SUPERIOR COURT OF ARIZONA
APACHE COUNTY

4/8/2021 CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

T. DeRaddo
Deputy

FILED: 4/16/2021

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

CV6417-300

In Re: Navajo Nation

MINUTE ENTRY

Central Court Building – Courtroom 301

1:30 p.m. This is the time set for a telephonic Status Conference before Special Water Master Susan Ward Harris to discuss whether Phase 2 and Phase 3 of this case should be consolidated.

A record of the proceedings is made digitally in lieu of a court reporter.

The following attorneys appear telephonically:

- Andrew Guarino, for the US Department of Justice
- Kimberly Parks for Arizona Department of Water Resources ("ADWR")
- David A. Brown, Brian Heiserman and Lauren Caster for the LCR Coalition
- Carrie Brennan and Kevin Crestin for the Arizona State Land Department
- Jeffrey Leonard, Kathryn Hoover, Judith Dworkin, Evan Hiller and Candace French for the Navajo Nation
- Grace Rebling for the Hopi Tribe
- Mark McGinnis, John Weldon and Michael Foy for SRP
- Alexandrea Arboleda and Lee A. Storey for the City of Flagstaff

- Robyn Interpreter for the Pascua Yaquai Tribe and the San Juan Southern Paiute Tribe

Mr. Leonard states that he filed a report with a litigation schedule for the Court's consideration yesterday.

Mr. Leonard reports that a discussion was held between representatives of the Navajo Nation, the United States and ADWR. Mr. Leonard informs the Court that the Navajo Nation, the United States and ADWR are all in favor of consolidating Phases 2 and 3. Mr. Leonard states that the decision was guided by ADWR's ability to complete the projects.

Proposed Schedule of the USA, ADWR and the Navajo Nation:

- ADWR would issue its consolidated, preliminary HSR by January 31, 2025.
- The comment period would conclude on July 31, 2025.
- The final HSR would be issued by January 31, 2026.
- The objection period for the final HSR would terminate on July 31, 2026.
- The claimants' disclosure statements and expert reports would be due by September 29, 2026.
- The disclosure statements of the objectors and expert reports would be due by January 15, 2027.
- The claimants' rebuttal reports would be due by March 16, 2027.
- Discovery would conclude by September 29, 2027.

Mr. Leonard informs the Court that he included a statement in the report regarding what ADWR has stated they could accomplish if there were not a consolidation of Phase 2 and Phase 3 of this case.

The Court asks Ms. Parks about the reasons for ADWR needing three and a half years to complete the HSRs. Ms. Parks states that her calendar is full for the next eight years and ADWR currently has limited resources. The United States gave ADWR an estimation of the number of irrigation claims they intend to file for Phase 3, which is numerous. Further discussion is held regarding estimates of time required to complete the Navajo reports if the phases are combined. Ms. Parks informs the Court that ADWR does not have all of the information required for those claims. Ms. Parks states that ADWR's work requires three field seasons to complete its investigation.

Mr. Guarino states that the amended Statement of Claimant for United States is due in December, 2021. Once the SOCs are finished, Mr. Garino will consult with his experts about where his experts are positioned in their careers. Mr. Guarino states that his concern at this time is that several members of the trial team are starting to retire, including Dr. Camelli, who worked on the issue of irrigated acreage and was an expert witness in the Hopi litigation. Mr. Guarino states that he may need to seek permission from the Court to preserve her testimony for trial, should it become necessary. Mr. Guarino states that he has no objection to the proposed schedule outlined by Mr. Leonard above, but may have some modifications in the future.

Further discussion is held regarding the best way to proceed.

Mr. Brown reports that LCR Coalition supports the consolidation of the phases, but believes that the deadlines in the schedule are too far into the future. Mr. Brown states that he believes that ADWR is doing "skinny" HSRs, and not providing attributes or potential water rights (PWRs). He believes that the timeframe should be shortened by one year. He believes that the time period between the time the claimants file their expert reports and the time the disclosure statements of the objectors and their expert reports is not enough time and points out that the time period spans two holidays. Mr. Brown requests that the LCR Coalition be given at least six months' time to produce its expert reports. Further discussion is held.

Ms. Brennan states that the Arizona State Land Department agrees with a consolidation of the two phases; and agrees with Mr. Brown regarding the time period between the time the claimants file their expert reports and the time the disclosure statements of the objectors and their expert reports are filed. Ms. Brennan is also in agreement with Mr. Brown about the extended timeframe for disclosure.

Ms. Rebling states that the Hopi Tribe does not oppose the consolidation of Phases 2 and 3. She also has concerns about the timeframe for disclosure. Ms. Rebling states that she is unsure if ADWR needs three seasons of field investigations to complete a preliminary HSR of the irrigation claims.

