

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

11/09/2018

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Hatfield

Deputy

FILED: 11/19/2018

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 32

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; Carrie Brennan and 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 on behalf of Salt River Project; Cody McBride on behalf of the United States Department of Justice; Grace Rebling and Colin Campbell on behalf of the Hopi Tribe; Joy Hernbrode on behalf of the Arizona Department of Water Resources.

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

Ms. Byrnes moves to exclude Dr. Whiteley's testimony in its entirety pursuant to Rule 26(B)(4)(d) which allows one expert per side per issue. Argument on the oral motion is set for 1:30 p.m. to allow the parties to review the chart prepared by the City of Flagstaff.

Ms. Byrnes provides the Court with the City of Flagstaff's proposed redactions to Dr. Whiteley's two expert reports.

Dennis Gilpin is sworn and testifies.

Navajo exhibit 166 is received in evidence.

Mr. Leonard moves for the admission of the list of references (pgs. 49-65) in Mr. Gilpin's expert report which has been marked as Navajo exhibit 599. Mr. Campbell requests that any reference included in the exhibit that is not relevant to Mr. Gilpin's testimony be redacted. Further discussion on this exhibit will be held November 26, 2018.

12:01 p.m. The Court stands at recess.

1:30 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.

Ms. Byrnes presents arguments on the City of Flagstaff's oral motion to strike the testimony of Dr. Whiteley.

LCRC, Navajo Nation, Arizona State Land Department and Salt River Project join in the City of Flagstaff's motion.

Counsel for the Hopi Tribe requests additional time to respond to motion. The Court grants the request and sets November 14, 2018 as the due date for the Hopi Tribe's response. Replies are to be filed by close of business on November 16, 2018. A decision by the Court will be provided to the parties by November 19, 2018.

LET THE RECORD REFLECT that the admissible portions of Navajo exhibit 143 as ordered in evidence on November 8, 2018 has been submitted to the above named clerk and is identified as Navajo exhibit 743, in evidence.

LET THE RECORD FURTHER REFLECT that the status of Navajo exhibit 143 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that pages 1-16 of Navajo exhibit 142 as ordered in evidence on November 8, 2018 has been submitted to the above named clerk and is identified as Navajo exhibit 744, in evidence.

LET THE RECORD FURTHER REFLECT that the status of Navajo exhibit 142 remains marked for identification, not in evidence.

LET THE RECORD REFLECT that Hopi exhibit 3907 as identified on November 8, 2018 has been submitted to the above named clerk and is received in evidence.

Mr. Gilpin resumes stand and continues to testify.

Discussion is held regarding the propriety of the counsel for the Hopi Tribe examining the Navajo Nation's expert witness about the content of the expert's unpublished manuscript when the reviewer selected by the publisher of the work is an expert witness retained by the Hopi Tribe and provided counsel with a copy of the unpublished manuscript. Mr. Heiserman argues that his client is prejudiced by the testimony because the manuscript has not been produced to the parties and thus he had no opportunity to prepare to examine the witness and the testimony should be stricken. Ms. Byrne moves to strike all of Dr. Charles Adam's testimony based on the unpublished manuscript of Mr. Gilpin.

Mr. Leonard argues that the draft of the manuscript is under review and should not have had to be produced by the Navajo Nation. He also moves that testimony regarding the manuscript going back to Dr. Adams should be stricken.

IT IS ORDERED striking all of Mr. Gilpin's testimony with reference to the unpublished manuscript.

3:01 p.m. The Court stands at recess.

3:28 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. Gilpin continues to testify.

3:48 p.m. Court is adjourned until 10:30 a.m. on November 26, 2018.

LATER

The City of Flagstaff moved to exclude the testimony and expert reports prepared by Dr. Whiteley on the grounds that the proposed evidence violates Ariz. R. Civ. Pro. 26(b)(4)(D) and needlessly presents cumulative evidence in violation of Ariz. R. Evid. 403.

