

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

06/02/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

S. Motzer

Deputy

FILED: 07/22/2020

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

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

CV6417-203

In re: Pre-Trial Conference re: Future Use Trial

MINUTE ENTRY

Courtroom: CCB 301

9:35 a.m. This is the time set for Oral Argument.

Court Reporter, Kristin Decasas, is present. A record of the proceeding is also made digitally.

The following attorneys appear telephonically:

- Carrie J. Brennan and Kevin P. Crestin for the Arizona State Land Department
- John B. Weldon, Jr. and Mark McGinnis for SRP
- David A. Brown, Lauren J. Caster, and Brian J. Heiserman for LCR Coalition
- Kimberly R. Parks observing on behalf of ADWR
- Sara Ransom and Lee Storey for the City of Flagstaff
- Vanessa Boyd Willard, Rebecca Ross, and Cody McBride for the United States
- Colin F. Campbell, Phillip Londen, Payslie Bowman, and Grace R. Rebling for the Hopi Tribe
- Jeffrey S. Leonard, Evan F. Hiller, and M. Kathryn Hoover for the Navajo Nation.
- Laurel A. Herrmann and Joe P. Sparks observing on behalf of the San Carlos Apache Tribe

- Robin L. Interpreter observing on behalf of the San Juan Southern Paiute Tribe

Argument is presented on the following:

- Salt River Project's Motion *in Limine* to Preclude Admission of Manuscript by Drs. Hanemann and Whittington.
- Salt River Project's Motion *in Limine* Regarding Redactions to Future Phase Expert Reports
- Hopi Tribe's Motion *in Limine* No. 1 Re: Testimony of Dr. Hanemann on Social-Cost Benefit Analysis filed January 29, 2020
- Salt River Project's Motion *in Limine* to Preclude Testimony or Other Evidence Concerning Social Cost-Benefit Analysis
- City of Flagstaff's Daubert Motion and Motion *in Limine* re: Hopi Tribe Expert Reports
- City of Flagstaff's Daubert Motion and Motion *in Limine* re: United States' Expert Reports

Argument is presented by Mark A. McGinnis, Colin F. Campbell, Brian J. Heiserman, Vanessa Boyd Willard, and Sara Ransom.

10:50 a.m. Court stands in recess.

11:10 a.m. Court reconvenes with respective counsel present.

Court Reporter, Kristin Decasas, is present. A record of the proceeding is also made digitally.

Argument continues to be presented on City of Flagstaff's Daubert Motion and Motion *in Limine* re: United States' Expert Reports.

Argument is presented on City of Flagstaff's Motion to Strike Untimely Disclosed Documents by the Hopi Tribe and Motion *in Limine* re: Craig Kunkel's Expert Reports.

Argument is presented by Sara Ransom, Cody L.C. McBride, and Colin F. Campbell.

11:53 a.m. Court stands in recess.

1:30 p.m. Court reconvenes with respective counsel present.

Court Reporter, Kristin Decasas, is present. A record of the proceeding is also made digitally.

Argument is presented on the following:

- LCR Coalition's Motion *in Limine* Regarding Redactions to Future Phase Expert Reports
- LCR Coalition's Motion *in Limine* to Exclude Undisclosed Expert Testimony from Hopi Fact Witness James Duffield
- LCR Coalition's Motion *in Limine* to Exclude Portions of Reports by Jason Bass

Argument is presented by Colin F. Campbell, Brian J. Heiserman, Vanessa Boyd Willard, Lauren J. Caster, and Phillip Londen.

2:15 p.m. Matter concludes.

LATER:

Among the motions argued are two motions that seek to exclude testimony in whole or in part from two of the Hopi Tribe's witnesses. The City of Flagstaff seeks to exclude the testimony of Craig Kunkel, an expert witness, on the grounds that it was prejudiced because the Hopi Tribe did not timely produce a copy of a publicly available document cited in Mr. Kunkel's reports. The LCR Coalition seeks to limit the testimony of James Duffield, who the Hopi Tribe has identified as a fact witness, to the testimony permitted to be given by a lay witness as opposed to opinions permitted from an expert witness.

City of Flagstaff's Motion to Strike Untimely Disclosed Documents by the Hopi Tribe and Motion *in Limine* re: Craig Kunkel's Expert Reports

Craig Kunkel is an expert witness called by the Hopi Tribe on "water system infrastructure needed to meet the long-term water demands of the projected Hopi population." Hopi 32nd Supplemental Disclosure Statements attached as Exhibit B to City of Flagstaff's Motion. Mr. Kunkel produced expert reports in March and June 2019 which, among other information, provided estimates of the costs of proposed water projects. The reports repeatedly reference the RSMeans Construction Pricing Guide ("RSMeans") as a source of information for the costing analysis. The expert retained by the City of Flagstaff described RSMeans as "an estimating guide that cost estimators use to pull specific prices out of individual constructions items". Deposition Testimony of Doug Smith at 23 (December 19, 2019) attached as Exhibit F to Hopi Response.

The City of Flagstaff, joined by the Arizona State Land Department, moves to strike the RSMeans that the Hopi Tribe listed as a trial exhibit on the grounds that it will be prejudiced by the Hopi Tribe's use of RSMeans to support Mr. Krunkel's opinions. In its Response, the Hopi Tribe explained that it may seek to read a portion of the 700-page RSMeans into the record at trial as a learned treatise in support of Mr. Krunkel's costing estimates and opinions. The City of Flagstaff further argues that in the absence of the RSMeans as supporting authority, Mr. Krunkel's reports are no longer competent evidence and should be stricken. Thus, the threshold issue is whether the Hopi Tribe should be precluded from using a published book at trial that was repeatedly identified in its expert's reports to support its expert's testimony for the reason that it did not earlier produce a physical or electronic copy of that book.

