

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

01/07/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

A. Hatfield

Deputy

FILED: 01/13/2020

In re: Hopi Reservation HSR
Contested Case No. CV6417-203

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

In re: Oral Argument

MINUTE ENTRY

Courtroom: CCB 301

2:05 p.m. This is the time set for Oral Argument on the *Hopi Tribe's Motion to Compel Jacobs Engineering Group Inc. to Comply with Subpoena Duces Tecum* filed December 2, 2019 ("Hopi Motion").

The following attorneys appear in-person: Colin Campbell on behalf of the Hopi Tribe; Judith Dworkin and Jeffrey Leonard on behalf of the Navajo Nation; Mark McGinnis on behalf of the Salt River Project; and Ethan Minkin on behalf of the City of Flagstaff.

The following attorneys appear telephonically: Emmi Blades on behalf of the United States; Kevin Crestin on behalf of the Arizona State Land Department; Brian Heiserman on behalf of the LCR Coalition; Evan Hiller on behalf of the Navajo Nation; Kimberly Parks on behalf of ADWR; and Sara Ransom on behalf of the City of Flagstaff.

Court reporter, Kristin Decasas, is present and a record of these proceedings is made digitally.

Oral argument is presented on the *Hopi Motion* by Colin Campbell and Ethan Minkin.

Discussion is held regarding which additional portions of Appendix C of the Red Gap Ranch Feasibility that the City of Flagstaff would be willing to provide to the Hopi Tribe.

Mr. Leonard addresses the *Hopi Motion to Compel the Navajo Nation to Produce Documents relating to Future Coal Development at Black Mesa* and requests that oral argument be scheduled.

2:40 p.m. Matter concludes.

LATER:

I. DISCOVERY DISPUTE - JACOBS ENGINEERING REPORT

In this phase of the case, the Hopi Tribe has put at issue the feasibility of transporting groundwater pumped from the Hart Ranch to the Hopi Reservation. It proposes to construct a “30-inch transmission line to bring C-Aquifer water approximately 64 miles from Hart Ranch to the Hopi Reservation beginning around 2050.” Hopi Tribe’s Reply in Support of Motion to Compel Jacobs Engineering Group Inc. to Comply with a Subpoena Duces Tecum, filed January 2, 2020 at 3 (“Reply”). Hopi Tribe now seeks an order to compel Jacobs Engineering Group, Inc. (“Jacobs), the expert retained by the City of Flagstaff, to comply with a subpoena duces tecum for a 2009 report on the feasibility of constructing a pipeline to supply the City of Flagstaff with water from land known as the Red Gap Ranch.

A. Background

Twelve years ago, the City of Flagstaff contracted with Jacobs, an international engineering firm, to conduct a feasibility study of a proposed pipeline to transport water from the Red Gap Ranch to the City of Flagstaff. Affidavit of Douglas L. Smith at 1 (December 19, 2019), Exhibit A to City of Flagstaff’s Objections to the Hopi Tribe’s Motion to Compel Jacobs Engineering Group Inc. to Comply with a Subpoena Duces Tecum filed December 23 2019 (“Objection”). The City of Flagstaff engaged Jacobs as part of its water planning efforts and not in connection with this litigation that began after the completion of the Hopi Reservation Hydrographic Survey Report in 2015.

In 2008, Jacobs produced the Red Gap Ranch Feasibility Study. It evaluated the proposed water supply pipeline and alternative routes for the placement of the pipeline. Objection at 4; Affidavit of Lee Storey at 2 (December 23, 2019), Exhibit B to the Objection. Douglas Smith, an engineer and a Manager of Projects for Jacobs, was one of seven or eight persons employed by Jacobs who worked on the Red Gap Ranch Feasibility Study in 2008 (“Feasibility Study”). Deposition of Douglas Smith at 12. (December 19, 2019), Exhibit A to Reply; Smith Affidavit at 1.

The precise scope of Mr. Smith's work on the Feasibility Study is not known because when counsel for the Hopi Tribe sought to elicit that information, the attorney for the City of Flagstaff instructed Mr. Smith not to answer the question. Smith Deposition at 7. Based on the record, Mr. Smith worked on technical aspects of the Feasibility Study, but he did not have general responsibility for the project. On his resume, Mr. Smith referenced the Red Gap Ranch pipeline project as part of his past experience as: "Doug was responsible for management of the technical issues related to the pipeline design report for this \$150 million pipeline." Smith Deposition at 7. Mr. Smith avowed that he did not author the Red Gap Ranch Feasibility Study (Smith Affidavit at 1) and at oral argument, the City of Flagstaff confirmed that the Mr. Smith did not provide the engineering seal on the Feasibility Study.

