

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

6/3/2020

CLERK OF THE COURT

SPECIAL WATER MASTER SUSAN WARD
HARRIS

T. DeRaddo

Deputy

FILED: June 16, 2020

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: Oral Argument re: The Hopi Tribe's
Motions in Limine Nos. 2-7; and the Navajo
Tribe's Motions in Limine Nos. 1-3.

MINUTE ENTRY

Central Court Building – Courtroom 301

9:30 a.m. This is the time set for Oral Argument on Motions in Limine. All attorneys appear telephonically as follows:

- Grace Rebling, Phillip London and Payslie Bowman appear on behalf of the Hopi Tribe
- Vanessa B. Willard, Cody McBride, and Rebecca Ross appear on behalf of the United States Department of Justice, Indian Resources Section
- Brian Heiserman, Brad Pew and David Brown on behalf of the LCR Coalition
- Carrie Brennan and Kevin Crestin on behalf of the Arizona State Land Department
- John Weldon on behalf of SRP
- Sarah Ransom and Lee Storey on behalf of the City of Flagstaff
- Kimberly Parks on behalf of ADWR
- Jeffrey Leonard, Evan Hiller and Kathryn Hoover on behalf of the Navajo Nation
- Joseph Sparks is observing on behalf of the San Carlos Apache Tribe

The Court has read and considered all briefing on the Motions in Limine submitted by the parties.

Hopi Tribe's Motion in Limine No 2: Douglas Smith

Summary: The Hopi Tribe moves in limine to exclude the expert opinions of Douglas Smith.

Grace Rebling presents argument on behalf of the Hopi Tribe. Sarah Ransom presents argument on behalf of the City of Flagstaff.

Discussion is held on the record regarding possible discovery sanctions.

Hopi Tribe's Motion in Limine No. 3: Pete Gallegos and Delwin Wengert

Summary: The Hopi Tribe Moves in limine to exclude the untimely disclosed tables prepared by expert witness Pete Gallegos and Delwin Wengert along with any testimony about the contents of those tables.

Payslie Bowman presents argument on behalf of the Hopi Tribe. Brian Heiserman presents argument on behalf of the LCR Coalition.

Hopi Tribe's Motion in Limine No. 4: Jim Chang

Summary: The Hopi Tribe moves in limine to preclude Dr. Jim Chang from testifying about new expert opinions first disclosed during his deposition.

Phillip London presents argument on behalf of the Hopi Tribe. Terry Brennan presents argument on behalf of the Arizona State Land Department.

Hopi Tribe's Motion in Limine No. 5: Duane Coleman and Chris Lowman

Summary: The Hopi Tribe moves in limine to limit the Arizona State Land Department and the LCR Coalition to one expert – either Duane Coleman or Chris Lowman – to opine on the grazing capacity of the Hopi Reservation.

Phillip London presents argument on behalf of the Hopi Tribe. Brian Heiserman presents argument on behalf of the LCR Coalition.

Hopi Tribe's Motion in Limine No. 6: Stephen Brophy and Brett Crosby

Summary: The Hopi Tribe moves in limine to preclude the testimony at trial of Stephen Brophy and Brett Crosby.

Grace Rebling presents argument on behalf of the Hopi Tribe. Brad Pew presents argument on behalf of the LCR Coalition.

Hopi Tribe's Motion in Limine No. 7: LCR Coalition's Farming and Ranching Witnesses

Summary: The Hopi Tribe moves in limine to preclude the testimony of the LCR Coalition's farming and ranching fact witness as irrelevant and cumulative: or, to treat the

witness as experts and exclude the testimony as unhelpful, inadequately disclosed, and subject to the one expert rule.

Phillip London presents argument on behalf of the Hopi Tribe. Brad Pew presents argument on behalf of the LCR Coalition.

Hopi Tribe's Motion in Limine No. 8: John Leeper

Summary: The Hopi Tribe moves in limine to exclude the expert report of John Leeper prepared for but not offered during the past and present trial.

Phillip London presents argument on behalf of the Hopi Tribe. Jeffrey Leonard presents argument on behalf of the Navajo Nation.

Navajo Nation's Motion in Limine No. 1: Testimony and Report of Cecilia Ciepiela-Kaelin,

Summary: The Navajo Nation files its motion in limine to exclude the testimony and report of Cecilia Ciepiela-Kaelin

Evan Hiller presents argument on behalf of the Navajo Nation. Grace Rebling presents argument on behalf of the Hopi Tribe.

