

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: December 6, 2004

CIVIL NO. 6417-033-0060

ORDER DENYING MOTION
FOR CLARIFICATION AND
RE-ISSUANCE OF 120-DAY
NOTICE

CONTESTED CASE NAME: *In re Phelps Dodge Corporation (Show Low Lake).*

HSR INVOLVED: Silver Creek Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master denies a motion for clarification and re-issuance of the Arizona Department of Water Resources' 120-day notice regarding the filing of the final supplemental contested case hydrographic survey report.

NUMBER OF PAGES: 7.

DATE OF FILING: Original mailed to the Clerk of the Court on December 6, 2004.

ORDER

On October 21, 2004, the Show Low Irrigation Company, Lakeside Irrigation Company, City of Show Low, and Other Small Claimants filed a Motion for Clarification and Re-Issuance of the Arizona Department of Water Resources' ("ADWR") 120-Day Notice Regarding the Filing of the Final Supplemental Contested Case Hydrographic Survey Report for the Claims of Phelps Dodge to Show Low Lake ("Supplemental Show Low Lake HSR"). An accompanying motion for expedited consideration was granted on October 26, 2004, and a briefing schedule was set.

The Navajo Nation and the Salt River Project filed responses. Phelps Dodge Corporation joined in the motion. ADWR filed comments.¹ The movants replied.

On October 1, 2004, pursuant to an order of the Special Master, ADWR filed the 120-day notice (“the notice”) described in A.R.S. § 45-256(H).² The motion for clarification states that the notice “upset so many people” and has “generated concern” among claimants. Movants’ counsel was “inundated with telephone calls from people throughout the Silver Creek watershed who received the Notice and who are now frightened that they are about to lose their domestic wells or other water rights.” Counsel indicates that local news articles reporting on other water related issues exacerbated concern. ADWR reports that in October, after sending “over 3,400 copies” of the notice, it “received over 1,700 telephone calls” about the notice.

It is essential that this case avoid the situation Judge Allen G. Minker (ret.) saw in 1994 - “too long, too expensive and too burdensome a process on the claimants, DWR and the Special Master.”³ The Special Master believes those negatives can be avoided and will work to accomplish it.

A. Forfeiture of Water Rights

According to movants, the notice “contains language that is fueling rumors alleging forfeiture of water rights,” and some callers “think that either the State or Phelps Dodge is planning to take their domestic wells away from them.” They argue that “[a]ny forfeiture of a right would occur after the final decree is issued,” which is “many years in the future.” Therefore, a potential claimant who does not wish to object to the Supplemental Show Low Lake HSR will not forfeit a water right if he or she does not file a statement of claimant before January 31, 2005.

The following paragraph in the notice is given as an “example of the troublesome language:”

Any water user who has not yet filed, or needs to amend, a statement of claimant should do so at this time. Failure to file the appropriate statement of claimant form may result in forfeiture of water rights, even though the Department may have previously issued a permit, certificate, or other form of approval for the water use. Failure to file a statement of claimant may also result in being prevented from asserting a water right in the Little Colorado River adjudication, or from filing objections to other water rights claims such as those filed by Phelps Dodge. See A.R.S. §§ 45-254 and 256. (Emphasis in original.)

¹ ADWR is neither a claimant nor a party in this adjudication. The Special Master believes that in matters in which ADWR has filed, or is preparing for filing, a notice or a technical report that ADWR should be allowed to submit comments if they would assist the Court, parties, and claimants. This allowance will not, however, elevate ADWR to the status of litigant.

² A.R.S. § 45-256(H) requires that, “At least one hundred twenty days before the final report is to be filed, the director shall file with the court a notice stating the date on which the final report is to be filed.” 1995 Ariz. Sess. Laws, ch. 9, § 19.

³ Order (Modification of Pretrial Orders No. 1 and No. 2) 1 (Jan. 27, 1994).

It is correct that failure to file a statement of claimant may result in forfeiting a water right. This result dates back to the first general stream adjudication statutes enacted in 1919.⁴ The barred, estopped, and forfeiture language has remained constant. When the adjudication statutes were amended in 1979, this provision was retained in A.R.S. § 45-254(E). In 1995, A.R.S. § 45-254(E) was amended and became subsection F, which states as follows:

On entry of the final decree pursuant to section 45-257, any potential claimant who is properly served and who failed to file a statement of claimant as prescribed by this article for any water right or whose motion for permissive intervention was finally denied by the court is barred and estopped from subsequently asserting any right that was previously acquired on the river system and source and that was not included in a statement of claimant and forfeits any rights to the use of water in the river system and source that were not included in a properly filed statement of claimant.

All potential claimants who were served the first summons issued on July 20, 1981, or the new use summons approved by the Court in July 2000, were so informed. All summonses have contained the forfeiture language of A.R.S. § 45-254(E), and after the 1995 amendment, of subsection F. In *Gila I*, where the Arizona Supreme Court held that the procedures for service of summons comport with due process, the Court stated that:

Persons who received the summons - as well as persons who otherwise received actual notice of the adjudication - and who did not submit statements of their claims before the applicable deadline now may be precluded by statute from asserting any claims to rights in the adjudicated watersheds. *See* A.R.S. § 45-254(E) [now subsection F].⁵

The notice also correctly indicates that under A.R.S. § 45-256(B) only claimants, or persons who have filed claims in the adjudication, may file objections to ADWR's recommendations and present evidence in support of or in opposition to them.

