

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

07/18/2018

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

S. Brown
Deputy Clerk

FILED: 8/8/2018

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

In re: Hopi Reservation HSR
Contested Case No. CV6417-203

In re: Oral Argument

MINUTE ENTRY

Courtroom: CCB 301

12:59 p.m. This is the time set for oral argument before Special Master Susan Ward Harris on objections filed by Paul H. and Florence A. Anspach and Melvin and Nancy Hatley.

The following attorneys appear in person: on behalf of the Navajo Nation; Mark McGinnis, Jeffrey Heilman, and John Weldon, Jr. on behalf of SRP; Colin Campbell, Phillip Londen and Grace Rebling on behalf of the Hopi Tribe; David Brown, Lauren Caster, Bradley Pew, and Brian Heiserman for the LCR Coalition; Carrie Brennan on behalf of Arizona State Land Department; and Vanessa Willard on behalf of the United States.

The following attorneys appear telephonically: Stanley Pollack and Rodgerick Begay on behalf of the Navajo Nation; Joe Sparks (observing) on behalf of the San Carlos Apache Tribe and Tonto Apache Tribe; Cody McBride on behalf of the United States; Kimberly Parks on behalf of ADWR; Jay Tomkus on behalf of Pascua Yaqui Tribe and Yavapai-Apache Nation; Megan Tracy on behalf of APS; and Albert Brown on behalf of the LCR Coalition. Paul and Florence Anspach are neither present nor represented by counsel. Melvin and Nancy Hatley are neither present nor represented by counsel.

Court reporter, Scott Kindle is present and a record of the proceedings is also made digitally.

The Court will give the Anspachs or Hatleys additional time to appear.

1:03 p.m. Court stands at recess.

1:29 p.m. This is the time set for oral argument on the United States' Motion for Summary Judgment; LCR's Motion for Partial Summary Judgment, Navajo Nation's Motion to Strike; and a number of Motions in Limine. Court reconvenes with respective counsel present. Jeffrey Leonard, Kathryn Hoover, Judith Dworkin, and Evan Hiller are present on behalf of the Navajo Nation; Lee Storey, Alex Arboleda, and Erin Byrnes are present on behalf of the City of Flagstaff; Jay Brown is present telephonically on behalf of LCR Coalition.

Court reporter, Scott Kindle is present and a record of the proceedings is also made digitally.

LET THE RECORD REFLECT the Anspachs and Hatleys were given 30 minutes to appear and present argument on their objections, and there has been no appearance made.

The Court notes receipt of the Hopi Nation's Motion to Restructure Future Water Rights Trial and the Navajo Nation's Motion to Designate Issues of Attributes Necessary to Quantify Priority, Enforcement, and Administration of Federal Reserved Reserve Water Rights on Indian Reservations as an Issue of Broad Legal Importance.

IT IS ORDERED setting Oral Argument on both motions on **August 1, 2018 at 1:30 p.m.**

Mr. Campbell requests that any motions or proposals to continue the future use trial be filed by August 1, 2018. Discussion is held regarding the scheduling of depositions.

Arguments are presented on the United States' Motion for Summary Judgment; LCR's Motion for Partial Summary Judgment, and Motions in Limine.

2:59 p.m. Court stands at recess.

3:15 p.m. Court reconvenes with the parties and respective counsel present.

Court reporter, Scott Kindle is present and a record of the proceedings is also made digitally.

Argument continues.

The City of Flagstaff requests time to file a joinder to the Navajo Nations Motion to Strike the Hopi and United States' fifth amended Statements of Claimant.

IT IS ORDERED the City shall file its joinder by July 23, 2018.

Mr. McGinnis addresses the response and reply deadlines to the Hopi and Navajo motions.

Argument is presented on the Navajo Nation's Motion in Limine #4 regarding depositions.

IT IS ORDERED vacating the oral argument date previously set on the Hopi and Navajo motions. The Court will set new response and reply times in accordance with pretrial orders, and a new date for oral argument will be scheduled.

On the parties' agreement,

The Court will rule on all remaining motions in limine and the Navajo Nation's Motion to Strike without argument.

IT IS ORDERED taking these matters under advisement.

4:45 p.m. Matter concludes.

LATER:

Motions in Limine

1. Flagstaff's Motion in Limine to Preclude Evidence Referring to a "Comfortable Homeland"

The City of Flagstaff moved to preclude the admission of any evidence in the case or legal argument that implies that the applicable legal standard for determining federal reserved water rights is one which provides a "comfortable homeland". The Arizona State Land Department joined in the motion. The apparent motivation for the motion stems from a report and the testimony of Dr. Hanemann. As shown by the February 19, 2018 deposition transcript attached to both the motion and the response, Dr. Hanemann appeared to understand the applicable standard adopted by the *Gila V* court. The Hopi Tribe argues that Dr. Hanemann used the term "comfortable" as a shorthand expression for the appropriate legal standard.

