

**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: May 12, 2006 TIME: 9:31 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	May 24, 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. Lisa McKnight, and Mr. John Hetrick, representing Salt River Project; Mr. Lauren J. Caster, representing Abitibi Consolidated Sales Corporation and Arizona Water Company; Ms. Jane Marx, Mr. Edward Wemytewa, and Mr. Andres Cheama, representing Pueblo of Zuni; Mr. Colin Cloud Hampson, Mr. Reid Chambers, and Mr. Eugene Kaye, representing Hopi Tribe; Ms. Jan Ronald, representing Arizona Department of Water Resources; Mr. Michael Brown, representing various claimants; Mr. Marc Jerden, representing Tucson Electric Power Company; Mr. Patrick Sigl and Ms. Mary Mangotich Grier, representing Arizona Attorney General's Office for the State Land Department; Mr. Stanley Pollack and Mr. Scott McElroy, representing the Navajo Nation; Ms. Cynthia Haglin, representing City of Chandler; 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 Section); and Mr. Steve Wene, representing City of Flagstaff.

Minute Entry
CASE NO. CV-6417
DATE: May 12, 2006
Page 2

Present by phone: Mr. Scott Deeny, representing Arizona Department of Water Resources.

Also in attendance: Special Master George A. Schade, Jr.

Judge Ballinger welcomes everyone in attendance. The Court appreciates everyone submitting memoranda on issues that will be addressed.

Status of Zuni Tribe Settlement Special Proceedings

The Court inquires about the status of settlement negotiations.

Ms. Jane Marx, representing the Zuni Tribe, reports they filed the Application for Court's Approval of the Settlement. The technical report of the Arizona Department of Water Resources ("ADWR") is due on Monday, and there is a public education meeting on June 1st in Apache County. Ms. Marx states all the conditions need to be met before December 31, 2006, and hopes the Court can approve the settlement so this matter can be completed in a timely fashion.

Mr. John B. Weldon, Jr., representing Salt River Project, reports the settlement objections are due June 29, 2006, and the settling parties have until August 8 to file responses. The settling parties will look at the objections and will contact the objectors to informally resolve issues raised and not wait until August 8. They are concerned about referring the objections to the Special Master because the adjudication statutes have two different time frames for filing objections to the Master's report. The first one is 60 days for issues such as subflow. The second one is 180 days for reports affecting an entire federal reservation or watershed. The 180 days objection period is a problem if it is applicable to the objections.

The settling parties propose scheduling a status conference after June 29 and before August 8 to come up with a schedule to resolve the objections preferably by the Court, although some objections may be referred to the Special Master.

Upon inquiry by the Court regarding notice, Mr. Weldon states the settling parties received an updated mailing list from ADWR generated for the Show Low Lake proceedings. They mailed notices to 3,496 addresses and have received 280 as non-deliverable. He advises that Mr. Brown's paralegal has ascertained updated addresses for 160 notices. There were 986 addresses that ADWR described as bad addresses and those claimants were not mailed notices. The Department is working on updating those addresses. The settling parties will use the updated addresses to do a second mailing this coming week. Notice has been published in all three northern counties so the public is aware of the pendency of the special proceeding.

Minute Entry
CASE NO. CV-6417
DATE: May 12, 2006
Page 3

The Court and Mr. Weldon discuss the mailings and claimants providing changes of address to ADWR. The Court states that notices should be sent to all claimants.

Status of Settlement Discussions

Ms. Vanessa Boyd Willard, representing the U.S. Department of Justice, provided an update of United States participation in the settlement discussions involving the Hopi Tribe, Navajo Nation, and State parties. The United States is participating in the settlement negotiations pursuant to the procedures established by the U.S. Department of the Interior. Pursuant to those procedures, negotiation teams are tasked with drafting an assessment report and making recommendations to Washington D.C. regarding federal participation in a settlement. The assessment report has been completed and submitted to Washington D.C. policy makers.

Mr. Reid Chambers, representing the Hopi Tribe, states that negotiations are ongoing on three fronts:

- First, negotiations between the Hopi Tribe, Navajo Nation, and companies to see about water transfers from the C Aquifer to the mine. This is related to the Little Colorado River Adjudication.
- Second, the lawsuit the Navajo Nation filed against the U.S. Department of the Interior about allocation of water in the Colorado River which is in Federal District Court subject to a two year stay. Some parties including the Hopi Tribe have been brought into those discussions.
- Third, discussions involving parties in the Little Colorado River Adjudication concerning on-reservation water issues. There might be a settlement brought about involving these issues.

Mr. Lauren J. Caster, representing Abitibi Consolidated Sales Corp. and Arizona Water Company, reports discussions between federal agency claimants and State parties are on hold because of David Brown's illness.

Mr. Michael Brown, representing various claimants, reports that David Brown is doing well, is having surgery today, and should be returning to St. Johns within the next couple of weeks.

