

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE
DONNA J. GRIMSLEY, PRESIDING JUDGE

THE HONORABLE EDDWARD
P. BALLINGER, JR., Visiting Judge

SUE HALL, Clerk

COURT REPORTER: Susan Humphrey

By: Barbara J. Silversmith, Deputy

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE	Case No. CV-6417 DATE: October 18, 2005 TIME: 9:40 A. M. MINUTE ENTRY: Status Conference
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DESCRIPTIVE SUMMARY	Status Conference held in the Apache County Superior Courtroom, St. Johns, Arizona.
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DATE OF FILING	January 26, 2006

MINUTE ENTRY

This is the date and time set for a Status Conference in Civil No. 6417.

APPEARANCES

Mr. John B. Weldon, Jr.; Ms. Alexandra M. Arboleda; and Mr. Jeffrey Ehlers, representing Salt River Project; Mr. Lauren J. Caster, representing Abitibi Consolidated Sales Corporation and Arizona Water Company; Ms. Jane Marx; Mr. Carleton Albert, Sr.; Mr. Edward Wemytewa; and Mr. Andres Cheama, representing Pueblo of Zuni; Mr. Colin Hampson; Mr. King Honani, Sr.; Mr. Ambrose Naunola, Sr.; and Mr. Jerry R. Sekayumtewa, Sr., representing Hopi Tribe; Mr. Gregg Houtz and Mr. Rich Burtell, representing Arizona Department of Water Resources; Mr. Michael Brown and Mr. David A. Brown, representing various claimants; Mr. Marc Jerden, representing Tucson Electric Power Company; Mr. Graham Clark, representing Arizona Attorney General's Office for the State Land Department; Mr. Stanley Pollack, representing the Navajo Nation; Mr. Cynthia Haglin, representing City of Chandler; Mr. Stephen G. Bartell, representing U.S. National Park Service, U.S. Forest Service and Bureau of Land Management; Mr. Roy Jemison, representing U.S. Forest Service, Region 3; Mr. William Staudenmaier, representing Arizona Public Service, Aztec Land & Cattle Company, and Phelps Dodge; Ms. Vanessa Boyd Willard, representing U.S. Department of Justice (Indian Resources

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Section); Mr. Steve Wene, representing City of Flagstaff; Mr. Charles Cahoy, representing City of Mesa.

Also in attendance: Special Master George A. Schade, Jr.; and Kathy Dolge, Assistant to the Special Master.

Judge Ballinger welcomes everyone in attendance.

**Court's Report on April 21, 2005 Meeting with ADWR
Director Herb Guenther**

The Court reports on the meeting last spring with ADWR Director Herb Guenther. Their primary discussion centered on the State's downward economic turn and lack of resources available to assist with the adjudications. They discussed a plan to build the adjudication resources to a sufficient level similar to those in place in the mid 1990's. The Court notes that the Director is moving expeditiously to request a substantial increase in resources from the Legislature. The Court also indicates they need to get to a point where ADWR can work on a number of issues identified in this adjudication and the Gila Adjudication that need the expertise of ADWR. Mr. Gregg Houtz, representing Arizona Department of Water Resources, states a proposal has been sent to the Governor's Office and discussions for funding are ongoing.

Status of Settlement Discussions

The Court asks for updates on settlements.

Mr. Stephen G. Bartell, representing the U.S. Department of Justice (General Litigation Section), reports they have been engaged in general settlement agreements to resolve water claims and objections of three Federal agencies. Settlement negotiations have been ongoing for years and they are optimistic they will eventually settle. He further reports that in a June meeting, another draft of a settlement agreement was on the table and that non-Federal parties will be submitting comments on that draft. There will be another meeting in November, and State parties are working together without a mediator.

The Court facilitates discussion concerning a Memorandum filed on behalf of the Navajo Nation, the Kyl Report and Federal District Court litigation. Mr. Bartell states they are making progress.

Ms. Vanessa Boyd Willard, representing the Department of Justice, reports on the settlement negotiations involving Indian Tribes. The LCR Indian Settlement negotiations have been linked to settlement negotiations surrounding the Navajo Breach of Trust claims against the United States. They had several meetings and there is another meeting on November 9, 2005. They are slowly progressing with proposals

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on the table and advises there is a stay on the Federal District Court litigation regarding the Little Colorado River until October 2006. From her perspective, the looming October 2006 deadline is encouraging parties to move forward.

Ms. Jane Marx, representing the Zuni Tribe, reports on the Zuni settlement. They are optimistic about settlement and will be asking the Court to approve the settlement but cautions that there are still a number of conditions to be met prior to the Court's approval.