Dr. Whiteley is an anthropologist listed as an expert witness by the Hopi Tribe. He has prepared two reports: *The Importance of the Little Colorado River Drainage and Its Water Resources to the Hopi* ("Importance of Water") and *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540 – 1900* ("1540-1900 Report"). The

Hopi Tribe represents that Dr. Whiteley’s reports have been substantially redacted so that only portions that concern Hopi religious beliefs as part of the Hopi culture and tradition will be offered. [100418:14-15 (Campbell). With respect to the 1540-1900 Report, the Hopi Tribe has redacted those portions of the report describing the period prior to 1846.

The City of Flagstaff bases its argument on a detailed comparison of Dr. Whiteley’s reports and the testimony and, in some cases, reports provided by the following witnesses:

Name of Witness	Area of Academic Expertise	Party
Charles Adams, Ph.D.	Anthropologist	Hopi Tribe
T. J. Ferguson, Ph.D.	Anthropologist	Hopi Tribe
Anthony Godfrey, Ph.D.	Historian	Hopi Tribe
Micah Loma’omvaya	Lay witness	Hopi Tribe
Hana Samek Norton, Ph.D.	Historian	United States
Lionel Puhuyesva ¹	Lay witness	Hopi Tribe

1. Dr. Adams

On behalf of the Hopi Tribe, Dr. Adams prepared a report that traced the use of water in the Little Colorado River drainage basin through 1700 by the ancestors of the Hopi Tribe and the Hopi Tribe. The stated purposes of Dr. Adams report were: (1) to establish the priority of the Hopi Tribe; and (2) to demonstrate the nature, extent, and timing of the Hopi Tribe’s use of water. City of Flagstaff cites five instances in which it claims that evidence provided by Dr. Adams should preclude evidence from Dr. Whiteley. Two of those instances occurred during cross examination by an opposing party. Given the broad latitude allowed under Ariz. R. Evid. 611 to cross examine on any relevant matter, testimony elicited from Dr. Adams on cross examination about topics that may also be addressed by Dr. Whiteley should not preclude Dr. Whiteley from testifying about material that was fully disclosed.

The remaining three instances cited by the City of Flagstaff occur in Dr. Adams’ report. In resolving similar issues the courts have examined the evidence to determine whether the experts are testifying about separate issues. *Felder v. Physiotherapy Associates*, 215 Ariz. 154, 167, ¶ 69, 158 P.3d 877, 890 (App. 2007) Dr. Adams’ statement regarding the importance to the Hopi Tribe of streams located on the mesas because they provided a critical source of water does not pertain to the same issue addressed by Dr. Whiteley. A statement of physical dependence on a water source is not

¹ See discussion on page 7.

duplicative of an explanation of the religious and cultural significance of water. As to the remaining sources of claimed duplication, Dr. Adams does make a statement regarding religious significance of water at Hopi Exh. 783 at 33, but that statement is simply a general introductory sentence and should not be used to preclude the more in-depth analysis offered by Dr. Whiteley as to the cultural and religious significance of water to the Hopi Tribe. The final instance listed by the City of Flagstaff is a reference to an action that occurred in the late 1700s, which is not the time period of Dr. Adam's report, cited to establish the validity of an event that occurred prior to 1700s. Based on the foregoing, no part of Dr. Whiteley's reports which the City of Flagstaff claim duplicate Dr. Adam's report or testimony will be excluded from evidence pursuant to Ariz. R. Civ. Pro. 26(b)(4)(D) or Ariz. R. Evid. 403.

2. Dr. Ferguson

On behalf of the Hopi Tribe, Dr. Ferguson prepared and testified about a report concerning the Hopi Tribe's farming practices entitled *Hopi Agriculture and Water Use* ("Ferguson Report"). The City of Flagstaff lists 28 instances of overlap between Dr. Ferguson's report and testimony and Dr. Whiteley's report.

