINUTE ENTRY

Central Court Building - Courtroom 301

8:30 a.m. This is the time set for a Pretrial Conference at the request of Mr. Campbell on behalf of the Hopi Tribe. All parties appear telephonically as follows:

- Vanessa Boyd Willard and Andrew G. Guarino on behalf of the United States Department of Justice, Indian Resources Section;
- Collin Campbell, Axel Buchwalter and Grace Rebling on behalf of the Hopi Tribe;
- Kathryn Hoover, Jeff Leonard and Evan Hiller on behalf of the Navajo Nation and the Navajo Nation Department of Justice;
- Lauren Caster and David Brown on behalf of the Little Colorado River Coalition (LCR Coalition);
- Carrie Brennan on behalf of the Arizona State Land Department;
- Mark McGinnis and Jeffrey Heilman on behalf of Salt River Project (SRP);
- Lee Story, Sara Ransom and Alexandra Arboleda on behalf of the City of Flagstaff; and
- Kimberly Parks on behalf of Arizona Department of Water Resources (ADWR).

Court Reporter, Marylynn LeMoine is present. A record of the proceedings is also made digitally.

Discussion is held regarding the Navajo Nation's motion to move the proposed briefing the attributes of federal reserved water rights from *In re Navajo Nation* to this case.

Mr. Campbell suggests that the issue can be briefed in connection with the parties' objections to the Court's draft order and requests that the parties not be required to submit separate briefing. He feels that any issues with respect to the federal reserved water rights can be incorporated into those briefings because it would tie the issue to the facts.

In the Court's proposed order in its Findings of Fact and Conclusions of Law (pages 63-68) regarding livestock, Mr. Campbell seeks clarification of whether there are uses other than livestock where the Court has an issue with respect to defining the characteristics of federal reserved water rights. Mr. Campbell also pointed out that the parties have briefed their positions on the characteristics of federal reserved water rights in the context of the *de minimis* issue in *In re Navajo Nation*.

The Court addresses the parties and states that based on the record made at trial regarding specific characteristics there does not appear to be an issue with the quantity of water used at specific places of use and from specific points of diversion for past use of water for mining or for most of DCML. The two areas where there is not the same specificity as to quantity at specific places of use and points of diversion are livestock and irrigation. Mr. Campbell has opined in his pleading that exact specificity as to place of use is not required with regard to irrigation as between upstream and downstream users within the reservation.

The Court requests that the parties discuss the areas where there is a need to further define the characteristics of federal reserved water rights.

Vanessa Willard addresses the Court stating that the United States is in agreement with Mr. Campbell that further briefing should be conducted in the context of objections to the draft report rather than a separate briefing schedule. Ms. Willard plans to focus the United States' positions on livestock and agriculture.

Kathryn Hoover addresses the Court stating that the Navajo Nation has a different view. Ms. Hoover believes that the Court's intent was to resolve the question of federal water rights attributes that would include not only the past and present claims, but also the claims for future use. The Navajo Nation's position is that the briefing should address all claims, past, present and future uses, and that all attributes of federal reserved water rights for each type of use should be resolved. Further, the Navajo Nation does not agree that there are only certain types of claims for which there is a question as to federal reserved water right characteristics. Additionally, the Navajo Nation disagrees with the Hopi Tribe's position that factual conditions on the Hopi Reservation and the Navajo Reservation may dictate different attributes for the two tribes.

Ms. Hoover states that the Order setting today's hearing suggests that the difference between the Navajo Nation and the other objectors and the Hopi Tribe and the United States is focused on the source of supply and the question of whether a source can be used to supply different uses. She states that the fundamental difference is that the United States and the Hopi Tribe believe there are only four attributes and the other parties believe that full panoply of attributes must be determined. The difference in positions between Navajo and Hopi is whether attributes for federal reserved water rights may be different in some places than they are under state law. The Navajo Nation believes that every type of use needs briefing as to the attributes and then for each type of use the difference between existing and future uses. Ms. Hoover also raised the issue of whether the determination made in the Court's report re aboriginal uses means that those uses have a time immemorial priority and, if so, would the same types of use in the future also have a time immemorial priority.