Both the City of Flagstaff and the Hopi Tribe intend to call expert witnesses to testify about the cost of future water projects. The Hopi Tribe produced expert reports that included multiple references to RSMeans to document at least a portion of the expert's opinions. The City of Flagstaff's expert, in contrast, did not reference similar documentation. The absence of a written data source to support the City of Flagstaff's expert's opinion has been the source of discovery disputes initiated by the Hopi Tribe between the parties. Thus, the City of Flagstaff was or should have been aware of the importance that the Hopi Tribe placed on external documentation of an expert's cost analysis.

The Court has held that before the sanction of exclusion should be applied, consideration should be given to whether the failure to disclose was harmful to the opposing party or to the justice system in light of the relevant circumstances. *Allstate Ins. Co. v. O'Toole*, 182 Ariz. 284, 288, 896 P.2d 254, 258 (1995). The relevant facts are that the City of Flagstaff knew or should have known about Mr. Krunkel's reliance on the RSMeans at the time it received the expert reports. The City of Flagstaff does not allege that the reports' production was delayed or otherwise untimely. It was on notice about the RSMeans months in advance of Mr. Krunkel's deposition. The RSMeans is a published book that is publicly available. The City of Flagstaff does not claim that it could not obtain a copy of the RSMeans. It did not file a motion to compel the Hopi Tribe to produce a physical or electronic copy of the book. Its expert was familiar with the RSMeans and knew or should have known that Mr. Krunkel relied on the RSMeans when the City of Flagstaff's expert analyzed the costs of the water projects. The RSMeans will not be introduced in evidence (although the Hopi Tribe may move to read portions into the record as a learned treatise) nor used to offer new facts or opinions into the record or support a new theory of the case. The sole purpose of the book at trial, according to the Hopi Response, is the purpose for which it was repeatedly cited in the expert reports, i.e., bolster the basis of the expert's existing opinions. These facts do not support a finding of prejudice to warrant excluding a limited use of the book at trial as outlined in the Hopi Tribe's Response. In light of the foregoing conclusion, the remainder of the motion is moot.

LCR Coalition’s Motion *in Limine* to Exclude Undisclosed Expert Testimony from Hopi Fact Witness James Duffield (“Duffield Motion”)

James Duffield is the interim director of the Hopi Tribe’s Water Resources Program. The LCR Coalition, joined by the Arizona State Land Department, seeks an order to preclude Mr. Duffield from testifying about the characteristics of the aquifers underlying the Hopi Reservation on the grounds that such testimony constitutes undisclosed expert testimony in violation of Ariz. R. Civ. Pro. 26.1(d).

The Hopi Tribe opposes the motion by arguing that Mr. Duffield is a lay witness, not an expert witness, and his testimony will be based on his personal observations. Hopi Response at 2. Based on his deposition testimony, Mr. Duffield has dealt with the availability of groundwater with respect to a proposed development south of Second Mesa. Deposition Testimony of James Duffield at 30, 67 (September 24, 2019) attached as Exhibit C to the LCR Coalition’s Motion (Duffield Deposition). He has been involved with spring and riparian restoration monitoring. Duffield Deposition at 31. He is also aware of a well drilled into the N aquifer and the flow and quality of water from that well. Duffield Deposition at 35. He has analyzed water quality pumped from the C aquifer by a well in Moenkopi as well as aquifer geometry in Moenkopi, potential sources of contamination, and expected yields. Duffield Deposition at 59, 67. He has been involved in the arsenic content of the D aquifer. Duffield Deposition at 85. So long Mr. Duffield’s testimony is limited to relevant facts based on his personal knowledge as permitted by Ariz. R. Evid. 602, then no violation of Rule 26.1(d) will have occurred.

Difficulties will arise if Mr. Duffield were to move from providing factual information to opinions. While lay witnesses may provide opinions, the substance of the opinion is limited by Ariz. R. Evid. 701. Lay testimony differs from expert testimony in that the lay witness’ testimony results from a process of reasoning “familiar in every day, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.” *Joshua David Meilberg LLC v. Will*, 386 F. Supp. 3d 1098, 2000 (2019). Under Arizona’s Rules of Evidence, a witness who is not testifying as an expert cannot testify to an opinion that is based on “scientific, technical, or other specialized knowledge within the scope of Rule 702.” Ariz. R. of Evid. 701(c). Thus, Mr. Duffield, named as a lay witness, cannot be asked to express opinions based on specialized knowledge that can only be mastered by a hydrologist or hydrogeologist.

The Hopi Tribe’s position is correct that it is difficult to determine at this juncture the questions that may be asked of Mr. Duffield at trial and whether those questions will call for factual information or a scientific or technical opinion. Mr. Duffield has not been identified as an expert witness and he did not produce an expert report. Accordingly, he will be treated as a lay witness subject to the limitations that such classification imposes under the Arizona Rules of Evidence.

For the reasons stated above,

IT IS ORDERED denying the City of Flagstaff's Motion to Strike Untimely Disclosed Documents by the Hopi Tribe and Motion in Limine re: Craig Kunkel's Expert Reports.

IT IS FURTHER ORDERED denying the LCR Coalition's Motion *in Limine* to Exclude Undisclosed Expert Testimony from Hopi Fact Witness James Duffield with leave to the LCR Coalition to re-urge the objection to questions posed at trial of Mr. Duffield that seek to elicit opinions not permitted from a lay witness.

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