SUPERIOR COURT OF ARIZONA
APACHE COUNTY

February 24, 2023 CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

A. Parmar
Deputy

FILED: March 14, 2023

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

Case No. CV6417-300

In Re: Navajo Nation

MINUTE ENTRY

Courtroom 301 – Central Court Building

12:00 p.m. This is the time set for Continued Oral Argument regarding the Navajo Nation's *Motion in Limine Re: San Juan Southern Paiute Evidence* filed January 13, 2023 and Pretrial Conference before Special Water Master Susan Ward Harris.

The following attorneys appear virtually through Court Connect:

- Julia Kolsrud and Kate Shaffer on behalf of the San Juan Southern Paiute Tribe
- Emmi Blades and Rebecca Ross on behalf of the United States Department of Justice
- Payslie Bowman and Phillip Londen on behalf of the Hopi Tribe
- Judith M. Dworkin, Jeffrey S. Leonard, Evan Hiller, Candance French and Kathryn Hoover on behalf of the Navajo Nation
- Assistant Attorney Generals, Michelle Brown-Yazzie and McArthur Stant, observing on behalf of the Navajo Nation Department of Justice
- Mark McGinnis and Katrina Wilkinson on behalf of Salt River Project ("SRP")
- Brian J. Heiserman, David Brown, and Bradley Pew on behalf of the LCR Coalition

- Carrie Brennan and Kevin Crestin on behalf of the Arizona State Land Department ("ASLD")
- Lee Storey and Ethan Minkin on behalf of the City of Flagstaff
- Michael Rolland on behalf of the Cities of Avondale, Glendale, Mesa, Scottsdale, and Tempe

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

Mr. Leonard addresses the Court regarding the Navajo Nation's *Motion in Limine Re: San Juan Southern Paiute Evidence* filed January 13, 2023. When the Motion was initially filed, the San Juan Southern Paiute tribe had disclosed eight witnesses. The tribe now intends to call only three trial witnesses at 30 minutes each. The Court inquires whether the Navajo Nation would like to withdraw the motion. Mr. Leonard is not able to withdraw the motion as there is not an internal agreement at this time.

While Mr. Leonard believes it is unnecessary, he does not object to the San Juan Southern Paiute Tribe presenting evidence regarding their use of the land. He does not believe they are entitled to show that they have a greater percentage of the population as their population expert did not give separate percentages for each tribe, but rather one overall estimate.

It is the Court's position, that this is not meant to be a mini proceeding for the San Juan Southern Paiute tribe in the midst of this proceeding. The Court does not wish to do anything in this case that may be considered issue preclusion later on. The Court believes that once San Juan Southern Paiute Tribe's ownership rights are established, the Tribe should file a Statement of Claimant and go through the standard adjudication proceedings. The Court is leery of allowing too much evidence in this case for that reason and inquires as to Ms. Shaffer's position.

Ms. Shaffer's position is that the San Juan Southern Paiute Tribe does have current rights established and current joint ownership. She does not believe that Navajo Nation has met the burden to support the exclusion of broad subject matter. She does not believe Dr. Greene used the correct enrollment numbers and would like the opportunity to call the enrollment officer to explain why the numbers are no longer accurate. If the Phase 1 trial involves the population and DCMI of the entire reservation, she believes the tribe has the right to prove that they were not adequately considered.

The Court addresses the parties regarding the breaks in upcoming trial. The Court affirms that the breaks in trial will occur May 29, 2023 through June 2, 2023 and July 3, 2023 through July 7, 2023.

The Court inquires as to which party will be responsible for preparing the USB drive with the exhibits and excel spreadsheet. Mr. Leonard states the claimants will be responsible for preparing the spreadsheet and exhibits.

Discussion is held regarding opening statements. Mr. Leonard and Ms. Blades agree that the Navajo Nation will take the lead. Mr. Heiserman states that the objectors have not yet determined an order for opening statements but proposes that the order of cross examination should be the Hopi Tribe and the San Juan Southern Paiute Tribe prior to the objectors/claimants as they are situated in this case a little differently.

Mr. Londen and Ms. Shaffer do not object as long as they each have the opportunity to cross examine any witnesses. Ms. Brennan, Mr. McGinnis, and Ms. Storey do not object either.

Mr. Heiserman suggests that each party give a 45-minute opening statement in order to get the opening statements done in one day; but does not object to an hour at the extent that other parties need it.

