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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN
THE LITTLE COLORADO RIVER
SYSTEM AND SOURCE

CV 6417-203

ORDER RE:
NAVAJO NATION'S MOTION TO
STRIKE AND MOTIONS IN LIMINE
NOS. 1, 2 & 5
LCR COALITION'S MOTION IN LIMINE
TO EXCLUDE TESTIMONY AND
OTHER EVIDENCE RELATING TO
FUTURE WATER USES

CONTESTED CASE NAME: *In re Hopi Reservation HSR*
HSR INVOLVED: *Hopi Reservation*
DESCRIPTIVE SUMMARY: Court rules on motions filed by the Navajo Nation and
the LCR Coalition and instructs the United States to file a stipulated protective order
by August 8, 2018.
NUMBER OF PAGES: 14
DATE OF FILING: July 31, 2018

On June 22, 2018, the Navajo Nation, joined by the City of Flagstaff, filed a Motion to
Strike three portions of the Fifth Amended Statements of Claimant filed by the United States

1 and the Hopi Tribe after the discovery deadline set for this phase of the case.¹ Also related to
2 the Motion, the Navajo Nation simultaneously filed Motions in Limine Nos. 1-4 and Motion in
3 Limine No. 5 (Testimony of B. Sunday Eiselt) dated June 22, 2018. On the same date, the LCR
4 Coalition filed a Motion in Limine to Exclude Testimony and Other Evidence Relating to Future
5 Water Uses on the Hopi Reservation, joined by the Arizona State Land Department.

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7 **I. DCMCI Claim**

8 **a. Procedural History**

9 The Hopi Tribe and the United States on behalf of the Hopi Tribe filed Statements
10 of Claimant in 1985 to assert water rights for the 1882 Executive Order Reservation and
11 Moenkopi Island, (collectively referred to as the Hopi Reservation). They amended their
12 initial Statements of Claimant in 2003. The Arizona Department of Water Resources
13 (ADWR), as required by A.R.S. §45-256, reviewed and investigated the amended claims
14 and in 2008 it issued a Preliminary Hydrographic Survey Report. The United States and
15 the Hopi Tribe subsequently amended their Statements of Claimant in 2009 and 2015.

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18 The United States, in its Third Amended Statement of Claimant stated: “The
19 United States on behalf of the Hopi Tribe, claims 8,746 acre-feet per year, or a rate of
20 approximately 7.80 million gallons per day, for present and future DCMCI water uses on
21 the 1882 Executive Order Reservation and Moenkopi Island. This claim is based on the
22 current Hopi population, future Hopi population projections and estimated rates of water
23 consumption per capita.” *United States’ Third Amended Statement of Claimant*, filed
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27 ¹ Given the decisions herein, no consideration is given or determination made concerning the arguments
28 regarding the propriety of the United States’ and the Hopi Tribe’s filing amended statements of claimant after the
discovery deadline.

1 June 2, 2015 at 11. The Third Amended Statement of Claimant filed by the Hopi Tribe
2 contained a table summarizing its claims that included a single entry for DCMI for 9,348
3 acre feet of water. *Hopi Third Amended Statement of Claimant*, dated June 2, 2015 at 27.
4 The Hopi Tribe's Third Amended Statement of Claimant included the statement: "The
5 Hopi Tribe claims 9,348 acre-feet of water annually for future domestic, commercial,
6 municipal, and industrial (DCMI) uses of water on the 1882 Reservation and Moenkopi
7 Island [footnote omitted]." *Id.* at 28.
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10 Prior to the issuance of its final report, ADWR filed a motion with the court
11 requesting clarification of its obligations to analyze the claims filed by the United States
12 and the Hopi Tribe because the Hopi Tribe and the United States had declined to provide
13 information requested by ADWR. *Arizona Department of Water Resources' Request for*
14 *an Order Clarifying the Scope of the Final Hopi Hydrographic Survey Report*, dated
15 October 2, 2015 at 6 ("ADWR Motion"). Specifically with respect to the DCMI uses,
16 the ADWR motion represents that ADWR had requested from the United States and the
17 Hopi Tribe supporting data and calculations for the per capita demand of 150 gallons per
18 day claimed by the United States and 160 gallons per day claimed by the Hopi Tribe.
19 *ADWR Motion* at 4-5. The United States had not provided the requested information and
20 ADWR reported that the Hopi Tribe responded to the request by email stating that "it
21 does not plan to produce this information to ADWR at this time." *ADWR Motion* at 5.
22 The Hopi Tribe and the United States joined the ADWR Motion and described the
23 claims including DCMI as "claims largely composed of future uses even though there is
24 a limited present use component in both." *Joinder by the Hopi Tribe and United States*
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1 *in Support of ADWR Request for an Order Clarifying Scope of the Final Hopi HSR,*
2 dated October 14, 2015 at 3. The court granted ADWR's motion and instructed it to
3 proceed based on the information in its possession. *Minute Entry*, dated November 10,
4 2015 at 1.

