

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

10/16/2018

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Hatfield

Deputy

FILED: 11/6/2018

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

CV 6417-203

In re: Hopi Reservation HSR

In re: Trial to the Court Day 23

MINUTE ENTRY

Courtroom: ECB 613

10:30 a.m. This is the time set for Trial to the Court before Special Water Master Susan Ward Harris.

The following attorneys and parties appear in-person: Jeffrey Leonard, Judith Dworkin and Evan Hiller on behalf of the Navajo Nation; Kevin Crestin on behalf of the Arizona State Land Department; Brian Heiserman and David Brown on behalf of the LCR Coalition; Erin Byrnes on behalf of the City of Flagstaff; R. Jeffrey Heilman and Mark McGinnis on behalf of Salt River Project; Sarah Foley on behalf of the United States Department of Justice; Grace Rebling and Colin Campbell on behalf of the Hopi Tribe; Kimberly Parks on behalf of the Arizona Department of Water Resources.

Court reporter, Luz Franco, is present and a record of the proceedings is made digitally.

LET THE RECORD REFLECT that the portions of Hopi exhibit 218 as ordered admissible on October 10, 2018 has been submitted to the above named clerk and is identified as Hopi exhibit 3889, in evidence.

LET THE RECORD FURTHER REFLECT that the status of Hopi exhibit 218 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that the portions of Hopi exhibit 261 that have been submitted to the above named clerk and are identified as Hopi exhibit 3890, are admitted in evidence.

LET THE RECORD FURTHER REFLECT that the status of Hopi exhibit 261 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that the portions of Hopi exhibit 294 as ordered admissible on October 12, 2018 has been submitted to the above named clerk and is identified as Hopi exhibit 3891, in evidence.

LET THE RECORD FURTHER REFLECT that the status of Hopi exhibit 294 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that the portions of Hopi exhibit 386 as ordered admissible on October 12, 2018 has been submitted to the above named clerk and is identified as Hopi exhibit 3892, in evidence.

LET THE RECORD FURTHER REFLECT that the status of Hopi exhibit 386 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that the portions of Hopi exhibit 436 that have been submitted to the above named clerk and are identified as Hopi exhibit 3893, are admitted in evidence.

LET THE RECORD FURTHER REFLECT that the status of Hopi exhibit 436 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that the portions of Hopi exhibit 508 as ordered in evidence on October 12, 2018 has been submitted to the above named clerk and is identified as Hopi exhibit 3894, in evidence.

LET THE RECORD FURTHER REFLECT that the status of Hopi exhibit 508 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that the portions of Hopi exhibit 580 as ordered in evidence on October 10, 2018 has been submitted to the above named clerk and is identified as Hopi exhibit 3895, in evidence.

LET THE RECORD FURTHER REFLECT that the status of Hopi exhibit 580 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that the portions of Hopi exhibit 602 as ordered in evidence on October 12, 2018 has been submitted to the above named clerk and is identified as Hopi exhibit 3896, in evidence.

LET THE RECORD FURTHER REFLECT that the status of Hopi exhibit 602 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that the portions of Hopi exhibit 602 as ordered in evidence on October 12, 2018 has been submitted to the above named clerk and is identified as Hopi exhibit 3896, in evidence.

LET THE RECORD REFLECT that the portions of US exhibit 516 that have been submitted to the above named clerk and are identified as US exhibit 3897, are admitted in evidence.

LET THE RECORD REFLECT that the portions of Hopi exhibit 869 as ordered in evidence on October 12, 2018 has been submitted to the above named clerk and is identified as Hopi exhibit 3897, in evidence.

LET THE RECORD FURTHER REFLECT that the status of Hopi exhibit 869 remains marked for identification, not in evidence.

Discussion is held regarding the proposed redactions of the expert reports, Hopi exhibits 880 and 882, of Hopi Witness Dr. Godfrey. Hopi exhibits 880 and 882 with the approved redactions will be admitted. Hopi exhibits 880 and 882 having been submitted in electronic format only, Counsel for Hopi Tribe is directed to submit a revised electronic file to the courtroom clerk containing only the portions in evidence for identification and retention as admitted.

