

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

11/26/2018

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

S. Ortega

Deputy

FILED: 12/18/18

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 33

MINUTE ENTRY

Courtroom: ECB 613

Prior to commencement of trial, Hopi Tribe's Exhibits 3910 and 3911 are given to the clerk electronically.

10:30 a.m. Trial to the Court continues from November 9, 2018.

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

Court reporter, Marylynn Lemoine, is present.

Discussion is held regarding Navajo's motion to admit references to Dr. Gilpin's expert report. Mr. Leonard previously moved for the admission of the list of references (pgs. 49-65) in Mr. Gilpin's expert report which has been marked as Navajo Exhibit 599.

For the reasons set forth on the record,

IT IS ORDERED sustaining the objections to the Motion. Navajo's Exhibit 599 will not be admitted into evidence.

Mr. Leonard requests that a redacted list be submitted as an offer of proof.

IT IS FURTHER ORDERED that Navajo Exhibit 599 is accepted as an offer of proof.

Mr. Leonard moves to strike every list of references included every Hopi expert report on the same grounds.

IT IS FURTHER ORDERED denying counsel's motion to strike.

Discussion is held regarding testimony about Dr. Gilpin's unpublished manuscript.

Mr. Hiller clarified that Dr. Adams did not reference a manuscript prepared by Dr. Gilpin in his testimony. He stated that Dr. Adams testified about an undisclosed presentation prepared by Dr. Bernardini.

For the reasons set forth on the record,

IT IS FURTHER ORDERED taking the issue of Dr. Gilpin's manuscript under advisement.

Hopi Tribe's case continues.

Peter Whiteley is sworn and testifies.

Hopi Tribe's Exhibit 483, a copy of Dr. Whiteley's resume, is received in evidence.

Dr. Whiteley testified about his report entitled "The Importance of the Little Colorado River Drainage and its Water Resources to the Hopi." Hopi Exhibit 486.

Argument is heard regarding the references in the redacted report which is numbered as Hopi Exhibit 3910.

IT IS FURTHER ORDERED overruling objections to the report with references. Hopi Tribe's Exhibit 3910 is received in evidence.

Dr. Whiteley testified about a second report called "Historic Hopi Use and Occupancy of the Little Colorado Watershed" marked as Hopi Exhibit 484.

The redacted version of Hopi Exhibit 484 is marked as Hopi Tribe's Exhibit 3911.

Hopi Exhibit 3911 is received in evidence.

Discussion is held regarding a portion of Dr. Godfrey's testimony.

IT IS FURTHER ORDERED that Dr. Godfrey's testimony given on October 23, 2018 is struck from page 65, line 17 through page 69, line 8.

Discussion is held regarding the proper timing of LCR Coalition's Rule 52(c) motion.

11:56 p.m. The Court stands at recess.

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.

Discussion is held regarding Hopi Tribe's Exhibits 3910 and 3911.

Counsel Colin Campbell confirms that Hopi Tribe's Exhibit 3911 is a redacted copy of Exhibit 484, and Hopi Tribe's Exhibit 3910 is a redacted copy of Hopi Tribe's Exhibit 486.

Peter Whiteley continues to testify.

Counsel Jeffrey Leonard moves to strike the list of references in Hopi Tribe's Exhibits 3910 and 3911.

IT IS FURTHER ORDERED denying the oral motion to strike.

Discussion is held regarding redacted pages 99 and 100 of the report in Hopi Tribe's Exhibit 3911. Counsel Colin Campbell requests that those pages be un-redacted for purposes of this witness testimony.

For the reasons stated on the record,

IT IS FURTHER ORDERED denying counsel's request to un-redact pages 99 and 100 of the report in Hopi Tribe's Exhibit 3911.

The witness is excused.

Hopi Tribe rests.

The Navajo Nation moves for admission of U.S. Department of Justice Exhibit 530, and discussion is held.

For the reasons set forth on the record,

IT IS FURTHER ORDERED that a portion of U.S. Department of Justice Exhibit 530 (specifically the table on pages 135-139) is received in evidence. U.S. Department of Justice Exhibit 530 having been submitted in electronic format only, counsel for the Navajo Nation is directed to submit a revised electronic file to the courtroom clerk containing only the portion in evidence for identification and retention as admitted.

Discussion is held regarding the exhibit list in this matter.

IT IS FURTHER ORDERED that the exhibit list will be updated and copies given to counsel on December 17, 2018.

The Court informs counsel that she will make a decision about the reconsideration issue involving Dr. Gilpin's unpublished manuscript and, if allowed, additional testimony from Dr. Adams and Dr. Gilpin.

Mr. Heiserman requested that the LCR Coalition be given 24 hours from the time of the decision reconsidering the admissibility of the testimony from Dr. Gilpin to file a Rule 52(c) motion.

IT IS FURTHER ORDERED that the LCR Coalition shall have one (1) business day from the Court's decision reconsidering the admissibility of Dr. Gilpin's testimony about the unpublished manuscript to file a motion for judgment as a matter of law.

Closing arguments are confirmed for **December 17 and 18, 2018.**

2:55 p.m. Matter concludes.

LATER:

IT IS FURTHER ORDERED confirming that the questioning and testimony regarding Dr. Gilpin's unpublished manuscript is stricken from the record. No additional testimony from Dr. Adams or Dr. Gilpin will be allowed with respect to the unpublished manuscript. Evidence not disclosed in an untimely manner shall be excluded from evidence absent good cause. *Allstate Insurance Co., v. Toole*, 182 Ariz. 284 (1995). The unpublished manuscript was prepared by Dr. Gilpin and submitted for peer review and publication. Dr. Adams, the expert for the Hopi Tribe, received a copy of the manuscript for review but stated that he did not inform counsel for the Hopi Tribe about the manuscript or provide counsel with a copy until approximately two weeks before the cross examination of Dr. Gilpin. Counsel for the Navajo Nation argued that the unpublished manuscript was confidential and testimony about the transcript should be stricken because the document was improperly obtained. The LCR Coalition argued that the testimony should be excluded because the Hopi Tribe did not comply with the disclosure rules. Rule 16(g)(1)(E) requires a party to list all exhibits including exhibits for impeachment to be included in the joint pretrial statement. Clearly good cause exists

for the Hopi Tribe's failure to include the unpublished manuscript in its joint pretrial statement based on counsel's statement and the expert's statement that the unpublished manuscript was not received by counsel until after trial began. Rule 37(c)(3) governs the appropriate method for using information first disclosed during trial which requires immediate disclosure. Counsel did not immediately disclose the information upon receipt. The unpublished manuscript was only disclosed during the cross examination of Dr. Gilpin. If receipt of the unpublished manuscript had been disclosed immediately, issues such as further cross examination of Dr. Adams and the propriety of the use of a document which Dr. Gilpin testified was confidential could have been timely addressed. Equally important, as stressed by counsel for the LCR Coalition, the parties would have had an opportunity to review the document and prepare their examination of the witness with full knowledge of the same information available to the Hopi Tribe.

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