

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

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 LITTLE COLORADO RIVER  
SYSTEM AND SOURCE

Civil Case No. CV6417-300

ORDER DENYING SALT RIVER  
PROJECT'S MOTIONS *IN LIMINE* AND  
TO STRIKE SUPPLEMENTAL REPORT  
BY DR. GRETCHEN GREENE

CONTESTED CASE NAME: *In re Navajo Nation*  
HSR INVOLVED: Navajo Reservation Hydrographic Survey Report.  
DESCRIPTIVE SUMMARY: Salt River Project's Motions *In Limine* And To Strike  
Supplemental Report by Dr. Gretchen Greene are denied.  
NUMBER OF PAGES: 5  
DATE OF FILING: October 4, 2022

This Order addresses the fifth report prepared by Dr. Greene that estimates the future population of the Navajo Nation on the Navajo Reservation. This report was prepared more than two months after the April 30, 2022 deadline for filing expert reports set by the Case

1 Management Order, dated November 2, 2020. On July 8, 2022, the United States moved to  
2 amend the Case Management Order to, *inter alia*, extend the deadline to allow it to timely  
3 submit Dr. Greene's fifth report. United States' Motion to Amend Case Management Order –  
4 Phase I Claims filed July 8, 2022 ("U.S. Motion to Amend"). A week later the United States  
5 filed a "Notice: Completion of Greene Supplemental Expert Report" to which it attached the  
6 report. The U.S. Motion to Amend was denied on the ground that the United States had not  
7 demonstrated the good cause and absence of prejudice required by Ariz. R. Civ. P. 16(c)(5) to  
8 amend the Case Management Order to submit the untimely report. Minute Entry filed August  
9 11, 2022.  
10

11 On September 8, 2022, Salt River Project Agricultural Improvement and Power District  
12 ("SRP"), joined by the LCR Coalition and the City of Flagstaff, moved for an order to preclude  
13 the report from being admitted in evidence or used with respect to any motion filed in this case  
14 and to strike the report from the court record. It relies on Ariz. R. Civ. P. 7.1(f) and 7.2. The  
15 United States, joined by the Navajo Nation, opposes the motion. It argues that the report cannot  
16 be stricken because that the report should remain in the record to preserve the issue for review  
17 and appeal. The United States also opposes the motion *in limine* because it did not submit the  
18 report as an untimely disclosure, nor did it request that the report be admitted into evidence.  
19

20 Arizona Rules of Civil Procedure provide that "[a] motion to strike may be filed . . . .  
21 if it seeks to strike any part of a filing or submission on the ground that it is prohibited, or not  
22 authorized, by a specific statute, rule, or court order." Ariz. R. Civ. P. 7.1(f)(1). Salt River  
23 Project generally asserts that the report should be stricken because it was not authorized by any  
24 statute, rule or court order. SRP's Motion at 2-3. Rule 7.1 permits "other evidence" to be  
25 submitted "in support of any motion or memorandum." Ariz. R. Civ. P. Rule 7.1(a)(4). The  
26 submission of the report in support of the U.S. Motion to Amend was permitted by Rule 7.1,  
27  
28

1 because as the United States characterizes the submission, it was submitted for the limited  
2 purpose of supporting the motion and, not as an untimely disclosure. U.S. Response at 1.  
3 Courts disfavor using motions to strike to resolve evidentiary issues. In *Sitton v. Deutsche Bank*  
4 *Nat. Trust Co.*, 233 Ariz. 215, 311 P.3d 237 (App. 2013) the court considered a motion to  
5 strike a declaration attached to a motion for summary judgment on the grounds that the  
6 declaration was untimely. The court stated:

7  
8       Objections to a movant's filings are properly made in the response to the  
9 motion, and a separate motion is neither required nor authorized by any rule.  
10 Absent extraordinary circumstances or those expressly contemplated in Rule  
11 12(f), motions to strike usually waste the time of the court and the resources  
12 of the parties. An objection is all that is necessary to alert the court to the need  
13 to disregard legally infirm evidence, and such evidence should be  
14 disregarded—not stricken from the record. Effective January 1, 2014, motions  
15 such as those filed here will be expressly prohibited by Ariz. R. Civ. P. 7.1(f).

