

**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

THE HONORABLE ALLEN G. MINKER
Visiting Judge

SUE HALL, Clerk

By: C. Morrow, Deputy

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

DATE: July 16, 1998

TIME: 9:40 a.m.

CIVIL NO. 6417

DESCRIPTIVE SUMMARY:	Status Conference held in the Apache County Superior Courtroom, St. Johns, Arizona.
NUMBER OF PAGES:	9
DATE OF FILING:	August 6, 1998

MINUTE ENTRY

This is the date and time set for a Status Conference in Civil No. 6417.

Courtroom Reporter: Susan Humphrey.

APPEARANCES

The Court calls for appearances and they are as follows: Mr. John B. Weldon Jr., Mr. John Sullivan, Mr. Frederic Beeson and Mr. David C. Roberts, representing Salt River Project; Mr. David A. Brown, representing various claimants; Mr. Lauren J. Caster, representing the Stone Container Corporation, the Arizona Water Company, Santa Fe Pacific Railroad Company and the Burlington Northern Santa Fe Railroad Company; Mr. Pete Shumway, representing LCR counties; Mr. Mitchel D. Platt, representing various claimants; Mr. Joe Clifford, representing the Arizona Attorney General's Office; Mr. Jerry L. Haggard, Ms. Dawn Meidinger and Ms. Cynthia Chandley, representing the Phelps Dodge Corporation; Mr. William Darling, representing the Cameron Trading Post and Atkinson Trading Company; Mr. Jim Boles, Mayor of the City of Winslow, and Mr. Bill Barris representing the City of Winslow; Mr. Barry Sanders and Mr. Alan Matheson, representing Arizona Public Service and Aztec Land and Cattle Company; Mr. William Staudenmaier, representing Arizona Public Service; Mr. Marc Jerden, representing Tucson Electric Power Company; Mr. Jerry Goldsmith, representing Pine Lake Meadows; Mr. Richard Bertholf and Mr. Robert Hoffman, representing Southern California Edison; Mr. Thomas Wilmoth, representing the Arizona

Department of Water Resources; Mr. Bradley S. Bridgewater, representing the United States; Mr. David Hayes and Mr. Michael Connor, representing the U.S. Department of the Interior; Mr. Andrew F. Walch, representing the United States National Park Service, Forest Service and Bureau of Land Management; Mr. John Cawley, representing the Department of the Interior / Bureau of Indian Affairs; Ms. M. Sharon Blackwell, representing the United States Federal Negotiating Team; Mr. Edward L. Sullivan, representing Peabody Western Coal Company; Ms. Jane Marx, Ms. Joan M. Cheama, Mr. Harry Chimon, Mr. Wilfred Eriacho, Sr., Mr. Barton Martza, representing the Pueblo of Zuni; Ms. Rosemary Ponteate, representing the Pueblo of Zuni Tribe Water Rights; Mr. Randall Lindsay, representing the City of Flagstaff; Mr. Wayne Taylor, Ms. Rachel Sakiestean-Scott, Mr. Lyman W. Polacca, Mr. Scott Canty, Mr. Eugene Kaye and Mr. Reid Chambers, representing the Hopi Tribe; Mr. Stanley Pollack, representing the Navajo Nation; Mr. Michael Foley, Mr. John Leeper and Mr. Johnnie D. Francis, representing the Navajo Nation Department of Water Resources; Ms. Michelle Hellickson and Mr. Bill Hansen, representing the National Park Service - Petrified Forest NP; Mr. Sam Henderson, representing the National Park Service - Flagstaff Areas; Mr. Peter Fahmy, representing the Office of the Solicitor, Department of the Interior.

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

OPENING REMARKS

The Court welcomes all those in attendance, and especially welcomes David Hayes of the Department of the Interior. The Court advises that this hearing will begin where the last hearing left off, including the timing of the bill to be presented to Congress. It appears to the Court that no bill has been prepared or sent. The Court states the intention of determining why this has not occurred and what the prospects are in this matter.

The Court calls the representative of the Hopi Tribe to report.

