

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

July 29, 2022

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

A. Parmar
Deputy

FILED: August 11, 2022

In re: the General Adjudication
Of All Rights to Use Water in the
Little Colorado River System and Source
Case No. CV6417-300

In Re: Navajo Nation

MINUTE ENTRY

Central Court Building – Courtroom 301

1:30 p.m. This is the time set for Oral Argument before Special Water Master Susan Ward Harris regarding the United States’ *Motion to Amend Case Management Order – Phase I Claims* and the Navajo Nation’s *Motion to Amend Case Management Order to Defer Consideration of Future Population until Phase II*.

The following attorneys appear virtually through Court Connect:

- Gus Guarino, Emmi Blades, and Cody McBride on behalf of the United States Department of Justice
- Brian J. Heiserman on behalf of the LCR Coalition
- Mark McGinnis and Katrina L. Wilkinson on behalf of the Salt River Project (“SRP”)
- Carrie J. Brennan and Kevin Crestin on behalf of the Arizona State Land Department (“ASLD”)
- Lee Storey, Ethan Minkin, and Scott Dosek on behalf of the City of Flagstaff
- Evan Hiller, Jeffrey S. Leonard, Judith M. Dworkin, Candace French, and Kathryn Hoover on behalf of the Navajo Nation
- Irania Fimbres-Ruiz on behalf of the San Juan Southern Paiute Tribe

- Payslie Bowman on behalf of the Hopi Tribe
- John Burnside on behalf of Arizona Public Service (“APS”)
- Kimberly Parks observing on behalf of the Arizona Department of Water Resources (“ADWR”)

A record of the proceedings is made digitally in lieu of a court reporter.

Mr. Guarino addresses the Court regarding the United States’ Motion to Amend.

Mr. Heiserman addresses the Court.

Mr. McGinnis addresses the Court.

Ms. Brennan addresses the Court.

Mr. Hiller addresses the Court.

Mr. Guarino addresses the Court.

Mr. Hiller addresses the Court regarding the Navajo Nation’s Motion to Amend.

Mr. Heiserman addresses the Court.

Mr. McGinnis addresses the Court.

Ms. Brennan addresses the Court.

Mr. Hiller addresses the Court.

Based on the arguments presented,

IT IS ORDERED taking both motions to amend under advisement. The court will issue its ruling by Minute Entry.

4:15 p.m. Matter concludes.

LATER:

United States’ Motion to Amend Case Management Order – Phase 1 Claims

The United States moves to extend the deadline to submit an additional expert report from Dr. Gretchen Greene to present an alternative basis to support its claim for water rights. The proposed report concerns the future population of the Navajo Nation living on the Navajo Reservation in Arizona. The United States disclosed reports from Dr. Greene on this topic on April 27, 2021 (initial report), January 2022 (rebuttal), June 2022 (corrected), and June 13, 2022 (supplemental). It now seeks leave to file a fifth

report that Dr. Greene prepared using an alternative methodology known as trend extrapolation to calculate a future population. As described by the LCR Coalition, the United States motion is, in essence, a request to permit a third round of expert disclosures about future population forecasts. LCR Coalition's Response in Opposition to United States' Motion to Amend Case Management Order – Phase I Claims at 3 (July 27, 2022) (“LCR Motion”). Deadlines have been set in this case that began in 2015 for expert reports and discovery. Dates have been set for dispositive motions and the commencement of the trial.

The court has the discretion to modify the dates established in a Scheduling Order based upon a showing of good cause. Ariz. R. Civ. P. 16(c)(5). The equivalent federal rule has been interpreted as requiring a consideration of the diligence of the party seeking the amendment. *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The court also recognized that the existence or degree of prejudice to the opposing party may supply additional reasons for the denial of the motion. *Id.* In *Johnson*, the court found the plaintiff lacked good cause for his schedule alteration request. In that case, the plaintiff had been repeatedly told by the defendant that he had named the wrong defendant. The defendant filed summary judgment on the issue, which the court granted. The plaintiff requested joinder of the correct defendant after the court had ruled that he had not named the proper defendant.

