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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,
Visiting Judge

SUE HALL, CLERK
By: Barbara Neuzil, Deputy

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

DATE: May 2, 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:

10

DATE OF FILING:

May 2, 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, Mr. John B. Weldon, Jr., Mr. Frederic L. Beeson and Mr. Ronnie Hawks representing Salt River Project; Mr. Jack Brown, Arizona State Senate Minority Leader; Mr. Michael J. Brown and Mr. David A. Brown representing various claimants; Ms. Lee Storey representing the City of Flagstaff; 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; Mr. Pete Shumway representing the LCR counties; Mr. Mitchel D. Platt representing various parties; Mr. Stanley Pollack and Mr. Scott McElroy representing the Navajo Nation; 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. Susan Williams, Ms. Jane Marx, Mr. Andrew L. Othole, Mr. Barton Martza, Mr. Alex Boone, Mr. Phillip Vicenti, Mr. John Niiha, Mr. Harry Chimoni and Mr. Ed Vicenti representing the Pueblo of Zuni; Mr. Wilton Niiha, Zuni Cultural Resource Advisory Member; Mr. Thomas Wilmoth and Mr. Gregg Houtz representing the Arizona Department of Water Resources; Mr. Joe Clifford and Ms. Charlotte Benson representing the Arizona Attorney General's Office; Mr. Marc Jerden representing Tucson Electric Power; Mr. Don McDaniel representing the City of Winslow; Mr. Aaron Osterby representing the Gallup Independent/AP; Mr. Bill Richardson, Mr. Jerry L. Haggard and Ms. Dawn Meitinger representing Phelps Dodge; Mr. Ferrell Secakuku, Hopi Tribal Chairman and Ms. Maxine Namebi, Mr. Phillip Quochytewa, Mr. Cedric Kawaninvaya, Mr. Nat A. Nutongla, Mr. Leon Koruh, Mr. Workman Honanie, Mr. Ron Morgan, Mr. Scott Canty, Mr. Eugene Kaye and Mr. Harry Sachse representing the Hopi Tribe; Mr. Harold Tunney representing the Navajo Nation Council-Cameron & Gap/Bodawoy Chapter; 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. Tod Smith representing the San Juan Southern Paiutes; Mr. Richard Berthoff, Mr. Larry Cope and Mr. Robert Hoffman representing Southern California Edison; Mr. E.L. Sullivan representing Peabody Western Coal Company; Ms. Sylvia Cates, Mr. Watson, Mr. Elmer Clark, Mr. William Veeder and Mr. Robert Brauchli representing the White Mountain Apache Tribe; Mr. McLaughlin and Mr. Bill Hansen representing the National Park Service; Mr. Andrew Walch representing the National Park Service/Bureau of Land Management/Forest Service.

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 reviews that the parties have met numerous times for settlement negotiations since the last status conference. Status reports have been submitted to the Court on January 10, 1997 and on April 18, 1997. The issue before the Court this date is whether the parties believe that the time has run for settlement discussions.

PROGRESS REPORTS

Mr. Harry Sachse advises that he again appears before the Court in the dual capacity as Counsel for the Hopi Tribe and as Chairman of the Settlement Committee, a de facto shared role with Mr. Pollack, Mr. Brophy, Mr. Weldon and others. Mr. Sachse further advises that there has been a great deal of progress in both the north and south negotiations since 1996 and substantial additional progress since the April 18, 1997 report to the Court. The parties can see the configuration of the settlement and many of the details have been worked out. Since the April report, Mr. Sachse advises that the parties have dropped the Blue Ridge Reservoir as a part of the settlement; the Navajo Nation has outlined an alternative that appears to be satisfactory to them and to the other parties. Secondly, Mr. Sachse advises of the Hopi Tribe's acquisition of land in the south. Mr. Sachse reviews that in October 1996, the Hopi Tribe presented a written proposal to the parties on its use of C-Aquifer water on the current Hopi Reservation, the Winslow Industrial Park and any other lands that the Hopis might acquire. As a result of the recent meetings, the non-Hopi parties are formulating a written reply concerning the C-Aquifer to be presented in a few weeks to which the Hopi Tribe is committed to discussing with them in about 30 days.

