

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

06/18/2002

CLERK OF THE COURT
FORM V000

HONORABLE EDDWARD BALLINGER, JR.

R. Luiszer
Deputy

CV-6417

FILED: July 16, 2002

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

MINUTE ENTRY

A hearing was held on June 4, 2002 on various requests for relief filed by the Navajo Nation, Small Claimants, United States, Salt River Project, Arizona Public Service, Phelps Dodge Corporation, Aztec Land and Cattle Company, Abitibi Consolidated Sales Corporation, Tucson Electric Power Company, and the City of Flagstaff. After considering all the filed memoranda and argument of counsel,

IT IS ORDERED:

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1. The Navajo Nation's Motion to Direct the Special Master to Report on the Arizona Department of Water Resources' ("ADWR") Procedures to Provide Technical Assistance is DENIED. The court is satisfied with ADWR's avowal that it is taking all steps necessary to insure that those ADWR employees who have participated and are participating in settlement negotiations are not, directly or indirectly, supplying input concerning advice and assistance ADWR is providing this court and the special master. Further, the court, the special master, or the parties can address in future hearings the evidentiary issue raised by the motion.
2. The Navajo Nation's Motion to Set a Trial Date and Discovery Schedule for Show Low Lake, Show Low Irrigation Company, and Lakeside Irrigation Company is GRANTED, IN PART. Any stay or abeyance of litigation relating to Show Low Lake (WFR 033-56-ABC-027) is dissolved, and the parties may proceed with any needed discovery for the determination of water rights in that contested case.

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As to scheduling for hearing pretrial motions, setting a trial date and directing that a revised pretrial order be submitted, consideration of these requests must await the court's review of the report to be filed by ADWR concerning available resources and expected costs relating to preparation of hydrographic survey reports ("HSRs") and updates for Arizona's two water adjudications. After reviewing the report, the court will issue additional direction as to how this adjudication, including the Show Low contested case, will proceed. The relief requested concerning the Show Low Irrigation Company (WFR 033-56-074) and the Lakeside Irrigation Company (WFR 033-56-073) matters, is DENIED, without prejudice, to the request being resubmitted after June 1, 2003.

3. The preparation of a comprehensive HSR for all Hopi lands and for which the Tribe or the United States on its behalf claim a federal or state law water right will most efficiently accomplish the objectives of this

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adjudication. For this reason, in preparing the Hopi HSR, ADWR is directed to investigate all statements of claimant for all reservation and non-reservation lands for which the Hopi Tribe or the United States on behalf of the Tribe claim water rights under federal or state law.

4. In accordance with the offer made in open court, the Hopi Tribe and the United States on behalf of the Tribe shall identify any allotted lands derived from the Hopi Reservation or from non-reservation lands, or that are held by tribal members, on or before Friday, August 16, 2002, or thereafter within forty-five (45) days of transfer. This disclosure shall also disclose the respective water right claims attributable to any allotted lands. The information shall be submitted to ADWR, and a notice of submission filed with the court. The parties are asked to work out as much as possible any issues that might arise relating to further disclosure of the information.

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5. The Hopi Tribe and the United States shall file new or amended statements of claimant for all reservation and non-reservation lands for which the Tribe or the United States on behalf of the Tribe claim water rights under federal or state law on or before Friday, December 20, 2002. The purpose of this deadline is to identify and update all the water right claims that ADWR should investigate so that the HSR reports current information. The Hopi Tribe and the United States are not precluded from amending their statements of claimant later in accordance with A.R.S. section 45-254(E).

6. The court will direct ADWR to complete HSRs and other tasks by separate order to be issued after reviewing ADWR's report due on July 26, 2002. In undertaking the work ordered, including the preparation of the Hopi HSR, ADWR shall take into consideration the directives of the Arizona Supreme Court contained in the interlocutory review decisions rendered in *In re the General Adjudication of All Rights to Use Water in the Gila River*

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System and Source. The court specifically incorporates the directions set forth in the order entered in the Gila River Adjudication dated April 12, 2002, concerning the contents of the Gila River Indian Reservation ("GRIR") HSR, which directed ADWR "to evaluate each of the factors listed by the Arizona Supreme Court in the *Gila V* decision, 201 Ariz. 307, 35 P.3d 68 (2001), in connection with the preparation of the GRIR HSR, to report in accordance with A.R.S. section 45-256(B) proposed water right attributes for each claim investigated, and to examine the physical factors of water use and supply and land arability."

7. In preparing the Hopi Tribal Lands Hydrographic Survey Report ("Hopi HSR"), ADWR shall give due consideration to the information and items requested to be included in an Indian lands HSR by the parties in their comments to ADWR's Preliminary Hydrographic Survey Report for Indian Lands in the Little Colorado River System (September

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1994) and Report Re: Scope of Indian Lands HSR (August 10, 2000). The court makes the following directives:

- A. The Hopi HSR shall contain hydrological and technical information about available surface water and groundwater supplies and resources to meet each claim.
- B. The Hopi HSR shall contain comprehensive and detailed information about historic, current and existing water uses.
- C. The Hopi HSR shall report all statements of claimant, including the most recent amended statements, filed by both the Hopi Tribe and by the United States on its behalf.
- D. The Hopi HSR shall report any statement of claimant filed by claimants other than the Hopi Tribe or the United States on behalf of the Tribe that are associated with the Tribe's reservation and non-reservation lands.
- E. The Hopi HSR shall identify statements of claimant associated with fee owned in-holdings, if any, but

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these claims will not be adjudicated as part of the Hopi HSR.

F. The Hopi HSR shall report water rights claimed by the Hopi Tribe or the United States on the Tribe's behalf that may claim a priority earlier than the date the reservation was created.