Mr. McGinnis states that SRP does not oppose the consolidation of Phases 2 and 3, and joins in Mr. Brown's concerns as stated above. Mr. McGinnis states that his position regarding the briefing of the priority date issues between completion of the trial in Phase 1 and the initiation of the consolidated Phases of 2 and 3 depends upon the scheduling order.

Ms. Storey states that the City of Flagstaff does not oppose consolidating Phases 2 and 3. Ms. Storey is in agreement with Mr. Brown's positions as stated above.

Ms. Interpreter states that the San Juan Southern Paiute Tribe have no objections to consolidating Phases 2 and 3. Ms. Interpreter states that the San Juan Southern Paiute Tribe has submitted its proposal regarding the Tribe's issues, claims and objections. Ms. Interpreter states that she is in agreement with Mr. Leonard and prefers to adopt the preliminary HSR proposed schedule submitted by the US Government, the Navajo Tribe and ADWR. Ms. Interpreter agrees with Mr. Brown regarding the time period for the claimants to file expert reports and the objectors to file expert reports. She believes that addressing priority issues will only take one year, to be done in either 2023 or 2024.

Discussion is held regarding the benefits of adopting the ADWR schedule beginning in 2025 and how that schedule would assist in the resolution of the issues with respect to the Paiute Tribe. Ms. Interpreter states the San Juan Southern Paiute Tribe has its own independent water rights claims, and asserts that in this Navajo case, the claims are not being addressed. She further states that the San Juan Southern Paiute Tribe is entitled to have those claims addressed in the preparation of an HSR. If a contested case

is established for San Juan Southern Paiute, Ms. Interpreter would need approximately two years to be prepared to submit their amended claim.

Ms. Parks addresses Court regarding the timeframe that ADWR may need to prepare the Navajo reports in light of the many reports that must be done in other cases.

Mr. Brown addresses the Court about the scope of the HSR. In the Hopi case, ADWR was not asked to address possible future uses. Mr. Brown reminds the Court that there was an Indian Lands Report (issued in 1994) that was prepared by ADWR prior to any settlement, which set forth maps and descriptions. He reported that in settlement discussions, approximately 8,000 to 10,000 acres were designated to be historical irrigated lands that were to be grandfathered under the settlement.

Mr. Guarino addresses the Court to discuss the position of the US Department of Justice regarding ADWR's analysis for future uses in Phases 2 and 3. Mr. Guarino states that he does not believe that it is ADWR's role to prepare an analysis of future uses.

Mr. Leonard addresses the Court regarding ADWR's involvement in future uses, and how the case may best proceed. Mr. Leonard reports that in 2013, Judge Brain entered an Order that applied to the Gila case and to the CV 6417-203 (In re the Hopi Reservation) case directing that the HSR should be cut back to the minimum requirements of the statute. In 2015, Judge Brain entered an Order saying that "future use shall be excluded from the Hopi HSR." Mr. Leonard addresses scheduling issues. Mr. Leonard states that the Navajo Nation will be deeply involved in the trial of the Phase 1 of this case well into the end of 2023.

Mr. Brown suggests that the parties meet and confer with ADWR and have a status conference in a few weeks. Mr. McGinnis is in agreement with Mr. Brown, as is Mr. Guarino. Mr. Brown states that he needs approximately one month to organize the meeting between the parties and ADWR to collect information that will assist ADWR in determining whether he can realistically shorten the time that ADWR needs to write its report. Mr. Leonard agrees. Ms. Parks states that she does not have enough information to compile a report. ADWR has not been given enough information for Phase 2 or for Phase 3.

Mr. McGinnis is in favor of moving the HSR date up to 2024 rather than 2025.

The Court is not of the opinion that the first phase of trial will last 6 months due to the fact that it focuses on stock pond, stock water and DCMI uses. The scope of issues in Phase 1 is not as broad as the second phase of the Hopi Trial.

With regard to paragraphs 5 and 6 of the stipulations filed by the parties, Ms. Interpreter (the San Juan Southern Paiute Tribe) makes an oral request to have more than 60 minutes for direct examination of her expert witnesses who will submit expert reports.

For the reasons stated on the record,

IT IS ORDERED denying Ms. Interpreter's request to be given more than 60 minutes for direct examination of her expert witnesses at trial.

2:33 p.m. Matter concludes.

NOTE: All court proceedings are recorded digitally and not by a court reporter. **The parties or counsel may request a CD of the proceedings**. For copies of hearings or trial proceedings recorded previously, please call Electronic Records Services at 602-506-7100.