In 2018, the City of Flagstaff retained Jacobs for this litigation to analyze and rebut the report produced by the Hopi Tribe as to the feasibility of the proposed Hart Ranch pipeline. Response at 4. Mr. Smith along with three other employees prepared rebuttal reports. Smith Deposition at 17. Subsequent to the production of the rebuttal reports and prior to his deposition, Mr. Smith instructed another Jacob's employee to review some of the costing figures used in the Feasibility Study and prepare a table showing a comparison of the cost figures included in the expert reports for this case and the Feasibility Report. Smith Deposition at 4-5. On November 22, 2019, prior to the deposition, the City of Flagstaff produced the 4-page portion of Appendix C to the Feasibility Study entitled "Pipeline Linear Foot Unit Price Development". Exhibit 3 to Objection. Following the deposition, the City of Flagstaff produced the table prepared by Mr. Smith's associate.

In response to questions from the Court following a recitation by counsel for the Hopi Tribe of a list of needed information at oral argument on the Hopi Motion, the City of Flagstaff proposed the production of three additional sections of Appendix C to the Feasibility Study: Pipe Pricing Projection Estimate, Pump Station Estimate, and Pump Station & Forebay Sizing Criteria. The City of Flagstaff represents that Mr. Smith has not reviewed any of these portions of Appendix C to the Feasibility Study in preparation of his reports or in connection with the formation of his opinions in this case. City of Flagstaff's Status Report on Additional Disclosures Offered in Response to Fourth Subpoena to Jacobs Engineering, filed January 9, 2020.

B. Discussion

Mr. Smith's reports include Cost Estimate Tables that provide estimated costs of the various components of the project. Mr. Smith cited "past project experience" as the source of the vast majority of the cost estimates of the component parts of the proposed pipeline. The reason for the Hopi Tribe's frustration is clear. It cannot test the validity, i.e., cross examine Mr. Smith about "past project experience" without data. According to the Hopi Tribe, Mr. Smith's "expert file did not include any documents from past projects that would substantiate his costing for the Hopi pipeline scenarios." Hopi Motion at 3. As its remedy, the Hopi Tribe elected to pursue the production of the Feasibility Study.

The information which an expert considers in the preparation of an expert report must be produced. Ariz. R. Civ. P. 26.1(d)(4)(C); see also Ariz. R. Evid. 705. The Hopi Tribe defines the relevant issue here as "whether [Mr. Smith] considered the Feasibility Study when costing the Hopi Project." Hopi Motion at 5. The City of Flagstaff contends that Mr. Smith did not consider or rely upon the Feasibility Study and therefore it should not be produced. The City of Flagstaff also contends that the Feasibility Study should not be produced because it is confidential, proprietary, privileged and because the Hopi Tribe seeks the information for impermissible and improper purposes. Objection at 2-3.

The Hopi Tribe argues that that Jacobs must produce the entire Feasibility Study because Mr. Smith worked on it and because after completion of his reports produced in this case, but before his deposition, Mr. Smith had an assistant review certain costing information included in Appendix C to the Feasibility Study and provide him with an analysis of that information.

Mr. Smith used an analysis of a 4-page portion of Appendix C from the Feasibility Study to test the reasonableness of the opinions reached in the expert report prior to the date of his deposition. The fact that the analysis was performed after the issuance of the written report is not dispositive. Evidently, Mr. Smith believed that it was necessary to take the additional step of having a limited portion of the Feasibility Report analyzed to complete the process of developing his opinion about which he testified at his deposition. *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 361, ¶ 34, 322 P.3d 168, 178 (App. 2014) (deposition testimony may be considered part of an expert's disclosed opinion). Thus, Mr. Smith considered the 4-page portion of Appendix from the Feasibility Study and that information must be disclosed. The City of Flagstaff has properly disclosed it and the analysis that was prepared from those pages.

The question in dispute is whether the City of Flagstaff must produce the remainder of the Feasibility Study. The Hopi Tribe appears to argue that it is entitled to the Feasibility Study because Mr. Smith has estimated the cost of the Hopi's proposed 65-mile pipeline at \$306 million while arriving at an estimate a decade ago for a shorter pipeline at \$150 million. Discovery of expert's conclusions and opinions in unrelated matters for purposes of impeachment does not support a broad reading of Rule 26. *Trunk*

v. Midwest Rubber & Supply Co., 175 F.R.D. 664, 665 (D. Colo. 1997). Here, the potential cost of the Red Gap Ranch pipeline is not known because Mr. Smith declined to answer a question on that topic on instruction of counsel. Smith Deposition at 8. Mr. Smith explained that the \$150 million number was included in his resume to provide an indication of the magnitude of the project. *Id.* at 9. Based on this testimony, the cost of the Red Gap Ranch pipeline could range from more than \$100 million to less than \$1 billion. Mr. Smith did confirm that he did not conclude more than ten years ago that the cost of the pipeline was \$150 million. *Id.*

Mr. Smith has avowed that he has not reviewed the Feasibility Study in many years. Smith Affidavit at 3. The fact that Mr. Smith stated that he has not read the remainder of the Feasibility Study recently is not determinative of whether he considered the Feasibility Study in developing his opinion. *United States v. Dish Network, LLC* 297 F.R.D. 589, 594 (C.D. Ill. 2013) Mr. Smith worked on the project and knows about at least a portion of the content of the Feasibility Study albeit to the extent a person can remember a project completed a decade in the past. A federal district court aptly framed the issue involving a similar discovery dispute:

This case presents an interesting question. On the one hand, an expert should not be able to limit the discoverability of facts and data learned during a prior retention by simply stating that he did not consider them when forming his current opinion. On the other hand, an expert should not have to disclose all facts and data known to him relating to any work he ever performed for a party.