Mr. Sachse outlines two other remaining key issues in this settlement: the management plan for the N-Aquifer and the shared plan for the Hopi Tribe and Navajo Nation for the use of the washes that run through both reservations. Meetings on these issues are scheduled in two weeks and again in early June. Mr. Sachse reiterates that there has been enormous progress on the north side settlement. The one large remaining issue is the provision for the end of the pipeline in the Hopi Reservation. Mr. Sachse advises that that portion of the settlement has not yet been resolved; there is need for a settlement provision or solid assurances for programmatic federal funding for the pipeline to extend at least to Kykotsmovi. Mr. Sachse requests that these matters not be set for litigation but that the Court extend the time for negotiations an additional six months.

The Court clarifies with Mr. Sachse that if the settlement negotiations are allowed to continue, the Hopi Tribe's acquisition of land in the three canyon area should not threaten or impede these negotiations.

At the request of the Court, Mr. Bridgewater discusses the unresolved issue of funding and whether further discussions would be fruitful. Mr. Bridgewater advises that negotiations should continue, that there has been progress from the discussions of these recent days and that a number of constructive suggestions have been offered concerning operating within the financial constraints. Mr. Bridgewater recommends that negotiations continue and advises that there have been a number of issues in the last few days on which the federal representatives in Washington need to be briefed.

Mr. Cawley echoes Mr. Bridgewater's comments and confirms the need to brief the Department in Washington.

Mr. Pollack believes that the time for negotiations has not yet run, that the deadlines imposed have been taken quite seriously and that the proposals made during this week's negotiations "shook the jar," in the words of Judge Nelson. Mr. Pollack advises that the south negotiations, which are more central to the Little Colorado adjudication, are close to resolution. Mr. Pollack indicates that yesterday they constructed a list with Judge Nelson of the outstanding issues. Mr. Pollack believes that the particulars

can be resolved in a short amount of time, that the "blanks" are due to the significant amount of time spent by the parties on those issues that could be fatal to settlement which are funding, water marketing and the replacement water for Phelps Dodge. There has also been progress on resolution of the Zuni claims. Mr. Pollack relates that the numbers for a south settlement required \$90,000,000, which is unachievable. Mr. Pollack explains that the State and State parties would have to contribute \$25,000,000; a contribution from the State and the State parties of \$10,000,000 would be more likely. The Navajo Nation arrived at this week's settlement discussions prepared to eliminate that constraint on the negotiations by reducing the amount needed for funding by \$15,000,000.

Mr. Pollack explains that prior to this week's negotiations, they had deep fundamental philosophical differences with Salt River Project over the water market prohibitions that were being sought as part of the settlement. Since coming to St. Johns, they have agreed in concept to the restrictions that SRP was looking for on the assumption that the Navajo Nation would receive a marketable allocation of Central Arizona Project water pursuant to the same terms under which the other tribes have received their marketable amount of Colorado River water. The fundamental question is how much water is available. The other issue discussed was whether the Navajo Nation would have the ability to market ground water off of the reservation. There is an agreement in principal that the Navajo Nation will be able to market like any other water company with questions still remaining pertaining to the scope of the franchise area and the amount of water allocated.

