

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

08/20/2020

CLERK OF THE COURT
FORM V000

HONORABLE MARK H. BRAIN

S. Ortega
Deputy

FILED: 08/20/2020

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

MINUTE ENTRY

The Court has received and considered the following documents:

- The Hopi Tribe's Motion to Set Aside the Special Master's Procedural Order Denying Motion for Continuance for a Courtroom Trial and Objections to a Virtual Trial (hereinafter for brevity's sake, "the Motion," filed July 17, 2020).
- The United States' Response to the Motion (filed July 27, 2020), which is in general support of the Motion.
- Salt River Project's Response to the Motion (filed July 27, 2020), which is in opposition.
- The Arizona State Land Department's Response to the Motion (filed July 27, 2020), also in opposition.
- The LCR Coalition's Response to the Motion (filed July 27, 2020), which is in opposition.
- The City of Flagstaff's Joinder in the Responses filed by the LCR Coalition and Response to the Motion (filed August 3, 2020), which is in opposition to the Motion.
- The Hopi Tribe's Reply in support of the Motion (filed August 12, 2020).

It appears to be common ground among the parties that this Court should review the Special Master's decision to proceed to trial in September on a virtual platform for an abuse of discretion, although the Hopi Tribe suggests that the subordinate role of the master "means that the trial court's review for abuse of discretion may be more searching

tha[n] the review an appellate court makes of a trial court.” Motion at p. 10 (quoting the advisory committee notes to the 2003 amendments to Rule 53, Federal Rules of Civil Procedure). It is unclear precisely what that “more searching review” might encompass. That said, over the course of the last several months, the Maricopa County Superior Court, and this Court in particular, has had significant experience with the virtual platforms at issue, and thus has a unique perspective to offer.¹ So, a few comments are pertinent (in no particular order).

Covid-19 has proven to be an extraordinary challenge. The Hopi Tribe requests to continue the trial until a trial can be safely held in a traditional setting. It is entirely unclear when such circumstances will exist. Covid-19 cases have ebbed and flowed over the course of several months. If experience over the last few months has taught us anything, it is that the United States will continue having issues with Covid-19 until the nation as a whole gets serious about following public health recommendations, painful though they may be in the short term. There is no telling when a trial of this scope can safely be held in a traditional setting.

At the same time, the Courts have a constitutional duty to continue their business of resolving disputes. Several months ago, the Maricopa County Superior Court began using the virtual platform of GoToMeeting to resolve matters that did not require an in-person hearing.² This platform shares many of the features that the parties recently used when they transformed a non-electronic courtroom in the Central Court Building into an electronic courtroom for purposes of several federal water rights cases. For example, the Court can delegate to individual attorneys the ability to display and highlight exhibits, run powerpoints, etc. Remote hearings have been hugely successful. Even self-represented litigants have routinely and successfully participated in hearings using commonly available equipment, such as an ipad, smart phone, or inexpensive laptop. Likewise, attorneys and their clients routinely log in from different locations for hearings. If the self-represented litigants in family court, many of whom are novices in courtroom procedure and lack anything approaching an Information Technology Department, can navigate the program successfully, the Court has no doubt that the participants in a water trial can do so; after all, they are led by some of the most sophisticated attorneys in the state.

Various other objects were raised. For example, there are suggestions that teams of personnel will need to assemble, unacceptably raising the risks of spreading infection.

¹ In particular, this judge has handled hundreds of matters, including contested trials, via GoToMeeting over the last several months. In doing so, many of the exhibits have been electronic (a practice in which the water cases were a leader, with others only now catching up), and the courtroom has otherwise been empty (even the clerk appears virtually).

² For example, the Confrontation Clause arguably requires various matters to be held in person as a general matter, with limited exceptions. *State ex rel. Montgomery v. Kemp*, 239 Ariz. 332 (App. 2016).

Suffice it to say that the Court believes that the parties can overcome the dangers presented through appropriate planning. Such measures include having such teams assemble virtually when possible, and engaging in distancing and good hygiene (including face masks) when in-person interactions are necessary. In the meantime, the underlying question is whether the Special Master abused her discretion by ordering the trial to proceed. Had this Court faced the issue as a matter of first impression, it would also have ordered the trial to proceed; thus, the Special Master plainly did not abuse her discretion.

IT IS ORDERED:

1. The Motion is DENIED.
2. The Hopi Tribe's Conditional Motion to Stay the Trial Pending Special Action Review of the Denial of the Hopi Tribe's Motion to Set Aside Procedural Order of the Special Master (filed August 12, 2020) is also DENIED.