Mr. Stanley Pollack, representing the Navajo Nation, states they submitted a comprehensive settlement proposal which would resolve the main stem issues for the Navajo Nation in the Lower Basin and the Little Colorado River Basin. They will be meeting next month to discuss the proposal. He reviews the background of the Kyl Report and the merger of discussions on Little Colorado River and Colorado River. Parties have acknowledged that resources within the Little Colorado River Basin are not sufficient to secure a permanent homeland for the Navajo people. The Kyl report and other studies have reached the conclusion that there would be a need for some imported water supplies from the Colorado River. In the late 1990s, that settlement included the use of Colorado River water for both the Navajo and Hopi Tribes. At that time they did not have discussions with respect to Central Arizona Project water supplies.

Mr. Pollack and the Court discuss the use of Colorado rural water and basin water. Mr. Pollack agrees with the Court, in the event there was a shortfall in the Little Colorado, they would be asking for more Colorado River water. Mr. Pollack states they will try to present a water budget that will look at all the various water supplies.

The Special Master asks about how the settlement process has been progressing without the services of a settlement judge. Mr. Houtz informs the Court that he has assumed the role of coordinator and facilitator at meetings. The Court states it has not forgotten about the need for a mediator. At this time the best that can be done is having updates from the parties until funding is available for a mediator.

Federal Non-Indian Water Rights (federal land management agencies)

Mr. Bartell states their settlement discussions would encompass all of the Forest Service and BLM water right claims. It would also encompass all the objections the National Park Service and National Forest Service would have to other parties that would sign onto that agreement. The National Park Service has already entered into an agreement which has been approved. They want to create a general settlement agreement and any party that signs onto that agreement would not be in position to object to the water rights laid out in the settlement agreement.

The Special Master inquires regarding ADWR's role in terms of field work of a global settlement of non-Indian water rights. Mr. Bartell states they have not discussed that particular issue. They are looking at different means of determining existing water uses, stock ponds and wells.

Mr. David Brown, representing various claimants, states the dilemma is that there are obviously many claimants that may or may not have objections to the claims involving the BLM or Forest Service. What they are trying to do is provide a safe harbor where a claimant can take advantage of the settlement without having to go through the litigation. They are trying to craft a way of finding those claimants that want to take advantage of these safe harbors, while the Forest Service and BLM have their water rights made part of the settlement. He indicates it is very complicated, but they have made significant progress.

ADWR's Report on Hopi Tribe HSR

The Court inquires of ADWR's written report concerning the Hopi Tribe HSR and notes that the Show Low Lake contested case has been resolved. The Court indicates it looked at the April 1994 report of Special Master John Thorson also referred to as the "*De Minimis* Report" and suggests taking issues identified by Mr. Pollack of the Navajo Nation. One major issue that is winding its way is the State of Arizona's motion regarding the existence of federal reserved water rights on State Trust Lands, which the Special Master has.

Special Master Thorson's Memorandum Decision, Findings of Fact, and Conclusions of Law for Group I Cases Involving Stockponds, Stockwatering, and Wildlife Uses (April 1994)

The Court asks for opinions on Special Master Thorson's April 1994 report regarding the five major sections as outlined in the report and whether they are appropriate for resolution of the ongoing adjudication.

Mr. Brown addresses several points regarding the 1994 report:

- Settlement negotiations ongoing with the United States regarding BLM and the Forest Service deal with a broader variety of issues than those contained in the report. If parties have to litigate the conclusions of law made by the Special Master in 1994 with regard to ownership of federal land that is going to put an end to negotiations. His clients have very small water uses and are not able to do both types of litigation.
- Mr. Walsh, who was the predecessor to Mr. Bartell, made the same observation to Judge Dawson who suggested a resolution by settlement.

- As far as *de minimis* water rights in the settlement negotiations with the United States involving BLM and Forest Service claims, they are going down a different track with *de minimis*. They are finding better ways to deal with *de minimis* uses. They may or may not use the same criteria the Special Master recommended. Those criteria will not be helpful in negotiations with the United States on behalf of BLM and Forest Service, so he sees no need to address *de minimis* water rights.
- The ADWR should amend the HSR Watershed File Reports as some claimants have died, permittees no longer own the permits or have transferred them, and some may not have filed statements of claimant. Much of the report dealt with who owned water rights on State lands. Mr. Brown filed significant briefs for trial in behalf of the Cattlegrowers Association.
- The State Land Department filed new claims on December 22, 2003, making new claims on the same stock ponds. They also filed claims for federal reserved water rights on some of the same waters that the Special Master had already ruled on. ADWR would have to pull the amended claims in the Watershed File Reports to figure out the status. Mr. Brown does not think they can move forward on the Watershed File Reports if they are subject to amended claims.
- The State Land Department among others introduced legislation in 1995 which the Supreme Court held was unconstitutional regarding ownership to water rights on State land. It is an issue that needs to be addressed as the law was different in 1994.
- The Motion for Summary Judgment filed by the State Land Department creates uncertainty as to all watershed file reports, all State land claims and those that have State land leases until the federal reserve water rights question is resolved. Negotiations are on-going in federal ownership issues.

