

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

Special Master, GEORGE A. SCHADE, JR.

SUE HALL, Clerk

COURT REPORTER: Sheryl Barker

By: Barbara J. Silversmith, Deputy

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE	Case No. CV-6417-033-0060 DATE: February 04, 2003 TIME: 8:57 A. M. MINUTE ENTRY: Status Conference
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DESCRIPTIVE SUMMARY	Status Conference held in the Pinetop/Lakeside Council Chambers, Pinetop/Lakeside, Arizona.
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DATE OF FILING	March 25, 2003

MINUTE ENTRY

This is the date and time set for a Status Conference in Civil No. 6417-033-0060.

APPEARANCES

Mr. David Brown and Mr. Michael Brown, representing various clients; Mr. Larry Whipple, representing Show Low-Pinetop Woodland Irrigation Company; Mr. Fred R. Hansen, representing Show Low-Pinetop Woodland Irrigation Company Board Member; Mr. Stanley Pollack and Mr. Scott McElroy, representing the Navajo Nation; Ms. Cynthia Chandley and Mr. William A. Richards, representing Phelps Dodge Corporation; Ms. Jan Ronald and Mr. Rich Burtell, representing Arizona Department of Water Resources (ADWR); Mr. John B. Weldon, Jr., Mr. Mark A. McGinnis and Mr. Dave Roberts, representing Salt River Project; Ms. Vanessa Boyd Willard, representing the U.S. Department of Justice (Indian Resources Section); Mr. Steve Wene, representing the City of Flagstaff; Ms. Cynthia Haglin, representing City of Chandler; Mr. Thomas Shedden, Arizona Attorney General's Office representing Arizona Department of Transportation, Game & Fish, Land Department, and State Parks; Mr. Jeff Hodge, representing Pinetop/Lakeside Sanitary District; Mr. John Doney, representing the Department of the Interior (Office of the Solicitor); Mr. Randall L. Chavez, representing U.S.D.A Forest Service, Lakeside Ranger District; and Mr. Jim Probst, representing Apache-Sitgreaves National Forest.

Also in attendance: Kathy Dolge, Assistant to the Special Master.

The Special Master states the purposes of this hearing are to:

- Identify the scope of the case.
- Identify pending motions.
- Discuss whether Phelps Dodge intends to amend its statement of claimant.
- Discuss whether ADWR should update watershed file report 033-56-ABC-027.
- Discuss notification and objection if the watershed file report is updated.
- Discuss disclosure, discovery, prehearing statements, actual hearing and presentation of evidence.
- Discuss settlement prospects.
- Review the Court-approved mailing list.
- Schedule future proceedings.

The Special Master states that Judge Ballinger's order of reference (filed December 9, 2002) clearly severs Phelps Dodge's claims to Show Low Lake from the special consolidated case that Special Master Thorson set up eight years ago (6417-033-9005). This case is numbered 6417-033-0060 and named In re Phelps Dodge Corporation (Show Low Lake).

Ms. Cynthia Chandley, on behalf of Phelps Dodge, agrees that Phelps Dodge's claims and uses with respect to Show Low Lake should be severed from the special consolidated case.

Mr. Scott McElroy, on behalf of the Navajo Nation, agrees this case should only be about Phelps Dodge's utilization of the Show Low Lake water right, including issues of transbasin diversion.

The Special Master asks Ms. Chandley about the place of use as an issue and Mr. McElroy's concerns about transporting the water out of the Little Colorado River basin.

Ms. Chandley informs the Special Master that in the past, Mr. McElroy wanted to examine every source of Phelps Dodge's water supply that went into Morenci, and that is an enforcement issue, not an adjudication issue.

Mr. McElroy states there is a pretrial statement in this case. Special Master Thorson looked at the issues and determined which ones he thought were relevant to the adjudication of Phelps Dodge's rights at Show Low Lake. He does not want to take a step back from the work done previously and narrowing or restricting the scope as they spent a lot of time before Special Master Thorson looking at what was properly discoverable and what the real issues were.