The Court notes that the United States filed a consolidated response to the Navajo Nation's Motion in Limine No's 2 and 3.

Navajo Nation's Motion in Limine No. 2: Reports of Hannah Samek Norton

Summary: The Navajo Nation files its motion in limine to exclude the reports of Hannah Samek Norton

Navajo Nation's Motion in Limine No. 3: Reports of Chris Banet

Summary: The Navajo Nation files its motion in limine to exclude the reports of Chris Banet

Jeffrey Leonard presents argument on behalf of the Navajo Nation and its Motions in Limine Nos. 2 and 3. Vanessa Willard presents argument on behalf of the United States Department of Justice, Indian Resources Section.

IT IS ORDERED taking these Motions in Limine under advisement.

11:39 a.m. Matter concludes.

LATER:

The motions *in limine* argued by the parties can be grouped into four general categories:

1. Motions to exclude expert witnesses because they either did not adequately demonstrate a basis for an expert opinion or do not have the expertise to offer an opinion.
2. Motions to exclude new or amended expert opinions provided after the due date for expert reports.
3. Motions to exclude witnesses as cumulative, irrelevant or in violation of Ariz. R. Civ. P. 26(b)(4)(F)(i).
4. Motion to exclude expert reports or portions of expert reports used in the first phase of the trial.

Motions to Exclude Experts

The Hopi Tribe and the Navajo Nation filed motions to exclude expert witnesses on the grounds that they are not reliable or lack expertise. As the United States has argued generally in this round of motions *in limine*, there is less need to require the court to serve as a gatekeeper to assure that proposed expert testimony is reliable under Arizona Rule of Evidence 702 and thus helpful to the jury's determination of facts at issue in a bench trial. *See United State v. Brown*, 415 F.3d 1257, 1269 (11th Cir. 2005). In a bench trial, the court has the discretion to hear the evidence and objections to it and rule on its admissibility during the trial in the appropriate factual context. *Arizona State Hosp./Arizona Cmty. Prot. & Treatment Ctr. v. Klein*, 231 Ariz. 467, 474, ¶ 31, 296 P.3d 1003, 1010 (App. 2013).

The Hopi Tribe moved to exclude Douglas Smith, an engineer engaged by the City of Flagstaff to rebut the opinions of the Hopi Tribe's expert about a water infrastructure project to withdraw water from the Hopi Hart Ranch for the benefit of the Hopi Reservation. Mr. Smith prepared a report that considered four different scenarios and concluded that a significant difference between his scenarios and those of the Hopi Tribe's expert concern the treatment of peak flow rates. The report contains an appendix titled "Engineer's Opinion of Probable Costs" listing "Past project experience" for many line items as the source of his information.

A witness may provide an expert opinion based on past experience provided that it is based on sufficient facts or data. Ariz. R. Evid. 702. The rules further permit an expert to base an "opinion on facts or data in the case that the expert has been made aware of or personally observed." Ariz. R. Evid. 703. In a case dealing with the reasonableness of charges for medical treatment, the court allowed an expert to testify based on a review of a third party data base finding that "it stands to reason, therefore, that experts may rely on industry standards and comparison data sources to establish the

reasonableness of medical bills in a particular instance.” *Contreras v. Brown*, CV-17-08217-PHX-JAT, 2019 WL 2080143, at *4 (D. Ariz. May 10, 2019).

The Hopi Tribe seeks to exclude Mr. Smith as an expert claiming that he improperly failed to produce the documents demonstrating the “Past project experience” that he relied upon to form his opinions. The basis for the Hopi Tribe’s position can be seen in Mr. Smith’s deposition testimony:

Q. I want to understand.

You’re telling me that you have spreadsheets that are backup for the appendices that are in the report but they haven’t been produced to us? Am I right?

A. Yeah.

Q. Okay. Do you remember getting a subpoena in this case?

A. Yes.

Q. Did you gather everything together?

A. Yes

Q. Did you think the spreadsheets weren’t asked for?

A. I didn’t think they were relevant. They’re – there’s a lot of detail calculations there.

Exhibit B to Hopi Tribe’s Motion in Limine No. 2: Douglas Smith. Deposition of Douglas Lee Smith, 109 (December 19, 2019).

