

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF YAVAPAI

FILED
DATE: August 26 2015
3:51 O'Clock P.M.
Donna McQuality, Clerk
BY: J. Malinowski
Deputy

DIVISION 1

HONORABLE DAVID L. MACKEY

CASE NO. P1300CV4772

Donna McQuality, CLERK

BY: Becky Hamilton, Deputy Clerk

DATE: August 21, 2015

TITLE:

GEORGE HANCE, et al,

Plaintiff,

-vs-

WALES ARNOLD, et ux., et al.,

Defendants,

In the matter of the VERDE DITCH
COMPANY,

COUNSEL:

Richard Mabery

L. RICHARD MABERY, P.C. (e)

(For Plaintiff)

HEARING

Re: Form of MOU and
Objections

NATURE OF PROCEEDINGS

COURT REPORTER

Lisa Edgar

START TIME: 10:11 a.m.

APPEARANCES:

Richard Mabery, Counsel for the Verde Ditch Company

Craig Cooley, Verde Ditch Commissioner

John Teague, Verde Ditch Commissioner

Mark McGinnis, Counsel for SRP

Patrick Sigl, SRP

Lucas Shaw, SRP

Bruce Hallen SRP

Rebecca Davidson, SRP

Jeff Lane, SRP

Janet Miller, Arizona Department of Water Resources

Nicole Klovas, Arizona Department of Water Resources

Patrick Barry, U.S. Dept. of Justice, on behalf of the Yavapai Apache Nation

Yosef Negose, U.S. Dept. of Justice, on behalf of the Yavapai Apache Nation

Robyn Interpreter, Counsel for Yavapai Apache Nation

Chris Coder, Representative for the Yavapai Apache Nation

Peter Mollick, Shareholder on the Verde Ditch

Karen Phillips, Shareholder on the Verde Ditch

TELEPHONIC

APPEARANCES:

Susan Montgomery, Counsel for Yavapai Apache Nation

Douglas Brown, Counsel for Monroe Lane Neighborhood Coalition

Karen Oberhauser, U.S. Dept. of the Interior

Theresa Craig, Arizona Assistant Attorney General for Arizona State Parks

Bob Sejkora, Water Program Manager, Arizona State Parks

This is the time set for hearing regarding the Court's consideration of the Verde Ditch Commissioners and Salt River Project's request for authorization for the Commissioners to sign a Memorandum of Understanding. The Court has reviewed all filings in this matter. The Court will first hear from the requesters by allowing brief openings on behalf of the Verde Ditch Commissioners and Salt River Project regarding any relief being requested, or about any changes since the submission and filing of replies. The Court will then provide time for those who have objected to the request to be heard further today.

The Court notes Don Ferguson, Leroy Miller and Bradford Gordon are not present.

Mr. Mabery addresses the Court and provides a three page document of the Verde Ditch recommendations addressing the specifics put forth by Salt River Project and the objections and proposals made. The document is placed on the overhead as well as copies provided.

Mr. McGinnis addresses the Court.

Ms. Miller addresses the Court.

Mr. Barry addresses the Court. Mr. Barry has brought copies of exhibits and the objection to this hearing for all those who wish to have a copy.

Ms. Interpreter addresses the Court.

~* ~* ~* ~* Recess at 12:02 p.m. ~* ~* ~* ~*

At 1:34 p.m., Court resumes with previously identified parties present and the addition of Mr. Williams who is appearing telephonically.

IT IS ORDERED the document presented by Mr. Mabery and discussed throughout the morning shall be attached to today's minute entry.

Karen Philips, a shareholder, addresses the Court regarding objection filed.

Peter Mollick, a shareholder, addresses the Court regarding objection filed.

The Court has now heard from all parties who filed objections and will now hear the responses to those objections.

Mr. McGinnis addresses the Court with response.

Mr. Mabery addresses the Court with response.

The Court will recess until 3:15 to consider what has been presented today.

Upon request of Mr. Barry, the Court permits Mr. Negose to substitute for Mr. Barry after the recess.

~* ~* ~* ~* Recess at 2:28 p.m. ~* ~* ~* ~*

At 3:24 p.m., Court resumes with all previously identified parties present, Mr. Negose is substituting for Mr. Barry.

The Court has fully considered all of the objections and arguments presented. The Court appreciates the objections and the input that has been provided regarding the original proposed Memorandum of Understanding, filed in December of 2014.