Mr. Leonard addresses the Court regarding a site visit or in the alternative a short video of the sites that would have been proposed for a visit. He does not think a concrete time limit should be put for opening statements at this time as he would like to present that video at the commencement of trial. He does not disagree with a 45-minute limit for standard opening statements.

The parties all agree to a 45-minute time limit for standard opening statements with the order as follows: Navajo Nation, United States, Hopi Tribe, San Juan Southern Paiute Tribe, and then the group of objectors. The objectors have not yet determined an order for their group but will determine an order amongst themselves.

The Court inquires as to whether the United States or Navajo Nation will be preparing a calendar for witnesses. Mr. Leonard states that they are working on a calendar now and circulating a spreadsheet to determine time estimates for each witness. The parties are not required to present the calendar prior to trial but must at least have it ready by April 24th when trial commences.

Ms. Blades inquires as to what date the Court would like to receive the exhibits. The Court will confirm the deadline with the Clerk's Office and inform the parties at a later date.

Mr. McGinnis inquires whether the Court would like to stack or slot the witnesses. The Court will let the parties determine that amongst themselves.

Ms. Brennan expresses concerns with slotting the witnesses. She does not think it is an efficient use of time to allot an entire day for a witness that may only take a half day when the parties are having to travel downtown and set up for court each day. If the parties are not able to agree, the Court will issue a decision.

Mr. Heiserman addresses the Court regarding virtual witnesses. He asks if the Court would be amenable to the parties' tech staff to meet with the Court's staff to evaluate the

tech set up. The Court declines to do so because the courtroom is equipped with TEAMS that allows witnesses to appear by video in the courtroom.

The Court affirms that it will ensure that the breakout rooms are available for the parties.

Mr. Heiserman addresses the Court regarding the parties' March 17, 2021 Stipulation. It is the LCR Coalition's position that the Stipulation is approved but would like to confirm with the other parties and the Court.

Mr. Leonard believes that there is one point that is not covered by the Stipulation. Mr. Heiserman and Mr. Leonard have no objection to splitting the allotted time for direct between direct examination and rebuttal but does not know if the other parties object.

Ms. Brennan expresses that she would like time to think this over as it has just been brought to her attention.

The Court will formally approve the Stipulation and the parties may file a stipulated amendment if necessary.

Mr. Heiserman asks if the parties will be permitted to list time for friendly cross.

Mr. Londen and Ms. Shaffer both ask that the same rules used in the Hopi Tribe's trial be applied in this matter and that the parties be precluded from conducting friendly cross.

Mr. McGinnis agrees but states that they may want conduct cross examinations on another objector's witness regarding issues where the objectors may be in disagreement.

Mr. Leonard believes the parties should discuss this before the next pretrial conference. He does not think this should apply to cross examination as to other expert's opinions and would like more time to discuss this amongst the other parties.

The parties state that they would like another pretrial conference in late March with the understanding that the Court will need to schedule the last one at least ten days before trial. By agreement of the parties, the Court will schedule the next pretrial conference the week of March 20th.

Based on the testimony and matters presented,

IT IS ORDERED taking SRP's *Motion in Limine to Preclude Evidence of Census Undercount* filed January 13, 2023, SRP's *Motion in Limine to Preclude Reports and Testimony by Jonathan Taylor* filed January 13, 2023, LCR Coalition's *Motion in Limine Regarding Jonathan Taylor's Expert Reports and Testimony* filed January 13, 2023 and Navajo Nation's *Motion in Limine Re: San Juan Southern Paiute Evidence* filed January 13, 2023 under advisement.

IT IS FURTHER ORDERED formally approving the parties' Stipulation submitted March 17, 2021 as an order of the Court.

12:57 p.m. Matter concludes.

LATER:

1. Salt River Project's *Motion in Limine to Preclude Evidence of Census Undercount*

Salt River Project ("SRP"), joined by City of Flagstaff and Arizona State Land Department ("ASLD"), moves to exclude testimony and reports prepared by a demographer retained by the Navajo Nation and an economist retained by the United States. In each case, the witness formulated her opinions of the future population beginning with a 2010 population greater than the population reported in the 2010 U.S. Census. *See* Table 1. No party disputes that the 2010 population estimates used by the two witnesses exceed the 2010 U.S. Census.