In this contested case, the United States has submitted four reports prepared by Dr. Greene in 2021 and 2022. According to Salt River Project, Dr. Greene considered the trend extrapolation methodology in her January 2022 rebuttal report and concluded that it was the wrong methodology. Salt River Project's Response to United States' Motion to Amend Case Management Order – Phase 1 at 5 (July 27, 2022). The United States now contends that it should be allowed to submit a new report from Dr. Greene that uses the trend extrapolation methodology as an alternative basis for its population claim and that the Objectors should incur the costs that would be required to have the Objectors' experts review the report and prepare responsive reports.

No dispute exists that the United States' motion to add an alternative theory to support a claim is being submitted late in the litigation – after expert reports have been filed, including four by Dr. Greene. There is also no dispute that the United States was aware of the use of a trend extrapolation method to forecast population prior to Dr. Greene's issuance of her initial report. The sole basis cited by the United States to support its motion is the Final Report in *In re Hopi Reservation*, CV 6417-203, which the United States described as finding “that the trend extrapolation method is appropriate to quantify a tribe's federal reserved water rights.” It concluded that the Final Report poses “a now-plain risk that the Court will reject Dr. Greene's methodology and conclusions as to the future population of the Navajo Reservation.” United States Motion at 4. In effect, it is the United States' position that its changed risk assessment of the success of its position in light of the Final Report constitutes good cause to amend the case management order in this case. In litigation involving opposing expert opinions, the risk exists that the party's expert opinion will be rejected. The alternative methodology could have been timely included in Dr. Greene's opinion filed at the beginning of this litigation.

The Final Report does not constitute the good cause required by Rule 16(c)(5). *See Zyda v. Four Seasons Hotels & Resorts*, 371 F. Supp. 3d 803, 810 (D. Haw. 2019) (court's order dismissing a class representative did not provide grounds to amend scheduling order to identify new class representative); *see also Lovely-Coley v. D.C.*, 255 F. Supp. 3d 1, 8 (D.D.C. 2017) ("Nonetheless, the Court finds it troubling that it was not until being threatened with potential termination of her case through reconsideration of essential facts underlying her FMLA claims that the plaintiff first sought leave to file an amended complaint.") The proposed modification also prejudices the Objectors because it will require them to incur additional expenses for another set of reports from their experts.

This decision is limited to a finding that the United States did not establish good cause for extending the deadline for filing an additional expert report to support an alternative basis for a claim and the absence of prejudice to the Objectors. This decision does not address the merits of any of the reports submitted by Dr. Greene. This decision is not issued in the context of a motion *in limine*. Dr. Greene's reports in this case have not been reviewed except for the excerpt discussed below and this decision is not reached on the substance of Dr. Greene's reports. The 22-page analysis of Dr. Greene's reports and opinions in the Final Report was undertaken pursuant to the direction that federal reserved water rights are to be determined on a reservation-by-reservation basis, and that analysis was based on the facts and circumstances surrounding the Hopi Reservation, the people living on the Hopi Reservation, and the data used, and conclusions reached by Dr. Greene concerning the Hopi population.

Motion to Amend Case Management Order to Defer Consideration of Future Population until Phase II

The Navajo Nation moves to postpone consideration of the future population of the Navajo Reservation until the second phase of this case scheduled to be tried beginning on September 20, 2027. As discussed above, the rules of civil procedure permit a modification of the dates in a Scheduling Order based upon a showing of good cause and a consideration of the prejudice to the opposing parties. *Ariz. R. Civ. P. 16(c)(5)*; *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

This case began in 2016 with a case management order requiring the United States and the Navajo Nation to begin trial in January 2022 and present their evidence to support their claims for rights to water for future domestic, commercial, industrial and municipal ("DCMI") use. Case Management Order at 8 (December 16, 2016). The Claimants chose to calculate the quantity of the DCMI use based on two factors: (1) a water use rate per capita, and (2) the future population. DCMI use is the product of the water use rate multiplied by the future population. The Navajo Nation now effectively argues that DCMI use should be tried in both phases of the case as it seeks to bifurcate consideration of the two factors that generate its claimed DCMI use. It contends that the water use rate should be litigated in Phase I and the future population should be litigated in Phase II.