The Court **finds** the Memorandum of Understanding is a far better document today based upon the numerous objections and input.

The Court **finds** some of the issues raised in the objections are not ripe for the Court's resolution at this time, such as whether or not the Court agrees with Salt River Project's interpretation of A.R.S. § 45-172(A)(5) as has been discussed today, and the Arizona Department of Water Resources concern about how the Court will address moving water from non-Verde Ditch water users to Verde Ditch shareholders. The resolution of such issues by the Court will await those issues being squarely presented to the Court and will be resolved only after appropriate due process rights have been provided to those entitled to be heard, including notice and the right to be heard, and only then will the Court make specific rulings on those issues.

Furthermore, the Court **finds** its decision today is not an adoption or approval of any legal position taken in the Memorandum of Understanding, either by the Verde Ditch Commissioners or Salt River Project.

The question before the Court today is whether it should authorize the Verde Ditch Commissioners to enter into a Memorandum of Understanding. The Court **finds** it is appropriate to authorize the Verde Ditch Commissioners to enter into a Memorandum of Understanding with the terms that will be specifically outlined by the Court in a moment.

The Court **finds** it is appropriate to overrule, and does overrule, the objections of the United States and the Court denies the stay of proceedings requested by the United States.

The Court **finds** it is appropriate to overrule the other objections submitted, unless the changes suggested are specifically adopted by the Court in today's ruling.

The Court **finds** that it has historic authority dating to before the adoption of the statutes and the general stream adjudication process argued by the United States. That historic authority is to interpret, adjudicate and enforce water use on the Verde Ditch, pursuant to the Hance v. Arnold Decree. The Court also **finds** that no action by any shareholder, Verde Ditch Commissioners or attorneys authorized by the Verde Ditch Commissioners, has divested the Court of that historic authority. The Court **finds** that the Court's historic authority has not been challenged through appellate action or modified by court decisions that did not specifically address this Court's authority over decreed rights on the Verde Ditch.

The Court **finds** there are benefits to the Verde Ditch shareholders to the process outlined in the Memorandum of Understanding, specifically, there are two entities that could challenge a shareholder's use of Verde Ditch water but agree not to do so through litigation, unless or until efforts are exhausted to resolve the dispute through an open dialogue and negotiations with other water users. By authorizing the Verde Ditch Commissioners to execute a Memorandum of Understanding, the Court is not expanding or limiting its historic authority as Master of the Verde Ditch.

The Court **finds** that nothing in the Memorandum of Understanding that will be authorized, precludes an individual Verde Ditch shareholder from seeking approval of a severance and transfer directly to this Court without triggering the provisions of the Memorandum of Understanding, including the

provision that SRP seeks approval of such transfers; however, such a process will not trigger the provisions and the protections of the Memorandum of Understanding or the promises of SRP and the Verde Ditch Commissioners, as set forth in the Memorandum of Understanding.

THEREFORE IT IS ORDERED authorizing the Verde Ditch Commissioners to enter into a Memorandum of Understanding in the following form:

The Memorandum of Understanding filed with the Court on June 15, 2015 is authorized with the following additions and modifications:

1. The Memorandum of Understanding filed on June 15, 2015 shall include the map as Exhibit One. This map was attached as Exhibit One to the proposed Memorandum of Understanding previously filed with the Court in December of 2014 and attached to the December 19, 2014 Notice of Filing. That Exhibit One shall be the Exhibit One to the Memorandum of Understanding that is authorized by the Court to be signed.
2. Regarding a different Exhibit One that was attached to the Salt River Project's Reply to Objections to the Revised Proposed Memorandum of Understanding, the Court directs the following changes be made:
 - a. The Court authorizes the Verde Ditch Commissioners to sign a Memorandum of Understanding that includes the change to paragraph 4.11 as set forth in that Exhibit.
 - b. The Court authorizes the Verde Ditch Commissioners to sign a Memorandum of Understanding that includes the changes outlined in paragraph 4.21 and the change that modifies the existing paragraph 5.5, which changes it to paragraph 5.6, and the new paragraph 5.5 shall be as outlined in Exhibit One to the Reply.
 - c. The Court further authorizes the Verde Ditch Commissioners to execute a Memorandum of Understanding that includes: the change to paragraph 6.1, proposed in Exhibit One; the changes to paragraphs 8.1 and 9.2 as set forth in Exhibit One; the change to paragraph 8.5 as set forth in Exhibit One; the change to paragraph 11.1 as set forth in Exhibit One; the changes proposed for paragraphs 12.2 and 12.6 as set forth in Exhibit One.
 - d. The Court authorizes the Verde Ditch Commissioners to sign a Memorandum of Understanding that includes the current paragraph 17. The Court declines to modify or delete that paragraph.
 - e. Finally, the Court authorizes the Verde Ditch Commissioners to sign a Memorandum of Understanding that includes the changes to paragraph 20 as outlined in Exhibit One with the following modifications: the Court **ORDERS** it shall read, "Any amendment or modification of this MOU shall be effected only by an instrument executed and acknowledged by each of the parties, or their successors in interest, and authorized by the Hance v. Arnold Court".

