IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTIES OF APACHE AND MARICOPA

IN CHAMBERS (X) IN OPEN COURT ( )

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	DATE: August 8, 2006
IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE	CIVIL NO. W1-104 CV 6417-100 ORDER DENYING THE STATE OF ARIZONA'S MOTION FOR LEAVE TO AMEND MOTION FOR PARTIAL SUMMARY JUDGMENT

CONTESTED CASE NAME: *In re State Trust Lands*.

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master denies the State of Arizona's Motion for Leave to Amend Motion for Partial Summary Judgment.

NUMBER OF PAGES: 5.

DATE OF FILING: August 8, 2006.

On May 19, 2006, the State of Arizona ("State") filed a motion for leave to amend its motion for partial summary judgment filed in both adjudications. ASARCO LLC and Abitibi Consolidated Sales Corporation jointly, the group of parties designated Joint Movants, and the San Carlos Apache Tribe, Yavapai-Apache Nation, Tonto Apache Tribe, and Pascua-Yaqui Tribe (collectively the "Tribes") oppose the request.

The request for leave was timely filed in accordance with the May 19, 2005, Scheduling Order. The State gives two reasons why it wants "to modify its Motion for Partial Summary Judgment," namely:

> First, the motion is amended to clarify the fact that the State is not seeking a determination that a federal reserved water right should be implied for each and every parcel of state trust land. Rather, the State seeks a determination that the federal reserved water rights doctrine is applicable to at least some state trust lands. Second, the motion is amended to identify as a test case specific state trust lands (lands within the Prescott Active Management Area) for which there is presently no water supply available to support development under the state law scheme, which allocates water based on prior appropriation. [1]

A. The State is not seeking a determination that a federal reserved water right should be implied for each and every parcel of state trust land.

Based on extensive disclosures and discovery, the State anticipated that the objecting claimants might construe the State's motion for partial summary judgment as asserting that the reserved water rights doctrine "must be implied for all state trust lands."[2] The State wants to clarify that it "does not attempt to demonstrate that a reserved right is necessary and should be implied for all nine million acres of state trust land."[3]

The Special Master agrees with the State that "[a]lthough the Opposing Claimants suggest that the State's motion seeks a ruling that there is a reserved right attached to every one of the 9.3 million acres of trust land, *both the original and the amended motions make clear that this is not the case* (emphasis added)."[4] The original motions sought "to resolve as a matter of law the threshold issue of whether there are federal reserved water rights for State Trust Lands."[5] Do such water rights exist for State Trust Lands? This is a different issue than whether such water rights exist on *all* State Trust Lands.

In its order of reference, the Court noted that the State's summary judgment motions "are based upon the State's claim that it possesses priority-reserved water rights for *certain trust lands* ceded to Arizona by the federal government (emphasis added)," and the State "limits its request to the important determination as to whether such water rights exist."[6]

The Special Master finds that the State's position that it is not seeking a determination that a federal reserved water right should be implied for all parcels of State Trust Lands is evident in the original motions for partial summary judgment. In any event, the State has now made known its point of clarification to all parties.

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[1] State's Motion for Leave to Amend 3.
[2] *Id*. at 2.
[3] State's Consolidated Reply 2, n.3 (July 24, 2006).
[4] *Id*. at 5.
[5] State's Motion for Partial Summary Judgment Establishing the Existence of Federal Reserved Water Rights for State Trust Lands 2 (June 21, 2004, Gila River Adjudication, and Nov. 21, 2002, Little Colorado River Adjudication).
[6] Order 1 and 3 (Jan. 20, 2005).

B. The State identifies as a test case specific state trust lands within the Prescott Active Management Area ("Prescott AMA") for which there is presently no water supply available to support development under the state law scheme.

The State explained in its consolidated reply that "it sought only to establish, by way of example, that there are at least some specifically identified state trust lands for which there is no legally available assured water supply other than a federal reserved right."[7] The State identified trust lands located within the Prescott AMA as the "example" for its contention "that there are at least some state trust lands for which there is no state based water right available."[8]

The State concedes that "[t]he proposed amendment anticipated the argument [asserted in the Joint Movants' motion for summary judgment] that because the State has been able to sell a few thousand acres of state trust land without the benefit of a reserved right, a reserved right should not be implied because it is not necessary to fulfill the purposes for which the state trust lands were reserved."[9] This argument is associated with the third issue being briefed: "if lands were withdrawn and held in trust, did the United States intend to reserve unappropriated waters to accomplish the purpose of each reservation?"