Mr. Pollack next discusses the replacement water for the Blue Ridge Reservoir, the most conceptually difficult issue of all. Mr. Pollack clarifies that the Navajo Nation and the other parties have not dropped the Blue Ridge Reservoir from the settlement negotiations. Phelps Dodge, during negotiations, wanted to obtain a firm water supply that would solve some of the problems that they are having regarding the transporting of their water across the San Carlos Apache Reservation from the Black River pumping station. The parties believe that it will take approximately five years for Phelps Dodge to resolve this matter, a delay which would be a death knell to this settlement. This settlement cannot bear the cost in time or the cost in funding that would be required to discover a water source that would avoid the San Carlos Apache Reservation. The Navajo Nation has proposed this week that with respect to the replacement source for the Blue Ridge Reservoir that Phelps Dodge be given a reasonable amount of time to resolve its conflict with the San Carlos Apache Tribe. If the matter is resolved in a timely manner, the Blue Ridge Reservoir would remain part of this settlement. In the event that resolution is not possible, Phelps Dodge could offer a proposal to make the Navajo Nation whole by perhaps aiding the Navajo Nation in obtaining water from the three canyon area. Failing that, Mr. Pollack submits that the Navajo Nation and all other parties except Phelps Dodge move forward with a plan that does not include grandfathering Phelps Dodge's water usage at Blue Ridge Reservoir or Show Low Lake.

Mr. Pollack suggests that an additional fixed period of time is needed to complete these plans and negotiations for the South.

Mr. Pollack advises that there has also been a great deal of progress on the north side. The major impediment to negotiations in this matter has been obtaining a level of funding that is commensurate with the benefits to which both tribes feel they are entitled. Given the shortfall, the Navajo Nation is

prepared to move forward with the current level of funding. Mr. Pollack explains that he has been told that the Hopi Tribe is not prepared to accept the shortfall. Mr. Pollack suggests that the Hopi Tribe can either opt in and accept the \$15 to \$21 million dollar shortfall or opt out and not be included in the settlement. If the Hopi Tribe decides to opt in, the Navajo Nation understands their need and is willing to assist the Hopi Tribe in approaching Congress for additional programmatic funding to extend the pipeline. Mr. Pollack is alarmed by a letter received from the Department of the Interior indicating that the federal contribution is \$65,000,000 when the parties have been operating under the assumption that the federal contribution would be \$85,000,000. Mr. Pollack urges that the parties settle and not risk any additional shortfalls. Mr. Pollack suggests that the Court allow discussions to continue through the summer to finalize an agreement in concept document for both sides.

Mr. Haggard begins by taking exception to comments made earlier and clarifies that Phelps Dodge does not agree that the Blue Ridge Reservoir is out of the settlement negotiations. He further believes that an alternate source has not been found for the three canyon area. Mr. Haggard advises that in November a letter was received from Mr. Pipkin of the Department of the Interior stating that the only alternate source for which they would assist Phelps Dodge is the Black River. The San Carlos Apache Tribe has ordered that Phelps Dodge vacate the Black River by July of this year. In addition, the Department of the Interior stated that they would not help Phelps Dodge in identifying any other water source and the Department would also have to approve any alternate water source that may be found. Mr. Haggard further advises that Mr. Cawley has been barred from participating in any discussions involving a replacement water source for Phelps Dodge. Mr. Haggard indicates that there are several problems. Phelps Dodge owns Blue Ridge Reservoir with a replacement value of \$31,000,000 and a water right value of \$7 million to \$30 million dollars. While the San Carlos Apache settlement is not part of this settlement, Phelps Dodge has to consider it as the only source that the U.S. Department of Interior will allow it to use and the San Carlos Apache Tribe will not allow Phelps Dodge to remain on the Black River.

Mr. Haggard reveals that Phelps Dodge has had two meetings with the federal team, SRP and the Arizona Game and Fish Department in March and in April. Phelps Dodge has, without assistance from the Department of the Interior, located six or seven other alternate water sources. Mr. Haggard outlines the steps necessary to ascertain the feasibility of each of these alternate sources and proposes that the Department of the Interior facilitate this process. It has been suggested during discussions this week that possibly the settlement be made contingent upon a ten year period before the Blue Ridge Reservoir is transferred to the Navajo Nation with the obvious requirement that there be a replacement source for Phelps Dodge. Mr. Haggard believes that finding a replacement source can parallel these settlement negotiations. Mr. Haggard addresses the issue of cost. Phelps Dodge will consider cost sharing in a replacement source; however, the value of the Blue Ridge Reservoir must be recognized.