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6 In December 2015, ADWR issued a report on the past and present water uses on
7 the Hopi Reservation. *Final Hydrographic Survey Report for the Hopi Indian*
8 *Reservation*, dated December 2015 ("HSR"). Tables 3-1 and 3-2 in the HSR
9 summarized the DCMCI claims made by the Hopi Tribe and the United States in each
10 iteration of their amended Statements of Claimant. It listed "0" for the amount claimed
11 for past and present DCMCI in the 2004, 2009 and 2015 versions of the Statements of
12 Claimant and included the full amount claimed for DCMCI by each claimant as a claim
13 for future DCMCI.
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16 The discussion of DCMCI water use in the HSR consisted of ADWR: (1) reciting
17 the per capita use rates claimed by the United States and the Hopi Tribe; (2) identifying a
18 report that ADWR had prepared about water usage at various locations in the Little
19 Colorado River Plateau Basin; (3) multiplying the per capita use rates proposed by the
20 United States and the Hopi Tribe by the estimated population represented by the
21 claimants to be based on a report by Ramboll Environ (a copy of which was not provided
22 to ADWR); and (4) stating that neither party provided data or information to support the
23 claimed gallons per capita per day ("gpcd") use rates. *Final Hopi Reservation HSR*,
24 dated December 2015 at 4-4, 4-5. The HSR contains no proposed water rights attributes
25 for past and present DCMCI water use. *Id.* at Table 5-1.
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1 The United States filed an objection to the HSR which stated in relevant part:
2 “The United States objects to the omission of the category of Domestic, Commercial,
3 Municipal and Industrial (“DCMI”) because DCMI claims include present – as well as –
4 future uses. The United States will present evidence in litigation regarding both present
5 and future DCMI water uses.” *United States Objections to the Final Hydrographic*
6 *Survey Report for the Hopi Reservation*, dated June 10, 2016 at 3. Similarly, the Hopi
7 Tribe objected to the HSR: “The Final HSR failed to propose a water right attribute for
8 the Hopi Tribe’s past and present Domestic, Commercial, Municipal and Industrial water
9 uses (DCMI).” *The Hopi Tribe’s Objections and Comments to the Final Hydrographic*
10 *Survey Report for the Hopi Reservation*, dated June 13, 2016 at 3.
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13 Prior to the initial scheduling conference for this contested case, the United States
14 proposed “that litigation of the claims would proceed most efficiently by bifurcating the
15 proceedings into two broad categories that dovetail with the information presented in the
16 Final Hopi HSR: 1) water right claims whose evidentiary basis is established by past and
17 present uses (‘past and present claims’), and 2) water right claims associated with water
18 use anticipated in the future to ensure that the Hopi Reservation remains a homeland as
19 intended (‘future claims’).” *United States’ Statement re: Litigation of Hopi Main*
20 *Reservation Lands and Updating Hopi and Navajo Claims*, dated July 6, 2016 at 3-4.
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1 The Case Management Order, adopting the requested approach,² set deadlines and trial
2 dates for the two phases, i.e., past and present uses and future water use.³

3 The discovery deadline, which had been extended, for the trial on past and present
4 claims occurred on March 23, 2018. *Minute Entry*, filed December 14, 2017. On April
5 13, 2018, the United States filed a Fifth Amended Statement of Claimant and on April
6 16, 2018, the Hopi Tribe filed its Fifth Amended Statement of Claimant.

8 **b. Amended Claims**

9 The Fifth Amended Statements of Claimant filed by the Hopi Tribe creates
10 differentiated classes of DCMI: historic water use, present needs and future uses. *The*
11 *Hopi Tribe's Fifth Amended Statement of Claimant*, dated April 19, 2018 at 24-25. The
12 Fifth Amended Statement of Claimant filed by the United States similarly distinguishes
13 among maximum historic use, present needs and future use. *United States' Fifth*
14 *Amended Statement of Claimant on Behalf of the Hopi Tribe*, dated April 13, 2018 at 13-
15 14. The Navajo Nation moved to strike the claim for DCMI based on “present need” on
16 the grounds that it is a new, undisclosed theory and that its assertion is unfair and
17 prejudicial to the objecting parties. The City of Flagstaff joined the Navajo Nation’s
18 motion and similarly urged that because these claims were asserted following the close
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22 ² The United States also proposed that no deadlines or trial date be set with respect to future uses
23 until after the litigation of the past and present claims concluded. *Id.* at 4. That portion of the proposal
24 was not accepted.