The Court states that the attributes in the decree will describe the water rights based on future use and past use, and anticipates that there will be one set of attributes in the decree establishing the federal reserved water rights for the Hopi Tribe.

The Court states that Mr. Campbell makes the argument that the characteristics necessary to define federal reserved water rights may be fact-dependent and questions Ms. Hoover whether the issue of the characteristics of federal reserved water rights can be properly briefed in connection with the objections to the draft report.

Ms. Hoover ultimately feels that these issues may not be properly briefed in the context of objections to the draft report. The Nation's view is that attributes may be different for past and present and future uses. Ms. Hoover states that when you have a (future) use that does not yet exist, there is no way to assign attributes to it, and specificity is not possible with respect to assignment of attributes. She suggests that additional briefing on this issue may be necessary.

Lauren Castor addresses the Court and states that the question of attributes is broader as to factual matters than outlined in the Court's order setting the pretrial conference. Water sources' flow rates should be quantified, but they have not been. Mr. Castor believes that this is a defect in the evidence past and present and also for the claims presented for the future case(s). Mr. Castor agrees with the Navajo Nation in that the requirements for the attributes of the future federal reserved water rights are not the same as they are for past uses. Linking this briefing to the record of the past and present case would be a mistake. He suggests that any party that wants to brief the attributes of the federal reserved water rights should do so in conjunction with the Court's dispositive motion briefing schedule. Thus, the Court can rule on these motions prior to the future use trial. Mr. Castor also cited to the current demand on the parties' time and resources as additional factors not to require additional briefing at this time.

Carrie Brennan addresses the Court. She is in agreement with Mr. Castor in that the most efficient way to brief this issue is in conjunction with the dispositive motion

schedule. She states that it is preferable to not link this issue with the past and present report.

Mark McGinnis addresses the Court and agrees with Ms. Brennan and Mr. Castor in that he does not feel that the briefing should be included with the past and present comments on the Court's report. He states that if the parties brief the issue with the summary judgment (dispositive motion) deadline that the parties would be tying the briefing to the future case. Mr. McGinnis requests that a separate, elongated briefing schedule be set in place. He further stated the issue could be jointly briefed in the Navajo and the Hopi cases and the two tribes need to be treated fairly and equally.

Lee Storey addresses the Court and agrees with the LCR and the State Land Department with respect to the need to define the rights with specificity to have an enforceable decree. Ms. Storey states her concern given the discovery schedule to meet the current deadline for dispositive motions. She does not agree that the attributes for the Hopi Tribe or the Navajo need to be different. She asserts it is suitable to issue attributes at the same time; she feels that the attributes need to be proven up. She argues that based on the Statements of Claimant, the United States and the Hopi Tribe do not have the data necessary to prove rights with the specificity required for federal reserved water rights. She does not express an opinion as to the appropriate time to schedule the briefing.

Mr. McGinnis requests that the opening briefs be due in late October; and the responses due later in the year so that the Court could resolve this issue at or before the dispositive motion deadline in both cases and not bind it with the dispositive motions in the future uses case.

Jeffrey Leonard addresses the Court and speaks about the Hopi fact witnesses' depositions. Mr. Leonard discusses consideration of a plan to take water from Well No. 9 which would relate to the mining claims, and to use the abandoned slurry pipe line to transport the water for the DCMi use. He believes that unlike past uses, the future uses are not "neatly categorized."

Mr. Campbell states that *Gila V* requires a comprehensive, fact-based determination with respect to federal reserved water rights. Mr. Campbell reports that no one is in a position to determine the attributes of future water rights until all of the facts are determined as to the source of and need for water. Mr. Campbell responds to the Court's question about whether he believes it is appropriate to decide attributes on motions prior to the trial.