IT IS FURTHER ORDERED any action before this Court arising from the Memorandum of Understanding shall comply with due process and the notice requirements of Arizona law.

The Court **finds** the resolution of what has been called an "Administrative Order" is going to take more work. The Verde Ditch Commissioners have proposed a form of Administrative Order and the Yavapai Apache Nation has proposed a form of Order to the Court; however, the Court is not comfortable with either forms in their entirety at this time. The Court declines to use the term "Administrative Order" since that term typically refers to an order issued by a presiding judge in another context. The Court directs there be an order ultimately issued that will be named "Order Regarding Proceedings Pursuant to The Memorandum of Understanding".

The Court was somewhat initially inclined to say that the statement about due process, in compliance with existing Arizona law regarding notice, is sufficient, and the various arguments that have been made or objections that have been made at this point regarding appropriate forms of notice are not yet ripe for resolution. The Court believes some of the notice requirements may vary depending upon what actual relief is being sought; however, the Court does recognize there is a great deal of concern about how that process will occur. The Court agrees with Ms. Interpreter that guidance from the Court on that issue is appropriate.

IT IS ORDERED each party who is joined in these proceedings may now offer a form of order that sets forth the procedure for relief sought from the Court, pursuant to the Memorandum of Understanding, within 60 days of today's date. The original of that proposed order shall be filed with the Clerk of the Court and an electronic copy in Word format shall be provided to the Court's Judicial Assistant and electronically distributed to the other parties as previously authorized by the Court. Objections to the forms of order may be filed by any party who is joined in these proceedings, at this point, within 45 days of service of the proposed form of order.

IT IS FURTHER ORDERED there shall be no replies without leave of Court. The Court will then decide whether to issue an Order Regarding Proceedings Pursuant to The Memorandum of Understanding or to set a hearing regarding the appropriate form of order.

The Court directs the clerk to prepare today's minute entry for the Court's signature.

The Court **finds**, pursuant to Rule 54(b) of the Arizona Rules of Civil Procedure, there is no just reason for delay and expressly directs the entry of an order that resolves the issue with respect to authorization of the Verde Ditch Commissioners to enter into the Memorandum of Understanding as set forth in this ruling.

The Court is not looking for further argument on any issue or a statement of disagreement. The arguments and objections are fully preserved for further relief by the parties.

Mr. Mabery addresses the Court.

Ms. Interpreter addresses the Court.

There being no further issues that the parties believed would be resolved today, the Court concludes today's hearing.

END TIME: 3:51 p.m.

August 26, 2015


Honorable David L. Mackey, Superior Court Judge

cc: John B. Weldon, Jr. / Mark A. McGinnis / Patrick Sigl, Salmon, Lewis & Weldon, P.L.C.,
2850 E. Camelback Rd., Suite 200, Phoenix, AZ 85016
Douglas E. Brown / David A. Brown, Brown & Brown Law (e)
Patrick Barry, U.S. Department of Justice, Indian Resources Section, ENRD
P.O. Box 7611, Ben Franklin Station, Washington, DC 20044
Robyn Interpreter / Susan Montgomery, Montgomery & Interpreter, P.L.C.,
4835 E. Cactus Rd., Suite 210, Scottsdale, AZ 85257
Don Ferguson, 1695 W. Bronco Drive, Camp Verde, AZ 86322
Janet Miller, Arizona Department of Water Resources,
3550 N. Central Avenue, Phoenix, AZ 85012
Carrie Brennan, Assistant Attorney General, Arizona Attorney General's Office,
1275 West Washington Street, Phoenix, AZ 85007

