

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

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

DATE: September 8, 2008

CV 6417-201

CASE INITIATION ORDER
AND DESIGNATION OF
ISSUES FOR BRIEFING

CONTESTED CASE NAME: *In re Hopi Tribe Priority.*

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master organizes a contested case to determine the issue referred by the Court concerning the priority of the claims of the Hopi Tribe, designates seven issues for briefing, and sets timelines for disclosure statements, discovery, and motions.

NUMBER OF PAGES: 8.

DATE OF FILING: September 8, 2008.

The Special Master has considered the comments and proposed issues submitted to resolve the question referred by the Court of “whether the claims to water rights asserted by, or on behalf of the Hopi Tribe in this adjudication have a priority of ‘time immemorial’ or are otherwise senior to the claims of all other claimants.” A contested case will be organized, and issues will be designated for briefing.

Catalyst Paper (Snowflake) Inc. (“Catalyst”), the Hopi Tribe, and the Navajo Nation submitted issues. The Hopi Tribe proposed as issues whether it holds water rights

with priority dates of (1) time immemorial, (2) 1848 as a result of the Treaty of Guadalupe Hidalgo, (3) 1882 as a result of the executive order establishing the Hopi Reservation, and (4) any other priority as a result of Congressional acts or court decisions that added lands to the reservation and, if so, for what uses and from what water sources.

Catalyst suggested that the United States as trustee and the Hopi Tribe be required to disclose “all Hopi rights claimed to be more senior than those asserted by all other claimants, regardless of whether the asserted priority is described as ‘immemorial’.” If the Hopi Tribe’s issues are to be adopted for briefing, especially when attributes of water uses and sources are involved, specific information of the Tribe’s claimed water rights for each asserted priority must be disclosed at the outset. Catalyst’s suggestion is proper. The Hopi Tribe and the United States will also be directed to file their disclosure statements prior to other parties being required to file their disclosures.

The Hopi Tribe suggested as an issue whether “the Navajo Nation or any other party hold water rights with a priority date equal or senior to rights of the Hopi Tribe?” This issue turns around the question referred to the Special Master which concerns Hopi Tribe priorities. This issue is not designated for initial briefing.

The history of the “disputes over various reservation lands and resources for more than a century,” summarized by the Navajo Nation, includes Congressional acts, executive orders, federal court decisions, Indian Claims Commission decisions, and land acquisitions. The lists of these events provided in several disclosure statements filed in 2002 are lengthy. Underlying most of the proposed issues is the question of whether claim preclusion, issue preclusion, or both impact the claimed water right priorities of the Hopi Tribe. Catalyst includes accord and satisfaction as part of that underlying theme. This history cannot be avoided in any resolution of the Hopi Tribe’s claimed priorities.

Many of the Navajo Nation’s proposed issues relate to attributes which do not directly involve priority. These issues will come up in the future when their resolution will be more pressing. However, the Navajo Nation submitted the issue of whether in light of the federal process for the “fair and equitable” allocation of resources between the Nation and the Hopi Tribe established by Congressional acts in 1958 and 1974, may the Hopi Tribe assert a priority that is senior to the Navajo Nation for water resources that are shared by both tribes? This issue is relevant to the question referred by the Court.

Seven issues set forth below are designated for briefing. Disclosures, discovery, and briefing shall be limited to these issues. The Navajo Nation’s suggestion that the Hopi Tribe and the Nation file their disclosures at the same time is adopted. The Arizona Department of Water Resources (“ADWR”) will be asked to create and maintain an electronic data base and index of disclosed documents as done in other contested cases.

As this contested case is not framed by a hydrographic survey report, and the issues designated for briefing are of basin-wide importance and interest, the Court approved mailing list for this case will be the main mailing list for this adjudication.

IT IS ORDERED:

1. Contested Case. This case is designated *In re Hopi Tribe Priority*, Docket No. CV 6417-201.

2. Litigants. At this time, all the litigants in this case cannot be specified, but they include all the parties who have submitted disclosure statements, comments, and proposed issues concerning the issues to be resolved in this case.

3. Court Approved Mailing List. The mailing list for this case shall include, with one exception, all persons listed on the Court approved mailing list for the Little Colorado River Adjudication Civil No. 6417 dated July 25, 2008, and as updated hereafter. Judge Eddward P. Ballinger, Jr. will not be included in this case's mailing list.

4. Filings.

A. Date of Filing. Papers submitted to the Clerk of the Apache County Superior Court shall be considered timely filed if postmarked by the deadline specified in an order issued in this case.