Mr. Stanley Pollack, representing the Navajo Nation, reports they have had settlement discussions with various groups, the Hopi Tribe, and the City of Flagstaff concerning groundwater issues. There is no reason to be optimistic of seeing any kind of negotiated settlement given the complexity of the issues. The Navajo Nation's lawsuit concerning its claim to Colorado River water is under a stay until

Minute Entry
CASE NO. CV-6417
DATE: May 12, 2006
Page 4

October, 2006, in order to give parties the opportunity to explore settlement.

The Court returns to a discussion of the Zuni settlement and the time concerns. Mr. Weldon states that in other settlements objections have been filed by people who are concerned that the settlement may adversely affect their water use and once the nature of the settlement is explained to them, most objections are withdrawn. He proposes a status hearing after June 29.

The Court states an order will be sent out setting a status hearing for the second or third week in August for objectors and proponents of the Zuni settlement.

Upon inquiry by the Court, Mr. Weldon states there is no statutory requirement that the Court must enter findings of fact and conclusions of law. The Court will have to enter a judgment finding that the conditions of the Supreme Court's procedural rules have been satisfied.

ADWR's Report on Hopi Tribe HSR

Ms. Janet Ronald, representing ADWR, reports she has been working on the Zuni technical assessment report. The report is finished and will be in the mail today. ADWR anticipates that next week papers will be filed for the Gila River Indian Community settlement. ADWR may be tasked with a technical report which may take most of the summer to complete.

Upon the Court's inquiry about the number of ADWR employees working on the adjudication, Ms. Ronald states there are four people, two part-time attorneys and 1.5 staff for administrative support, and on the technical side almost two people.

Ms. Ronald advises that \$500,000.00 is being considered by the legislature which would mean 10 to 12 people for adjudications. Upon inquiry by the Court, the Special Master indicates he is aware of the potential funding.

Last year, ADWR sent field people to the Hopi reservation, with the cooperation of the tribe, who spent about 300 man hours between September and December collecting information on irrigation fields. Over 500 fields were investigated. All the information collected will be compared with satellite imagery, but the imagery is not yet available. There are over 500 impoundments, and ADWR needs to figure out how to investigate them. ADWR has investigated 15 large impoundments but does not have the staff to analyze all the data quickly.

Funding of Adjudications

The Court expresses concern regarding funding. If there is no adequate legislative

funding it raises a problem in evaluating the status and effectiveness of the adjudications. The Court states that whenever someone raises the idea of funding outside the legislature, two thoughts come to mind. First, small claimants may not afford increased filing fees, and second, if some claimants contribute more than others it could create a potential appearance of unfairness.

Special Master George A. Schade, Jr. reports that he spent time on the most serious issue facing the general stream adjudications which is ADWR's funding. He quotes from a report ADWR filed that ADWR does not have the resources to work on more than one technical matter at a time. Mr. Schade expresses his opinion that the department cannot simultaneously do all the work that the Court has directed. The inability of ADWR to undertake technical work has affected the manner and speed in which the adjudications are moving.

He states that ADWR had requested \$900,000.00 to employ up to 12 people. That request was not included in the Governor's proposed budget for Fiscal Year 2007. The Executive's protocol is that if a State agency's funding request is not approved, the agency cannot and will not lobby for unapproved funding.

He saw three possibilities that could be implemented in February or March, 2006:

- First, depend on the parties and counsel to lobby the legislature.
- Second, ask the Judiciary's lobbyist to lobby for ADWR's funding.
- Third, have the Court and Special Master visit legislators.

Mr. Schade found that parties have differences of opinion about the adequacy and urgency of funding and there is no consensus among parties about funding; claimants may support funding, but their legislative agendas are set by others and those agendas may focus on other issues; and people have no interest in lobbying for an agency's funding when the agency itself cannot lobby. The Special Master states that besides the judicial propriety of doing so, the Court and Special Master do not have the expertise, wherewithal, contacts, and time to do that job.

The solution is to implement a stable and on-going funding mechanism. He has no answer, but suggests raising filing fees, assessing all or some claimants, assessing all water right holders, and asking parties involved in settlements to contribute. He also suggests the institution of benchmarks to measure the level of progress of the adjudications. He suggests that the Court appoint a working group to explore and recommend a statutory funding mechanism.

The group would consist of not more than 10 people who would represent surface

Minute Entry
CASE NO. CV-6417
DATE: May 12, 2006
Page 6

water users, ground water users, reserved water right claimants, counties, municipalities, representatives of the Administrative Office of the Court and Superior Court of Arizona, and the Director or Deputy Director of ADWR. The Court can appoint a chairperson for one year and travel expenses for the committee could be reimbursed out of the funds of filing fees. The committee would file a report within six months after being formed. The process will take one to two years and carries risks. The Special Master believes that ADWR needs at least 10 people working full-time working on the Hopi HSR.

The Court directs the Special Master to submit his comments in a report provided to both adjudications.

