

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

9/30/2021

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Parmar

Deputy

FILED: October 18, 2021

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

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

MINUTE ENTRY

South Court Tower – Courtroom 5D

9:06 a.m. This is the time set for Day 1 of Closing Argument before Special Water Master Susan Ward Harris.

The following attorneys appear in person:

- Lee Storey and Sara Ransom on behalf of the City of Flagstaff
- Carrie J. Brennan and Kevin Crestin on behalf of the Arizona State Land Department (“ASLD”)
- Jeffrey S. Leonard, Judith M. Dworkin, and Evan F. Hiller on behalf of the Navajo Nation
- Mark McGinnis on behalf of Salt River Project (“SRP”)
- Colin Campbell, Phillip Londen, Grace Rebling, and Payslie Bowman on behalf of the Hopi Tribe
- Vanessa Boyd Willard and Guss Guarino on behalf of the United States Department of Justice, Indian Resources Section
- Brian J. Heiserman on behalf of the Little Colorado River Coalition (“LCRC”)

The following parties are present in the Court:

- Delores Coochyamptewa
- Judith Youvella
- Michael Elmer

- Timothy Nuvangyaoma
- Clifford Balenquah-Qotaaquahu
- Rosa Honanie
- Phillip Quochoytewa Sr
- David Talayumptewa
- Fred Lomayesva

Court Reporter, Teri Veres, is present. A record of the proceedings is also made digitally.

Vanessa Boyd Willard addresses the Court.

10:23 a.m. The Court stands in recess.

10:46 a.m. The Court reconvenes.

Court Reporter, Teri Veres, is present. A record of the proceedings is also made digitally.

Colin Campbell addresses the Court.

11:52 p.m. The Court stands in recess.

1:33 p.m. The Court reconvenes.

Court Reporter, Vanessa Gartner, is present. A record of the proceedings is also made digitally.

Brian J. Heiserman addresses the Court.

1:56 p.m. Matter concludes.

LATER:

Motion to Defer Transmission of the Report and Decree Until Conclusion of the Navajo Case filed August 27, 2021 (“Hopi Motion”)

The Hopi Tribe, joined by the United States and, in part by the Navajo Nation, moves to defer the entry of a final report in this contested case for, at least, six or seven years. Hopi Motion at 2. The Hopi Tribe contends that the issuance of a final report should be delayed because the record in *In re Hopi Reservation HSR* is not complete. It references additional hydrological information that will be presented in *In re Navajo Nation* that should be considered with respect to the Hopi Tribe’s claims. In 2001, Judge Ballinger considered and rejected a proposal that the hydrology of the two reservations should be considered in a single HSR and directed that ADWR proceed with individual HSRs for each reservation. The Hopi Tribe also argues that the delay is

warranted due to a lack of evidence “on claims common to both tribes.” Hopi Motion at 7, 9-10. The trial in this case consumed almost 10 months, had thousands of pages of exhibits admitted into evidence and involved many witnesses including multiple hydrologists who testified and submitted expert reports about the hydrology of the area. The evidentiary phase of the case is complete. Subject to the ruling on Arizona State Land Department’s Request for Judicial Notice and absent a reviewing court’s decision that the record needs to be reopened for additional factual findings, the record is closed. Evidence received in *In re Navajo Nation* will be used to decide the claims and resolve the objections in that case. It will not be used to create a supplemental record for *In re Hopi Reservation HSR*. See *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 318, 35 P.3d 68, 79 (2001) (“*Gila V*”) (quantification of federal reserved water rights to accomplish the purpose of a reservation must be made based on the facts pertinent to that reservation).

Raising the specter of inconsistent decisions, the Hopi Tribe asserts that a final report must be held in abeyance until after the conclusion of *In re Navajo Nation* “because no meaningful distinction exists between the tribes that would justify different results between the tribes for certain permanent homeland water claims.” Hopi Response at 6. Again, this argument appears to contemplate that the record in this contested case would be the subject of a *de facto* supplement from the evidence presented in *In re Navajo Nation*. To the extent that such an identity of facts exists between the two tribes, the final report in this case should be issued for consideration and rulings by the water court so that legal concepts such as *stare decisis* and law of the case will apply to limit inconsistent rulings in *In re Navajo Nation*.

