

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE
DONNA J. GRIMSLEY, PRESIDING JUDGE

**THE HONORABLE EDDWARD
P. BALLINGER, JR., Visiting Judge**

SUE HALL, Clerk

COURT REPORTER: (Digitally Recorded)

By: Barbara J. Silversmith, Deputy

| | |
|---|--|
| IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE In re Proposed Zuni Indian Tribe Water Rights Settlement Special Proceeding | Case No. CV-6417-200 DATE: August 18, 2006 TIME: 1:32 P. M. MINUTE ENTRY: Status Conference |
|---|--|

| | |
|----------------------------|---|
| DESCRIPTIVE SUMMARY | Status Conference held in the Apache County Superior Courtroom, St. Johns, Arizona. |
| NUMBER OF PAGES | 9 |
| DATE OF FILING | August 30, 2006 |

MINUTE ENTRY

This is the date and time set for a Status Conference in Contested Case Civil 6417-200.

APPEARANCES

Mr. John B. Weldon, Jr.; Ms. Lisa M. McKnight; Mr. David C. Roberts; Mr. Frederic L. Beeson; and Mr. Craig Sommers, representing Salt River Project; Ms. Jane Marx; Mr. Edward Wemytewa; Mr. Andres Cheama; and Mr. Wilfred Eriacho, Sr., representing Pueblo of Zuni; Mr. David A. Brown and Mr. Michael J. Brown, representing various claimants; Mr. Patrick B. Sigl, representing Arizona Attorney General's Office for the State Land Department; Ms. Cynthia J. Haglin, representing City of Chandler; Ms. Vanessa Boyd Willard, representing U.S. Department of Justice (Indian Resources Section); Mr. Robert Sejkora, representing Arizona State Parks; and Mr. Christopher Banet, representing U. S. Department of the Interior, Bureau of Indian Affairs.

Present by telephone: Ms. Janet Ronald, representing Arizona Department of Water Resources.

Minute Entry
CASE NO. CV-6417-200
DATE: August 18, 2006
Page 2

Also in attendance: Special Master George A. Schade, Jr. and Kathy Dolge, Assistant to the Special Master.

Judge Ballinger welcomes everyone in attendance.

Special Master Schade informs the parties that his assistant Kathy Dolge will be retiring in October and thanks Ms. Dolge for her service to the adjudications which includes case management, financial administration, and intern supervision. The Court also thanks Ms. Dolge.

The Court states this hearing is to consider the status of the Zuni Indian Tribe Water Rights Settlement specifically the Technical Assessment Report submitted by the Arizona Department of Water Resources ("ADWR"). The Court advises it has a message that Ms. Ronald will not be present and inquires if ADWR is represented.

The Court is aware of four objections that have been filed and are the subject of the Motion for Summary Disposition that Mr. Weldon and a number of parties filed. The Court inquires if any of the objectors are present. None are present.

Regarding the Motion for Summary Disposition, the Court states that in looking through ADWR's report and the settlement agreement, that even if the Court granted the motion, the Court will not be in a position to approve the settlement at this time. The Court states that the form of order submitted by the movants contains a finding that all the conditions set forth in section three of the agreement have been accomplished. The Technical Assessment Report lists a number of conditions that must be completed before the Court can sign the order. The Court inquires if striking the finding that all conditions have been met would be sufficient for approval of the settlement agreement. The Court suggests setting a response time and giving the objectors time to file responses. After reading any filings, the Court can determine if the motion's points are no need for an evidentiary hearing. The Court could grant the motion to summarily dismiss the objections or if something is filed that causes the Court to conclude there is a dispute, the Court could set a hearing.

The Court's second issue is that the form of order has an additional finding that the Court finds that there is no surface water available for appropriations in the Norviel Decree area. The Court inquires on what basis does it make that finding.

