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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  
GILA RIVER SYSTEM AND SOURCE

Case No. CV 6417-203

ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
LIMIT DEPOSITION TESTIMONY OF  
BRADLEY HILL

CONTESTED CASE NAME: *In re Hopi Reservation HSR*  
HSR INVOLVED: Hopi Reservation Hydrographic Survey Report  
DESCRIPTIVE SUMMARY: Limitations imposed on the scope of the deposition of Bradley Hill  
NUMBER OF PAGES: 9  
DATE OF FILING: November 4, 2019

On October 7, 2019, the City of Flagstaff filed a Motion to Limit Deposition Testimony of  
Bradley Hill ("Motion"). On October 28, 2019, following oral argument on the Motion, the City  
of Flagstaff filed a revised proposed order granting the motion to limit the deposition testimony.

1 The Hopi Tribe filed a Response on October 30, 2019 (“Response”), requesting that either the  
2 Motion be denied or, in the alternative, that the proposed order be modified. Mr. Hill is the  
3 expert witness named by the City of Flagstaff to testify about the quantity of water used by the  
4 City of Flagstaff each year for domestic, commercial, municipal, and industrial (DCMI) purposes.  
5 Mr. Hill is also the Director of Water Services for the City of Flagstaff. At issue is the permitted  
6 scope of the deposition examination of Mr. Hill.  
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### 8 9 **1. Background**

10 In its Third Amended Statement of Claimant, the Hopi Tribe claimed DCMI water use of  
11 9,348 acre-feet per year, which is the product of a claimed future population and an assumed per  
12 capita daily water usage rate reported in gallons and abbreviated as “gpcd”. Final Hydrographic  
13 Survey Report for the Hopi Indian Reservation at 4-3 (December 2015) (“Hopi HSR”). In the  
14 Hopi HSR, the Arizona Department of Water Resources reported: “The Hopi use a per capita  
15 usage rate of 160 gpcd, which includes residential indoor use, residential outdoor use, commercial  
16 use, light industrial use, public uses and system losses. The Hopi did not provide any  
17 documentation or information to support the 160 gpcd usage figure, although it was requested by  
18 ADWR.” *Id.*  
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20  
21 The Hopi Tribe objected to the Hopi HSR in relevant part: “In its Community Water  
22 System Program, ADWR found that the surrounding communities’ water use ranged from 135-  
23 213 gpcd. Based on ADWR’s own analysis, the Hope tribe’s claim for 160 gpcd was within the  
24 range for present per capita DCMI uses found in the surrounding communities.” The Hopi  
25 Tribe’s Objections and Comments to the Final Hydrographic Survey Report for the Hopi  
26 Reservation at 3 (June 13, 2016). Based on the foregoing, it appears that the Hopi Tribe’s  
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1 quantifies its future DCMI use based at least in part on historic per capita usage amounts reported  
2 by towns and communities in the Little Colorado River watershed.

3 The City of Flagstaff named Bradley Hill as an expert witness to testify about “the City’s  
4 DCMI use and comparison of that use with the Hopi’s proposed future DCMI claims. Mr. Hill  
5 may also testify regarding best management practices for DCMI water.” City of Flagstaff’s  
6 Second Supplemental Disclosure Statement (Future Use) (Expert Disclosure) at 2 (May 17,  
7 2019). Mr. Hill produced a 14-page expert report that: defined the scope of the City of  
8 Flagstaff’s DCMI existing water uses; assessed the uses that the Hopi Tribe and the United States  
9 included and excluded from their respective claims for water for DCMI purposes; listed the  
10 City of Flagstaff’s current sources of water; referenced the data used to calculate the City of  
11 Flagstaff’s population; described the current conservation efforts undertaken taken by the City of  
12 Flagstaff; and, commented on the population data for the City of Flagstaff used by experts  
13 retained by the Hopi Tribe and/or the United States.

