

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

CV 6417-203

ORDER GRANTING IN PART AND  
DENYING IN PART THE NAVAJO  
NATION'S MOTION TO AMEND THE  
CASE MANAGEMENT ORDER

CONTESTED CASE NAME: *In re Hopi Reservation HSR*

HSR INVOLVED: *Hopi Reservation*

DESCRIPTIVE SUMMARY: The Special Master amends the Case Management Order and sets a status hearing to evaluate information provided in expert reports to identify claimed water rights.

NUMBER OF PAGES: 7

DATE OF FILING: November 21, 2016.

The Navajo Nation filed a motion requesting four amendments to the Case Management Order dated August 25, 2016.

1. Deadline extension. Currently, section 6(A) of the Case Management Order requires that the Hopi Tribe and the United States on behalf of the Hopi Tribe file their respective Disclosure Statements under Rule 26.1, Arizona Rules for Civil Procedure with

1 respect to past and present claims for water uses on the Hopi Reservation on or before January  
2 23, 2017. Section 8 of the Case Management Order requires that the parties shall produce  
3 their respective expert reports on the dates set for filing Disclosure Statements. All other  
4 parties (collectively referred to as the “Objecting Parties”) shall file their initial Disclosure  
5 Statements and expert reports on or before May 1, 2017. The Navajo Nation requested an  
6 extension of the deadline to July 14, 2017, to file its initial Disclosure Statement and expert  
7 reports. No party objected to the proposed extension.  
8

9 2. Disclosure of Prior Expert Reports. The Navajo Nation moved for an order  
10 requiring that all parties shall produce all reports prepared by their respective experts in the  
11 past five years. The United States and the LCR Coalition objected to the proposed amendment  
12 to the Case Management Order. At the hearing, the parties who participated in the proceeding  
13 subsequently agreed to revised terms to define the expert reports to be produced and no party  
14 raised any additional objections.  
15

16 3. Rebuttal Reports. The Navajo Nation requested that the United States and the  
17 Hopi Tribe file rebuttal expert reports. The United States agreed to the request, which the  
18 Hopi Tribe joined, provided that sufficient time was permitted to review the expert reports  
19 produced by the Objecting Parties and engage in further discovery. The United States  
20 submitted a timeline for the submission of rebuttal reports and the conclusion of discovery.  
21 No party objected to the United States’ proposed schedule.  
22

23 4. Attributes of Claimed Water Rights. The Navajo Nation asked that the expert  
24 reports filed by the United States and the Hopi Tribe be required to include for each claim,  
25 other than claims for *de minimis* use, the following basic information: source of water; point  
26 of diversion; location of use; flow rates at place of diversion; and timing of use during the  
27 water year (October 1st through September 30<sup>th</sup>). In its response, the LCR Coalition also  
28

1 requested that the expert reports include priority dates and the water sources subject to federal  
2 court partition in *Masayesva v. Zah*, 816 F. Supp. 1387 (D. Ariz. 1992), *aff'd in part and*  
3 *rev'd in part on other grounds* 65 F.3<sup>rd</sup> 1445 (9<sup>th</sup> Cir. 1995), *cert denied*, 517 U.S. 1168  
4 (1996).

5 The United States responded that federal law governs the standard and level of detail  
6 that the United States and the Hopi Tribe must meet with respect to their federal reserved  
7 water claims citing *San Carlos Apache Tribe v. Superior Court*, 144 Ariz. 265, 278, 697 P.2d  
8 658, 671 (1985). In that case, the court addressed the statutory requirements for a statement  
9 of claimant in response to the assertion by the United States, the San Carlos Apache Tribe  
10 and the Tonto Apache Tribe that “federal *Winters* rights claimants do not have access to some  
11 of the information required by the statute.” *Id.*

12 The purpose of this contested case is to conduct a hearing and receive the testimony  
13 “necessary to determine the relative water rights of each claimant.” A.R.S. §45-257.  
14 Adjudicated water rights should provide certainty and permit enforcement; little will be  
15 gained by decreeing ill-defined water rights. Federal reserved water rights have been defined  
16 in very specific detail to accomplish these goals. *See, e.g., U.S. v. Cappaert*, 508 F. 2d 313,  
17 322 (1974) (“We affirm the decision of the District Court. The District Court held the water  
18 level should be maintained at 3.0 feet below the copper washer in order to preserve the  
19 pupfish in the Devil's Hole pool.”) In this state adjudication, federal substantive law will be  
20 applied to determine water rights asserted under federal law and “[w]here the state law  
21 conflicts, it must give way”. *San Carlos Apache Tribe*, 144 Ariz. at 279, 697 P.2d at 670.  
22 Where state law does not conflict, however, state law will be applied. 144 Ariz. at 278, 697  
23 P.2d at 669.  
24  
25  
26  
27  
28



1 The United States represented that its expert reports will provide all of the information  
2 developed in support of its claims. It urges that no action be taken until the actual expert  
3 reports are issued, arguing that to do otherwise would be to act in a vacuum. Given the  
4 relatively short period of time until the expert reports and Disclosure Statements are to be  
5 provided, the United States' proposal has merit. A more discrete approach can be fashioned  
6 after the United States and the Hopi Tribe produce their required documents to address  
7 deficiencies identified by the Objecting Parties. Accordingly, no additional instructions will  
8 be mandated with respect to the description of the water claims except as set forth below.  
9

10 For the reasons set forth above,

11  
12 **IT IS ORDERED** granting the Navajo Nation's motion to extend the deadline for the  
13 filing of expert reports. The deadline set in section 6(B) of the Case Management Order for  
14 the filing of Disclosure Statements by the Objecting Parties shall be extended. All parties,  
15 other than the Hopi Tribe and the United States acting on behalf of the Hopi Tribe, shall file  
16 their Disclosure Statements and expert reports regarding claims based on past and present  
17 water uses by **July 14, 2017**.  
18

19 **IT IS FURTHER ORDERED** that Sections 8, 9 and 10 of the Case Management  
20 Order shall be amended as follows:

21  
22 8. Expert Reports.