The Court is sympathetic to the small users that have to expend funds to protect their rights. He understands Mr. Brown's concern on how the Court would order the resolution of legal issues. He feels that the stay that was put into place concerning adversarial proceedings did not help move negotiations forward.

Mr. Brown states he does not disagree with this in regards to the Indian claims and explains that the WFR's that are the subject of the order in this case will not address issues they are working on in the negotiations. The hard cases are the ones that were not addressed by the Special Master in the Silver Creek rulings, for instance, water rights established prior to 1903 and ownership of federal reserved water rights on

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Forest Service land. BLM land is a whole different issue and in the south there are PWR 107 BLM claims, which are the Court's fifth priority. In this area there are very few PWR 107 BLM claims and the major issues that might be decided by the Court are not in the Special Master's report. The third issue is lakes, reservoirs and springs on National Forest lands and their water use off Forest land which supply his clients' irrigation districts are not reflected in this report. Lastly, groundwater was not addressed in the report.

The Court addresses the parties regarding *de minimis* water rights and inquires why a determination at this time of a *de minimis* standard similar to John Thorson's report would be detrimental.

Mr. Brown does not know if it would be detrimental or helpful. He feels the information is stale and would have to be reviewed by ADWR, which would divert them from bigger issues such as the Hopi HSR. He states issues set forth by the Navajo Nation are all issues raised in prior disclosures. Disclosure statements were filed December 31, 2001, and State Parties filed a list of legal issues that could be determined without an HSR. Additionally, the Navajo Nation filed a Disclosure Statement in November 2002 that set forth similar information with regard to issues that could be litigated without an HSR. Mr. Brown indicates that Mr. Pollack has just recently submitted a summary of these issues.

Mr. Colin Hampson, representing the Hopi Tribe, requests additional time to respond to the Navajo Nation. The Tribe wants time to assess the facts and the law reflected in the pleading. They have proceeded under the notion that the matters would be resolved in trial and need time to confer with the Hopi Tribal Council. Mr. Hampson asks for 90 days to address the above issues that were identified by Mr. Pollack. The Court grants the Hopi Tribe 90 days to respond.

The Court reviews the history of the dispute between the Tribes and different claims, where there was extensive litigations and asks who represented the Hopis and the Navajos with respect to that extensive litigation. The Court is informed that Arnold and Porter represented the Hopi Tribe and Brown and Bain was the law firm of record for the Navajo Tribe. In subsequent cases, a number of different firms represented the Navajo Nation.

The Court informs the parties that he worked at the law firm of Brown and Bain until he was appointed to the Superior Court. He had previously disclosed this information and had researched the judicial code concerning this matter and finds that there is no conflict.

Mr. Hampson feels the question of a priority date is important for determining the rights of the Hopi Tribe and the Navajo Nation to the water resources, which they both share access to. Mr. Hampson states that the Hopi Tribe is land locked by the Navajo Nation.

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In considering the Navajo Nation pleading, he asks if the expedited time frame will allow for factual development.

The Special Master inquires if the summarized issues from Mr. Pollack's pleading could be reduced to one or two issues. Mr. Pollack states that the two issues that are critical to the Navajo Tribe are prioritization and access to water resources outside the Reservation line. Mr. Pollack states that there are issues that lend themselves to adjudication without the necessity of an HSR. With respect to all issues, there will be discussions whether or not factual inquiry will be necessary and whether there would be legal matters to be resolved by way of summary judgments or evidentiary hearings.

The Court and Mr. Pollack discuss priority and access issues. Mr. Hampson clarifies the two issues from his reading of the Navajo Nation's pleading.

Mr. Lauren J. Caster, representing Abitibi Consolidated Sales Corp. and Arizona Water Company, states that there are more issues that have been before the Court for three years. There were 20 issues listed in the November 2002 Disclosure Statement. He proposes that motions for summary judgment be staggered and expresses concern about the 90 day briefing period.

The Court explains his schedule and his family court assignment. His goal is to have consensus on the next issues that should be brought before the Court.

Mr. Weldon, representing Salt River Project, states he is in agreement with Mr. Brown with respect to the Special Master's report. He addresses the issues raised by the State Parties and the Navajo Nation. The Norviel Decree applies to the 26 Bar Ranch that the Hopi Tribe acquired through the land settlement legislation. He reviews the 26 Bar Ranch status under the Norviel Decree and suggests that access to those water resources should be resolved by summary judgment. The Hopi Reservation's access to water is another significant issue in his opinion. Not all claims need to be referred to the Special Master. Mr. Weldon suggests a dual track system, some issues going before the Special Master and some going directly to the Court. He urges the Court to set a briefing schedule dividing these issues before the 90 day time period passes.