Population of the Study Area			
Census Year	U.S. Census	Dr. Carolyn Liebler	Dr. Gretchen Greene
2010	57,556	70,267	60,648

Table 1.
Sources: Exhibits A and B attached to Salt River Project Motion to Preclude Evidence of Census Undercount

Salt River Project contends that there is no evidence to support the basis for the witnesses' opinion that the 2010 U.S. Census undercounted the Navajo population on the Navajo Reservation within the boundaries of the Little Colorado River General Adjudication. SRP Motion to Preclude Evidence of Census Undercount at 2. It further argues that even if the U.S. Census undercounted the population of the Navajo Reservation, no evidence supports the magnitude of the undercounts of the population by the U.S. Census used by the witnesses in their reports. *Id.* As a result, according to Salt River Project, the opinions of the witnesses and their reports do not satisfy Rule 702 of the Arizona Rules of Evidence and should be excluded from evidence.

In its response, the Navajo Nation cites to an exhibit reporting that for all American Indian and Alaska Natives living on reservations, the United States Census Bureau determined that there was an average undercount of 4.9%. Navajo Nation's Response to SRP's Motion to Preclude Evidence of Census Undercount at 5 (citing Exhibit 6, attached thereto). The exhibit makes no reference to the Navajo Reservation. The Navajo Nation also cites to four exhibits to argue that factual evidence exists to demonstrate an undercount in 2010 and/or 2020 of the Navajo population on the Navajo Reservation. Response to SRP's Motion to Preclude Evidence of Census Undercount at 5 (citing Exhibits 7–10). Those exhibits are excerpts from the deposition testimony of Thomas Walker, Jr., Dr. James Q. Chang, Leonard Gorman, and the former president of the Navajo Nation, Jonathan Nez.

Thomas Walker, Jr., testified that he was not involved with the 2010 U.S. Census and has no personal knowledge about the 2010 Census. Mr. Walker's testimony focused on possible factors that may make it more difficult to contact individuals living on the Navajo Reservation to complete the census reporting. Dr. Chang, as the Navajo Nation correctly states, testified that the Navajo Reservation is considered to be a "hard-to-count" area. Dr. Chang explained that due to that determination, the United States has to dedicate "a lot more resources" to the completion of the Census. Deposition of Dr. Chang at 28–29 (September 30, 2022).

Salt River Project bases its motion on the experts' upward adjustment of the 2010 population, which serves as the basis for witnesses' 100-year population estimates. The deposition excerpts from the testimony of Leonard Gorman concern the 2020 U.S. Census. Deposition of Leonard Gorman at 23–26 (May 24, 2022). Similarly, Jonathon Nez did not work on the 2010 Census. Mr. Nez testified about the impact of the Covid pandemic on the 2020 Census. Deposition of Jonathan Nez at 37 (February 2, 2022 Thus, for purposes of this motion, any undercounts of the 2020 population in the 2020 U.S. Census is not relevant to the resolution of SRP's contention that the experts fatally erred in adjusting the 2010 U.S. Census upward. At oral argument, Navajo Nation focused on the deposition testimony of Mr. Nez who also testified that he heard that there were about 10 to 15 residents who complained to his office that they were not being counted in the U.S. Census. Deposition of Jonathon Nez at 63–64 (May 23, 2022). Assuming all of the people referenced by Mr. Nez lived in the Study Area did not submit census forms and were not contacted, that number of people, who may not have been counted, does not support the increase in the 2010 population by thousands in the case of Dr. Greene and more than ten thousand in the case of Dr. Liebler.

The United States argues that SRP's motion necessitates the resolution of factual disputes and the weighing of evidence that cannot properly be done in the context of a motion in limine. U.S. Response to SRP's Motion to Preclude Evidence of Undercount at 3 (citing *Pipher v. Loo*, 221 Ariz. 399, 404, ¶ 17, 212 P.3d 91, 96 (App. 2009)). In *Pipher,* the court found that the trial court erred when it excluded a doctor's testimony after the court found that a foundation existed for the evidence and the doctor testified that it was not speculative. *Id.* In the context of a motion in limine, the courts have interpreted the language of Rule 702 that an expert's testimony must be based on "reliable principles and methods," as requiring that the adopted methodology must be based on more than speculation but does not need to be established with scientific certainty. *State ex rel. Montgomery v. Miller*, 234 Ariz. 289, 298, ¶ 23, 321 P.3d 454, 463 (App. 2014); *Maricopa County v. Barkley*, 168 Ariz. 234, 239, 812 P.2d 1052, 1057 (App. 1990) ("If these witnesses failed to make a thorough and complete capitalization valuation according to the standard methodology of professional appraisers, then that failure went to the weight of their opinions rather than to admissibility.") Thus, the question is where the population estimates by the two witnesses concerning the Navajo Reservation are on the spectrum that is bounded at one end by mere guesses at by scientific certainty at the other end.