Ms. Chandley states Phelps Dodge currently is in negotiations with the White Mountain Apache Tribe to renew the expired right of way across the reservation. Until an

agreement is completed, the water at issue cannot be used in the transbasin diversion. Adjudicating this claim with respect to the place of use while at the same time negotiating the right of way for that place of use is cumbersome.

The Special Master addresses the history of this case and states that his goal is to have a water right determined.

Ms. Chandley agrees with Special Master Schade's goal and would like to see Phelps Dodge's water right adjudicated.

The Special Master next advises the parties that he has identified two pending motions that relate to this case. One is a motion filed in January 1994 in which Phelps Dodge moved for an interlocutory stay and a request for expedited consideration. The second motion is Phelps Dodge's motion to review Special Master Thorson's decision on the issues of laches. Phelps Dodge's status report dated January 30, 2003, indicates that the first motion is essentially moot, but the laches motion is pending. Upon inquiry, Ms. Chandley agrees.

The status report also mentions two other pending motions. The Special Master believes one of those motions pertains more to the Woodland Irrigation Company than to this particular case.

Ms. Chandley explains the motion for clarification or in the alternative motion for reconsideration was on the issue of a small settlement agreement between those parties and what the impact of the settlement meant. It may still be a live issue and it may pertain more to Pinetop/Woodland Irrigation Company.

Discussion ensues among Ms. Chandley, Mr. McElroy, and Special Master Schade concerning whether or not watershed file report (WFR) 033-56-ABC-027 should be updated. Ms. Chandley urges revision of the WFR, followed by a new round of objections. She takes this position based on the length of time that has passed, new information that has come to light, possible irrelevance of some of the previous objections and information, and the amendments to the adjudication statutes in 1995.

Mr. McElroy strongly recommends to the Master that the process not be restarted by revising the WFR. He urges updating the work that was done in preparation for the trial that had been scheduled in 1994.

Upon inquiry by the Special Master, Mr. McElroy clarifies his position that the WFR should not be revised, but the pretrial statement and witness lists, for example, should be updated. It is his position that Phelps Dodge's underlying claim to a 1951 water right has not changed, notice was properly given by means of the 1990 HSR, objections were filed in 1991, and the parties were identified. None of that has changed.

The Special Master raises the issue of notice. If DWR updates the watershed file report, should all other claimants in the adjudication be informed and have the right to file new

objections?

Mr. McElroy can see some utility to an updated watershed file report but does not want to start the process where everyone has to file new objections and have the same arguments with Phelps Dodge about what is really being looked at with this case. He does agree that it may be necessary to serve notice that the case is back in litigation.

Ms. Chandley states due process concerns, in that the 1995 amendments compel revisions to the WFR. As suggested in the report filed January 30, 2003, the watershed file report should be updated and issued, allow objections to it, sort through the new and old objections to determine what objections comply with the statute.

Mr. David Brown, on behalf of various claimants, states he agrees with Phelps Dodge in this matter. The clients he represents have changed significantly over the last ten years, and some were not involved in this case in 1993 or 1994. He strongly urges the Special Master to follow the recommendations in the report that he issued in the PWR 107 case in the San Pedro River watershed. He suggests that the 120-day notice could be started now.

The Special Master inquires if we are talking about one WFR in this case and it doesn't look like a very complicated WFR. It looks like this case went farther along than any of the contested cases in the San Pedro so is there any merit to saying this case is a little different than the cases we were talking about in the Gila and maybe reduce the 180 days to file objections to 90 days.

Mr. Brown states this case was not the furthest along either in the San Pedro or up here. Lakeside Irrigation Company was set for trial a mere two or three weeks after a hearing in March of 1994. The next case to go to trial was the Show Low Lake Irrigation Company case. About the same time was the Silver Creek Irrigation District and it was set in the summer of 1994. But they were set for trial every three or four weeks during that period of time and there were cases that were more prepared to go to trial than this case was. He would strongly urge that those cases be redone. The San Pedro and Palmering case had a pretrial order and a trial date. St. David Irrigation District had a pretrial order ready to go in that case also. He doesn't have a problem with the 90 days if that is legally acceptable and legally allowable and it fits under the statute.

