

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

**THE HONORABLE EDWARD P. BALLINGER, JR.**  
Visiting Judge

**SUE HALL, Clerk**

COURT REPORTER: Susan Humphrey

By: Barbara J. Silversmith, Deputy

<b>IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE</b>	Case No. <b>CV-6417</b>  DATE:         April 06, 2004  TIME:         9:30 A. M.  <b>MINUTE ENTRY: Status Conference</b>
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<b>DESCRIPTIVE SUMMARY</b>	Status Conference held in the Apache County Superior Courtroom, St. Johns, Arizona.
<b>NUMBER OF PAGES</b>	<b>(9)</b>
<b>DATE OF FILING</b>	July 7, 2004

**MINUTE ENTRY**

This is the date and time set for a Status Conference in the Little Colorado River Water Adjudication case, Civil No. 6417.

**APPEARANCES**

David Brown and Michael Brown, representing various clients; Stephen G. Bartell, representing the U.S. Department of Justice (U. S. National Park Service, Forest Service & BLM); Jane Marx, Edward W. Wemytewa and Albert Carleton, representing the Pueblo of Zuni; A. Scott Canty, James Meggesto, Eugene Kaye and Jerry Sekayuptewa, representing the Hopi Tribe; Stanley Pollack and Scott McElroy, representing the Navajo Nation; Graham Clark, representing the Office of the Attorney General for the Arizona State Land Department; Jan Ronald, representing Arizona Department of Water Resources; Cynthia Chandley, representing Phelps Dodge; John Lemaster and Amy Langenfeld, representing Arizona Public Service, Phelps Dodge and Aztec Land & Cattle Co.; John B. Weldon, Jr., David C. Roberts and Alexandra M. Arboleda, representing Salt River Project; Vanessa Boyd Willard, representing the U.S. Department of Justice (Indian Resources Section); Lauren J. Caster, representing Abitibi Consolidated, the Arizona Water Company, Santa Fe Pacific Railroad Company and Burlington Northern Railroad Company; Mitchel D. Platt, representing various claimants; William W. Quinn

and John Doney, representing the Department of the Interior (Office of the Solicitor); William Darling, representing Cameron Trading Post & Atkinson Trading Company; Cynthia Haglin, representing City of Chandler; Pete Shumway, representing LCR counties; Mary Ann Joca, representing USDA Forest Service; Charles Cahoy, representing City of Mesa; and Dan Heap and R. Bruce Overson, representing St. Johns Irrigation Company; Jim Hauser, representing Lyman Irrigation Company.

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

### **STATUS OF SETTLEMENT DISCUSSIONS**

The Court addresses the parties in attendance concerning general settlement progress. Judge Nelson will no longer be a settlement judge in this process. The court inquires if any informal meetings have taken place.

Mr. Stephen G. Bartell, on behalf of U.S. Department of Justice (U. S. National Park Service, Forest Service & BLM) reports they have not engaged in settlement discussions and will be eager to go back into settlement negotiations.

The Court inquires of the Indian Tribes.

Mr. Stanley Pollack, on behalf of the Navajo Nation, addresses his previous report and states there was consensus that tribal settlement did not make sense until the Kyl Study was completed and released for public review. It is not a study that lends itself to easy access by the parties for use in settlement discussions. He advises there have not been any settlement discussions concerning the tribal claims to the Little Colorado River. There have been some discussions between the Navajo Nation, the United States and State of Arizona concerning the filing of the Navajo Nation's claims on the main stem of the Colorado River in Federal Court. This is a separate litigation concerning those claims which are a pre-trust action against the Secretary of the Interior for failure to quantify the Navajo Nation claim. A hearing in the federal litigation is scheduled for May 2004 in Phoenix.

The Court expresses concern regarding the complications and frustrations associated with this adjudication. Currently, the Department of Water Resources functions as the technical advisor to the litigation and is operating on minimal staff compared to the staffing levels in 1995. Ms. Jan Ronald, on behalf of Arizona Department of Water Resources, informs the Court that in the upcoming fiscal year the department may add staff to assist with technical support for the adjudication process. She indicates that the current workload for the two support staff that assist with administration of the adjudication is full time and personnel should be added to do field work and analysis of the data that needs to be done in order to get the Hopi HSR on track. She reiterates they are grossly understaffed. Ms. Ronald states there is a draft supplemental HSR for Show Low Lake coming out July 2<sup>nd</sup> and subflow work which are both on track.