14 The Hopi Tribe noticed Mr. Hill’s deposition for the purpose of “probing the basis for Mr.  
15 Hill’s opinions.” Response at 2. Three business days and the day before the scheduled  
16 deposition, counsel for the Hopi Tribe disclosed a series of documents relating to the City of  
17 Flagstaff’s future planning efforts and water quality. Counsel for the City of Flagstaff raised  
18 concerns about the use of the disclosed documents with counsel for the Hopi Tribe prior to the  
19 deposition and received in response brief emails about the scope of Ariz. R. Evid. 611 and an  
20 opportunity for a verbal exchange in the minutes before the deposition. Exhibit 1 to Reply in  
21 Support of Revised Proposed Order Granting Motion to Limit Deposition at 2, 4 (November 1,  
22 2109) (“Reply”).

23 On October 8, 2019, counsel for the Hopi Tribe examined Mr. Hill. Counsel questioned  
24 Mr. Hill about the methodology used to calculate the City of Flagstaff’s gpcd among other issues  
25 that were the subject of his expert report. Counsel for the Hopi Tribe moved beyond the scope  
26 of the expert report to seek information about a draft of the City of Flagstaff’s master plan for  
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1 future water use (Hill Deposition at 34-36), location of wells drilled by the City of Flagstaff  
2 (Hill Deposition at 43, 55-56), potential future sources of water for the City (Hill Deposition at  
3 66-67, 90-91), and meetings attended on the Hopi reservation with the tribal council four to five  
4 years in the past (Hill Deposition at 85-87). Following continued questions by counsel for the  
5 Hopi Tribe about a draft of a master plan quantifying the amount and cost of proposed future  
6 pumping of groundwater at the Red Gap Ranch for future water supplies for the City of Flagstaff,  
7 counsel for the City of Flagstaff suspended the deposition.  
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## 9 **2. Scope of Examination of Expert Witness**

10 The scope of the examination of an expert witness in a deposition is defined by the scope  
11 of cross-examination permitted at trial. *Emergency Care Dynamics, Ltd. v. Super. Ct.*, 188 Ariz.  
12 32, 35 (App. 1997); Ariz. R. Civ. P. 30(c)(1). The right to cross-examine is not unlimited.  
13 *Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 399, 949 P.2d 56, 59 (App. 1997). The Arizona courts  
14 have defined the scope of cross-examination as that examination necessary “to probe the  
15 groundwork” of the expert’s opinions. *Id.* at 36, 932 P.2d at 301. An examination may properly  
16 explore the extent of an expert’s knowledge about the subject matter of the opinion given, the  
17 facts and reasons upon which the opinion is based, and the expert’s qualifications. *State v.*  
18 *Swafford*, 21 Ariz. App. 474, 486, 520 P.2d 1151, 1163 (1974). In addition, the courts have  
19 generally permitted cross examination that tends to show bias or prejudice on the part of expert  
20 witnesses. *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, 511, ¶ 13, 217 P.3d 1212, 1216  
21 (App. 2009). Thus, the courts have effectively defined the relevance standard of Ariz. R. Evid.  
22 611(b), by reference to the expert’s opinions, biases, and prejudices. Rule 26(b)(6) permits the  
23 questioning of designated expert witnesses about the current and past quantification of the City of  
24 Flagstaff’s DCMI uses but does not support “wild fishing expeditions” into all aspects of the City  
25 of Flagstaff’s water planning and management operations. *Green v. Nygaard*, 213 Ariz. 460, 466,  
26 ¶ 18, 143 P.3d 393, 399 (App. 2006).

1 The Hopi Tribe objects to any limitation on its ability to question Mr. Hill's opinion that  
2 reclaimed water is not included in DCMi use. Response at 4. The components of DCMi and the  
3 methodology that Mr. Hill used to calculate the City of Flagstaff's gpcd rate are the subject of the  
4 expert report and are properly the subject of examination. No limitation on that subject has been  
5 requested by the City of Flagstaff and none is imposed here. Reply at 9.

