

JUN 8 - 2011

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10 SUPERIOR COURT OF ARIZONA

11 MARICOPA COUNTY

12 IN RE THE GENERAL
13 ADJUDICATION OF ALL RIGHTS
14 TO USE WATER IN THE GILA
15 RIVER SYSTEM AND SOURCE

Civil Nos. W-1, W-2, W-3, and W-4

16 **REPORT OF GILA RIVER
17 ADJUDICATION STEERING
18 COMMITTEE CHAIR**

19 (Assigned to the Hon. Eddward P. Ballinger, Jr.)

20 CONTESTED CASE NAME: Not applicable

21 HRS INVOLVED: Not applicable

22 DESCRIPTIVE SUMMARY: The Chair of the Gila River Adjudication Steering
23 Committee reports on the Committee's June 1, 2011 meeting on the possible adoption of a
24 special procedural order for review and approval of water right settlements not involving
25 Indian and certain non-Indian federal water right claims.

26 STATEMENT OF CLAIMANT NUMBERS: ASARCO – Nos. 39-U8-62699 et al.;
Tucson Electric Power Company – Nos. 39-74051 et al.

NUMBER OF PAGES: 6

DATE OF FILING: June 6, 2011

The Court, in its Minute Entry filed April 4, 2011 at 3, directed the Chair of the
Gila River Adjudication Steering Committee ("Committee") to advise the Court of

1 recommendations concerning adoption of the special procedural order that is the subject
2 of the Request To Set Steering Committee Meeting To Discuss and Consider Possible
3 Adoption of Special Procedural Order for Review and Approval of Non-Indian Water
4 Rights Settlements (March 9, 2011). The Committee met on June 1, 2011 at the offices of
5 the Department of Water Resources.

6 **1. Committee Discussion Regarding the Proposed Order**

7 The following claimants filed comments on the proposed order in the Gila River
8 Adjudication prior to the Committee's meeting:

- 9 1. City of Phoenix;
- 10 2. Cities of Avondale, Chandler, Glendale, Mesa and Scottsdale;
- 11 3. San Carlos Apache Tribe and Tonto Apache Tribe;
- 12 4. Freeport-McMoRan Corporation and Arizona Public Service Company; and
- 13 5. State of Arizona.

14 Those comments served as the backdrop for the Committee's discussion.

15 The Committee began by designating the undersigned as Chair succeeding
16 Mr. M. James Callahan, who advised of his impending retirement from employment with
17 the City of Phoenix. The Committee then turned to a discussion of the proposed order.

18 Proponents of the proposed order stated that, with one exception, they were
19 amenable to the modifications suggested by Freeport-McMoRan and Arizona Public
20 Service in Exhibit A to those entities' Response.¹ The sole exception was the
21 recommended addition of the phrase "to the extent permissible under applicable law" to
22 § 2(c)(5) of the proposed order, found on page 3, lines 17-18 of Exhibit A to the
23 Freeport/APS Response. Disagreement with that addition reflected a broader divergence

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25 ¹ Response to Requests to Set Steering Committee and Settlement Committee Meetings to
26 Discuss and Consider Possible Adoption of Special Procedural Order for Review and
Approval of Non-Indian Water Rights Settlements (May 20, 2011) ("Freeport/APS
Response").

1 of view within the Committee over whether settlements subject to the proposed order
2 should be capable of binding non-signatories. Proponents of the order see no necessity for
3 the order unless settlements can be made binding on non-signatories following approval
4 by the Court, since claimants are free to enter into bilateral or multilateral settlements that
5 bind no one but the signatories in the absence of an order. Others maintain that such
6 settlements should not bind non-signatories even if approved by the Court. This topic was
7 aired at length but no consensus developed.

8 Proponents of the proposed order suggested that in addition to the changes
9 recommended by Freeport-McMoRan and Arizona Public Service, the words "exercise
10 of" in Section 4(k)(2)(ii), found on page 6, line 19 of Exhibit A to the Freeport/APS
11 Response, should be deleted. The purpose would be to align the phrasing more closely to
12 existing Supreme Court orders for review of Indian settlements.² Counsel for Freeport-
13 McMoRan and Arizona Public Service consented to that change, and no one else voiced
14 an objection during the meeting.

15 Some claimants advocated that the order require the Department of Water
16 Resources to prepare a technical analysis of every settlement subject to the proposed
17 order. As written, the order places preparation of such a report at the discretion of the
18 Court. *See* § 2(c)(6), page 3, lines 19-21 of Exhibit A to Freeport/APS Response.
19 Proponents of the order were amenable to that suggestion, noting that the order was
20 modeled after the existing Supreme Court orders that leave the question of whether a
21 report is prepared to the Adjudication Court's discretion. Another approach raised during
22 the meeting would make a report mandatory but permit the proponents of a settlement to
23 ask the Court to dispense with a report by the Department, supporting that request with an

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25 ² *See* Special Procedural Order Providing for the Approval of Federal Water Rights
26 Settlements, Including Those of Indian Tribes, Supreme Court Nos. WC-79-0001 through
WC-79-0004 (May 16, 1991) at Subpart D.6.b, page 8; Administrative Order, Supreme
Court No. WC-79-0006 (Sept. 27, 2000) at Subpart 6.b, pages 8-9.

