

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: March 12, 2003

CIVIL NO. 6417-033-0060

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

DESCRIPTIVE SUMMARY: The Special Master issues an order establishing procedures for the designation and determination of this contested case.

NUMBER OF PAGES: 6; Attachment A - 3 pgs; Total - 9 pgs.

DATE OF FILING: Original mailed to the Clerk of the Court on March 12, 2003.

ORDER

A status conference was held on February 4, 2003. The Special Master has considered the positions of counsel and Phelps Dodge Corporation's ("Phelps Dodge") memorandum on proposed prehearing procedures.

1. Contested Case Designation. The water right claims of Phelps Dodge to Show Low Lake will be determined in this contested case, which will be severed from the special consolidated case *In re Reporting of Diversion Information and Other Objections*, No. 6417-033-9005. The designation of this case will be *In re Phelps Dodge Corporation (Show Low Lake)*, No. 6417-033-0060. The scope of this case is narrower than that of the special consolidated case.

2. Prior Decisions of the Special Master. Nearly nine years have passed since the Superior Court held in abeyance the litigation of Phelps Dodge's claimed water rights to Show Low Lake. Prior to the abeyance in early 1994, several legal issues were briefed and argued before Special Master John E. Thorson, who issued decisions.

One issue was whether the Arizona Department of Water Resources (“ADWR”) should prepare a watershed file report for “a transriver system diversion” such as Phelps Dodge’s diversion and use of water stored in Show Low Lake. On October 30, 1992, Special Master Thorson issued a “memorandum decision” clarifying and approving¹ a stipulation filed by the litigants “concerning the reporting and adjudication of transwatershed and transriver system diversions.” Special Master Thorson stated, “The essence of the stipulation is the proposal that rights to water diverted into another watershed or into another river system be adjudicated, in all respects, in the watershed where the water originates.”² In this case, the Silver Creek Watershed is the watershed of origin of Phelps Dodge’s claimed water rights to Show Low Lake.

The decision also gave ADWR directions on how to report transbasin diversions. Paragraph VI.B of Special Master Thorson’s order stated that:

In future final hydrographic survey reports, the Department of Water Resources shall prepare watershed file reports for transbasin diversions that report and analyze the use of the diverted water in the destination watershed in the same fashion as if the use of the diverted water occurred in the watershed of origin. Similarly, when water is diverted into another watershed or river system as part of an exchange agreement, DWR shall report information on all aspects of the exchange sufficient to allow potential objectors in the watershed of origin to make an informed decision about whether or not to object to the claimed water rights. This information shall include a water budget for the entire water exchange describing all points of diversion, consumptive and nonconsumptive uses, return flows, groundwater recharge, as well as maps, a history of the exchange, and summaries of important agreements and other documents.³

This decision resulted in part from the discussion before Special Master Thorson regarding the matters that ADWR should investigate and report for a transbasin diversion. Counsel for Phelps Dodge and the Navajo Nation have different opinions as to the information the Special Master should consider and ADWR should report regarding other water supplies available to Phelps Dodge for use in Morenci, Arizona.

3. ADWR’s Technical Work. ADWR’s most comprehensive technical analysis of Phelps Dodge’s claims was reported in the Final Hydrographic Survey Report (“HSR”) for the

¹ The decision approved the stipulation subject to the condition that the term “transbasin diversion” “does not include the storage and release of water in a reservoir on a watercourse, if the storage of water occurs in one watershed and the use occurs in a downstream watershed on the same river system,” and stated, “The acceptance of the stipulation is subject to the final approval of the Superior Court following the filing of the Master’s report pursuant to [A.R.S.] section 45-257(A)(2).” Memorandum Decision 9-10. Little Colorado River Adjudication Docket No. 1412 (November 2, 1992).

² *Id.* 5. Special Master Thorson viewed Phelps Dodge’s use of the water diverted in Show Low Lake as a transriver system diversion because the water was sent from Show Low Lake in the Little Colorado River system to the Salt River of the Gila River system. *Id.* 3.

³ *Id.* 9-10.

Silver Creek Watershed, which was filed on November 30, 1990. Because discovery on the transriver system diversion was being made, Special Master Thorson did not direct ADWR to prepare a watershed file report for Phelps Dodge's claims in accordance with his October 30, 1992, memorandum decision.

4. Events Since 1994. Since 1994, the Legislature has amended the general stream adjudication statutes,⁴ and the Arizona Supreme Court has issued three interlocutory review opinions.⁵ The Supreme Court has clarified or determined matters that ADWR must report and should consider when preparing an HSR.