Both Dr. Ferguson and Dr. Whiteley are archeologists by education, training and experience. The Hopi Tribe argues that Dr. Ferguson and Dr. Whiteley may both be properly called because they have different sub-specialties. Dr. Ferguson "provided a biological (human adaptability) anthropological report on Hopi farming". *Hopi Tribe's Response to City of Flagstaff's Oral Motion to Preclude Testimony of Dr. Peter M. Whiteley*, filed November 14, 2018, p. 5. The Hopi Tribe differentiates Dr. Whiteley's anthropological expertise as "ethno/cultural" and focusing on "religion, religious practice, culture and traditions.... and linguistic anthropology regarding the Hopi language". *Id.* The Navajo Nation contends that whether the two men may have different sub-disciplines is not material. Instead, it argues the proper analysis is whether they will testify on the same issue, whether the specialized knowledge will help the trier of fact to understand evidence or determine a fact in issue, and whether such evidence is needlessly cumulative.

The City of Flagstaff lists Dr. Ferguson's four page discussion about the religious foundation of Hopi agriculture and the religious importance of springs as grounds for excluding a portion of Dr. Whiteley's Importance of Water Report. Ferguson Report, pp. 19-22, 187-194. A general review of the Importance of Water shows that it constitutes a very broad discussion of the Hopi religion, the importance of water in religious practices and beliefs, the role of water in the clan system and the vocabulary created to describe water. The City of Flagstaff accurately lists five statements where the Ferguson Report

contains information that is the same or similar to that included in the Importance of Water. In this case, those statements will not preclude the admission of the challenged portions of the Importance of Water because Dr. Whiteley's report examines the issues that are the subject of those statements in more depth than presented by Dr. Ferguson with his emphasis on agricultural issues and because of the importance that the Arizona Supreme Court has placed on the consideration of religious beliefs and cultural practices in adjudication of Indian water rights:

Deference should be given to practices requiring water use that are embedded in Native American traditions. Some rituals may date back hundreds of years, and tribes should be granted water rights necessary to continue such practices into the future. An Indian reservation could not be a true homeland otherwise.

In addition to history, the court should consider tribal culture when quantifying federally reserved rights. Preservation of culture benefits both Indians and non-Indians; for this reason, Congress has recognized the "unique values of Indian culture" in our society. 25 U.S.C. § 1902 (1994) (recognizing the importance of culture when placing Indian children in foster care); *see also* 20 U.S.C. § 7801 (1994) (finding that education **80 *319 should "build on Indian culture"). Water uses that have particular cultural significance should be respected, where possible. The length of time a practice has been engaged in, its nature (e.g., religious or otherwise), and its importance in a tribe's daily affairs may all be relevant.

In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 201 Ariz. 307, 318–19, ¶¶42-43, 35 P.3d 68, 79–80 (2001)

The remaining statements from Ferguson's Report listed by the City of Flagstaff concern the portions of the 1540 – 1900 Report that the Hopi Tribe has not redacted and have not been the subject of redactions by the Navajo Nation, City of Flagstaff, Salt River Project or the Little Colorado River Coalition. The City of Flagstaff's comments regarding Part I appear to be moot because the copy of the 1540-1900 Report attached as Exhibit B to the Hopi Tribe's Response redacted Part I in its entirety. Next, the City of Flagstaff focuses on the common descriptions of the area provided by the United States Army that are included in Part II of the 1540-1900 Report at pages 63-67. Dr. Ferguson does provide an extensive discussion of the same material at pp. 147-149 of his Report. Similarly, the City of Flagstaff correctly highlights Dr. Whiteley's recitation of records of

crop production in the 1540-1900 Report at pp. 95-100 as reproducing information provided by Dr. Ferguson in the Ferguson Report at pp.157-160. Dr. Whiteley's material is duplicative so pp. 63-67 and 95-100 of the 1540-1900 Report will be redacted and not admitted pursuant to Ariz. R. Civ. Pro. 26(b)(4)(D) ad Ariz. R. Evid. 403.

With respect to the discussion of the Mormon Visits, the 1860s, the 1870s, the Establishment of the 1882 Hopi Reservation, and the allotments on page 101 of the 1540-1900 Report, there is certainly some overlap, but Dr. Ferguson primarily focuses on agricultural issues on the reservation while Dr. Whiteley engages in a broader discussion of the Hopi Tribe and relations with the surrounding populations, including the Navajo Nation (which portion the Navajo Nation has stricken). Dr. Whiteley also provides specific information about the allotments whereas Dr. Ferguson acknowledged the process on page 160 of his Report, but does not provide information about the allotted lands. Thus, different aspects of the Hopi Tribe's history are explained in each report so they are not duplicative and good cause exists to allow the contested portions of the 1540-1900 Report at issue to be offered.

