

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

12/16/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Parmar

Deputy

FILED: January 8, 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 39

Courtroom: CCB 301

9:01 a.m. Trial to the Court continues from December 15, 2020.

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.

Counsel for the Hopi Tribe moves to offer Hopi Tribe's exhibits 4300, 4301 and 4303. At the request of counsel for ASLD, the Court will address the admission of the exhibits after the morning break to allow counsel time to review the exhibits.

Judy Chang, having been previously sworn, testifies.

Upon motion of the Hopi Tribe, ASLD's exhibit 434 is received in evidence.

Upon motion of the Hopi Tribe, LCRC's exhibits 1256 and 1269 are received in evidence.

10:30 a.m. The Court stands in recess.

10:45 a.m. The Court reconvenes with the parties and counsel present.

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

Discussion is held regarding the admission of Hopi Tribe's exhibits 4300, 4301 and 4303. ASLD waives any objections to 4300 and 4301 but maintains the hearsay objection to 4303. LCRC and City of Flagstaff waive their objections. The Court will address the admission of Hopi Tribe's exhibit 4303 at a later time.

Hopi Tribe's exhibits 4300 and 4301 are received in evidence.

Counsel for Hopi Tribe moves to admit Hopi Tribe's exhibit 4599. The Court will rule on its admission at a later time.

Hopi Tribe's exhibit 4299 is received in evidence.

Upon motion of the Hopi Tribe, LCRC's exhibit 1293 is received in evidence.

12:04 p.m. The Court stands in recess.

1:30 p.m. The Court reconvenes with the parties and counsel present.

Court Reporter, Robin Bobbie, is present. A record of the proceedings is also made digitally.

Judy Chang testifies further.

The witness is excused.

Witness, Steve Brophy, is sworn and testifies.

LCRC's exhibit 441, 455, 459, 461, 474, 1197, 1200, 1203 and 1472 are received in evidence.

4:49 p.m. The matter stands at recess until Thursday, December 17, 2020 at 9:00 a.m.

LATER:

Hopi Exhibit 4303 - United States Department of Energy, *A Review of the CO₂ Pipeline Infrastructure in the U.S.* (April 21, 2015) ("Report")

The United States Department of Energy issued the Report as work sponsored by the United States with a disclaimer that the United States made no warranty and assumed no legal liability with respect to the accuracy, completeness, or usefulness of "any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned right." The general rule is that when public records are presumed authentic and trustworthy, the party opposing the admission of the evidence bears the burden of establishing a basis for excluding the documents from evidence. *Johnson v. City of Pleasanton*, 982 F.2d 350, 352–53 (9th Cir. 1992). The party must present "enough negative factors to persuade a court that a report should not be admitted." *Bradford Trust Co. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 805 F.2d 49, 54 (2d Cir.1986).

The Arizona State Land Department argues that due to the disclaimer included in the Report, the document is not admissible as an exception to the hearsay rule under Ariz. R. Evid. 803. In response, the Hopi Tribe cites to *In re Owner Mgmt. Serv., LLC Tr. Corps*, 530 B.R. 711 (Bankr. C.D. Cal. 2015), *aff'd sub nom. OMS, LLC v. Bank of Am., N.A.*, CV 15-3876-R, 2015 WL 12712307 (C.D. Cal. Nov. 6, 2015) where the court considered the admissibility of documents obtained from the Secretary of State that were filed by third parties and also subject to a disclaimer by the state entity. The court admitted the documents, reasoning:

The contents of the evidence would be admissible under Rule 803(8)(A)(i) which provides a hearsay exception for records or statements of public offices, which includes agencies, Rule 101(b)(3), dealing with official activities of the office or agency reasonably necessary for the performance of the duties of the office. The Secretary of State's office supports Businesses by registering and authenticating business entities and trademarks and enabling secured creditors to protect their financial interests. The Secretary of State Websites provide access to domestic stock, domestic nonprofit and qualified foreign corporations, limited liability company and limited partnership information of record with the Secretary of State.

When public records are presumed authentic and trustworthy, the burden of establishing a basis for exclusion falls on the opponent of the evidence. *Johnson v. City of Pleasanton*, 982 F.2d 350, 352–53 (9th Cir.1992), citing *Keith v. Volpe*, 858 F.2d 467, 481 (9th Cir.1988). Defendants offered no evidence on the unreliability of the information from the Secretary of State website. The websites contain disclaimers but this does not show that the information is not reliable, correct or incomplete in that the Court understands these records to be the information submitted by the entities or individuals indicated on the records and not an independent investigation by the Secretary of State. Thus, the business entity search records produced by the Secretary of State Websites would be admissible at trial because the business information was compiled by a public office necessary for the performance of the duties for that office. In addition, if necessary, Plaintiff could obtain certified copies of the records.