In 1995, the Legislature amended A.R.S. § 45-256(B)⁶ adding these requirements for an HSR:

The report shall list all information that is obtained by [ADWR] and that reasonably relates to the water right claim or use investigated. The report shall also include [ADWR's] proposed water right attributes for each individual water right claim or use investigated.... If no water right is proposed in connection with an individual water right claim or use, [ADWR's] recommendations shall so indicate.

In its memorandum, Phelps Dodge described some of the pertinent statutory changes enacted in 1995 that are in effect.⁷ The requirement that ADWR report "proposed water right attributes for each individual water right claim or use investigated" is an important amendment affecting how this contested case should proceed. The 1990 Final Silver Creek HSR did not report "proposed water right attributes."

At the status conference, counsel for Phelps Dodge stated that Phelps Dodge is negotiating with the White Mountain Apache Tribe for a right of way over reservation lands; Phelps Dodge has not used water from Show Low Lake since January 2001; and the place of use of the certificated water right⁸ may be severed and transferred to Miami, Arizona. Counsel stated that these matters would take time to clarify and resolve. It is reasonable to conclude that

⁴ 1995 Ariz. Sess. Laws, ch. 9 (effective Mar. 17, 1995). After constitutional challenges were made to many of the new provisions, the Arizona Supreme Court upheld some and found others invalid. *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179 (1999).

⁵ The opinions are referred to as *Gila III*, 195 Ariz. 411, 989 P.2d 739 (1999), *cert. denied sub nom. Phelps Dodge Corp. v. United States* and *Salt River Valley Water Users' Assn. v. United States*, 530 U.S. 1250 (2000); *Gila IV*, 198 Ariz. 330, 9 P.3d 1069 (2000), *cert. denied sub nom. Phelps Dodge Corp. v. United States*, 533 U.S. 941 (2001); and *Gila V*, 201 Ariz. 307, 35 P.3d 68 (2001).

⁶ 1995 Ariz. Sess. Laws, ch. 9, § 19 (effective Mar. 17, 1995). The Arizona Supreme Court did not find this provision invalid. *San Carlos Apache Tribe v. Superior Court*, *supra*.

⁷ Phelps Dodge Corporation's Status Report and Proposed Pre-Hearing Procedure ("Status Report") 4-6. Little Colorado River Adjudication Docket No. 3100 (February 3, 2003). The Special Master does not express any opinion regarding the merits of Phelps Dodge's analysis but notes the description of pertinent amendments.

⁸ Phelps Dodge's State Certificate of Water Right No. 2093 dated November 28, 1955.

since at least 1994, other factual circumstances have changed which would affect the adjudication of Phelps Dodge's claimed rights to Show Low Lake.

Much discussion ensued about how much of the work done by the Court, Special Master, and the litigants between 1991 and 1994 should or can be used to continue with the resolution of this case. The determination of Phelps Dodge's claims to Show Low Lake has a record and is beyond Day 1. The Special Master wishes to continue with the posture of this case as he finds it today, but realizes that statutory amendments and changed circumstances due to the passage of time will require adoption of some new procedures.

5. Future Investigations and Supplemental Reports. ADWR has estimated that, "[a] field investigation of the lake and the mine [in Morenci, Arizona] together with associated pump stations would...[r]equire approximately one week for one team of Departmental investigators," and "[t]he supplemental HSR could be completed in approximately two months...."⁹

If Phelps Dodge amends its claims and provides new or updated information to ADWR, the department might need more time to prepare a supplemental contested case HSR. In light of Phelps Dodge's continuing negotiations with the White Mountain Apache Tribe and the possibility of a changed place of use, the process of providing information to ADWR may be an ongoing process. The Special Master wants to foster an effective process for providing new or updated information to ADWR.

6. Notice of Filing Supplemental Contested Case HSR and Filing of Objections. In the Gila River Adjudication, the Superior Court has before it the Special Master's report¹⁰ on two issues of broad legal importance, namely:

1. Which claimants or parties should ADWR notify that a supplemental contested case HSR has been filed, and which claimants or parties should be allowed to file written objections? and
2. How much time should claimants or parties have to file written objections after ADWR files a supplemental contested case HSR?

Objections to the report have been filed, and the Superior Court will consider the objections before adopting, rejecting, modifying, or recommitting the report. The Superior Court's ruling could possibly establish a precedent for this case. Section 12.00 of the Rules for Proceedings Before the Special Master (November 1, 1991), which provides procedures for raising and determining issues of broad legal importance, states in pertinent part, "A motion or objection raises an issue of broad legal importance if the issue is one of procedural or substantive significance that is similar to issues in other contested cases and that, if decided in

⁹ ADWR's Report Concerning the Preparation of New and Updated Hydrographic Survey Reports and Related Matters. Little Colorado River Adjudication Docket No. 3050 (July 29, 2002).