Discussion is held regarding the proposed redactions of the expert reports, Hopi exhibits 185 and 182, of Hopi Witness Dr. Hanemann. Hopi exhibit 185 and 182 with the approved redactions will be admitted. Hopi exhibits 185 and 182 having been submitted in electronic format only, Counsel for Hopi Tribe is directed to submit a revised electronic file to the courtroom clerk containing only the portions in evidence for identification and retention as admitted.

Unredacted version of Hopi exhibit 182 is not admitted as evidence but constitutes an offer of proof.

Discussion is held regarding the proposed redactions of the expert reports, Hopi exhibits 484 and 486, of Hopi Witness Dr. Whitely. Hopi exhibits 484 and 486 with the approved redactions will be admitted. Hopi exhibits 484 and 486 having been submitted in

electronic format only, Counsel for Hopi Tribe is directed to submit a revised electronic file to the courtroom clerk containing only the portions in evidence for identification and retention as admitted.

Unredacted version of Hopi exhibits 484 and 486 are not admitted as evidence but are submitted as an offer of proof.

Discussion is held regarding the proposed redactions of the expert reports, Hopi exhibits 175 and 179, of Hopi Witness Dr. Whittington. Hopi exhibits 175 and 179 with the approved redactions will be admitted. Hopi exhibits 175 and 179 having been submitted in electronic format only, Counsel for Hopi Tribe is directed to submit a revised electronic file to the courtroom clerk containing only the portions in evidence for identification and retention as admitted.

The unredacted version of Hopi exhibit 179 is not admitted as evidence but is submitted as an offer of proof.

11:55 a.m. The Court stands at recess.

1:31 p.m. Court reconvenes with the parties and respective counsel present.

Court reporter, Luz Franco, is present and a record of the proceedings is made digitally.

Mr. Campbell makes an oral motion for the Court to reconsider its ruling on Dr. Lawrence Stevens' expert report.

The Court will advise the parties if it needs any briefing before it makes a decision.

Discussion is held regarding witnesses for the Navajo Nation.

Mr. Heiserman seeks clarification regarding the scope of the evidence to be included in an affidavit proposed by the Hopi Tribe regarding the Treaty of Guadalupe Hidalgo and the water rights of the Hopi. Discussion ensues.

Dr. David Seibert is sworn and testifies.

Hopi exhibits 868 and 3897 are received in evidence.

The witness is excused.

Mr. Campbell provides an update on Dr. Whitely's availability to testify.

Mr. Heiserman raises inquires about the timing of closing arguments and the filing of a Rule 52(c) motion.

The parties are to be prepared to discuss on October 22, 2018 the issues raised with regard to the Treaty of Guadalupe Hidalgo. The Court states that the issue is what evidence,

other than what has been heard in this trial, is appropriate to be submitted in any post-trial briefing.

2:28 p.m. Court is adjourned until 10:30 a.m. on October 22, 2018.

LATER:

The Hopi Tribe requested the Court to reconsider its exclusion of the report entitled *Pasture Canyon Springs Reconnaissance* by Dr. Lawrence Stevens marked as Hopi Exhibit 149 and duplicated as Exhibit 886, and the appendix to the report separately marked as Hopi Exhibit 150. A redacted version of the report with the attached appendix has been marked as Hopi Exhibit 3886 (“Stevens Report”). Salt River Project objected to the admission of the Stevens Report under Ariz. R. of Evid. 401 because all of the springs cataloged are managed by the Navajo Nation.¹ The locations of the springs inventoried in the Stevens Report range over more than a mile north of the border of the Hopi Reservation.

