

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

1/15/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

L. Stogsdill

Deputy

FILED: February 25, 2020

In re: Hopi Reservation HSR
Contested Case No. CV 6417-203

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

In re: Pre-Trial Conference re: Future Use Trial
and Status Conference

MINUTE ENTRY

Courtroom: CCB 301

1:30 p.m. This is the time set for a Pre-Trial Conference and a Status Conference.

The following attorneys are present in the Courtroom: Carrie J. Brennan and Kevin P. Crestin for the Arizona State Land Department, David A. Brown for Mr. and Mrs. Cavendar, the City of Cottonwood, LCR Coalition, John D. Burnside for BHP Copper, Charles L. Cahoy and Brad Holm for the City of Phoenix, Jeffrey R. Heilman and Mark McGinnis for SRP, William H. Anger for the City of Mesa, Sean T. Hood for Freeport Minerals, Steven L. Wene for the City of Stafford and Town of Huachuca, Brian Heiserman and Bradley Pew for LCR Coalition, Colin F. Campbell, Philip Londen and Payslie Bowen for the Hopi Tribe, Jeffrey Leonard and Evan F. Hiller for the Navajo Nation.

The following attorneys appear telephonically: Robyn L. Interpreter observing for the Yavapai-Apache Nation, Kimberly R. Parks for ADWR, Lee A. Storey, Alexandria Arboleda and Ethan Minkin for the City of Flagstaff, Vanessa Boyd Willard, Emmi Blades and Cody McBride for the United States, Grace Rebling for the Hopi Tribe, and M. Kathryn Hoover for the Navajo Nation.

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

Trial scheduling is discussed. The Court advises counsel that the same Courtroom will be available for this trial as used for the first phase of the proceeding. Trial will take place 4 days per week. David Brown advises the Court that he prefers 9:00 a.m. to 4:30 p.m. Mr. Brown determined that there will be approximately 38 experts and approximately 37 fact witnesses. Mr. Brown further advises that calculates 181.5 hours for expert witnesses and the non-Hopi fact witnesses and approximately 8.5 days for Hopi fact witnesses. The total number of hours would result in a 13 week trial.

Discussion is held regarding breaks during the course of the trial.

Court and counsel agree that during the 1st week of July, sometime in mid-August, and the week of Labor Day week the Court will be dark. Counsel agree to that schedule.

The order of trial presentation is discussed. Mr. Campbell suggests proceeding by blocks, i.e., in the same manner as the parties have scheduled depositions. He notes that coordinating witness times was an issue in the previous trial. Mr. Campbell suggests a couple of options relative to utilizing blocks of witnesses.

Mr. Brown notes that certain witnesses may need to testify more than once and he feels proceeding by parties would be easier for that reason. He agrees with the approach suggested by counsel for the Navajo Nation. Mr. Leonard offers his opinion and opposes scheduling witnesses and evidence by topic, adding that there will be a large amount of overlap in the witnesses' testimony. Ms. Willard agrees with counsel for the Hopi Tribe's proposal regarding scheduling. If the Court prefers the traditional approach of Claimants first then objectors, Ms. Willard notes that time will need to be set aside for rebuttal testimony. Ms. Storey is in agreement with the outline proposed by Mr. Brown.

Ms. Brennan agrees with the more traditional trial schedule proposed by counsel for the Navajo Nation. She also discusses timing for the filing of Rule 52 motions.

Mr. Campbell addresses the next issue of using power point presentations during opening and closing statements and whether those power points should be marked for demonstrative purposes. Mr. Leonard objects to the power point presentation used in an opening statement being marked and admitted as an exhibit because opening statements are not evidence nor are they argument.