As Salt River Project correctly stated, Dr. Greene's application of the 2010 undercount percentage for American Indians and Alaska Natives to the population of the Hopi Reservation to generate the beginning population for her opinion of the future population was one of the multiple factors that resulted in the rejection of Dr. Greene's population projections in *In re Hopi Reservation*, CV 6417-203. SRP Motion to Preclude Evidence of Undercount at 7. Dr. Greene's decision about the appropriate 2010 population living on the Hopi Reservation was not, however, the sole factor in the final assessment of Dr. Greene's future population estimate.

No party, including Salt River Project, questions the credentials of the witnesses to provide testimony about future populations. Instead, Salt River Project has targeted one specific data point used by the witnesses in their models to estimate 100-year projections. The better approach at this juncture is to permit the testimony and reports of the witnesses to be admitted and evaluated as a whole for their accuracy and reliability. In *Pipher v. Loo*, the court found that testimony from an expert with established expertise should be admitted so that the fact finder, with the benefit of cross-examination, could evaluate the accuracy and reliability of a witness' factual basis, data, and methods and assess its weight and credibility. 221 Ariz. 404, 212 P.3d at 96. *See also Montgomery v. Miller, supra.*

IT IS ORDERED denying Salt River Project's *Motion in Limine to Preclude Evidence of Census Undercount*

2. **Salt River Project's *Motion in Limine to Preclude Reports and Testimony by Jonathan Taylor* and the LCR Coalition's *Motion in Limine Regarding Jonathan Taylor's Expert Reports and Testimony***

Salt River Project, joined by the LCR Coalition, moves to exclude the testimony of Jonathan Taylor, an economist who will testify on behalf of the Navajo Nation. SRP's Motion to Preclude Reports and Testimony by Jonathan Taylor ("SRP Motion re Jonathan Taylor") at 2; LCR Coalition's Joinder at 1. Dr. Taylor undertook an analysis of the future gallons per capita per day ("gpcd") which he expects will be required for domestic, commercial, municipal, and light industrial ("DCMI") use by the future population living the Navajo Reservation. Exhibit E to Salt River Project's Motion re Jonathan Taylor at 2.

Salt River Project argues that the Navajo Nation is precluded by Arizona Rule of Civil Procedure 26(b)(4)(D) from calling Dr. Taylor. Rule 26(b)(4)(D) states that "each side shall presumptively be entitled to only one independent expert on an issue, except upon a showing of good cause." Ariz. R. Civ. P. 26(b)(4)(D). Salt River Project points to Dr. Liechty, a licensed professional engineer, as the expert for the Navajo Nation who will testify about the appropriate gpcd calculation to be used to determine DCMI use on the Reservation and argues that Rule 26(b)(4)(D) does not permit the Navajo Nation to call a second expert witness on the same issue, i.e. appropriate quantity of water for DCMI use measured as the product of gpcd and the future population. SRP's Motion to Preclude Reports and Testimony by Jonathan Taylor at 2.

The purpose of the Rule 26(b)(4)(D) is to avoid unnecessary costs inherent in the retention of multiple independent expert witnesses. Ariz. R. Civ. P. 26, cmt. to 1991 Amendment. Where, however, an issue involves analysis by more than one professional discipline, the courts have been liberal in allowing more than one expert. *See Felder v. Physiotherapy Associates*, 215 Ariz. 154, 167, ¶ 69, 158 P.3d 877, 890 (App. 2007); *In re Conservatorship for Hardt,* 242 Ariz. 449, 452, ¶ 11, 397 P.3d 1049, 1052 (App. 2017) (explaining that the rule is intended to limit the admission of cumulative evidence that merely tends to establish a point already proved by other evidence). Here, the relevant issue can be addressed by more than one discipline. Projecting DCMI water use, as the expert reports of Dr. Liechty and Dr. Taylor demonstrate, can be analyzed by an economist who considers "economic growth and development [and] natural resource economics," as well as by an engineer who relies on hydraulic modeling and hydrology. Exhibit E to SRP Motion re Jonathan Taylor at 6; Exhibit C at vii.

