

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 20, 2004

CIVIL NO. 6417-033-0060

ORDER DENYING MOTION
FOR PROTECTIVE ORDER
LIMITING THE SCOPE OF
THE FINAL SUPPLEMENTAL
CONTESTED CASE
HYDROGRAPHIC SURVEY
REPORT FOR THE CLAIMS
OF PHELPS DODGE TO
SHOW LOW LAKE

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 protective order limiting the scope of the final supplemental contested case hydrographic survey report and gives further directives to the Arizona Department of Water Resources.

NUMBER OF PAGES: 10.

DATE OF FILING: Original mailed to the Clerk of the Court on December 20, 2004.

ORDER

On November 8, 2004, claimant Phelps Dodge Corporation (“Phelps Dodge”) filed a Motion for Protective Order Limiting the Scope of the Final Supplemental Contested Case Hydrographic Survey Report for the Claims of Phelps Dodge to Show Low Lake

("Supplemental Show Low Lake HSR"). A motion for expedited consideration was granted on November 9, 2004, and a briefing schedule was set.

The Cities of Chandler, Glendale, Mesa, and Scottsdale ("Cities") support the motion. The United States and the Navajo Nation oppose it. The Arizona Department of Water Resources ("ADWR") filed comments.¹ Phelps Dodge replied.

Phelps Dodge and the Cities argue that the directives of Special Masters Thorson and Schade do not allow ADWR to report on all of Phelps Dodge's water sources that are used at the Morenci Mine Complex, and second, the Supplemental Show Low Lake HSR would deny due process (1) to Gila River Adjudication claimants if Phelps Dodge's water right claims to watersheds in the Gila River System are adjudicated in this contested case and (2) to Phelps Dodge if its water right claims in the Gila River Adjudication are subjected to objections by Little Colorado River Adjudication claimants. Phelps Dodge also argues that the Draft Supplemental Show Low Lake HSR ("Draft HSR") does not comply with A.R.S. § 45-256(B) because ADWR does not recommend a proposed quantity of use for Phelps Dodge's Show Low Lake water right.

The United States and the Navajo Nation respond that the Draft HSR addresses all of Phelps Dodge's water sources used at the Morenci Mine Complex in accordance with orders issued in a prior discovery matter, the descriptions of the sources and related agreements do not raise due process concerns, and publication of the Supplemental Show Low Lake HSR should not be delayed due to Phelps Dodge's failure to provide adequate information to enable ADWR to recommend a quantity of water use.

Phelps Dodge requests that ADWR be instructed to remove all discussion of water rights other than those directly related to Show Low Lake, propose a quantity of use for Phelps Dodge's Show Low Lake water right, and publish a revised Draft HSR.

The pleadings hint at issues that likely will be raised when this case returns to its trial phase. The discovery issues involving Phelps Dodge, the United States, and the Navajo Nation (and others), litigated in 1993, may see another day. The Special Master senses concerns about the "if" and "how" application of statements made in prior orders; how decisions made in this case might affect other water users who hold numerous or diverse water rights; confidential information and its discovery; legal parameters of Arizona's concept of beneficial use; and the prospect of multiple litigations. The overlay is the transriver diversion and storage system, linked with various water exchange agreements and easements, which Phelps Dodge has operated in Show Low Lake for fifty years in order to provide water to its operations in Morenci.

A. Does reporting on the water rights that Phelps Dodge has outside the Silver Creek Watershed comply with the directives to ADWR concerning the scope of the supplemental HSR?

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.

Phelps Dodge argues that contrary to the directives of Special Masters Thorson and Schade, “ADWR analyzes and reports on numerous water rights located in the Salt, Gila, and Verde River watersheds that have no relation to the Little Colorado River Adjudication.”² These rights include Salt River credits, Gila River rights (San Francisco River, Chase Creek, Eagle Creek, Gila River), Verde River rights in Horseshoe Reservoir, Central Arizona Project deliveries, and groundwater (Upper Eagle Creek Well Field).

The directives are contained in Special Master Thorson’s October 30, 1992, order and this Special Master’s March 12, 2003, order. The March 12, 2003, order directed ADWR as follows:

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.