Although the State's original motions did not identify specific lands that are not eligible for a state based water right, the affidavits of State Land Commissioners Winkleman and Anable state that certain lands do not have water available, that some lands have more water available than other lands, and the value of the land is influenced by water availability. The following avowals are the same in both affidavits:

> 13. Grazing lands that have water available for the watering of livestock, irrigation of pastures, and/or domestic uses that support ranching operations, are more valuable than grazing lands that do not have water available, or that have less water available.
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> ***
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> 16. Without water for irrigation, the arable State Trust Lands have little value for agricultural use. Where water is available for irrigation of the arable State Trust Lands, those lands have considerable value for agricultural use.
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> 18. If there is sufficient water available for additional irrigation significantly more State Trust Land could be used for agriculture.
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> 21. Without water for domestic use, the State Trust Lands have little value for residential use.[10]

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[7] State's Consol. Reply 2 n.3.
[8] *Id*. at 8.
[9] *Id*. at 2.
[10] Affidavit of Mark Winkleman 3-4 (June 21, 2004, Gila River Adjudication); Affidavit of Michael E. Anable 3-4 (Nov. 21, 2002, Little Colorado River Adjudication).

These avowals do not mention water rights, but they make the points that not all State Trust Lands have water available for use, and that the availability of water influences the value of those lands.

Further, this proposed amendment could inject genuine issues as to material facts in at least the determination of the third issue being briefed. In its consolidated reply, the State engages the Joint Movants in argument about the factual background of the certificate of assured water supply that the Movants proffered in their response as raising a potential disputed material issue.[11] The Joint Movants identified other disputed factual issues that could - and if leave is granted, likely would - be raised regarding the Prescott AMA lands. "[M]inimal evidence sufficient to establish that there is present a material factual issue" will defeat summary judgment.[12]

C. Law

The Special Master agrees with the State that Arizona Rule of Civil Procedure 15(a) addresses requests for leave to amend pleadings including motions for summary judgment. Although leave to amend is discretionary, the rule states that "[l]eave to amend shall be freely given when justice requires." Refusal to grant leave must have a "justifying reason."[13]

The Arizona Supreme Court and the Arizona Court of Appeals have held that in *Foman* "the United States Supreme Court set forth the standard for determining whether leave to amend should be granted:"

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason - such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - the leave sought should, as the rules require, be "freely given."[14]

A request for leave to amend need not be granted "when the amendment would be futile."[15] An amendment is futile if it merely restates in different terms what is already

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[11] State's Consol. Reply 7 n.6.
[12] The Joint Movants cite to *Gibbons v. Globe Dev., Nevada, Inc.*, 113 Ariz. 324, 325, 553 P.2d 1198, 1199 (1976). In 1992, while serving in an administrative capacity, the Special Master heard many of the disputed issues involving the "new water" in Rain Tank Wash and Dam. The Arizona Department of Transportation and Gibbons were parties in that matter.
[13] *Foman v. Davis*, 371 U.S. 178, 182 (1962).
[14] *Spitz v. Bache & Company, Inc.*, 122 Ariz. 530, 531, 596 P.2d 365, 366 (1979); *Walls v. Ariz. Dep't of Public Safety*, 170 Ariz. 591, 597, 826 P.2d 1217, 1223 (Ct. App. 1991).
[15] *Bethany Pharmacal Co., Inc. v. QVC, Inc.*, 241 F.3d 854, 861 (7th Cir. 2001).

contained in the initial pleading[16] or "if the added claim would not survive a motion for summary judgment."[17]

The State's proposed amendments are evident in the original motions for partial summary judgment, and although a claim is not being added (as in a contract or tort action) - but an example - the example of the Prescott AMA lands could inject disputed issues of material facts which could defeat the State's summary judgment request.

The opposing parties raised other grounds for denying the State's Motion, but the foregoing are sufficient reasons not to grant leave to amend.

IT IS ORDERED denying the State of Arizona's Motion for Leave to Amend Motion for Partial Summary Judgment.

DATED: August 8, 2006.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On August 8, 2006, an original of the foregoing was mailed to the Clerk of the Apache County Superior Court for filing, and a duplicate original was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing to the persons who appear on the Court-approved mailing list for this contested case dated July 7, 2006.

/s/KDolge
Kathy Dolge

[16] *Adair v. Johnson*, 216 F.R.D. 183, 186 (D.D.C. 2003); *Bancoult v. McNamara*, 214 F.R.D. 5, 8 (D.D.C. 2003); *see* 3 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 15.15[3] (3d ed. 2000).

[17] *Bethany Pharmacal, supra*; *Collyard v. Washington Capitals*, 477 F. Supp. 1247, 1249 (D. Minn. 1979).