

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

05/28/2015

CLERK OF THE COURT
Form V000

JUDGE MARK H. BRAIN

T. Springston
Deputy

W1-11-3342

FILED: June 2, 2015

In re Aravaipa Canyon
Wilderness Area

W1-11-3342

In re Final Trial Management Conference

In re Oral Argument

MINUTE ENTRY

East Court Building – Courtroom 413

9:03 a.m. This is the time set for a final trial management conference and oral argument before Judge Mark H. Brain.

The following attorneys appear telephonically:

- Kathy Sergent on her own behalf; and
- Susan B. Montgomery on behalf of the Yavapai-Apache Nation and Pascua Yaqui Tribe.

The following attorneys appear in-person:

- Sean T. Hood, Shilpa Hunter-Patel, Brian J. Heiserman and L. William Staudenmaier on behalf of Freeport Minerals Corporation;
- David Gehlert and R. Lee Leininger on behalf of the United States;
- Scott M. Deeny, Jeffrey R. Heilman, Lisa M. McKnight and Patrick B. Sigl on behalf of Salt River Project;
- Joe P. Sparks and Julia M. R. Kolsrud on behalf of the San Carlos Apache Tribe and the Tonto Apache Tribe;
- Janet L. Miller and Nicole D. Klobas on behalf of the Arizona Department of Water Resources;
- Morgan R. Holmes on behalf of City of Sierra Vista; and

- Carrie J. Brennan on behalf of State of Arizona.

Court reporter Kristen Brown is present and a record of the proceedings is also made by audio and/or videotape.

THE COURT DIRECTS the persons/attorneys joining via telephonic conference who wish to make an appearance to send their names and the names of the parties that they represent to the division's judicial assistant at ellisonr@superiorcourt.maricopa.gov.

Discussion is held regarding the schedule for today's conference. Court and counsel agree to discuss trial procedures first.

Trial procedures are discussed. Counsel agree no interpreters are needed for trial and no parties will be appearing telephonically to listen to the three (3) week trial.

Pro per claimant Kathy Sergent requests to appear in-person and be heard at trial. The court confirms that she may be heard at trial.

Mr. Leininger indicates that the parties agreed to 30 minute opening statements for each party and that there are three (3) parties anticipated to make opening statements.

Mr. Hood indicates that the trial scheduled will be tight and expresses concern for staying within the time limits if something unforeseen occurs.

Ms. Brennan requests that the State of Arizona be allowed to participate in the trial. The court confirms that the State of Arizona is allowed to participate in trial.

Discussion is held regarding closings for trial. As a result,

THE COURT DIRECTS counsel to submit proposed findings of fact and conclusions of law after trial. Counsel may also submit closings as post-trial briefing if the information is not duplicative of the proposed findings of fact and conclusions of law. The court also mentions that it prefers single-sided documents to double-sided documents.

Discussion is held regarding exhibits and expert reports. Counsel stipulate to the admission of expert reports.

Discussion is held regarding the courtroom that the trial will be held in. As of this date, the equipment is not modern. The court offers the jury room for counsel's use at trial (at the location of the trial, Central Court Building – 1201), if no criminal jury trial is occurring at the same time.

Procedural matters discussion concludes.

The motions in limine listed below are argued to the court.

- United States' Motion in Limine to Exclude Opportune Extraction Model and Related Testimony (received May 4, 2015)
- SRP's Joinder in the United States' Motion in Limine to Exclude Opportune Extraction Model and Related Testimony (received May 5, 2015)

10:59 a.m. Court stands at recess.

11:13 a.m. Court reconvenes with respective counsel and parties present.

Court reporter Kristen Brown is present and a record of the proceedings is also made by audio and/or videotape.

Argument on the motions in limine continues.

Argument on the motions in limine concludes.

IT IS ORDERED taking the motions in limine under advisement.

Freeport Minerals Corporation's Motion for Partial Summary Judgment (received January 16, 2015) is argued to the court.

11:58 a.m. Court stands at recess and shall reconvene at 1:15 p.m.