LATER:

The parties appear to be in agreement that Phase 2 and Phase 3 of this case should be consolidated. The United States and the Navajo Nation will file their amended Statements of Claimant for Phase 3 of this case on December 1, 2021, and most of the parties agree that ADWR should issue its final HSR in 2024 rather than in 2025. Based on the explanation provided by ADWR, the reason for its January 2025 due date is a lack of resources as opposed to a need to examine water uses on the same land for three consecutive growing seasons. Given the savings in time and resources to the court and the parties when a claim is adjudicated closer in time to its date of filing and the need to advance this adjudication, consideration should be given to measures that can be adopted to expedite the issuance of a final HSR.

The HSR serves two general purposes. It provides the adjudication court with ADWR's independent, expert technical analysis of the claims submitted. It also serves notice of the claims and the results of ADWR's investigation to claimants and water users in a watershed so that interested claimants can participate, if they so choose, in the adjudication of the claims. While not intending to minimize the amount of time and the cost necessary to provide the requisite notice in the Little Colorado River watershed, the satisfactory completion of this duty should not materially affect the due date. The former purpose, i.e., the scope of the expert analysis, is the primary driver of the extended due date.

Arizona Department of Water Resources has already prepared one HSR for the Navajo Reservation for Phase 1 of this case. In accordance with the Case Management Order dated December 28, 2016, ADWR prepared the HSR that analyzed the claims for stock ponds, stock water and domestic, commercial, municipal and industrial uses. As part of that HSR, ADWR generally described the location of the Navajo Reservation and the treaties, congressional acts and executive orders defining its boundaries. It also includes a chapter devoted to a discussion of the groundwater and surface water sources on the Reservation.

The question now is the appropriate scope of the HSRs for Phases 2 and 3. On July 2, 2013, Judge Brain entered a minute entry stating that HSRs should be limited to

the minimum content required by the statute. The governing statutes require ADWR to investigate or examine the facts pertaining to the claim and produce a report that includes all information collected by the director that reasonably relates to the claim as well as the director's proposed water right attributes. A.R.S. §45-256(A)(4) and (B). Clearly, no reason exists to duplicate the work in the next HSR that has already been completed in the first HSR, which includes background information on the boundaries and origins of the Navajo Reservation, general information about water resources, range lands, population, and sources of surface water and groundwater. The HSR for Phase 2 and Phase 3 should focus on those past and current uses that are specifically at issue in Phases 2 and 3. Following Judge Brain's order in *In re Hopi Reservation,* CV 6417-203, dated November 10, 2015, ADWR shall have no obligation to address the future uses of water claimed for use on the Navajo Reservation or on lands located outside the Navajo Reservation owned in fee by the Navajo Nation or in trust for the Navajo Nation by the United States.

By **May 7, 2021**, ADWR shall provide a list to the Navajo Nation and the United States of the additional information it expects the claimants to produce for Phase 2 and the format in which the information should be produced. On or before the meeting scheduled with ADWR, the Navajo Nation and the United States shall provide dates by which the information will be produced or provide a reasons that the information will not be produced.

In advance of or at the meeting between ADWR and the parites, ADWR shall provide a summary of the items required to be accomplished to produce the HSR for Phases 2 and 3, the methods used to accomplish each listed item, and the amount of time necessary to accomplish the item. This summary will be produced for the purpose of educating all concerned about relative demands of each aspect of the HSR. At the meeting the parties will address whether the scope of the project can be defined to meet the statutory requirements and enable ADWR to complete the project by 2024.

The meeting will be scheduled no later than **May 28, 2021**.

The Navajo Nation and the United States shall prepare and file a joint meeting report by **June 3, 2021**. The joint meeting report shall include a proposed description of the scope of the HSR that has been agreed to by ADWR and all parties. If there is no agreement, then the joint report shall include a description of that portion of the scope of the HSR agreeable to all of the parties and a list of those items that are in dispute. All argument related to any disputed aspect of the scope of the HSR shall be presented at the status conference and not included in the joint meeting report.

IT IS ORDERED setting a status conference on **June 10, 2021 at 1:30** p.m. for the purpose of determining whether Phase II and Phase III of this case should be consolidated, defining the scope of the HSR(s), and setting a schedule for Phases 2 and 3.

Instruction to appear via GoToMeeting:
https://global.gotomeeting.com/join/398795469

Telephone:
United States: +1 (786) 535-3211
Access Code: 398-795-469

Join from a video-conferencing room or system.
Dial in or type: 67.217.95.2 or inroomlink.goto.com
Meeting ID: 398 795 469
Or dial directly: 398795469@67.217.95.2 or 67.217.95.2##398795469

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 minute entry is provided to all parties on the Court approved mailing list.