Mr. John B. Weldon, Jr., representing Salt River Project, states that in the Norviel Decree area, which is subject to the continuing jurisdiction of the Norviel Decree Court, there is a decision of the Arizona Court of Appeals that precludes ADWR from entertaining applications to appropriate surface water within that area on the basis that the basin is overappropriated. The proposed finding recognizes the holding of the Court of Appeals decision. If the Court wants to change the language to make

reference to that decision, that will comply with the requirements.

The Court states it is uncomfortable signing an order that says there is no appropriable water in the Norviel Decree area just because a group of private parties have agreed to that, and the order was going to be binding on nonparties. The Court's reading of the proposed order is that it would be, so if the Court recognizes the holding that there is no surface water available for appropriations in the Norviel Decree area, it means this is a nonappealable ruling of the Arizona Court of Appeals.

Mr. Weldon states the settling parties have not had time to confer concerning the Court's idea of striking out language from the proposed order.

The Court inquires what can be presented showing that there is no appropriable water in the Norviel Decree area other than an agreement by a number of private individuals. The Court's thinking is to deal with the objections, make the revisions, and question ADWR regarding the conditions that have not been satisfied.

Mr. Weldon addresses the form of judgment which states that the conditions in paragraphs 3.1.A to 3.1.J have been satisfied. He states that approval of the judgment and decree is a condition to the effectiveness of the settlement. The United States cannot publish the notice in the Federal Register that says all the conditions have been satisfied until the Court signs the judgment. He explains that in other settlements the Court has been ready to approve and sign the judgment, but the effectiveness of the Court's order is conditioned upon the publication of the notice by the Department of the Interior.

The Court recites the problems it has with ADWR's report in sections 3.1.A thru 3.1.L which describes each condition not yet met.

Mr. Weldon suggests that the settlement parties advise the Court of the status of each of the conditions.

The Court wants the parties to consider that either the conditions will be satisfied or not, suggests taking out the language of the finding regarding the satisfaction of the conditions, and recites sections of ADWR's report. The Court states it cannot sign the judgment until it is shown that every condition has been completed.

Mr. Weldon states the process has evolved differently than the parties anticipated when the conditions were developed. Generally, the approval of the judgment and decree, as in other settlements, has been the last act. He addresses the objections and hopes that the proceedings on the objections can be concluded before November. He is confident that all of the conditions will be satisfied by early December. He reports that the only issue is the completion of the transfer of title to

Minute Entry
CASE NO. CV-6417-200
DATE: August 18, 2006
Page 4

section 34 from the State Land Department which is on schedule to be auctioned in November. Other items on the list should be completed and most done by the middle of October.

The Court and Mr. Weldon concur that there will have to be a hearing for all parties to show that all the conditions have been met.

The Court inquires about the payments to be made by the State of Arizona described in ADWR's report. The Court inquires if the money has already been appropriated but only partly disbursed.

Mr. Weldon states that two million dollars would be contributed to the settlement by the State of Arizona. Part of that money will be a grant from the Arizona Water Protection Fund to the Zuni Tribe. The Tribe applied for and received the grant. The amount of the grant was backed out from the appropriated amount but left an issue concerning \$14,000. He believes that situation has been solved. The \$14,000 will be deposited into this fund.

Mr. Christopher Banet, representing the U.S. Department of the Interior, Bureau of Indian Affairs, reports he has been in contact with the Arizona State Treasurer and states that the second installment has not yet been deposited in the trust fund. The first installment was disbursed to the trust fund, and they are waiting for the exact amount of the grant money going to the Tribe to determine how much is to be made up by the appropriated amount.

The Court is not averse to having a hearing and going through the list to see which conditions have been completed before signing the order. The Court inquires if the hearing should be held in early December, in case some conditions are not met, making it necessary for another hearing to be scheduled in late December.

The Court and Mr. Banet discuss the scheduling and signing of the order.