6 The Hopi Tribe asserts that "Flagstaff uses conservation measures that it argues should be  
7 a limiting factor in the DCMi rights awarded to the Hopi Tribe" and argues that the basis of this  
8 opinion and whether it is relevant should be allowed on cross-examination. Response at 4.  
9 Again, conservation measures undertaken by the City of Flagstaff are included in the Report and  
10 are properly the subject of cross examination. Similarly, counsel may explore the extent of Mr.  
11 Hill's opinion on this topic and inquire into whether Mr. Hill has an opinion about the  
12 applicability of the existing conservation measures used by the City of Flagstaff and the relevance  
13 of City of Flagstaff's gpcd rate to the Hopi Reservation.<sup>1</sup>

14 The Hopi Tribe also asserts that it is entitled to examine Mr. Hill about the City of  
15 Flagstaff's future DCMi need and sources to satisfy those needs because such questions may  
16 demonstrate bias and lack of credibility if it can be shown that future water development plans for  
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19 <sup>1</sup> It does appear that such a line of questioning occurred:

20 Q. You're not saying that the Hopis should get 148 gallons per person  
21 per day because they're not using rain barrels, are you?

22 THE WITNESS: Actually, I didn't evaluate whether 150 GPCD or 160  
23 GPCD were appropriate at all. I do that for Flagstaff, but I didn't do that for Hopi.  
24 So I can't testify whether 150, in this example, is appropriate or not.

25 What I did state, though, was keeping it constant because of implementation of  
26 best management practices, of which one is water conservation, absolutely, and I  
27 demonstrated that as the City of Flagstaff has a proud history of seeing that  
28 decline.

MR. CAMPBELL. Hip hip hooray for the City of Flagstaff.

Hill Deposition at 82.

1 the Hopi Reservation adversely affect future plans of the City of Flagstaff. Response at 4-5.  
2 Except with reference to future consideration of Direct Potable Reuse, the expert report does not  
3 address the City of Flagstaff's future plans or water sources. Such a line of questioning about  
4 future master plans or future water sources is outside the scope of the Report. Moreover, it is  
5 difficult to understand how any perceived potential future adverse impacts of Hopi water use on  
6 the City of Flagstaff could create bias or lack of credibility with respect to the annual reports of  
7 gpcd rates that have occurred over decades. If the Hopi Tribe questions the veracity of Mr. Hill's  
8 reporting of past and current gpcd rates, an examination about numbers provided and figures  
9 included in the Report are certainly appropriate to "to probe the groundwork" of Mr. Hill's  
10 opinions.

11 The stated basis for the wide range of questions posed to Mr. Hill was that "he's the water  
12 director, I can ask him all the questions I want to." Hill Deposition at 67; *see also* Hill  
13 Deposition at 93. Mr. Hill, in addition to serving as the City of Flagstaff's expert witness, also  
14 serves as the Director of Water Services for the City of Flagstaff. Hill Deposition at 67, 93. Mr.  
15 Hill was not present at the deposition in his capacity as Director of Water Services for the City of  
16 Flagstaff; he was present as an expert witness. The fact of Mr. Hill's official position is relevant  
17 because it affects bias and credibility. It does not, however, expand the scope of deposition that  
18 the that Hopi explicitly acknowledge was set to explore the basis of Mr. Hill's opinions. Nor does  
19 the fact that Mr. Hill holds the position of Director of Water Services for the City of Flagstaff  
20 make all questions about the City of Flagstaff's water management and future planning relevant to  
21 the issue of the proper quantification of the DCMI use for the Hopi Reservation.