The Court inquires concerning the Pueblo of Zuni agreement. Ms. Jane Marx on behalf of the Zuni Tribe is happy to report the 2005 funding request will be in the President's

budget and states the key date is December 31, 2006 to acquire a number of water rights. She states the Arizona Department of Water Resources and a number of other settlement parties are pursuing state legislative changes needed to achieve settlement.

Before coming back to Court with a proposed judgment and decree, a number of conditions and issues need to be met. She will be meeting with parties following the hearing to talk about reinvigorating efforts that are not funding dependent. It is her view that it is just a matter of focusing their attention and moving forward.

John B. Weldon, Jr., representing Salt River Project adds to Ms. Marx's comments that the settlement parties have successfully completed the negotiations of an amendment to the settlement agreement that is required to conform the original agreement to the legislation that was passed by Congress and signed by President Bush last year. The amendment process was complicated by the fact that negotiations were with the Department of the Interior with final approval to the form of the amendment through the Justice Department before being signed. There will be a formal ceremony for the signing of the amendment.

#### **FUTURE OF SETTLEMENT ACTIVITIES**

The Court inquires about the status of Federal non-Indian rights and if there is a desire by the parties to have a replacement settlement judge.

Mr. Bartell states they would be happy if another settlement judge or facilitator were appointed to help bring settlement back to the table. He hopes for a general settlement concerning Forest Service and the BLM's water rights and states that the Park Service claims have been settled.

The Court introduces discussion about using a Federal Negotiating Team to assist with the settlement and also discusses a replacement Settlement Judge. Mr. Weldon addresses the criteria adopted by the Department of Interior in 1992 and the role of the negotiating team. He believes it would be helpful to appoint another mediator as discussions between the Forest Service and BLM were moving forward. Larger negotiations between Navajo, Hopi and all the other state parties are a little more problematic with its ties to the Navajo claim to the Colorado River main stem water. Ms. Marx, representing the Pueblo of Zuni, expresses interest in having help from a Settlement Judge in the negotiation process.

Ms. Vanessa Boyd Willard, representing the U.S. Department of Justice (Indian Resources Section) concurs with Mr. Weldon's statements regarding the Federal Negotiation Team. She advises that there is a Federal Negotiating Team for the Little Colorado River Adjudication and the team is comprised of representatives from the Department of Justice, the Interior Department and the federal government. She states if they were to go back into general settlement discussions that involve the tribes in the basin, then the Federal Negotiating Team would be part of the process.

Mr. George A. Schade, Jr., Special Master raises questions regarding the need for a Settlement Judge or mediator. He inquires if there should be more than one Settlement Judge, one for the federal reserved rights and another for other water rights. Mr.

Weldon states they have been involved in settlements acted by Congress and concurs with Mr. Schade that there was no Settlement Judge involved in any of those water settlements. He compares the various water users including industrial users in the Gila River Adjudication and Little Colorado River Adjudication. He feels the past Settlement Judge advanced the negotiation process. He feels that a new Settlement Judge for the Little Colorado adjudication would not need to be as knowledgeable about water issues as the prior Settlement Judge.

Mr. David Brown, representing various claimants, comments on their support for an ongoing Settlement Judge in shortening the process of the Zuni settlement.

The Court states there is a consensus and the task will be to identify viable candidates. Upon inquiry by the Court, Mr. Pollack states he agrees that to have meaningful settlement negotiations a facilitator or a Settlement Judge should be involved. He concurs with comments on the complexity of the Navajo claims. Mr. Pollack suggest that since Judge Nelson is now in a retired status that he be used as Settlement Judge. Ms. Cynthia Chandley, on behalf of Phelps Dodge supports Mr. Pollack's suggestion. Mr. Brown feels that this suggestion is not viable at this time. The Court agrees with Mr. Brown and stresses the need for the Settlement Judge to be someone that does not generate any personal animosity between the litigants.

The Court states that he is interested in a process for accepting recommendations for a Settlement Judge and asks if a candidate should have water law background. Parties feel that it would be a benefit, but not an absolute necessity. Mr. Schade addresses the workload for this individual over the next twelve months and suggests having the parties seek funding from the Governor for this. Mr. Pollack suggests that the parties have informal discussions regarding a facilitator. The Court suggests that a survey be done regarding candidates and funding sources for Settlement Judge. The Court asks that parties think about this issue and make recommendations to the Court.