Vanessa Willard addresses the Court. She states that the United States is opposed to briefing what attributes are necessary for a federal reserved water right "in theory." The facts of future use claims need to be determined. The federal reserved water rights are subject to tribal sovereignty. The water rights will be administered by the tribes. Ms. Willard asserts that the tribes are federally recognized and not controlled by a state court.

The Court suggests the possibility of having range managers and range experts meet and confer regarding range management needs for water including the mapping of required sources and uses and amounts of water of wells, stock ponds and springs. The Court notes that the lack of data appears to be most prevalent in the area concerning livestock.

IT IS ORDERED the parties shall speak to their experts regarding whether consultation on the development of a range management plan would advance the resolution of this case. The Court will set a time for the parties to respond to this question.

9:24 a.m. Matter concludes.

LATER:

These current proceedings arose from the Court's proposal in *In re Navajo Nation* to have the parties brief the attributes of federal reserved water rights given the parties' ongoing dispute about the characteristics that must be proven to define those rights. The Navajo Nation subsequently moved, without any objection from the other parties, to have the issue briefed in this case as opposed to in *In re Navajo Nation*. The Hopi Tribe responded to the Court's proposal by suggesting that the issue could be addressed in part in the context of past and present uses by including briefing with the objections to the draft report. Fundamentally, however, neither the United States nor the Hopi Tribe appear to view the issue as one of law and contend that the issue of the attributes of federal reserved water rights must be determined based on the facts and law. The logical extension of their arguments is that attributes of federal reserved water rights cannot be determined prior to the completion of the trial. Two other parties, the Navajo Nation and the LCR Coalition, contend that the attributes could differ depending on whether the rights arise from past and present uses or future uses. Thus, an initial dispute appears to exist as to whether the attributes of federal reserved water rights for an Indian reservation are a matter of law or a matter of fact and law.

Based on the foregoing and the arguments presented, the Court will not pursue its proposal to have the parties brief the attributes of federal reserved water rights at this juncture. A party that desires to brief the attributes of the federal reserved water rights may do so in conjunction with the established dispositive motion briefing schedule.

IT IS FURTHER ORDERED that the parties shall file by **November 1, 2019** a statement whether they believe that a joint meeting of the expert range managers for the Hopi Tribe, the United States, the Navajo Nation as well as expert range managers for the other parties to devise a detailed plan for stockpond and stock watering uses on the Hopi Reservation sufficient for the Hopi Tribe to maintain livestock consistent with a permanent homeland could advance the resolution of the claims for water for livestock use in this case. Lawyers for the parties would not be excluded from the meeting.

IT IS FURTHER ORDERED setting a Pretrial Conference on **January 15, 2020** at **1:30 p.m.** in the Maricopa County Superior Court, Courtroom 301, Central Court Building, 201 West Jefferson, Phoenix, Arizona 85003 to schedule due dates and address the content of a Pretrial Statement, including the form of the exhibit list and exhibits, the expected duration of the trial, and time periods and topics for post-trial briefing. A proposed schedule for the Pretrial Statement is as follows:

March 27, 2020 - The United States completes additions to the Pretrial Statement and distributes a revised Pretrial Statement to all other parties.

April 3, 2020 - The Hopi Tribe completes additions to the Pretrial Statement and distributes a revised Pretrial Statement to all other parties.

April 13, 2020 - The Navajo Nation completes additions to the Pretrial Statement and distributes a revised Pretrial Statement to all other parties

April 20, 2020 - The LCR Coalition completes additions to the Pretrial Statement and distributes a revised Pretrial Statement to all other parties

April 27, 2020 - State Land Department completes additions to the Pretrial Statement and distributes a revised Pretrial Statement to all other parties.

May 1, 2020 - The City of Flagstaff and any other parties complete additions to the Pretrial Statement and distribute the revised Pretrial Statement to all parties.

May 15, 2020 - Joint Pretrial Statement filed.

Instructions for telephonic appearance:
Dial: 602-506-9695 (local)
1-855-506-9695 (toll free long distance)
Dial Participant Pass Code 357264#

A copy of this order is mailed to all parties on the Court-approved mailing list for Civil Case No. CV6417-203.