Mr. John Weldon, on behalf of Salt River Project, states they are in agreement with Mr. Brown's comments concerning updating the WFR. It seems clear that under the 1995 statutory amendments and circumstances with respect to Phelps Dodge's water use in Show Low Lake since 1994, that it is necessary to update the WFR. SRP's position is that the WFR should be updated to reflect new information, particularly what appears to be the absence of any beneficial use by Phelps Dodge at Show Low Lake. All parties to the case should have an opportunity to file new objections based upon the recommendations of the DWR.

Mr. Weldon also refers to the Special Master's ruling in the PWR 107 case in the San Pedro River watershed. Until and unless Judge Ballinger modifies that ruling, it should be controlling. With respect to an objection period of 90 or 180 days, Mr. Weldon states that, as indicated in SRP's briefing on the PWR 107 issues, there isn't any basis in the statute to shorten the 180-day period for objections to a supplemental WFR.

The Special Master inquires if there are any issues the he can consider while waiting for DWR to update the WFR and waiting for new objections to be filed, a process that could take up to a year.

Mr. Weldon states one of the things that could move forward is the appeal that Phelps Dodge filed with respect to Special Master Thorson's ruling on laches.

The Special Master informs the parties that the laches issue is before Judge Ballinger and not before the Special Master.

Mr. Weldon states Judge Ballinger may not be aware that the appeal is pending and states the appeal was filed at the same time the case was stayed.

Ms. Chandley does not agree to move forward with that motion because she does not know if the motion would be applicable until she sees all the objections and it is determined which issues will actually go to trial.

Mr. Weldon states that as long as Phelps Dodge continues to rely on the attributes set forth in the certificate of water right as a means to preclude objections by the United States to those attributes, that issue will be before the Special Master. He expresses his opinion that the laches motion was an effort to preclude the United States from objecting to those attributes based on the certificate and their failure to participate in the administrative proceedings that led to the issuance of the certificate. There are other issues that were raised in the pretrial statement that may be mooted by whatever DWR determines to be the water right attributes.

The Special Master asks Ms. Ronald what a supplemental and updated WFR will show.

Ms. Jan Ronald, on behalf of Arizona Department of Water Resources, states they would need to reformat the WFR and include recommended water rights attributes. In reviewing the existing WFR, it was brought to ADWR's attention that the transbasin diversion issue was denominated an issue of broad legal importance by Special Master Thorson in 1992. In a memorandum decision dated October 30, 1992, Special Master Thorson addressed the issue of whether ADWR, when preparing an HSR, should prepare a WFR for transbasin diversions where the use of water is a) outside the watershed or b) outside the river system being adjudicated.

Special Master Thorson refrained from directing ADWR to update the WFR relating to that transbasin diversion issue. In that same order, Special Master Thorson directed ADWR in all future HSRs to deal with those types of issues. Subsequent to that, there was an agreement entered into among Phelps Dodge and other parties regarding how

those issues were to be addressed. ADWR would need direction from the Special Master on what it needs to include in the updated WFR relating to that issue.

The Special Master inquires if there are any other issues that DWR needs guidance for supplementing the WFR. He expresses his opinion regarding DWR and wonders if he should allow everyone to submit comments and then issue an order directing ADWR on how to supplement the WFR.

Ms. Ronald states the contents of the original HSR was the subject of much debate. Without further guidance from the Special Master they could come up with a supplement, an updated WFR, which if they use the terminology used in the Gila PWR 107 case, they are talking about a supplemental contested case HSR. Also, for Show Low Lake, she does not think DWR has made a site visit at the Morenci mine.

The Special Master asks Ms. Chandley about the change in circumstances that Phelps Dodge has not been using water from Show Low Lake since January, 2001. He inquires if Phelps Dodge wishes to amend its Statement of Claimant.

Ms. Chandley states it would be appropriate at some time for Phelps Dodge to amend its Statement of Claimant to reflect a new place of use. She further states an amendment would be impractical until after Phelps Dodge completes the right-of-way negotiations with the White Mountain Apache Tribe and completes discussions with SRP about the exchange agreement. Ms. Chandley then describes how the transbasin diversion works.

