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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: September 26, 1997

TIME: 9:30 A.M.

CIVIL NO. 6417

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

NUMBER OF PAGES: 10

DATE OF FILING: September 26, 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 representing Salt River Project; Mr. David A. Brown representing various claimants; 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. Rosemary Ponteat representing the Zuni Water Right Committee; Ms. Dorothy FireCloud, Ms. Jane Marx, Mr. Milfred Eriachos, Ms. Jobeth Mayes, Mr. Andres Cheana, Ms. Joan M. Cheana, Mr. Rueben Ghahate, Mr. Joseph Solomon, Mr. Harry Chimoni and Mr. Edison Vicenti 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. John Roche representing the City of Winslow; Ms. Cindy Chandley, Mr. Jerry L. Haggard and Ms. Dawn Meitinger representing Phelps Dodge; Mr. Ferrell Secakuku, Hopi Tribal Chairman and Mr. Todd Honguoma Sr., Mr. Phillip Quochytewa, Mr. Ron Morgan, Mr. Scott Canty, Mr. Eugene Kaye and Mr. Harry Sachse representing the Hopi Tribe; Mr. George Arthur, Mr. Stanley Pollack and Mr. Scott McElroy representing the Navajo Nation; Mr. Harold Tunne representing the Navajo Nation Council-Cameron & Gap/Bodaway 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; Ms. Jeanne Whiteing representing the San Juan Southern Paiutes; Mr. Richard Berthoff and Mr. Robert Hoffman representing Southern California Edison; Mr. E.L. Sullivan representing Peabody Western Coal Company; Ms. Laurel Laclier, Mr. Michael Kaczmarek, Mr. Watson, Mr. Elmer Clark, Mr. William Veeder and Mr. Robert Brauchli representing the White Mountain Apache Tribe; Mr. Peter Fahmy and Mr. Bill Hansen representing the National Park Service; Mr. Andrew Walch representing the National Park Service/Bureau of Land Management/Forest Service; Mr. Jerry Sako representing the Arizona Game and Fish Department; Mr. Ron Billstein representing MSE-HKM, Inc.

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 at the last status conference in May, the strong consensus was for the Settlement Committee to continue with the discussions; the month of September has been busy with those discussions.

PROGRESS REPORTS

Mr. Harry Sachse, Settlement Committee Chairman and counsel for the Hopi Tribe, advises that there has been a lot of recent progress made. Mr. Sachse presents to the Court the actual list made of the issues still pending in the northside and southside negotiations. On the southside, Mr. Sachse advises that there are still some negotiations with the municipalities as well as pending issues between the Navajo Nation, the City of Winslow and Arizona Game and Fish concerning stock ponds and a few other matters. Mr. Sachse further advises that they await the hydrologist's report regarding the Hopi new lands which should arrive today or tomorrow after which they will sit down with the Navajo Nation for discussion. Mr. Sachse indicates that the Navajo Nation has asked for Central Arizona Project allocations in lieu of marketing their water. The Department of the Interior has rejected the amount requested by the Navajo Nation but is willing to continue to negotiate.

Mr. Sachse advises that the most difficult issues still to be resolved are the status of Blue Ridge Reservoir and the alternative Navajo project if Blue Ridge is not a part of this settlement. The federal government has given a December 1st deadline to its consultant for the geophysical work on the alternative project. The resolution of these issues depends on the outcome of this work and there is no guarantee that the deadline will be met.

Mr. Sachse discusses the actual settlement document. An issue needing resolution is the time for releasing claims. Mr. Sachse advises that on the northside there has been progress between the Navajo Nation and the Hopi Tribe in working out the distribution of water in the washes that run between them. Mr. Sachse further advises that there also has been progress on the N-Aquifer plan and the 638 contract and he estimates that 30 to 45 days is reasonable time frame for resolving both.

