

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

November 10, 2022

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER
SUSAN WARD HARRIS

M. Pritchard

Deputy

FILED: November 22, 2022

In re: Navajo Nation
Contested Case No. CV6417-300

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

In re: Oral Argument

MINUTE ENTRY

Courtroom: CCB 301

1:30 p.m. This is the time set for Oral Argument before Special Water Master Susan Ward Harris regarding the Navajo Nation's *Motion to Compel*.

The following attorneys and parties appear virtually via Court Connect.

- Jeffrey Leonard, Evan Hiller, Judy Dworkin, Candace French, Kathryn Hoover, and Debra Davenport for the Navajo Nation
- Julia Kolsrud for the San Juan Southern Paiute Tribe
- Brian Heiserman for the LCR Coalition
- Carrie J. Brennan and Kevin Crestin for the Arizona State Land Department ("ASLD")
- Katrina Wilkinson for Salt River Project ("SRP")
- Lee Storey and Ethan Minkin for the City of Flagstaff
- Emmie Blades for the United States Department of Justice
- Phillip Londen for the Hopi Tribe

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

The Court has received a *Stipulation Regarding Dispute Of Ownership Of Real Property And Related Water Claims* filed by the Navajo Nation.

All parties stated that they did not intend to file an objection to the Stipulation.

Mr. Leonard addresses the Court regarding the Navajo Nation's *Motion to Compel*.

Ms. Storey addresses the Court.

Mr. Leonard addresses the Court.

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Mr. Leonard addresses the Court.

Ms. Storey addresses the Court.

There are no further comments or objections from the other parties.

IT IS ORDERED taking the matter under advisement.

LATER:

1. Navajo Nation's Motion to Compel

The Navajo Nation seeks to compel answers to 14 questions from Erin Young, the Water Resources Manager for the City of Flagstaff. Counsel instructed Ms. Young not to answer the questions identified by the Navajo Nation on the grounds that the questions improperly sought expert opinions, confidential information, and information not relevant to the current case. The Navajo Nation argued that it is entitled to discover facts relevant to the basis for expert opinions given by Brad Hill. At the oral argument, counsel referenced Mr. Hill's report that stated that the United States and the Navajo Nation did not apply best management practices to their DDMI claims. Mr. Hill evidently stated that the City of Flagstaff is a prime example of the successful implementation of best management practices, efficient water use, and sound water management practices.

In its response, the City of Flagstaff contends that answers were provided to four of the 14 questions. It argues that five of the questions call for expert opinions and the

remaining five questions seek to discover confidential information and/or information not relevant to this case. At the oral argument, counsel for the City of Flagstaff also raised the objection that the questions asked were outside the scope of Mr. Hill's report.

A. Answered Questions

Q1. Inquiry as to the reasons for projecting low, medium, and fast-growth scenarios.

According to the excerpts of the deposition testimony, counsel for the Navajo Nation asked Ms. Young whether it would be appropriate to project growth using low, medium, and fast growth scenarios and the reasons for projecting growth at three levels. Ms. Young testified that it is appropriate to project growth using three scenarios because it is an industry standard to provide a range of growth scenarios. Although the excerpted portions of the transcript contain objections and an instruction not to answer from counsel for the City of Flagstaff, the witness did respond to the question by referencing industry standards.

Q3. Request for an explanation for a statement found in Deposition Exhibit 263 that 5.5 MGD from Upper Lake Mary can be used for peak day production when 8 MGD is theoretically available.

Before counsel instructed her to not to answer the question, Ms. Young testified that she could not provide an explanation for the statement. Later in the deposition she stated that she did not know and could not answer the question about the reasons that 5.5 MGD was considered available for peak day consideration.

Q4. Question about why Rio de Flag is not used as a surface water source for the City of Flagstaff.

Ms. Young acknowledged that the City of Flagstaff does not use water from Rio de Flag and that it may possibly be a water source. She also stated that she does not know the reason that the City does not use the water from Rio de Flag. Navajo Motion to Compel at 9, 5-7 ("Navajo Motion"). Ms. Young answered the question by stating that she did not have the information requested.

Q10. Inquiry about the expense of water from an undesignated source.