B. Signature Page. In papers joined by numerous parties, in lieu of separate signature pages, the Special Master will accept as sufficient an avowal by the lead counsel that includes a listing of the attorneys and the parties each represents who join in the pleading. This allowance is made pursuant to Arizona Rule of Civil Procedure 1 that the rules "shall be construed to secure the ... inexpensive determination of every action." If a party has concerns related to Rule 11(a), that party may request or provide an individual signature.

5. Initial Issues. The following issues shall be briefed at this time:

A. Does the Hopi Tribe hold water rights with a priority of time immemorial?

B. Does the Hopi Tribe hold water rights with a priority date of 1848 as a result of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1848)?

C. Does the Hopi Tribe possess water rights with a priority date of 1882 as a result of the establishment of the Hopi Reservation under the Executive Order of December 16, 1882?

D. Does the Hopi Tribe possess water rights with another date of priority as a result of Congressional acts and court decisions adding property to the Hopi Reservation?

E. Does claim or issue preclusion or both preclude any claims by or on

behalf of the Hopi Tribe to water rights more senior to those held by any other claimant?

F. Does accord and satisfaction preclude any claims by or on behalf of the Hopi Tribe to water rights more senior to those held by any other claimant?

G. May the Hopi Tribe assert a priority that is senior to the Navajo Nation for water resources that are shared by both tribes in light of the process for the allocation of resources established by the Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403, and the Act of December 22, 1974, Pub. L. No. 93-531, 88 Stat. 1712, as amended?

6. Disclosure Statements.

A. Scope. Disclosure statements shall be limited to matters concerning the issues designated for briefing in this case initiation order.

B. Filing Date for the United States, the Hopi Tribe, and the Navajo Nation. On or before **January 6, 2009**, the United States acting as trustee, the Hopi Tribe, and the Navajo Nation shall file their initial Arizona Rule of Civil Procedure 26.1 disclosure statements.

C. Filing Date for All Other Parties. On or before **February 6, 2009**, all other parties shall file their initial Rule 26.1 disclosure statements.

D. Contents. All disclosures shall include information and data in the possession, custody, and control of the disclosing party as well as that which can be ascertained, learned, or acquired by reasonable inquiry and investigation. The disclosure statement shall set forth:

(1). The factual basis of a party's claim concerning each of the designated issues.

(2). The legal theory upon which each claim is based including, where necessary for a reasonable understanding of the claim, citations of pertinent legal or case authorities.

(3). The names, addresses, and telephone numbers of any witnesses whom the disclosing party expects to call to substantiate its claims with a fair description of the substance of each witness' expected testimony.

(4). The names and addresses of all persons whom the disclosing party believes may have knowledge or information relevant to the events, transactions, or occurrences that gave rise to each claim, and the nature of the knowledge or information each such

individual is believed to possess.

(5). The names and addresses of all persons who have given statements, whether written or recorded, signed or unsigned, and the custodian of the copies of those statements.

(6). The name and address of each person whom the disclosing party expects to call as an expert witness, the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, a summary of the grounds for each opinion, the qualifications of the witness, and the name and address of the custodian of copies of any reports prepared by the expert.

(7). The existence, location, custodian, and general description of any tangible evidence, relevant documents, or electronically stored information that the party plans to use to support its claims.

(8). A list of the documents or electronically stored information, or in the case of voluminous documentary information or electronically stored information, a list of the categories of documents or electronically stored information, known by the disclosing party to exist whether or not in its possession, custody, or control and which that party believes may be relevant to any of its claims concerning the designated issues, and those which appear reasonably calculated to lead to the discovery of admissible evidence, and the date(s) upon which those documents or electronically stored information will be made, or have been made, available for inspection and copying. Unless good cause is stated for not doing so, a copy of the documents and electronically stored information listed shall be served with the disclosure. If production is not made, the name and address of the custodian of the document and electronically stored information shall be indicated. A party who produces documents for inspection shall produce them as they are kept in the usual course of business.

E. Continuing Duty. All parties shall have a continuing duty to disclose as required by and in the manner provided in Rule 26.1(b)(2).

F. Service of Disclosures. All disclosing parties shall provide a notice of filing and a listing of the disclosed documents and electronically stored information to all persons appearing on the Court approved mailing list for this case. Paper copies of disclosed documents need not be served upon the other parties in this case, as copies can be obtained from ADWR.

G. Service of Lengthy Listing of the Disclosed Documents: If a party's listing of its disclosed documents or electronically stored information, not

the disclosure statement, exceeds twenty-five pages, that party shall so state in its disclosure statement and shall provide a copy of the complete listing to the Special Master, ADWR, and to those parties who request from the disclosing party a copy of the complete listing.

