

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

11/02/2018

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Hatfield

Deputy

FILED: 11/8/2018

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

CV 6417-203

In re: Hopi Reservation HSR

In re: Trial to the Court Day 30

MINUTE ENTRY

Courtroom: OCH 309

9:30 a.m. This is the time set for Trial to the Court before Special Water Master Susan Ward Harris.

The following attorneys and parties appear in-person: Kathryn Hoover, Jeffrey Leonard, Judith Dworkin and Evan Hiller on behalf of the Navajo Nation; Kevin Crestin on behalf of the Arizona State Land Department; Brian Heiserman on behalf of the LCR Coalition; Erin Byrnes and Lee Storey on behalf of the City of Flagstaff; R. Jeffrey Heilman and Mark McGinnis on behalf of Salt River Project; Cody McBride on behalf of the United States Department of Justice; Grace Rebling, and Colin Campbell on behalf of the Hopi Tribe.

Court reporter, Marylynn Lemoine, is present and a record of the proceedings is made digitally.

Dr. Leeper resumes the stand and continues to testify.

11:00 a.m. The Court stands at recess.

11:15 Court reconvenes with the parties and respective counsel present.

Court reporter, Marylynn Lemoine, is present and a record of the proceedings is made digitally.

Dr. Leeper continues to testify.

12:29 p.m. The Court stands at recess. Court will reconvene at the East Court Building in Courtroom 613.

COURTROOM: ECB 613

1:31 p.m. Court reconvenes with the parties and respective counsel present.

Court reporter, Barbara Stockford, is present and a record of the proceedings is made digitally.

Dr. Leeper continues to testify.

LET THE RECORD REFLECT that Navajo exhibit 741 as ordered in evidence on November 1, 2018 has been submitted to the above named clerk and is in evidence.

LET THE RECORD REFLECT that the admissible portions of Navajo exhibit 596 has been submitted to the above named clerk and is identified as Navajo exhibit 742 in evidence.

LET THE RECORD FURTHER REFLECT that the status of Navajo exhibit 596 remains marked for identification, not in evidence.

Mr. Leonard moves for the admission of Navajo exhibits 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 67, 68, 69, 70, 71, 79, 80 and 81 under the business record exception. Counsel for the Hopi Tribe objects to the admission of the exhibits.

The Court takes the matter under advisement.

Navajo exhibits 167 and 168 are received in evidence.

2:58 p.m. The Court stands at recess.

3:17 p.m. Court reconvenes with the parties and respective counsel present.

Court reporter, Barbara Stockford, is present and a record of the proceedings is made digitally.

Dr. Leeper continues to testify.

The witness is excused.

3:37 p.m. Court is adjourned until 10:30 a.m. November 8, 2018.

LATER

The Navajo Nation retained Dr. McCord and Dr. Leeper as expert witnesses to analyze and testify about the data and modelling used by the United States and the Hopi Tribe to quantify certain water uses on the Hopi Reservation. As part of their work, Dr. McCord and Dr. Leeper visited the Hopi Reservation and made stops at a number of sites. The field visit resulted in a set of field notes documenting observations about each site that the Navajo Nation marked the field notes as its exhibits 50 - 81. Counsel for the Hopi Tribe cross-examined Dr. McCord about a portion of the field notes and moved for the admission of those field notes, Navajo exhibits 62, 63, 64, 65, 66, 72, 73, 74, 75, 76, 77, and 78, which were admitted in evidence without objection. Subsequently, as part of its redirect examination of Dr. Leeper, counsel for the Navajo Nation moved to admit the remaining field notes not moved into evidence by counsel for the Hopi Tribe, Navajo exhibits 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 67, 68, 69, 70, 71, 79, 80, and 81 (Remaining Field Notes). Hopi Counsel objected. Counsel for SRP specifically stated that he did not object to the admission of the Remaining Field Notes as hearsay. Counsel for the Navajo Nation argued that the Remaining Field Notes should be admitted pursuant to Ariz. R. Evid. 803(6) as business records. Alternatively, after asking foundational questions of Dr. Leeper, he proposed preparing a transcript of the Remaining Field Notes and submitting the transcript rather than reading the Remaining Field Notes into the record pursuant to Ariz. R. Evid. 803(4).

Relevant evidence is generally admissible unless it is otherwise precluded by court rules, statutes, or constitutional provisions. Ariz. R. Evid. 402. Information about the topography identified by the Hopi Tribe as irrigated land and possible points of diversion of water on to that land is plainly relevant in this adjudication of water rights. The issue is whether the Remaining Field Notes prepared by the Navajo Nation's experts as part of their efforts to formulate expert opinions in this case are otherwise precluded by court rules. The Remaining Field Notes constitute hearsay because they represent the statements of Dr. McCord, Dr. Leeper or members of their team made out of court and offered for the truth of the matter asserted. Ariz. R. Evid. 801(c). In *Arizona, Dept. of Law, Civil Rights Div. v. ASARCO, LLC*, 844 F. Supp. 2d 957 (D. Ariz. 2011), the court summarily rejected the argument that an expert report qualified as a business record because the report was prepared in anticipation of litigation. Notes prepared for the purpose of preparing an expert report that will be used in litigation should similarly not be characterized as business records under the exception afforded by Ariz. R. Evid. 803(6).

Although the Remaining Field Notes do not qualify for an exception to the hearsay rules as business records, the Navajo Nation's motion to admit the Remaining

Field Notes is granted based on Ariz. R. Evid. 106. Rule 106 “provides that if one party introduces part of a recorded statement, an adverse party may require the concurrent introduction of other parts when fairness demands”. *State v. Steinle in and for the County of Maricopa*, 239 Ariz. 415, 418, 372 P. 3d 939, 942 (2016). Although marked as separate exhibits, the field notes constitute a writing about the experts’ observations made contemporaneously with the field visit. Counsel for the Hopi Tribe sought and obtained the admission of a portion of the field notes. Counsel for the Navajo Nation subsequently sought the admission of those field notes not requested to be admitted by the Hopi Tribe. Fairness requires that the complete set of field notes be included in the record for purposes of the court’s consideration of the expert opinions offered by Dr. McCord and Dr. Leeper given that the Hopi Tribe had already submitted a portion of the field notes. Alternatively, and in the interests of justice, the Remaining Field Notes are admitted under Ariz. R. Evid. 807 given that they have the same level of trustworthiness, materiality and probative value as the field notes that were admitted pursuant to the Hopi Tribe’s motion.

The weight that will be accorded to the field notes will take into account the fact that Dr. Leeper and Dr. McCord spent multiple days on the stand testifying on direct and under extensive cross examination about their expert report and the information they derived from field visit.

IT IS ORDERED admitting Navajo Exhibits 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 67, 68, 69, 70, 71, 79, 80, and 81 into evidence.

A copy of this order is mailed to all persons listed on the Court approved mailing list for Contested Case No. CV6417-203.