Taking another tack, the Hopi Tribe argues that the extended delay is warranted because it perceives that there has been procedural unfairness and prejudice. In support of its claim, the Hopi Tribe points to the division of the trial into two phases: past and present uses tried in 2018 and future uses tried in 2020-2021. The United States proposed the division in its *Statement Re: Litigation of Hopi Main Reservation Lands and Updating Hopi and Navajo Claims* filed in CV 6417 on July 6, 2016. The bifurcation of the case was the subject of a Status Conference on July 12, 2016, attended by the Hopi Tribe along with the other parties active in this case. All parties agreed to the proposed two-phase approach. Minute Entry at 2 (filed July 26, 2016 in CV 6417-201). The Hopi Tribe neither explains the nature of the alleged prejudice nor recognizes any benefit from the proposal advanced by the United States in the form of the additional time it received to prepare its case in support of its repeatedly amended Statements of Claimant for water for future use. The Hopi Tribe was not prejudiced by the presentation of their case in two phases.

The Hopi Tribe cites to the procedures adopted for the adjudication of the federal reserved water rights for the Navajo Reservation as evidence of unfair treatment. Entered roughly contemporaneously with the scheduling decision in *In re Hopi Reservation*,¹ the structuring decision for the Navajo Nation’s case was not adopted as the Hopi Tribe surmised because “in retrospect the division of trial in the Hopi case was not the best litigation path forward.” Hopi Response at 6. The decision in *In re Navajo Nation* was entered at the initiation of the process to

¹ The initial Case Management Order in *In re Hopi Reservation* that approved the phased trial schedule was issued August 25, 2016. The Order to File Amended Statements of Claimant in *In re Navajo Nation* was issued December 28, 2016.

adjudicate federal reserved water rights and was motivated by a need to establish a process that would lessen the delay between the filing of an amended Statement of Claimant and beginning a trial on the objections and claims for water for what the Hopi Tribe described as “by far the largest water user in the Basin.” Hopi Motion at 2. That same process in *In re Hopi Reservation* began with an order on July 16, 2002 for the Hopi Tribe to file an amended Statement of Claimant, the submission of the first amended Statement of Claimant in 2004, the filing of a final HSR in 2015 and the second phase of the trial beginning in 2020. Under the current schedule for *In re Navajo Nation*, the order to file the first of three amended Statements of Claimant occurred in 2016, the first Statement of Claimant was filed in 2018, ADWR issued its final HSR in 2020 reporting on the first Statement of Claimant, and a trial is scheduled to begin in February 2023 on the first Statement of Claimant. The organization of the adjudication of the claims asserted by the Navajo Nation and the United States in *In re Navajo Nation* is not indicative of any procedural unfairness in *In re Hopi Reservation HSR*. It is indicative of a need to establish procedures that fully engage all participants in the General Adjudication so that claims for water rights can be timely adjudicated.

The Hopi Tribe also argues that it was prejudiced because it was required to proceed before the Navajo Nation with the presentation of its claims. In 2001, Harry Sachse, counsel for the Hopi Tribe “state[d] that there is no real disagreement with the Hopi Tribe being the first Indian HSR, but a hydrology report should be prepared prior to an HSR for the Tribe’s claims.” Minute Entry, 5-6 (filed October 16, 2021). The Hopi Tribe now claims that by moving forward first, it was forced to incur “substantially disproportionate cost” in “setting the precedent for the Navajo Nation’s contested case”. Hopi Motion at 12-15. It is certainly true that the Hopi Tribe, like the other parties, have incurred substantial costs in this case, but the Hopi Tribe does not explain the reason that its costs incurred to prove its claims would have been less if the precedent-setting decisions had been made in the context of water use on the Navajo Reservation. As SRP observed, the Hopi Tribe received the benefit that any precedent created in this case applicable to the determination of a federal reserved water right was based on the facts and circumstances relevant to the Hopi Reservation.

A lengthy delay is not warranted for the reasons advanced by the Hopi Tribe. As argued by SRP and the LCR Coalition, joined by the City of Flagstaff, the multi-year delay will certainly generate unnecessary costs that prejudice all parties. If the final report were delayed as requested, the parties, including the Hopi Tribe, would be put to substantial expense as their counsel had to review the multiple volumes of trial transcripts and thousands of pages of admitted exhibits to file finalize objections years after the trial concluded and respond to objections. An unnecessary expenditure of time would occur even if parties’ counsel prepared draft objections at the time of the issuance of the report.