7. Disclosures of the United States Acting as Trustee and Hopi Tribe. The disclosure statements of the United States acting as trustee and of the Hopi Tribe shall designate all water rights claimed to be more senior than those asserted by all other claimants in this adjudication and shall state the claimed date of priority of each right.

8. Electronic Data Base and Index Provided by ADWR. ADWR is directed to create and maintain an electronic data base and index of all disclosed documents which shall be available on ADWR's Internet site. ADWR may confer and work with any of the parties in this case to implement the electronic data base and index.

A. Electronic Format. A disclosing party shall submit to ADWR a copy of all documents disclosed and an index of the documents in accordance with the following requirements:

(1). Number each document in numeric sequence with a unique alpha identifier which is related to the name of the disclosing party.

(2). Complete a Disclosure Input Form in Microsoft Excel format for each disclosed document containing the following searchable index fields:

a. Title or description of document.

b. Unique identifying number created by the disclosing party for each document.

c. Date of publication or preparation of document.

d. Document type (article, book, letter, map, report).

e. Recipient.

f. Number of pages of document.

g. Disclosing party.

h. Date of submittal of document.

i. Subject matter of document (up to three categories).

j. Any other item that would make the disclosed document easy to find and read.

(3). Create a portable document format file (.pdf) of each

document.

(4). Provide a compact disc to ADWR with copies of the Disclosure Input Forms (Microsoft Excel files) and corresponding disclosure documents in .pdf file format.

(5). Provide to ADWR paper copies of disclosed documents and corresponding Disclosure Input Forms. ADWR will maintain paper copies to satisfy the Public Records Act, A.R.S. §§ 39-101 *et seq.*

B. Internet Access. ADWR shall place a blank copy of the Disclosure Input Form together with format protocols on the Internet at a domain or address made known to all persons who appear on the Court approved mailing list for this case. In order to provide access to the disclosed documents, each index field in the Disclosure Input Form shall be subject to query. To the greatest extent possible, electronic copies of all disclosed documents and completed Disclosure Input Forms shall be made available on the Internet for viewing and copying.

C. Form. To the extent possible, parties shall submit documents in the following form: single-sided, 8.5" x 11" size, no punched holes, no permanent binding (staples excepted), and no tabs.

D. Copies of Disclosed Documents. ADWR shall make available to any claimant, at the claimant's expense, a copy of disclosed documents on a CD-ROM or a paper copy. ADWR shall determine the best and most practical manner for providing copies.

E. Fees. ADWR may collect its standard fees for copies and other services rendered related to the use of the electronic data base and index.

9. Expert Reports. On or before **January 6, 2009**, all parties shall exchange expert reports that a party considers relevant to the issues designated for briefing. Parties may stipulate to a different date but not later than February 6, 2009.

10. Discovery.

A. Scope. Discovery shall be limited to matters concerning the issues designated for briefing in this order.

B. Commencement. Parties may commence formal discovery on or after **January 6, 2009**, but prior thereto may, and are encouraged, to engage in informal discovery.

C. Completion. All discovery including depositions shall be completed by **June 30, 2009**.

D. Rules. All discovery related to the designated issues shall be conducted

according to Arizona Rules of Civil Procedure 26 through 37, and as applicable, pretrial orders issued in this adjudication and the Rules for Proceedings Before the Special Master.

11. Motions. On or before **September 1, 2009**, any party in this case may file the appropriate motion that presents the party's position concerning any of the designated issues. Each issue shall be separately addressed in the motion. Parties sharing the same position are encouraged to file joint pleadings.

12. Responses. Responses to all motions shall be filed by **November 2, 2009**.

13. Replies. Replies to all motions shall be filed by **December 14, 2009**.

14. Statement of Position. A party may file a statement of position in lieu of a motion. Responses to a statement and replies shall be subject to the foregoing deadlines.

15. Page Limitations. Parties are excused from mandated page limitations for motions, responses, and replies, but reasonableness is expected.

16. Oral Argument and Hearings. Oral argument will be held on all the issues. The place, date, and time of oral argument will be announced later. Oral argument and hearings will be held in the Maricopa County Superior Court in Phoenix, but any party in this case may request that a proceeding be held in the Apache County Superior Court in St. Johns or in another location.

17. Status Conference. At this time, a status conference is not set. Any party may request a conference, which may be held telephonically, to consider any matter including the need for an evidentiary hearing.

DATED: September 8, 2008.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On September 8, 2008, the original of the foregoing was mailed to the Clerk of the Apache County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for the Little Colorado River Adjudication Civil No. 6417 dated July 25, 2008.

/s/ George A. Schade, Jr.
George A. Schade, Jr.