United States v. Dish Network, LLC 297 F.R.D. 589, 594 (C.D. Ill. 2013)

The Arizona court has expressed a similar approach with its recognition that many discovery disputes involve a question of degree and its admonitions that experts should not be subjected to overbroad discovery requests that could have a chilling effect. *Am. Family Mut. Ins. Co. v. Grant*, 222 Ariz. 507, 514, ¶ 24, 217 P.3d 1212, 1219 (App. 2009) (There must, however, be some limit, lest civil discovery devolve into a war of attrition and deter qualified experts who might otherwise provide valuable assistance to the trier of fact.) In that case, the court concluded that discovery relating to expert bias should not include documents older than three years. Here, the Feasibility Study is more than a decade old and, while the requested discovery does not go to bias on its face, the same policies of not subjecting experts to examination on work concluded years in the past applies here. Generally, allowing discovery into the facts and data about an expert's prior work unrelated to the litigation extending back more than a decade could have a chilling effect on experts' willingness to participate in the litigation process.

An exception to the policy would be warranted if Mr. Smith had considered the Feasibility Report. “Considered” in this case means an objective determination of whether the analysis used in the Feasibility Report informs either the opinions or assumptions used in the analysis of the cost of the Hopi pipeline. The City of Flagstaff produced the Feasibility Report under seal for *in camera* review. The Feasibility Report, like the expert reports prepared, concerns a proposed pipeline to be constructed in Northern Arizona to transport water. The cost of a particular pipeline, however, depends on a wide variety of factors such as length, topography of the specific land traversed, water demand, and alternative sources of supply. All of the components and facts and circumstances related to a major pipeline make these pipeline unique. Given the age of the Feasibility Report and the technical nature of the costing information included in the Feasibility Report, it is reasonable to conclude that the information in the Feasibility Report could not have informed Mr. Smith’s opinion absent a review to refresh his memory. In addition, except for the most basic information, such as the cost of the pipe provided in the disclosed sections of the report, the myriad of factors and relative impact of different factors on cost unique to such major pipelines to be constructed over different routes precludes a finding that the reports are sufficiently related so as to have informed Mr. Smith’s opinions.

For the reasons stated above, the Hopi Tribes’ Motion to *Compel Jacobs Engineering Group Inc. to Comply with Subpoena Duces Tecum* is denied. The City of Flagstaff should not read this minute entry as making any decision other than with respect to the whether it is compelled to produce the remainder of the Feasibility Study.

II. DISCOVERY DISPUTE – FUTURE COAL DEVELOPMENT

The Navajo Nation has requested oral argument on the *Hopi Motion to Compel the Navajo Nation to Produce Documents relating to Future Coal Development at Black Mesa*.

IT IS ORDERED setting oral argument on the *Hopi Motion to Compel the Navajo Nation to Produce Documents relating to Future Coal Development at Black Mesa* on **February 5, 2020 at 3:30 p.m.** Oral argument will be held in the Superior Court of Arizona, Central Court Building, Courtroom 301, 201 West Jefferson Street, Phoenix, AZ 85003-2202.

Instructions for telephonic participation:

Dial: 602-506-9695 (local)

1-855-506-9695 (toll free long distance)

Dial Collaboration (conference) Code 357264#

III. SUMMARY JUDGMENT MOTIONS

The LCR Coalition filed two motions for partial summary judgment on December 20, 2019. The Hopi Tribe moved for clarification of the Motion for Partial Summary Judgment on the Hopi Tribe's Claim to Immemorial Priority on the ground that it was essentially a motion for reconsideration and, if a response were to be required, that it be granted an extension. On January 2, 2020, the Hopi Tribe filed a Motion for Extension of Time with respect to the LCR's Motion for Partial Summary Judgment Regarding the Hopi Tribe's and United States Claims to Water for Generation of electrical power on the Hopi Reservation for Use Outside the Hopi Reservation. The United States has joined in the Motion for Extension of Time. The LCR Coalition offered to agree to extended deadlines but the dates were evidently not acceptable to the Hopi Tribe. As discovery is now concluding and the LCR appears to have no objection to a limited extension, good reason exists to extend the deadlines to the motions, but not to the extent requested by the Hopi Tribe.

IT IS ORDERED that responses to the motions for summary judgment shall be filed on or before **February 10, 2020**, and replies shall be due on **March 9, 2020**.

A copy of this order is mailed to all persons listed on the Court-approved mailing list.