It is correct, as movants argue, that a final decree in this adjudication will not be issued within a foreseeable future. This fact alone may be the greatest obstacle to ending the flood of telephone calls whenever legal notices are sent to water users.

On the other side of the scale are the considerations that this adjudication must be comprehensive, every opportunity to inform potential claimants of the need to file statements of claimant must be used, and informing potential claimants that they do not need to file a claim if they do not wish to object to a particular supplemental HSR could possibly lead not only to

⁴ 1919 Laws of Ariz., ch. 164, § 32; Rev. Code § 3305 (1928); Gen. Laws of Ariz. Ann. § 75-126 (1939). From March 1919 to April 1979, the determination of the relative rights of water users to a stream was under the purview of the State Water Commissioner and later the Arizona State Land Department. After 1979, general stream adjudications came under the jurisdiction of the Superior Court of Arizona.

⁵ *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992). Actual notice referred to legal notices published in local newspapers.

misunderstandings but also to missed deadlines as time goes by and properties change ownership.

In its first post-1979 decision regarding adjudications, after discussing the McCarran Amendment, 43 U.S.C. § 666 (2000), and certain state constitutional provisions, the Arizona Supreme Court held that “[n]o adjudication can be effective unless all claimants are before the court.”⁶ A general stream adjudication must be comprehensive in terms of including all water users and rights on a river system and source.⁷ To achieve and preserve comprehensiveness, every effort to inform potential claimants must be made continuously. The 120-day notice is a means to advise claimants of the right to file objections as well as inform potential claimants of the adjudication and the consequences of inaction. This is the reason the notice was sent to all claimants and known non-claimant water users in the Silver Creek Watershed.

Suggesting that a water right claim should be filed “at this time” avoids situations where potential claimants do not file due to procrastination, forgetfulness, or transferring ownership of property or water rights. Furthermore, a potential claimant who files now preserves the opportunity to file an objection, an opportunity whose value may be evident later during the 180-day objection period.

The language of the notice is not mandatory - it says “should” not “must” file “at this time.” The notice explains how to file a claim and describes the “Opportunities to File or Amend Statements of Claimant.” The explanations of the filing opportunities are clear that a water user is not mandated to file or amend a statement of claimant by January 31, 2005, or even by August 1, 2005, the last day to file objections to the Supplemental Show Low Lake HSR, if the user does not wish to be a party in this contested case. Considering the notice in its entirety, the Special Master finds that the word “should” is advisory and not mandatory.

Weighing all arguments and considerations, the Special Master does not find good cause to clarify or re-issue the notice to state that “[w]ater users who do not wish to file an objection to the Show Low Lake Supplemental Report will not forfeit their water rights if they do not file a statement of claimant or amend an existing statement of claimant by January 31, 2005.”

B. Deadlines to File a Statement of Claimant

ADWR was directed to include in the notice the “deadlines for filing a new statement of claimant or amendment to an existing statement of claimant as provided by A.R.S. § 45-254.”⁸ The notice describes the four different deadlines or opportunities to file a statement of claimant and states that the “court will consider a statement of claimant as long as it is properly filed within one of the statutory deadlines with the appropriate filing fee.”

⁶ *United States v. Superior Court*, 144 Ariz. 265, 276, 697 P.2d 658, 669 (1985).

⁷ Special Master Thorson discussed the McCarran Amendment’s comprehensiveness requirements in his report regarding *de minimis* categories for certain stockponds, stockwatering, and wildlife uses in the Silver Creek Watershed. Memo. Dec. 55-56 (Apr. 20, 1994).

⁸ Spl. Mtr. Order 4 (Mar. 9, 2004).

The notice advises that the “first two deadlines are no longer available for most water users in the Silver Creek Watershed.” The first deadline has passed for water users who have already received summonses (the deadlines were December 23, 1985, and for new users ninety days after service of a new use summons⁹). The second deadline is not available because the Final Silver Creek Watershed HSR was published in 1990.¹⁰

If these two deadlines have been missed, the notice advises that “a third filing opportunity is now available” for both filing and amending a statement of claimant, namely, the period that extends until the conclusion of hearings by the Special Master for the entire Silver Creek Watershed. The notice then describes “one final opportunity to file a new, or amend an existing, statement of claimant.” The fourth opportunity ends when the Special Master has completed hearings for the entire Silver Creek Watershed and has filed a report with the court.¹¹

The key distinction between these two remaining filing opportunities is that after the Special Master concludes hearings for the entire Silver Creek Watershed and files a report, a water user who wishes either to file or amend a statement of claimant must obtain the court’s permission to intervene. The court may or may not grant the request.

At this time, it is not possible to estimate when the Special Master will conclude hearings or file a report for the entire Silver Creek watershed. Movants argue that the notice misleads because the third opportunity “will continue to exist for many years in the future.” Potential claimants can elect to wait until later to file a statement of claimant and are not required to do so “now.”

