

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

10/7/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

S. Motzer

Deputy

FILED: October 12, 2020

In re:
Contested Case No. 6417-203

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

In re: Trial to Court

MINUTE ENTRY

TRIAL TO COURT DAY 13

Courtroom: CCB 301

9:00 a.m. Trial to the Court continues from October 6, 2020.

The following attorneys and parties appear via GoToMeeting:

- Colin Campbell, Grace Rebling, Phillip Londen and Payslie Bowman for the Hopi Tribe
- Vanessa Boyd Willard, Cody McBride, Emmi Blades, and Rebecca Ross for the United States Department of Justice, Indian Resources Section
- Sarah Foley for the United States Department of the Interior
- Brian J. Heiserman, David A. Brown, Lauren J. Caster, Bradley J. Pew for LCR Coalition
- Mark A. McGinnis for the Salt River Project
- Carrie J. Brennan and Kevin Crestin for the Arizona State Land Department
- Lee A. Storey, Sara Ransom, Alexandra Arboleda, and Ethan B. Minkin for the City of Flagstaff
- Jeffrey S. Leonard, Judith M. Dworkin, Evan F. Hiller, and Kathryn Hoover for the Navajo Nation

Court Reporter, Jovanna Roman, is present. A record of the proceedings is also made digitally.

Discussion is held regarding procedural matters.

The Court discusses the pending motion to admit Hopi Tribe's exhibit 4590 pursuant to Rule 612, Arizona Rules of Evidence.

The Court requests a copy of the exhibit from counsel and states that it will review the exhibit to determine the relevant portions of the document.

Discussion is held regarding LCR Coalition's request for judicial notice of multiple documents.

IT IS ORDERED granting LCR Coalition's Request for Judicial Notice as it pertains to document nos. 10 – 13, 15, 22, 24, 34, 44, 47, 51, 54 – 56, 67, 68, 70, 75, 79 – 81, 89, 94, 96 – 98, 115 – 137, and 138 – 141. The request is otherwise denied.

Counsel for LCRC addresses the Court regarding the submission of the additional exhibits referenced in LCRC's Supplemental Motion.

Counsel for the Hopi Tribe moves to admit the Hopi Tribe's exhibit 175 (unredacted Hopi Tribe's exhibit 3898) and 179.

Hopi Tribe's exhibits 175, 179, 182, 185, 842 are received in evidence.

Hopi Tribe's Exhibits 4580, 4583, and 3964 are admitted into evidence.

William Michael Hanemann is sworn and testifies

Counsel for SRP moves to strike testimony as nonresponsive and outside the scope of the expert report. City of Flagstaff and LCR join with the objection.

IT IS ORDERED granting SRP's oral Motion to Strike the witness's testimony as nonresponsive and outside the scope of the expert report.

William Michael Hanemann continues to testify.

Counsel for the City of Flagstaff moves to strike testimony based on a USGS report.

IT IS FURTHER ORDERED granting the City of Flagstaff's oral Motion to Strike in regards to the wastewater figures in the USGS Report.

Discussion is held regarding LCRC's submission of exhibits.

LET THE RECORD REFLECT that the Court addresses a report from counsel for the Navajo Nation that there is a technical issue with the public telephone, as opposed to

the GoToMeeting line. Counsel is requested to call into the trial using the public telephone line to test the line and the test establishes that the public telephone line is operational.

10:01 a.m. The Court stands at recess.

10:06 a.m. The Court reconvenes with the parties and counsel present.

Court reporter, Jovanna Roman, is present and a record of these proceedings is made digitally.

Discussion is held regarding the public line for this trial.

10:11 a.m. The Court stands at recess.

10:30 a.m. The Court reconvenes with the parties and counsel present.

Court reporter, Jovanna Roman, is present and a record of these proceedings is made digitally.

The Court addresses the status of the technical issues.

William Michael Hanemann continues to testify.

Counsel for the City of Flagstaff moves to strike testimony concerning the third adjustment. Counsel for LCRC, SRP, and Arizona State Land Department join.

Discussion is held thereon.

Based on the foregoing,

IT IS FURTHER ORDERED granting said motion to strike.

LCRC's exhibit 753 is received in evidence.

The Hopi Tribe's exhibit 3967 is received in evidence.

11:59 a.m. The Court stands at recess.

1:30 p.m. The Court reconvenes with the parties and counsel present.

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

William Michael Hanemann continues to testify.

Counsel for SRP moves to strike testimony as nonresponsive.

IT IS FURTHER ORDERED granting Counsel for SRP's oral Motion to Strike.

Counsel for the City of Flagstaff moves to strike testimony.

IT IS FURTHER ORDERED granting the City of Flagstaff's oral Motion to Strike.

William Michael Hanemann continues to testify.

