

SUPERIOR COURT OF ARIZONA  
APACHE COUNTY

06/30/2020

CLERK OF THE COURT  
FORM V000

SPECIAL WATER MASTER  
SUSAN WARD HARRIS

S. Motzer  
Deputy

FILED: July 2, 2020

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

CV6417-203

In Re: Hopi Reservation HSR

In re: Oral Argument re: Motions filed  
June 18, 2020 by the Hopi Tribe

**MINUTE ENTRY**

Central Court Building – Courtroom 301

1:30 p.m. This is the time set for Oral Argument before Special Water Master  
Susan Ward Harris.

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

The following attorneys appear telephonically:

- Judith M. Dworkin, M. Kathryn Hoover, Jeffrey S. Leonard and Evan F. Hiller for the Navajo Nation
- Alexandra Arboleda and Sara Ransom for the City of Flagstaff
- Cody L.C. McBride, Rebecca Ross, Vanessa Boyd Willard and Emmie Blades for the United States Department of Justice
- Carrie Brennan and Kevin Crestin for the Arizona State Land Department
- David A Brown, Brian J. Heiserman, Lauren J. Caster and Bradley J. Pew for the LCR Coalition
- Colin F. Campbell, Grace R. Rebling and Philip Londen for the Hopi Tribe

- John B. Weldon, Jr. and Mark A. McGinnis for SRP
- Kimberly Parks is observing for ADWR

Oral argument is held on The Hopi Tribe's Motion for Continuance for a Courtroom Trial and Objections to a Virtual Trial filed June 18, 2020 and the Hopi Tribe's Motion to Stay the Trial Pending Emergency Special Action Appeal if the Hopi Tribe's Objections to a Virtual Trial are Rejected file June 18, 2020. Argument is presented by Lauren J. Caster, Jeffrey S. Leonard, Vanessa Boyd Willard, Colin F. Campbell, Mark McGinnis, Carrie J. Brennan and Sara Ransom.

Oral argument is presented to the Court.

Based on the matters presented,

**IT IS ORDERED that the following motions are taken under advisement:**

- The Hopi Tribe's Motion for Continuance for a Courtroom Trial and Objections to a Virtual Trial
- Motion to Stay the Trial Pending Emergency Special Action Appeal if the Hopi Tribe's Objections to a Virtual Trial are Rejected

2:36 p.m. Matter concludes.

LATER:

#### **A. Procedural Background**

The United States and the Hopi Tribe claim rights to water for the Hopi Reservation. The adjudication of the rights has been divided into three phases. The first phase dealt with the applicable priority dates for water rights under federal law. Decisions in this phase were reached on motions.

In December 2015, the Arizona Department of Water Resources completed its hydrographic survey report of the past and present uses of water on the Hopi Reservation. The United States proposed that "litigation of the claims would proceed most efficiently by bifurcating the proceedings into two broad claim categories that dovetail with the information presented in the Final Hopi HSR: 1) water claims whose evidentiary basis is established by past and present use ('past and present claims'); and 2) water right claims associated with water use anticipated in the future to ensure that the Hopi Reservation remains a homeland as intended ('future claims')." *United States' Statement re: Litigation of Hopi Main Reservation Lands and Updating Hopi and Navajo Claims* (filed July 6, 2016) at 2-3. No party objected to the United States' proposal so sequential proceedings were scheduled to hear evidence regarding past and

present uses and future uses.<sup>1</sup> The phase of the proceedings concerning past and present water use was the subject of a hearing that began in September 2018 and ended in December 2018. Daily attendance at the hearing typically consisted of more than 40 lawyers, paralegals, witnesses, parties, members of the public, and court personnel. During that phase, the Hopi Tribe, among other witnesses, called numerous members of the Hopi Tribe to testify about the religious importance of water and the cultural and historical uses of water on the Hopi Reservation.

The third phase of this proceeding concerns the Hopi Tribe's present needs for water and anticipated future water uses. This proceeding may involve testimony from approximately 30 expert witnesses. The parties have stipulated that expert reports would be admitted into evidence in lieu of traditional direct examination so the expert witnesses will only be subject to cross examination during the proceedings. Joint Stipulation Regarding the Future Water Use Trial (Dec. 13, 2018) at 2. The United States, the Navajo Nation, and the Arizona State Land Department will only call expert witnesses. The Hopi Tribe plans to call 15 expert witnesses. It has also listed 17 lay witnesses, several of whom testified in the past and present phase of the proceeding. The LCR Coalition has listed expert witnesses, witness characterized as expert/lay witnesses, and lay witnesses.