Mr. Haggard considers the Navajo Nation position to be a settlement breaker: that without Phelps Dodge's agreement to contribute Blue Ridge Reservoir, Phelps Dodge will be excluded from settlement and the Blue Ridge Reservoir and the Show Low Lake water rights will not be grandfathered. Mr. Haggard believes that settlement should continue on two tracks to find either an alternate water source for Phelps Dodge, making Blue Ridge Reservoir available to the Navajo Nation, or discovering an

alternate water source for the Navajo Nation. Mr. Haggard commends Judge Nelson on his remarkable understanding of the issues and keeping the parties on track during these negotiations.

Mr. Bridgewater responds with the United States' position on locating an alternate water source for the Blue Ridge Reservoir. Mr. Bridgewater explains that part of the problem is ascertaining what would satisfy Phelps Dodge as an alternate source. Mr. Bridgewater states that the Department of the Interior agreed to find replacement water with the same location and reliability as the Blue Ridge Reservoir. Phelps Dodge requires an at-Morenci source, requires that the Department pay for part of the delivery cost, objects to the Department's right to approve the source, and wants this settlement contingent upon development of a source on another river which is entangled in water rights issues before other courts. Mr. Bridgewater clarifies the Department of the Interior's position to be the offer to Phelps Dodge of assistance of the same level that would be provided to any citizen or corporation of this country. The Department is willing to offer a supply of water equivalent in reliability and delivered in like manner.

Mr. Clifford believes that Mr. Pollack described the status of the negotiations succinctly and eloquently. Mr. Clifford requests that the parties be given until the end of September to prepare an agreement for the Court. Mr. Clifford trusts that the apparent stand-off between Phelps Dodge and the United States can be resolved through summer negotiations.

Mr. Brophy advises that he agrees in general with Mr. Pollack with some exceptions. Mr. Brophy has divided the issues into three categories for analysis: 1) no apparent resolution, 2) significant resolution of some matters and 3) basic issues resolved with some ministerial matters to address. Mr. Brophy considers a major issue to be the Hopis being bound by limitations on the south side; if the Hopi Tribe opts out, there will be no south side settlement. Mr. Brophy additionally considers the Blue Ridge Reservoir to be a fundamental and serious issue. Mr. Brophy further categorizes other major issues to be marketing, the Zuni issues and the Park Service issues and states that these issues can be resolved. Mr. Brophy agrees with the September 30th deadline previously proposed to have the north side and south side agreements in concept before the Court.

Ms. Williams representing the Pueblo of Zuni advises that there has been substantial progress made in these negotiations. The Zuni issues involve both surface and ground water. Ms. Williams anticipates numerous meetings throughout the summer with an eye to the end of September deadline.

Mr. Walch agrees that there has been substantial progress as well. Mr. Walch had previously expressed a concern on the part of the Park Service regarding the level of technical understanding of the ground water system, particularly the C-Aquifer. The study group has completed a substantial report on the C-Aquifer. Mr. Walch is willing to move forward with negotiations accepting many of the concepts that have been agreed to by the parties in the south side discussions. There have also been discussions with many of the parties with respect to the federal reserved rights to surface water. A two page document has been drafted addressing each of the park units, with one possible exception. Mr. Walch recommends that the Court allow negotiations to continue; the United States Department of Justice is willing to accept the time constraints and the framework suggested by the other parties.