The Arizona Supreme Court determined that "the essential purpose of Indian reservations is to provide Native American people with a 'permanent home and abiding place,' (citation omitted) that is, a 'livable' environment." *In re the General Adjudication*

of All Rights to Use Water in the Gila River System and Source, 201 Ariz. 307, 313, ¶16, 35 P.3d 68, 74 (2001) (“*Gila V*”). Thus, the correct standard to quantify federal reserved water rights is a livable, permanent homeland. To the extent the purpose of the motion is to preclude testimony at trial that literally uses the term a “comfortable homeland” as opposed to a “livable homeland” or “permanent homeland,” the motion is granted. The witnesses and the parties are instructed to apply the correct standard during the course of the trial and in post-trial pleadings.

The granting of this motion shall not be read more broadly as a determination that Dr. Hanemann intended to apply a different standard than the standard set by the *Gila V* court. Any ruling regarding the prior testimony of Dr. Hanemann or exhibits offered into evidence that include the word “comfortable homeland” will await objections made at trial.

2. LCR Coalition’s Motions in Limine to Exclude Testimony and Other Evidence Offered to Support a Reconsideration of Prior Rulings and to Exclude Testimony and Other Evidence Relating to Tribal Presence and Water Use Outside the Hopi Reservation

The LCR Coalition, joined by the Arizona State Land Department, moves in response to pleadings filed by the United States to exclude evidence that it perceives as designed to challenge legal conclusions already determined during the course of the proceedings undertaken to define the Hopi Tribe’s water rights. The Hopi Tribe counters that the motion is premature because the references made by the LCR Coalition to the United States’ positions are questions of law that are currently pending.

Due to a number of circumstances, the Hopi Tribe’s claims for water rights have been litigated over a number of years and in discrete phases. Beginning in 2008, the parties engaged in a significant amount of work under the case name **In re Hopi Tribe Priority, Case No. CV 6417-201** to litigate the legal and factual issues related to the priority dates that attach to the Hopi Tribe’s claims for water rights. The court has determined the following legal issues:

The 1934 Act provided federal reserved water rights for the use of the Hopi Indians residing in Moenkopi Island.

The priority date for federal reserved water rights for Moenkopi Island is June 14, 1934.

The priority date of the Hopi Tribe’s federal reserved water rights for the Hopi Partitioned Lands owned by the federal government on December 16, 1882 is December 16, 1882.

Aboriginal title does not extend the priority date that attaches to federal reserved water rights based on the 1882 Executive Order and the 1934 Act to time immemorial.

The Hopi Tribe's aboriginal title was extinguished for all land within the reservation created by the 1882 Executive Order except as to that land in Land Management District 6.

Minute Entry, filed January 25, 2016 at 2-3; Order Denying the Hopi Tribe's Motion for Reconsideration, filed August 18, 2017 at 5, 8.

The Hopi Tribe also contends that ruling on the LCR's motion would constitute a "broad preclusive ruling" akin to the ruling sought in *Hanley v. Warburg Pincus Capital Co., L.P.*, No. CV-96-390-TUC-FRZ, 2005 WL 6295802 (D. Ariz. Dec. 7, 2005). In the *Hanley* case, the court denied a motion to exclude "evidence of information unknown or unknowable" to mining officials because a critical factual issue existed for the jury as to whether information was known or knowable at a certain time. Here, the evidence sought to be excluded concerns legal issues that have been decided.

The LCR Coalition is correct that evidence should not be introduced during the trial on past and present uses for the purpose of relitigating legal conclusions based on the complete record developed in **In re Hopi Tribe Priority, Case No. CV 6417-201**. Thus, the motion is granted as to evidence for which the sole purpose it is offered is to relitigate legal issues already resolved. The admissibility and the relevance of evidence offered at trial for dual purposes will be determined at trial where it can be evaluated in the context of the Hopi Tribe's case.

The LCR Coalition filed a second motion in limine, also joined by the Arizona State Land Department, to preclude evidence regarding the Hopi Tribe's historical uses of water located beyond the boundaries of the Hopi Tribe's reservation because the Hopi Reservation HSR focused on water uses within the reservation boundaries. Given that the purpose of this portion of the trial includes making factual findings about the Hopi Tribe's past water use, evidence about historical use of water on lands surrounding the present day reservation boundaries may be relevant. Thus, the motion in limine is denied.

