

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

8/31/17

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

L. Stogsdill

Deputy

FILED: September 13, 2017

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

CV 6417

In re: Oral Argument Re: Hopi Tribe's Motion to
Perpetuate Testimony and Admit Reports &
Request for Appointment of a Steering Committee

Re: Hopi Reservation HSR
Contested Case No. CV6417-203
Re: Navajo Nation
Contested Case No. CV6417-300

MINUTE ENTRY

Courtroom 301- CCB

1:00 p.m. This is the time set for Oral Arguments before Special Master Susan Ward Harris on the Hopi Tribe's Motions to Perpetuate Testimony and Request to Appoint a Steering Committee.

The following attorneys appear in person: Gregory L. Adams and Lauren J. Caster on behalf of the LCR Coalition; Carrie J. Brennan on behalf of the Arizona Attorney General's Office; Jaclyn D. Foutz and Alexandra Arboleda on behalf of the City of Flagstaff; Kathryn M. Hoover, Jeffrey S. Leonard, Judith M. Dworkin and Scott B. McElroy on behalf of the Navajo Nation; Jenny Winkler on behalf of APS; John Weldon and Mark A. McGinnis on behalf of the Salt River Project; Monique Coady on behalf of the City of Phoenix and Colin F. Campbell and Jana Sutton on behalf of the Hopi Tribe

The following attorneys appear telephonically: David A. Brown on behalf of the LCR Coalition; Cody L.C. McBride and Vanessa Boyd Willard on behalf of the U.S. Department of Justice; Janet L Miller on behalf of the Arizona Department of Water Resources; Susan B. Montgomery on behalf of the Pascua Yaqui Tribe and Yavapai-Apache

Nation; Stanley M. Pollack on behalf of the Navajo Nation Department of Justice; Christina C. Sheehan on behalf of the Atkinson Trading Company, Inc. and Joe P. Sparks on behalf of the San Carlos Apache Tribe and Tonto Apache Tribe.

Court reporter Lori Thielmann is present. A record of the proceedings is also made digitally.

Counsel for LCR Coalition outlines its position with regard to the pending motion to preserve testimony arguing that the Hopi Tribe did not comply with Rule 27(a). With regard to the admission of expert reports, counsel advises the court that there is no objection that the reports be marked as exhibits during a deposition but the fact that deposition is marked as an exhibit does not mean that it should be admitted into evidence at trial for the truth of the matter asserted.

Oral argument is presented by counsel on behalf of the Hopi Tribe regarding the preservation of testimony. Counsel further advises the court of concern regarding preserving testimony of its expert witnesses, some of whom are 65 years or older, because the loss of an expert witness will result in the additional expense of hiring a new expert witness and potential requests for additional extensions of time to complete discovery. Counsel is not seeking to preserve testimony of lay witnesses in *In re Hopi Reservation HSR*. Counsel also argued that expert reports should be admitted into evidence at trial, as opposed to the live experts' testimony, as being a more efficient way to proceed with trial in this matter.

Counsel for the Navajo Nation argued that depositions to preserve testimony of expert witnesses should not occur in advance of the presentation of the experts' reports. Also voices concern regarding the age of some of the potential expert witnesses and issues regarding use of deposition transcripts in substitution of live expert testimony during trial. Counsel for the Navajo Nation joined with Hopi Tribe's counsel that generally expert reports should be admissible, but does not believe that question should be considered at this time because there may be issues such as trustworthiness of reports that should be considered after discovery.

Counsel for Hopi Tribe argues its position with regard to the appointment of a steering committee. Counsel for LCR Coalition and the Arizona State Land Department disagree that a steering committee should or needs to be appointed and argued the meet and confer process should suffice to address the issues raised by the Hopi Tribe concerning discovery and pre-trial issues.

Further discussion is held.

The court requests that counsel for the Hopi tribe draft a proposed procedure for circulation among the parties regarding the issues which have been discussed.

For the reasons stated on the record,

IT IS ORDERED as follows:

Counsel will meet and confer regarding deposition procedures and other pre-trial procedural matters such as numbering of exhibits that the parties deem necessary, and counsel for the Hopi Tribe will file the proposed procedures with the court by **November 1, 2017**;

Responses to the Hopi Tribe's proposed procedures will be filed by **November 17, 2017**. Oral argument on the proposed procedures will be set on **November 29, 2017**.