Over the past two years, the Claimants and the Objectors have each produced a series of expert reports and rebuttal reports that forecast the future population. The Navajo Nation argues that delaying the litigation of future population to support its claimed DCMI use for five years is warranted because the 2020 Census data is a key component of its forecast of the population many decades, if not a century into the future. The United States issued the 2020 Census subcounty data in August 2021. The Navajo Nation contends that the five-year extension is necessary because additional information will become available that will allow it to gather additional evidence that goes to the accuracy of the 2020 Census issued almost a year ago.

In April 2022 and May 2022, Dr. Greene and the expert for the Navajo Nation, respectively, wrote additional reports that addressed the 2020 Census. Both reports challenge the accuracy of the 2020 Census and both reports state that the 2020 data “as reported or adjusted” would not alter the forecast of the future population. Updated Comments on 2020 United States Census Bureau Data for the Navajo Reservation dated May 10, 2022, attached as Exhibit F to LCR Motion. The expert for the Navajo Nation stated: “The size and timing of my population projections of the Study Area, given in the Liebler Rebuttal Report, are not impacted by the 2020 Census data nor the release of the PES Report.” Statement on the 2020 Census Post-Enumeration Survey Estimation Report: A Supplement to “Future Population of the Navajo Nation Reservation in the Arizona Portion of the Little Colorado River Basin” at 1, April 26, 2022. Attached as Exhibit G to the LCR Motion. The statements of the two witnesses do not support a finding of good cause to grant an extended delay to further analyze the 2020 Census data.

The Navajo Nation also argues that the future population issue should be separated from the first phase of the case due to the analysis of Dr. Greene’s opinions in the Final Report in *In re Hopi Reservation*, CV 6417-203. Navajo Motion at 5. Specifically, it points to the need to establish a basis for an assumption of future economic development. The United States and the Navajo Nation have filed their claims for both phases of the case for water uses required by future economic development. Thus, their population experts have had access to information about proposed economic development for more than a year before they filed their additional reports in 2022 and have had ample opportunity to substantiate a basis for their opinions. Based on the same authority cited above, the Final Report does not constitute good cause to grant a five-year delay to litigate the second factor used to establish federal reserved water rights for DCMI use.

The extended delay requested by the Navajo Nation prejudices the Objectors. If Claimants were permitted to spend five years seeking additional information about the 2020 Census and future economic development to incorporate into their population projections, new expert reports and rebuttal reports would be inevitable. The new work would supersede work done to date imposing on the Objectors the burden of duplicative expenses. According to the LCR Motion, at least 30 depositions have been taken on the issue of future Navajo population, economic development, or both and a five-year delay would cause those witnesses to be deposed again. LCR Motion at 10. The City of Flagstaff also stressed the duplicative costs that would have to be incurred if the future population issue were not litigated in accordance with the deadlines set in the Case Management Order

as it has been amended. City of Flagstaff's Joinder in the LCR Coalition's Response in Opposition to the Navajo Nation's Motion to Amend Case Management Order to Defer Consideration of Future Population Until Phase II at 2 (July 27, 2022). Clearly, the Objectors would be prejudiced in the form of increased expense in terms of new reports, additional preparation, and new depositions.

IT IS ORDERED denying the *United States' Motion to Amend Case Management Order – Phase 1 Claims* and the Navajo Nation's *Motion to Amend Case Management Order to Defer Consideration of Future Population until Phase II*

A copy of this minute entry is provided to all parties on the Court approved mailing list.