In *Gaston v. Hunter*, 121 Ariz. 33, 43, 588 P.2d 326, 336 (App. 1978), the court properly exercised its discretion by not allowing a doctor to testify about information gathered from patient records after the witness “refused to disclose numerous facts about these patients, contending he was forbidden to do so by the FDA and the physician-patient privilege.” In this case, however, there does not appear to be a refusal to produce documents. The City of Flagstaff contends that Mr. Smith’s “requests to his colleagues, and analysis of Jacobs Engineering’s extensive project database detailing costing of other pipeline projects” were disclosed. City of Flagstaff’s Response at 14. The only discovery dispute that arose between the parties about Mr. Smith during the discovery phase of this proceeding concerned a report prepared for a project that Mr. Smith did not rely upon to form his opinions in this case. Thus, it appears that facts surrounding the data relied upon by Mr. Smith are not comparable to the facts in the *Gaston* decision so the sanction of exclusion is not warranted. The better course of action is to permit Mr.

Smith to testify at trial at which time a determination can be made as to the reliability of his opinions based on the stated source.

The Navajo Nation also moved to exclude an expert witness. It sought to exclude the testimony of Cecilia Ciepiela-Kaelin, who has been engaged by the Hopi Tribe to provide an expert opinion about the economic feasibility of developing a livestock value chain on the Hopi Reservation. It contends that Ms. Ciepiela-Kaelin lacks sufficient education or experience to testify as an expert about the Hopi Tribe's future plans. According to the curriculum vitae for Ms. Ciepiela-Kaelin attached as Exhibit A to the Hopi Tribe's Response, Ms. Ciepiela-Kaelin has a graduate degree in economic development, worked for the U.S. Agency for International Development and as a consultant to develop local and regional strategies for economic development. She conducted a value chain study in New Mexico about grass-fed beef in New Mexico. The test of whether a person is an expert is whether "a jury can receive help on a particular subject from the witness. [citation omitted]. The degree of qualification goes to the weight given the testimony, not its admissibility." *State v. Davolt*, 207 Ariz. 191, 210, ¶ 70, 84 P.3d 456, 475 (2004); *see also State v. Romero*, 239 Ariz. 6, 10 ¶17, 365 P.3d 358, 362 (2016). Ms. Ciepiela-Kaelin meets the standard necessary for her testimony to be admitted as expert testimony.

The Navajo Nation also objects that she simply serves as a conduit for the opinions of Steve Warshawer. An expert may testify based on upon information provided by other lay and expert witnesses. *Lehn v. Al-Thanyyan*, 246 Ariz. 277, 284, ¶ 24, 438 P.3d 646, 653 (App. 2019). The Hopi Tribe represents that Ms. Ciepiela-Kaelin relied upon factual information provided by three other people to prepare her expert report and form her expert opinions. An expert may rely on the opinions of another expert as part of the basis of the expert's testimony. *State ex rel. Montgomery v. Karp*, 236 Ariz. 120, 125, ¶ 17, 336 P.3d 753, 758 (App. 2014). The determinative factor is whether Ms. Ciepiela-Kaelin is testifying about her own independent conclusions. *Id.* As demonstrated by the deposition testimony included in the Hopi Tribe's Response at 6, Ms. Ciepiela-Kaelin did formulate her own expert opinion about whether the feedlot operation is financially profitable and thus she should not be excluded from testifying about her expert opinions formulated in this case.

Motions to Exclude Expert Opinions

The two motions in this category concern expert opinions provided after the deadline for delivering expert reports. The Hopi Tribe filed both motions. It challenged Dr. Jim Chang, retained by the Arizona State Land Department, who reviewed the population report prepared by the Hopi Tribe's witness, Dr. Swanson and prepared a report. Evidently, Dr. Swanson generated population forecasts using the Auto-Regressive Integrated Moving Average (ARIMA) test and a secondary test known as a

demographic projection. Dr. Chang timely prepared a report dated May 15, 2019 expressing his opinions on the ARIMA approach, but did not provide opinions on the secondary test. According to the ASLD, Dr. Chang was motivated to provide an opinion about the value of a factor used in the secondary test as a result of either observing Dr. Swanson's deposition or reading Dr. Swanson's rebuttal report.

Arizona Rule of Civil Procedure 37(c)(1) states that untimely disclosed information may not be used at trial absent a showing of no prejudice or good cause. No explanation was provided for Dr. Chang's decision not to investigate the factors used in the demographic projection prior to the time his expert report was due so no good cause can be found for the late opinion.