¹⁰ A copy of the report is available at <<http://www.supreme.state.az.us/wm/>> on the *Gila River Adjudication* page under the heading *In re PWR 107 Claims*. Gila River Adjudication Docket No. 3032 (January 24, 2003).

the instant contested case, may establish a precedent for other contested cases...possibly, in another river system adjudication.”

The Special Master will not at this time make any orders which relate to either of the issues of broad legal importance, but will address those issues in this case immediately after the Superior Court rules on the report. A timeline will be set for this case that should accommodate this concern.

7. Pending Motions. There are four pending motions that directly or indirectly relate to issues that may need to be determined in this case. The motions are described on page 3 of Phelps Dodge’s status report. Two of the motions, filed by Phelps Dodge, seek Superior Court review of decisions of Special Master Thorson. The motion on the issue of laches that is before the Superior Court might need to be briefed and heard depending on how this case proceeds. Some or all of the motions might be withdrawn. Furthermore, the parties have not fully briefed the motions, and should the motions need to be heard, some or all may need to be revised to reflect current law and facts.

8. Disclosure of Information and Discovery. It is premature to issue scheduling orders regarding disclosure of information in accordance with Rule 26.1, Ariz. R. Civ. P., and discovery. In its July 16, 2002, order, the Superior Court ruled, “[t]he parties may proceed with any needed discovery for the determination of water rights in that contested case.” That order is in effect in this case.

9. Court-Approved Mailing List. Based on the statements made at the status conference and the responses to the Special Master’s subsequent order regarding the mailing list,¹¹ the office of the Special Master has prepared a Court-approved mailing list for this contested case. The list is set forth in Attachment A.

IT IS ORDERED:

1. The determination of the claimed water rights of Phelps Dodge to Show Low Lake is severed from the special consolidated case *In re Reporting of Diversion Information and Other Objections*, No. 6417-033-9005. The designation of this contested case shall be *In re Phelps Dodge Corporation (Show Low Lake)*, No. 6417-033-0060.

2. On or before **Friday, July 25, 2003**, Phelps Dodge shall file an amended statement of claimant or statements of claimant associated with its claimed water rights to Show Low Lake. The information provided in the amended statement(s) shall be used by ADWR to update the information reported in the 1990 Final Silver Creek Watershed HSR and to prepare a supplemental contested case HSR.

3. ADWR is directed to update the watershed file report(s) associated with Phelps Dodge’s claimed water rights to Show Low Lake and prepare and file a supplemental contested case HSR on or before **Wednesday, December 31, 2003**.

¹¹ A copy of the order is available at <<http://www.supreme.state.az.us/wm/>> on the *Little Colorado River Adjudication* page. Little Colorado River Adjudication Docket No. 3102 (February 10, 2003).

4. ADWR is directed to update the watershed file report(s) and prepare a supplemental contested case HSR in accordance with the requirements set forth in Paragraph VI.B of Special Master Thorson's October 30, 1992, memorandum decision, in addition to the relevant statutory requirements and holdings of the Arizona Supreme Court.

ADWR is directed to report information related to Phelps Dodge's water uses at the place of use of its State Certificate of Water Right No. 2093, or in Miami, Arizona, if the place of use will be severed and transferred to that location. ADWR is not directed, however, to prepare proposed water right attributes, pursuant to A.R.S. § 45-256(B), for water rights that Phelps Dodge claims or holds in the Salt River Watershed or in the Upper Gila River Watershed.

5. The consideration of the notice and opportunity to file objections that shall be given to claimants and parties upon the filing of the supplemental contested case HSR shall be deferred until the Superior Court has considered the Special Master's report on these issues that is pending in the Gila River Adjudication.

6. The consideration of any pending motion in this case shall be deferred until such time as it becomes clearer that a motion requires a ruling. A briefing schedule will then be set.

7. Orders regarding disclosure of information in accordance with Rule 26.1, Ariz. R. Civ. P., and discovery are not made at this time except that discovery is allowed in accordance with the Superior Court's July 16, 2002, order. The litigants are encouraged to disclose and exchange technical and other information and to avoid discovery disputes.

8. The litigants are encouraged to meet and discuss their positions to determine if a mutual resolution of this case is likely.

9. The Court-approved mailing list for this contested case shall consist of the persons listed on Attachment A, which is incorporated in this order by reference.

10. A status conference will be set at an appropriate time. A litigant may request the Special Master to hold a conference if one would expedite the resolution of this case.

DATED: March 12, 2003.

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

The original of the foregoing was mailed this 12th day of March 2003, to the Clerk of the Apache County Superior Court for filing and mailing to all persons named on the Court-approved mailing list (Attachment A).

/s/ KDolge
Kathy Dolge