Dr. Liechty analyzed future use based on the assumption that economic conditions on the Navajo Reservation will improve to the point that its future gpcd use will be equivalent to historical and present use by surrounding communities. Exhibit C to SRP Motion re Jonathan Taylor at 4-3. He adjusted the DCMI amount to account for climate change. *Id.* at 4-2. Dr. Liechty evaluated sources of supply, necessary sizes of facilities, and water treatment requirements. *Id.* at vii. Dr. Taylor focused his economic analysis primarily on future per capita income on the Navajo Reservation and used that information with an assembled dataset of water uses from 165 Arizona Community Water Systems throughout Arizona to predict future Navajo DCMI use "on par with other flourishing communities in Arizona." Exhibit E to SRP Motion re Jonathan Taylor at 51. Although both witnesses ultimately provide figures for future per capita DCMI use in their reports, each considers unique factors from their different disciplines in producing that estimate. For instance, Dr. Liechty, an engineer with expertise in water system planning and hydraulic modeling projects, considered "infrastructure needs and sizing" as well as total water availability as limiting factors for DCMI use. Exhibit C to SRP Motion re Jonathan Taylor at vii; Navajo Response to SRP Motion re Jonathan Taylor at 3. Dr. Liechty assumes that future economic conditions will be comparable to the current conditions of surrounding areas and calculates DCMI use. Exhibit C to SRP Motion re Jonathan Taylor at 4-3. Likewise, Dr. Taylor opines that multiplicative relationships characterize water demand across communities, plots a trajectory for the economy of the Navajo Nation, and links economic prosperity to DCMI demand. Exhibit E to SRP Motion re Jonathan Taylor at 47. Each expert based his opinion on his respective area of expertise. As a result, under a liberal reading of Rule 26(b)(4)(D), Dr. Taylor's testimony and report will not be excluded as a prohibited second expert opinion.

Salt River Project also argues that Dr. Taylor's evidence should be excluded under Arizona Rules of Evidence 401 and 402 because his opinion that the population of the Navajo Nation will require 300 gpcd in the future is in excess of the amount claimed by the Navajo Reservation. SRP Motion re Jonathan Taylor at 8. Relevant evidence is evidence having any tendency to make the existence of any material fact more or less probable than it would be in the absence of the evidence. Ariz. R. Evid. 401. "The standard of relevance is not particularly high." *State v. Fish*, 222 Ariz. 109, 124, ¶ 48, 213 P.3d

258, 273 (App. 2009). Dr. Taylor's independent modeling provides results consistent with, albeit in excess of, the Navajo Nation's claims. In other words, Dr. Taylor's expert testimony is generally probative of the validity of the Navajo Nation's claims and should not be excluded under the low standard imposed by Rule 401.

Finally, Salt River Project contends that Dr. Taylor's testimony should be excluded under Rule 403 because it is confusing, cumulative, and time consuming. SRP Motion re Jonathan Taylor at 10. Given that this is a bench trial, exclusion of evidence on the grounds that the finder of fact may make improper inferences from the evidence is disfavored. *Gulf States Utilities Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981). As a result, the evidence will not be excluded on the ground that is confusing. Further, as discussed above, Dr. Taylor modeled future DCMI use emphasizing economic factors that Dr. Liechty does not. Consequently, Dr. Taylor's testimony and expert report is not inherently cumulative. As to time, the amount of time that will be devoted to Dr. Taylor is primarily a function of the parties' cross-examination. The parties have already stipulated to the admission of the expert report and the limitations on direct testimony. This is a bench trial expected to last three months. Thus, the addition of a day, or even two, spent cross-examining Dr. Taylor is relatively immaterial.

