

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

8/28/2020

CLERK OF THE COURT
FORM V000

SPECIAL WATER MASTER SUSAN WARD
HARRIS

L. Stogsdill

Deputy

FILED: 9/10/2020

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

CV6417-203

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

MINUTE ENTRY

Courtroom: CCB 301

2:37 p.m. This is the time set for a pre-trial conference.

The following attorneys appear via GoToMeeting:

- Emmi Blades and Rebecca Ross for the U.S. Department of Justice
- Phillip Londen and Grace R. Rebling for the Hopi Tribe
- Jeffrey S. Leonard, Evan F. Hiller, Kathryn Hoover and Judith M. Dworkin for the Navajo Nation
- David A. Brown, Lauren J. Caster, Brian J. Heiserman, and 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
- Sara Ransom and Lee A. Storey for the City of Flagstaff
- Colin Campbell for the Hopi Tribe
- Kimberly Parks for ADWR
- Joe Sparks and Laurel A. Herrmann for the San Carlos Apache Tribe
- Vanessa Boyd Willard for the United States

Court Reporter, Jeanne Kappendal is present and a record of the proceedings is made digitally.

Discussion is held regarding the provision of a revised exhibit list and thumb drives. The Court is advised that the updated thumb drive includes the updated list,

redactions and objections. A thumb drive with the exhibits will also be provided for the clerk.

Mr. Leonard has no trial issues to raise at this time.

Ms. Willard has discussion regarding deadline for Hopi allottees, and requests the pending status conference be reset once trial is over.

IT IS ORDERED vacating the telephonic status conference in October. The conference will be reset in sometime in February of 2021.

Mr. Heiserman advises that the thumb drive provided by the United States does not contain any confidential information.

A format for objections during testimony is discussed. Counsel will hold up their hand to signal the moderator, if they have an objection to witness testimony.

Mr. McGinnis states that a previous minute entry indicated that Dr. Hamman's report dated March 15, 2019, section 4.7, states pages #72-75 are to be redacted. The correct page numbers to be redacted are #74-77 of Hopi Exhibit #4580.

Counsel has no objections to this clarification.

Mr. McGinnis, Ms. Brennan and Mr. Crestin all presented a document for viewing by all parties, and all were successful in doing so.

Ms. Ransom requested that any demonstrative exhibits be presented to counsel to 3 business days prior to their use so that objections may be discussed. Counsel does not have an objection to the request.

Ms. Willard inquires if a witness can remain seated when he or she is sworn in so as not to cause issues with the GoToMeeting format. The Court agrees that the witness may remain seated when being sworn in by the clerk.

2:59 p.m. Matter concludes.

LATER:

The Navajo Nation filed a motion to prohibit extended cross-examination of co-parties' expert witnesses whose opinions have been adopted by others and the use of leading questions for friendly witnesses. The Hopi Tribe objected to the motion because it argued that its ability to cross-examine the United States' witnesses should not be unfairly limited because its interests are not necessarily aligned with those of the United States. The Navajo Nation's motion arose out of a practice in the first phase of the trial where primarily counsel for the Hopi Tribe spent hours with witnesses called by the United States asking questions to insure that large portions of the expert's witness report

was read into the record or otherwise questioning the witness to elicit confirming statements about information included in the expert report. In this proceeding, the parties have agreed that the experts' reports will be admitted into evidence subject to non-hearsay objections. Thus, each expert's opinions will be a part of the record. In addition, the parties have further agreed that the parties' will be able to conduct a direct examination of the expert, but it will be limited to 30 minutes. The Navajo Nation raises the concern that cross-examination will be used by a party who has a common interest with the party calling the expert witness to effectively circumvent the 30-minute rule by the use of cross-examination that is effectively a direct examination. Accordingly, it requests neither extended cross-examination nor leading questions be allowed by a party of a friendly expert witness. A trial court has the discretion to deny the use of leading questions on cross-examination of a friendly witness. Ariz. R. Evid. 102; Ariz. R. Evid. 611; *J. & B. Motors v. Margolis*, 75 Ariz. 392, 257 P.2d 588 (1953).

The first issue concerns the definition of a friendly expert witness. For purposes of this trial, an expert will be considered friendly to a cross-examining party when the cross-examining party has adopted the expert report in whole or in part or who will not present an expert to counter the testimony of the witness. The second issue concerns the requested constraint on the cross-examination of the expert witness. The Salt River Project proposed the use of a time limit to define "extended" cross-examination. Although a valid suggestion, other parties opposed it primarily on the attendant details that would need to be resolved.

The United States argues that no decisions should be made in advance of trial and that objections should be addressed in the context of the questions asked. While this proposal provides the most flexibility, it provides little guidance for counsel as they prepare their cross-examinations.

As defined by Black's Law Dictionary, the purpose of a cross-examination is to discredit a witness. The purpose of cross-examination is not to ask questions that counsel believes should have been asked during direct examination. The following guidelines will be followed with respect to the cross-examination of an expert witnesses that is friendly to the position advocated by the counsel conducting the cross-examination:

1. No time limit will be imposed on cross-examination of a friendly expert witness, but at such point as the questions cross-examination effectively becomes a direct examination defined as an exercise to reaffirm or favorably highlight opinions already in evidence the cross-examination will be terminated.
2. Leading questions on cross-examination of a friendly expert will generally be permitted under Rule 611, Ariz. R. Evid. except as provided below.
3. Leading questions on cross-examination of a friendly expert will not be permitted if the leading questions are effectively a direct examination and the purpose of the question is to either reaffirm an expert report admitted into evidence or testimony previously given.

4. Counsel who ask a question of a friendly expert witness on cross-examination that has drawn an objection as leading will be expected to identify the reason that counsel believes that the expert is unfriendly or hostile to the cause of the examiner with respect to the subject of the question. The objection will be sustained if counsel cannot establish that the witness is adverse to counsel's position on the subject matter of the question.

IT IS FURTHER ORDERED Hopi Tribe's Rule 37(c)(4) Motion to Extend Time for Disclosure Re: Black Mesa Coal Federal Funding Opportunities is granted. The Hopi Tribe will be permitted to offer testimony outlined in its Motion subject to evidentiary objections by the other parties except no objections will be permitted based on failure to timely disclose and disclosure after deadline.

IT IS FURTHER ORDERED that a briefing schedule for the LCR Coalition's Request that the Court Rule that Certain Documents Qualify for Judicial Notice and Request for Expedited Consideration will be set on **September 14, 2020**.

IT IS FURTHER ORDERED that the telephonic status conference scheduled for **October 6, 2020 at 1:30 p.m.** is vacated. It is rescheduled for **February 16, 2021 at 1:30 p.m.**

Instructions for telephonic participation:

Dial: 602-506-9695 (local)

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

Dial Collaboration (conference) Code 357264#

Additional information about public access to the trial scheduled to begin on September 14, 2020 will be provided by a subsequent order.

2:59 p.m. Matter concludes.

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