The next issue addressed is the need to redact expert reports. Mr. Campbell proposed submitting all expert reports to the Court and the Court give the reports the weight they deserve, rather than redacting the reports. Mr. Brown states that he joins with the Navajo that redactions to expert reports in the first phase of the trial may have been related to the future case but other redactions dealt with legal conclusions or other defects and so all redactions should not be allowed to come in wholesale. The Court

states that the redaction of expert reports can be discussed during the first day of trial. Ms. Willard agrees with the parties comparing notes and addressing redactions of expert reports during the first day of trial.

For the reasons stated on the record,

IT IS ORDERED that counsel shall meet and confer regarding the redactions made in expert reports in the first phase of the trial and provide the Court with those redactions which are disputed for decision on the first day of trial. Redacted portions of expert reports about which there is no dispute will be admitted into evidence on the first day of trial.

Mr. Campbell raised the issue of redactions of expert reports that will be newly introduced in this phase of the trial and suggests that the reports be admitted and then the court give the reports the weight they are due.

Mr. Brown suggests that Motions in Limine be filed relative to the redactions of the expert reports be due in April 2020. Mr. Campbell stated that the parties may not have sufficient time to file the motions on all of the expert reports because the work required for dispositive motions. Mr. McGuiness does not want to wait until the first day of trial to do redactions and wants to resolve issues by motions in limine. Ms. Brennan stated she supports the idea of a list of reports from the Hopi Tribe a month before the motions in limine are due. The Court and Ms. Brennan discussed alternative due dates for motions in limine regarding redactions of expert reports.

Ms. Willard requests clarification regarding the redactions of prior past/present expert reports versus redactions of expert reports that will be offered into evidence for the first time in the future trial.

The Court proposes that the parties file Motions in Limine as to the new expert reports by a certain date and set a later deadline for the review of redactions of the prior expert reports from the past and present trial. Ms. Storey concurs with Mr. McGinnis that redactions should not be done during the trial.

Mr. Leonard discusses the issue of admissibility of portions of the expert reports and exhibits. He suggests the parties can reserve their objections (other than as to authenticity) prior to trial in the Joint Pre-Trial Statement. He also suggests counsel hold their objections to exhibits until the time exhibits are offered to streamline matters.

Discussion is held regarding the Hopi interpreter proposed by Mr. Campbell. Mr. Leonard and Ms. Storey have five days to determine if they have an objection to Mr. Campbell's selection. There are no other objections.

Findings of Facts and Conclusions of Law are discussed by Mr. Leonard. He suggests that the parties that wish to file their Findings of Fact and Conclusions of Law do so and there will be no responses and then the Court will review the submitted finding and conclusions of law and prepare a draft Findings of Facts and Conclusions of Law. Counsel may then object to the Court's draft.

The Court suggests that counsel for the Hopi Tribe file proposed Findings of Fact and Conclusions of Law and that remaining counsel file their responses thereto. Mr. Leonard states that the parties want to avoid this process because there would be multiple filings that would generate a large number of responses from the parties. He states that the Navajo Nation will probably file findings of fact and conclusions of law. Mr. Leonard states that it would be premature to discuss topics for post-trial briefing at this stage.

Court stated that post-trial briefing will be permitted.

Mr. Brown inquired about time limitations on opening statements and requested that closing argument be set a week after the last day of the trial.

For the reasons stated on the record,

IT IS FURTHER ORDERED that the dates for the joint pretrial statement proposed in the September 10, 2019 minute entry are adopted. The Court further directed that each party shall file on May 19, 2020 a form of a proposed decree of water rights that will be issued in this case. The parties shall not include statements of jurisdiction, procedural history, findings of fact, conclusions of law, or any other language that would otherwise be included in a final decree other than the language that actually decrees the water right. Thus, the only portion of a proposed decree which will be filed by each party is that portion of the decree that begins with:

THE COURT ADJUDICATES AND DECREES
that the Hopi Tribe and the United States acting in its capacity
as trustee for the Hopi Tribe shall have . . .

