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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
IN AND FOR THE COUNTY OF APACHE  
THE HONORABLE MICHAEL C. NELSON, PRESIDING JUDGE

IN CHAMBERS ( )

IN OPEN COURT (X)

**THE HONORABLE ALLEN G. MINKER**

SUE HALL, CLERK

Visiting Judge

By: Barbara Neuzil, Deputy

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE  
WATER IN THE LITTLE COLORADO RIVER SYSTEM AND  
SOURCE

DATE: December 12, 1997

TIME: 9:30 A.M.

CIVIL NO: 6417

DESCRIPTIVE SUMMARY: Status Conference held in the Apache County Superior Courtroom, St. Johns, Arizona

NUMBER OF PAGES - 7

DATE OF FILING: December 12, 1997

**MINUTE ENTRY**

This is the date and time set for a Status Conference.

Courtroom Reporter Susan Humphrey is present.

**APPEARANCES**

The Court calls for appearances and they are as follows: Mr. Craig Sommers, Mr. David C. Roberts and Mr. John B. Weldon, Jr. representing Salt River Project; Mr. David A. Brown representing various claimants; Mr. Pete Shumway representing LCR counties; Ms. Lee Storey representing the City of

Flagstaff; Mr. William Staudenmaier representing Arizona Public Service; Mr. Barry Sanders and Mr. Michael Brophy representing Arizona Public Service and the Aztec Land and Cattle Company; Mr. Lauren J. Caster representing Stone Container Corporation, the Arizona Water Company, Santa Fe Pacific Railroad Company and the Burlington Northern Santa Fe Railroad Company; Mr. William Darling representing the Cameron Trading Post and Atkinson Trading Company; Mr. Mitchel D. Platt representing various parties; Mr. Barry Brandon, Ms. M. Sharon Blackwell and Mr. John Cawley representing the Department of the Interior/Bureau of Indian Affairs; Mr. Bradley S. Bridgewater representing the United States; Ms. Dorothy FireCloud, Ms. Jane Marx, Ms. Joan M. Cheana and Mr. Rueben Ghahate representing the Pueblo of Zuni; Mr. Thomas Wilmoth and Mr. Gregg Houtz representing the Arizona Department of Water Resources; Mr. Joe Clifford, Mr. Don W. Young and Ms. Charlotte Benson representing the Arizona Attorney General's Office; Mr. Marc Jerden representing Tucson Electric Power; Mr. Jim Boles, Mayor, and Mr. Bill Barris representing the City of Winslow; Mr. Jerry L. Haggard representing Phelps Dodge; Mr. Todd Honguoma Sr., Mr. Nat A. Nutongla, Ms. Margie Tsosie, Mr. Ron Morgan, Mr. Neil Blandford, Mr. Scott Canty, Mr. Eugene Kaye, Mr. Read Chambers and Mr. Harry Sachse representing the Hopi Tribe; Mr. Stanley Pollack and Mr. Scott McElroy representing the Navajo Nation; Mr. Melvin Bautista representing the Navajo Nation, Division of Natural Resources; Mr. Michael Foley, Mr. John Leeper and Mr. Johnnie D. Francis representing the Navajo Nation Department of Water Resources; Mr. Richard Berthoff and Mr. Robert Hoffman representing Southern California Edison; Mr. E.L. Sullivan representing Peabody Western Coal Company.

Also in attendance: Special Master John E. Thorson; Ms. Kathy Dolge, assistant to the Special Master; and Judge Michael C. Nelson, Presiding Judge of Apache County Superior Court.

The Court extends his welcome to the participants.

The Application to Appear Pro Hac Vice filed by Ms. Marx is hereby granted.

LET THE RECORD SHOW that the Order on Application to Appear Pro Hac Vice is hereby entered, all in accordance with the formal written Order this date signed and filed.

### **PROGRESS REPORTS**

Mr. Harry Sachse, Settlement Committee Chairman and counsel for the Hopi Tribe, expresses his optimism for settlement. Mr. Sachse says that there has been confirmation by the Department of the Interior that its \$20 million dollars would be contributed in return for the Hopi Tribe's cancelation of certain judgments against the Navajo Nation. The Department of the Interior has also confirmed that it would pay the operation, maintenance and repair charges. Equally significant is the confirmation by Southern California Edison that its \$12 million dollars is again included in the settlement.