## **B. Hearing**

The hearing in the future phase of these proceeding was scheduled to begin on June 2, 2020. *Amended Case Management Order* (December 20, 2018). On April 6, 2020, the Hopi Tribe sought an indefinite continuance of the June 2, 2020 trial date due to the impact of the novel coronavirus 2019 (COVID-19) pandemic on trial preparation efforts, safety concerns, and the Tribe's desire for an in-person trial. The June 2, 2020 trial date was vacated and tentatively rescheduled for July 7, 2020 due to uncertainty about the progress of COVID-19 and the protocols that the Arizona Supreme Court and Maricopa County Superior Court would implement to protect the health and safety of all participants during a hearing expected to involve a large number of people. *Order* (filed April 15, 2020).

Following a pretrial conference on June 5, 2020, trial was scheduled to begin on August 17, 2020, using the Court's GoToMeeting platform consistent with court protocols. *Minute Entry* (filed June 11, 2020) at 1-2. *See* Arizona Supreme Court, Administrative Order No. 2020-79 (May 20, 2020) at 1; Maricopa County AO 2020-78 at 6 ("civil proceedings will presumptively proceed through the use of audio and video appearances," with in-person proceedings authorized under certain circumstances and with certain restrictions.)

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<sup>1</sup> The United States' proposal was approved solely on the procedural grounds that the parties were prepared to being the process of litigating past and present uses, but required additional time to prepare to litigate future uses. No other procedural or substantive reason factored into the adoption of the United States' unopposed proposal.

The Hopi Tribe has now renewed its motion for an indefinite delay of the hearing. It objects to conducting the hearing using the technology approved by the court that will allow this proceeding to continue, the demeanor of the witnesses to be observed, and not require all parties and court staff to spend long days in the same room in violation of existing court protocols and CDC guidelines. The United States joined with the Hopi Tribe's motion. The Navajo Nation took no position on the Hopi's Motion but, represented that it is prepared to proceed. All other parties oppose the motion and are prepared to proceed.

In its most recent pleadings, the Hopi Tribe focuses on the vulnerability of members of the Hopi Tribe to COVID-19, the actions the Hopi Tribal Council has taken to protect the health of tribal members including a Stay at Home Executive Order, and the lack of internet access readily available to members of the Hopi Tribe. At oral argument, counsel for the Hopi Tribe also focused on the recent number of confirmed cases of COVID-19 that has caused lawyers and staff of the law firm representing the Hopi Tribe to work outside the office and the threat to the health of all participants from in-person pre-trial preparation and in-person meetings involving the Hopi Council, tribal members, and other witnesses.

It is understandable that with the continued acceleration of new cases of COVID-19 in Arizona that all of the participants will want to maintain or implement more stringent safety procedures. It is also recognized that changes in normal pretrial procedures and procedures used during a trial and the introduction of new technology causes frustration, delays, and inefficiencies as new procedures are developed, tested and refined. Nevertheless, new procedures must be designed and implemented. The optimism of March and early April when there was a belief that a delay of a month or two could safely allow for an in-person trial has given way to the reality that it may not be safe for a year or more for dozens of people to congregate in the same room over several months to try a case, especially when a large number of those people are especially vulnerable to COVID-19. *See* Declaration of Chairman Timothy Nuvangyaoma, dated June 27, 2020, attached as Exhibit 1 to the Hopi's Motion ("Declaration of Chairman"). Further, additional delay will occur once it is safe to schedule an in-person trial with a large number of participants because backlogged criminal matters will generally be prioritized over civil matters such as this trial of an Apache County matter that requires one of the Maricopa County courtrooms large enough to accommodate all of the parties in this case that also has the technological capabilities requested by the parties. *See* Arizona Supreme Court AO 2020-79 at 5-6.

The Hopi Tribe argues that a delay is not prejudicial because the "Hopi Tribal Council does not believe that there is an urgency or need to quantify scarce and limited resources available to the Hopi on our reservation." Declaration of Chairman at 4. He also points out that no actions have been brought by or against the Hopi Tribe to enjoin the use of water. While the absence of current dispute marks a difference between a case in the general adjudication and the typical case, the purpose of the general adjudication is to determine water rights to enable future planning and access to water when the supply does not meet the demands of the people who rely upon it.

This particular case has been fully prepared by the parties in anticipation of the

June 2 trial date. An indefinite delay would impose significant additional costs as preparation efforts would have to be duplicated at least in part. It creates risks that one or more of the roughly seventy expert and fact witnesses would not be available for trial, that scheduling conflicts would delay the resumption of the proceedings in the future, and, as pointed out by the Arizona State Land Department, funding available to the parties could be reduced.