25 ³ The strictly procedural decision to try this case in two phases does not change or otherwise
26 alter the fact that *In re Hopi Reservation HSR* is a single contested case. To facilitate the review of
27 findings of fact and conclusions of law made during the course of these proceedings, the current plan is
28 to prepare a single final decision on all claims for water rights on the Hopi Reservation. However, as
requested by the parties, a draft report permitted by Ariz. R. Civ. P. 53(f) will be issued after each phase
of the proceedings to allow the parties to submit comments.

1 of discovery the parties will be unfairly prejudiced if these new claims are litigated in the
2 first phase of the proceedings.

3 The Hopi Tribe argues that the objecting parties will not be unfairly prejudiced
4 because they knew or should have known that the Hopi Tribe intended to make a claim
5 for “present need” since the first deposition taken in this case. *Hopi Tribe’s Response to*
6 *City of Flagstaff’s Joinder in Navajo Nation’s Motion to Strike Untimely Disclosed*
7 *Mining, DCMI, and Irrigation Claims*, dated July 31, 2018 at 4. In support of its
8 argument, it cites a deposition transcript that contains a statement by counsel for the
9 Hopi Tribe representing, “the ADWR HSR calculates present use by using population
10 times gallons per person, whether you call it future or a calculation of present.” *Id.* at 3.
11 Essentially, the Hopi Tribe’s argument is that its intent to claim “present need” (as
12 opposed to present use) was evident months before it filed its Fifth Amended Statement
13 of Claimant due to its counsel’s inquiry at deposition into the use of gpcd methodology.
14 Questioning regarding the gpcd methodology does not provide a clear disclosure that the
15 Hopi Tribe intended to present in this phase of the case the “present need” for water that
16 the Hopi Tribe would demand if desired future developments were in place given that
17 heretofore the Hopi Tribe had only used this methodology in its amended Statements of
18 Claimant to calculate future DCMI water use. *See First Amended Statement of*
19 *Claimant*, filed January 30, 2004 at 26-27; *Second Amended Statement of Claimant*, filed
20 November 13, 2009 at 27; *Third Amended Statement of Claimant*, filed June 3, 2015 at
21 28.

1 The United States argues that if “present need” were to be tried during this phase
2 of the proceedings, the objecting parties would suffer no prejudice because sufficient
3 disclosure of the claim occurred by virtue of the *Gila V* homeland standard “combined
4 with the factual analysis in the HSR.” *United States’ Response to the Navajo Nation’s*
5 *Motion to Strike Untimely Disclosed Mining, DCMI, and Irrigation Claims*, dated July
6 13, 2018 at 12. The United States is correct that the Arizona Supreme Court has decided
7 that the amount of water subject to federal reserved water rights is that amount that
8 “must satisfy both present and future needs of the reservation as a livable homeland.” *In*
9 *re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 201 Ariz.
10 307, 316, ¶28, 35 P.3d 68, 77 (2001) (“*Gila V*”). This holding, however, constitutes the
11 ultimate factual conclusion as to the appropriate quantity of water subject to a federal
12 reserved water right. Present need is not an intermediate step in the quantification
13 process. The determination of present and future need must be based on a multi-faceted
14 approach that requires a factual determination of “actual and proposed uses,
15 accompanied by the parties’ recommendations regarding feasibility and the amount of
16 water necessary to accomplish the homeland purpose.” *Gila V* at 318, ¶41, 35 P.3d at 79.
17 The *Gila V* decision suggests the present-future water use dichotomy followed by
18 ADWR in the HSR, requested by the United States in its initial scheduling proposal and
19 adopted in the Case Management Order.

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22 The United States reliance on the HSR to bolster its argument that it had
23 adequately disclosed its claim for “present need” is misplaced. As stated above, the
24 Final HSR contains no proposed water rights attributes for past and present DCMI water
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1 use. ADWR had attempted, without success, to obtain information or documentation to
2 support the claimed amounts and finally sought a court order to relieve it of the
3 obligation to continue to pursue the data it believed necessary to assess the validity of
4 the claim.