Mr. Sachse advises that the major funding issues in the northside negotiations have been resolved. Mr. Sachse advises that one of the remaining larger issues in the northside settlement is that of pipeline

capacity (8,000 acre/feet of water versus 12,000 acre/feet of water) and the priority of that water.

Mr. Sachse discusses the two remaining big issues on the southside settlement. First, there are details to be worked out on the Navajo's Three Canyon Area Project. Second, at an apparent impasse, is the amount of Central Arizona Project (CAP) water the Navajo Nation is requesting and whether that water can be marketed by the Nation.

Mr. Sachse is encouraged that an outline for legislation has been drafted by Mr. Michael Brophy. The Committee is now ready to begin drafting that legislation. Mr. Sachse says that Mr. Stanley Pollack has merged the northside and southside agreements; the pieces continue to be filled in. Mr. Sachse believes that a congressional bill may be ready by mid-March or April 1st.

Mr. Stanley Pollack reiterates that the Three Canyon Project and the CAP allocation are the outstanding issues in the southside settlement. The Navajo Nation views the Three Canyon Project as the cornerstone of the settlement.

Mr. Pollack indicates that at the last status conference, the United States stated that time was needed to complete the work on the alternative southside project. Mr. Pollack says that the work was completed earlier than anticipated; however, some of the suggested scenarios present problems such as construction and environmental issues. There have been recent meetings with the Arizona Game and Fish Department and hydrologists from the United States and the Navajo Nation concerning a "recovery plan" for the endangered species in question. The "recovery team" is scheduled to meet in January to review the various scenarios submitted and attempt to formulate a plan. The United States will continue to investigate and evaluate scenarios designed to maximize the water yield, minimize the cost and ameliorate the damage to the endangered species. Mr. Pollack states that the United States needs a maximum of two months to complete this work. Until the configuration of the Three Canyon Project is known, decisions cannot be made regarding the other various interests.

Mr. Pollack clarifies that with respect to the CAP allocation, there is an express prohibition against marketing reservation water which the Navajo Nation will accept provided it receives a marketable CAP allocation. Mr. Pollack advises that there are proposals to reduce the total amount of municipal and industrial water if other water is received. Mr. Pollack states that they are very willing to consider alternatives and to work with others in this regard. There is a meeting scheduled in mid-January with Mr. David Hayes of the Department of the Interior.

Mr. Pollack defers to Mr. Sachse, Mr. McElroy and Mr. Weldon regarding a time frame for introducing a congressional bill. Mr. Pollack adds that they are putting together settlement position papers to be used to brief the various members of the congressional delegation. They are also trying to draft the accompanying reports in a fashion to easily facilitate incorporation into a piece of legislation. Mr. Pollack advises that the Committee understands that the window for settlement is this year.

Mr. Bradley Bridgewater advises that a lot of work is needed for this settlement to survive. Mr.

Bridgewater says that Judge Michael Nelson has sketched out a rather tight schedule for the next three months. Mr. Bridgewater concludes with brief comments regarding positive developments with Phelps Dodge.

Mr. Barry Brandon advises that the Department of the Interior views these matters in global terms. Mr. Brandon agrees that some funding issues in the northside have been resolved. Mr. Brandon also agrees with Mr. Pollack's discussion of the southside issues. The Department of the Interior is interested in the nature and the cost of the Three Canyon Project. Mr. Bridgewater says that while the Phelps Dodge offer looks better, it still involves replacement water, the cost of which is unknown at this time.

Mr. Brandon states that the CAP allocation is a major issue. A recent letter from the Department of Water Resources raised several problems with respect to the United States' reallocation of any CAP water. The DWR is also opposed to any marketing of CAP water by the Navajo Nation, which is a different view than that of the Department of the Interior.

