

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

1/21/2021

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Parmar

Deputy

FILED: January 27, 2021

In re Hopi Reservation HSR
Contested Case No. 6417-203

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

In re: Trial to Court

MINUTE ENTRY

TRIAL TO COURT DAY 49

Courtroom: CCB 301

9:01 a.m. Trial to the Court continues from January 20, 2021.

The following attorneys and parties appear via GoToMeeting:

- Colin Campbell, Grace Rebling, Phillip Londen, Payslie Bowman and Frederick Lomayesva for the Hopi Tribe
- Vanessa Boyd Willard, Cody McBride, Emmi Blades, and Rebecca Ross for the United States Department of Justice, Indian Resources Section
- Sarah Foley for the United States Department of the Interior
- Brian J. Heiserman, David A. Brown, Lauren J. Caster, Bradley J. Pew for LCR Coalition
- Mark A. McGinnis for the Salt River Project
- Carrie J. Brennan and Kevin Crestin for the Arizona State Land Department
- Lee A. Storey, Sara Ransom, Alexandra Arboleda, and Ethan B. Minkin for the City of Flagstaff
- Jeffrey S. Leonard, Judith M. Dworkin, Evan F. Hiller, and Kathryn Hoover for the Navajo Nation

Court Reporter, Diane Donoho, is present. A record of the proceedings is also made digitally.

Discussion is held regarding the City of Flagstaff's Motion for Reconsideration/Clarification filed on January 20, 2021.

IT IS ORDERED denying the Motion for Reconsideration. The Court will address the motion for clarification more fully by minute entry.

Witness, Brian Richards, is sworn and testifies.

LCRC's exhibits 1056, 1057, 1061 and 1063 are received in evidence.

The Hopi Tribe's exhibits 4132 through 4140, 4142 and 4143 are received in evidence.

Upon motion of the Hopi Tribe, LCRC's exhibit 1058 is received in evidence.

The witness is excused.

9:58 a.m. The matter stands at recess until Monday, January 25, 2021 at 9:00 a.m.

LATER:

On January 20, 2020, the City of Flagstaff filed a Motion for Reconsideration or Clarification Regarding Scope of Cross for Expert Witnesses that was set forth in a ruling included in the minute entry for Trial Day 34 filed on January 5, 2021 ("January 2021 Minute Entry"). The January 2021 Minute Entry addressed three objections made by the Navajo Nation during the cross examination of its expert. First, the ruling concluded that the expert report, which constituted the majority of the direct examination, did not limit the scope of the cross-examination of the expert and, the questioning did not extend so far beyond the expert report as to be intrusive, burdensome, violative of Ariz. R. Evid. 403, or call for a legal opinion. Second, the ruling concluded that neither Ariz. R. Civ. P. 26(b)(4)(E) nor 26.1(a) applied to the cross examination of an opposing party's expert at trial. Third, the ruling concluded that the testimony elicited during cross examination was relevant to the issues presented in the case. The City of Flagstaff argues that the January 2021 Minute Entry conflicts with two prior orders in this case that it references as the Smith Order¹ and the Hill Order² and seeks clarification.

The Smith Order resolved a discovery dispute concerning the production of a 2009 report known as the Red Gap Ranch Feasibility Study ("the Feasibility Report") prepared for the City of Flagstaff as part of the City's water planning efforts. At issue was whether Ariz. R. Civ. P. 26 required the production of an expert report prepared more than a decade