23 A. All parties shall produce expert reports relevant to claims for past and present  
24 water uses on the dates set for Disclosure Statements for past and present water  
25 uses.

26 B. All parties shall produce expert reports relevant to claims based on future water  
27 uses on the dates set for Disclosure Statements for future water uses.  
28

1 C. The expert reports or Disclosure Statements accompanying the expert reports  
2 shall identify: (i) the legal basis of each claim as aboriginal water right, federal  
3 reserved water right or state water right; and, (ii) the water sources subject to  
4 federal court partition in *Masayesva v. Zah*, 816 F. Supp. 1387 (D. Ariz. 1992),  
5 *supra*.

6 D. All parties producing an expert report shall disclose all documents relied upon by  
7 the expert, including an electronic version of any computational model used by  
8 the experts with input and output files.

9 E. All parties shall produce those reports prepared by their respective experts in  
10 addition to those produced under (A) or (B) above for which the expert was  
11 identified in a court proceeding as an expert whose opinions may be presented at  
12 trial with respect to the report provided that: (i) the report was filed in the court  
13 proceeding and the submission was not under seal; (ii) the report dealt with a  
14 topic or field substantially similar to the topic or field of the report produced  
15 under (A) or (B); and, (iii) the report was filed with a court no earlier than  
16 November 1, 2006.

17 F. The United States on behalf of the Hopi Tribe and the Hopi Tribe shall submit  
18 rebuttal expert reports on or before **September 22, 2017**.

19 9. Discovery.

20 A. Past and Present Water Uses. All discovery including depositions shall be  
21 completed by **January 31, 2018**.

22 B. Future Water Uses. All discovery including depositions shall be completed by  
23 **May 25, 2018**.

24 C. All discovery related to the designated issues shall be conducted according to  
25  
26  
27  
28

1 Arizona Rules of Civil Procedure 26 through 37, and as applicable, pretrial orders issued in  
2 this adjudication and the Rules for Proceedings Before the Special Master.

3 10. Motions. On or before **March 30, 2018**, any party in this case may file a motion  
4 or motions that present the party's position concerning issues related to past and present water  
5 uses. On or before **August 1, 2018**, any party in this case may file a motion or motions that  
6 present the party's position concerning issues related to future water uses.  
7

8 **IT IS FURTHER ORDERED** denying the Navajo Nation's motion requesting that  
9 certain, specified water right attributes be included in the expert reports at this time based on  
10 the representations made by the United States and a desire to avoid any delay in the timely  
11 production of the expert reports. By **February 8, 2017**, the Objecting Parties shall file a  
12 Statement that specifically identifies deficiencies in water attributes for water claims listed in  
13 the expert reports or Disclosure Statements. The failure to file a Statement or a failure to list  
14 a deficiency shall not constitute a waiver of any objection to the expert reports or disclosure  
15 statement. The sole purpose of the Statement is to quickly identify potential issues with the  
16 designation of water attributes so that the necessary action can be implemented. The Hopi  
17 Tribe and the United States shall file a Response to the Statements on or by **February 22,**  
18 **2017**, with proposed resolutions and identifying, but not arguing, any legal issues that must be  
19 resolved with respect to the identification of the water rights.  
20  
21

22  
23 **IT IS FURTHER ORDERED** setting a status conference to determine the proceedings  
24 necessary to resolve issues presented by either the Statements or the Responses, including a  
25 briefing schedule to address the legal questions, if any, presented in the Responses. The  
26 status hearing shall be held on **March 1, 2017**, at 10:00 a.m. in the Superior Court of Arizona,  
27  
28

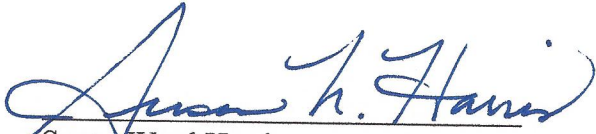


1 Central Court Building, Courtroom 301, 201 West Jefferson Street, Phoenix, AZ, 85003-  
2 2202.

3  
4 Instructions for telephonic participation:

- 5 1. Dial 1 602-506-9695 (toll free number)  
6 2. Dial Participant Pass Code 163622# (pound)

7 DATED: November 21, 2016.  
8

9  
10  
11   
12 Susan Ward Harris  
13 Special Master  
14  
15  
16

17 On November 21, 2016, the original of the foregoing  
18 was mailed to the Clerk of the Apache County  
19 Superior Court for filing and distributing a copy to all  
20 persons listed on the Court approved mailing list for  
21 the Little Colorado River Adjudication Civil No. 6417-  
22 203.  
23  
24  
25  
26  
27  
28