G. The Hopi HSR shall report ADWR's proposed water right attributes, pursuant to A.R.S. section 45-256(B), for claims based on Indian reserved rights, federal non-Indian reserved rights, and state law for historic, current and existing water uses. ADWR will not be required to report proposed water right attributes for proposed future water uses.

H. The Hopi HSR shall contain adequate descriptive and technical information about proposed future uses of water on both the Tribe's reservation lands and non-reservation lands. Pursuant to Pretrial Order No. 2 (August 15, 1988) and as modified in Pretrial Order No. 3 (January 27, 1994), ADWR shall not include

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descriptions or opinions of the feasibility, profitability or practicability of future uses of water for irrigation or other uses, but ADWR may survey the already existing literature on that issue and list what previous studies have been done. The information shall be adequate to, as stated in Pretrial Order No. 2, "serve as a basis for evaluating claims of future uses."

I. ADWR should conduct field investigations when and where ADWR deems necessary to verify claims, water uses or technical reports prepared by others. If any issues relating to ADWR's access to Hopi lands should arise, they should be brought to the court's attention, although the court does not anticipate such issues arising.

J. ADWR shall use all available relevant technical reports and try to find the most recent reports or the ones having the most recent data or information.

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K. The parties are encouraged to provide technical and other information to ADWR during the course of preparing the Hopi HSR. Voluntary production of information will not limit a party's right to amend a statement of claimant or to present evidence related to an objection, and will not require ADWR to use or not use information supplied.

L. ADWR shall not be required to prepare the Hopi HSR in accordance with the "simplifying assumptions" identified by Special Master Thorson in a memorandum dated September 23, 1994, and released with ADWR's Preliminary Hydrographic Survey Report for Indian Lands in the Little Colorado River System (September 1994). If ADWR uses any of the simplifying assumptions in preparing the Hopi HSR, ADWR shall identify the assumptions used and the reasons for their use.

M. ADWR is expected to adhere to its estimated timeline of two years to complete the Hopi HSR.

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8. Some of the factors to be considered by ADWR as a result of this order require that ADWR undertake economic analysis and consider proposed uses of water within the Hopi Tribal lands that may not be known to ADWR. The court expects that the Hopi Tribe and the United States will provide ADWR, on a cooperative and ongoing basis, with information and supporting documentation relating to the Tribe's current and future land and water use planning within the area affected by the Hopi HSR. If this process needs clarification, the matter can be considered at the October 8, 2002 hearing in this case.

9. ADWR shall file its report regarding available and needed staff and other resources and expected costs related to its technical advice to the court and the special master, both in this adjudication and in the Gila River Adjudication, on or before Friday, July 26, 2002. The court asks ADWR to include in its report ADWR's capability to provide a central repository of information

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for this adjudication. The report should describe with detail the staff allocations and all expected costs.

10. The Joint Motion for Confirmation of Binding Effect, as Between Signatory Parties, of Certain Stipulations Addressing Specified Water Rights Claims is GRANTED, and the stipulations as corrected and filed with the court are approved. The stipulations shall bind each signatory, but not any other party in this adjudication, ADWR, this court, or the special master in any respect. ADWR shall not be precluded from technically analyzing the information contained in the stipulations or reporting the information and its determinations in technical reports. The movants shall promptly submit to this court a form of order similar to the one they filed on March 27, 2002, but stating that the parties to a written agreement modifying a stipulation "shall submit the modified stipulation to this Court for review and approval."

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11. The Joint Motion for Clarification on Use of Claimants' Filing Fees for Reimbursement of Expenses Incurred by Settlement Judge is deemed moot in light of the Arizona legislature's recent amendment to A.R.S. section 45-255(B), effective on August 22, 2002, which serves as evidence that the legislature intends that the funds of claimants' filing fees be used to pay more than the compensation and expenses of the special master.
12. Some of the parties seek resolution of questions relating to the issues of whether the Hopi Tribe has a viable claim to the mainstem of the Little Colorado River, the purported effect of terms contained in the Navajo-Hopi Land Dispute Settlement Act of 1996, and the preclusive effect of prior decrees or legislation. The resolution of these issues may necessitate determinations relating to matters identified in the preliminary Hopi HSR.

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All of the parties have urged the court to consider and resolve the claims held by and for Indian Tribes prior to addressing other claims. Toward this goal, the court directs that any party who believes that prior agreements, decrees, or federal and state legislation, as well as other issues properly addressed by expedited disposition, have adjudicated, settled or otherwise significantly affected any part of the reserved water right claims held by the Hopi Tribe, Navajo Nation, San Juan Southern Paiute Tribe, and the Zuni Pueblo shall file a disclosure on or before Friday, November 22, 2002, setting forth each matter the party believes affects the relevant reserved water rights claim and a brief factual summary of the basis for each assertion.

Each disclosure filed shall list the relevant documents and the names and addresses of any witnesses, including expert witnesses, the party believes will be called to substantiate the claim. The disclosure shall contain a

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fair description of the substance of expected testimony. For any expert witnesses, the disclosure shall include a copy of the expert's curriculum vitae and a list of case names and dates of all prior testimony in water right cases. No copies of the listed documents shall be attached to the disclosure statement served on the parties or the court. The disclosure shall contain a well considered statement as to whether or not that party believes any issue can be resolved by summary judgment based on the existing documents or whether an evidentiary hearing will be needed and shall state the time required to prepare such motions or for an evidentiary hearing.

13. A hearing shall be held on Tuesday, October 8, 2002, at 9:30 a.m., in the Apache County Courthouse. The court will hear any issues that may impede the timely progress of the Hopi HSR and requests that would expedite its preparation.

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A copy of this minute entry is mailed to all parties on the
Court-approved LCR mailing list dated February 7, 2002.