Mr. Sachse notes that problems have developed for funding the Lake Powell pipeline. Pursuant to the letters received from Mr. David Hayes, it appeared that the 20 million dollars that the United States had previously offered was being withdrawn from the settlement. However, yesterday, the representatives of the United States indicated that if the problem of the 15 million dollar to 21 million dollar gap could be solved, they would recommend that the United States return the 20 million dollars to these negotiations. Yesterday, the Hopi Tribe agreed that the 21 million dollar gap could be reduced to a 15 million dollar gap by the reconfiguration of the pipeline. The Hopi Tribe further agreed to reduce the gap by another 5 million dollars if the Navajo Nation would contribute an additional 5 million dollars toward the settlement to build the pipeline at least to Kykotsmovi and if the non-Indian parties would contribute another 5 million dollars as well. Mr. Sachse further advises that the Navajo Nation indicated that it would contribute 5 million dollars if certain funding issues regarding its new project could be resolved and if the other issues between the Hopi Tribe and the Navajo Nation could be satisfactorily resolved.

Mr. Sachse explains that Southern California Edison has withdrawn its contribution of 12.5 million dollars from the Lake Powell pipeline contingent upon the Department of the Interior withdrawing a letter it issued requiring Southern California Edison to put scrubbers on the Mohave power plant. Mr. Sachse further explains that the issue of Lake Powell pipeline capacity can be resolved within 30 to 45

days, as well as the issue of power for that pipeline. The United States prefers to use federal power for the pipeline; the Navajo Nation prefers to acquire power from the Navajo Tribal Utilities Authority.

Mr. Sachse concludes that documents have been drawn up with only few provisions still in dispute. Mr. Sachse observes that if Southern California Edison removes its contribution from the northside settlement, "it would kill it". Mr. Sachse recommends having an additional status conference at the end of January with a tight schedule from now until then.

Mr. David Brown advises that it is difficult for some of the issues to be ironed out because of the inability to know until December 1st what the alternative Navajo project may require. Believing that more progress is made in the face of a deadline, Mr. Brown urges that there be a status conference sometime before the end of the year as well as a visit to the congressional delegation before November 15th.

Mr. Sachse advises that a mid-December status conference could be fruitful.

Judge Michael Nelson cautions that a mid-December conference may be too early.

Mr. Stanley Pollack suggests that progress is not being driven by court-imposed deadlines or threat of litigation but by the belief that the dollars offered by the United States government are tenuous and can disappear easily. The critical issue now is to capture the dollars. Mr. Pollack finds a mid-December conference to be pointless if the Navajo project triggers other issues. Because it is unknown whether there will be wet water development on the southside until the United States has done additional studies, Mr. Pollack thinks it is unlikely that there will be a meeting with the congressional delegation before mid-November.

Mr. Pollack says that the Blue Ridge Reservoir remains an important issue. Mr. Pollack adds that if the alternative project is inefficient in terms of water, or fuel, or is too expensive, it may not be possible to grandfather Phelps Dodge's rights. Mr. Pollack warns that there is nothing more threatening to settlement right now than the loss of money.

Mr. Pollack continues to advise that the Central Arizona Project (CAP) allocation is a tremendously troubling issue because it is difficult for the United States to come up with the water and it is linked to the water marketing issue. The Navajo Nation is willing to live with the off-reservation marketing prohibitions but must have a CAP allocation to market. If there is going to be a ban on out-of-basin exports from the Little Colorado basin, the Navajo Nation expects that ban to apply to every party in this adjudication. Mr. Pollack cautions that the Navajo Nation should not be treated any differently than any of the other parties. Mr. Pollack concludes that mid-February is a more realistic time frame for meeting with the congressional delegation.

Mr. John Weldon reiterates that the money is driving this process and the availability of money continues to be shaky at best. If the United States adheres to the position outlined in the letters from Mr.

Hayes, the northside negotiations are effectively dead. Mr. Weldon advises that it is important to meet with the congressional delegation for a commitment before they recess in mid-November. In January, Congress will face even more budget constraints. Mr. Weldon addresses the Navajo project, marketing issues and a CAP allocation for the Navajo Nation. Mr. Weldon advises that it is important for the Court to keep track of progress. Mr. Weldon further advises that there was substantial progress made yesterday and suggests a status conference around December 1st to ascertain progress on the issues needing 30 to 45 more days.

