

SUPERIOR COURT OF ARIZONA  
APACHE COUNTY

02/21/2019

CLERK OF THE COURT

SPECIAL WATER MASTER  
SUSAN WARD HARRIS

L. Stogsdill  
Deputy Clerk

FILED: 3/7/2019

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

In re: Hopi Reservation HSR  
Contested Case No. CV6417-203

In re: Pre-Trial Conference, Hopi Tribe's Motions Regarding Cumulative Testimony and  
for Site Visit to Hopi Reservation Prior to the Future Trial

MINUTE ENTRY

Courtroom: CCB 301

1:30 p.m. This is the time set for a Pre-Trial Conference and Oral Argument on  
the Hopi Tribe's two motions.

The following attorneys appear in person: Carrie J. Brennan and Kevin Crestin on  
behalf of the Arizona Land Department; David A. Brown, Bradley J. Pew and Brian J.  
Heiserman on behalf of the LCR Coalition; John D. Burnside on behalf of APS; Erin E.  
Byrnes on behalf of the City of Flagstaff; Colin F. Campbell and Grace R. Rebling on  
behalf of the Hopi Tribe; Judith A. Dworkin, Jeffrey S. Leonard, Evan F. Hiller and M.  
Kathryn Hoover on behalf of the Navajo Nation; and Mark A. McGinnis on behalf of the  
Salt River Project.

The following attorneys appear telephonically: Susan B. Montgomery on behalf  
of Pascua Yaqui Tribe and Yavapai-Apache Nation; Kimberly R. Parks on behalf of  
ADWR; A. Lee Story on behalf of the City of Flagstaff and Vanessa Boyd Willard on  
behalf of the United States Department of Justice.

Court reporter, Jovanna Roman is present and a record of the proceedings is also made digitally.

Oral argument is presented on the Hopi Tribe's Motion Regarding Cumulative Testimony by Colin F. Campbell and David Brown.

David Brown advised that almost all of the filed water use reports are erroneous and the LCR Coalition is working to file amended 2018 reports about water use.

For the reasons stated on the record,

**IT IS ORDERED** that calling the City Managers to testify as to water practices or water uses is not cumulative testimony.

**IT IS FURTHER ORDERED** that counsel shall timely file those reports so that they can be available for depositions.

**LET THE RECORD REFLECT** that the Court denied the Hopi's motion regarding the remaining ranchers and farmers as it is premature to rule on the issue. The motion may be re-filed at a later date.

The Court notes that the time has not expired for replies to be filed to the Hopi Tribe's Motion for Site Visit to Hopi Reservation Prior to the Future Trial.

The Court inquires if counsel has any objections to the plans outlined in the Hopi's motion.

Carrie Brennan requests that the visit be completed 30 days prior to the trial.

Colin F. Campbell presents further argument on the Motion for Site Visit.

For the reasons stated on the record,

**IT IS FURTHER ORDERED** granting the Motion for a Site Visit. A 1.5 day site visit will be set during **April 2020**.

**IT IS FURTHER ORDERED** that a firm date for the site visit shall be set by **September 30, 2019**.

Discussion is held regarding deposition designations and required and counter-designations which was discussed but not decided during the December Pre-Trial Conference.

Mr. Campbell advises the Court that he wants the Court to require the parties to submit counter-designations to deposition designations made by the Hopi Tribe as required by the Arizona Rule of Civil Procedure.

The Court states that the issue involves the extent of designations that Mr. Campbell intends to make of the deposition because it makes a difference if he intends to only designate a portion of a deposition or if he intends to designate the entire deposition.

After further discussion from Jeffrey Leonard and Brian Heiserman urging the adoption of the same procedure used in the first phase of the trial, the Court advises Mr. Campbell that by allowing Mr. Campbell to designate all or substantially all of the deposition, he has flexibility with regard to the presentation of his case, but that flexibility cannot be allowed to cause unnecessary work for the other counsel to review an entire deposition for counter-designations and objections.

Mr. Leonard states that the new Arizona Rules of Civil Procedure adopted the Federal Rules with regard to expert reports and communications. He states the amendment applies to both proceedings commenced after the effective date and it applies in pending cases, absent an order to the contrary. He requests confirmation that amended Rule 26(b)(4) will apply in this case. He advises the Court that 26(b)(4) (A) depositions of experts who may testify; (B)-trial preparation for draft reports or disclosure, protecting drafts of any reports or disclosures required under 26(d); 26(b)(4)(C) protects communications between the parties and their expert witnesses; and outlines which communications are and are not subject to discovery. Mr. Leonard feels if this rule is not applicable in this action, Court and counsel should be aware of same, i.e. contrary to Rule 81(b). Mr. Leonard isn't sure if they've provided draft expert reports to other parties.