Mr. Schade states that the Court should address those issues that would have impact on negotiations and suggests that the parties get together to identify three to five issues of importance.

The Court does not think that everyone would agree on what issues are the most important and inquires of Mr. Caster what issues he believes are important. Mr. Caster indicates there are other issues he would like to file with the Court.

Mr. Hampson states they are willing to participate in conversations that will aid resolutions.

The Court addresses the parties concerning outstanding issues.

Mr. Schade addresses Mr. Weldon's comments regarding the Norviel Decree and suggests hearing from other parties. He inquires if there are other parties who claim rights under that decree who may want to join in the briefing of Norviel Decree issues.

Mr. Weldon states there is a statute that deals with prior decrees. The issue is whether the Hopi land is encompassed within the scope of that decree and the fact the Little Colorado River runs through the 26 Bar Ranch. He also addresses the extent of the water uses set forth under the Norviel Decree.

Ms. Willard comments on the scheduling and the summary judgment issues. She states there are two factors which indicate they will be moving forward: #1 - HSR on Hopi has been started and the timeline of Ms. Ronald's filing indicates that ADWR will have a completion date in May 2006. #2 - Mr. Brown's comments on settlement discussion with non-Indians' interest in the basin. In the Spring or summer of 2006 water issues can be addressed due to a deadline in the Federal District Court litigation. Ms. Willard states that she also is in support of the 90 days.

Mr. Graham Clark, representing Arizona Attorney General's Office, comments that the Game and Fish Department and the State Land Department support the many of the *de minimis* findings in Special Master Thorsen's Report and have no objection to a case management policy. Secondly, they are impressed with the capability of the contested case format and the way it is being handled. He also addresses federal reserved water rights and State Trust Lands. Lastly, he expresses skepticism about having a dual track for determinations of issues.

Mr. William Staudenmaier, representing Arizona Public Service and Aztec Land & Cattle Company, agrees with the State Parties and suggests keeping it to a list rather than briefings and suggests the Hopi Tribe and Navajo Nation do the same lists of issues.

Mr. Caster notes how the Court considered legal issues through motions for summary judgment in the W1-203 and W1-206 contested cases in the Gila River Adjudication.

Mr. Pollack states that in terms of prioritization of issues, agreement between the Hopi Tribe and the Navajo Nation concerning resources shared by the two Tribes and the Norviel Decree issues are important issues in terms of settlement.

The Court inquires if it is realistic to ask for the list of issues from the State Parties in 30 days. Mr. Weldon states that it is.

Mr. Houtz asks if ADWR should respond to the lists of issues. The Court informs Mr. Houtz that the Court will allow ADWR to participate. Mr. Caster states that ADWR's

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input will not be helpful because these are legal issues.

The Court makes comments concerning a briefing schedule, oral arguments, and referring issues to the Special Master. The Court will allow all claimants thirty days to file lists of issues, and the Hopi Tribe will have sixty days after that to file its list of issues.

The Court inquires if St. Johns is a convenient location for hearings. Discussion follows concerning the location of the next hearing. Mr. Hampton and Mr. Brown suggest Phoenix. The Court states that there might be a few hearings held in Phoenix. The Court hopes ADWR's report will be done by May 2006. There is discussion concerning the next status conference date.

Mr. Brown asks the Court to hold ADWR to completing the Hopi HSR within the original time frame of two to three years after the amended Statements of Claimant were filed. The Court indicates that he clearly communicated to ADWR that they need to step up and provide the services that will move the litigation forward.

Special Master's Report

Mr. Schade reports the Show Low Lake contested case was dismissed. ADWR issued a news release. He will file a final report. He also reports on the Supreme Court's amendment of Arizona Rule of Civil Procedure 53 which goes into effect January 1, 2006. He comments that in 1992, one of the parties in this adjudication appealed Special Master Thorson's report which ended in a special action in the Supreme Court. Mr. Schade submitted comments to the Supreme Court to clarify the rule that only a master's final decision should be reviewed by the Court. He also states that the Supreme Court will adopt a new Records Retention Schedule which will govern the records of adjudication cases. All court records, pleadings, statements of claimant, exhibits and transcripts will be permanently retained. They will be microfilmed and originals will be sent to State Archives. Mr. Houtz inquires about the use of computer imaging as opposed to microfilming. Mr. Schade indicates that microfilm is the accepted standard for archival purposes.

The Court thanks everyone for their attendance.

11:18 a.m. - Hearing concludes.

The original is filed with the
Apache County Superior Court.

A copy of this Minute Entry is
mailed to all parties on the Court
approved mailing list for

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CV-6417 dated June 15, 2005.