Mr. Brophy agrees with the reports presented thus far with the exception of Mr. Pollack's comment that progress does not depend on court-imposed deadlines. Mr. Brophy suggests a status conference during the first weeks of December to report on whether these lesser issues have been resolved and what the congressional delegation has conveyed regarding funding. Mr. Brophy suggests an additional status conference toward the end of January at which time a litigation schedule could be outlined, if necessary.

Mr. Joe Clifford agrees with the previously made assessments and adds that the State is only peripherally involved. Mr. Clifford observes that there is a commitment on everyone's part to negotiate and to continue negotiations. Mr. Clifford urges the Court to set a status conference sooner rather than later. Mr. Clifford believes that settlement remains very much in the public interest. If settlement does not take place, there would be significant opportunities lost for environmental preservation in the basin.

At the urging of the Court, Mr. Clifford enumerates some of the concerns that the Arizona Game and Fish Department has regarding these opportunities. An initiative was passed several years ago which provides the Arizona Game and Fish Department and the state Parks Department with 10 million dollars each year for environmental education and environmental protection. Some of that money is available each year for the purchase of land and water rights. On the western edge of the basin around Flagstaff, the Game and Fish Department and the United States Forest Service are together attempting to buy a ranch which has associated with it approximately 5,000 acre/feet of water in three lakes. If the ranch is not acquired, it will be developed and lost permanently as significant wildlife habitat. When key habitat in a forest is protected, the forest around it remains useful habitat, too. If a meadow is lost, then the surrounding forest is devalued. Without the grandfathering of water rights in the settlement, there is no basis for purchase of potential wildlife habitat. The timing is such that the opportunity will never come again.

Mr. Clifford asserts that the Game and Fish Department, the National Parks Service, and the United States Forest Service would very much like to see diverted Show Low Lake water returned to the basin, thereby restoring water to the streams that run through the communities. There would be enormous environmental and recreational benefits if the water in that area could be restored.

Mr. Clifford further advises that the Game and Fish Department has for many years undertaken a plan for restoring the stream flow to this area by acquiring lands when people decide that they no longer want to farm. By taking the land and water from their current uses and allowing water to be returned to the main stream, the area is protected and provision is made for game and species habitat.

Mr. Clifford concludes that the Game and Fish Department wants to provide a means for enhancing stream flow of the Little Colorado River by purchasing water rights. The settlement is key because it is the vehicle for obtaining the consent of all the people in the area. The opportunities that are presently open will not be available five or ten years from now.

Mr. Jerry Haggard advises that the Blue Ridge Reservoir has been a central feature of settlement discussions. Mr. Haggard provides a brief background regarding Phelps Dodge's position with respect to the Blue Ridge Reservoir. Approximately two years ago, the United States proposed that the Blue Ridge Reservoir be made part of the settlement to provide water to the Navajo Nation. Phelps Dodge agreed so long as a reliable source of replacement water could be obtained for Phelps Dodge at reasonable cost. The Department of the Interior rejected Phelps Dodge's conditions. The Department of the Interior then counterproposed that replacement water would be provided to Phelps Dodge from CAP sources with an agricultural priority, the lowest priority in the CAP system. That is not acceptable to Phelps Dodge. In the meantime, Navajo County approached Phelps Dodge with the possibility of also contributing Show Low Lake to the settlement, which would offset to some extent the agreement that the local community had made not to construct any new major reservoir. Last July, Phelps Dodge modified its proposal to include Show Low Lake if replacement water for that source was also provided.

Mr. Haggard explains that Phelps Dodge has made four significant concessions. First, the United States and other settling parties would not bear the responsibility to furnish the replacement water for Blue Ridge Reservoir and Show Low Lake for use at Morenci and another project near Safford. Phelps Dodge would take on that burden. Second, the United States and other settling parties would not be required to pay for the conversion costs necessary to develop replacement water for Morenci and Safford. Third, the United States and other settling parties would not have to pay for all of the facility costs; that Phelps Dodge would bear these costs up to a million dollars. Fourth, Phelps Dodge no longer insists that replacement water must be acquired and necessary construction or conversion be complete before settlement can be finalized. Phelps Dodge has decided that only permitting and the contract permitting procedures would have to have been completed in advance.

