

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

01/05/2005

CLERK OF THE COURT
FORM V000

HONORABLE EDDWARD BALLINGER, JR.

R. Luiszer
Deputy

W-1, W-2, W-3, W-4(Consolidated)
CV-6417

FILED: JANUARY 20, 2005

In Re the General Adjudication
of All Rights to Use Water in
The Gila River System and Source

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

Order Re: State of Arizona's
Request for Partial Summary Judgment

After considering the views expressed by the parties, the Court has decided to grant the State of Arizona's request to permit consideration of the motions for partial summary judgment pending in both of Arizona's stream adjudications. These 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. A number of parties objected to the Court granting the State's request arguing, among other things, that the motions cannot be considered until the State files quantified claims for the tracts of land in question and

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there are determinations as to the amount of water available for appropriation with respect to each claim.*

The legal principle underlying the State's motions is the belief that lands granted to the State by the United States possess reserved water rights similar to those recognized by the United States Supreme Court in *Cappaert v. United States*, 426 U.S. 128 (1976), and *United States v. New Mexico*, 438 U.S. 696 (1978). This state's supreme court described the method for determining federal non-Indian reserved water rights in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 313, 35 P.3d 68, 74 (2001) ("*Gila V*"):

"For each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water - the minimal need as set forth in *Cappaert* and *New Mexico* - required for such purposes."

If undertaking to resolve all of the issues presented by the *Gila V* reserved rights test at this juncture, the Court

* With respect to the latter point, the Court agrees with a position asserted recently by the United States that to the extent the State demonstrates its trust lands possess federal reserved water rights these rights are "superimposed on the state system", but remain "subordinate to rights acquired under state law prior to the creation of the reservation..." United States' Reply to Responses to Motion for Approval of Hydrographic Survey Report Format for National Park Service Units 5 (citing *United States v. Bell*, 724 P.2d 631, 641 (Colo. 1986) and *Gila V*, 201 Ariz. 310-311, 35 P.3d 71-72). Therefore, it is possible to decide whether a federal reserved right exists prior to being able to determine whether this right has practical value by virtue of attaching to an unappropriated water source.

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would agree with the objecting parties that the current motions would serve no purpose other than to expedite consideration of the State's claims. But, the State's request is less ambitious. It leaves for another day the quantification of any federally reserved water rights it is deemed to hold. It limits its request to the important determination as to whether such water rights exist.

Even the limited inquiry requested by the State will require careful evaluation of source materials in order to ascertain congressional intention with respect to the various components of the *Gila V* test: What lands, if any, were withdrawn from the public domain by the federal government and reserved for state use? Did each of these withdrawals serve a federal purpose and, if so, what was the purpose? Is there evidence establishing congressional intent to reserve unappropriated waters? Providing a mechanism permitting coordination of discovery needed to focus the parties on materials relevant to the issues and ensuring proper handling of any technical or expert testimony required constitutes a condition exceptional enough to justify initial referral of this matter to the Special Master.

Based on the foregoing,

IT IS ORDERED,

1. Granting the State's motion to hear and brief its motions for partial summary judgment establishing the existence of federal reserved water rights on state trust lands.

2. The Special Master shall organize a contested case to hear the State of Arizona's motions for partial summary judgment in accordance with the practices and procedures of the Special Master.

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3. The Special Master shall submit findings of fact, conclusions of law, and recommendations and set them forth in a report to this Court (the "Special Master's Report").

4. The issues to be addressed by the Special Master shall include:

- a. Whether, and to what extent, does the evidence establish that the United States withdrew land from the public domain and reserved this property as state trust land?
- b. If land was withdrawn and reserved, what was the purpose to be served by each reservation?
- c. If lands were withdrawn and held in trust, did the United States intend to reserve unappropriated waters to accomplish the purpose of each reservation?
- d. Any other issues required to be resolved in connection with addressing the matters listed above.

5. In the event the Special Master determines that the State possesses federal reserved water rights, he shall not consider the priority date for any such right, the quantity, if any, of appurtenant unappropriated water or the minimum amount of water necessary to fulfill the federal purpose for each reserved right. The hydrographic survey report prepared for the watershed within which the land related to each right is situated will frame these considerations for final resolution.

6. In presiding over the contested case, the Special Master may adopt procedures similar to those used in his consideration of the subflow issues, including methods for effective presentation of expert opinions by sworn declarations. Proceedings before the Special Master may include consideration of discovery issues, including any matters arising under Ariz. R. Civ. P. 26 and 26.1 and he

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shall be fully empowered with all the powers enumerated in Ariz. R. Civ. P. 53, including subsection (c).

7. The Special Master shall set an initial meeting to discuss the best method for considering the matters required to be resolved by this order. The time limit set forth in Ariz. R. Civ. P. 53(d) shall not apply to scheduling this initial meeting. At the initial meeting the parties may provide suggestions as to how the Special Master can ensure that hearings and conferences held in connection with implementing this order are conducted in a manner that is convenient for the parties in both adjudications.

8. Objections and comments to the Special Master's Report may be filed within sixty (60) days after the report is filed with the court. Responses to objections and comments shall be filed within forty-five (45) days after objections and comments are due, with any replies to be filed not later than thirty (30) days after the response due date. Filing times are exclusive of the additional period authorized by Ariz. R. Civ. P. 6(e).

* * * *

A copy of this minute entry is mailed to all parties on the Court-approved W-1, W-2, W-3 and W-4 mailing list (Gila River Adjudication) and the Court-approved CV-6417 mailing list (Little Colorado River Adjudication), both dated October 21, 2004.