The Court addresses Pretrial Order #1 where a settlement committee was set up that was chaired by Mr. Sachse. Mr. James Meggesto, representing the Hopi Tribe, informs the Court that Mr. Sache is not in attendance. The Court inquires about the committee membership. Mr. Pollack explains that the prior Settlement Judge would bring the parties into the settlement process as needed. The Court will appoint the successor settlement individual.

#### **STATE OF ARIZONA'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Court informs the parties that a year and half ago, he denied the State's Motion for Partial Summary Judgment and at that time promised he would bring it up again at the first status conference in 2004. Mr. Graham Clark, representing the Office of the Attorney General for the Arizona State Land Department, addresses the Motion for Partial Summary Judgment. He recites the purpose of the motion to move the adjudication along, the court's focus on moving HSR's through the process and explains that is what his motion was based on. He gives the background of the Indian federal reserved rights and the State Trust Land. The basis for the State's motion was that federal reserved rights had not been applied to State Trust lands, but they had

never been denied. Given the fact that State Trust lands in Arizona are so large and a potential claim of seniority which predates almost all the Indian reservations in Arizona, only immemorial rights are senior to that, the potential impact of the State based federal reserved rights claims, which are a matter of record, gives substance to their motion. He states the Arizona State Land Department is renewing its motion for a request for Partial Summary Judgment and that it be put on the briefing schedule.

### **STATUS OF HOPI HSR**

Upon inquiry by the Court, Ms. Ronald advises ADWR had estimated in 2002 needing three to four months to do investigative work for the Hopi HSR. That time frame may increase due to the lack of ADWR staff. Upon inquiry by Mr. Schade, Ms. Ronald estimates that it will be two or three years from the date the amended claims were filed to finish the Hopi HSR. She states they have not turned their attention to those amended claims due to the HSR supplement for Show Low Lake. She also addresses field verifications.

### **ABITIBI CONSOLIDATED SALES CORPORATION AND ARIZONA WATER COMPANY APPLICABILITY OF RULING IN ONE ADJUDICATION TO OTHER ADJUDICATION**

The Court addresses Abitibi's motions and inquires of Mr. Caster.

Mr. Lauren J. Caster, representing Abitibi Consolidated, the Arizona Water Company, Santa Fe Pacific Railroad Company and Burlington Northern Railroad Company, addresses issues they saw from a ruling in the San Pedro case that were introduced into this adjudication through the Show Low Lake contested case, where the participants were given an opportunity to comment and suggests they should be given an opportunity to comment. The Court states that it will always give parties the opportunities to be heard. Mr. Caster uses the Gila subflow ruling as an example and would like the opportunity to present a position to the court without automatically bringing in the Gila subflow findings.

### **FURTHER DISCUSSION ON THE STATE'S MOTION**

Mr. Bartell representing the Federal government is not opposed to the State's renewed Motion for Summary Judgment. Mr. A. Scott Canty, representing the Hopi Tribe, supports moving this issue forward and setting it for a briefing. They would file an amended response. The Court states that the tribe would not need to file an amended response because the issue would be placed on the calendar and parties would have an opportunity to address it at that time.

Mr. Caster states they filed a response in November 2002 and their position remains the same. He addresses two points from their response that merit some attention before jumping to the new claim. He also encourages the Court to follow the model used in the Gila case in reference to disclosures.

Mr. Clark states their position regarding the State Trust Land in relation to the HSR

process and Department of Water Resources limited resources. He states they disagree with Mr. Caster's position that a ruling on just the first three legal elements would be of no use. He states there has never been a decision that federal reserved rights can apply to a party which is not the Federal government or an Indian tribe. He believes a decision of whether or not federal reserved rights could apply to State Trust lands would be very significant in terms of moving the adjudication forward.

The Court reviews the State's motion to seek a determination as well as there could be a legal basis for the claim acknowledging that if anyone tried to quantify the claim that would require factual information and the State would not be entitled to a summary judgement.

Mr. Clark concurs and makes additional statements concerning the elements involved and issues of law. He addresses the purpose of the State Trust Land when the Federal government conveyed the land to the state.

Mr. Weldon advises the Court that Salt River Project filed a response urging a briefing schedule and that they stand on that position. He concurs with Mr. Clark's statements regarding the existence of the federal reserved rights on State lands will have a dramatic impact on the adjudications and a significant effect on negotiations with the Navajos and Hopis. He advises they are currently involved in a project on both reservations that could be adversely affected by the existence of such reserved rights.