Mr. John Weldon advises that Mr. Pollack's overview is an accurate one. There has been no word from the White Mountain Apache Tribe regarding these negotiations; their issues will remain unresolved. Mr. Weldon asserts that the Hopi issues are contentious and inextricably linked to the other issues. Mr. Weldon mentions the Blue Ridge Reservoir issue and his concerns regarding the State funding. Mr. Weldon cautions that settlement may not include all of the parties. Mr. Weldon addresses the north side issue of funding and indicates an interest in working with the Hopi Tribe to seek additional federal funding on a programmatic basis. Mr. Weldon expresses optimism regarding settlement with the Pueblo of Zuni. Finally, Mr. Weldon refers to the critical and unfortunate innuendo contained in the *New Times* regarding Judge Nelson. Mr. Weldon stresses that Judge Nelson has been fair and were it not for his involvement, all the parties would be in litigation this date. Mr. Weldon requests a short extension of negotiating time.

Mr. Tod Smith requests that settlement continue along the lines as suggested by Mr. Pollack. There are meetings scheduled in June with the Hopi Tribe to work out pipeline issues. Mr. Smith supports the end of September deadline as previously suggested.

Mr. David Brown concurs with Mr. Weldon. There have been significant issues resolved in concept and he requests a short time for continued negotiations. Mr. Brown commends the remarkable progress made by the Pueblo of Zuni and also the progress with the Park Service.

The Court will meet with Mr. Sachse during recess in chambers for an ex parte discussion on the limited and sole issue of the Hopi Tribe's position concerning the continuation of Judge Nelson as settlement judge. No party present expresses an objection.

10:53 A.M. - Recess.

11:41 A.M. - Reconvene.

The Court advises that during the recess, Mr. Sachse expressed that his client is content to continue with Judge Nelson as settlement judge.

Mr. Sachse advises that they are very satisfied with Judge Nelson and that the *New Times* story was misreported. Mr. Sachse explains that the Hopi Tribe has always known that Mrs. Nelson is a member of the Navajo Nation and that Judge Nelson at one time worked for the Navajo Nation. Mr. Sachse reviews that initially the Hopi Tribe was reluctant to have Judge Nelson serve as settlement judge. When this Court appointed Judge Nelson he also directed that the Hopi Tribe give Judge Nelson a chance. Judge Nelson was invited by the Hopi Tribe to visit and the Hopi Tribe found Judge Nelson to be a good man and perhaps his entrees to the Navajo Nation would be of use. Mr. Sachse expressed the opinion of all that Judge Nelson is a fine mediator. Judge Nelson had proposed a solution to settlement at one time to all of the parties and the Hopi Tribe was the only tribe ready to sign the then called Nelson Plan. Mr. Sachse emphasizes that Judge Nelson has worked very hard and diplomatically back and forth between the parties. Mr. Sachse adds that he has worked with several mediators and finds Judge Nelson to be one

of the best.

Mr. Lauren Caster addresses the Court on behalf of the Santa Fe Pacific Railroad Company and the Burlington Northern Santa Fe Railroad Company. Mr. Caster explains that there is currently a proposal to the Navajo Nation. Within the reservation and New Lands the mineral developments will be complicated and perhaps it is best for the Nation and the railroad if those interests were traded out for land elsewhere. There is a disagreement with the Navajo Nation over what is the right of the Burlington Northern Santa Fe Railroad Company to ground water use.

Ms. Lee Storey advises that she is pleased with the south side progress, that the City of Flagstaff, tribes and Park Service have resolved most of the issues and are meeting after the hearing this afternoon. The city has just received a draft of the study group report. The city is committed to resolving the issues during the summer.

Mr. William Darling mentions the inholding issues and advises that they are at an impasse because of jurisdictional issues. Mr. Darling explains that if these matters were litigated now they would then fit into settlement negotiations. Of primary concern are the jurisdictional issues.

Mr. Pollack asserts that the issue of tribal jurisdiction over Mr. Darling's client's water rights are not properly before this Court. This matter should be decided in tribal court. Only substantive issues should be before this Court.

Mr. Darling counters that the McCarran Amendment gives this Court jurisdiction. Mr. Darling advises that he would not object to discussions continuing throughout the summer.