In re Owner Mgmt. Serv., LLC Tr. Corps, 530 B.R. at 719.

Here, the actions of the United States Department of Energy were more than a compiler of documents that third parties are required to file. Notwithstanding the disclaimer, it elected to publish the report as a public document. Thus, the better approach is to treat the document as a public document and the view the disclaimer as relevant to the weight to be accorded the evidence and not to the admissibility of the document. *See Hudgins v. Sw. Airlines, Co.*, 221 Ariz. 472, 485, ¶ 33, 212 P.3d 810, 823 (App. 2009). Accordingly,

IT IS ORDERED admitting Hopi Exhibit 4303 into evidence.

Hopi Exhibit 4599 – *The Emerging Value of CCS for Utilities*, The Brattle Group (“Paper”)

On November 16, 2020, two months after trial began, the Hopi Tribe moved to amend its Trial Exhibit list to include the Paper dated August 2020 on the grounds that it did not learn about the Paper until November 2, 2020. The motion was granted for good cause shown. The Hopi Tribe subsequently moved for the admission of the Paper into evidence arguing that the Paper is not hearsay under Ariz. R. Evid. 801(d).

The Hopi Tribe argues that the Brattle Group is the expert witness based on the Expert Witness Contract, ASLD Exhibit 434, and the Paper contains statements inconsistent with the opinions given by Judy Chang, a former consultant with the Brattle Group and the testifying expert called by the LCR Coalition. Transcript at 54, lines 10-

14 (December 16, 2020 – AM). In opposing the admission of the Paper, the LCR Coalition contends that the Paper is hearsay and it should not be admitted because the Brattle Group is not a singular entity that provides expert opinions. Instead, it asserts that individuals, such as Judy Chang, provide the opinions. *Id.* at lines 19-24.

A statement is not hearsay if a declarant testifies, thereby becoming a witness, the declarant is subject to cross-examination and the prior statement is inconsistent with the declarant's testimony. Ariz. R. Evid. 801(d)(1)(A). A witness is subject to cross-examination when the witness appears and answers questions under oath. *See United States v. Owens*, 484 U.S. 554, 555 (1988). The rule allows for the admission of a declarant-witness' statements that would otherwise be considered hearsay because the dangers inherent in hearsay are largely eliminated given that the declarant is present and available as a witness for cross-examination, both about the present testimony and the past statement. *State v. Joe*, 234 Ariz. 26, 29, ¶ 12, 316 P.3d 615, 618 (App. 2014).

As framed by the parties, the issue turns on the definition of a declarant. Rule 801(b) defines a declarant as “a person who makes a statement”. The persons who wrote the Paper are the listed authors. Accordingly, under Rule 801(b), the authors are declarants with respect to the Paper. The Hopi Tribe argues that because the Paper was issued under the auspices of the Brattle Group and the Brattle Group entered into the Expert Witness Contract¹, the Brattle Group is the declarant. Implicit in this argument is the additional contention that Judy Chang testified as the Brattle Group because Rule 801(2)(d)(1) requires a common identity between the declarant and the witness.

The Rules of Evidence do not define “person.” *See* Ariz. R. Evid. 101; *State v. Stuebe*, 249 Ariz. 127, 467 P.3d 252 (App. 2020). According to the Hopi Tribe's argument, the term “person” for purposes of Rule 801(d)(1) would include a corporation, such as the Brattle Group, in order to attribute statements made by one consultant on a project outside the scope of engagement with the LCR Coalition to the testifying expert in this case. Essentially, it seeks to incorporate the rules of agency applicable under Rule 801(d)(2), and no other requirements from Rule 801(d)(2), into Rule 801(d)(1) to make the Brattle Group and Judy Chang additional declarants with respect to the Paper. The Hopi Tribe cited to no case law in support of this position. A finding that a business entity is a person for purposes of Rule 801(d)(1) is not consistent with the requirement that the declarant-witness testify and be subject to cross-examination. A corporation is a fictional entity; it can neither testify nor be subject to cross-examination. A broad

¹ The Expert Witness Contract identifies Judy Chang as the expert witness and it provides for the “expert services of Judy Chang.” ASLD Exhibit 434 at 1.

interpretation of person in this case to include the Brattle Group would not be consistent with Rule 801(d)(1) because its inherent safeguards were not operational. Not only did Judy Chang did not write the Paper but, she had accepted another job prior to the issuance of the Paper. Thus, cross-examination was not available to ameliorate the dangers inherent in hearsay because Ms. Chang's lack of involvement with the Paper prevented her from explaining any discrepancies the Hopi Tribe found between the Paper and her expert opinion.

IT IS ORDERED denying the admission of Hopi Exhibit 4599 into evidence.

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