IT IS ORDERED that the Motion to Defer Transmission of the Report and Decree Until Conclusion of the Navajo Case is denied.

Request to Take Judicial Notice filed September 8, 2021 (“ADWR Motion”)

The parties called four expert witnesses during the hearing in 2020-2021 to provide their opinions about the future Hopi population in 50 to 100 years. After all parties rested, the federal government issued the 2020 U.S. Decennial Census. Arizona State Land Department filed a

request that judicial notice be taken of the 2020 U.S. Census reporting the population of the Hopi Reservation and Off-Reservation Trust Land. *See* Attachment A.

Arizona Rule of Evidence 201(b) states that “[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: . . . (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Census data meets the requirements of Rule 201(b). *United States v. Esquivel*, 88 F.3d 722, 726-27 (9th Cir. 1996). It is an undisputed fact that the population information on Attachment A was reported in the 2020 Census. The United States and the Hopi Tribe argue that the census results do not establish the population of a Native American community residing on an Indian reservation as a settled fact. The courts, as demonstrated by federal and state case law, recognize that the U.S. Census data is sufficiently accurate and reliable to be the subject of judicial notice. *Id.*; *Lawson v. Ridgeway*, 72 Ariz. 253, 233 P.2d 459 (1951); *Hernandez v. Frohmiller*, 68 Ariz. 242, 204 P.2d 854, (1949).

The United States argues that judicial notice of its decennial census is not supported by the cases cited by Arizona State Land Department because population in those cases was “relevant to resolving some other dispute between the parties – not the dispute itself.” U.S. Response at 2. The dispute in this case is not the 2020 population living on the Hopi Reservation and the Off-Reservation Trust Lands. The dispute among the parties is the appropriate amount of water that should be reserved for future domestic, commercial, industrial, and municipal (“DCMI”) uses on the Hopi Reservation. Neither the Hopi Tribe nor the United States claims that the relevant population is the number of people living on the Hopi Reservation and the Off Reservation Trust Lands in 2020. Instead, they point to different configurations of the populations of Hopi people living a century in the future as the relevant population. Thus, the census data is not dispositive of an issue. Instead, as in the cases cited below, the 2020 census information is simply one more data point that may be considered in determining one variable in the equation to set the federally reserved quantity of water for DCMI use.

In addition to substantive objections, the United States and Hopi Tribe make the procedural argument that judicial notice of the 2020 Census results should be denied because the evidentiary record is closed and, if judicial notice were granted, the case should be reopened and they should be given an opportunity to present additional evidence. Taking judicial notice of the 2020 Census results that all parties knew would be issued shortly after the conclusion of the case is not precluded because the evidentiary record is closed nor does it entitle the parties to submit additional evidence. Census data may be the subject of judicial notice after the factual record is closed. *Lawson v. Ridgeway*, 72 Ariz. At 258, 233 P.2d at 463 (1951) (court took judicial notice of 1930 census data in its determination of whether certain funds were community or separate funds). Judicial notice of census data can also occur on appeal in connection with an issue not raised at trial. The Arizona Supreme Court took judicial notice of 1940 data in connection with a basis it developed independent of the parties to declare a law unconstitutional. *Hernandez v. Frohmiller*, 68 Ariz. at 257-58, 204 P.2d at 864 (1949). The record will not be reopened to allow additional evidence to be presented regarding the 2020 Census.

IT IS FURTHER ORDERED that the Request to Take Judicial Notice is granted. Judicial notice is taken that the 2020 Census reported the information on Attachment A. The oral request for oral argument made on September 30, 2021 by counsel for the Arizona State Land

Department is denied. The request to schedule additional proceedings to considered evidence and testimony regarding the 2020 Census is denied.

A copy of the minute entry will be sent to all parties on the Court approved mailing list.