The LCR Coalition filed a separate motion to request that certain portions of Dr. Taylor's reports be excluded from evidence. It submits that portions of Dr. Taylor's Report should be redacted because those sections constitute prohibited legal conclusions and legal opinions. LCR Coalition's Motion in Limine Regarding Jonathan Taylor's Expert Reports and Testimony ("LCR Motion re Jonathan Taylor"). Expert opinions offering legal interpretations of judicial opinions or providing opinions about the proper legal standard are not admissible under Arizona Rule of Evidence 703. *Ryan v. Napier,* 245 Ariz. 54, 66, ¶ 53, 425 P.3d 230, 242 (2018). The Navajo Nation responds that Dr. Taylor did not provide legal opinions about the appropriate standard that should be used to quantify federal reserved water rights. Navajo Nation's Response to LCR Motion re Jonathan Taylor at 3. It makes the argument that Dr. Taylor acknowledged the existence of the law to use it as a constraint on his conclusions. *Id.* at 4.

The Arizona Supreme Court has set the standard governing quantification of federal reserved water rights for the Navajo Nation to be determined in this judicial proceeding. The governing standard is that amount of water necessary to provide a permanent homeland for the Navajo Nation that is a livable environment in the present and in the future that is tailored to the minimal needs of the Navajo Nation. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68, (2001) ("*Gila V*").

Among the commentary included in the Report, Dr. Taylor made multiple statements about the appropriate method to and appropriate standards for quantifying water right:

> Leaving the questions aside, the pictures point to a deeper and more fundamental challenge for this proceeding. Who's to judge whether and how the water demand

> in evidence is extravagant? The repeated appearance of artificial Bocas Grandes, Sarasotas, and Miami Beaches in the Arizona desert is evidence that this kind of water deployment makes money – the very antithesis of pie-in-the-sky projects for the developers that made them. Thus, in the future when Navajos rise in wealth to the point of watering the lawns of Karigan Estates (and more) will their "permanent homeland water" be allowed to accommodate lagoons in their neighborhoods? Arizonans make profits and enjoy property values based on such uses, so on what basis would they be excluded from the permanent homeland standard for Navajo water?

Exhibit B to LCR Motion re Jonathan Taylor at 9.

> Since the economic value of DCMI water (i.e., non agribusiness, non-heavy industry water) arises from multiple consumer demands, delineating "needs" from "wants," or from "extravagances," is not only potentially subjective (you might judge something I "need" to be a "want"), but also the observable response of consumers to incentives across and within the above categories ranges widely.

Id. at 10.

> If the parties establishing the Indian water rights get the water left over by the rights setting process, they pervert the fair division logic of "I cut, you choose" into "I cut, I choose." For Arizona's stream adjudications to counter this dynamic requires anchoring Indian water quantification somewhere between a level so low it violated *Winters* on the low end and voluminous water uses on the high end.

Id. at 11

> Such a rubric [Indian treaty rights to a natural resource secure so much as but not more than a moderate living] would imply a search for the boundary between moderate and more than moderate, above which the treaty resources would redound to non-Indians. Articulating a robust boundary – if it could be done- would act to countervail the economic incentives for the strategic self-dealing in the advocacy of the low Indian water standards. How, then, to articulate the bounds of *immoderate* water use?

Id. at 12

These statements and statements similar to them are essentially disguised legal opinions and are not admissible under Arizona Rule of Evidence 703. No determination will be made in this proceeding based on standards such as whether water uses are extravagant or immoderate. In contrast, statements that simply acknowledge the controlling law can be found in Dr. Taylor's rebuttal report:

> *Gila V* calls for Arizona stream adjudications to quantify Indian reserved water rights to advance the purposes of a tribe's "permanent home and abiding place," as those purposes are "given broad interpretation" and "liberally construed," to advance "the twin goals of Indian self-determination and economic self-sufficiency." [and] *Gila V* calls on Arizona stream adjudication to quantify

> "sufficient water . . . for [the tribe's] well-being," "under changed circumstances," meeting both present and future needs," and "tailored" to the reservation's "minimal need," all while avoiding "pie-in-the-sky ideas that will likely never reach fruition" and taking into account the tribe's "economic base" and other features of its context.

Exhibit C to LCR Motion re Jonathan Taylor at 22.