REPORTS

Mr. Reid Chambers, representing the Hopi Tribe and on behalf of the entire settlement committee, expresses appreciation to Judge Nelson for his mediation abilities and to Judge Nelson's staff for the hospitality provided in St. Johns. Mr. Chambers confirms that there is no draft bill prepared to be presented to Congress, and additionally states that given the time, there is no immediate prospect of this happening. Mr. Chambers describes the goal of having a bill ready by January 1999 when Congress resumes. Mr. Chambers reviews the necessity of having a settlement agreement, and states his belief that the bill will write itself once the agreement is made. Mr. Chambers warns of the danger of intervening events, but advises that the goal is still there and that progress is being made. Mr. Chambers addresses the matters that concern the Hopi Tribe, including the pipeline going to Red Lake with the spurs to the Peabody Mine and other Hopi villages. Mr. Chambers references proposed agreements, and defers to Mr. Pollack regarding the Three Canyon Project. Mr. Chambers states that the Hopi Tribe and the Navajo Nation have now resolved all intertribal issues regarding the shared aquifers. Mr. Chambers reviews the two remaining major issues with regard to the Hopi Tribe, which involve formalizing the water rights on the Hopi ranches, and the size of the pipeline and the amount of water from the pipeline. Mr. Chambers additionally states that the water referenced involves the municipal water supply.

The Court inquires if Mr. Chambers or the settlement committee has visited with the congressional delegation since the last meeting here. Mr. Chambers replies that he has not, but that there has been communication with the delegation.

The Court confirms that proposed issues have been identified regarding the necessity of additional time and states that Mr. Chambers has also alluded to money issues without being specific.

Mr. Chambers responds that he was speaking about the allocation of water, that it does cost something, but that he does not believe that cost with regard to the canyon project is an issue. Mr. Pollack confirms the previous statement made by Mr. Chambers. The Court inquires about the overall figures for the entire project. Mr. Chambers states that those figures are available, explaining he does not have them at hand, but that they are not major issues. The Court inquires further regarding the Hopi Tribe and Navajo Nation being in agreement on what those figures should be. Mr. Chambers confirms that the Hopi Tribe and Navajo Nation are in agreement on this issue.

The Court calls Mr. Pollack to address the Three Canyon Project.

THREE CANYON PROJECT

Mr. Pollack reviews the progress made since the last hearing, and addresses a draft map posted on the Courtroom wall, prepared to better explain the project. Mr. Pollack advises that the project has been discussed with the Department of the Interior and that it falls within the proposed budget. Mr. Pollack explains that no final agreement has been reached regarding Blue Ridge Reservoir, but that agreement appears to be close. Mr. Pollack further reviews the project, and the first of three proposed phases. Mr. Pollack additionally advises that water treatment is not included, but would possibly be available through tribal grants and funding. The overall budget is based on forty-five million dollars (\$45,000,000) using July 1995 dollars, and that amount has now increased to a forty-eight million dollar (\$48,000,000) project. Mr. Pollack acknowledges that the Chevelon diversion may have to be downsized to keep the budget lower. Mr. Pollack addresses the issue regarding endangered species, the question of what the U.S. Fish and Wildlife Service will tolerate, and advises that they are trying to obtain tentative approval of the proposed project. Informal consultation with the U.S. Fish and Wildlife Service is proposed, along with trying to make the proposal work within the budget. Mr. Pollack again refers to the draft map, advising that the map illustrates the complexity of the proposed settlement agreement. Mr. Pollack concludes by stating that the Navajo Nation does not want to be treated as a second-class tribe, but wants to join together shoulder to shoulder with the other tribes. Mr. Pollack states his belief that all of the parties are genuinely committed to settlement.

There is discussion regarding section 4 of the agreement and the cost involved.

The Court calls for comments from Phelps Dodge.

Mr. Haggard joins in commending Judge Nelson for his work in the settlement efforts. Mr. Haggard references the agreement Phelps Dodge has made regarding Blue Ridge Reservoir and Show Low Lake, and defers to Ms. Chandley for further explanation.