Brian Heiserman advises the Court that he agrees that the language of Rule 81(b) makes the amendment retroactive to pending cases but this case is complicated in that a lot of discovery of expert materials has been completed and multiple subpoenas have been sent out. Counsel may have received material in response to those subpoenas that was discoverable under the old rule but may not be discoverable under the new rule. His client intends to utilize some of this material at depositions. It may become an issue if certain parties want to issue subpoenas in the future looking for that material and other parties that may feel it is not proper for material to be requested under the new rule. The rule is retroactive unless it effectuates an injustice or it is not feasible to apply it retroactively. He suggested following the old rule in the Hopi contested case and transition to new rule in the next contested case. His issue is with subsection (B) of the rule. They intend to seek to admit the materials at deposition, as the evidentiary rules have not changed, and at trial. Mr. Heiserman states his experts have been subpoenaed and he provided their entire file along with communications along with draft reports if they had them. He advises the Court that if the new rule is applied, he does not feel obligated to return any previously received CDs provided by counsel which may contain draft expert reports. He advises the Court that the rule is in place to protect attorney/client privilege.

Mr. Campbell advises that since they have been in trial it could result in their being treated unfairly without a uniform rule being imposed. They received subpoenas last year for their experts' files. They have provided expert witness files in response to those subpoenas. He said the rule should be applied uniformly so it won't be unfair to his client who has already provided entire files, and if the new rule is applied, parties can provide only the expert's report. He suggests that the Court either adopt the current Federal Rule or apply the old rule to this entire case to avoid confusion.

The Court inquires if other counsel have provided draft reports in response to subpoenas received.

Erin Brynes for the City of Flagstaff states she doesn't believe she has provided any drafts of expert reports to counsel.

Mark McBride for the U.S. states they have provided drafts in response to subpoenas received from counsel. He also thinks that future subpoenas should follow the old rules.

For the reasons stated on the record,

**IT IS ORDERED** that Mr. Heiserman shall file a motion and attach a representative sample of the documents in question as outlined by the Court.

**IT IS FURTHER ORDERED** that the issue shall be decided by **June 1, 2019** and oral argument to be set prior to **May 17, 2019**.

**IT IS FURTHER ORDERED** that each party shall attach similar schedules to their response so that the parties will know what they are dealing with.

**IT IS FURTHER ORDERED** taking these matters under advisement.

2:44 p.m. Matter concludes.

**LATER:**

A joint pretrial statement must include a "statement by each party identifying any proposed deposition summaries or designating **parts** of any deposition testimony to be offered by that party at trial, other than for impeachment purposes." Ariz. R. Civ. P. 16(f)(2)(F) (emphasis added). While a party is normally limited to the use of only the designated portions of the deposition at trial, the court does have discretion to allow additional portions of a deposition where good cause is shown. For example, if a witness were to be unexpectedly hospitalized for an extended period of time, the court has the authority to allow the use of the witness' deposition testimony even though it was not designated pursuant to Rule 16(f)(2)(F). Thus, the exception for good cause eliminates the need for protective designations of all or substantially all of a deposition transcript to guard against an unexpectedly unavailable witness.

**IT IS FURTHER ORDERED** that to the extent that a party complies with Rule 16(f)(2)(F) and designates parts of a deposition transcript, opposing parties shall comply with Rule 16(f)(2)(F). If a party designates all or substantially all of a deposition transcript, then no opposing party shall be required to comply with Rule 16(f)(2)(F) unless the party so designating gives four (4) calendar days' notice of intent to use the deposition testimony in which case the opposing parties shall file within two (2) calendar days their counter designations and objections. Notwithstanding the foregoing, if a party designates all or substantially all of a deposition transcript for a witness that it identifies in the joint pretrial statement as a witness whose testimony will be presented solely by deposition pursuant to Rule 16(f)(2)(D), then the opposing parties shall comply with Rule 16(f)(2)(F).

To the extent that a dispute arises with respect to the application of these rules, a decision will be made requiring the opposing party to undertake the work required by Rule 16(f)(2)(F) only when it clearly appears that the deposition testimony actually will be used in trial. One party's desire to preserve the flexibility through the trial to present its case using deposition or live testimony will not be permitted to unduly burden the opposing parties in this phase of the case which may involve more than eighty (80) depositions.

**IT IS FURTHER ORDERED** that the LCR Coalition shall file a motion briefing the application of amended Ariz. R. Civ. P. 26(b)(1)(B) and (C) to the second phase of this trial by **April 1, 2019**. Joinders in the motion will be due by **April 4, 2019**. Responses in opposition to the motion or joinders to the motion shall be due on **April 19, 2019**, and replies shall be due on **May 3, 2019**. Ariz. R. Civ. P. 7.1(a) page limits apply. Oral argument on the motion shall be held on **May 9, 2019** at 3:00 p.m. in the Superior Court of Arizona, 201 West Jefferson Street, Courtroom 301, Phoenix, AZ 85003-2202.

Instructions for telephonic appearance:  
Dial: 602-506-9695 (local)  
1-855-506-9695 (toll free long distance)  
Dial Participant Pass Code 357264#

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