MOU Section	Issue Raised By	Substance of Proposed Revision	Proposed Language
4	Mr. Mollick	Specifically defining "Landowners."	**SRP does not believe this revision is necessary or beneficial to the VDC shareholders but would not oppose it if desired by the Court and VDC. VDC – Not Recommended.
4.11	YAN	Stating that valid S&Ts of a post-1919 certificate of water right, if any exist in the VDC area, are included within the definition of "Historic Water Use."	Insert "valid" before "severance and transfer" in the last line and delete "pre-1919" in that line. VDC – Recommended.
4.21	YAN	Clarifying that "SRP Rights" includes only those rights claimed by SRP prior to January 1, 2014.	Insert "asserted prior to January 1, 2014" after "claims to rights" in the first line. VDC – Recommended.
New 5.5 (making existing 5.5 new 5.6)	Mr. Mollick; Mr. Gordon; ADWR	Stating that the designation of a parcel as Purple is not evidence of forfeiture or abandonment of any water right for that parcel.	"The preliminary designation of certain lands as Purple and not currently receiving or using water from the Verde Ditch was based upon limited information available to the Parties. Such designation is not intended to form the basis for any assertion that any water rights for the parcel have been forfeited or abandoned pursuant to applicable law." VDC – Recommended.
6.1	Mr. Mollick; Mr. Gordon; ADWR	Specifically stating that, during the pendency of the MOU, SRP will agree not to contest the existence of Historic Water Use for Purple Lands.	Insert "or Purple" after the word "Green" at the end of the third line. VDC – Recommended.

7.2	ADWR	Attaching a form HWU Agreement as an exhibit to the MOU.	**SRP does not believe this revision is necessary or beneficial to the VDC shareholders but would not oppose it if desired by the Court and VDC. VDC – Not Recommended.
8.1 and 9.2	Mr. Mollick; Mr. Gordon	Further clarifying that any severance and transfers from Green or Purple Lands to Orange Lands will be voluntary and with the full consent of the landowners.	“All transactions between the landowners for the severance and transfers will be voluntary.” VDC – Recommended.
8.5	YAN	Providing that VDC’s Statement of Claimant in the Adjudication will be updated to reflect S&Ts reviewed and approved by the Court.	Add the following sentence after the first sentence: “VDC will also promptly file an amendment or amendments to VDC’s Statement of Claimant in the Adjudication to ensure that a proper record of the severances and transfers are available to ADWR as the technical advisor to the Adjudication Court.” VDC – Recommended.
8.5, 8.7, and 9.5	ADWR	Delete provisions stating that the MOU does not require any VDC shareholder to undertake the separate ADWR statutory approval process after it obtains the Court’s approval of an S&T.	**SRP does not believe this revision is necessary or beneficial to the VDC shareholders but would not oppose it if desired by the Court and VDC. VDC – Not Recommended.
9.1 and 9.2	ADWR	Revise language to refer to “water rights” instead of “Historic Water Use.”	**SRP does not believe this revision is necessary or beneficial to the VDC shareholders but would not oppose it if desired by the Court and VDC. VDC – Not Recommended.

11.1	Mr. Mollick; Mr. Gordon; ADWR	Clarifying that efforts will be made to agree upon the existence of Historic Water Uses for Purple Lands.	Insert “and Purple” after “Green” in the middle of the third line. VDC – Recommended.
12.2	Mr. Mollick; Mr. Gordon; ADWR	Specifically stating that, in the Final Settlement Agreement, SRP will agree not to contest the existence of Historic Water Use for Purple Lands.	Insert “or Purple” after the word “Green” near the end of the second line. VDC – Recommended.
12.6	YAN	Clarifying that reconciliation of Verde Ditch Shares is wholly within the jurisdiction and responsibilities of the <i>Hance v. Arnold</i> Court.	Insert the following sentence at the end of that subsection: “All reconciliations of shares in the Verde Ditch shall be submitted to the Court for final approval.” VDC – Recommended.
17	Mr. Mollick	Deleting the express attorneys’ fees and costs provision.	**SRP does not believe this revision is necessary or beneficial to the VDC shareholders but would not oppose it if desired by the Court and VDC. VDC – Recommend delete “shall” and insert “may.”
20	YAN	Providing that any amendment or modification to the MOU is subject to the approval of the <i>Hance v. Arnold</i> Court. Also removing the words “or termination” from the Section because it is fully addressed in Section 3.	Revise this section to state: “Any amendment of modification of this MOU shall be effected only by an instrument executed and acknowledged by each of the Parties or their successors in interest and approved by the <i>Hance v. Arnold</i> Court.” VDC – Recommended.