ADWR was directed to prepare a supplemental contested case HSR in accordance with Paragraph VI.B of the October 30, 1992, order, and not to prepare proposed water right attributes for Phelps Dodge’s water rights located outside the Little Colorado River Watershed.

1. October 30, 1992, Order

This order approved a stipulation submitted by Phelps Dodge, the United States, the Navajo Nation, and others regarding an issue of broad legal importance that Special Master Thorson had framed. The issue was “[s]hould Phelps Dodge’s claimed water rights be adjudicated in the Silver Creek proceedings, in the Upper Salt River proceedings,³ in the Upper Gila River proceedings, or in some combination of these?”⁴ The approved stipulation resolved that Phelps Dodge’s claims to Show Low Lake would be adjudicated in the Silver Creek proceedings or in the watershed of origin.

Paragraph VI.B states that:

In future final hydrographic survey reports, the Department of Water Resources shall prepare watershed file reports for transbasin diversions that report and

² Phelps Dodge’s Motion 5.

³ A preliminary HSR for the Upper (*note*: not the entire) Salt River Watershed was filed on January 25, 1993. A final HSR has not been published. The “Phelps Dodge Corporation-Salt River Valley Water Users’ Association Water Exchange Agreement” was described in volume 1 at 373-378.

⁴ Order 4 (Oct. 30, 1992).

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 right. 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.⁵

The Special Master considered this order before issuing the March 12, 2003, directives to ADWR. The October 30, 1992, order set forth a reasonable test to measure the scope a supplemental HSR for a transbasin or transriver diversion should have, namely, the HSR must contain “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 right.” “All aspects of the exchange” appropriately include a description of all the water rights and sources that interact or might interact with the transriver diversion and storage system. Having this information at hand will assist a claimant to elect or not elect to file an objection. If the Supplemental Show Low Lake HSR describes only the diversion and storage mechanism at Show Low Lake, without providing a comprehensive understanding of the exchange, it would not meet the test.

Second, the order directed ADWR to “include a water budget for the entire water exchange,” describe “all points of diversion, consumptive and nonconsumptive uses,” and give “a history of the exchange” and “summaries of important agreements and other documents.” Show Low Lake is a core component of an intricate water delivery system built on agreements of impressive linkage.

The Special Master has carefully read Special Master Thorson’s directives and the Draft HSR’s descriptions of the Show Low Lake transriver diversion and storage system. In order to give those directives reasonable meaning and effect, the descriptions of Phelps Dodge’s other water rights and sources used at Morenci that interact or might interact with the transbasin diversion and storage at Show Low Lake should remain in the supplemental HSR. It is possible that as the litigation of this case proceeds, the workings of the system are clarified, and portions of the HSR may merit no further review.

2. March 12, 2003, Order

The Draft HSR complies with the Special Master’s March 12, 2003, order as the HSR does not contain proposed water right attributes for any of Phelps Dodge’s water right claims and uses located outside the Silver Creek Watershed. It describes those other water rights and sources, but contains no recommendations of water right attributes. As explained in the next section, those rights and sources cannot be adjudicated in this contested case in the absence of recommendations regarding their attributes.

⁵ *Id.* at 8.

The Special Master has not relied in this ruling on Judge Stanley Z. Goodfarb's (ret.) order of September 17, 1993, because that order was limited to consideration of an issue regarding beneficial use that arose in a discovery dispute, and Phelps Dodge's motion can be determined on other bases.

The Special Master finds that the Draft HSR's extent of reporting on the water rights Phelps Dodge has outside the Silver Creek Watershed complies with the directives to ADWR regarding the scope of the supplemental HSR.

B. Does the Supplemental Slow Low Lake HSR risk denying due process to claimants in the Gila River Adjudication by reporting on water rights other than Show Low Lake that Phelps Dodge uses at Morenci?