¹ Minute Entry filed January 13, 2020

² Order filed November 4, 2019

ago as part of the City of Flagstaff's planning process. It was not prepared in connection with the existing or related litigation. The Smith Order recognized that: (1) discovery disputes involve questions of degree; and, (2) there is a general prohibition against overbroad discovery requests that could chill experts' willingness to participate in the litigation process. It also relied on a court opinion holding that "[w]hile Rule 26 does provide for broad discovery of experts as to the opinions to be offered at trial, *Smith v. Ford Motor Company*, 626 F.2d 784, 793 (10th Cir.1980) (internal citations omitted), the court finds that conclusions and opinions offered in unrelated litigation do not fall within the scope of Rule 26 discovery and 'would unnecessarily burden litigation with pre-trial inquiry into facts and issues wholly irrelevant to the case at hand.'" *Trunk v. Midwest Rubber & Supply Co.*, 175 F.R.D. 664, 665 (D. Colo. 1997). Thus, after an *in-camera* review of the Feasibility Report, the Smith Order evaluated the document production request in terms of the burden imposed and relevance to the claims for water rights made by the United States and the Hopi Tribe. The Smith Order concluded that "allowing discovery into the facts and data about an expert's prior work unrelated to the litigation extending back more than a decade could have a chilling effect on experts' willingness to participate in the litigation process." Smith Order at 5. The question of whether Mr. Smith had relied upon the Feasibility Report in forming his opinions in the case was important to the decision of whether an exception should be made to the general rule of discovery that an expert should not be required to produce a report unrelated to the issues in the litigation prepared more than a decade earlier. Mr. Smith's reliance on a portion of an Appendix to the Feasibility Report required that portion of the Feasibility Report to be produced, but the absence of reliance on the remainder of the Feasibility Report made the general rule applicable to the request for its production. Accordingly, the Smith Order regarding the production of the Feasibility Report was not inconsistent with the tests applied in the January 2021 Minute Entry and no further clarification is necessary.

The Hill Order also resulted from a discovery dispute. The City of Flagstaff filed a motion to object to deposition questions of Bradley Hill, the City of Flagstaff's Director of Water Services Division and designated expert. The City of Flagstaff argued that the Hopi Tribe had improperly noticed Mr. Hill's deposition, that the proposed questioning would violate Ariz. R. Civ. P. 26(a)(4)(F), and could result in the revelation of privileged or confidential information. Along with its motion, the City of Flagstaff submitted a proposed order that would limit deposition questions to the scope of Mr. Hill's report. See Proposed Order attached to Motion to Limit Deposition filed October 7, 2019. The order in the form proposed by the City of Flagstaff was not granted. Instead, the Hill Order addressed specific areas of questioning identified by the parties.

No limitation was imposed on questions about the proper reporting of reclaimed water use in DCMi calculations and conservation measures undertaken by the City of Flagstaff. Limitations were imposed on possible questions about other litigation between

the City of Flagstaff and the Hopi Tribe and prior settlement negotiations between the parties. Reiterating the limitations for purposes of trial with respect to questions regarding other litigation, including the “Snowbowl litigation” between the Hopi Tribe and the City of Flagstaff should be unnecessary because the Hopi Tribe represented in the papers filed during the discovery dispute that it does not intend to inquire into other litigation or settlement discussions. The Hill Order also imposed limitations on questions about the Red Gap Ranch project. Given that Feasibility Report has been reviewed and determined to not be relevant to the issues presented in this case, (except as discussed above), cross-examination of Mr. Hill will not be permitted with respect to the Feasibility Report.

The remaining limitation in the Hill Order concerns the City of Flagstaff’s plans for future water supplies and the details of future infrastructure projects. The language in the Hill Order that undoubtedly gives rise the City of Flagstaff’s Motion for Clarification concerns the stated reasoning for limiting possible questions at the deposition about the City of Flagstaff’s future plans. In addition to recognizing that not all questions about the City of Flagstaff’s future plans are relevant to the issue of the proper quantification of DCMI use on the Hopi Reservation, the Hill Order also relied on the scope of Mr. Hill’s report as a reason to limit questions on the general topic. Hill Order at 6. Under Arizona law, the scope of cross-examination cannot be limited solely by the scope of the expert report. *See Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, 512, 217 P.3d 1212, 1217 (App. 2009). While the underlying determination remains, i.e., the City of Flagstaff’s future water development plans and the details of those plans are generally not relevant to the issues in this case, if a specific question were to be posed on cross-examination that fits within this category and it draws an objection, the objection will be resolved based on whether the question is relevant, intrusive or burdensome, calls for a legal opinion or privileged communications or is otherwise excluded by the Arizona Rules of Evidence.

A copy of the minute entry will be sent to all parties on the Court approved mailing list.