Upon inquiry by the Special Master, Ms. Chandley explains all that has changed is water is taken out of Black River and sent to SRP. But instead of sending that reservoir water as part of the San Carlos Apache settlement, the water they now send to SRP is leased CAP water. In return, Phelps Dodge diverts water from Black River and pumps it to Morenci from there. Water from Show Low Lake is never actually delivered to Morenci because it is delivered to SRP.

The Special Master states if Phelps Dodge wishes to amend its Statement of Claimant, a deadline must be given, then ADWR would start supplementing the WFR, with a deadline. Filing new objections would also have a deadline.

Discussion continues between the Special Master and Ms. Chandley regarding the WFR update and the negotiations between Phelps Dodge and the White Mountain Apache Tribe. Ms. Chandley is uncertain of the date negotiations might be complete, but the water can't be transported across the reservation without the right of way. She further states that resuming the adjudication of this claim is cumbersome while at the same time engaged in negotiations with the White Mountain Apache Tribe.

The Special Master asks if DWR could make a recommendation about the place of use.

Ms. Chandley states the historic place of use was Morenci and the proposed new place

of use is Miami. DWR could look at that even though the right of way is not in place.

Mr. McElroy states Ms. Chandley's statements are useful but without having a WFR and without having new objections filed, it all has to do with the same underlying water right and their claim that they are entitled to the water. One option might be to put out some sort of notice that the litigation has resumed and parties that want to intervene or participate could intervene and participate. The pretrial order is the critical event. The pretrial order is going to control the evidence that is presented to the court concerning the determination of the relative rights of the parties.

Ms. Chandley counters that what Mr. McElroy suggests does not comply with the statute. The current HSR and objections do not comply with the statute. It is necessary to comply with the statute in order to move forward and litigate this case.

The Special Master inquires if Phelps Dodge has any information that has been accumulated over the last eight years that DWR should have to start supplementing or updating the WFR? Is there any merit to ordering Phelps Dodge to provide information to DWR within a specified time period?

Ms. Chandley responds that the data provided to DWR at the time the HSR was produced covered a period through 1990 or 1991. She states statistical information concerning gauging and credits since 1991 or 1992 can be provided.

The Special Master informs the parties he has in mind setting a deadline for Phelps Dodge to file an amended updated Statement of Claimant with the information it has and asking DWR to update the WFR. He asks for comments regarding what DWR should consider as it updates the WFR.

Ms. Chandley states DWR should consider the reservoir, the diversion, and the credits that it built in the exchange. She does not believe DWR should prepare a watershed file report for Morenci outside the scope of the upper Gila River HSR.

The Special Master inquires if Phelps Dodge is willing to state that the water will not be used in Morenci.

Ms. Chandley states that is not the case and explains.

The Special Master asks Mr. McElroy about notification; that is, if DWR updates the WFR, should all 3,000 claimants in the Little Colorado adjudication be notified and be allowed to file objections?

Mr. McElroy expresses concern that the process would start all over again. An updated WFR will give the parties a new opportunity to object. At least on the face of the statute, he cannot find a way to get around that.

The Special Master asks Mr. McElroy what DWR should consider when it updates the

WFR.

Mr. McElroy states DWR would have to show how the exchange agreement operates, where the water does or does not go, what the underlying factors are that trigger Phelps Dodge's demands on Show Low Lake, and what Phelps Dodge's alternative water supplies are. In other words, the updated WFR should be a comprehensive examination of the water supply of Phelps Dodge and how Show Low Lake fits within that. He states that comprehensive examination does not mean we are going to adjudicate those other rights.

Ms. Chandley states what Mr. McElroy really wants to do is an HSR of Phelps Dodge's entire water rights supply for the Morenci operation. She states there is no requirement in the statute to show need for the water; the requirement is to appropriate the water and put it to beneficial use.

Mr. McElroy advises that they have discovery of those matters by order of Judge Goodfarb and went through the pretrial process in front of Special Master Thorson. He reiterates that there are existing rulings and resists any effort to redecide these matters.