Counsel for Navajo Nation and LCR Coalition agree that they will provide to counsel for the United States and the Hopi Tribe a non-binding list of proposed experts by **September 15, 2017**.

The court advises counsel that a pre-trial conference will be set 4-6 months prior to the trial date to address issues such as exhibits, motions in limine, and joint pre-trial statements.

2:04 p.m. Matter concludes.

LATER:

Motion to Perpetuate Testimony and Admit Expert Reports

In *In re Hopi Reservation HSR*, the Hopi Tribe seeks to perpetuate testimony of its expert witnesses concerning future water uses due to a concern that its experts may not be available due to retirement or death. Under the current iteration of the discovery schedule, the Hopi Tribe must produce all of its expert reports for future claims by December 15, 2017. Given that a discovery schedule and a trial date currently exist, this motion is essentially a request to modify the discovery schedule to accelerate the depositions of the Hopi Tribe's experts to a date before the objectors have had a full opportunity to consult with their experts and review the rebuttal reports from the Hopi Tribe's experts. While an unexpected loss of an expert witness does impose a cost on a party, all parties in this case are subject to the same risk. The objectors, however, are entitled to adequate time to prepare for the depositions of the Hopi Tribe's experts. Accordingly, the Hopi Tribe's motion with respect to its experts for future use is denied.

The Hopi Tribe also moved to perpetuate testimony with respect to *In re Navajo Nation*. At this point, the Navajo Nation is still in the process of filing their claims which must be analyzed by the Arizona Department of Water Resources (ADWR). Those claims will be subject of a report required to be widely distributed in the adjudication. The request does not comply with either the Rule §9.08[7] of the Rules for Proceedings before the Special Master, Arizona Stream Adjudication nor with Ariz. R. Civ. Pro. 27. The Hopi Tribe urges the adoption of a procedural order similar to Pre-trial Order No. 2 issued in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*.

It is not clear that Pre-trial Order No. 2 was intended to preserve the testimony of expert witnesses. As this request is being made in a specific case, the better approach is to consider specific situations and tailor a response to those facts and circumstances. Consideration of such a potential request will take into account whether the same testimony can be provided by another expert at a later date, the burden imposed on the parties to prepare for depositions of experts concerning claims that have not yet been filed and not analyzed by ADWR, and the prejudice to potential parties who may subsequently file objections to ADWR's report.

Finally, the Hopi Tribe seeks a ruling that all of its expert reports shall be admitted into evidence at trial. At oral argument, counsel for the Hopi Tribe argued that a ruling to the contrary would unnecessarily prolong the trial. Counsel's point is well taken and will be taken into consideration at the pre-trial conference after discovery is complete and the parties are prepared to address procedures to be adopted for the trial and motions in limine to be filed. Accordingly, at this time, the Hopi Tribe's motion to generally admit all of its expert reports into evidence is denied.

Motion to Appoint a Steering Committee

The steering committee in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source* was created for the purpose of providing recommendations concerning issues that affect the entire adjudication. The Hopi Tribe's and the Navajo Nation's requests for appointment of a steering committee each pertain to a single case rather than to the Little Colorado Adjudication in its entirety. No steering committee has been appointed to date in the Little Colorado River Adjudication. Pre-Trial Order No. 1 in the Little Colorado River Adjudication, unlike Pre-Trial Order No. 1 in the Gila River Adjudication, does not reference a steering committee. While it may be appropriate at some point to consider the adoption of steering committee procedure in the Little Colorado Adjudication, the goals of the Hopi Tribe and the Navajo Nation for their individual cases can be accomplished by the parties' efforts to meet and confer on procedural issues and the court's active management of the litigation. Thus, the Hopi Tribe's request for appointment of a Steering Committee in *In Re Hopi Reservation HSR* and the Navajo Nation's request for appointment of a Steering Committee in *In re Navajo* are denied.

Oral argument on the procedures proposed by the Hopi Tribe shall be heard on **November 29, 2017, at 1:30 p.m.** in Maricopa County Superior Court, Courtroom 301, Central Court Building, 201 West Jefferson Street, Phoenix, Arizona 85003.

Instructions for telephonic participation.

Dial: 602-506-9695 (local)

1-855-506-9695 (toll free long distance)

Dial Participant Pass Code 357264#

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