Mr. E.L. Sullivan advises that his client has no interest in the southern issues and that up until this week the companies involved in the northern issues have been somewhat discouraged. Through Judge Nelson's efforts and the discussions of this week, Mr. Sullivan concludes that it would be in the best interest of all concerned to continue discussions of resolution.

Mr. Pete Shumway compliments Judge Nelson for his efforts and the Court's choice of Judge Nelson as settlement judge. Mr. Shumway urges the Court to stay the course and follow an accelerated schedule.

Mr. Wilmoth advises that Mr. Pearce regrets that he cannot be present this date. The Department of Water Resources extends its support to continued negotiations and the proposed September deadline.

ORDERS AND DIRECTIVES FROM THE COURT

Based upon the work product that has been provided, the requests of all parties that have addressed the Court this morning and no objection otherwise,

IT IS HEREBY ORDERED extending the period of time for the settlement discussions to continue

under the guidance of Judge Michael C. Nelson.

On behalf of Judge Nelson, all parties are directed to remain in the courtroom after this hearing to be advised of schedules for further discussions.

IT IS FURTHER ORDERED setting an additional **Status Conference on Friday, September 26, 1997 at 9:30 A.M.** in the Apache County Superior Court, St. Johns, Arizona.

IT IS FURTHER ORDERED that interim progress reports be submitted to the Court by August 8, 1997 and by September 19, 1997.

On September 26, 1997, the parties are directed to bring with them their written agreements if they have not been submitted prior to that date.

IT IS FURTHER ORDERED that requests to litigate certain specific claims or issues, such as Mr. Darling expressed, be submitted to the Court by September 19, 1997 showing 1) what efforts have been made to settle the matter, 2) what are the specific issues or claims sought to be litigated, 3) what are the legal issues involved and a brief description of the position of the claimant, 4) what is the nature of the factual dispute and what type of evidentiary hearing is needed, and 5) a proposed time frame for any necessary discovery, for actual hearings and the presentation of legal argument.

The Court directs that Mr. Darling, Mr. Pollack and Mr. McElroy meet to fully explore all possible solutions to what has been described this date as an impasse.

FURTHER REPORTS FROM CLAIMANTS

The Court reviews that Mr. Veeder on behalf of the White Mountain Apache Tribe has filed a Motion to Dismiss, not only in the Little Colorado adjudication but also in the Gila River adjudication. It is the Court's further understanding that Judge Bolton has not taken any action regarding the motion filed in the Gila River adjudication.

Pursuant to the Court's request at the last hearing, Mr. Veeder has reported back to the Court that the White Mountain Apache Tribe does not wish to involve itself in these settlement negotiations.

The Court clarifies that the invitation to join these negotiations was not an attempt to subvert tribal authority or sovereignty or decision making powers. It was the desire of the Court to notify the White Mountain Apache Tribe of what was taking place so that the Tribe would make an informed decision.

In light of the time and energy required to advance to this stage by the various parties, the Court declines to address the Motion to Dismiss until after the September Status Conference. No parties are to respond to the Motion to Dismiss until further notice of this Court.

The Court is pleased by presence of the representatives of the White Mountain Apache Tribe and is not quarreling with their decision of nonparticipation. The Court suggests that the Tribe be kept advised of the progress of these negotiations.

Mr. Veeder addresses the Court and reiterates his request to argue the Motion to Dismiss and have others respond. This is a serious issue and Mr. Veeder had hoped it could be set for a hearing.

For the reasons previously mentioned, the Court declines to set this matter for a hearing. The Court speaks for Judge Nelson declaring that he and his office stand open to communication with the White Mountain Apache Tribe.

12:00 P.M. - Hearing concludes.

HONORABLE ALLEN G. MINKER

JUDGE OF THE SUPERIOR COURT

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

On this ____ day of May, 1997, a copy of the foregoing mailed

to those parties who appear on the Court-Approved mailing list for Case No. 6417 dated September 13, 1996.

Barbara Neuzil, Deputy