22 Similarly, the fact that Mr. Hill serves as Director of Water Services for the City of Flagstaff  
23 does not mean that the scope of the examination in this case can be used to obtain information  
24 about other litigation between the City of Flagstaff and the Hopi Tirbe. The City of Flagstaff  
25 specifically objected to the use of the deposition to obtain information about litigation between the  
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1 City of Flagstaff and the Hopi Tribe such as the “Arizona Snowbowl litigation” and settlement  
2 discussions.<sup>2</sup>

3 Based on the foregoing and due to the tenor of the proceedings including the abbreviated  
4 attempts to resolve the dispute, it is appropriate to exercise the authority granted under Rules  
5 26(c)(1) and 30(d) Ariz. R. Civ. P. to define the scope of the examination. See *Mirlis v. Greer*,  
6 249 F. Supp. 3d 611 (D. Conn. 2017) (“When there is a breakdown of decorum at a deposition, a  
7 court should use ‘its authority to maintain standards of civility and professionalism. It is precisely  
8 when animosity runs high that playing by the rules is vital.... Because depositions take place in  
9 law offices rather courtrooms, adherence to professional standards is vital.’”[citation omitted])

10  
11 IT IS ORDERED that the deposition of Mr. Bradley Hill shall resume on November 26,  
12 2019 without the need for an additional notice of deposition.

13 IT IS FURTHER ORDERED that:

- 14 1. The scope of the examination is limited to the examination permitted of an expert  
15 witness which is to probe the basis of Mr. Hill’s opinions set forth in May 15, 2019  
16 Report, his qualification, and any bias or prejudice relevant to the Report subject to  
17 the limitation sets forth in paragraph 4.
- 18 2. The scope of the examination may include questions with respect to other expert  
19 reports prepared by other experts retained by the parties relevant to the issue of  
20 whether Mr. Hill relied on the other reports in forming his opinion and, if so, the  
21 extent of the reliance.
- 22 3. The scope of the examination may include questions about whether and what  
23 information Mr. Hill provided to other experts. If counsel for the City of Flagstaff  
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26 <sup>2</sup> In its Response, counsel represented that “Hopi does not intend to inquire into other litigation or  
27 settlement, including the Snowbowl litigation (relative to the use of reclaimed water on the San Francisco Peaks).  
28 Response at 6.

1 has an objection to the question(s), the objection will be made fully on the record  
2 and the witness shall answer the question unless instructed not to answer based on  
3 assertion of a privilege or due to a limitation set forth below in this order.

4 4. The scope of the examination shall not include:

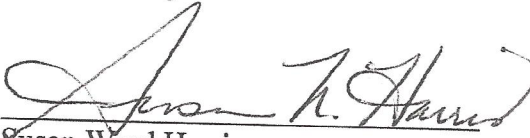
5 A. Matters regarding the City's future water supply plans and infrastructure  
6 including its development of the Red Gap Ranch pipeline project;

7 B. The City's existing water rights and its development of those rights,  
8 including siting, evaluation, and drilling of infrastructures and well fields  
9 and other plans regarding the City's water rights; or

10 C. Matters involving the City's other on-going litigation with the Hopi Tribe  
11 or current or prior settlement discussions with the Hopi Tribe, including  
12 the "Snowbowl litigation" or discussions and meeting to evaluate the  
13 potential for settlement on water issues with the Hopi Tribe, the Navajo  
14 Nation or other parties.

15 5. No document that had not been disclosed by October 7, 2019, shall be used or  
16 marked as an exhibit in the deposition of Mr. Hill. Documents disclosed by  
17 October 7, 2019, may be used subject to the limitations set forth above.

18 6. If a question is posed by counsel for the Hopi Tribe that is not addressed by the  
19 above limitations or an ambiguity exists, then counsel for the Hopi Tribe shall  
20 explain on the record the reason that the question relates to Mr. Hill's May 2019  
21 opinions, or Mr. Hill's bias or veracity. Counsel for the City of Flagstaff shall  
22 state any objection on the record and unless privilege is asserted, Mr. Hill shall  
23 answer the question to the best of his ability.

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25   
26 Susan Ward Harris  
27 Special Master  
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1 On November 4, 2019, the original of the foregoing  
2 was mailed to the Clerk of the Apache County  
3 Superior Court for filing and distributing a copy to  
4 all persons listed on the Court approved mailing list  
5 for Contested Case No. 6417-203.

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