The determinative question is whether the Stevens Report has any tendency to make the quantity of water available to the Hopi Tribe in Pasture Canyon more or less probable than the quantification would be without the evidence. Counsel for the Hopi Tribe argued that information about water sources that arise on the Navajo Reservation and flow on to the Hopi Reservation that the Hopi Tribe has used for hundreds of years is relevant. [101218:31 (Campbell)] Addressing the temporal aspect of the argument first, the Stevens Report does not contain time series data for the surveyed springs to establish flow over an extended period of time. Instead, the Stevens Report stated that it documented flow for the springs at a “single point in time”. *Stevens Report* at 4. At the single point in time, two of the springs were dry and nine of the springs were classified as “previously unreported (new) springs.” *Id.* at 3. Dr. Stevens did reference a gauging station north of the Hopi Reservation that the USGS regularly maintained from 2004 – 2017, and reported the average measurement and confirmed the flow on the day of the site visit. Flow data collected on a single day will not support a reasonable factual determination about the quantity of flow from the 23 selected springs over hundreds of years.

¹ The Steven Report is not precluded by the hearsay rules because the Court previously admitted expert reports offered by the Hopi Tribe pursuant to its authority under Ariz. R. Evid. 611 when the expert was sworn as a witness, testified that his report represented his opinions in this case and that he adopted the report as his testimony.

Turning to the spatial aspect of the argument that the water from the springs flowed on to the Hopi Reservation, eighteen of the streams inventoried produced either no flow or no measurable flow, including the spring at the site closest to the boundary of the Hopi Reservation. The flow from the remaining five springs for which Dr. Stevens and his team could find measurable flow flows ranged from 0.004 cfs to 0.32 cfs at the respective measurement sites. The largest measurement occurred at the site maintained by the USGS (S0468) located approximately a mile north of the Hopi Reservation. [101518:19 (Stevens)] The four remaining springs with measurable flow, SO459, SO464, Sec 2, and Sec 3, are all

located north of the USGS site. See figure 1, Stevens Report at 2.

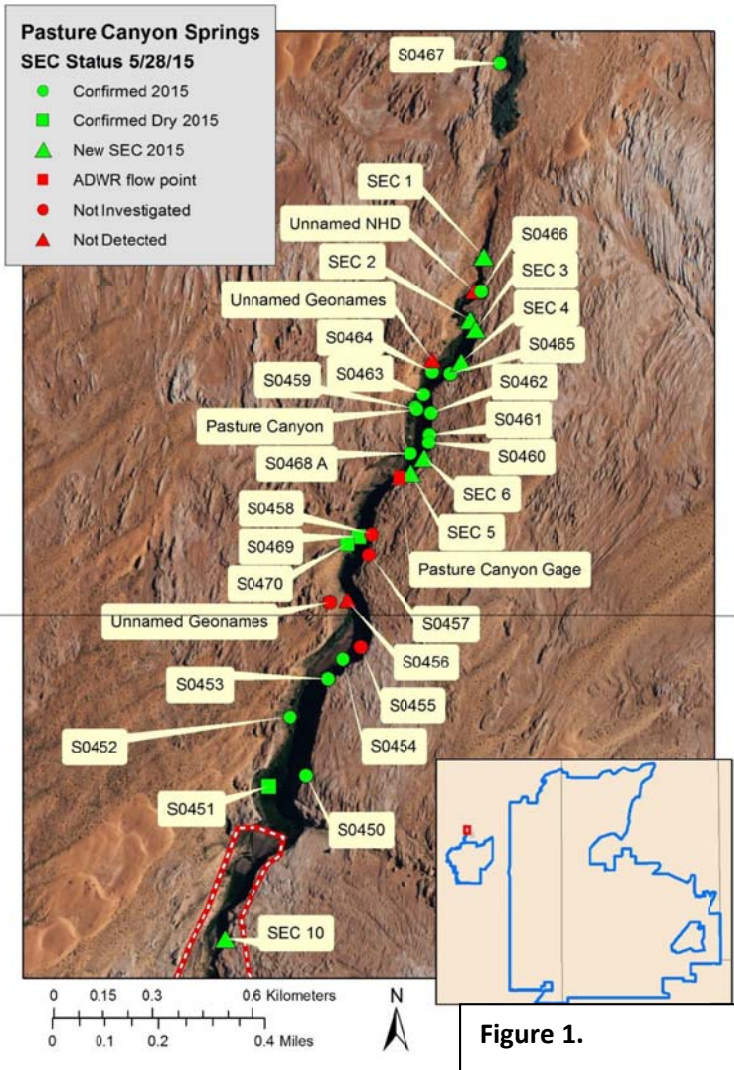


Figure 1.