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6 As recognized by the United States in its Fifth Amended Statement of Claimant,
7 “present need” quantified by the United States and the Hopi Tribe as 150-160 gpcd does
8 not equate to actual use. “Factors preventing Hopi’s current needs from being met – and
9 thus driving down Hopi’s per capita use – include an inadequate water supply
10 infrastructure, poor water quality, and a lack of economic development on the
11 Reservation.” *United States’ Fifth Amended Statement of Claimant on Behalf of the*
12 *Hopi Tribe*, filed April 13, 2018 at 13. Thus, the claim for either a 150 or 160 gpcd
13 based on usage of other locations in the Little Colorado River watershed or anticipated
14 demand assuming changed conditions is not relevant to the determination of the Hopi
15 Tribe’s actual present and past DDMI water use on the Hopi Reservation, which is the
16 purpose of the first phase of the trial beginning on September 11, 2018.

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19 The next phase of the case is the appropriate time to litigate those amounts that
20 the United States and the Hopi Tribe have characterized as “present needs”. The
21 discovery deadline for future uses has not expired allowing the objecting parties the
22 opportunity to conduct discovery regarding the claim for “present need”. It is in the
23 next phase of this case that evidence should be presented regarding the proposed future
24 improvements to the Reservation’s physical infrastructure as well as projected changes
25 in the economic base that the United States asserts are relevant to and necessary for a per
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1 capita rate of use that exceeds current use. To fulfill the directive of *Gila V* that
2 determinations must be made reservation by reservation, the evidence to support the
3 claimed DCMI uses should be specific to the Hopi Reservation.

4 Taking a position similar to the Navajo Nation in its Motion to Strike, the LCR
5 Coalition filed a Motion in Limine to Exclude Testimony and other Evidence Relating to
6 Future Water Uses on the Hopi Reservation, filed June 22, 2018. The LCR Coalition
7 specifically included a request for an order that would preclude evidence regarding the
8 impact of future infrastructure development on water use. The Navajo Nation Motion in
9 Limine No. 2 (Evidence regarding Future Needs and Plans) also made arguments similar
10 to those made in its Motion to Strike except that it identified specific witness and
11 exhibits that it sought to exclude.
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13 The United States generally objects to the motions as inappropriate in a bench
14 trial because all objections should be ruled on during the course of trial. A motion in
15 limine can be appropriate in a bench trial because it can serve other purposes such as
16 limiting the issues at trial or in civil cases as a means to exclude evidence from trial for
17 violations of the disclosure rules. *See Zimmerman v. Shakman*, 204 Ariz. 231, 235, 62
18 P.3d 976, 980 (Ct. App. 2003). Here, the motions in limine have been brought to limit
19 the United States and the Hopi Tribe from presenting evidence concerning their recently
20 disclosed claims for “present need” with its associated dependence on future
21 improvements and development that is not relevant to actual past and present DCMI
22 water use, but is relevant to future use. Evidence is relevant if: (a) it has any tendency to
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1 make a fact more or less probable than it would be without the evidence; and (b) the fact
2 is of consequence in determining the action.” A.R.S. Rules of Evid., Rule 401.

3 Among its arguments opposing the motions in limine, the Hopi Tribe objects to
4 the motions on the grounds that it is not appropriate to make “context-specific
5 decisions”. *Hopi Tribe’s Response to Navajo Nation’s Motion in Limine No. 2*, dated
6 July 16, 2018 at 2. It also countered the Navajo Nation’s Motion in Limine No. 2 with
7 representations that portions of the anticipated testimony from the witnesses and parts of
8 the exhibits listed by the Navajo Nation will be relevant to past and present water uses.
9 Based on these representations, no specific witness or exhibit will be precluded at this
10 time. Objections made at trial that offered testimony or specific exhibits do not pertain
11 to past or present actual DCMI use will be decided at trial.
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14 **II. Irrigation Claims**

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16 The Navajo Nation seeks to strike the irrigation claim made in The Hopi Tribe’s
17 Fifth Amended Statement of Claimant to the extent that the Hopi Tribe intends to present
18 archeological and anthropological evidence of annual irrigation of 21,900 to 35,040
19 acres of land in the 16th and 17th centuries. It also filed a separate motion in limine
20 making the same argument and seeking to strike specific testimony and reports. *Navajo*
21 *Nation Motion in Limine No. 1 (Evidence Regarding Hopi Agriculture Prior to 1934)*
22 filed June 22, 2018. The primary objection appears to be that the witnesses disclosed
23 by the Hopi Tribe would support a claim for irrigation water based on historical practices
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1 from past centuries as opposed to relying on historical information from the 1930s to the
2 present to support a claim for irrigation use.

