

**SUPERIOR COURT OF ARIZONA
APACHE COUNTY**

March 3, 2022

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

T. DeRaddo
Deputy

FILED: 3/8/2022

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

CV 6417-300

In Re: Navajo Nation
In Re: Oral Argument

MINUTE ENTRY

Central Court Building – Courtroom 301

3:00 p.m. This is the time set for a virtual/telephonic Oral Argument on Hopi's Motion to Exclude the Expert Report of William Greenslade, via the Court Connect / Teams application. All parties appear virtually. Appearances are as follows:

- Phillip Londen, Colin Campbell and Payslie Bowman for the Hopi Tribe
- Jeffrey Leonard, Judy Dworkin, Evan Hiller and Kate Hoover for the Navajo Nation
- Brian Heiserman, David Brown and Bradley Pew for the LCR Coalition
- Carrie Brennan and Kevin Crestin for the Arizona State Land Department (ASLD)
- Mark McGinnis, Michael Foy and John Weldon for Salt River Project
- Lee Storey for the City of Flagstaff
- Andrew Guarino, Emmie Blades and Rebecca Ross for the United States Department of Justice

The Court poses the question to the Navajo Nation:

What is the relationship between the Western Navajo Hopi Water Supply Needs Alternatives and Impact Study HDR 2003 cited in Mr. Greenslade's report, and The Hopi Western Navajo Water Supply Study referenced in the 2001 Protective Order?

Jeffrey Leonard states that he is not aware of any differences between the two documents.

The Court asks Mr. Heiserman whether he has any proposed limiting language for the Order requested by the Hopi Tribe? Mr. Heiserman states that he does not. The Joinder filed by LCR Coalition was only to note that there is publicly available information regarding that model which may appear in future technical reports. Mr. Heiserman voices his concern that the Court should not prejudge the admissibility of all reports and materials that refer to the model but address them on a case by case basis. Mr. Heiserman states that in the future if a technical report cites those materials, he does not want them to have already been ruled to be inadmissible.

Phillip Londen states that he is in agreement with Mr. Heiserman.

Mr. Londen states that there are certain issues that the Navajo Nation does not contest. He believes that these undisputed key issues form the basis for exclusion under Rule 408 and under the Protective Order. Mr. Londen enumerates the Key Issues that are undisputed: (1) The Kyle Study and the model were created using public funds specifically appropriated for compromised negotiations to facilitate settlement; (2) Senator Kyle assured the parties that the information used in the Kyle Study would be broadly protected from use in the LCR adjudication (attached floor statement); (3) But for the settlement negotiations, neither the Kyle Study nor the WNHN Model would exist.

Mr. Londen addresses these issues, presenting argument on his position. He requests that the Court enforce Rule 408. Accordingly, The Hopi Tribe moves to exclude the expert report of Mr. Greenslade.

What is your response to the issue brought up by the City of Flagstaff that if that report is excluded, then the Navajo Nation will move to file an amended report? What will that do to the schedule?

Mr. Londen states that he anticipated that if the certain sections of Mr. Greenslade's report are excluded that the Navajo Nation will move to file an amended report. Mr. Londen states that he believes that this could be finished within the current trial schedule, or make a limited exception to the discovery schedule on just this issue.

Mark McGinnis states his position on the record. He states that most of the progress that has been made in these cases is through settlement negotiations. He states the Court must keep the confidentiality of those negotiations. Mr. McGinnis urges the Court to consider the report on the merits.

Jeffrey Leonard states that the position taken by the Navajo Nation is consistent with the Protective Order and the arguments that were made in support of the Protective Order. The Navajo Nation was concerned that any settlement negotiations that were made public may be used against them. Mr. Leonard states that the Navajo Nation said in

support of its request for a Protective Order that the parties are not likely to produce sensitive information to the preparers of this study, if they “run the risk that the evaluation of that data can be used against them in court proceedings.”

Mr. Leonard further asserts that nobody, including the Hopi Tribe, not in its Motion nor Reply, nor any other party who filed a joinders or other responses to the Hopi Motion has identified a single piece of information that is jeopardized by the use of the Greenslade Model. The Navajo Nation is not using the Western Navajo Hopi Water Supply Study. Mr. Greenslade’s opinions are not based on this study. His report is based on the refinement of work that was done by “Peabody.” Mr. Leonard discusses other models on the record.