2:48 p.m. Pre-Trial Conference concludes

2:49 p.m. Status Conference re: Hopi Tribe's Request for a Status Conference re Allottees

LET THE RECORD REFLECT that Ethan Minkin has dropped off the telephone call. All other appearances remain the same.

Mr. Campbell requests that the Court provide a scheduling order with respect to the allotments under State law. He states that the Hopi Tribe is an allottee with respect to 9 of the 11 allotments and expects that in time the Hopi Tribe will be an allottee of all 11 allotments because the Hopi Tribe becomes an allottee when an allottee dies without an heir or if an allottee's percentage interest reaches some miniscule amount. He further advises the Court that the Bureau of Indian Affairs (BIA) has a probate division and is involved with regard to some allotments and that the Hopi Tribe has been told that the information in the probate division is confidential.

Further discussion is held. Ms. Willard will follow up with BIA and advise the Court with regard to the federal administrative probate process. She states that there are approximately 600 fractionated interests.

Mr. McGinnis raises a legal issue regarding the allotments under the Water Rights Registration Act. Mr. Pew believes that the allotment issue is a matter of state law which can be briefed following the future phase trial. He recommends that the state law claims for the allotments should be handled after the future phase of the trial.

Mr. Campbell states that the allotment claims have been severed from this trial and does not want to include the claims in the future phase of the trial. He suggests that a status conference be set after the future phase of the trial.

Ms. Willard confirms with the Court the United States, as Trustee on behalf of the allottees under the Federal Reserve Water Rights Doctrine, will proceed as a part of the future use phase.

The Court confirms that the state law claims on the allotments will be addressed after the future use trial. Remaining counsel has no objection to the proposal.

Scheduling is discussed. Counsel offer their suggestions as to whether the Initial 26.1 Disclosure Statements should be exchanged before the Notice of Issue of Broad Legal Importance is prepared.

3:42 p.m. Matter concludes.

LATER:

A. Schedule for Oral Arguments on Motions

Oral argument shall be held on **March 19, 2020 at 1:30 p.m.** in the Superior Court of Arizona, 201 West Jefferson Street, Courtroom 301, Phoenix, AZ 85003-2202 on:

1. The LCR Coalition's Motion for Partial Summary Judgment on Hopi Claim to Immemorial Priority; and
2. LCR Coalition's Motion for Partial Summary Judgment on Hopi & U.S. Claims to Water for Electrical Power on Hopi Reservation for Use Outside the Reservation.

Oral Argument shall be held on **April 2, 2020 at 1:45 p.m.** in the Superior Court of Arizona, 201 West Jefferson Street, Courtroom 301, Phoenix, AZ 85003-2202 on the following motions:

1. The United States Motion for Partial Summary Judgment on the Attributes Required to Establish an Indian Reservation's Federal Reserved Water Rights;
2. The City of Flagstaff's Motion for Partial Summary Judgment on DCMCI Claims;
3. LCR Coalition's Motion for Partial Summary Judgment Regarding the Hopi Tribe's Contention that the 1996 Act Created an Easement for the Movement of Water off of the Hopi Newly Acquired Ranches;
4. LCR Coalition's Motion for Partial Summary Judgment that the United States has an Enforceable Obligation to Construct or Fund Water or Economic Development Projects for the Hopi Reservation;
5. LCR Coalition's Motion for Partial Summary Regarding the Hopi Tribe's Claims to Water for Agriculture and Ceremonial and Subsistence Gardening;
6. LCR Coalition's Motion for Partial Summary Judgment Regarding the United States' Claim to Water for Electrical Generating Plant on the Hopi Reservation;

7. LCR Coalition's Motion for Entry of Order Regarding the Attributes Necessary for Adjudication of Federal Reserved Water Rights; and
8. LCR Coalition's Motion for Partial Summary Judgment Concerning the Feasibility Standard Under *Gila V.*

Instructions for telephonic appearance in Oral Arguments:

Dial: 602-506-9695 (local)