Ms. Young answered that she had no idea about the expense of the water. Navajo Motion at 9. Although counsel for the City of Flagstaff subsequently instructed her not to answer that question as well as a question about a comparison about the cost of that source of water with groundwater, the question has been effectively answered. Ms. Young does not have information about the expense of water from an undesignated source which necessarily precludes answering a question that requires a comparison.

The City of Flagstaff is correct that Ms. Young answered questions 1, 3, 4, and 10.

B. Questions Improperly Seeking Expert Opinions

Q2. Question about whether the height of the dam could be raised to provide more water from Upper Lake Mary to the City of Flagstaff.

Q7. Query regarding extent of opposition to development of Red Gap Ranch.

Q8. Inquiry about initial estimates of Red Gap Ranch project reported at a 2022 City Council meeting.

Q12. Question about the truth of the statement in the Flagstaff 2025 Strategic Plan prepared by an outside consultant about “[i]ncreased temperatures and ‘longer summers’ will increase overall demand.”

Q13. Query regarding the truth of the statement prepared by an outside consultant in the Flagstaff 2025 Strategic Plan about “Specific Responses” which included: “Update predictions on the ongoing yield of Upper Lake Mary based on climate change considerations.”

Q14. Inquiry regarding the truth of the statement prepared by an outside consultant in the Flagstaff 2025 Strategic Plan that “[c]limate change is accelerating, resulting in increased uncertainty in water supply issues, indicating more aggressive planning and communications should begin now.”

The Navajo Nation justified these questions on the grounds that Ms. Young is the Flagstaff Water Resources Manager with responsibility for technical and strategic planning assistance and recommendations and producing technical reports and analysis. Navajo Motion at 11. The issue presented here, however, is not whether Ms. Young has the expertise to answer the questions. Instead, the narrow issue presented and decided is whether the six questions posed by the Navajo Nation would elicit an opinion that may only be offered by a fact witness.

The information requested by the six questions listed above is not information about known facts concerning the City of Flagstaff’s water program, its existing procedures and practices, methods used to create a technical plan, or information provided in a technical report prepared by the witness. The information requested seeks opinions about hypothetical dam modifications, future events and actions forecast by an outside consultant, estimated costs of a future project, and specialized knowledge about public opinion. Testimony by a fact witness in the form of an opinion is limited to opinions not based on scientific, technical, or other specialized knowledge. Ariz. R. Evid. 702; *see also*, *People v. Kinder Morgan Energy Partners, L.P.*, 159 F. Supp. 3d 1182, 1199 (S.D. Cal. 2016).

Questions 2, 12, 13, and 14 improperly require specialized knowledge. An opinion about whether the structure of a dam could be altered and whether that alternation would result in more water requires specialized knowledge from fields such as hydrology, engineering, and climatology. Further, an opinion from Ms. Young evaluating the truth of statements included in the Flagstaff 2025 Strategic Plan dealing with the future events

would similarly require specialized knowledge and violate the general rule that opinion testimony about the conclusions of an expert cannot be provided by a fact witness. *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17, 262 P.3d 238 (App. 2011). Because answers to questions about dam alterations and the influence of climate change on water supply would require expert testimony, questions 2, 12, 13, and 14 are improper.

Question 7 improperly seeks data on public opinion regarding the development of Red Gap Ranch. A question concerning the quantification of opposition to the Red Gap Ranch by members of the City of Flagstaff City Council, city commissions, city agencies, or public members presents several problems. Gauging and quantifying public support of (or opposition to) the development of Red Gap ranch requires expertise. An opinion regarding public feelings toward development of Red Gap Ranch would qualify as an expert opinion because it would have to be based on specialized knowledge and be the product of reliable principles and methods.

Question 8 improperly seeks an expert opinion on the veracity of cost estimates presented at a meeting. Prior to question 8, Ms. Young was presented with the summary of minutes of a 2022 city council meeting (Exh. 268), and she confirmed that the document reported estimated costs. The City of Flagstaff objected to the next question, Question 8, which asked whether the minutes reflected her understanding of project costs. At oral argument, counsel for City of Flagstaff argued that the question, in essence, required Ms. Young to verify the accuracy of the information prepared by the City's real estate manager. The City of Flagstaff is correct that this question goes beyond eliciting whether information was given at a meeting. The information reported by Ms. Young was not prepared by her and would require an expert analysis. As a result, Question 8 improperly requires an expert opinion.