In its second motion, the Hopi Tribe seeks to exclude amended tables prepared by Pete Gallegos and Delwin Wengert delivered prior to the close of discovery but after the depositions

of the experts. See figure 1. At issue are the amended calculations of the costs of irrigating proposed alfalfa fields in the Oraibi Delta. Hopi Motion in Limine No. 3 at 3.

The calculations required input about the pumping rate of the wells to

determine the number of wells that would be required to pump sufficient groundwater to irrigate alfalfa.

The pumping rate used to calculate the number of wells was taken from the Hopi Expert's report which

Phrase	Units	Amount	Unit cost	Total all units	cost/acre
Capital expense					
126 acre Center Pivot	No.	22	\$ 77,590.00	\$ 1,706,980.00	\$ 615.79
60 Hp Pivot booster pump	No.	22	\$ 10,471.00	\$ 230,362.00	\$ 83.10
1/4 mile pivot 12" pipeline	No.	22	\$ 23,543.00	\$ 517,946.00	\$ 186.85
2100 ft wells casing @320gpm each	No.	88	\$ 630,000.00	\$ 55,440,000.00	\$ 20,000.00
well equipment: pumps, motor, panel	No.	88	\$ 531,300.00	\$ 46,754,400.00	\$ 16,866.67
5,280 l.f. of 8" pipe @ \$15.70/ft x1.2 fittings	No.	88	\$ 395,366.40	\$ 3,678,060.90	\$ 3,137.83
Electric service to farm from Winslow to Hopi south boundary \$99.45K/mile	miles	40	\$ 99,450.00	\$ 3,978,000.00	\$ 1,435.06
Total capital expense			\$ 1,797,720.40	\$ 113,347,748.90	\$ 42,325.31
Annual amortized cost per year					
126 acre Center Pivot Life 15yrs.x2	30	22	\$ 2,586.33	\$ 56,899.33	\$ 20.53
60 Hp Pivot booster pump Life yrs. 15	35	22	\$ 698.07	\$ 15,357.47	\$ 5.54
1/4 mile pivot 12" pipeline Life 20yrs. x2	40	22	\$ 588.58	\$ 12,948.65	\$ 4.67
2100ft. well @320gpm each Life 20yrs.x1.5	30	88	\$ 21,000.00	\$ 1,848,000.00	\$ 666.67
well equipment: pump, motor, panel life 15yrs	35	88	\$ 35,420.00	\$ 3,116,960.00	\$ 1,124.44
5280l.f. pipeline Life 20yrs x2	40	88	\$ 8,884.38	\$ 889,808.78	\$ 313.78
Electric service to farm Life 7 Use 40	40	40	\$ 2,486.25	\$ 99,450.00	\$ 35.88
Subtotal annual cost			\$ 2,486.25	\$ 6,019,421.58	\$ 2,171.51
Total annual cost			\$ 99,932.26	\$ 9,890,958.34	\$ 3,567.34

Phrase	Units	Amount	Unit cost	Total all units	cost/acre
Capital expense					
Farm Equipment	No.	22	\$ 142,025.00	\$ 3,124,550.00	\$ 1,127.18
126 acre Center Pivot	No.	22	\$ 77,590.00	\$ 1,706,980.00	\$ 615.79
60 Hp Pivot booster pump	No.	22	\$ 10,471.00	\$ 230,362.00	\$ 83.10
1/4 mile pivot 12" pipeline	No.	22	\$ 23,543.00	\$ 517,946.00	\$ 186.85
2100 ft wells casing @640gpm each	No.	44	\$ 630,000.00	\$ 27,720,000.00	\$ 10,000.00
well equipment: pumps, motor, panel	No.	44	\$ 531,300.00	\$ 23,377,200.00	\$ 8,433.33
7x5,280 l.f. of 10" pipe @ \$28.80/ft w/fittings	No.	44	\$ 304,128.00	\$ 6,690,816.00	\$ 2,413.71
Electric service to farm from Winslow to Hopi south boundary \$99.45K/mile	miles	40	\$ 99,450.00	\$ 3,978,000.00	\$ 1,435.06
Total capital expense			\$ 1,818,507.00	\$ 63,367,854.00	\$ 24,295.04
Startup expense			\$ 1,858,361.52	\$ 64,241,653.44	\$ 24,611.43
Annual amortized cost per year					
126 acre Center Pivot Life 15yrs.x2	30	22	\$ 2,586.33	\$ 56,899.33	\$ 20.53
60 Hp Pivot booster pump Life yrs. 15	35	22	\$ 698.07	\$ 15,357.47	\$ 5.54
1/4 mile pivot 12" pipeline Life 20yrs. x2	40	22	\$ 588.58	\$ 12,948.65	\$ 4.67
2100ft. well @640gpm each Life 20yrs.x1.5	30	44	\$ 21,000.00	\$ 924,000.00	\$ 333.33
well equipment: pump, motor, panel life 15yrs	35	44	\$ 35,420.00	\$ 1,558,480.00	\$ 562.22
5280l.f. pipeline Life 20yrs x2	40	44	\$ 7,603.20	\$ 334,540.80	\$ 120.69
Electric service to farm Life 7 Use 40	40	40	\$ 2,486.25	\$ 99,450.00	\$ 35.88
Subtotal annual cost			\$ 2,486.25	\$ 3,001,676.25	\$ 1,082.86
Total annual cost			\$ 112,009.02	\$ 6,118,160.79	\$ 2,407.13