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

Dial Collaboration (conference) Code 357264#

B. Schedule for Pretrial Conference

A pretrial conference shall be held on **May 19, 2020 at 2:30 p.m.** in the Superior Court of Arizona, 201 West Jefferson Street, Courtroom 301, Phoenix, AZ 85003-2202

Instructions for telephonic appearance at the Pretrial Conference:

Dial: 602-506-9695 (local)

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

Dial Collaboration (conference) Code 357264#

C. Schedule for Trial

Taking into consideration the availability of the Courtroom 613, the Court's schedule, and the parties stated preferences, the second phase of the hearing on the Hopi Reservation HSR will be heard in Courtroom 613, East Courthouse from 8:45 a.m. to 4:45 p.m. on the following dates:

June 2020

June 2 – June 5; June 9 – June 12; and June 16 – June 19

July 2020

June 30 – July 2; July 7 – July 10

August 2020

August 4 – August 7; August 18 – August 21; August 25 – August 28

September

Sept. 1 – Sept. 4; Sept. 15 – Sept 18

D. Schedule for Order of Trial

The Hopi Tribe proposed that the trial proceed in eight subject matter blocks with the Hopi and the United States presenting their expert and fact witnesses in discrete categories, following by the Objectors' expert and fact witnesses, and concluding with the Hopi and the United States rebuttal witnesses on the same topic. The Hopi Tribe clearly put a lot of thought into the mechanics of the proposal. Due to the length of the trial, this proposal would certainly aid in a quicker grasp of the relevant facts on each topic. Except for the United States, the other parties oppose the proposal on the grounds that it will create difficulties in scheduling witnesses and will require the same witness to be called more than once. Given the number of witnesses involved in this case, the better course of action is to follow the procedure that will facilitate witness scheduling. Accordingly, the United States and the Hopi Tribe will present their cases, followed by the Objectors, and the United States and the Hopi Tribe will conclude the hearing by calling their rebuttal witnesses.

E. Admission of Power Point Presentations as Demonstrative Evidence

The Hopi Tribe seeks a ruling regarding the evidentiary treatment of a power point presentation that will be used during its opening statement as a demonstrative exhibit. Demonstrative exhibits may be used during opening statements as long as they do not reference or include matters that cannot be proved or would be inadmissible. Counsel for the Hopi Tribe also used a power point presentation during his opening statement in the first phase of this trial. A review of the transcript and the minute entries for the first day of the trial during the past and present phase indicate a printed copy of the power point presentation was provided to the court. The presentation was not marked as an exhibit and was not admitted into evidence.¹

The specific question here is whether a power point presentation that will be used during opening statement in the future phase of the proceeding may be admitted into evidence. Courts may, in the proper exercise of their discretion, permit demonstrative exhibits to be introduced in evidence where a proper foundation exists and will aid the jury to better understand the facts because “graphic exhibits in most instances gives the

¹ The admitted exhibits offered by the Hopi Tribe that were characterized as demonstrative exhibits were: Exhibits 39 (tables from preliminary HSR), 2135 (GIS data for historic acreage), 3869 (groundwater conditions), and 3907 (coal sales.)

jury a clearer picture of the facts than can be obtained from the testimony of witnesses.” *Slow Dev. Co. v. Coulter*, 88 Ariz. 122, 129, 353 P.2d 890, 895 (1960); *State v. King*, 226 Ariz. 253, 257, ¶ 10, 245 P.3d 938, 942 (App. 2011); *Falcher v. St. Luke's Hosp. Med. Ctr.*, 19 Ariz. App. 247, 252, 506 P.2d 287, 292 (1973). Here, the demonstrative exhibit will be presented during opening statement. Obviously counsel is not testifying during opening statement so no foundation for a demonstrative exhibit exists.