Ms. Vanessa Boyd Willard, representing the U.S. Department of Justice, shares the Court's concern about meeting all the deadlines set forth in the settlement agreement and settlement act as well as giving the Court information and confidence in signing the order. She states she is in charge of the process to get the secretarial findings published in the Federal Register which has to be accomplished by December 31, 2006. That process in Washington D.C. takes about a month, and their concern is having all the documents prepared and ready to go by December. One of the prerequisites of the secretarial notice is this Court's approval of the decree, and the settling parties all agree that the language in the proposed order includes Article 3.1 sections A through J. The parties are confident in coming before this Court for a hearing showing that by the end of November all the conditions have been accomplished with the exception of one.

The Court states its position regarding the removal of the language to make everyone's lives easier and addresses the publication issue. The Court explains the process of setting a hearing and a deadline for the objectors to respond.

The Court and Ms. Boyd Willard discuss taking out the language from the proposed order. She does not know if other settling parties have concerns about removing that language.

Mr. Weldon suggests holding a hearing in October on the objections and states that at that time, the Court may inquire about deleting that language from the judgment. By then, the settling parties would have conferred, and if they agree, the Court is done. The language issue can be addressed if it needs to be left in the order.

2:06 p.m. - Present by telephone: Ms. Janet L. Ronald, representing ADWR.

Upon inquiry by the Court regarding the Technical Assessment Report, Ms. Ronald does not know why a planned storage reservoir has been excluded from the restoration project.

Ms. Jane Marx, representing the Zuni Tribe, states that budgetary constraints resulted in dropping that part of the plan.

The Court reads page 15 of the report that states that ADWR will compile a catalog of all existing wells in the Little Colorado River Basin by December 31, 2009, and inquires of any concern about that undertaking.

Ms. Ronald states that ADWR is aware of that requirement and is willing to move forward to meet it.

The Court inquires how ADWR intends to utilize the additional money appropriated to it this year by the state legislature.

Ms. Ronald advises that they are posting positions to add people. They are in the process of interviewing and hope to have additional people by the end of the year. The new employees will work on the adjudications.

The Court refers to a statement on Page 26 on conditional approval to be obtained from the Norviel Decree Court. Upon discussion and the Court having been advised the Norviel Court approved this morning what it had been requested to consider, the Court states this matter goes in the completed category.

Ms. Marx states that this condition applied to the acquisition of up to 2,350 acre feet of water. The Tribe has made a determination that it will not seek a conditional

Minute Entry
CASE NO. CV-6417-200
DATE: August 18, 2006
Page 6

severance and transfer. It is one of the conditions that can be waived. The only matter they were taking before the Norviel Decree Court was the Lyman agreement which was approved. The Tribe will waive its rights to bring the other matters prior to the enforcement date.

Ms. Ronald states that is her understanding.

The Court reads page 8 of ADWR's report which states that a long term goal of the restoration project is to restore 700 acres of wetlands and riparian habitat. There is an estimated average water demand of 5,500 acre feet per year. The Court states that it looks like twice that amount is being granted.

Mr. Weldon explains that the reason the numbers do not correspond is that in some years surface water will be used, in other years flood flows will be used, and in other years groundwater will be used. The 5,500 acre feet is the anticipated annual requirement which can be satisfied by a combination of resources depending on their availability.

The Court references section 3.2.2 of the settlement agreement, paragraph 14, concerning the limitation on the Zuni Tribe's objections to surface water rights. There is a discussion regarding the circumstances when the Tribe may not object to surface water rights. The last sentence of that section states that the Zuni Tribe is allowed to object on State law grounds to protect surface water rights on existing or future Zuni lands. The Court inquires as to the realistic effect on the limitation in light of the exception.

Ms. Marx states that the exception is limited to objections to surface water rights the Tribe will acquire as part of this agreement under existing state law.

The Court refers to page 16 of ADWR's report and inquires if the finding that the Norviel Decree area is fully appropriated will affect the Adjudication Court's jurisdiction to determine abandoned, forfeited or changed uses.