The concern is two-fold: first, that Phelps Dodge's water rights claims in the Salt River, Upper Gila, and Verde River Watersheds will be adjudicated in the Little Colorado River Adjudication without giving claimants in those watersheds notice or opportunity to be heard, and second, that if the Court accepts "ADWR's characterization" of Phelps Dodge's water rights in those watersheds, "this HSR could have a persuasive, or even binding, effect in the Gila River Adjudication under principles of *res judicata* or collateral estoppel."⁶

1. Due Process

The Special Master does not believe that because ADWR has summarized the various agreements or described the other water rights Phelps Dodge uses at Morenci that the adjudication of those uses in this proceeding is inevitable. Describing or summarizing a water right or use in an HSR does not open the door to its adjudication. An HSR must provide more for a water right or use to be adjudicated.

A.R.S. § 45-256(B) states in pertinent part:

The report shall also include the director'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, the director's recommendations shall so indicate.... An objection shall specifically address the director's recommendations regarding the particular water right claim or use investigated. The court or master shall summarily dismiss with prejudice objections that do not comply with this subsection. Each claimant who has filed timely written objections that comply with this subsection shall have a fair and reasonable opportunity to present evidence in support of or in opposition to those recommendations of the director. (Emphasis added.)

In order to adjudicate a water use, the HSR must contain a recommendation regarding the use or claimed right. A recommendation is the starting point. The recommendation either sets forth proposed water right attributes or indicates that a water right is not proposed.

⁶ Phelps Dodge's Motion 9-10.

The Draft HSR does not contain any recommendations or proposed water right attributes for any of Phelps Dodge's water right claims or water sources located outside the Silver Creek Watershed. Accordingly, none of those claims or sources can or will be adjudicated in this contested case based on the Supplemental Show Low Lake HSR.⁷

A.R.S. § 45-256(C) is part of that framework. It provides that:

Those portions of the report that do not contain the director's recommendations for the water rights claims and uses investigated shall not be summarily admitted into evidence but may be offered into evidence for any purpose relevant to the determination of a water right claim or use that is subject to adjudication... (Emphasis added.)

The portions of a supplemental contested case HSR that do not contain recommendations can be offered to determine a claim or use that is "subject to adjudication." If admitted after a finding of relevancy, those portions will be used only to determine a water claim or use that is being adjudicated in that contested case. A.R.S. § 45-256(B) and (C) do not allow the Court or the Special Master to go far afield or roam at large throughout the river system adjudicating water rights.

Finally, the procedural structure of Arizona's adjudications is that the filing of an HSR and the conclusion of a 180-day objection period must precede the adjudication of a water use. Neither has occurred in the Salt River, Upper Gila River, and Verde River Watersheds so water uses in those areas cannot be adjudicated at this time.

2. *Res Judicata* or Collateral Estoppel

In addition to objecting to ADWR's recommendations contained in the Supplemental Show Low Lake HSR, any claimant in the Little Colorado River Adjudication can object to those portions of the HSR that do not contain recommendations. The summaries and descriptions contained in an HSR, even those admitted into evidence over objection, can not be presumed to be correct simply because they are set forth in the HSR. Pursuant to A.R.S. § 45-256(C), "[i]f admitted into evidence over an objection, those portions of the report shall not be given any presumption of correctness." Furthermore, A.R.S. § 45-256(E) is likely to apply in this case as the diversion claim is for at least approximately 1,000 acre feet per annum. That section states that:

Information that is included in the director's report and that describes a water right claim or use of more than five hundred acre-feet per year shall not be summarily admitted into evidence. If offered into evidence and if admitted over objection, it shall be given no presumption of correctness.

⁷ Recommendations are also linked to objections. Reviewing the validity of A.R.S. § 45-256(B), the Arizona Supreme Court held, "Objections are permitted, but they must specifically address DWR's recommendations." *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 214, 972 P.2d 179, 198 (1999).

As Phelps Dodge points out, the challenge is when factual and legal determinations are made in a contested case. Given the number of parties, geographical enormity, complexity of issues, interaction of settlements with litigations, and issuance of a final decree far in the future, how the doctrines of *res judicata* and collateral estoppel might fairly apply in a general stream adjudication is a dynamic issue.

Transriver diversions and water exchanges are unique as their adjudication could involve different parties in different watersheds being adjudicated at different times and very likely under different circumstances. This is an area where the Court, the Special Master, and the claimants could implement procedures that recognize the two doctrines as well as special circumstances. The Special Master will work to define precisely the issues to be tried. Consideration could be given to identifying at the conclusion of the case the determinations that will have a preclusive effect and using conditional orders.