Resolutions of Issues and Process

The Court states that it tried to sort the topics listed in the memoranda that could be characterized as ones requiring or not requiring detailed factual analysis. The Court states that the Hopi memorandum talks about an implied way of necessity that exists to permit the Hopi Tribe to obtain water should it need it. The Court inquires if there is evidence of an implied way of necessity.

Mr. Colin Cloud Hampson, representing the Hopi Tribe, characterizes it differently and explains the Hopi Tribe's on- and off-reservation water rights under *Gila V.*

The Court and Mr. Hampson discuss *Gila V.* Additional discussion ensues concerning water rights, quantification, entitlement, and expansion of easements. The Court states that based on treaties, settlements, or court cases, the Navajo Nation claims that the Hopi claims are legally barred.

The Court and Mr. Hampson continue discussion of the Hopi priority issues.

Mr. Hampson addresses the Court regarding cases litigated under 1958 and 1974 statutes and explains the statements in the Hopi memorandum read by the Court.

The Court and Mr. Hampson continue discussion on getting water across the Navajo Nation. The Court recites statements in the Navajo Nation's memorandum that court decisions, settlements, and acts of Congress preclude the Hopi Tribe from asserting those water rights.

The Court reads the pleadings on page 6 of the memorandum; Mr. Hampson states his responses and states it leads into the implied way of necessity.

A discussion ensues concerning the Hopis acquisition of lands from third parties and aboriginal water right claims. Mr. Hampson addresses the Hopi Tribe's rights under

Minute Entry
CASE NO. CV-6417
DATE: May 12, 2006
Page 7

the 1996 Navajo and Hopi Land Dispute Settlement Act. Under the act, the Hopi Tribe acquired ranches, and those lands will go into trust.

Mr. Hampson proposes that the Hopi Tribe's water rights relating to the Norviel Decree be decided on summary judgment. Additional discussion ensues concerning the Norviel Decree and lands acquired by the Hopi Tribe.

The Court states that it worked for a law firm that represented the Navajo Nation in a major lawsuit. The Court states it has previously disclosed this information, and invites both tribes to look into it.

The Court recites issue two of the memorandum referencing *Healing vs. Jones* and requests clarification. Mr. Hampson explains the potential impact of Indian Claim Commission cases which may affect aboriginal rights.

There is further discussion concerning Hopi water rights and access to off-reservation water sources.

Mr. Scott McElroy, representing the Navajo Nation, states their position regarding the responses, what's been discussed so far, and the need to refer to the Special Master the question of adjudicating the Hopi Tribe's water rights. He addresses the disclosures made by the Hopi Tribe and the basis for its positions.

The Navajo Nation takes a strong position regarding the Hopi claim of first priority. There is some uncertainty about the basis for that claim and that idea or concept cannot be reconciled with the history of the two tribes reflected in settlement acts and court decisions. He addresses the statement regarding a permanent homeland for both reservations and gives some examples such as claiming water for three resorts which would affect the Navajo Nation. He states that there should be disclosures and understanding of the Hopi Tribe's positions.

The Court recites its understanding of the comments concerning the history leading to the settlement agreements and court decision that established there is priority and the effect of claims. The Court and Mr. McElroy discuss the Navajo Nation's priority issue and disclosures.

The Court reads from page 6 of the Navajo Nation memorandum. Mr. McElroy explains that more disclosures and discovery are needed and there is a need to sort the Hopi Tribe's reserved water rights and aboriginal rights. Mr. McElroy states that the Hopi Tribe cannot assert a priority that precludes the Navajo Nation from living on its reservation as a permanent homeland.

Additional discussion ensues concerning priorities, shared resources, and the

Minute Entry
CASE NO. CV-6417
DATE: May 12, 2006
Page 8

decisions of the Indian Claims Commission.

The Court, Mr. McElroy, and Mr. Hampson discuss the scope of a contested case to address all the issues and the potential for other issues to be raised. Mr. McElroy states that disclosures and discovery are needed. Mr. Hampson concurs with the contested case issues the Court has identified, and states that the preclusive effect of the decisions of the Indian Claims Commission can be addressed.

The Court inquires concerning the issue of determinations made in the Norviel Decree on Hopi lands acquired outside the reservation which are part of the decree.

Mr. Lauren J. Caster gives an example, the Hopi Industrial Park, for which aboriginal and reserved rights have been claimed, although the land has been in and out of federal ownership.

The Court states it will determine which issues can be resolved by summary judgment.

Mr. Caster states they listed the issues in three groups. He explains each of the groups and suggests which should be heard by the Court and by the Special Master.

Mr. McElroy states that a settlement will require importation of water for an adequate water supply, and the future needs of the tribes must be met.

Mr. Chambers informs the Court about water needs on the Hopi Reservation and Western Navajo Nation. There are no swimming pools or athletic fields, and homes do not have kitchen sinks or toilets. The people have to haul water. He agrees with Mr. McElroy that a resolution of all issues will depend on the importation of water.

Schedule Next Hearing

The Court and parties discuss scheduling a status hearing.

11:48 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
CV-6417 dated February 28, 2006.