Figure 1. Relevant portion of the original and amended tables showing number of wells reduced from 88 to 44.

stated an average flow (gpm) of 384.6 was expected from a well. Based on this flow rate, Mr. Gallegos calculated that 88 wells would be needed for the project. The original tables, based on 88 wells (*see figure 1*), showed projected total annual costs of \$3,567.94 per acre.

After the original calculations were produced, the Hopi Tribe's expert witness submitted a report which included a "short-term maximum pumping rate" of 703 gpm. Based on a pumping rate of 703 gpm rather than 386.4 gpm, Mr. Gallegos calculated that instead of 88 wells the project would require 44 wells. *See Figure 1*. At issue are the admissibility of two one-page revised tables that calculate the cost of irrigating alfalfa by pumping groundwater from a reduced number of wells. The only changes made to the tables as represented by counsel for the LCR Coalition were the result of the change in the number of wells. The amended tables show projected total annual costs of \$2,207.13 per acre.

The Hopi Tribe claims that there is no good cause to allow the LCR Coalition to use the amended tables and, notwithstanding that the amended tables show almost a 40% reduction in total annual costs to the benefit of the Hopi Tribe, also argues that it will be prejudiced because it has no "meaningful opportunity to probe the conclusions presented in these tables or cross-examine [the experts] on the veracity of these updated figures." Hopi Motion *in Limine* No. 3 at 6. The purpose of the pretrial disclosure rules is "to provide the parties 'a reasonable opportunity to prepare for trial. *Sandretto v. Payson Healthcare Mgmt., Inc.*, 234 Ariz. 351, 360, ¶ 34, 322 P.3d 168, 177 (App. 2014). In *Sandretto*, the appellate court affirmed the lower court's exercise of discretion to permit a witness to testify as to an opinion because the objecting party was able to obtain sufficient information about the opinion from the witnesses' deposition testimony and disclosure affidavit to prepare its case.

Here, the Hopi Tribe's expert witness provided peak and average flow rates (gpm) in its original report and "short-term maximum pumping rate" in a rebuttal report. The flow rates in the first report did not match the flow rate in the second report. The original cost projections prepared by the experts for the LCR Coalition were based on the flow rate as can be seen in *figure 1* that listed the flow rate on the line with the number of wells. After the LCR Coalition received the rebuttal report and months before trial, the amended one page tables were produced based on the Hopi Tribe's expert's report. The tables used the same methodology and format to calculate the projected costs except the number of wells was reduced.

Good cause exists to not exclude the tables. The original tables were timely produced. The amended tables were produced as a result of report prepared by the

objecting party's expert that provided information different from the information upon which the original tables had been based. The change in flow rate resulted in a change in the number of wells. To exclude the tables would result in an erroneous record because the original tables do not calculate costs based on the Hopi Tribe's expert's final flow rate. There is no prejudice to the Hopi Tribe because it knew or should have known that a change in the flow rate by its expert would cause a change in the number of wells and, therefore, a change in the total annual costs. Further the nature of the change is purely formulaic and can be readily identified in the table, especially as the amended table highlighted each line item that changed due to the change in number of wells.