Mr. Brandon indicates that there have been positive discussions with the Zuni Pueblo but there remain unanswered questions concerning federal financial contributions to that portion of the settlement. Mr. Brandon says that while the Department of the Interior is not withdrawing any money from its offer, it remains concerned about the overall costs of the northside settlement. Mr. Brandon concludes that before the Department of the Interior can participate in drafting legislation, a clearer picture is needed.

Mr. Michael Brophy is very encouraged and reiterates that time is limited so participants need to be aggressive in drafting this legislation.

Mr. John Weldon advises that he was part of the group that visited the congressional delegation. Mr. Weldon says that the Department of the Interior has outlined the financial limitations it will support which are subject to the approval of the Office of Management and Budget. The settlement parties, the representatives of the administration, the Department of the Interior officials and Secretary Babbitt need to stand together in order to obtain the support of the congressional delegation for funding.

Mr. Weldon affirms that the CAP allocation is a major issue. Also troublesome is the letter from Ms. Rita Pearson of ADWR regarding funding. Mr. Weldon expresses concern over the Three Canyon Project, particularly the length of time required to sort through the details. Time is running out; Mr. Weldon believes this bill must be introduced by the end of February. Mr. Weldon corrects a mistake in the southside funding report. The state parties will raise 10 million dollars, not 20 million dollars. Mr. Weldon states that there are difficult issues which the parties are committed to resolve, and there are issues involving non-parties that make the settlement more difficult.

Mr. Jerry Haggard emphasizes that progress has been made toward settlement. Mr. Haggard clarifies that Phelps Dodge has made concessions to the conditions under which Show Low Lake and the Blue Ridge Reservoir would be made available, all contained in a report made to Judge Nelson outlining Phelps Dodge's position.

Mr. Haggard says that there was an omission in the December 5th status report to the Court regarding the drafting of grandfathering agreements. Phelps Dodge has also submitted a draft agreement with respect to Show Low Lake and the Blue Ridge Reservoir.

Mr. David Brown advises that one difficulty to settlement is not knowing what the Navajo's Three Canyon Project looks like. Another "slow down" for Mr. Brown is the time he needs to consult with the many clients that he represents. Mr. Brown does feel that he can work within the mentioned time constraints.

Mr. Clifford advises that the State's perspective has changed slightly. The State's initial involvement was for the protection of the State Land Department's water rights as well as the rights of the Arizona Game and Fish Department. Mr. Clifford states that presently the focus is more toward the State's overall contribution toward settlement. Mr. Clifford says that he views the letter from the DWR as raising concern about costs versus benefits, not as opposition to the settlement. There is a perception that the public wants environmental benefits for free. Mr. Clifford recognizes that there are costs involved with environmental issues and Arizona has "always paid its way."

The Court observes that Mr. Clifford has been involved with this case for a number of years and that Mr. Clifford's eloquence has grown. The Court states that no one has stated the positive aspects of the settlement and the benefits for everyone better than Mr. Clifford did at the last hearing. The Court further states that no one has stated more eloquently what is to be lost to everyone if a settlement is not achieved in this case.

Mr. Clifford advises that he believes that a settlement can be sent to Washington in 1998. However, Mr. Clifford notes, there are other unresolved issues that do not involve the State of Arizona.

The Court views Mr. Clifford as being a valuable contributor toward communications between the other parties who are directly affected. The Court states that Mr. Clifford has the potential to bring the parties closer together so that an agreement can be completed in time.

Responding to the letter from Ms. Pearson to Senator Kyl, Mr. Clifford advises it is now time to bring the regulatory aspect of the State into these negotiations. The upcoming meeting in Phoenix between Committee members and Ms. Pearson is a good step.

Mr. Tom Wilmoth affirms Mr. Clifford's assessment that the letter from Ms. Pearson was not intended as opposition to the settlement in general but rather an expression of concern. The State is concerned that the benefits match the level of funding. Mr. Wilmoth advises that marketing a CAP allocation is clearly opposed by the Director. Mr. Wilmoth says that there are alternatives and discussion of these alternatives is encouraged. The State is also concerned that federal legislation would prohibit transfer of water rights off the LCR plateau. The DWR would not support that federal legislation. Mr. Wilmoth indicates that there is need for clarification of groundwater issues. Mr. Wilmoth advises that all of these issues can be resolved and will be addressed at the meeting next week in Phoenix. The DWR does

support settlement with these concerns in mind.