Mr. Weldon believes those issues are still subject to page 16 of the Norviel Decree Court. Any change of use, severance, and inquires will the Norviel Decree Court until the decree is folded into the larger Little Colorado River Adjudication. He states this settlement does not affect the jurisdiction of the Norviel Decree Court.

The Court concurs and inquires of the Zuni Tribe and the United States if they agree. Both state they agree.

The Court requests clarification regarding why the United States was deemed the proper signatory to the operating agreement, mentioned on page 17 of ADWR's report, and now it is not. Ms. Boyd Willard states that it was the original

understanding of the United States that the BIA was required as a signatory for the Tribe to enter into the agreement. However, they reviewed the federal regulations that apply to these types of agreements and determined that BIA oversight is not required. To make it clear they removed the U.S. as a signatory to the agreement. This is consistent with federal law and the requirements the BIA has to follow in its relationship with the Tribe.

The Court having reviewed the report inquires if ADWR made any evaluations or completed any studies on the possible consequences of the estimated increased intensity levels of flows between Zion Reservoir and the Zuni Reservation. The Court refers to the discussion on page 34 of the report.

Ms. Ronald communicated with the settling parties on that issue and the information in the report is the only information the department had available. She is not aware of any independent analysis that ADWR may have conducted based on the information it had available.

Mr. Weldon states that the Zion Reservoir Dam has washed out, and the Little Colorado River is flowing through a breach in that dam to Zuni Heaven Reservation and beyond.

The Court refers to page 44 of the report, regarding statements about data not being made available to ADWR, and inquires if it was ADWR's belief that there was data held by the Tribe or others, relating to the discussion on page 44, that was not provided to ADWR.

Ms. Ronald states that the settling parties were very cooperative in providing information in a timely manner, and the department was pleased with the level of cooperation.

The Court reads from the report referencing page 44.

The Court recites the statements made in section 7.2 of ADWR's report concerning Carrizo and Big Hollow Washes, Concho Creek, and the Zuni River. The Court inquires if the Tribe agrees with those statements. Ms. Marx states yes.

Ms. Marx defers to Mr. Sommers, who would know more about it from a technical perspective, but states that the flows will be flood flows which are not easily usable.

Special Master Schade states that ADWR's report indicates there will be more water flowing down the Little Colorado River from Lyman Lake to the Zuni Heaven Reservation. Reciting the language used in the report, he inquires with the additional water that is flowing towards the Zuni Reservation, what environmental effects it will have on the land and the river.

Minute Entry
CASE NO. CV-6417-200
DATE: August 18, 2006
Page 8

Mr. Craig Sommers introduces himself to the Court and parties. He indicates he has worked with the experts of the United States and the Tribe on science and water resources economics. He states they have worked together for a number of years on how much water to acquire. A study was done by the Tribe's consultants on what the downstream flow impacts would be in response to concerns by the Hopi and Navajo Tribes about what the restoration project would do in terms of additional withdrawals. That analysis concluded there would be slightly more water in the long term. He states the additional flows should be more beneficial. Between Zuni Heaven Reservation and Lyman Lake, they have not done detailed studies of how the river channel will change. The Zuni Tribe hired a number of people who studied why the wetlands no longer exist. They hope that over time, the sediment held back by the Zion Reservoir Dam will settle out in Hunt Valley. The intent is to restore more natural conditions to the river.

The Court and parties discuss scheduling.

The Court indicates it will send out an order which requires the objectors to respond to the Motion for Summary Disposition within 30 days and set a hearing in October.

Upon inquiry by Ms. Ronald, the Court states it wants ADWR to be present at future hearings.

Mr. Schade suggests September 12, 2006, as the last day for objectors to file and serve responses to the Motion for Summary Disposition.

The Court thanks everyone for their attendance.

2:35 p.m. - Hearing concludes.

The original is filed with the
Apache County Superior Court.

A copy of this Minute Entry is
mailed to all parties on the Court
approved mailing list for
CV-6417-200 dated July 7, 2006.