The Special Master agrees that potential claimants can elect not to file a claim until later and not object to the Supplemental Show Low Lake HSR, but cannot find that the notice viewed as a whole misleads a potential claimant to believe that a claim must be filed by January 31, 2005.

C. Amendments: Determination of Subflow

Movants argue that for many claimants “[a]ccurate amendments regarding subflow are difficult to file at this time” because “subflow issues [in this adjudication] will not be resolved in the near future.” Hence, claimants who have filed on wells and believe they are pumping non-appropriable groundwater are not in a position to amend their claims at this time.

The notice states that a claimant who “needs to amend” a statement of claimant “should do so at this time.” Claimants can only amend what they know or believe to be true. If a claimant has learned or discovered new information regarding a statement of claimant, the

⁹ New water users who receive a new use summons have ninety days after service of the summons to file a statement of claimant unless the court grants an extension. The summons states that A.R.S. § 45-254(E) “describes under what circumstances statements of claimant may be filed after this ninety-day period.” See Pretrial Order No. 5 Re: New Use Summons (July 26, 2000).

¹⁰ A.R.S. § 45-254(E) and (E)(1).

¹¹ A.R.S. § 45-254(E)(2 and 3).

claimant should amend the claim. Amendments to an existing statement of claimant may include a new name, new mailing address, new or more accurate legal descriptions of points of diversion or places of use, increased or reduced amounts of water use, and new or revised water use or sharing agreements with others. Most claimants in the Silver Creek Watershed filed their claims at least over thirteen years ago. Many facts have likely changed during that time, and those known should be amended.

This discussion is about amendments to adjudication claims. Claimants, however, may also need to amend their surface water applications, permits, certificates of water right, water rights registrations (statements of claim), and stockpond registrations.¹² Amending all the pertinent water use filings upon learning or discovering new information is the best practice, as amendments preserve a history of water use.

D. *De Minimis* Uses

Movants argue that pending the determination of the “summary disposition” of *de minimis* uses “there may be a presumption that small uses (and in particular, domestic wells) will not be subject to the adjudication,” and the notice “has unnecessarily created concern among rural homeowners within the Silver Creek watershed by implying that they have to file on such small domestic wells immediately.”

There has not been any decision made in this adjudication that claimants who have water uses that are, or might be, determined to be *de minimis* will be exempt from filing a statement of claimant for that use. Further, there has not been any determination made as to whether some or all domestic wells are *de minimis* water uses.

Special Master Thorson’s *de minimis* report, filed in 1994, addressed only certain stockponds (differentiated by volume), stockwatering, and wildlife uses, and second, recommended a “summary adjudication” of these *de minimis* uses.¹³ The court has not taken up the report. Special Master Thorson recommended that the water right abstracts for those *de minimis* uses “unless unusual circumstances warrant...will...set forth [the]...[s]tatement of claimant associated with [the] proposed water right.”¹⁴ Regarding the statement of claimant to be listed in the abstract, he recommended that:

In this portion of the water right abstract, the number of the statement of claimant matched to the proposed water right will be listed. A statement of claimant must be filed for a water right to be recognized and adjudicated in the general stream adjudication. (The first sentence of then A.R.S. § 45-254(E), now subsection F, was quoted).¹⁵

¹² See A.R.S. §§ 45-164(B), 45-182(D), and 45-272(C); see also A.R.S. § 45-593(C).

¹³ Memo. Dec. n.7, *supra*, 17.

¹⁴ *Id.* at 17 and 18.

¹⁵ *Id.* at 19.

In short, the only determination regarding *de minimis* water rights made to date in this adjudication presupposes that a statement of claimant has been filed for the water use.¹⁶

The Court-approved instructions for completing a Domestic Statement of Claimant (as well as the other forms) state that “[a]nyone who uses or has used water from a well...for any purpose...should file a claim for water rights.” The prudent course for any person who uses a domestic well or wants to assert a *de minimis* water use is to file a statement of claimant. If the domestic or other water use is someday excluded from the adjudication, the claim can be withdrawn.

E. Future 120-Day Notices

Movants request that for future supplemental HSRs, ADWR be directed to serve a draft 120-day notice to all persons on the Little Colorado River Adjudication Court-Approved Mailing List for comments and court approval. This suggestion will be considered in future cases.

For the foregoing reasons, IT IS ORDERED denying the motion for clarification and re-issuance of the October 1, 2004, notice.

Although the motion is denied, the Special Master will work with ADWR to provide explanations of filing opportunities in the objection notice that will be sent when the Supplemental Show Low Lake HSR is published.

DATED: December 6, 2004.

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

The original of the foregoing was mailed this 6th day of December 2004, to the Clerk of the Apache County Superior Court for filing, and a copy was mailed to all persons listed on the Court-approved mailing lists for Contested Case No. 6417-033-0060 and for Civil No. 6417, both dated October 21, 2004.

/s/ KDolge
Kathy Dolge

¹⁶ See *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 211-12, 972 P.2d 179, 195-96 (1999) (discussion of former A.R.S. §§ 45-258 and 45-182(B)(4)).