Motions to Exclude Multiple Witnesses

The Hopi Tribe claims in excess of 100,000 acre feet of water per year for future livestock and agricultural use. The LCR Coalition has named nine witnesses and Arizona State Land Department has named one witness who will testify about various aspects of these claims. The Hopi Tribe challenges the ten witnesses on the grounds that they either offer cumulative testimony, irrelevant testimony, or the actions of the parties violate Ariz. R. Civ. P. 26(b)(4)(F)(i).

A. Expert Witnesses

The Hopi Tribe and the United States claim water for increased livestock operations. In the past and present phase, evidence was presented about the need for livestock grazing on the Hopi Reservation. The evidence showed that the average number of animal units based on the data available for the period 1978 through 2017 was 3,478 and the median was 2,310.25. The maximum number after excluding 1997 was 8,917.75 in 1996 and the minimum count was 1,383 in 2002. In the future phase, the Hopi Tribe and the United States claim water necessary for 47,762.9 animal units. The Hopi Tribe also proposes to develop a livestock value chain operation which it claims will require 12,215 acre feet of water pumped each year from the C aquifer or other water sources to irrigate alfalfa fields and from the D aquifer for cattle not on the range but held in a series of yards prior to slaughter. Hopi Tribe's Motion *in Limine* No. 6 at 2. The Hopi Tribe moves to exclude four expert witnesses who will address various aspects of these claims.

The Arizona State Land Department and the LCR Coalition listed Chris Lowman and Duane Coleman. The Hopi Tribe claims that they will both testify about the grazing capacity of the land. In addition, the Hopi Tribe moves to exclude one of the two witnesses because the Arizona State Land Department employs Chris Lowman and is paying a portion of the expert fees for Duane Coleman and. The key issue here is whether the two men will testify about the same issue. The court has broad discretion in defining scope of "issue" for purposes of one-expert-per-issue presumption. *Felder v. Physiotherapy Assocs.*, 215 Ariz. 154, 167, ¶ 69, 158 P.3d 877, 890 (App.2007).

While the issue of whether the land can support approximately a 2000% increase in livestock could generally be characterized under the broad umbrella of grazing capacity, presumably careful consideration needs to be given to a number of factors to determine whether the land can sustain an increase of that magnitude. Mr. Lowman, a Range Resource Manager, will discuss, among other issues, the methodology used by the Hopi's expert to determine carrying capacity that includes appropriate statistical values, physical confirmation of assumed land attributes, and mathematical formulas as well as the impact on other wildlife consuming available vegetation. Among the topics included in Mr. Coleman's report are cow to bull ratios, fencing and water infrastructure and optimal grazing fields. The issues are sufficiently distinct that the testimony is neither cumulative nor violate of Ariz. R. Civ. P. 26(b)(4)(F)(i). Similarly with respect to the proposed backgrounding and feedlot operations, the two witnesses will be testifying about sufficiently distinct issues. Mr. Brophy, a rancher, will testify about estimates for construction, operation, and maintenance costs for the Hopi Tribe's proposed feedlot and factors that affect market conditions. Mr. Crosby is an economist who will testify about the economics of the project.

B. Fact Witnesses

The LCR Coalition also expects to call six fact witnesses to testify about the alfalfa production, livestock value chain operations, carrying capacities of a ranch, and cost of water for agricultural use. The Hopi Tribe contends that this testimony is irrelevant because the witnesses will be testifying about operations located around the Hopi Reservation rather than about operations on the Hopi Reservation. The Hopi Tribe states that its "agricultural and livestock techniques are unique to their history, culture, and location, and are dissimilar to many of the farming and ranching witnesses' operations." Hopi Tribe's Motion in Limine No. 7 at 7. This challenged testimony is not rendered irrelevant in this future use phase of the case by the factors listed. In this phase of the case, the claims at issue are for future uses of water such as water needed for substantially larger herds of livestock, the irrigation of alfalfa fields and to provide for livestock value chain operations that are not currently in place on the Hopi Reservation. Thus, testimony from the six individuals about current operations similar to those planned by the Hopi Tribe for future water use meets the criteria of relevancy under the broad standard of Ariz. R. Evid. 402. The Hopi Tribe also argues that by calling this group of witnesses, the LCR Coalition violates the rules related to expert witnesses. The LCR Coalition represents that the witnesses are fact witnesses and the witnesses will be expected to limit their testimony to their personal knowledge and refrain from expressing opinions pursuant to Ariz. R. Evid. 602. The fact that a witness has specialized knowledge does not convert factual testimony to expert opinion testimony. *State ex rel. Montgomery v. Whitten*, 228 Ariz. 17, 21 ¶12, 262 P.3d 238, 242 (App. 2011).

