

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

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

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

DATE: June 18, 2012

CV 6417-201

ORDER DENYING THE NAVAJO
NATION'S MOTION TO STRIKE
THE HOPI TRIBE'S THIRD
SUPPLEMENTAL RULE 26.1
DISCLOSURE STATEMENT

CONTESTED CASE NAME: *In re Hopi Tribe Priority.*

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master denies the Navajo Nation's Motion to Strike the Hopi Tribe's Third Supplemental Rule 26.1 Disclosure Statement.

NUMBER OF PAGES: 5.

DATE OF FILING: June 18, 2012 (mailed).

The Navajo Nation moved to strike the Hopi Tribe's third supplemental disclosure statement on the grounds that the disclosures are untimely, there is no showing of good cause for the lateness, the late filing cannot be considered inadvertent, and the prejudice resulting from the admission of the disclosures cannot be remedied without significant delay and expense. The Hopi Tribe responded to each argument.

The Hopi Tribe's third supplemental disclosure includes the following

documents:

1. A revised summary of facts and legal theories underlying the Hopi Tribe's claim of a time immemorial priority date as a result of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1948);
2. Eight colonial Spanish maps. Four maps appear to be parts 1 through 4 of a composite map;
3. A Revised Partial Hopi-Spanish/Mexican Chronology, 1540 - 1850. The revisions consist of information Dr. John L. Kessell added to a chronology he had compiled; and
4. A collection of articles and source materials associated with the reports of the Hopi Tribe's experts, primarily Dr. David J. Weber.

This order will address the four sets of disclosures.

When this case began, the Hopi Tribe was using Dr. David J. Weber as an expert. In April 2009, the Hopi Tribe filed Dr. Weber's expert report concerning the Hopi Tribe's land and water rights claims under Spanish and Mexican law. Thereafter, Dr. Weber was unable to continue as the Hopi Tribe's expert. John L. Kessell, Ph.D. substituted Dr. Weber. On May 3, 2010, the Hopi Tribe filed Dr. Kessell's expert report which endorsed and supplemented Dr. Weber's report.

A. Colonial Spanish Maps, Revised Chronology, and Articles and Source Materials

On March 13, 2012, the Navajo Nation took the deposition of Dr. Kessell. During the course of Dr. Kessell's deposition, the Hopi Tribe disclosed and provided to the Navajo Nation copies of the eight colonial Spanish maps and the Revised Partial Hopi-Spanish/Mexican Chronology. The Hopi Tribe's counsel avows that he received these documents on February 21, 2012, and February 24, 2012. The Navajo Nation's counsel received them on March 13, 2012, twenty-one and eighteen days after February 21 and 24, 2012, respectively.

The Hopi Tribe's new counsel avows that after Dr. Kessell's report was filed, new counsel did not ask Dr. Kessell to do any additional research on behalf of the Tribe.¹ Dr. Kessell stated that he undertook to do the research for his use and as part of preparing for his deposition.² During that research, he obtained the colonial Spanish maps and the information added to the original chronology he had compiled.

The Hopi Tribe argues that the collection of articles and source materials listed in the third supplemental disclosure statement are copies of articles and source materials

¹ Hopi Tribe's Attorney's Decl. at 2 (May 21, 2012).

² Hopi Tribe's Resp. to Navajo Nation's Motion to Strike, Exh. A at 130 l. 25 - 132 l. 6 (May 21, 2012). *See also* Navajo Nation's Motion to Strike, Exh. 2.

that the Hopi Tribe's experts, primarily Dr. Weber, relied upon in their reports. According to the Hopi Tribe, these copies were provided "as a convenience to the Special Master and to meet the spirit of" Arizona Rule of Civil Procedure 26.1.³

Rule 26.1(b)(2) states in pertinent part that the duty to disclose:

[S]hall be a continuing duty, and each party shall make additional or amended disclosures whenever new or different information is discovered or revealed. Such additional or amended disclosures shall be made seasonably, but in no event more than thirty (30) days after the information is revealed to or discovered by the disclosing party.

The Special Master's Case Initiation Order and Designation of Issues for Briefing (para. 6(E), Sept. 8, 2008) reiterated the required continuing duty to disclose.

Rule 37(c) addresses failure to disclose and untimely disclosure. The Arizona State Bar Committee's notes regarding the 1996 and 1997 amendments to Rule 37 state that:

In keeping with *Bryan v. Riddell*, 178 Ariz. 472, 875 P.2d 131 (1994), the committee wishes to reemphasize that the disclosure of the information need not be in a formal disclosure statement but can be in response to ... [a] deposition ... so long as all parties are reasonably apprised of the ... information possessed by the witness, or other information sought to be admitted.⁴

The notes of the committee charged with revising the rules "reemphasize" that a disclosure can be timely if made in a deposition. The Arizona Court of Appeals upheld this interpretation concerning a deposition in *Link v. Pima County*, 193 Ariz. 336, 339, 972 P.2d 669, 672 (1998).