In determining whether any such offered evidence is relevant and not needlessly cumulative, consideration will be given to the substantial historical evidence that has already been submitted in the course of the litigation of the Hopi Tribe's historical water use. The court has adopted findings of fact concerning the Hopi Tribe's historical land and water use practices as follows:

Finding of Fact No. 1. The Hopi used their aboriginal lands for villages, farming for food, farming cotton, making textiles for use and trade, making pottery for use and trade, herding, and coal mining, with an economy that changed as new activities and crops were introduced. 210 F. Supp. At 134; E. Charles Adams, Ph.D., *Hopi Use and Development of Water Resources in the Little*

Colorado River Drainage Basin of Arizona: An Archeological Perspective to 1700, 90-105 (March 2009); J. O. Brew, *Hopi Prehistory and History to 1850* (“Coal Mining”), 9 *Handbook of North American Indians* 517-19 (William C. Sturtevant and Alfonso Ortiz, eds., Smithsonian Inst. 1979); Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 8, 10, 14-15, 18-21 (March 2009); Charles R. Cutter, Ph.D., *Documentary Evidence for Hopi Agriculture and Water Use in the Spanish and Mexican Periods*, 9-10 (March 30, 2009).

Finding of Fact No. 2. The Hopi’s extensive use of its water and land was noted by the earliest Spanish explorers and later visitors from Coronado’s expedition in 1540 forward. Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 11-12, 14 (March 2009).

Finding of Fact No. 3. “In the sixteenth century, Hopi seems to have been the principal supplier of cotton for the indigenous Southwest and perhaps beyond: ‘From all accounts Hopiland was supplying Zuni and the Rio Grande towns with woven cloth and also some cotton fiber, a practice which has continued until the present time.’” Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 13 (March 2009).

Finding of Fact No. 4. The Puebloan people that comprise the Hopi Tribe have lived in the Little Colorado River Basin for centuries and were well-established in the Basin at the time of European contact. Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 1-4 (March 2009); Hana Samek Norton, Ph.D., *The Establishment of the Hopi Reservation and Hopi Agricultural Developments, 1848-1935*, 3 (March 30, 2009).

Finding of Fact No. 5. The Hopi are credited with farming techniques that were specialized to growing crops in an arid climate like the Little Colorado River Watershed. T. J. Ferguson, Ph.D., *Hopi Agriculture and Water Use*, 18 (March 2009); Hana Samek Norton, Ph.D., *The Establishment of the Hopi Reservation and Hopi Agricultural Developments, 1848-1935*, 4-9 (March 30, 2009).

Finding of Fact No. 6. In addition to farming, the Hopi utilized springs and other water sources to support livestock. T. J. Ferguson, Ph.D., *Hopi Agriculture and Water Use*, 195-97 (March 2009); Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 42-43 (March 2009).

Report of the Special Master filed April 24, 2013, approved by Minute Entry, filed January 25, 2016 at 2.

Additional historical information offered in support of past uses should focus on the quantification of specific historical uses.

3. Navajo Nation's Motion in Limine No. 3

The Navajo Nation has generally moved for a determination that all expert reports, including those created for **In re Hopi Tribe Priority**, that have been identified by the Hopi Tribe (presumably in its disclosure statements) should be excluded from the trial on past and present uses as not relevant. The mere fact that the expert reports may have been prepared for **In re Hopi Tribe Priority** does not make them *per se* irrelevant to this proceeding.

Evidence in this phase of the case is relevant if it has any tendency to make the past and present uses claimed by the United States on behalf of the Hopi Tribe or by the Hopi Tribe more probable than would be the case without the evidence and it is of consequence to deciding the issue in dispute. Rule 401, Ariz. R. Evid. "This standard of relevance is not particularly high." *State v. Oliver*, 158 Ariz. 22, 28, 760 P.2d 1071, 1077 (1988). Given that the Navajo Tribe has not identified any specific report or portions of a specific report that it seeks to exclude as not relevant, no determination can be made with respect to relevance.

The Navajo Nation also seeks to exclude reports as hearsay. A report prepared by a party's testifying expert made in anticipation of litigation constitutes "classic" hearsay because it represents an "out of court declaration offered for its truth." *Arizona, Dep't of Law, Civil Rights Div. v. ASARCO, L.L.C.*, 844 F. Supp. 2d 957, 965 (D. Ariz. 2011), *aff'd sub nom. Arizona v. Asarco LLC*, 543 F. App'x 702 (9th Cir. 2013), *adhered to on reh'g en banc*, 773 F.3d 1050 (9th Cir. 2014), and *aff'd sub nom. Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014). Although excerpts from a report prepared by a testifying expert may be admissible under the Rules of Evidence, as discussed by the federal district court there are few exceptions to the hearsay rule available that would permit the admission of the entire report of a testifying expert. *Id.* In the absence, however, of any specificity by the Navajo Nation of the reports it seeks to exclude, the motion is denied. Rulings will be made at trial to specific objections made to specific reports.

A copy of this order is mailed to all persons listed on the Court approved mailing list.