An indefinite delay in this case is not necessary. Adequate technology exists to move forward. *Argonaut Ins. Co. v. Manetta Enterprises, Inc.*, No. 19CV00482PKCRLM, 2020 WL 3104033, at \*3 (E.D.N.Y. June 11, 2020) (rejecting an argument that any limitations of videoconferencing justified an indefinite continuance of trial); cf. *Wilkins v. ValueHealth, LLC*, No. 19-1193-EFM-KGG, 2020 WL 2496001, at \*2 (D. Kan. May 14, 2020) ("Video or teleconference depositions and preparation are the 'new normal' and most likely will be for some time. Litigation cannot just come to an indefinite halt."); *Grano v. Sodexo Mgmt., Inc.*, No. 18CV1818-GPC(BLM), 2020 WL 111975057, at \*3 (S.D. Cal. Apr. 24, 2020) ("Attorneys and litigants all over the country are adapting to a new way of practicing law, including conducting depositions and deposition preparation remotely."); *In re RFC & ResCap Liquidating Tr. Action*, 162020 WL 1280931 at \*4 ("However, as this is a bench trial, the Court is confident it will adequately understand Dr. McCrary's testimony even through videoconference technology.").

Further, person-to-person contact can be reduced through videoconferencing; using separate rooms for counsel, staff, and witnesses; and the adoption of other measures designed to ensure that social distancing can be maintained. See Declaration of Colin Campbell at 3-6 attached as Exhibit 2 to the Hopi Tribe's Motion. The Tribe also suggests that certain Hopi fact witnesses who live on the Hopi Reservation may not have a reliable internet connection and would need to travel to a location with suitable facilities, thus increasing the risk of exposure to COVID-19. Hopi Tribe's Motion at 8. This problem may exist with respect to the fifteen lay witnesses although it is not clear that an investigation has been undertaken with respect to any computer or internet deficiencies that exist with respect to those particular witnesses. No similar representation was made with respect to the expert witnesses. Based on information provided during oral argument, the Hopi Tribe has a government building, hotel, and a school on the Reservation with internet connections and it also has a commercial building in Flagstaff that has internet connections. As the LCR Coalition has suggested, the Court and the parties can be flexible to make accommodations for individual situations.

Based on the information provided, the beginning of the trial will be delayed an additional month to give counsel the opportunity to work with the Hopi Tribe to make necessary arrangements to permit Hopi lay witnesses to safely testify from either their homes or the commercial building in Flagstaff or the school, hotel, or government building on the Hopi Reservation. The additional time should also allow the development of pre-trial procedures to proceed in a safe fashion. This extension should be the final delay in this case because we will proceed forward with no expectation that the COVID-19 pandemic will abate and allow procedures formerly implemented to be followed in this case. Also, as counsel for the LCR Coalition correctly pointed out, a

stuttering trial date imposes costs in time and resources as the parties have to continually reorganize and constant change in the court's calendar imposes difficulties with respect to other cases in differing stages of litigation.

### **C. Stay**

The relief sought in the Motion to Stay is, in effect, the same relief the Hopi Tribe seeks in its Motion to Continue - i.e., a delay of the August 17, 2020 start date. To be entitled to a stay pending appeal, the Hopi Tribe must demonstrate (1) a strong likelihood of success on the merits, (2) irreparable harm if the stay is not granted, (3) that the harm to the requesting party outweighs the harm to the party opposing the stay, and (4) that public policy favors the granting of the stay. *Smith v. Arizona Citizens Clean Elections Comm'n*, 212 Ariz. 407 P.2d 10, 410, 132 P.3d 1187, 1190 (2006). The Hopi Tribe has not met its burden.

**IT IS FURTHER ORDERED** that the pretrial conferences scheduled for July 17, 2020 is vacated. Pretrial conferences shall be held on **July 31, 2020, August 14, 2020, and August 28, 2020**. Each pretrial conference shall begin at **1:30 p.m.** The purpose of the pretrial conferences is to address any issues raised by the parties and to practice using the GoToMeeting platform.

**IT IS FURTHER ORDERED** that the Hopi Tribe shall file a schedule by **September 1, 2020**, identifying the date that it anticipates that its expert and lay witnesses shall testify beginning on **September 29, 2020**. The schedule shall include a column that identifies for each witness currently living on the Hopi Reservation a location from which the witness will testify, a representation that the witness' home computer and internet service are sufficient to participate in the trial, or the need for a special accommodation.

**IT IS FURTHER ORDERED** extending the first day of trial date to **September 14, 2020**. Trial days are Monday through Thursday, beginning at 9:00 a.m. and ending at 4:45 p.m. The United States shall call its first witness on **September 15, 2020**. No trial shall be held on September 28, 2020.

**IT IS FURTHER ORDERED** denying the Hopi Tribe's Motion for Continuance for a Courtroom Trial and Objections to a Virtual Trial

**IT IS FURTHER ORDERED** denying the Hopi Tribe's Motion to Stay the Trial Pending Emergency Special Action Appeal if the Hopi Tribe's Objections to a Virtual Trial are Rejected

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