Attachment A

Label	Hopi Reservation and Off-Reservation Trust Land, AZ
Total:	6,377
Hispanic or Latino	62
Not Hispanic or Latino:	6,315
Population of one race:	6,265
White alone	84
Black or African American alone	14
American Indian and Alaska Native alone	6,139
Asian alone	25
Native Hawaiian and Other Pacific Islander alone	0
Some Other Race alone	3
Population of two or more races:	50
Population of two races:	47
White; Black or African American	0
White; American Indian and Alaska Native	32
White; Asian	1
White; Native Hawaiian and Other Pacific Islander	3
White; Some Other Race	0
Black or African American; American Indian and Alaska Native	2
Black or African American; Asian	0
Black or African American; Native Hawaiian and Other Pacific Islander	0
Black or African American; Some Other Race	0
American Indian and Alaska Native; Asian	5
American Indian and Alaska Native; Native Hawaiian and Other Pacific Islander	0
American Indian and Alaska Native; Some Other Race	2
Asian; Native Hawaiian and Other Pacific Islander	2
Asian; Some Other Race	0
Native Hawaiian and Other Pacific Islander; Some Other Race	0
Population of three races:	3
White; Black or African American; American Indian and Alaska Native	2
White; Black or African American; Asian	1
White; Black or African American; Native Hawaiian and Other Pacific Islander	0
White; Black or African American; Some Other Race	0
White; American Indian and Alaska Native; Asian	0
White; American Indian and Alaska Native; Native Hawaiian and Other Pacific Islander	0
White; American Indian and Alaska Native; Some Other Race	0
White; Asian; Native Hawaiian and Other Pacific Islander	0
White; Asian; Some Other Race	0
White; Native Hawaiian and Other Pacific Islander; Some Other Race	0
Black or African American; American Indian and Alaska Native; Asian	0
Black or African American; American Indian and Alaska Native; Native Hawaiian and Other Pacific Islander	0
Black or African American; American Indian and Alaska Native; Some Other Race	0
Black or African American; Asian; Native Hawaiian and Other Pacific Islander	0
Black or African American; Asian; Some Other Race	0
Black or African American; Native Hawaiian and Other Pacific Islander; Some Other Race	0
American Indian and Alaska Native; Asian; Native Hawaiian and Other Pacific Islander	0
American Indian and Alaska Native; Asian; Some Other Race	0
American Indian and Alaska Native; Native Hawaiian and Other Pacific Islander; Some Other Race	0
Asian; Native Hawaiian and Other Pacific Islander; Some Other Race	0
Population of four races:	0
White; Black or African American; American Indian and Alaska Native; Some Other Race	0
White; Black or African American; American Indian and Alaska Native; Asian	0
White; Black or African American; American Indian and Alaska Native; Native Hawaiian and Other Pacific Islander	0
White; Black or African American; Asian; Native Hawaiian and Other Pacific Islander	0
White; Black or African American; Asian; Some Other Race	0
White; Black or African American; Native Hawaiian and Other Pacific Islander; Some Other Race	0
White; American Indian and Alaska Native; Asian; Native Hawaiian and Other Pacific Islander	0
White; American Indian and Alaska Native; Asian; Some Other Race	0
White; American Indian and Alaska Native; Native Hawaiian and Other Pacific Islander; Some Other Race	0
White; Asian; Native Hawaiian and Other Pacific Islander; Some Other Race	0
Black or African American; American Indian and Alaska Native; Asian; Native Hawaiian and Other Pacific Islander	0
Black or African American; American Indian and Alaska Native; Asian; Some Other Race	0
Black or African American; American Indian and Alaska Native; Native Hawaiian and Other Pacific Islander; Some Other Race	0
Black or African American; Asian; Native Hawaiian and Other Pacific Islander; Some Other Race	0
American Indian and Alaska Native; Asian; Native Hawaiian and Other Pacific Islander; Some Other Race	0
Population of five races:	0
White; Black or African American; American Indian and Alaska Native; Asian; Native Hawaiian and Other Pacific Islander	0
White; Black or African American; American Indian and Alaska Native; Asian; Some Other Race	0
White; Black or African American; American Indian and Alaska Native; Native Hawaiian and Other Pacific Islander; Some Other Race	0
White; Black or African American; Asian; Native Hawaiian and Other Pacific Islander; Some Other Race	0
White; American Indian and Alaska Native; Asian; Native Hawaiian and Other Pacific Islander; Some Other Race	0
Black or African American; American Indian and Alaska Native; Asian; Native Hawaiian and Other Pacific Islander; Some Other Race	0
Population of six races:	0
White; Black or African American; American Indian and Alaska Native; Asian; Native Hawaiian and Other Pacific Islander; Some Other Race	0