3. Duplicative Litigation

The pleadings discuss the undesirability of litigating the same matters in different watersheds. Special Master Thorson tried to clarify this concern in his October 30, 1992, order, but had to concede that “it is difficult to immunize [Phelps Dodge] from further proceedings in the Upper Salt River watershed or in the Upper Gila River watershed”⁸ because claimants in those watersheds must be afforded the opportunity to object to any aspect of the water exchange that occurs within their watershed that concerns them.

The Special Master will work to reduce duplicative litigation whenever it can be avoided while preserving claimants’ fundamental due process. The success of that effort will only be evident once the litigation of this case begins, but the effort will be made.

C. Does the Draft HSR fail to comply with A.R.S. § 45-256 because ADWR does not recommend a proposed water right attribute for the quantity of use?

Phelps Dodge argues that “ADWR neglected its statutory responsibility by failing to propose a quantity for this water right in the Draft HSR”⁹ because A.R.S. § 45-256(B) directs that when ADWR prepares a report, “[t]he report shall also include the director’s proposed water right attributes for each individual water right claim or use investigated....” The quantity of use is an attribute of a water right.

ADWR claims “it is not required to make a recommendation regarding water right attributes in all circumstances”¹⁰ because the next sentence in section 45-256(B) states that “[i]f no water right is proposed in connection with an individual water right claim or use, the director’s recommendations shall so indicate.” Hence, ADWR can elect not to recommend a specific water right attribute.

The first sentence deals with “water right attributes” while the second speaks of a “water right.” A water right is a composite of water right attributes. The Special Master finds

⁸ Order 7, *supra*.

⁹ Phelps Dodge’s Motion 11.

¹⁰ ADWR’s Comments 10.

that the second sentence applies to situations where ADWR does not recommend, for whatever reason, the adjudication of any water right. This statutory provision allows ADWR not to recommend a water right even though one might have been claimed.

May ADWR elect not to propose a specific water right attribute as it did in the Draft HSR where all the attributes of a water right are recommended except for the quantity of use for the diversion right? The election is permissible as long as ADWR has complied with all the investigatory requirements set forth in A.R.S. § 45-256(A) and (B). Section 45-256(B) requires that “[t]he report shall list all information that is obtained by the director and that reasonably relates to the water right claim or use investigated.”

The Draft HSR explains as follows why a quantity of use is not recommended:

ADWR understands that there are unresolved legal issues regarding these diversions and uses, including the quantification standard that should be applied. Without further direction from the Court, ADWR makes no recommendation for a proposed quantity of use for the Phelps Dodge water rights to Show Low Lake at this time.¹¹

In its comments, ADWR explains the unresolved quantification issue. That is the issue Judge Goodfarb dealt with in his September 17, 1993, order. It is not necessary to address that issue before the Supplemental Show Low Lake HSR is filed. Judge Goodfarb found that the beneficial use issue was of “such significance” that its determination “should only be done after all parties are given an opportunity to brief the issue and argue same before the court.”¹² That opportunity will best be provided, if necessary, during the litigation of this case after the supplemental HSR is filed.

The omission of a proposed quantity of water use must be evaluated under the standard of A.R.S. § 45-256(B) - does the Draft HSR list all information obtained by ADWR that reasonably relates to Phelps Dodge’s water right claim? In its investigations of amounts of water diverted and used, ADWR obtained information from Phelps Dodge, the Gila Water Commissioner, United States Geological Survey, Central Arizona Water Conservation District, Arizona Corporation Commission, Salt River Project, and ADWR’s records. Four tables in the Draft HSR indicate that “data [is] forthcoming” from the Salt River Project.¹³ This effort is far more extensive than the one reported in the Final Silver Creek Watershed HSR.¹⁴ ADWR indicates that “[t]he data in **Table 16** may be used to determine the quantity of use to which Phelps Dodge is entitled, depending upon the quantification standard adopted by the Court for transbasin diversion and mining uses (bold in original).”¹⁵

The Draft HSR states that prior to publication:

¹¹ Draft HSR 59.