3 According to the Hopi Tribe's Fifth Amended Statement of Claimant, it will
4 assert evidence of irrigation of 21,900 to 35,040 acres of land annually. *The Hopi*
5 *Tribe's Fifth Amended Statement of Claimant* at 27. Under the Quantification Method
6 One, the Hopi Tribe claims 31,442 acre-feet for past and present irrigated acreage which
7 it claims is the acreage verified by Dr. Eiselt and supported by the historical annual
8 acreage estimates of anthropologists. *Id.* at 31-32. As the Hopi Tribe highlights in its
9 Response, it specifically referenced in its Third Amended Statement of Claimant an
10 archeological report in support of its irrigation claims. *Id.* at 33.

13 In a related motion the Navajo Nation moved to exclude the testimony of Dr.
14 Eiselt, an anthropologist, concerning historic irrigated acreage on the Hopi Reservation
15 on the grounds that her testimony does not meet the standards of A.R.S. Rules of Evid.,
16 Rule 702. *Navajo Nation's Motion in Limine No. 5 (Testimony of B. Sunday Eiselt)*
17 dated June 22, 2018. Dr. Eiselt is an anthropologist who the Hopi Tribe expects to call
18 to give expert testimony about historically irrigated acreage. The Navajo Nation's
19 objections to the Dr. Eiselt focuses on her ability to use and interpret the technology used
20 to create the pictures of the acreage and to determine the time at which specific acreage
21 was irrigated. The Hopi Tribe counters with statements regarding Dr. Eiselt's expertise
22 with various types of mapping technologies and examples of other reports she has
23 prepared that require an examination of agricultural acreage.
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1 According to Dr. Eiselt’s curriculum vitae, she holds a Ph.D. in her field and has
2 worked on projects over the last decade that involve field surveys, mapping and
3 interpretation of images of historically irrigated land. It appears that she has general
4 expertise in the area about which she is being called to testify. Given that this is a bench
5 trial, the better course of action is to determine whether this particular expert’s testimony
6 meets the standards of Rule 702 after having the opportunity to hear the evidence and
7 objections to it at trial. *Arizona State Hosp./Arizona Cmty. Prot. & Treatment Ctr. v.*
8 *Klein*, 231 Ariz. 467, 474, 296 P.3d 1003, 1010 (Ct. App. 2013)(“the court may decide
9 to hear the evidence and objections to it and rule on its admissibility without conducting
10 a separate hearing.’)

13 **III. Mining Claims**

14 The Navajo Nation’s Motion to Strike is moot given the Navajo Nation’s
15 willingness to address the mining claims if additional information is provided to it which
16 the United States has now stated that it has provided or will provide upon the issuance of
17 an appropriate protective order. Thus, the discovery deadline is extended as requested
18 by the Navajo Nation and the United States shall file a stipulated form of protective
19 order no later than **August 8, 2018**.

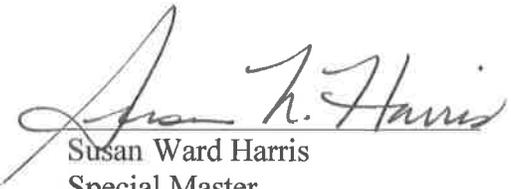
22 Accordingly,

24 **IT IS ORDERED** granting the LCR Coalition’s Motion in Limine to Exclude
25 Testimony and Other Evidence Relating to Future Water Uses on the Hopi Reservation
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1 and to preclude evidence regarding the impact of future infrastructure development on
2 water use.

3 **IT IS FURTHER ORDERED** denying the Navajo Nation's Motion in Limine
4 Nos. 1, 2 and 5.

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6 **IT IS FURTHER ORDERED** granting the Navajo Nation's Motion to Strike
7 claims for "present need" insofar as the United States and the Hopi Tribe may not
8 present evidence regarding "present need" in the first phase of the trial and the discovery
9 deadline is extended to allow the Navajo Nation to obtain the documents requested
10 regarding mining claims and the Motion to Strike is otherwise denied.
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15 Susan Ward Harris
16 Special Master

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18 On July 31, 2018, the original of the
19 foregoing was mailed to the Clerk of the
20 Apache County Superior Court for filing and
21 distributing a copy to all persons listed on
22 the Court approved mailing list for the Little
23 Colorado River Adjudication Civil No.
24 6417-203.

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27 
28 Barbara Brown