3. Dr. Godfrey and Dr. Norton

The United States and the Hopi Tribe called Dr. Godfrey and Dr. Norton, respectively, as expert witnesses. Due to the conflicting claims and positions asserted by the United States and the Hopi Tribe, the parties have not been treated as on the same side in this phase of the litigation. Thus, Dr. Norton's testimony does not preclude the testimony of Dr. Whiteley under Rule 26(b)(4)(D). The testimony of Dr. Godfrey and Dr. Norton is also not precluded because they are historians rather than archeologists. As the court directed in *In re Conservatorship for Hardt*, 242 Ariz at 451, ¶ 8, 397 P.3d at 1051, Rule 26(b)(4)(D) contemplates liberal expansion where an issue cuts across several professional disciplines.

During the course of her testimony, Dr. Norton made very clear that as an historian she was to find and summarize primary and secondary source documents and present a general overview. [091218:19 (Norton)] She testified about the discovery and identification of numerous documents maintained in governmental archives. As illustrated by her testimony cited by the City of Flagstaff regarding the Jeddito Wash, Dr. Norton generally limited her testimony to statements that she was providing a summary of a historical document and did not otherwise express opinions about the documents. (091218:110 (Norton)).

Dr. Godfrey prepared a report in 1988 about livestock grazing outside the boundaries of the 1882 Reservation. In the introductory chapter, Dr. Godfrey described the introduction of livestock by the Spanish and the use of grazing techniques taught by the Spanish. On page 10 of his Report, Dr. Godfrey referenced Padre Escalante's observations regarding cattle owned by the Hopi Tribe. In a later chapter, Dr. Godfrey again recounts the history related to the livestock by citing on page 133 of his Report to observations regarding cattle and horses. Although this information is also referenced by Dr. Whiteley, the information is provided as part of study using a difference discipline. Thus, none of the portions of the reports sought be excluded by the City of Flagstaff as duplicative of Dr. Norton's or Dr. Godfrey's work will be excluded under Rules 26(b)(4)(D) or 403.

4. Micah Loma'omvaya and Lionel Puhuyesva

The Hopi Tribe called two of its members to testify about current religious practices. Mr. Puhuyesva, the water resource director for the Hopi Tribe, also testified about water management. Given the scope and extent of his experience in and responsibilities for water management in a professional capacity on the Hopi Reservation, Mr. Puhuyesva was permitted to testify as an expert concerning water management issues reflected in photographs taken on the Hopi Reservation. [100118:70-71] *Rasor v. Nw. Hosp. LLC*, 244 Ariz. 423, 419 P.3d 956, 963 (Ct. App. 2018)(a witness qualifies as an expert if he possess "skill and knowledge superior to that of [people] in general."); *State v. Delgado*, 232 Ariz. 182, 186, ¶12, 303 P.3d 76, 80 (Ct. App. 2013)("Whether a witness is qualified as an expert is to be construed liberally, and it would be an abuse of discretion " "to exclude testimony simply because ... the proposed expert does not have the specialization that the court considers most appropriate." " *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3rd Cir.1997), quoting *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777, 782 (3rd Cir.1996). If an expert meets the 'liberal minimum qualifications,' her level of expertise goes to credibility and weight, not admissibility. *Id*") Mr. Puhuyesva was not offered as an expert witness with respect to religious issues. Instead, like Mr. Loma'omvaya, he testified about his personal knowledge of his and the Hopi Tribe's religious practices. The trial transcript does not state that Mr. Loma'omvaya was offered as an expert, that an objection was made to his testifying as an expert or that a ruling was made about his testifying as an expert. Accordingly, the testimony of these two witnesses on religious matters does not preclude Dr. Whiteley's expert archeological testimony.

IT IS ORDERED granting the City of Flagstaff's motion in part and denying it in part.

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