C. Questions That Do Not Seek Relevant Information

Q9. Inquiry about whether the witness has ever asked why Rio de Flag is not used as a surface water source.

The Navajo Nation provide no rationale that would support a finding that whether or not Ms. Young ever asked anyone for a reason that the City of Flagstaff did not currently use Rio de Flag as a surface water source would be relevant to the Navajo Nation's claims for water rights on the Navajo Reservation or would lead to the discovery of relevant information.

D. Questions About the City of Flagstaff's Future Water Supplies

The remaining questions concern the City of Flagstaff's future plans to develop water sources. The City of Flagstaff argues that the rules applicable to the deposition of Brian Hill as an expert witness in CV 6417-203 should be imposed in this case. The scope of the examination of an expert witness in a deposition is defined as that examination

necessary to “probe the groundwork” of the expert’s opinion and to demonstrate any bias or prejudice on the part of the expert. *Cervantes v. Rijlaarsdam*, 190 Ariz. 396, 949 P.2d 56 (App. 1997); *Am. Family Mut. Ins. Co v. Grant*, 222 Ariz. 507, 217 P.3d 1212 (App. 2009). At oral argument, counsel for the City of Flagstaff argued that questions outside the scope of Mr. Hill’s report should not be permitted presumably because they were not relevant to Mr. Hill’s opinions.

Unlike Mr. Hill, the Navajo Nation deposed Ms. Young as a fact witness albeit to address the factual basis of statements made by and opinions given by Mr. Hill. The general standard for the scope of discovery applies to Ms. Young, which allows for discovery relevant to the subject matter of the pending action. The standard for relevancy is broader at the discovery stage than at trial, requiring only that the information requested be “reasonably calculated to lead to the discovery of admissible evidence.” *Brown v. Superior Court In & For Maricopa Cnty.*, 137 Ariz. 327, 332, 670 P.2d 725, 730 (1983) (citation omitted); *see also Norwest Bank (Minnesota), N.A. v. Symington*, 197 Ariz. 181, 185, ¶ 15, 3 P.3d 1101, 1105 (App. 2000)(“‘[R]elevance’ for discovery purposes is quite broad, not limited to evidence that is admissible at trial but including information that may be useful solely because it reasonably may lead to admissible evidence.”) The test to be applied to the remaining questions is whether the information requested is either directly relevant or would likely to lead to relevant evidence.

Q5. Question about whether there are plans for future use of surface water from Rio de Flag.

According to counsel for the Navajo Nation, Mr. Hill disagreed that sources of water for DCMI use on the Navajo Reservation could not include surface water and represented that the City of Flagstaff has decades of experience treating the surface water. Counsel for City of Flagstaff stated that Mr. Hill was referencing treatment of water from Upper Lake Mary and not Rio de Flag so any future plans to use surface water from Rio de Flag are not relevant. Given the broad standard that attaches to discovery, the information about future plans to use or not use water from a surface water source is either relevant or likely to lead to relevant evidence given Mr. Hill’s opinion about the ability to treat surface water for DCMI use. Accordingly, Ms. Young shall answer the question about whether she is aware of any future plans to use or not use surface water from Rio de Flag. If she is affirmatively aware that there are plans to use water in Rio de Flag, Ms. Young shall describe the plans. If she is affirmatively aware that there are no plans to use water from Rio de Flag, Ms. Young shall describe the reasons that the City is not planning to use the surface water. If Ms. Young does not know whether there are any future plans to use water from Rio de Flag, no further answer is required other than a statement that to her knowledge there are no future plans to use surface water from Rio de Flag.

Q6. Inquiry about the distance from Red Gap Ranch to the City of Flagstaff.

