

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

06/04/2019

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

L. Stogsdill
Deputy

FILED: 07/02/2019

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: Oral Argument re: United States' Motion to Initiate a Navajo
Allotments Contested Case

MINUTE ENTRY

Courtroom: CCB 301

1:30 p.m. This is the time set for Oral Argument re: the United States' Motion to Initiate a Navajo Allotments Contested Case.

The following attorneys appear in person: Jeffrey Leonard and Kathryn Hoover, on behalf of the Navajo Nation; Mark A. McGinnis on behalf of SRP; Kevin Crestin on behalf of the Arizona State Land Department; Andrew Guarino on behalf of the United States and Lauren Caster on behalf of the LCR Coalition.

The following attorneys appear telephonically: John D. Burnside on behalf of APS; Joy Hernbrode on behalf of ADWR; Vanessa Willard on behalf of the United States; Cody McBride on behalf of the U.S. Department of Justice; Robyn Interpreter on behalf of the Yavapai-Apache Nation and Pascua Yaqui Tribe; Evan F. Hiller and Judith M. Dworkin on behalf of Navajo Nation; David Brown on behalf of the LCR Coalition and Phillip Londen on behalf of the Hopi Tribe

Court reporter, Jennifer Sullivan is present and a record of the proceedings is also made digitally.

Oral argument on the U.S. Motion is presented by Andrew Guarino on behalf of the United States. Mr. Guarino stated that after working on the case for the past two years and collecting information and narrowing in on the allotment claims, the United States believes it is best to separate the claims of the allottees and the Navajo Nation. As trustee, the United States must advise the allottees about the case and claims asserted on their behalf.

The Court inquired about notice given in the past to the allottees about the adjudication. Mr. Guarino states that the United States has the responsibility to keep its allottees informed about its actions and it is the intention of the United States at the appropriate time to inform the allottees about these proceedings.

Further discussion is held.

The Court questions if the allotments that are not within the exterior boundaries of the Navajo Nation are added to the Lower Little Colorado, if the United States will be able to file the Statement of Claim in time for ADWR to review the same and issue a hydrographic survey report (“HSR”) in May of 2021.

Further discussion is held.

Lauren Caster argued on behalf of the LCR Coalition. He identified evidentiary and due process issues. The evidentiary issue concerns the locations of the allotments necessary to determine whether the allotment came from the public domain or the Navajo Reservation. He cited to listed allotments listed in the United States’ appendix that had dates following the enactment of statutes that precluded the creation of allotments. Mr. Caster provides the following allottee numbers from Appendix 2: 310059, 311436, 327969; and, from Attachment C: 3032, 311437 and 341877. Mr. Caster stated that it is the position of the LCR Coalition that the allotment claims should be determined after the close of evidence in the trial of the Navajo Nation’s claims for the Navajo Reservation and then one decree is entered for all land within the exterior boundaries of the Navajo Reservation.

The Court questions the appropriate timing to give notice to the allottees. Mr. Caster stated that notice must be given prior to the issuance of the final HSR and must adopt a procedure to avoid the risk that due process is not accorded to the allottees.

M. Kathryn Hoover argued on behalf of the Navajo Nation. Ms. Hoover outlines her position regarding the addition of the allottees to the Lower Little Colorado proceeding. The allotments within the reservation boundary should be treated as part of the Upper and Lower Little Colorado proceeding.

Mr. Guarino further outlines the United States’ position for the Court.

For the reasons stated on the record,

IT IS ORDERED taking the matter under advisement.

Discussion is held regarding the Navajo Nation's motion regarding *di minimis rights*.

The Court advises counsel it will be setting a status conference sometime in July 2019 to discuss the issue.

The Court further advises that it will issue an order advising counsel to file briefs regarding their respective positions as to the characteristics of water rights.

2:58 p.m. Matter concludes.

LATER:

The United States contends that its “ongoing investigation into the water rights claims for the Nation and the Navajo Allotments has revealed that simultaneous litigation of those two groups of claims in the same subproceeding is neither efficient [nor] advisable.” U.S. Motion at 6. In support of its position, the United States argues that the claims made for water rights for the Navajo Nation and the claims made for allotted lands apply different legal standards, are potentially competing, and inclusion of the allotment claims could delay the resolution of the federal reserved water rights for the Navajo Reservation and create confusion.

Allotted lands exist due to the General Allotment Act, 24 Stat. 388, passed by Congress passed in 1887. The Act provides in relevant part:

. . . in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes to cause said reservation or any part thereof, to be surveyed or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon . . .

SEC. 4. That where any Indian not residing upon a reservation or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations;

The General Allotment Act provided for allotments from tribal common lands and, under section 4, from public lands. According to the United States, the allotments at issue were created between 1900 and 1940 and were created “primarily” from public domain land. U. S. Motion at 4. The courts have considered allotment water rights for lands allotted to individuals from established Indian Reservations and concluded that where water rights were reserved for the Reservation, the allotment of land from the Reservation passed the right to “use some portion of tribal water essential for cultivation” to the allottees. *United States v. Powers*, 305 U.S. 527, 532, 59 S. Ct. 344, 346, 83 L. Ed. 330 (1939); *United States v. Preston*, 352 F.2d 352, 358 (9th Cir. 1965) (water rights reserved for the reservation become appurtenant to allotted land). The United States takes the position that water rights for public domain allotments are not derivative rights of the federal reserved rights for the Navajo Reservation. *United States Amended Statement of Claimant* at 9. The Navajo Nation asserts that allotments under Section 4 of the General Allotment Act, codified as 25 U.S.C. § 335, do not receive a ratable share of the Reservation’s water rights. As of 1985, public domain allotments had not appeared in reported water rights cases. Richard Collins, *Indian Allotment Water Rights*, 20 Land & Water L. Rev. 421, 437 (1985). The parties have cited no case and no case has been located that defines allotment water rights for lands allotted to individuals from the public lands as opposed to lands allotted from established Indian Reservations. Depending upon the position of the other parties, a full briefing may be required to resolve the legal standard to define water rights of allottees of land withdrawn from the public domain. Thus, the inclusion of water rights for allotted lands from the public lands in this contested case may require not only different factual findings but may require an initial significant legal determination.

The number of potential claims that must be resolved with respect to allotted lands is also significant. The United States reports that 589 allotments exist within the exterior boundary of the Navajo Reservation. *United States Amended Statement of Claimant* at 5 (filed June 1, 2018). Although the Navajo Nation may hold a partial, beneficial interest in the majority of the allotments (*Response of the Navajo Nation* at 2 (filed April 24, 2019), the United States reports that it holds allotments for potentially more than 5,000 allottees. *Id.*; U.S. Motion at 5. From a case management perspective, the inclusion of many unique parcels of land owned by a substantial number of beneficial owners creates a high probability that difficulties and delays will affect the adjudication of the federal reserved water rights for the Navajo Nation, which is already complex due to the magnitude of the factual findings required by [*In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 201 Ariz. 307, 35 P.3d 68 \(2001\)](#). Accordingly, the better approach is to exclude from this case claims for water rights for land allotted pursuant to 25 U.S.C. § 335.

As pointed out by the Navajo Nation and the LCR Coalition, the decision not to consider water rights for lands allotted pursuant to 25 U.S.C. § 335 in this proceeding does not resolve all of the questions presented by the U.S. Motion. Issues remain concerning the differentiation of lands allotted from the public domain from lands allotted from the reservation. As water rights for lands allotted from the reservation are derivative of water rights for the reservation, lands allotted from the reservation will not

be excluded from this contested case. Also, the United States as trustee must properly and timely notice and communicate information to the reportedly more than 5,000 allottees of these proceedings.

IT IS ORDERED granting the United States' motion to exclude from this contested case, *In re Navajo Nation*, CV 6417-300, claims for water rights for land allotted under the General Allocation Act, sec. 4, codified by 25 U.S.C. § 335, and within the exterior boundaries of the Navajo Reservation. Allotments of land from the Navajo Reservation land, if any, shall be retained in this case.

IT IS FURTHER ORDERED that by **September 9, 2019**, the parties shall file either jointly or separately their position regarding the exclusion from this contested case of water rights for land owned by the Navajo Nation in fee or held on its behalf by the United States located outside the exterior boundaries of the Navajo Reservation and for which an amended statement of claimant is currently due by June 1, 2021.

IT IS FURTHER ORDERED that by **September 9, 2019**, the United States shall:

1. Provide an updated list of all allotments located within the boundaries of the Navajo Reservation with complete information regarding location, date of allotment, and statement whether allocated from reservation or public domain land.
2. Provide the procedure and schedule to locate and timely notify the allottees of these proceedings.

IT IS FURTHER ORDERED that the parties shall file by **October 4, 2019**, their responses to the lists, procedure and schedule filed by the United States.

IT IS FURTHER ORDERED that a status conference shall be held on **October 16, 2019** at 1:30 p.m. in the Maricopa County Superior Court, Courtroom 301, Central Court Building, 201 West Jefferson, Phoenix, Arizona 85007.

Instructions for telephonic participation:

Dial: 602-506-9695 (local)

1-855-506-9695 (toll free long distance)

Dial Collaboration (conference) Code 357264#

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