Counsel for the City of Flagstaff moves to strike testimony as it pertains to an AMA.

Discussion is held.

Based on the foregoing,

IT IS FURTHER ORDERED denying the City of Flagstaff's oral Motion to Strike.

William Michael Hanemann continues to testify.

City of Flagstaff's exhibit 36 is admitted in evidence.

3:01 p.m. The Court stands at recess.

3:17 p.m. The Court reconvenes with the parties and counsel present.

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

Discussion is held regarding the AMA documents.

William Michael Hanemann continues to testify.

LCRC's exhibit 1170 is received in evidence.

Counsel for the City of Flagstaff moves to admit LCRC's exhibit 750.

Over the objection of counsel for the Hopi Tribe, LCRC's exhibit 750 is received in evidence.

Counsel for City of Flagstaff moves to strike.

The Court states that this issue will be addressed on October 8, 2020 after counsel for the City of Flagstaff and Counsel for the Hopi Tribe have a chance to discuss the AMA report.

LCRC's exhibits 1019, 1073, 1007, 1059, 1046, 1031, 994, and 979 are received in evidence upon motion for Counsel for LCR Coalition.

William Michael Hanemann steps down.

Scheduling as it relates to witnesses is discussed.

All parties agree that Dr. Hanemann will complete the remainder of his testimony on October 21, 2020 at 9:00 a.m.

Discussion is held regarding LCRC's submission of additional exhibits.

4:49 p.m. The matter stands at recess until Thursday, October 8, 2020 at 9:00 a.m.

LATER:

Hopi Exhibit 4590

Craig Kunkel prepared a report dated June 15, 2017 entitled "Related Infrastructure to Meet Hopi Tribe DCMI and Cultural and Subsistence Garden Irrigation Claims" ("2017 Report"). The report has been marked as Hopi Exhibit 4590. During its cross-examination of Mr. Kunkel on Day 10 of the trial, the City of Flagstaff used the 2017 Report to refresh Mr. Kunkel's memory that he had prepared a report in June 2017. The City of Flagstaff drew his attention to the second item on the Conclusions page which stated:

Future Hopi water supply can be reasonably obtained and transmitted from three main well fields located on the Hopi 1882 Reservation. Well field layout and long-term yields are addressed in a separate report by Blandford (2017). The estimated planning-level cost to provide water supply infrastructure is \$390,000,000 for the projected 2070 Hopi population, and an additional \$193,500,000 to supply the projected stable Hopi population.

The City of Flagstaff questioned Mr. Kunkel whether he had changed his opinion by December 2017 to include off-reservation well fields as a source of water for the projects studied. Mr. Kunkel agreed that the City of Flagstaff was correct. Subsequent questioning by the City of Flagstaff focused on meetings that occurred among the Hopi Tribe's counsel and experts culminating in the question, "So after this discussion with

the attorneys, you were amending your report to add off-reservation well use.” Mr. Kunkel responded that he did not know the catalyst for the change.

On cross-examination, counsel for the Hopi Tribe used the table of contents from the 2017 Report to point out that the 2017 Report did not include any analysis of infrastructure needed for water uses such as the proposed energy projects. Hopi Tribe subsequently moved for the admission of the entire 2017 Report. Under the Arizona Rules of Evidence, the Hopi Tribe is entitled to have any portion of the document introduced into evidence that relates to the witness’s testimony. Ariz. R. Evid. 612(b). Thus, the scope of the 2017 Report that may properly be admitted is defined by the witness’s testimony. *S & A Painting Co., Inc. v. O.W.B. Corp.*, 103 F.R.D. 407, 410 (W.D. Pa. 1984) (“Rule 612 authorizes a court to excise portions of the writing which are not related to the subject matter of the testimony. Considering the policies and authorities rehearsed, we do not interpret “testimony” to mean the entire testimony of a witness during a deposition or trial. Instead, we believe that “testimony” should be interpreted to mean only testimony which was refreshed by the writing.”)

The City of Flagstaff did not use the document to refresh Mr. Kunkel’s memory about water demand, existing systems, or the various aspects of the costs or design of the infrastructure discussed in the 2017 Report. Instead, the sole focus of counsel’s questioning related to the changes in the sources of water between the 2017 Report and the later reports. In the two-page Introduction to the 2017 Report, Mr. Kunkel expressly addresses the off-reservation sources of water. Thereafter, Mr. Kunkel focused on water sources available on the Hopi Reservation. Accordingly, the portions of the 2017 Report that may properly be admitted into evidence are the title page, the Table of Contents, the Introduction, and the Conclusions. Pages 3 through 27, the figures, tables, and appendices of the 2017 Report will not be admitted into evidence, but will be preserved for the record as required by Rule 612(b).

A copy of the minute entry will be sent to all parties on the Court approved mailing list.