Mr. Greg Houtz explains that his role is not to set policy but to aid in communication. Mr. Houtz advises he is from the Office of Indian Rights Settlement Facilitation and should be considered as a tool available to all parties. Mr. Houtz urges the negotiators to hurry. Other than Senators Kyl and McCain, there is no one in Congress with much experience in water rights settlements. The amount of information the congressional staff will need is immense.

Ms. Jane Marx advises that she hopes the Pueblo Zuni's meetings with the federal negotiating team in January will be technical rather than conceptual in nature. The needs of the Pueblo of Zuni are different than those of other tribes. The Pueblo needs to be guaranteed that real water will reach Zuni Heaven before they can settle. Ms. Marx is guardedly optimistic and is uncertain of the time frame.

Mr. Bridgewater advises that Ms. Whiteing has asked him to convey that there are still outstanding issues with respect to the San Juan Southern Paiute Tribe but none that pose an obstacle to settlement.

Mr. Mitchel Platt expresses his concern that the Zuni Pueblo will be left out of the settlement and have to litigate. The Court states that no one has advocated partial settlement.

Mr. Pete Shumway is optimistic and proposes another status conference in conjunction with Judge Nelson's settlement schedule.

Mr. Robert Hoffman corrects a misimpression in the December 5th status report. The 12.5 million dollars is a joint contribution from Peabody Coal, Salt River Project and Southern California Edison.

Mr. Darling advises that he filed his recent Petition pursuant to the Court's direction. The Navajo Nation filed its Response and Mr. Darling has filed a Reply. Mr. Darling requests that the Court set this matter on a schedule for resolution.

The Court declines to do so at this time because it would be a distraction from the enormous amount of work still ahead for the Settlement Committee. The Court defers Mr. Darling's request pending a report from the Settlement Committee. The Court urges Mr. Darling and the Navajo Nation to continue to work on resolving their issues using Judge Nelson's abilities and time.

The Court confers with Judge Nelson.

### **ORDERS AND DIRECTIVES FROM THE COURT**

The Court expresses his appreciation for everyone's hard work. No one has requested a return to litigation. The Court cautions, however, that no one should assume that if settlement is not obtained in 1998, that the Court will continue this case on a settlement track.

The Court urges the parties to redouble their efforts and to take advantage of Judge Nelson's guidance. Numerous parties have praised Judge Nelson's efforts. The Court states that Judge Nelson's willingness to go anywhere, to meet with anyone and to invest his time is rare.

The Court acknowledges that some parties have expressed a feeling that they are not heard. The Court urges that attention be paid to the issues and concerns that were voiced this morning.

The Court notes that DWR's role is an important one. The Court is pleased with the comments from Mr. Wilmoth and Mr. Houtz that the letter from Ms. Pearson should not be treated as opposition to settlement but a call for more discussion and involvement. The Court requests that all involved in this case, including DWR, work toward creative and viable solutions to reaching a settlement in the very near future. The Court reminds the parties that the energies and resources of Mr. Houtz may be utilized in reaching this agreement.

IT IS HEREBY ORDERED setting a Review Hearing on **Friday, March 6, 1998 at 9:30 am** in the Apache County Superior Court, St. Johns, Arizona.

The Court cautions that should there be any major obstacles which in Judge Nelson's view would best be solved by bringing everyone back to this courtroom before that time, the Court will do so. Now is the time to put this agreement together.

The Court directs that those people identified by Judge Nelson remain in the courtroom to confer with Judge Nelson.

11:10 A.M. - Hearing concludes.

HONORABLE ALLEN G. MINKER

JUDGE OF THE SUPERIOR COURT

The original of the foregoing is filed with the Clerk of Apache County.

On this \_\_\_\_\_ day of January 1998, a copy of the foregoing mailed to those parties who appear on the Court-Approved mailing list for Case No. 6417 dated December 4, 1997.

Barbara Neuzil, Deputy