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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 LITTLE COLORADO RIVER  
SYSTEM AND SOURCE

CV 6417-203

ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR A  
PROTECTIVE ORDER

CONTESTED CASE NAME: *In re Hopi Reservation HSR*  
HSR INVOLVED: Hopi Reservation Hydrographic Survey Report  
DESCRIPTIVE SUMMARY: The Special Master grants in part and denies in part  
the motion for a protective order filed by the Hopi Tribe.  
NUMBER OF PAGES: 8.  
DATE OF FILING: March 30, 2017.

The Hopi Tribe filed a Motion for a Protective Order concerning personal information gathered as part of a household survey it conducted to “support the Tribe’s Little Colorado River litigation.” Household Survey of the Hopi Reservation 2005-2006 (“Survey”), p. 3. Specifically, the Hopi Tribe seeks an order authorizing the redaction of the names, birth dates, addresses, and telephone numbers of the respondents from the

1 survey data. Motion, p. 2. The Survey does not appear to have requested the birth dates  
2 or telephone numbers of the respondents. At oral argument, counsel for the Hopi Tribe  
3 clarified that the specific information to be redacted is the names and addresses of the  
4 respondents requested by the Hopi Household Questionnaire, questions 1.11 through  
5 1.16b ("Personal Identifying Information"). The Hopi Tribe also seeks an order that  
6 will limit the distribution of the remaining data to attorneys and experts involved in the  
7 litigation and restrict the use of the data to "uses that are in furtherance of this  
8 litigation". Hopi Motion, p. 2. The Navajo Nation objected to the Hopi Tribe's  
9 proposed data redaction, but agreed to have access to the data restricted to the parties'  
10 attorneys and experts, "as needed to further this litigation". Navajo Nation's Expedited  
11 Response, p. 8. No other party filed a response to the Hopi Tribe's motion. Thus, the  
12 only issue concerns whether the Personal Identifying Information may be redacted.  
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16 The court "may make any order which justice requires to protect a party or person  
17 from annoyance, embarrassment, oppression or undue burden on expense." Ariz. R.  
18 Civ. P. 26(c). At oral argument, counsel for the Hopi Tribe cited the cultural  
19 importance that the Hopi Tribe attributes to privacy as the basis of its motion to redact  
20 the Personal Identifying Information and protect the survey data. Although Rule 26(c)  
21 does not specifically refer to privacy, "such matters are implicit in the broad purpose  
22 and language of the Rule." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984).  
23 The 42 page questionnaire used to conduct the Survey includes questions concerning  
24 income, expenses, and reasons for moving on and off of the reservation. The Hopi  
25 Tribe has a valid privacy concern in connection with the production of the survey data.  
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1 The Survey was conducted, however, "to support the Tribe's Little Colorado River  
2 litigation". Survey, p. 81. Each participant received a letter from the Hopi Tribal  
3 Chairman which stated "The Hopi Tribal government values your opinions as expressed  
4 by completing this survey." Survey p. 87. The Hopi Tribe encouraged its members to  
5 participate and it made no representation that it will not use the resulting survey results  
6 to support its claims for water. A party should not be able to conduct a survey to be  
7 used in litigation and subsequently protect the underlying survey data from scrutiny.  
8 *U.S. Surgical Corp. v. Orris, Inc.*, 983 F. Supp. 963, 970 (D. Kan. 1997). Among the  
9 routes open to the Navajo Nation and other objectors to counter the survey evidence is  
10 to test the specific individual responses of the survey respondents. *Static Control*  
11 *Components, Inc. v. Lexmark Int'l, Inc.*, No. 02-571, 2007 WL 102088, at 5 (E.D. Ky.  
12 Jan. 10, 2007). The Navajo Nation will require the Personal Identifying Information to  
13 perform such testing. Accordingly, the Hopi Tribe's motion to redact the Personal  
14 Identifying Information is denied.

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18 When a party makes a discovery request for material discoverable pursuant to  
19 Rule 26(b)(1), privacy concerns may typically be satisfactorily protected by an order  
20 limiting disclosure of the information to those with a need to know for purposes of  
21 litigation. *Catrone v. Miles*, 215 Ariz. 446, 456, 160 P.3d 1204, 1214 (Ct. App. 2007).  
22 The order to protect the survey data does not pose a risk to the public health, safety or  
23 financial welfare of third parties.  
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26 **IT IS HEREBY ORDERED** that the following Protective Order shall govern the  
27 disclosure, handling, and use of documents and data as specified below.  
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1 **I. Definitions**

2 1. "Household Survey Data" is the collection of survey responses obtained  
3 from various Hopi households by Dale Whittington, Joe Cook, and Michael Hanemann  
4 for the Survey.