Ms. Chandley explains how the settlement process has evolved, involving the Gila River Indian Community (GRIC), Blue Ridge Reservoir and Show Low Lake and describes the general structure of the agreement. Phelps Dodge proposes to transfer Blue Ridge Reservoir to the Navajo Nation and Show Low Lake to governments in Navajo County. Phelps Dodge will acquire a block of CAP water from Gila River Indian Community (GRIC) and exchange it for water nearer Morenci. Ms. Chandley advises that Phelps Dodge has

requested waivers for past damages, and that some parties are willing and some are not. There is discussion regarding the position of the parties regarding waivers.

The Court specifically requests the position of the Hopi Tribe and Navajo Nation regarding a waiver. Mr. Chambers responds that the Hopi Tribe is willing to give a waiver, supports the settlement, but states concerns about a waiver without a Little Colorado River settlement. Mr. Pollack agrees that this is an important component, that the Navajo Nation is amenable to exchange, and the direct answer to the question regarding waivers is “yes.”

The Court calls for comments from Salt River Project.

Mr. Weldon states that progress has been made on a number of issues, however the following four issues are critical to the settlement; Mr. Weldon further states that he is pessimistic about these issues being resolved. The issues are identified as:

- Money. The figures are quoted in 1995 dollars and payment of escalation costs is critical as well as the question of availability.
- Central Arizona Project water. 8,000 acre feet first proposed versus 12,000 acre feet now requested by the tribes.
- Marketing provisions regarding basin water awarded to the tribes.
- Three Canyon Project.

The Court requests an estimate of time needed to resolve the issues listed above. Mr. Weldon responds that it is not a matter of time. The Court reminds the parties that time is a great concern, and that settlement talks have been ongoing for the past four years. The Court requests comments from Mr. Bridgewater, Mr. Cawley and Mr. Hayes.

Mr. Bridgewater defers to Mr. Hayes regarding substantive questions, and advises that the settlement process is extremely complicated and complex. Mr. Bridgewater references language used in some of the proposals that was so confusing, even those persons who drafted the proposals could not agree on the specific meaning. Mr. Bridgewater also references Judge Nelson’s proposed plain language committee to address the need for an understandable document.

The Court prefaces Mr. Hayes’ remarks by revealing that he first met Mr. Hayes last fall at a conference of western water judges. The Court reminds the parties that the first motion in this case was signed by Jerry Haggard in 1978 and that we are now in the twentieth year of this litigation. The Court reviews a Minute Entry dated March 8, 1994, which specified certain things that parties were requested to do. The Court has invited Mr. Hayes, representing the Department of the Interior, to address the issue of what is now feasible. The Court advises that the process should not keep going without the hope of success.

Mr. Hayes echoes what the other speakers have said regarding Judge Nelson’s dedicated effort in this matter and states his appreciation to Judge Minker as well. Mr. Hayes addresses the issues that appear to be standing in the way of progress which include:

- The allocation of water for the proposed pipeline, including the size of the pipeline and the amount of water.

- The concerns of the State of Arizona regarding allocation of more Central Arizona Project water for tribal rights.
- Water marketing issue. Although the United States is supportive, it is bound to consider the views of the State. The State has indicated it will not allow the allocation of Central Arizona Project water or marketing.
- The cost of Central Arizona Project water for the companies that will receive it. The United States will not subsidize the delivery of this water.
- The protection of Navajo water rights in the south from future groundwater pumping.
- Blue Ridge Reservoir. Although there is encouragement regarding discussion, if there is not an agreement on an adequate amount for the Navajo Nation, it may be an issue.

Mr. Hayes addresses the proposal that in exchange for the Blue Ridge Reservoir, the United States would subsidize Central Arizona Project water for Phelps Dodge in an amount between ten million dollars (\$10,000,000) and fifteen million dollars (\$15,000,000) and that a number of issues remain to be fleshed out.

Other outstanding issues involve:

- The Endangered Species Act.
- Agreement with the Zuni Tribe.
- Dollars are growing more costly. The parties appear to expect the United States to take up the additional amount. The United States has agreed to sixty-five million dollars (\$65,000,000) and “that’s it.”