The Special Master asks if Mr. McElroy wants DWR to find the information and report it. DWR would not be doing an HSR for Phelps Dodge's water rights, but would compile information about how Phelps Dodge is using water in Morenci and report it.

Ms. Chandley states she does not have any objection to DWR looking at how Phelps Dodge uses water at Morenci. Referencing Mr. McElroy's statement that he wanted to look at other water supplies and how they are used at Morenci, she would object to DWR reporting on other water supplies that Phelps Dodge has in the Gila River system.

Mr. McElroy states they had the same argument years ago.

The Special Master informs the parties he will look at prior rulings and states it is premature to talk about disclosures and discovery. That is a process that will be triggered by an updated WFR and inquires if there is merit to allowing discovery or asking for some disclosures at this point.

Mr. McElroy states he wants to be clear, on the record, that his suggestion is that the Special Master take a different approach. That is, take up the case where it left off. If necessary, allow time for parties to intervene. Then, the Special Master could move on to disclosures and discovery.

The Special Master and Mr. McElroy discuss discovery.

The Special Master inquires if anyone else has comments on discovery and disclosures. He addresses the possibility of settlement. If Phelps Dodge is directed to file an amended statement of claimant, DWR prepares a supplemental HSR, all 3,000 claimants

are notified of the supplement, and new objections are filed in 180 days, there is a possibility that everything will change. If the parties settle this case in the next three months, that entire process would be avoided.

Ms. Chandley advises that she is preparing a water rights attributes sheet that she would like to propose to the objectors for settlement and states that Phelps Dodge is willing to discuss settlement.

Ms. Chandley hopes settlement would produce agreement among the objectors about the attributes of the Show Low Lake water rights. The Special Master asks if this would be a stipulation similar to the ones that were filed last fall and Judge Ballinger approved, or if it would be a partial decree. Ms. Chandley states it could be either one.

Mr. McElroy states he is willing to discuss settlement with Ms. Chandley.

The Special Master states according to the records, there are only three objectors, i.e., Phelps Dodge, Salt River Project, and the United States. He asks if the Hopi Tribe, Navajo Nation, and San Juan Southern Paiute are included in the United States' objection.

Ms. Vanessa Boyd Willard, representing the United States Department of Justice, states the United States will be participating in this case on behalf of the Indian tribes in the basin.

Upon inquiry by the Special Master regarding the Zuni Tribe, Ms. Willard states the Zuni Pueblo's water right settlement is pending before Congress. Prospects seem good for congressional approval and, therefore, Zuni would have no issues in the context of Show Low Lake. In addition, the United States also represents the White Mountain Apache Tribe in the Little Colorado River basin. They have some interest although they are in a separate part of the basin.

The Special Master asks how the White Mountain Apache Tribe is involved. Ms. Chandley states they are involved because of the right of way issues.

The Special Master asks for comments about the Court-approved mailing list.

Mr. David Brown notes several parties who should be removed, and the Special Master suggests that Mr. Brown meet with Ms. Dolge after this hearing. The Special Master agrees with a suggestion made by Mr. Brown to give the people one more opportunity to say yes or no to remain on this list.

Mr. Brown further suggests the mailing list should be restricted to parties that can actually file an objection and not include out of basin parties, unless there are issues of broad legal importance.

Cynthia Haglin, representing the City of Chandler, advises that they filed a notice of

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appearance in the previous consolidated case. They are primarily concerned about issues of broad legal importance.

Discussion ensues between the Special Master and Ms. Haglin regarding notice to the Cities of Chandler, Mesa, Scottsdale, and Glendale.

The Special Master describes some details of the financial situation with respect to the Little Colorado River adjudication. He states he has requested a legislative appropriation of \$20,000 for the fiscal year beginning July 2004. He has made this request through the Administrative Office of the Courts which prepares the judiciary's budget requests.

The Special Master states that within 60 days, he will issue an order.

10:47 a.m. - Conference adjourned.

The original is filed with the
Apache County Superior Court.

A copy of this Minute Entry is
mailed to parties on the service
list for CV 6417-033-0060 dated
March 25, 2003.

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CV 2003-03 By: BJSilversmith