The Navajo Nation also makes the argument that Dr. Taylor's opinions are opinions that described public policy standards and not law governing the quantification of federal reserved water rights. Navajo Nation's Response to LCR Motion re Jonathan Taylor at 6. Specifically, the Navajo Nation cites to Dr. Taylor's deposition testimony in which he explains that Section 4 of his report sets out public policy "criteria to evaluate [his] work." *Id.* Navajo Nation's Response to LCR Motion re Jonathan Taylor at 6. Public policy opinions are better suited for the legislative forum and not the courtroom. *Gila V* has set the standards that will be applied in this case making Dr. Taylor's public policy criteria are irrelevant and inadmissible. *Securities & Exchange Comm'n v. CapWealth Advisors LLC*, 2022 WL 4225846, at *5 (M.D. Tenn. Aug. 3, 2022); *Securities & Exchange Comm'n v. Ambassador Advisors LLC*, 576 F. Supp. 3d 250, 260 (E.D. Pa. 2021); *see also Conrad v. Owners Ins. Co.,* 20-CV-02173-KMT, 2021 WL 5280188, at *2 (D. Colo. Nov. 12, 2021) (extensive discussion of public policy from an expert excluded because such discussion may suggest public policy standards should be used in place of applicable legal standards).

IT IS ORDERED denying Salt River Project's Motion in Limine and granting the LCR Coalition's Motion in Limine with respect to the redactions in the report "The Economics of a Permanent Navajo Homeland and the Future Use of Domestic, Commercial, Municipal, and Industrial Water Within It" attached as Exhibit B to LCR's Motion, except for redactions on pages 5 and 42. The LCR Coalition's Motion in Limine is also granted for the redactions in the "Rebuttal Report" attached as Exhibit C to the Motion, except as to the redactions on pages 22 and 23.

3. Navajo Nation's *Motion in Limine Re: San Juan Southern Paiute Evidence*

The Navajo Nation moves to exclude seven categories of evidence from being admitted at trial:

1. Number of enrolled San Juan Southern Paiute tribal members;
2. Government operations of the San Juan Southern Paiute Tribe
3. Health and welfare programs and assistance provided to Tribal members;
4. The San Juan Southern Paiute Tribe's petition for recognition as a federally recognized Indian tribe;
5. The *Masayesva v. Zah* case;

6. The Treaty entered into between the Navajo Nation and the San Juan Southern Tribe in 2000 and negotiations regarding the Treaty; and
7. Contemplated future uses of the lands claimed by the San Juan Southern Paiute Tribe.

Navajo Nation's Motion re San Juan Southern Paiute Evidence at 1–2.

The Paiute Tribe argues that motions in limine in a bench trial are "a useless and illogical procedure" citing *Gulf States Utilities Co. V. Ecodyne Corp.,* 635 F.2d 517 (5th Cir. Unit A 1981). A motion in limine is properly granted when the evidence sought to be excluded is not probative of the issues. *See State v. Winters,* 160 Ariz. 143, 144, 771 P.2d 468, 469 (App. 1989). A motion in limine is properly granted when it excludes irrelevant evidence. *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 133, ¶ 33, 180 P.3d 986, 998 (App. 2008) Motions in limine may also be granted to exclude relevant evidence that is prejudicial or confusing. Ariz. R. Evid. 403.

The *Gulf States* decision cited by the Paiute Tribe clearly stated that a motion in limine is a useless procedure in a bench trial when the evidence to be excluded was relevant but could result in unfair prejudice. It did not, however, broadly hold that all motions in limine were useless procedures:

> Excluding relevant evidence in a bench trial because it is cumulative or a waste of time is clearly a proper exercise of the judge's power, but excluding relevant evidence on the basis of "unfair prejudice" is a useless procedure. Rule 403 assumes a trial judge is able to discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his mind in reaching a decision.

635 F. 2d. at 519.

As the *Gulf States* Court recognized, a distinction must be made between motions in limine that seek to exclude evidence under Ariz. R. Evid. 403 due to unfair prejudice and motions that seek to exclude evidence that is not relevant. *See Salt River Project Agric. Improvement & Power Dist. v. Miller Park, L.L.C.,* 218 Ariz. 246, 249, ¶ 15, 183 P.3d 497, 500 (2008). The issue here is whether the contested evidence is relevant to this proceeding and is, therefore, properly presented in a motion in limine.

Based on the papers and representations made at oral argument, the population experts who will testify on behalf of the United States and the Navajo Nation included information about the Paiute Tribe's population and enrollment numbers. Given the inclusion of the information in the expert reports, the evidence about the Paiute Tribe's population and enrollment satisfies the broad rule set forth in Arizona Rule of Evidence 401 that defines relevant evidence as evidence that "has any tendency to make a fact more

or less probable than it would be without the evidence" and "is of consequence in determining the action." Ariz. R. Evid. 401.

