

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

4/12/2018

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

S. Brown
Deputy

FILED: 4/24/2018

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

CV 6417-300

In re: Navajo Nation
Contested Case No. CV6417-300

In re: Status Conference

MINUTE ENTRY

Courtroom: CCB 301

10:31 a.m. This is the time set for a Status Conference before Special Master Susan Ward Harris to identify issues that are ripe for consideration and to consider whether *de minimis* proceedings are appropriate to adjudicate the any Claimants' water uses.

The following attorneys appear in person: Jeffrey Leonard, Kathryn Hoover, Judith Dworkin, and Evan Hiller on behalf of the Navajo Nation; Cody McBride on behalf of the United States; Erin Byrnes and Alexandra Arboleda on behalf of the City of Flagstaff; Jeffrey Heilman and Michael Foy on behalf of SRP; Colin Campbell, Grace Rebling, Geoff Sturr, and Phillip Londen on behalf of the Hopi Tribe; Lauren Caster and Brian Heiserman for the LCR Coalition; and Charles Cahoy on behalf of the City of Phoenix.

The following attorneys appear telephonically: Stanley Pollack on behalf of the Navajo Nation; Joe Sparks on behalf of the San Carolos Apache Tribe and Tonto Apache Tribe; Christina Sheehan on behalf of Atkinson Trading Company; Vanessa Willard on behalf of the United States; Susan Montgomery on behalf of the Yavapai-Apache Nation and Pascua Yaqui Tribe; Janet Miller on behalf of the Arizona Department of Water Resources; and David Brown on behalf of the LCR Coalition.

Court reporter, Patricia Kotarba is present and a record of the proceedings is also made digitally.

Counsel Leonard addresses the Navajo Nation's objections to following the procedures and timing utilized in the Hopi contested case. Counsel Willard and Counsel McBride join in the objections on behalf of the United States.

Counsel Campbell addresses the Hopi Tribe's position regarding timing and scheduling and believes the schedule set forth in the Court's December 28, 2016, order should be followed in this case and that the Court should proceed with a priority proceeding.

Counsel Caster and Counsel Miller state their client's respective positions regarding objections to scheduling and resolving legal issues.

Counsel Leonard responds to the objections.

Counsel Hoover, Counsel Campbell, Counsel Brown, and Counsel Miller address the Court's inquiry concerning going forward with *de minimis* proceedings in this case with regard to stockponds and stock watering.

Counsel Pollack speaks to the issue of *de minimis* wells from the subwatersheds in the Navajo Reservation that do not draw from the aquifers shared with the Hopi Reservation.

Discussion is held on Counsel Hoover's renewed request to include stock and domestic wells that have the capacity to pump 35 gallons per minute or less as potential *de minimis* uses. Counsel Hoover and Counsel Brown agree that the Statement of Claimants that list all the domestic wells will be completed by June of 2018. Counsel Miller expresses her concerns regarding producing a *de minimis* analysis for domestic uses.

IT IS ORDERED that upon review of the Navajo Nation's data, ADWR will issue a status report within 90 (ninety) days of receipt of the Navajo Nation's data addressing the feasibility of a *de minimis* calculation for wells for domestic use based upon the data provided. If ADWR determines it can evaluate the wells based on the information received and provide a technical report within the preliminary HSR, that will be acceptable to the Court.

11:25 a.m. Matter concludes.

LATER:

This status conference was set by order dated December 28, 2016 to consider whether there are issues of law that can be appropriately and efficiently addressed at this time now that the Claimants have timely filed historical, anthropological, archeological and ethnographic information in support of priority dates for on-reservation water uses. The Hopi Tribe submitted a list of seven issues to be considered. Counsel for the Hopi

Tribe urges that these issues are issues of law that can be resolved either based on rulings made in *In re Hopi Tribe Priority* or on federal case law. At oral argument, counsel further argued that these issues should be set for resolution and briefing at this point to avoid potentially delaying the adjudication of the Navajo Nation's claims. The LCR Coalition identified two broad issues and was joined by the City of Flagstaff and Salt River Project. The United States and the Navajo Nation oppose consideration of legal issues separate from and before the filing of their amended claims.

The desire to avoid delay motivated the initiation of *In re Hopi Tribe Priority*. In 2004, the Hopi Tribe and the United States filed amended statements of claimant and subsequently provided supplemental information requested by ADWR. As of March 2008, ADWR had not issued a preliminary HSR to evaluate those claims. Thus, by moving forward with *In re Hopi Tribe Priority*, the court was apparently attempting to further the adjudication of the Hopi Tribe's claims for water rights during a period when there was slow progress in the issuance of a Hopi Reservation HSR. In contrast, the Navajo Nation and the United States will file their first sets of amended statements of claimant in less than two months and ADWR will issue its preliminary HSR approximately six months thereafter. At oral argument, counsel for ADWR did not indicate any concern that ADWR would not be able to complete its work in a timely fashion. Thus, the facts and circumstances that apparently gave rise to the consideration of the Hopi Tribe's priority claims in advance of the issuance of an HSR do not appear to be present here.

Another factor to take into consideration is the existing schedule to try the Hopi Tribe's claims. A six-week trial will begin on past and present uses in September 2018. Counsel are divided in their assessment of their ability to appropriately handle additional motion practice at this time due to imminent deadlines in both this case and in *In re Hopi Reservation HSR*. Given the importance of allowing the parties to fully prepare for the upcoming trial in *In re Hopi Reservation HSR*, the fact that one or more suggested issues may be moot depending upon the amended claims filed by the United States and the Navajo Nation due in about six weeks, and the fact that the suggested issues can be raised in the context of the adjudication of an HSR for the Navajo Nation due in less than 18 months, the suggested issues will not be set for briefing at this time.

At the status conference, the parties also addressed the application of *de minimis* procedures similar to those adopted for claims filed in the San Pedro watershed under state law. As part of its preliminary HSR on the Navajo Nation's historic and present stock ponds, stock and wildlife watering, domestic, commercial, municipal and industrial water uses on the Navajo Reservation, ADWR shall include a chapter that assesses whether stock ponds and stock and wildlife watering on the Navajo Reservation or specific portions of the Navajo Reservation constitute *de minimis* uses.

A copy of this order is mailed to all persons listed on the Court approved mailing list.