The Red Gap Ranch is a potential source of groundwater for the City of Flagstaff. Navajo Motion at 8. Claims for water rights for the Navajo Reservation include sources of water that will require pumping and transporting. The City of Flagstaff is considering the pumping and transporting of water from Red Gap Ranch. Given that Mr. Hill focused

on the need to have a water resources master plan, stated that the City of Flagstaff is planning ways to accommodate future demand, and opined that the claimants' DCMI rates are not based on best management practices within the State of Arizona, questions directed to future planning issues that may be analogous to the water use on the Navajo Reservation may be relevant or lead to relevant evidence. Navajo Motion at 4. The physical distance from Red Gap Ranch to City of Flagstaff is a factual question, the answer to which may be within the scope of Ms. Young's duties as Flagstaff's Water Resources Manager. Ms. Young, if she knows without having to engage in new work, shall provide the distance from Red Gap Ranch to the City of Flagstaff as measured along a straight line. This question demonstrates the limitations that should be imposed on this line of questioning about the future water plans involving Red Gap Ranch. While the distance between the City and the property along a straight line requires an objective measurement, the implicit question about the distance that water would have to be pumped from Red Gap Ranch to the City of Flagstaff is a different question. The siting of a future transmission line involves a host of engineering and legal issues that would be beyond the scope of testimony that Ms. Young may provide as a fact witness.

Q11. Future demand reported to the City Council in January 2020 and reason for reporting the midpoint of eight scenarios.

According to counsel for the Navajo Nation, Mr. Hill stated that Flagstaff is reducing its demand based on gallons per capita per day due to climate change. At the January 14, 2020 meeting, Ms. Young made a planning presentation that addressed future demand based on gallons per capita per day and presented scenarios. According to counsel for the City of Flagstaff, Ms. Young summarized a report that she did not prepare, and she made no recommendation about the scenarios presented. Nevertheless, the information requested is factual because Ms. Young is not being asked to explain the basis for the information or her opinions about the information. She is being asked to relay in the deposition the information that she provided in the meeting. Thus, the only question is whether it is relevant to this case or likely to lead to relevant information. Given that Mr. Hill provided an expert opinion that included the City of Flagstaff's anticipated future demand, the information presented by Ms. Young concerning the future demand presented at the meeting is relevant to issues of credibility and bias associated with Mr. Hill's report.

Ms. Young shall answer the question with the information she provided to the City Council in January 2020. If she reported the midpoint of the eight scenarios, Ms. Young shall provide the reason for reporting the midpoint of the eight scenarios.

The Navajo Nation proposes that Ms. Young answer the remaining questions in accordance with Ariz. R. Civ. P. 31(c)(4) that provides for deposition answers to written questions. Given that there is an established procedure to deal with written questions, it will be followed in this case. Questions 5, 6, and 11 shall be asked and answered in accordance with Rule 31(c)(4) at a deposition that will occur no later than December 16, 2022. Counsel for the City of Flagstaff and Ms. Young are instructed that there may be no further discussions about the answers to the questions, and Ms. Young will answer questions 5, 6, and 11 to the best of her ability.

2. Dispositive Motions

IT IS ORDERED that oral argument on the dispositive motions due on November 21, 2022, shall be held on **February 7, 2023 at 1:30 p.m.** The oral argument will be held using the Court Connect program. Instructions for Court Connect are attached below. If you receive this Order by email, click on the red box “Join Court Connect Hearing” on the attached instructions to make an appearance. If you do not receive this Order by email, log into the Court Connect program on the internet by typing <https://tinyurl.com/specialwatermaster>. If you do not have access to the internet, you may attend telephonically using the telephone number and access code included in the instructions for Court Connect. Alternatively, you may attend telephonically using the following instructions:

Instructions for telephonic appearance:
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A copy of this order is mailed to all persons listed on the Court-approved mailing list.



Court Connect Hearing Notice for In re Navajo Nation

This hearing will be conducted through the new Court Connect program offered by the Superior Court of Arizona in Maricopa County. This new and innovative program allows Court participants to appear online, rather than in a physical courtroom. Hearings are preferably conducted by videoconference but can also be conducted by phone. Lawyers (and self-representing litigants) are responsible for distributing this notice to anyone who will be appearing on their behalf.

All participants must use the JOIN COURT CONNECT HEARING button or the dial in information below to participate.

Participants: Please follow the steps below to participate in the remote proceeding.

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Case Name: In re Navajo Nation, Contested Case No. CV6417-300

Start Date/Time: February 7, 2022 at 1:30 p.m.

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To ensure an optimal experience, please review the brief Court Connect training prior to the hearing: [Here](#)