Counsel argues that a power point presentation should be admitted in evidence so that the reviewing court will have the benefit of the presentation upon its review of the record. Presumably counsel will lay a proper foundation for all of the documents, diagrams, and/or photographs included in the proposed power point during the course of the trial and move to have them offered in evidence. Those documents, diagram, and/or photographs for which a proper foundation is shown and are admitted into evidence will be part of the record and available to the reviewing court. Thus, if this assumption proves true, the reviewing court may effectively have the benefit of the power point presentation used during opening statement.

The power point presentation used during an opening statement will not be admitted into evidence.

F. Expert Reports

Each party shall circulate a list by **March 13, 2020** to all other parties of the expert reports that it intends to list as exhibits that were not admitted in whole or in part in the first phase of the trial. Parties seeking redactions in expert reports that were not admitted into evidence in whole or in part during the past and present phase of this proceeding shall file a Motion in Limine to address those redactions by **April 9, 2020**.

Expert reports that were admitted into evidence in whole or in part during the past and present phase of this proceeding will be admitted into evidence on the first day of trial with no redactions except those:

- i. Redacted portions in an expert report about which the parties agree shall remain redacted. The party whose expert prepared the report that contains such redacted portions shall include a list of those redacted portions in its portion of the joint pretrial statement.
- ii. Redacted portions about which the parties disagree as to whether they shall remain redacted. The party whose expert prepared the report that contains such redacted portions shall include a list of those redacted portions in its portion of the joint pretrial statement. Oral argument on

the redactions shall occur on **June 2, 2020**. Given the amount of briefing and argument that occurred with respect to the original redactions, no further written briefing is necessary.

G. Objections to Exhibits and Numbering Exhibits

Pursuant to Ariz. R. Civ. P. 16(f)(2)(E) each party must list its objections to an exhibit and the basis for that objection. Counsel for the Hopi Tribe contends that the rule must be followed because he is entitled to know the opposing parties' objections in advance of trial. The opposing parties propose reserving objections other than authenticity until trial due to the number of exhibits listed by the Hopi Tribe and the United States.

In the past and present phase of this proceeding, the Hopi Tribe had 3,911 exhibits on its final exhibit list of which 28% were admitted into evidence. The United States had 829 exhibits listed of which 14% were admitted into evidence. Although more than half of the Hopi Tribe's exhibits were photographs, the Hopi exhibit lists still presented a daunting amount of work and supports the objecting parties' assessment of the task involved. To balance the rights of the Hopi Tribe under Rule 16(f) and burden on the opposing parties, the parties shall be entitled to reserved objections to photographs until trial and no party shall have to list an objection or the basis for an objection to an exhibit included in the joint pretrial statement for this phase of the case that was also included in the joint pretrial statement for the past and present phase of this case. The parties shall comply with Ariz. R. Civ. P. 16(f)(2)(E) with respect to all newly listed exhibits other than photographs.

In the joint pretrial statement, each party shall begin the numbering of its exhibits with the next consecutive number following the last numbered exhibit assigned by the clerk in the past and present phase of the trial. For example, the last numbered exhibit for the United States was 829 so newly identified exhibits for this phase should begin with exhibit number 830.

H. Hopi Interpreter

The Maricopa County Superior Court Interpretation and Translation Services Office is in the process of evaluating the credentials of Sheilah E. Nicholas as an interpreter and its procurement procedures regarding the appointment of Dr. Nicholas. The Hopi Tribe shall file a statement with respect to any issues it believed occurred during the first phase of this trial with respect to the interpreter services by **March 6**,

2020. In order to advance this process, the Hopi Tribe shall notify the court by **March 19, 2020** of the dates that it expects it will require the services of an interpreter.

I. Proposed Findings of Fact and Conclusions of Law

As the Hopi Tribe correctly stated, §14.01 Rules for Proceeding Before the Special Master permits a party to voluntarily submit proposed findings of fact and conclusions of law within 30 days of the conclusion of the hearing provided that the litigant gives notice of its intent to so file prior to the conclusion of the hearing. For purposes of this Section I, the conclusion of the hearing shall be the later of the date on which closing arguments conclude or the date on which the Response(s) is due for post-trial briefing on legal issues designated by the court or the parties prior to the conclusion of closing arguments.