Motions to Exclude Expert Reports or Portions of Expert Reports from First Phase of the Trial

The Hopi Tribe filed one motion and the Navajo Nation filed two motions to either exclude in whole or in part reports of experts who testified in in the first phase of this trial.

The Hopi Tribe moved to exclude the report prepared by John Leeper for the past and present phase of the trial, which it attached as Exhibit C to its motion, and Appendix A to John Leeper's report prepared for the future phase of the trial, which the Hopi Tribe attached as Exhibit D to its motion (the "Future Report"). The Navajo Nation filed its response believing the Hopi Tribe sought to exclude Appendix A to the Future Report. At oral argument it also appeared from the argument made by counsel for the Hopi Tribe that the exclusion of Appendix A was the issue. Thus, the motion will be treated as a motion to exclude Appendix A to the Future Report.

Appendix A is a series of typed field notes and photographs about 31 locations that Mr. Leeper and his team members visited on the Hopi Reservation. It is referenced in the Future Report prepared as Mr. Leeper's direct testimony in the upcoming bench trial concerning the future agricultural claims made by the Hopi Tribe. Factual information obtained from the field notes is cited in the Future Report as a basis for discussion and conclusions about the claims for future use. *See, e.g.* Future Report, pp. 5-7.

The Hopi Tribe does not argue that Appendix A does not provide data cited by Mr. Leeper to support his opinions in the Future Report or that it is not relevant to the Future Report. Instead, the Hopi Tribe makes the argument that the "Navajo Nation included as Appendix A to the Leeper Past report the field notes that the Court previously excluded on the basis of the Navajo Nation's strategic decision to call Dr. Leeper to provide live testimony" (Hopi Motion in Limine No. 8 at 3) citing to the trial transcript 110218:71 PM (Leeper). Given the choice of argument made by Hopi, it will be addressed as the sole basis upon which to exclude Appendix A. On October 30, 2018, counsel for the Hopi Tribe moved into evidence Navajo Exhibits 62, 63, 64, 65, 66, 72, 73, 74, 75, 76, 77, 78. [103018: 19- 63 (McCord)] These exhibits are handwritten notations about observations made at the field stops made by Mr. Leeper or members of his team. Counsel for the Navajo Nation moved for the admission of the remainder of the field notes on November 2, 2018. The motion was not granted [110218:75-76 PM] but was taken under advisement. The remainder of the field notes were subsequently admitted. *See* Minute Entry filed November 8, 2018. The treatment of the handwritten field notes in the past and present phase of this proceeding does not provide a basis for the exclusion of Appendix A to the Future Report.

The Navajo Nation moves to exclude the expert report prepared by the United States' witnesses Hana Norton and Chris Banet for the past and present phase of the trial. At oral argument, counsel for the United States candidly stated that the United States

intended to move the reports into evidence for ease of use on appeal rather than be required to cite to the testimony in the transcript and reference exhibits. While the United States' reasons are understandable, the reports will not be admitted into evidence because Dr. Norton and Mr. Banet not available for further cross examination and the reports are not relevant to this phase of the proceeding.

The United States is not prejudiced by the exclusion of the reports. The United States offered the witnesses' testimony following the correct evidentiary method of direct examination of the witness followed by cross examination. No time limits were imposed on the amount of time that the United States could spend on direct examination. The witnesses' testimony spanned many days on the stand that included hours spent with the witnesses' avowing to the correctness of counsel's reading of multiple passages of their reports. In addition, the United States moved without objection to the admission of selected portions of the report into evidence. The United States has a complete evidentiary record of the opinions and the bases of the opinions offered by Dr. Norton and Mr. Banet.

For the reasons set forth above,

IT IS ORDERED granting the Hopi Tribe's Motion *in Limine* No. 4: Jim Chang and denying the Hopi Tribe's Motions *in Limine* Nos. 2, 3, 5, 6, and 7.

IT IS FURTHER ORDERED granting Navajo Nation's Motions *in Limine* Nos. 2 and 3 and denying the Navajo Nation's Motion *in Limine* No. 1.

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