Mr. Hayes compliments Mr. Pollack for his efforts and presents the view that the United States is willing to carry these negotiations forward. Mr. Hayes advises that he cannot say the Office of Management and Budget will accept the proposal and further advises that final decisions cannot be made until there is clarity on major issues. Mr. Hayes informs the parties of water agreements in other areas, but states again his willingness to carry Arizona water issues forward. Mr. Hayes cautions that as the settlement continues to grow, the challenges are becoming enormous.

The Court calls Mr. Wilmoth to comment.

Mr. Wilmoth, representing the Arizona Department of Water Resources, addresses the following issues:

- Proper water allocation
- Water marketing

Mr. Wilmoth advises that there is support for the pipeline but issues remain regarding additional water allocations and the marketing of Central Arizona Project water. Mr. Wilmoth states his belief it is premature to end negotiations at this point.

The Court addresses the issues of cost increase and the decisionmaking process. The Court asks Mr. Wilmoth if the State is willing to increase amounts. Mr. Wilmoth responds that he is not authorized to speak regarding that issue, but that he is skeptical. Mr. Wilmoth advises that he cannot tell what is on the mind of the legislators, and cannot speak regarding the decisions that might be made.

The Court inquires of Mr. Pollack regarding communications with the Arizona legislators. Mr. Pollack answers that he has not had discussion with the legislators in recent years.

The question regarding additional funding is directed to Mr. Weldon.

Mr. Weldon advises that historically the State contributions are small. Mr. Weldon further advises that there was some legislative discussion approximately three years ago, and there is cautious optimism about the State coming up with funds. Mr. Weldon adds that he has no insight, but shares in the skepticism regarding additional funding.

The Court inquires regarding the opposition to marketing water rights and the fears about Central Arizona Project water being leased back. The Court understands there is “adamant opposition” and requests further explanation.

Mr. Wilmoth responds that the water users are afraid of losing what they may be entitled to as well as the water being leased back.

The Court calls Ms. Marx to comment.

Ms. Marx, representing the Pueblo of Zuni, states that slow progress is being made, but lists a number of issues that remain to be resolved including:

- how water will be acquired
- guarantee of water availability
- waiving rights in the final settlement

Ms. Marx requests that negotiations continue and further requests that another Status Conference be held in a few months.

The Court describes the scenario that an agreement is ready to present to Congress with one piece missing, that missing piece being the Pueblo of Zuni, and inquires how to avoid this obstacle. The Court states the belief that the only way Congress will address the matter is as one universal settlement. The Court again states that negotiations have been ongoing for over four years, and encourages Ms. Marx to define their project in rapid time so the claims of the Pueblo of Zuni can be incorporated.

The Court calls Mr. Hoffman to comment.

Mr. Hoffman reports on indexing and the cost of Central Arizona Project water, and states that progress is being made. Mr. Hoffman states that the progress has been described by others earlier in this hearing.

The Court reminds Mr. Chambers about a previous statement made by Mr. Sachse, expressing the opinion of trying for another six months or abandoning the project. Mr. Chambers agrees that there were impasses, and other issues still remaining are identified today. Mr. Chambers believes that the Three Canyon Project is the only remaining issue and that they are down to “cutting iron.” Mr. Chambers remarks that this is by far the most complicated settlement in his thirty years of practicing law. Mr. Chambers states his belief that further meetings are needed, but not further information, before a bill can be presented to Congress.

On behalf of the Settlement Committee, Mr. Chambers inquires about the previous announcement that Judge Minker planned to leave the bench, and the unanimous suggestion that Judge Minker continue on some basis.

The Court references an earlier statement regarding the parties blocking out two weeks of time and not leaving until the issues are hammered out. The Court states that everything he has heard today, he has heard before, regarding lost target dates, lost opportunities, needing more time and the complexity of the issues. The Court inquires as to the purpose of putting off litigation, and advises that the case could be dismissed if all the parties want is not to litigate. The Court further advises that the parties can walk away and file cases individually.

The Court inquires if anyone can articulate the reason for the insistence of prohibition on marketing water.