The Court reviews with Mr. Caster and Mr. Clark the Motion for Partial Summary Judgment and the need for a consolidated hearing to determine the issues stated in their motion.

Mr. Weldon requests to revisit the Hopi HSR, and states that based on Ms. Ronald's report that it may take three years for the ADWR to investigate Hopi claims. He suggests an alternative approach regarding the Hopi claim. The Hopis have acquired ranches through land settlements and these ranches are not subject to federal reserved rights. He suggests doing one ranch at a time rather than all at once. The Court will confer with the Special Master concerning this issue. Mr. Schade inquires about the extensiveness of an HSR for non-Hopi lands. Mr. Weldon suggests a watershed file reports for each ranch, not a full blown HSR.

The Court informs the parties he will make a written response to the pleadings after reviewing the filings.

Mr. John Lemaster representing Arizona Public Service and Phelps Dodge, addresses their response to the State's motion and maintains that there are factual issues and that this is not something that can simply be taken as a matter of law and feels there is merit in Mr. Caster's suggestion of moving ahead with the Indian claims first. He requests that the Court go back and look at Phelps Dodge and APS's responses.

Upon inquiry by the Court, Mr. Clark advises that the State filed a Motion for Partial Summary Judgment then a request that a briefing schedule be set and attached a form

of order attached to the motion. The Court suggests that the same motion be filed in the Gila Adjudication so parties are given the same opportunity to respond.

### **SPECIAL MASTER'S REPORT ON SHOW LOW LAKE CONTESTED CASE**

George A. Schade, Jr., Special Master, gives an update on the Show Low Lake contested case since the last hearing. The following events have taken place:

- An amended Statement of Claimant from the Phelps Dodge Corporation was filed in July 2003.
- The Department of Water Resources was directed to prepare an HSR by December 31, 2003. On December 10, 2003 ADWR filed a Motion for Extension to file the supplemental contested case HSR, because ADWR was awaiting the Court's decision on issues raised in the PWR 107 contested case for setting procedures on handling supplemental HSRs. There were no responses, but Mr. Caster raised the issue of the applicability of those procedures in the Gila to the Show Low Lake contested case.
- On March 1<sup>st</sup>, the Special Master met with ADWR staff to determine if ADWR was prepared to complete the HSR within a reasonable time, update time frames for the HSR and discuss the implementation of the procedures that were approved in the Gila River Adjudication.
- Following the meeting there was an order issued and he recites his plan of adopting into the Show Low Lake Case, the supplemental contested case procedures that were approved in the Gila with the exception of one due to lack of time.
- ADWR and he decided on July 2, 2004 for filing a draft supplemental contested case HSR.
- ADWR will file a draft supplemental contested case HSR for the Show Low case, the parties will have 90 days to comment on that HSR with a deadline date of October 1, 2004. After that there will be a 120 day notice issued. ADWR has advised they are able to complete the final HSR for the Show Low Lake case and have it filed by January 31, 2005. Parties will have 180 days to file objections to that HSR or August 1, 2005.
- He and ADWR will work on preparing a draft objection package and informs the parties to be prepared to comment on that package.
- A Status Conference will be scheduled late this year for the Show Low Lake case to start the objection process.
- Ms. Dolge, Assistant to the Special Master, is helping ADWR with data entry. Ms. Ronald expresses appreciation for Ms. Dolge's volunteering and her assistance. Mr. Schade advises there are 1,480 claims to be entered and Ms. Dolge is doing 8 or 9 an hour.

The Court states he will review Mr. Caster's responses and look over what was filed in support and/or opposition. He and the Special Master will discuss Mr. Weldon's suggestion about the Hopi ranches proceeding. In the event the State's motion is set for briefing and hearing, he states it will be held in Phoenix and inquires if there is any

opposition.

Mr. Pollack addresses the issue of a facilitator/Settlement Judge and suggests Judge Minker. Mr. Schade updates the Court on Judge Minker, who is residing in California. He also states that Judge Goodfarb has retired.

The Court asks everyone to please sign in and discusses the next scheduled Status Conference.

IT IS HEREBY ORDERED the next Status Conference shall be held on **Tuesday, October 19, 2004** at the hour of **9:30 a.m.** in the Apache County Superior Court.

11:01 a.m. - Hearing adjourned.

The original is filed with the  
Apache County Superior Court.

A copy of this Minute Entry is  
mailed to parties on the Court-  
approved mailing list for  
CV-6417 dated July 7, 2004.