Lee Storey states that she is in agreement with Mr. McGinnis regarding settlement discussions on an ongoing basis.

The Court asks the question of Mr. Londen: Mr. Londen, if your Motion were granted, Mr. Greenslade will be required to do a new model. How would you evaluate whether the new model is incorporating the prohibited model?

Mr. Londen asserts that the experts always explain the genesis and basis of their research; how they take existing models and modify them going forward. Mr. Londen states that there needs to be a clear rule in place before going forward.

4:10 Matter concludes.

LATER:

On January 6, 2022, the Hopi Tribe filed a Motion to Exclude the Expert Report of William Greenslade (“Motion”). The City of Flagstaff and Salt River Project Agricultural Improvement and Power District (“SRP”) joined in the Motion. The LCR Coalition, joined by the Arizona State Land Department, took no position on the Motion but urged that the decision on the Motion should not include a decision on the admissibility of agency reports and analyses that cite the Hopi/Western Navajo Water Supply Study. The United States took no position on the Motion.

The Navajo Nation retained Mr. Greenslade as one of its testifying experts in this contested case. He prepared a report dated April 30, 2021, titled “*Evaluation of Groundwater Availability to Meet the Navajo Nation’s DCMI Claim, Contested Case No. CV6417-300 (Phase I)*,” (“Greenslade Report”) that relies on a modified version of the Western Navajo Hopi N Aquifer Model (“WNHN Model”). The WNHN Model was prepared as part of *Western Navajo-Hopi Water Supply Needs, Alternatives, and Impacts (Errata, July 17, 2003)* (“Kyle Study”) undertaken by the Bureau of Reclamation funded by Congress to assist in the settlement discussions among the Navajo Nation, Hopi Tribe and other water users in the Little Colorado River watershed. Motion at 4-5. When he requested funding for the Kyle Study, Senator Kyle stated: “I also want to assure the

parties that this study is intended to be used to facilitate this settlement and cannot be used for any other purpose in any administrative or judicial proceeding.” 146 Cong. Rec. S9453-S9454 (2000).

Prior to the completion of the Kyle Study, the Navajo Nation moved for an anticipatory protective order that would govern the use of the Kyle Study once it was completed. In 2001, Judge Dawson granted the Navajo Nation’s request and issued the Protective Order that provided in relevant part:

1. **IT IS ORDERED** that the Hopi/Western Navajo Water Supply Study shall not be used in any judicial proceeding in this Adjudication by any party to this Adjudication or by any representative of a party to this Adjudication.

...

4 **IT IS FURTHER ORDERED** that no expert witness shall offer an opinion on behalf of any party to this Adjudication that is based in whole or in part on the Hopi/Western Navajo Water Supply Study in any judicial proceeding in this Adjudication, except in those judicial proceedings related to the approval of a water rights settlement with the Navajo Nation and/or the Hopi Tribe.

5. **IT IS FURTHER ORDERED** that expert witnesses may offer an opinion on behalf of any party to this Adjudication that is based in whole or in part on any documents, reports, studies, or compilations of data that are referenced in, analyzed by, or attached to the Hopi/Western Navajo Water Supply Study, unless such existing documents, reports, studies, or compilations of data were themselves prepared by a party to this Adjudication for settlement negotiation purposes in a manner protected by Rules 408 and 703, Ariz. R. Evid.

Protective Order at 1- 2 (filed December 31, 2001).

In its joinder, SRP emphasized the importance of settlement discussions in this General Adjudication and the need for the parties to engage in candid discussions with the assurance that statements made and documents produced during the settlement discussions will not later be used against them in litigation if the negotiations prove unsuccessful.

The Navajo Nation argues that Mr. Greenslade should be permitted to use the WNHN Model that he modified because the WNHN model does not use confidential information. When it moved for the Protective Order in 2001, the Navajo Nation did not focus on the need to protect confidential information. It took a much broader position:

Congress has undertaken the Study to facilitate the settlement of the Little Colorado River general stream adjudication. At the same time, negotiations may not succeed, and the parties may have to litigate their competing claims to water. In that event, Ariz. R. Evid. 408 prevents any use of the Study in any such litigation or administrative proceedings related thereto because it was developed for purposes of settlement. In order to eliminate any doubt over the use of the Study in such litigation, the Nation requests the Court to issue a protective order preventing the use of the Study in any administrative or judicial proceedings. The order should also preclude any reliance by expert witnesses upon the Study, since it will be developed for settlement purposes.