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6 2. "Party" includes all parties to CV 6417-203.

7 3. "Respondent" includes each individual or family of individuals who  
8 provided Household Survey Data.

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10 4. "Personal Identifying Information" means the responses to the Household  
11 Identification Information, 1.11 through 1.16b in the Hopi Household Questionnaire  
12 attached as Appendix 3 to the Survey.

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14 **II. Limitations on Use**

15 5. Disclosure of Confidential Information. Except with the prior written  
16 consent of the Hopi Tribe, Household Survey Data and Personal Identifying  
17 Information may be disclosed only to the following:

18  
19 (a) Counsel for any Party and any attorneys, paralegals, office clerks,  
20 secretaries, outside copying services and other personnel working under their  
21 supervision and assigned to perform duties in connection with the prosecution or  
22 defense of the action.

23  
24 (b) Any consultants or experts retained by any counsel of record for any  
25 Party, subject to compliance with Paragraph 6.

1 (c) Any other person whom the Hopi Tribe agrees in writing should  
2 have access to the Household Survey Data and the Personal Identifying Information,  
3 subject to compliance with Paragraph 6.

4 (d) The Court and its personnel, subject to the provisions for filing under  
5 seal set forth in the Arizona Rules of Civil Procedure and other applicable rules.  
6

7 6. Execution of Exhibit A. Prior to obtaining access to the Household Survey  
8 Data and the Personal Identifying Information, all persons described in Paragraph 5(b)  
9 and (c) above shall be shown a copy of this Protective Order and shall execute the  
10 document attached as Exhibit A. Counsel for the Hopi Tribe shall be responsible for  
11 maintaining copies of the executed Exhibit A.  
12

13 7. Disclosure of Parties' Own Confidential Information. Nothing herein shall  
14 restrict or preclude any Respondent from disclosing information contained in the  
15 Household Survey Data or the Personal Identifying Information to any person or entity  
16 without regard to the provisions of this Protective Order.  
17

18 8. Use of Confidential Information. Each Party's use of the Household Survey  
19 Data and the Personal Identifying Information is limited to purposes reasonably  
20 necessary for the effective prosecution or defense of the action.  
21

22  
23 **III. Other Provisions.**  
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25 9. Non-Waiver of Rights. Entering into and complying with the terms of this  
26 Protective Order shall not constitute a waiver of any rights to object to discovery or to  
27

1 the authenticity or admissibility into evidence of any documents or other materials  
2 produced in discovery. Neither the production of the Household Survey Data or the  
3 Personal Identifying Information by the Hopi Tribe, nor the receipt of the Household  
4 Survey Data and the Personal Identifying Information by a Party, shall be deemed to  
5 waive any testimonial or other privileges or protections that the Hopi Tribe may  
6 otherwise have.  
7

8 10. Additional Parties. Any additional Party who joins or is joined in this  
9 action shall not have access to the Household Survey Data or the Personal Identifying  
10 Information until its counsel of record has executed and filed with the Court its  
11 agreement to this Protective Order.  
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13 11. Conclusion of Action. Unless otherwise agreed in writing or ordered, all  
14 provisions of this Protective Order shall continue to be binding after the conclusion of  
15 this action. The Court shall retain jurisdiction over all Parties bound hereby for  
16 purposes of this Protective Order and may impose appropriate sanctions for violation  
17 of this Protective Order.  
18

19 12. Return of Confidential Information. Upon conclusion of the action,  
20 including appeals, any Party in the possession of the Household Survey Data or the  
21 Personal Identifying Information shall provide for the return or destruction of the  
22 Household Survey Data and the Personal Identifying Information.  
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24 13. Modification by Court Order. This Order may be amended only by order  
25 of the Court, whether upon stipulation, motion, or upon the Court's own order.  
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1 DATED: March 30, 2017.

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4 Susan Ward Harris  
5 Special Master  
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8 On March 30, 2017 the original of the foregoing  
9 was mailed to the Clerk of the Apache County  
10 Superior Court for filing and distributing a copy  
11 to all persons listed on the Court approved  
12 mailing list for the Little Colorado River  
13 Adjudication Civil No. 6417-203.  
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**EXHIBIT A**

**Agreement to Terms of the Protective Order**

**FORM OF ACKNOWLEDGEMENT:**

I, \_\_\_\_\_, being a person authorized in this Protective Order to have access to documents and information covered by the Protective Order, have read and understood this Protective Order, and hereby agree to be bound by this Protective Order.

s/ \_\_\_\_\_

Date: \_\_\_\_\_

Print name: \_\_\_\_\_