1 explanation of why a report was unnecessary in that instance. Proponents of the order
2 were receptive to that idea as well.

3 The detail claimants would require of the Department's report varied. Some urged
4 that a report be equivalent to or accompanied by a full hydrographic survey report with
5 completed subflow zone delineation, and an evaluation of how water rights to be
6 recognized by a settlement would be administered under a final decree. Proponents of the
7 order opposed that change, arguing that an extensive report would prove unnecessary in
8 some instances, and the attendant delay would diminish the value of settlements subject to
9 the order. They did not dispute that a settlement should articulate all attributes of a water
10 right that would be approved under a settlement as part of the initial filing with the Court,
11 and offered to modify the proposed order to make that clear. One participant suggested
12 that settling parties be required to submit technical data about the claims being settled
13 along with an explanation of why they thought the proposed settlement would not
14 materially injure other claimants. No consensus was reached on the detail required of a
15 report.

16 The State of Arizona urged that the period for objection to a settlement subject to
17 the proposed order be extended to 120 days. The proposed order, as well as Exhibit A to
18 the Freeport/APS Response, would require that objections be filed within 45 days after
19 service of the order for special proceedings, or within 45 days after service of the
20 Department of Water Resources' report on the settlement, whichever is later, subject to
21 extension by the Court for good cause. *See, e.g.*, § 3(c), page 4, lines 13-16, and § 5(f),
22 page 7, lines 26-27 of Exhibit A to Freeport/APS Response. While proponents of the
23 order thought 120 days was unnecessary, they were amenable to adjustment of the
24 objection period beyond 45 days if a longer period were warranted.

25 The Committee discussed whether the proposed order should issue from the
26 Arizona Supreme Court rather than the Superior Court. Proponents of the order explained

1 that they had no objection to issuance of such an order by the Supreme Court. They
2 submitted the order to this Court when advised by the Supreme Court staff attorney
3 assigned to the Adjudications that the Chief Justice preferred that approach. It was noted
4 that the Supreme Court not only authorized claimants to petition for interlocutory review,
5 but also authorized this Court to certify “to the Supreme Court questions deemed
6 substantial and properly the subject of interlocutory review or appeal”³ If this Court
7 thought it advisable to obtain Supreme Court review of the proposed order, it could
8 request that review on its own initiative.

9 The undersigned suggests that the Court schedule a joint conference with the Gila
10 River Adjudication Steering Committee and the Little Colorado River Adjudication
11 Settlement Committee at which claimants can express their views to the Court concerning
12 the proposed order and modifications they wish to see in the order (if any), and at which
13 the Court can ask any questions it might have. There seemed to be general agreement
14 during the Committee meeting that if an order of the kind requested is to be entered, the
15 order should be the same for both the Gila River and Little Colorado River Adjudications.

16 2. Committee Members

17 The Gila River Adjudication Steering Committee consists of the following:

18 William H. Anger, counsel for Cities of Avondale, Chandler, Glendale, Mesa and
19 Scottsdale

20 F. Patrick Barry, counsel for the United States

21 David A. Brown, counsel for Gila Valley Irrigation District, Franklin Irrigation
22 District and City of Cottonwood

23 Lauren J. Caster (Committee Chair), counsel for ASARCO LLC and Tucson
24 Electric Power Company

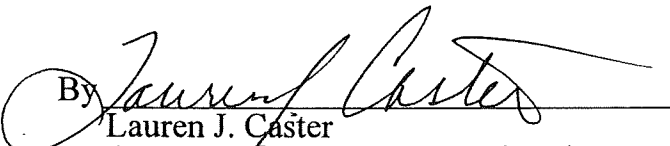
25 Cynthia M. Chandley, counsel for Freeport-McMoRan Corporation and Arizona
26 Public Service Company

³ See Special Procedural Order Providing for Interlocutory Appeals and Certifications (Sept. 26, 1989) at § A, page 1.

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Theresa M. Craig, counsel for the State of Arizona
M. Richard Mabery, counsel for Verde Ditch Company
Thomas L. Murphy, counsel for the Gila River Indian Community
William W. Quinn, Jr., Office of the Field Solicitor, United States Department of Interior
Joe P. Sparks, counsel for the San Carlos Apache Tribe and Tonto Apache Tribe
John B. Weldon, Jr., counsel for Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association
DATED this 6th day of June, 2011.

FENNEMORE CRAIG, P.C.

By 
Lauren J. Caster
Attorneys for ASARCO LLC and
Tucson Electric Power Company

COPIES of the foregoing mailed this
6th day of June, 2011, to all persons on
the Court-approved mailing list for the
Gila River Adjudication dated
January 12, 2011.