The Hopi Tribe disclosed the eight colonial Spanish maps and the revised chronology at Dr. Kessell's deposition on March 13, 2012, within thirty days after having received them from Dr. Kessell. Dr. Kessell was questioned about the revised chronology and maps. The Special Master finds that the maps and revised chronology were timely disclosed under Rule 26.1(b)(2).

The articles and source materials were identified in the disclosure statement filed on March 30, 2012. The Special Master compared the list of articles and source materials listed in the third supplemental disclosure statement with the list of "sources cited" in Dr. Weber's expert report. Generally speaking - because Dr. Weber provided a full citation while the third supplemental disclosure statement listed an abbreviated citation, he found a correlation. The disclosure statement also listed the depositions of Drs. Brescia, Cutter,

³ Hopi Tribe's Resp. to Navajo Nation's Motion to Strike at 7.

⁴ A.R.S. Ann. Part 1, Ariz. R. Civ. P. 37, State Bar Comm. Notes, 1996 and 1997 Amends., (2011).

and Kessell held in February and March 2012.

Bryan held that litigants “should fairly expose the facts and issues to be litigated, as well as the witnesses and exhibits to be relied upon.”⁵ By March 30, 2012, the Navajo Nation “was well aware of the evidence that would be forthcoming at trial;” it cannot be found that the Nation “was kept in the dark with respect to the ‘evidence’ in the case.”⁶ The articles and source materials were part of the expert reports previously disclosed.

The Special Master finds that the articles and source materials disclosed on March 30, 2012, were disclosed previously. However, this finding is reviewable in the future should it be shown that a particular article or source material listed in the third supplemental disclosure statement was not used in the Hopi Tribe’s expert reports.

B. Revised Summary of Facts and Legal Theories

The issue being briefed that led to the motion to strike is issue B: “Does the Hopi Tribe hold water rights with a priority date of 1848 as a result of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1848)?”

In its initial disclosure statement, the Hopi Tribe provided the legal theories underlying its claims on this issue as follows:

“The Hopi Tribe holds water rights with a priority date of 1848 **or earlier** as a result of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1848).” (Emphasis added.)⁷

The second supplemental disclosure statement, filed in March 2010, stated the following concerning Dr. Kessell’s testimony:

Dr. Kessell is expected to testify that the Treaty of Guadalupe Hidalgo protects the Hopis’ senior land and water rights. Specific language in the Treaty of Guadalupe Hidalgo protected the rights of citizens of Mexico, including the Hopis. **He will testify regarding the nature of water rights of aboriginal communities under Spanish and Mexican law which rights the Hopis possessed.** (Emphasis added.)⁸

The third supplemental disclosure statement states that:

The Hopi Tribe claims a time immemorial priority date as a result of its aboriginal use of water. In addition, the Hopi Tribe is entitled to a time immemorial priority date as a result of the United States entering the

⁵ 178 Ariz. at 477, 875 P.2d at 136.

⁶ 178 Ariz. at 476, 875 P.2d at 135.

⁷ Hopi Tribe’s Rule 26.1 Disclosure State. at 7 (Jan. 30, 2009).

⁸ Hopi Tribe’s Second Supp’l Rule 26.1 Disclosure State. at 3 - 4 (Mar. 16, 2010).

Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1848).⁹

The Navajo Nation argues that in its third disclosure statement the Hopi Tribe changed the factual and legal theories underlying its claim with respect to the issue. The Hopi Tribe's first and second disclosure statements do not support this argument.

The first disclosure statement indicated that under the 1848 Treaty of Guadalupe Hidalgo the Hopi Tribe also claimed a priority date "earlier" than 1848. The second supplemental disclosure stated that Dr. Kessell would testify regarding the "water rights of aboriginal communities under Spanish and Mexican law which rights the Hopis possessed." These disclosures made the Navajo Nation aware that the Hopi Tribe would claim a time immemorial priority date as part of its arguments on issue B. A time immemorial priority is central to the Hopi Tribe's positions in this case.

The Special Master has carefully considered all the arguments presented in the motion to strike. The flow of disclosures could have been smoother especially given the duration of this litigation, complexity of the issues, and level of exemplary advocacy, but he does not find grounds to grant the motion.

IT IS ORDERED denying the Navajo Nation's Motion to Strike the Hopi Tribe's Third Supplemental Rule 26.1 Disclosure Statement.

DATED: June 18, 2012.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On June 18, 2012, the original of the foregoing was mailed to the Clerk of the Apache County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for the Little Colorado River Adjudication Civil No. 6417-201 dated January 31, 2012. The Special Master distributed a copy by electronic mail.

/s/ George A. Schade, Jr.
George A. Schade, Jr.

⁹ Hopi Tribe's Third Supp'l Rule 26.1 Disclosure State. at 2 (Mar. 30, 2012).