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

IN RE THE GENERAL  
ADJUDICATION OF ALL  
RIGHTS TO USE WATER IN THE  
LITTLE COLORADO RIVER  
SYSTEM AND SOURCE

CV 6417-203

Orders re:  
City of Flagstaff's *Daubert* Motion and Motion *in  
Limine* Re: Hopi Tribe Expert Reports

City of Flagstaff's *Daubert* Motion and Motion *in  
Limine* Re: United States' Expert Reports

LCR Coalition's Motion *in Limine* Regarding  
Redactions to Future Phase Experts

LCR Coalition's Motion *in Limine* to Exclude  
Portions of Reports by Jason Bass

Salt River Project's Motion *in Limine* Regarding  
Redactions to Future Phase Experts

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2 CONTESTED CASE NAME: *In re Hopi Reservation HSR*

3 HSR INVOLVED: *Hopi Reservation*

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5 DESCRIPTIVE SUMMARY: Order granting in part and denying in part the City of Flagstaff's  
6 *Daubert* Motion and Motion *in Limine* re: Hopi Tribe Expert Reports, City of Flagstaff's *Daubert*  
7 Motion and Motion *in Limine* re: United States Expert Reports, LCR Coalition's Motion *in Limine*  
8 Regarding Redactions to Future Phase Expert Reports, LCR Coalition's Motion *in Limine* to  
Exclude Portions of Reports by Jason Bass, and Salt River Project's Motion *in Limine* Regarding  
Redactions to Future Phase Expert Reports

9 NUMBER OF PAGES: 8

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11 DATE OF FILING: August 13, 2020

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13 As the United States correctly points out, this is a bench trial and redactions of expert  
14 reports are not necessary to avoid jury confusion. The purpose of the motions *in limine* at issue is  
15 not to cause the court to "gate-keep expert testimony from [it]self." *Joseph S. v. Hogan*, No. 06-  
16 CV-1042, 2011 WL 2848330, at \*2-3 (E.D.N.Y. July 15, 2011). The United States and the Hopi  
17 Tribe are also correct that in bench trials, the courts are expected to be able to disregard evidence  
18 that does not comport with the rules of evidence. *Multi-Med. Convalescent & Nursing Ctr of*  
19 *Towson v. N.L.R.B.*, 550 F.2d 974, 977 (4<sup>th</sup> Cir. 1977). In this case, rulings of motions *in limine*  
20 concerning expert reports, which will constitute the vast majority of the experts' direct testimony,  
21 serve a twofold purpose. First, redacting impermissible evidence creates a trial record consisting  
22 of only admissible evidence upon which findings of fact and conclusions of law will be based.  
23 Impermissible legal opinions were redacted from the expert reports as well as those additional  
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1 statements that did not comport with the Arizona Rules of Evidence. *See State ex rel. Berger v.*  
2 *Superior Court*, 108 Ariz. 396, 397, 499 P.2d 152, 153 (1972) (Motions *in limine* may be used to  
3 exclude inadmissible evidence.) Objections to material in expert reports that simply went to the  
4 weight of the evidence were denied. Second, rulings on the motions *in limine* give the parties the  
5 benefit of knowing during the pretrial preparation period which evidence will not be considered  
6 from a particular expert.

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8 Those portions of the expert reports that referenced *In re Gen. Adjudication of All Rights to*  
9 *Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 320, ¶49, 35 P.3d 68, 81 (2001) ("*Gila V*")  
10 attracted multiple objections. Expert opinion offering legal interpretations of judicial opinions or  
11 obligations beyond a reference to the governing law is outside the purview of expert witnesses  
12 especially when the witness lacks legal training or expertise. *Ryan v. Napier*, 245 Ariz. 54, 66,  
13 ¶51, 425 P.3d 230, 242 (2018). The expert opinions ran the gamut from merely acknowledging  
14 the *Gila V* decision to analyzing and criticizing *Gila V*. Requested redactions of expert reports  
15 that generally consisted of identifying *Gila V* factors, the legal standard, or quotations from *Gila V*  
16 were denied whereas those sections of expert reports that attempted to engage in legal analysis of  
17 *Gila V* were granted as beyond the permitted scope of expert testimony. Similarly, redactions were  
18 granted of those portions of the expert reports in which the author offered his opinions about the  
19 legal obligations of the United States with respect to Indian tribes in general, to the Hopi Tribe in  
20 particular, or offered general assessment of laws governing water uses and rights.

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23 Rule 702 of the Arizona Rules of Evidence also imposes limitations on the scope of expert  
24 opinions offered by a witness. As an initial requirement, a witness must qualify as an expert by

1 “knowledge, skill, experience, training, or education”. In those instances where the author of a  
2 report moved outside his area of expertise to offer opinions that required scientific, technical or  
3 other specialized knowledge, the redactions requested by the Objectors were granted. Ariz. R. Evid.  
4 702. This rule precludes, for example, an engineer opining about economic theory or economists  
5 discussing causes of recent reductions in streamflow. Where, however, the expert’s statements  
6 could be construed as stating the basis of his or her opinions within the parameters of Rule 703 of  
7 the Arizona Rules of Evidence, the requested redactions were denied.  
8

9 Evidence must also be relevant to be admissible. Ariz. R. Evid. 402. While a very liberal  
10 relevancy standard applies to expert reports, it does have limits. This phase of the case concerns  
11 the Hopi Tribe’s and United States’ claims for federal reserved rights to water for the present and  
12 future needs of the Hopi Reservation. This immediate proceeding does not encompass all of the  
13 claims to water asserted by the Hopi Tribe, such as aboriginal water rights, statutory rights under  
14 federal law, state law rights, and contract rights. Further, this trial is not a general policy forum in  
15 which to consider broad interconnected issues generally applicable to Indian reservations, tribal  
16 criminal justice systems, or the impact of a public school’s curriculum. Relevant evidence is that  
17 evidence that pertains to the determination of federal reserved rights to water for use on the Hopi  
18 Reservation.  
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20 Similarly, relevant evidence must be of consequence in determining the attributes of federal  
21 reserved water rights. Material in an expert report about economic analysis that a trained economist  
22 could apply to evaluate a claim for a water right is relevant to a determination of a claimed water  
23 right only if the economist engaged in and produced the results of the analysis. The standards set  
24

