

1 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
2 IN AND FOR THE COUNTY OF MARICOPA  
3

4  
5 IN RE THE GENERAL ADJUDICATION  
6 OF ALL RIGHTS TO USE WATER IN THE  
7 GILA RIVER SYSTEM AND SOURCE

CIVIL NO. W1-11-2664  
(Consolidated)

8 ORDER GRANTING MOTION TO  
9 COMPEL

10 CONTESTED CASE NAME: *In re Redfield Canyon Wilderness Area.*

11 HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

12 DESCRIPTIVE SUMMARY: The Special Master grants motion to compel filed by Freeport  
13 Minerals Corporation.

14 NUMBER OF PAGES: 4.

15 DATE OF FILING: November 29, 2016.  
16  
17

18 Freeport Minerals Corporation filed a motion to compel production of all documents and  
19 communications created by, provided to, reviewed by, or received by James Fogg concerning the  
20 Redfield Canyon Wilderness Area or this contested case which were requested in its First Set and  
21 Second Set of Written Discovery Requests, dated August 17, 2015 and October 13, 2016,  
22 respectively (collectively the "Discovery Requests"). Similar requests were include in a civil  
23 subpoena duces tecum dated October 27, 2016.<sup>1</sup>  
24  
25

26  
27 <sup>1</sup> The Response filed by the United States stated that it refused to accept service of the subpoena duces tecum  
28 on the grounds that Mr. Fogg was a consulting witness. Response, p. 4. Accordingly, the issue involving the subpoena  
duces tecum is the same issue presented by the Discovery Requests.

1 In its motion, Freeport Minerals Corporation contends that the requested documents “relate  
2 directly to Mr. Fogg’s preparation of his expert witness report.” Motion, p. 2. The United States  
3 responded that it has produced “all documents used by Mr. Fogg in preparing the Perennial  
4 Streamflow Report.” Response, p. 4. Based on the United States’ Response and its representations  
5 made at the oral argument, the United States has produced the documents that relate directly to Mr.  
6 Fogg’s preparation of his expert witness report.  
7

8 The Discovery Requests actually seek a broader universe of documents and  
9 communications involving Mr. Fogg than just those documents and communications relating to the  
10 preparation of the expert report. Freeport Minerals Corporation seeks discovery of documents and  
11 communications that were created or occurred subsequent to the completion of the expert witness  
12 report, which was distributed on August 23, 2013. More particularly, Freeport Minerals  
13 Corporation seeks discovery of documents and communication that were generated or reviewed by  
14 Mr. Fogg after Mr. Fogg had been designated as a consulting expert.  
15

16 On August 28, 2015, the United States advised the parties that Mr. Fogg had resigned as a  
17 testifying witness. The United States subsequently retained Mr. Fogg as a consulting expert. The  
18 United States contends that because Mr. Fogg is currently designated as a consulting expert, the  
19 documents and communications requested should be protected under Rule 26(b)(4)(B), Ariz. R.  
20 Civ. P.. Thus, the issue in dispute is whether documents and communication concerning the  
21 Redfield Canyon Wilderness Area or this contested case created by Mr. Fogg in his capacity as a  
22 consulting expert must be produced.  
23

24 Rule 26(b)(4)(B), Ariz. R. Civ. P. provides:

25 A party may through interrogatories or by deposition discover facts known  
26 or opinions held by an expert who has been retained or specially employed by  
27 another party in anticipation of litigation or preparation for trial and who is not  
28 expected to be called as a witness at trial, only . . . upon a showing of



1 exceptional circumstances under which it is impracticable for the party seeking  
2 discovery to obtain facts or opinions on the same subject by other means.

3 Rule 26 clearly limits discovery with respect to consulting experts. Mr. Fogg, however, acted as a  
4 testifying expert before the United States designated him as a consulting expert. Under Arizona  
5 law, the redesignation of an expert from a testifying expert to a consulting expert restores an  
6 expert's immunity from discovery only in very limited circumstances. *Para v. ex rel. County of*  
7 *Maricopa Anderson*, 231 Ariz. 91, 290 P.3d 1214 (Ct. App. 2012).  
8

9 The *Para* court recognized that the federal courts have split on the question of whether the  
10 redesignation of a testifying expert as a consulting expert will prevent discovery with respect to  
11 that expert after the expert's report or opinion has been disclosed. 231 Ariz. at 93, 290 P.3d at  
12 1216. The cases holding that discovery can be prohibited as to a formerly designated testifying  
13 expert are based on a policy that the protections of Rule 26(b)(4)(B) are designed to promote  
14 fairness by preventing access to another party's diligent trial preparation. *Employer's Reinsurance*  
15 *Corp. v. Clarendon Nat'l. Ins. Co.*, 213 F.R.D. 422, 426 (D. Kan. 2003). The cases holding to the  
16 contrary apply the "literal language of Rule 26(b)(4)(B), which, by its plain terms, only addresses  
17 the discoverability of evidence from an opposing party's consulting expert. Thus, once discovery  
18 from an expert has been allowed, Rule 26(b)(4)(B) no longer applies." *Id.* at 426–427.  
19

20  
21 The Arizona Court of Appeals adopted the second interpretation of Rule 26(b)(4)(B) as the  
22 applicable rule in Arizona. In its decision, the court concluded that the denial of Rule 26(b)(4)(B)  
23 protection to a consulting expert who was initially named as a testifying expert was "more  
24 consistent with Arizona's broad disclosure requirements." 231 Ariz. at 94, 290 P.3d at 1217. The  
25 court also specifically rejected the policy underlying the first approach by finding that when a party  
26 has allowed discovery with respect to its expert, the policy of allowing counsel to obtain protected  
27  
28

1 expert advice has “little or no application.” *Id.* (quoting *Rubel v. Eli Lilly & Co.*, 160 F.R.D. 458,  
2 460 (S.D.N.Y. 1995)).

3 The question here is whether an exception exists to the broad rule established by *Para v. ex*  
4 *rel. County of Maricopa Anderson* that an expert whose opinions have been disclosed cannot “be  
5 shielded from discovery by mere redesignation.” 231 Ariz. at 94-95, 290 P.3d at 1217-1218. In an  
6 earlier case, the court had permitted the reinstatement of Rule 26(b)(4)(B) protection to a  
7 redesignated expert when the disclosed expert opinion was not relevant to the issues at trial. *Green*  
8 *v. Nygaard*, 213 Ariz. 460, 143 P.3d 393 (Ct. App. 2006). The scope of this exception is  
9 extremely narrow given the court’s express limitation of its holding to the facts of the case. The  
10 relevant facts in *Green* do not exist in this contested case. The United States continues to rely on  
11 Mr. Fogg’s expert report to support its claim for water rights.  
12

13  
14 For the reasons stated above,

15 **IT IS ORDERED** granting Freeport Minerals Corporation’s Motion to Compel. By  
16 **December 12, 2016**, the United States shall answer Interrogatory Nos. 4 and 5 and shall produce  
17 or cause to be produced the documents and communications responsive to the Requests for  
18 Production Nos. 13 and 14 of Freeport Minerals Corporation Second Set of Written Discovery  
19 Requests, dated October 13, 2016.  
20

21  
22   
23 **SUSAN WARD HARRIS**  
24 Special Master

25 On November 29, 2016, the original of the foregoing  
26 was delivered to the Clerk of the Maricopa County  
27 Superior Court for filing and distributing a copy to all  
28 persons listed on the Court approved mailing list for  
Contested Case No. W1-11-2664.