Mr. Weldon addresses this issue and explains that there are a number of reservations in Arizona and one of the central pieces is that through the settlement the water has to be used on the reservation only. It is not available as an "off-reservation" economic engine for the reservation. The State insists that there be no marketing of the water. The idea of marketing tributary water is described as being a huge issue. Following additional comments regarding the possibility of alternative water resources, the Court asks if there is anything further.

Mr. Sullivan, Peabody Western Coal Company, comments about the proposed Lake Powell pipeline and states the following issues:

- water costs
- indexing of capital costs
- trunk line
- surface impoundment water, including washes
- internal issues that he believes will be resolved
- emergency procedures

Mr. Sullivan concludes by stating that he does not want the Court to believe that all pipeline issues have been resolved.

Mr. Weldon comments briefly regarding pipeline issues and the validation of Peabody leases.

Mr. David Brown offers a response to the Three Canyon Project, based on a schematic received yesterday, Mr. Brown states it is premised largely on flood flows, and requests that this matter be considered carefully. On behalf of the City of Winslow, Mr. Brown states that the city is willing to participate but in return, the city also needs to receive a benefit. Mr. Brown mentions the large turnover in state legislators, and advises that there is no use to go to the legislators often. Mr. Brown concludes his remarks by stating his willingness to make every effort toward a settlement.

Mr. Shumway comments that he is also committed to settlement. Mr. Shumway urges continued support of Judge Nelson in his efforts to resolve the issues. Mr. Shumway expresses his appreciation to Mr. Hayes for his participation today. Mr. Shumway states his support for what has been done, urges all to reaffirm support to Judge Nelson, and suggests that everyone join together to resolve any unresolved issues in the best interest of all concerned parties.

The Court calls for a ten minute recess.

11:45 a.m. Court stands in recess.

12:05 p.m. Court reconvenes with respective parties present.

The Court advises that during the recess he was reminded by Judge Nelson the focus had been on what has *not* been accomplished, rather than focusing on the accomplishments that have been made and recognizing the resolution of issues that has occurred. The Court explains that there was no intent to disparage the efforts that have been made: To hear that the Hopi Tribe and the Navajo Nation are standing together on all the issues that formerly divided them certainly is an accomplishment. The Court recognizes that the south project has changed several times, but nevertheless the Court remains impatient and believes that the parties are dealing with opportunities now that may not exist in the future.

The Court will allow the settlement discussions to continue under the leadership of Judge Nelson.

FUTURE HEARINGS

IT IS HEREBY ORDERED setting an additional Status Conference on **Friday, November 20, 1998 at 9:30 a.m.** in the Apache County Superior Court, St. Johns, Arizona.

IT IS FURTHER ORDERED that a written report shall be submitted to the Court by **Friday, November 13, 1998** which *will state a resolution of the following two issues:*

- MARKETABILITY OF WATER.
- AMOUNT OF WATER ALLOCATED TO THE PIPELINE.

The Court directs that the two issues referenced above *must be resolved before the November 20, 1998 Status Conference.*

Other identified issues will continue to be addressed by Judge Nelson and negotiators so that an agreement may be presented to Congress early next year.

Judge Minker responds to the question submitted to him earlier this day regarding his continuing on this case. Judge Minker confirms that he will be leaving the bench in December and will not request the Supreme Court to assign him further to this case. Judge Minker informs the parties that he will be no longer residing in the State of Arizona. Judge Minker advises that he will inform the Supreme Court of the need to assign a judge to preside in the near future. Judge Minker states his hope that the assignment will be made in time for the next hearing, but comments that this decision is up to Chief Justice Zlaket and the other members of the Arizona Supreme Court. Judge Minker expresses his thanks for the kindness of those who suggested that he remain on this case.

The Court requests that the parties remain in the courtroom for further instruction from Judge Nelson.

12:15 p.m. Hearing concludes.

ALLEN G. MINKER
JUDGE OF THE SUPERIOR COURT

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

On this day of July, 1998, a copy of the foregoing is mailed
to those parties who appear on the Court-approved mailing list
for Civil No. 6417 dated April 3, 1998.

Carolyn Morrow, Deputy