Mr. Haggard advises that substantial progress has been made since last July. Mr. Haggard outlines the value of Blue Ridge Reservoir to the settlement. The current replacement cost of Blue Ridge Reservoir, including the water rights, is between 31 million dollars and 36 million dollars. The replacement cost for Show Low Lake is between 15 million dollars and 18 million dollars, making a contribution to the settlement from Phelps Dodge of between 46 million dollars and 54 million dollars without permitting costs. The Department of the Interior also rejected Phelps Dodge's proposal with these concessions.

Mr. Haggard says that Phelps Dodge is now prepared to make further concessions. First, on permitting, Phelps Dodge will consider waiving the contingency of completed environmental permitting if the Navajo Nation will also do the same. Second, Phelps Dodge will also take care of the permitting costs.

Responding to Mr. Pollack's earlier remarks that the Navajo Nation will not agree to grandfather water rights at Blue Ridge Reservoir, Mr. Haggard believes it is inappropriate to be posturing now on these

issues and singling out one party as not being grandfathered. Phelps Dodge is willing to further discuss alternative replacement sources. with the Navajo Nation, the Department of the Interior, and Salt River Project. SRP has agreed to brainstorm other ideas on replacement sources. Mr. Haggard agrees that it would be appropriate to have a status conference in mid-December.

Ms. Jane Marx, representing the Pueblo of Zuni, advises that progress is being made but more time is needed. She predicts a fair likelihood of settlement.

Mr. Bradley Bridgewater offers the United States' perspective on the Blue Ridge Reservoir issue. The alternative Navajo project is being viewed by the United States as a more affordable option. Mr. Bridgewater clarifies that the United States has never expressed an interest in Show Low Lake. There may still be points of interest to discuss with Phelps Dodge and Salt River Project.

Concerning the overall settlement, Mr. Bridgewater says that Department of the Interior decisionmakers believe the northside settlement, the Lake Powell pipeline, is dead. Southern California Edison has taken its very significant contribution to that settlement off the table. Concerning the letter regarding the Mohave power project scrubbers, it is unrealistic to expect the United States government to freeze all action on anything that might have any relevance to this settlement while negotiations continue. Mr. Bridgewater confirms that it is harder and harder to keep the money lined up. There is also a potential for a loss of CAP water available for the settlement.

Mr. Bridgewater is impressed that all the major players appear to have their heart set on settlement which is justification in itself to continue to try to solve these problems. Mr. Bridgewater concurs with the need for a December status conference.

Mr. Barry Brandon heartily agrees with the comments made by Mr. Bridgewater. Mr. Brandon reviews that within the last month, Mr. David Hayes, counselor to the Secretary, has written letters expressing the Department's concern that settlement would not be accomplished by this status conference. The letter discussed funding but raised more questions than it answered. Judge Nelson followed up with another letter requesting clarification. Mr. Hayes responded with a letter dated September 24th. Mr. Hayes' letter conveyed that the Department has regretfully concluded that there is not a possibility for a northside settlement under the current configuration. The funding issue has not really changed for over a year. There is no more federal funding available for the Department of the Interior to contribute, and it is looking to other parties to contribute more. Mr. Brandon says the United States' would consider renewing its financial commitment if the money gap could be closed. Mr. Brandon warns that the Secretary's office does not look favorably on having the tribes increasing their contributions to the settlement while the other parties reduce theirs. If these funding issues are resolved, Mr. Brandon suggests that the United States would try to resurrect the plan.

Mr. Hoffman offers the perspective of Southern California Edison beginning with a brief background. Southern California Edison has a contract to operate the Mohave Generating Station with an option for 20 more years to be exercised near the end of the original term. Southern California Edison and the

project manager at Mohave decided to take a risk with respect to the scrubber issue and offered 12 million dollars to fund the pipeline, planning to exercise the option in the year 2005. The Environmental Protection Agency was to utilize quantitative results and analysis of the data collected with regard to the Mohave plant using tracer techniques. There had been no indication that scrubbers would be required when the proposal was made and the money offered. The study has not yet been completed. While not having study results, the office of the Secretary said on August 19th that the Mohave project contributes to Grand Canyon haze. Mr. Hoffman further explains that his client is hopeful that negotiations between the EPA and the solicitor's office regarding the scrubber issue will somehow enable Southern California Edison to restore its settlement pledge. Mr. Hoffman speculates that a resolution of this issue may occur in perhaps 30 to 60 days.