Off the record, discussion is held regarding the status of a court reporter.

1:28 p.m. Court reconvenes with respective counsel and parties present.

Court reporter Barbara Stockford is present and a record of the proceedings is also made by audio and/or videotape.

Ms. Brennan informs the court that the State of Arizona filed a position statement and discussion is held regarding same.

Argument on Freeport Minerals Corporation's Motion for Partial Summary Judgment (received January 16, 2015) continues to the court.

Argument on Freeport Minerals Corporation's Motion for Partial Summary Judgment (received January 16, 2015) concludes.

IT IS ORDERED taking Freeport Minerals Corporation's Motion for Partial Summary Judgment under advisement.

SRP's Motion for Partial Summary Judgment (received January 5, 2015) is argued to the court.

Argument on SRP's Motion for Partial Summary Judgment (received January 5, 2015) concludes.

IT IS ORDERED taking SRP's Motion for Partial Summary Judgment under advisement.

The court invites counsel to call the division and set up an appointment to view the presentation equipment available in Central Court Building – Courtroom 1201, after rotations occur on June 22, 2015.

2:45 p.m. Court stands at recess.

LATER:

Having considered the parties' papers and arguments, the court resolves the motions as follows.

The United States' Motion in Limine to Exclude Opportune Extraction Model and Related Testimony (filed May 1, 2015) is DENIED because the court has determined that the admissibility of this evidence is better considered at trial pursuant to Rule 7.2(d), Arizona Rules of Civil Procedure.

Salt River Project's Motion for Partial Summary Judgment (filed May 5, 2015) is GRANTED. Specifically, the court agrees that as a matter of law: (1) the state-law based Certificate of Water Right No. 87114.0000 has no effect on the quantification of the United States' federal reserved right in the Aravaipa Canyon Wilderness Area ("the Area"); and (2) the United States may simultaneously hold both state and federal rights to the waters of Aravaipa Creek (with the understanding that these rights are not additive). Regarding the language in *Cappaert* indicating that federal implied reserved rights are limited to "appurtenant water *then unappropriated* to the extent needed to accomplish the purpose of the reservation," the court agrees that this language means "then unappropriated by others."¹ The parties did not cite, nor is the court aware of, any case holding that the United States cannot have simultaneous state and federal water rights. The court believes the "then unappropriated" language was a short-hand reference to the Takings Clause (that is, that the Supreme Court did not believe Congress intended to institute eminent domain proceedings by implication).

Freeport Minerals Corporation's Motion for Partial Summary Judgment (filed January 16, 2015) seeks three forms of relief. First, Freeport claims that the United States is not entitled to a federal reserved right for Goat Spring and Purgatory Spring for purposes of the Area because those waters are already appropriated in *In Re PWR 107 Claims*, and are thus not subject to appropriation under *Cappaert*. As noted above, the

¹ *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

court disagrees; accordingly, this portion of the motion is DENIED. Second, Freeport claims that the United States is not entitled to a federal reserved water right for the 13 manmade stock tanks within the Area because the use of stock tanks is not a primary purpose of the Area. The court agrees; accordingly, this portion of the motion is GRANTED. Third, Freeport claims that the United States is not entitled to a federal reserved water right for unknown “other naturally occurring waters” within the Area. At bottom, this portion of the motion appears to involve a semantic dispute, and is DENIED with the understanding that the court expects to include appropriate language in the decree which deals with this issue.

Current location:

Judge Mark H. Brain
Maricopa County Superior Court
East Court Building
101 West Jefferson Street
4th Floor, Courtroom 413
Phoenix, AZ 85003
Tel: 602.372.1141

New location as of June 22, 2015:

Judge Mark H. Brain
Maricopa County Superior Court
Central Court Building
201 West Jefferson Street
12th Floor, Courtroom 1201
Phoenix, AZ 85003
Tel: 602.372.1141

A copy of this order is mailed to all persons listed on the court approved mailing list for Contested Case No. W1-11-3342 dated March 12, 2015.