The second and seventh categories of evidence that the Navajo Nation seeks to exclude concern the government operations of the Paiute Tribe and its future uses of the land. Navajo Nation's Motion re San Juan Southern Paiute Evidence at 1–2. This contested case concerns the federal reserved water rights to be held by the United States on behalf of the Navajo Nation. As such, it will be focused on those factors relevant to the Navajo Nation listed in *Gila V*. This contested case will not determine federal reserved water rights for the Paiute Tribe. As such, evidence that may be considered in a case to determine claims for federal reserved water rights asserted by the United States for the Paiute Tribe under *Gila V* is not necessarily relevant in this case. Evidence concerning government operations of the Paiute Tribe and future uses is not relevant to this case and will be excluded under Rule 402.

No ruling will be made on the remaining four categories because evidence in those broad categories may be relevant in this case depending upon the reasons given at trial for its introduction. For example, the decisions in *Masayesva v. Zah* and the Treaty may be relevant for the purposes of defining that property to which the Paiute Tribe claims an exclusive interest or a joint interest. The health and welfare programs and assistance category listed by the Navajo Nation is too broadly described to merit a decision in advance of trial to exclude the evidence as irrelevant. Given the representation made at oral argument that the total evidence that the Paiute Tribe may offer is not more than an hour and a half, no scheduling or time management reason exists to exclude the evidence on the basis of Rule 403. Thus, a determination will need to be made at trial regarding the admissibility of the evidence in those categories and orders formulated that limit the purpose of the admission of such evidence to ensure that the evidence is relevant to the claims made by the Navajo Nation.

IT IS ORDERED granting the motion with respect to government operations of the Paiute Tribe and future uses of the land by the Paiute Tribe and otherwise the motion is denied.

Trial

IT IS ORDERED that a pretrial conference will be held on **March 23, 2023 at 10:30 a.m.** The pretrial conference will be held using the Court Connect program. Instructions for Court Connect are attached below. If you receive this Order by email, click on the red box "Join Court Connect Hearing" on the attached instructions to make an appearance. If you do not receive this Order by email, log into the Court Connect program on the internet by typing https://tinyurl.com/specialwatermaster. If you do not have access to the internet, you may attend telephonically using the telephone number and access code included in the instructions for Court Connect. Alternatively, you may attend telephonically using the following instructions:

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

IT IS FURTHER ORDERED that the exhibits will be submitted on a single computer drive accompanied by an index in excel format that identifies each exhibit. The parties must submit two copies of the computer drive to the Office of the Special Master no later than **April 17, 2023**.

IT IS FURTHER ORDERED that the trial will begin on **April 24, 2023 at 9:00 a.m.** Trial will be conducted Monday through Thursday of each succeeding week until completed expect as provided below. The trial schedule is amended to provide that no trial will be held on the following days:

May 29, 2023 - June 1, 2023
June 28, 2023 - June 29, 2023
July 3, 2023 - July 6, 2023

A copy of this minute entry is provided to all parties on the Court approved mailing list.

Court Connect Hearing Notice for In re Navajo Nation

This hearing will be conducted through the new Court Connect program offered by the Superior Court of Arizona in Maricopa County. This new and innovative program allows Court participants to appear online, rather than in a physical courtroom. Hearings are preferably conducted by videoconference but can also be conducted by phone. Lawyers (and self-representing litigants) are responsible for distributing this notice to anyone who will be appearing on their behalf.

All participants must use the JOIN COURT CONNECT HEARING button or the dial in information below to participate.

Participants: Please follow the steps below to participate in the remote proceeding.

1. Click the JOIN COURT CONNECT HEARING button below.
2. Enter your full name and role in name field.
3. Wait for the facilitator to admit you to the proceeding.

Remember to keep this email handy so you can use it to participate in the following proceeding.

Case Name: In re Navajo Nation, Contested Case No. CV6417-300
Start Date/Time: March 23, 2023 at 10:30 a.m.

JOIN COURT CONNECT HEARING

Dial-in Information: +1 917-781-4590

Private Dial-in Information: for privacy purposes, you can block your phone number by dialing *67 +1 917-781-4590

Dial-in Access Code: 688 970 203#

Tiny URL: https://tinyurl.com/specialwatermaster

To ensure an optimal experience, please review the brief Court Connect training prior to the hearing: ***Here***