The Hopi Tribe has stated its intent to file proposed findings of fact and conclusions of law. The Rule also grants to the Special Master the authority to require litigants to file proposed findings of fact and conclusions of law. Accordingly,

- i. The Hopi Tribe and the United States shall file proposed findings of fact and conclusions of law within 30 days after the conclusion of the hearing (a 30-day Filing). Any other party who gives notice of its intent to submit a 30-day filing prior to the conclusion of the hearing shall file within 30 days after the conclusion of the hearing.
- ii. The Objecting Parties who did not submit a 30-day Filing may file a response within 60 days after the conclusion of the hearing to the 30-day Filings submitted by the United States, the Hopi Tribe and any other party who elected to make a 30-day Filing.
- iii. The Objecting Parties who did not submit a 30-day Filing may also file any additional proposed findings of fact and conclusions of law within 60 days after the conclusion of the hearing. The additional proposed findings of fact and conclusions of law shall be clearly separated from the responses to the findings of fact and conclusions of law filed pursuant to paragraph (ii).
- iv. The Hopi Tribe, the United States, and any other party submitting a 30-day Filing shall file within 90 days after the conclusion of the hearing any response to the proposed findings of fact and conclusions of law submitted pursuant to paragraphs (i) and (iii) above.

- v. The Objecting Parties who did not submit a 30-day Filing may file within 90 days after the conclusion of the hearing any response to the proposed findings of fact and conclusions of law submitted pursuant to paragraphs (iii) above.
- vi. Proposed findings of fact will be presented in the same format as a Separate Statement of Facts required by Ariz. R. Civ. P. 56(c)(3)(A) with citations to the transcript and/or admitted exhibits. Responses to proposed findings of fact will be presented in the same format as a Separate Statement of Facts required by Ariz. R. Civ. P. 56(c)(3)(B)(i) with citations to the transcript and/or admitted exhibits.
- vii. No replies shall be filed to any responses filed pursuant to paragraphs (ii), (iv) or (v) above by any party.
- viii. Time periods will be computed in accordance with Ariz. R. Civ. P. 6(a).

The Hopi Tribe and the United States are encouraged to jointly file proposed findings of fact and conclusions of law. As to those proposed findings of fact and conclusions of law about which the Hopi Tribe and the United States do not agree, the filing could include separate sections for each party to state its proposed findings of facts and conclusions of law. In no event shall the filing made by the Hopi Tribe and the United States pursuant to paragraph (i) above include responses to the positions of the other party.

J. Opening Statement and Closing Arguments.

Each party shall be allowed 45 minutes to make an opening statement. Each party shall be allowed 60 minutes to make closing arguments. Closing arguments will be scheduled approximately one week after the last day on which witness testimony is heard.

K. Allottees

In order to assure notice to all Hopi allottees, the identification of the allottees must be ascertained which necessitates that the Bureau of Indian Affairs provide information about the allottees who have acquired interests through the administrative probate process. Accordingly,

IT IS FURTHER ORDERED that the United States shall provide to the Hopi Tribe with a list of the allottees who have an interest in the 11 allotments by **September 11, 2020**.

IT IS FURTHER ORDERED setting a status conference on **October 6, 2020** at 1:30 p.m. in the Superior Court of Arizona, 201 West Jefferson Street, Courtroom 301, Phoenix, AZ 85003-2202. The purpose of the status schedule is to set a schedule for dispositive motions, initiate disclosure statements, set a discovery deadline, and set a trial date with respect to allottees' claims for water rights under state law.

Instructions for telephonic appearance at the Status Conference:
Dial: 602-506-9695 (local)
1-855-506-9695 (toll free long distance)
Dial Collaboration (conference) Code 357264#

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