1 in *Gila V* also constrain the scope of evidence deemed relevant. The *Gila V* Court directly resolved  
2 the argument made by the state litigants that courts should act with sensitivity toward existing state  
3 water users when quantifying tribal water rights because tribal rights affect state water rights. It  
4 rejected that position stating that the “court’s function is to determine the amount of water necessary  
5 to effectuate this purpose, tailored to the reservation’s minimal need”. *Gila V* at 320, ¶48, 35 P.3d  
6 81. In other words, the focus of this case is the Hopi Reservation and not the people living in the  
7 surrounding area. Thus, the extent to which people in the surrounding communities may benefit  
8 from projects undertaken on the Hopi Reservation is not relevant to a determination of the United  
9 States’ federal reserved rights for water on the Hopi Reservation. Finally, requested redactions of  
10 expert testimony that would constitute a waste of time because the material was repetitive or  
11 redundant were granted. Ariz. R. Evid. 403.  
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13 Based on the foregoing,  
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15 IT IS ORDERED

- 16 1. Denying all redactions to the Greene Economics LLC reports dated March 2019  
17 corrected April 2019 and June 2019.
- 18 2. Denying all requested redactions to Dr. Blandford’s March 25, 2019 and July 9, 2019  
19 reports with the exception of Salt River Project’s requested redaction on pages 35-36 of  
20 the March 25, 2019 report, which is granted.
- 21 3. Denying all requested redactions to Mr. Bass’ March 2019 report, June 13, 2019 report  
22 and December 2017 report except LCR Coalition’s requested redactions of the last two  
23

1 lines on page 6 and first two words on page 7 and Salt River Project's redactions of the  
2 second, third, and fourth paragraphs on page 10, which are granted.

3 4. Denying all requested redactions to the Future DCMI Water Demand reports prepared  
4 by Natural Resources Consulting Engineers Inc. dated March 2019 and June 2019 except  
5 the City of Flagstaff's requested redactions with respect to Opinion C under "Response"  
6 on page 7, which are granted.

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8 5. Denying all requested redactions to Dr. Ciepiela-Kaelin's March 15, 2019 report.

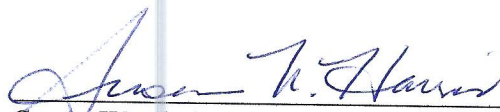
9 6. Denying all requested redactions to Mr. Kunkel's March 25, 2019 and July 9, 2019  
10 reports with the exception of Salt River Project's requested redaction on page 21 of the  
11 July 9, 2019 report, which is granted.

12 7. Denying all requested redactions to the March 15, 2019 and June 14, 2019 Amali &  
13 Luenke reports except the requested redactions of the last sentence of the second  
14 paragraph, the first two sentences of the third paragraph, and the first two sentences of  
15 the fourth paragraph on page 2 of the June 14, 2019 report, which are granted.

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17 8. Granting the requested redaction of subsection IV (F) on pages 22 – 24 and figure 9 of  
18 Dr. Henson's March 15, 2019 report. Granting the requested redaction of the final  
19 sentence of paragraph 9 on page 5, paragraph 13 on pages 5-6, the fourth and final  
20 sentences of paragraph 14 on page 7, paragraph 17 on page 8, pages 9 – 12, paragraph  
21 27 on pages 13-14, paragraphs 28-40 on pages 14-21, paragraph 44 on page 21-22,  
22 paragraph 47 on page 23, and Section III of Dr. Henson's June 14, 2019 Report. All  
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1 footnotes appearing in redacted sections are also redacted. Denying all other requested  
2 redactions of the Henson reports not specifically granted.

- 3 9. Granting the requested redaction by the City of Flagstaff on page 12, the second sentence  
4 of the first paragraph and the last three paragraphs on page 13, the last two sentences of  
5 the second paragraph on page 14, the last sentence of the third paragraph on page 14,  
6 the fourth paragraph on page 14, the two paragraphs designated for redaction by City of  
7 Flagstaff on page 15, redactions marked by Salt River Project and City of Flagstaff on  
8 page 19, the redactions marked by Salt River Project on pages 40, 43, 50, 57, Section  
9 4.7 on pages 72-75, redaction marked by LCR Coalition on page 114, redactions marked  
10 by Salt River Project on pages 120 and 121, redactions marked by the LCR Coalition on  
11 pages 130-131, and the redaction marked by Salt River Project on page 136 of Drs.  
12 Hanemann and Whittington's March 15, 2019 report. Also granting redaction of Section  
13 1, the redaction marked by Salt River Project and City of Flagstaff on page 12, all of  
14 page 18 except the third paragraph, the redactions marked by Salt River Project on pages  
15 26 – 27, the redactions marked by the LCR Coalition on pages 27-28, the second  
16 paragraph on page 33, and all requested redactions under the heading "What is at Stake"  
17 on pages 33 – 34 of Drs. Hanemann and Whittington June 14, 2019 report. Denying all  
18 other requested redactions not specifically granted.  
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24 Susan Ward Harris  
25 Special Master

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On August 13, 2020, the original of the foregoing was mailed to the Clerk of the Apache County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for the Little Colorado River Adjudication Civil No. 6417-203.