Mr. Brandon responds that he is unaware of any negotiations regarding Southern California Edison and the scrubber issue. Mr. Brandon believes that the Department's position is that air quality issues will not be tied to this settlement. The letter will not be withdrawn as a result of what is happening in these negotiations.

The Court notes that this problem should be followed up in a forum other than this courtroom this morning, perhaps under the guidance of Judge Nelson.

Ms. Lee Storey advises that municipal provider issues are minor. There has been significant progress between the National Park Service and the City of Flagstaff on the Walnut Canyon National Park issue. Ms. Storey assures the Court that these parties will endeavor to reach an agreement by mid-December. Ms. Storey commends Judge Nelson for his patience, guidance and hard work during this negotiation process.

Mr. Walsh advises that negotiations are continuing with the City of Flagstaff as well as with Salt River Project.

The Court reminds Mr. Darling that he filed a Motion to Intervene and a Petition for Declaratory Judgment and Recognition of Water Rights and that the time for responses has not yet passed.

Mr. Darling advises that if the inholding rights are to be treated as state water rights, they need to be grandfathered in the same way as all other state water rights.

Mr. Clifford advises that Mr. Pete Shumway is not here today and has requested that his appearance be entered in some fashion. He is at home and he is ill. Mr. Shumway wanted the Court to know that his illness is the only reason that he is not here today.

The Court wishes Mr. Shumway a speedy recovery and looks forward to seeing him at the next status conference.

Mr. Lauren Caster advises that he filed a Notice of Inability to Reach Settlement with the Navajo Nation

on behalf of the Burlington Northern Santa Fe Railroad Company but is attempting one last effort to settle. Mr. Caster believes that the northside and southside settlements should not be linked.

Ms. Jeanne Whiteing notes that the agreement between the United States and the San Juan Southern Paiute Tribe over funding issues has remained intact over the last two years. The one remaining issue is an actual allocation of water from the N-Aquifer. The allocation sought is expected to be a part of the N-Aquifer management plan that is being negotiated among the Navajo Nation, the Hopi Tribe and the San Juan Southern Paiute Tribe. While negotiation of the plan is not finished, there is no major objection to the allocation sought.

Mr. William Veeder reiterates the jurisdictional concerns of the White Mountain Apache Tribe. The Court reminds Mr. Veeder that the other parties are not required to respond to the White Mountain Apache Tribe's Motion to Dismiss at this time and therefore the Motion is not now before the Court. Mr. Veeder states for the record that the White Mountain Apache Tribe is being planned out of existence by the course of conduct that is being pursued. Mr. Veeder warns that if the tribe has to take affirmative action in another court, he will recommend it. Mr. Veeder says that he will not stand by and let this political deal go ahead to destroy the Coconino Aquifer and destroy the White Mountain Apache Tribe.

The Court notes Mr. Veeder's comments and reaffirms that there will be no disposition of the Motion to Dismiss at this time.

ORDERS AND DIRECTIVES FROM THE COURT

The Court finds that there is a consensus from all the active participants to continue negotiating the outstanding issues. The Court directs all parties to continue working with Judge Michael Nelson.

IT IS HEREBY ORDERED setting an additional **Status Conference on Friday, December 12, 1997 at 9:30 A.M.** in the Apache County Superior Court in St. Johns, Arizona.

IT IS FURTHER ORDERED that a Status Report be submitted to the Court by December 5, 1997.

The Court directs the Clerk to save the chart referred to by Mr. Sachse and used throughout this hearing. The chart will be reviewed at the next hearing for progress on the listed items.

The Court expresses concern regarding the comments from Mr. Hoffman and Mr. Brandon, posing what could be described as an impasse.

Judge Nelson shall meet with the Settlement Committee at the close of the hearing this date.

The Court extends the time to file a Response to Mr. Darling's Petition for Declaratory Judgment to October 31, 1997.

11:15 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 October, 1997, a copy of the foregoing mailed

to those parties who appear on the Court-Approved mailing list for

Case No. 6417 dated September 11, 1997.

Barbara Neuzil, Deputy