16 *Id.* at 220, 311 P.3d at 242.

17       In this case, the parties objecting to the U.S. Motion to Amend were clear that the  
18 deadline should not be extended to permit the report to be timely disclosed. The substance of  
19 the report was not considered in ruling on the U.S. Motion to Amend. Instead, the focus was  
20 on whether the grounds required by Rule 16(c)(5) existed to permit an extension of the deadline  
21 to allow the report to be timely disclosed. Once the U.S. Motion to Amend was denied, the  
22 report cannot be timely disclosed. Thus, the appropriate procedure required by the *Sitton* Court,  
23 and as subsequently followed by other courts pursuant to Rule 7.1(f), is to disregard the report,  
24 which it was, but not strike it from the record.

25       Salt River Project also moves under Rule 7.2 for an order precluding the admission of  
26 the report as evidence. Salt River Project argues that the United States, by attaching the  
27 supplemental report to the U.S. Motion to Amend, effectively moved to admit untimely  
28

1 disclosed evidence under Rule 37(c)(4). Salt River Project contends that the order denying the  
2 Motion to Amend also bars admission of the supplemental report under Rule 37(c)(4).

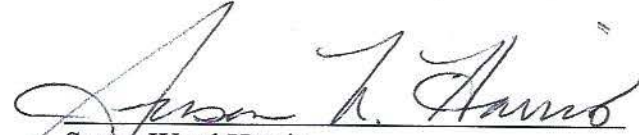
3 The order denying the U.S. Motion to Amend should not be construed as denying a  
4 motion filed under Rule 37(c)(4). Motions filed under Rule 16(c)(5) and under Rule 37(c)) are  
5 governed by similar but not identical standards. The United States made it clear that it was filing  
6 a Motion to Amend, not a Motion to Use Untimely Disclosed Evidence under Rule 37(c)(4). The  
7 United States affirmed that it did not request that the report be admitted into evidence. U.S.  
8 Response at 1. It makes no representation or assertion that it may later attempt to introduce the  
9 report as evidence. Thus, at least with respect to the United States and SRP there does not appear  
10 to be an evidentiary dispute to resolve.  
11

12 The Navajo Nation, like the United States, does not assert that the report should be  
13 admitted into evidence. It acknowledges that the report cannot be admitted into evidence as an  
14 expert report. Navajo Nation's Response to SRP's Motion *In Limine* and to Strike Supplemental  
15 Report by Dr. Greene at 2. The Navajo Nation, however, argues that there may be additional  
16 avenues that may permit portions of the report, which do not constitute expert opinions, to be  
17 introduced into evidence because the deadline for discovery has not yet expired. Based on this  
18 argument, no evidentiary dispute exists; only the possibility that an evidentiary dispute may  
19 exist if the Navajo Nation later seeks to admit information in the report that is not intertwined  
20 with expert opinions. Accordingly, the issue about whether any portion of the report may be  
21 introduced into evidence is not ripe for consideration.  
22

23  
24 This decision denying SRP's motions is based on narrow, procedural grounds. It should  
25 not be read to imply or suggest that reasons exist that will permit the admission of any part of  
26 the report into evidence. If the Navajo Nation later moves to admit portions of the report into  
27  
28

1 evidence, the motion will be evaluated under the appropriate standard fully cognizant of the  
2 date that Dr. Greene completed her fifth report in this case.

3 **IT IS ORDERED** denying Salt River Project's Motions *In Limine* and to Strike  
4 Supplemental Report by Dr. Gretchen Greene.

5  
6  
7  
8   
9 Susan Ward Harris  
Special Master

10  
11  
12 On October 4, 2022, the original of the foregoing was  
13 delivered to the Clerk of the Apache County Superior  
14 Court for filing and distributing a copy to all persons  
15 listed on the Court-approved mailing list for this contested  
16 case,

17   
Emily Natale