¹² Order 6-7 (Sept. 17, 1993).

¹³ Draft HSR, tbls. 8, 9, 10, and 13.

¹⁴ *Compare with* Silver Creek Watershed HSR, vol. 1, 250-255 (1990).

¹⁵ Draft HSR 57-58.

ADWR was unable to obtain any additional information from Phelps Dodge or elsewhere regarding water uses within the Morenci Mine Complex.... Recently, Phelps Dodge indicated that it might be able to arrange a limited tour. ADWR hopes to complete such a tour prior to the publication of the final report in this matter.¹⁶

Phelps Dodge replies that ADWR needs to schedule the tour. The Special Master expects that ADWR will complete the tour and incorporate new information - and any other forthcoming water use data - in the Supplemental Show Low Lake HSR. Site inspections and data exchanges with claimants have been very important and successful in facilitating the progress of this adjudication. Phelps Dodge avows that it “has provided a very large amount of information to ADWR over the course of this adjudication.”¹⁷

The Special Master finds that the Draft HSR contains all the information that ADWR has obtained that reasonably relates to Phelps Dodge’s diversion right to Show Low Lake. Additional information and data are forthcoming. The Draft HSR is therefore not deficient under A.R.S. § 45-256 because it does not recommend a proposed water right attribute for the quantity of use of the diversion right.

D. Should Volume II of the Draft HSR be made available for comment before the Supplemental Show Low Lake HSR is filed?

The Supplemental Show Low Lake HSR will consist of two volumes, but ADWR did not publish a draft of Volume II and make it available for comment. According to ADWR, Volume II “includes copies of the related agreements that are discussed in Volume I.”¹⁸ The Cities argue that “Volume II should be made available in draft form for comment and review before [ADWR] issues the final Show Low Lake HSR.”¹⁹

The 64-text page Draft HSR uses 14 pages (pp. 24-37) to summarize the various agreements. The Special Master does not know how long the agreements are or their complexity for copying. There is precedent for ADWR summarizing similar documents, for example, the Final Silver Creek Watershed HSR summarized four court decrees in less than two pages and did not contain copies of the decrees.²⁰ Furthermore, the Draft HSR complies with Special Master Thorson’s October 30, 1992, order that ADWR provide “summaries of important agreements and other documents.”²¹

Whether a supplemental contested case HSR should contain copies of agreements or court decrees is a decision that should be left to ADWR. A supplemental HSR may or may not need to provide copies of such documents in order to inform claimants and parties. In some cases, a good descriptive summary could be sufficient.

¹⁶ *Id.* at 19.

¹⁷ Phelps Dodge’s Reply 12.

¹⁸ Draft HSR 4.

¹⁹ Cities’ Resp. 8.

²⁰ Silver Creek Watershed HSR, vol. 1, 17-19.

²¹ *See* n.4, *supra*.

In other cases, particular circumstances might exist that an HSR should contain a copy of an agreement or a court decree. A supplemental contested case HSR might have to be more comprehensive or detailed than a watershed HSR. In those cases, copies of agreements and decrees should be provided in the HSR. It appears that ADWR believes this case to be one of those as it will provide copies of the agreements discussed in Volume I.

The Special Master finds that the summaries of the agreements set forth in the Draft HSR were sufficient to inform claimants and parties of the agreements' scope and contents. The absence of Volume II did not prejudice claimants who commented on the content and format of the Draft HSR.

For the foregoing reasons, IT IS ORDERED:

1. The motion for protective order limiting the scope of the Supplemental Show Low Lake HSR is denied.
2. ADWR is directed to provide in the Supplemental Show Low Lake HSR all the information it has collected regarding the quantity of use of Phelps Dodge's diversion right to Show Low Lake.
3. ADWR is directed to review all the comments submitted by October 1, 2004, and incorporate all relevant corrections and clarifications in the Supplemental Show Low Lake HSR.
4. The parties in this contested case are encouraged to confer and submit procedures to address *res judicata* and collateral estoppel concerns.

DATED: December 20, 2004.

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

The original of the foregoing was mailed this 20th 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