Navajo Nation's Memorandum in Support of the Motion for Protective Order at 3 (June 19, 2001) ("Navajo 2021 Motion")

The language of the Protective Order is similarly broad – it makes no distinction between parts of the Kyle Study derived from confidential information and the parts drawn from public information. The Protective Order barred experts from basing their opinions on the Kyle Study or on documents, reports, studies or compilations of data referenced in the Kyle Study prepared by the parties for settlement negotiations. Here the WNHN was prepared with funding from the United States, the party seeking federal reserved water rights in this adjudication, for the express purpose of advancing settlement discussions. The issue here is not whether the information was confidential, the issue is whether the actions of Mr. Greenslade violated the terms of the Protective Order.

The protective order bars an expert from basing his or her opinion in whole or in part on the Kyle Report or on “any documents, reports, studies or compilations of data that are referenced in, analyzed by or attached to the Hopi/Western Navajo Water Supply Study” prepared by any of the parties. Obviously, a factual dispute can exist about whether an expert has based an opinion in whole or in part on the Kyle Report and the listed documents. This situation, however, allows for no quibble about whether Mr. Greenslade based his opinion on the WNHN Report. Mr. Greenslade explicitly discussed other existing groundwater models and rejected their use in favor of working with the WNHN Model, as revised, to form his expert opinions. In the Greenslade Report, Mr. Greenslade clearly states that the WNHN model will provide the basis for his study:

Given the limited areal coverage of the USG model and its inability to incorporate all of the Navajo pumping centers and springs, it was decided to repair the WNHN Model layer issues and convert the model for use with an updated version of MODFLOWS (MODFLOW-NWR) for this study. An additional benefit is the fact that the WNHN model was specifically developed to assess water availability, while the other models were designed to assess the impact of PWC pumping.“

Greenslade Report at 15.

The Navajo Nation also argues that WNHN Model is simply a set of mathematical equations akin to equations found in an elementary school math textbook that falls outside the scope of the Protective Order. Although a groundwater model operates with mathematical equations and physical data, it is not a calculator. A groundwater model attempts to represent the reality of groundwater flow, but it can only present a simplified version of that reality because mathematical equations cannot fully capture the complexity of the natural world. Physical complexity exists because aquifers and groundwater flow are three-dimensional. Different types of soils, rock and geological formations can co-exist within the same aquifer. Aquifers can also have multiple sources and sinks of water, recharge and discharge, respectively. Thus, the translation of the physical reality to mathematical equations requires judgments and assumptions made by experienced hydrologists and geologists with advanced educational degrees to be incorporated into the design of a groundwater model.

The Navajo Nation also argues that the WNHN Model is not part of the Kyle Study because it is computer software program that does not generate text with summaries and conclusions. The WNHN Model was funded and developed by the United States as an integral part of the Kyle Study to be used for settlement discussions and cannot be separated from the Kyle Study under the terms of the Protective Order.

The Greenslade Report's use of the WNHN Model as the basis of expert opinions violated the terms of the Protective Order,

IT IS ORDERED granting the Hopi's Motion to Exclude Expert Report of William Greenslade.

The parties shall be prepared at the Scheduling Conference set for March 14, 2022, to identify extensions, if any, needed to the existing schedule to allow Mr. Greenslade to revise his expert report so that he does not base his opinion on the WNHN model.

NOTE: All court proceedings are recorded digitally. The parties or counsel may request a CD of the proceedings. For copies of hearings or trial proceedings recorded previously, please call Electronic Records Services at 602-506-7100.

Pursuant to Local Rule 2.22, if a party desires a court reporter for any proceeding in which a court reporter is not mandated by Arizona Supreme Court Rule 30, the party must submit a written request to the assigned judicial officer at least ten (10) judicial days in advance of the hearing, and must pay the authorized fee to the Clerk of the Court at least two (2) judicial days before the proceeding. The fee is \$140 for a half-day and \$280 for a full day.

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