

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

11/03/2009

CLERK OF THE COURT
FORM V000

HONORABLE EDDWARD BALLINGER, JR.

R.Tomlinson
Deputy

FILED: 12/03/2009

In Re the General Adjudication
of All Rights to Use Water in
The Little Colorado River System and Source

CV-6417

In Re Navajo Nation's Motion for Clarification

In Re Catalyst Paper (Snowflake) Inc.'s
Suggestion Regarding Additional Briefing

MINUTE ENTRY

After reviewing the positions of the parties with respect to the matters considered during the October 30, 2009 hearing held in the General Adjudication of All Rights to Use Water in the Little Colorado River System and Source, the Court finds and concludes as follows:

With respect to the matters raised by the Navajo Nation's Motion for Clarification and the memorandum filed by Catalyst Paper (Snowflake) Inc. ("Catalyst") (and supported by others) the Court agrees with Catalyst that resolution of the question of whether the Hopi Tribe is precluded from claiming a right to water associated with the Hopi Industrial Park based on aboriginal rights is appropriate for consideration. Therefore,

IT IS ORDERED directing Catalyst to file a motion for summary judgment regarding the question of whether the Hopi Tribe is precluded from claiming a right to water associated with the Hopi Industrial Park based on aboriginal rights on or before **August 19, 2010**. Memoranda in response to this motion shall be filed and served prior to **September 29, 2010**. Reply memoranda shall be filed and served on or before **October 29, 2010**. This order is not intended to prevent interested parties from joining in or filing memoranda in support of, or opposition to the relief requested by Catalyst.

Catalyst asserts that prior Court orders in this proceeding and the General Adjudication of Rights to the Gila River System and Source provide ambiguous directions to the Arizona Department of Water Resources ("ADWR") with respect to

ADWR's role in providing input and evaluations of proposed future water use claims by the Hopi Tribe (and presumably other tribal claimants). This ambiguity is purportedly evidenced by language in orders issued in 1988 and 2002, as well as statutory provisions set forth in Title 45, Arizona Revised Statutes. This perceived ambiguity may result, in part, from the holdings of the Arizona Supreme Court in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001) ("*Gila V*"), in which the supreme court mandated a dramatic change in how the adjudication court is to quantify Indian water rights.

Although the *Gila V* decision was rendered after the statutory structure for ADWR's technical advice to the Court was put in place, the Court finds that the new requirements imposed by the supreme court do not conflict with ADWR's statutory duties and are easily reconciled with prior adjudication orders.

Catalyst points to orders of the Court that prohibit ADWR from reporting as to the feasibility, profitability, or practicability of proposed future uses of water on Indian lands. Catalyst believes this direction is contrary to a subsequent order that instructed ADWR to analyze claims for both current and future water uses when reporting on tribal water claims and to consider directives found in *Gila V* that relate to future uses.

In addressing tribal water uses, ADWR could include at least three components of asserted claims:

1. Attributes of current and historic uses;
2. Data relating to claimed future uses, which is primarily descriptive and can include discussion of *Gila V* issues; and
3. Evaluation of the practicability, feasibility, profitability, legitimate necessity, and, perhaps equity, of prospective new uses of water for which a claim is asserted.

The Court invites ADWR's input with respect to items nos. 1 and 2, but believes no. 3 is not a proper role for the department. To the extent interested parties point to language that is inconsistent with the foregoing (e.g. the August, 1988, instruction in Pre-Trial Order No. 2 that prohibits ADWR from including "descriptions" of future uses in hydrographic survey reports) the Court finds the intent of prior orders concerning the scope of ADWR's work was to encourage submission of useful data and evaluative expertise, while always recognizing that determination of the validity or viability of any claim will be made by the Court after consideration of input by ADWR and others.

In light of the Court's interpretation of Title 45, *Gila V*, and ADWR's adjudication role, there is a question as to how objections to tribal water use claims can be considered if such claims are not considered and reported on by ADWR. The Court finds that the claim challenge mechanism contained within Title 45 governs potential disputes addressed by the statutes, but this statutory scheme is not exclusive and does not prevent challenges to claimed water use claims that the Court finds are not properly considered by way of referral to ADWR.

Finally, the Court declines the invitation by some parties to restrict the scope of work currently being undertaken by the Special Master.

/s/ Eddward P. Ballinger, Jr.
JUDICIAL OFFICER OF THE SUPERIOR COURT

A copy of this order is mailed to all parties on the Court-approved mailing list for the Little Colorado River Adjudication Civil No. 6417, dated July 27, 2009.