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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF APACHE
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10 IN RE THE GENERAL ADJUDICATION
11 OF ALL RIGHTS TO USE WATER IN
12 THE LITTLE COLORADO RIVER
13 SYSTEM AND SOURCE
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Civil Case No. CV6417-300

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

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17 CONTESTED CASE NAME: *In re Navajo Nation*

18 HSR INVOLVED: Navajo Reservation Hydrographic Survey Report.

19 DESCRIPTIVE SUMMARY: Salt River Project's Motions *In Limine* And To Strike
20 Supplemental Report by Dr. Gretchen Greene are denied.

21 NUMBER OF PAGES: 5

22 DATE OF FILING: October 4, 2022
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25 This Order addresses the fifth report prepared by Dr. Greene that estimates the future
26 population of the Navajo Nation on the Navajo Reservation. This report was prepared more
27 than two months after the April 30, 2022 deadline for filing expert reports set by the Case
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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.

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.

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,
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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:

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).

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

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

22 Salt River Project also moves under Rule 7.2 for an order precluding the admission of
23 the report as evidence. Salt River Project argues that the United States, by attaching the
24 supplemental report to the U.S. Motion to Amend, effectively moved to admit untimely
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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.
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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.
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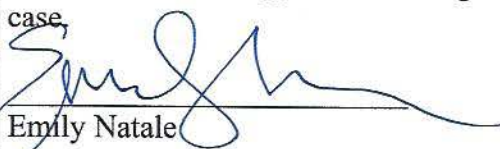
23 This decision denying SRP's motions is based on narrow, procedural grounds. It should
24 not be read to imply or suggest that reasons exist that will permit the admission of any part of
25 the report into evidence. If the Navajo Nation later moves to admit portions of the report into
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1 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.

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9 Susan Ward Harris
10 Special Master

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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,

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18 Emily Natale
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