The distance between the measurement site and the boundary of the Hopi Reservation is important given the description in the Stevens Report of the “losing condition of many springs.” *Stevens Report* at 4. A losing condition is one in which the discharge from the spring decreases downstream. Thus, based on the Stevens Report, the only conclusion that can be reached is that the flow south of the springs with measurable flow is less than the amount reported at the measurement sites. This conclusion is further reinforced by the conclusion found in the Stevens Report that “subsurface flow likely occurs in Pasture Canyon. Subsurface flow may pass downstream and diffuse into the reservoir or may infiltrate into deeper strata.” *Stevens Report* at 4.

In other words, an unquantified portion of spring flow may not flow south to the Hopi Reservation but may instead percolate into the aquifer.

The Stevens Report does not identify the flow collectively or individually from any of the surveyed springs at the boundary of the Hopi Reservation. The team of investigators found standing or seeping surface water at locations approximately one mile north of the boundary of

the Hopi Reservation to “near the reservation boundary”. *Id.* at 3. The Stevens Report contains no information or methodology to extrapolate the amount of flow at the border from the amounts measured north of the border. It fails to meet the relevance standard imposed by Rule 401 not because the sites measured were on the Navajo Reservation, but because it fails to quantify or present any methodology to quantify the amount of water that flows from the springs on the Navajo Reservation to the Hopi Reservation.

Counsel for the Hopi Tribe requested that the Court reconsider the decision to exclude the Stevens Report under Rule 401 based on *Masayesva v. Zah*, 816 F. Supp. 1387 (1992), *aff'd in part, rev'd in part sub nom. Masayesva v. Zah*, 65 F.3d 1445 (9th Cir. 1995), *as amended on denial of reh'g and reh'g en banc* (Dec. 5, 1995). In that case, the district court delineated the boundaries of the land to be held by the Hopi Tribe within the reservation created by the Act of June 14, 1934, 48 Stat. 960 (1934). The court partitioned the Pasture Canyon Reservoir to the Hopi Tribe. It also granted the Hopi Tribe an easement to maintain irrigation ditches running through the Navajo farms in the old Government Pasture from springs at the head of Pasture Canyon to ensure that water flows to Pasture Canyon Reservoir. *Masayesva*, 816 F. Supp. at 1420. The *Masayesva* decision, with its focus on practices and circumstances as of 1934, certainly supports the Hopi Tribe’s position that springs in Pasture Canyon have long been considered important for the Hopi Reservation. The relevant fact with respect to the Stevens Report, however, is not whether there are springs in northern Pasture Canyon or whether the Hopi Tribe maintains irrigation ditches across Navajo farms. Instead, the relevant fact for which the Steven’s Report is offered, as articulated by counsel for the Hopi Tribe, is the amount of water that flows from the springs on to the Hopi Reservation. Dr. Stevens does not quantify that flow. Dr. Stevens testified that measurements of flow at the boundary would be difficult because “it’s heavy mud, and I don’t know if – I’m not even sure if you could measure flow there. It’s a very diffused, muddy environment.” [101518:18 (Stevens)] While the information about spring flows on the Navajo Reservation from the Stevens Report may be useful for good water management and contribute toward a better understanding of the hydrology of the area, it does not provide information that makes a specific amount of surface flow on to the Hopi Reservation more or less probable. According,

IT IS ORDERED denying the motion for reconsideration of the decision to exclude the Stevens Report.

A copy of this order is mailed to all persons listed on the Court approved mailing list for Contested Case No. CV6417-203.