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 11, 2005 CIVIL NO. W1-104
IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE	CV 6417-100 ORDER DENYING THE ARIZONA STATE LAND DEPARTMENT'S OBJECTIONS TO THE SCHEDULING ORDER; DENYING REQUEST FOR A PROTECTIVE ORDER; MODIFYING OPPOSING CLAIMANTS' FIRST REQUESTS FOR DISCOVERY; GRANTING REQUEST FOR CLARIFICATION REGARDING SERVICE OF DISCOVERY; AND SETTING NEW DEADLINES

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

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master denies the Arizona State Land Department's objections to the Scheduling Order, denies the Department's request for a protective order, modifies some of the Opposing Claimants' first requests for production of documents and non-uniform interrogatories, grants the Department's motion for clarification regarding service of discovery, and sets new deadlines.

NUMBER OF PAGES: 9.

DATE OF FILING: August 11, 2005.

The Arizona State Land Department ("Department" or "State") has filed (1) objections to the Scheduling Order (May 19, 2005), (2) a Request for a Protective Order against the Opposing Claimants' first request for discovery, and (3) a Request for Clarification of Service of Discovery Process. In accordance with an expedited briefing schedule granted on June 21, 2005, a group of parties designated the "Opposing Claimants," the Gila River Indian Community, the Navajo Nation, and the United States responded. The Gila Valley Irrigation District and the Towns of Clarkdale and Jerome joined and supplemented the Opposing Claimants' response. The State replied.

All papers have been carefully considered. The issues have been well briefed, and oral argument is not necessary. The issues are divided as follows.

I. The State's Objections to the Scheduling Order

A. The Scheduling Order Does Not Limit Discovery to Materials Relating to Congressional Action or Intention

Some responding parties have indicated that they "expect to show that, for many decades, the Department has administered state trust lands, through sales, leases and otherwise, as if they had no reserved right to water." Gila Valley Irr. Dist., Clarkdale, and Jerome Response ("Resp.") 2. The Gila River Indian Community articulated a similar position. The Navajo Nation submits that "the State's actions subsequent to the passage of the legislation at issue may be informative about the meaning of that legislation." Navajo Nation Resp. 4. These parties plan to focus on the Department's "post-land grant activity, including trust land management activities." U.S. Resp. 3.

The Department argues that "[d]ocuments relating to actions subsequently taken by the State [after the passage of the legislation] cannot be indicative of genuine issues of material fact concerning prior congressional intent." Objections ("Obj.") 4. This is so because the Court in its order of reference defined "the matter at issue" as "the determination of the actions, and the intentions, of congress in withdrawing and reserving land as state trust land." Obj. 4.

The order of reference states that the "limited inquiry requested by the State will require careful evaluation of source materials in order to ascertain congressional intention." Pursuant to the Arizona Supreme Court's holding in *Gila V*, the "trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation,"[1] but the examination can include other materials, and there is precedent for this determination.

The majority of decisions that have dealt with federal reserved water rights have involved Indian tribes and federal enclaves. In those cases, Congressional legislation and

[1] *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*"); *see* Order of Reference 2 (Jan. 20, 2005).

Executive Presidential documents have been the start and end of the search for answers concerning Congressional intent. This case does not involve either kind of lands.

The United States Supreme Court's decision in *United States v. New Mexico*[2] involved federal reserved water rights on Forest Service lands, which are administered and managed by an Executive agency. In addition to interpreting the Organic Administration Act of 1897 and relevant Congressional legislation concerning the creation of national forests, the Supreme Court considered and cited from other sources that showed how the land management agencies understood the reservations.

The Court, per Rehnquist, J., held that:

> "The agencies responsible for administering the federal reservations have also recognized Congress' intent to acquire under state law any water not essential to the specific purposes of the reservation."[3]

In a footnote to this statement, the Court cited from the 1936 Forest Service Manual, February 1960 Forest Service Handbook, and January 1960 Forest Service Manual.[4]

The Court continued:

> "Administrative regulations at the turn of the century confirmed that national forests were to be reserved for only these two limited purposes."[5]

In a footnote to this statement, the Court cited from the 1901 Regulations of the Interior Department, a 1900 Department of Interior Circular, and the 1913 Report of the Forester to the Secretary of Agriculture.[6] In footnote 24, the Court cited an 1894 Department of Interior Circular and the 1906 Report of the Forester to the Secretary of Agriculture

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[2] 438 U.S. 696 (1978). *New Mexico* is an important and helpful decision on this point. In *Gila V*, the Arizona Supreme Court held that "the primary purpose for which the federal government reserves non-Indian land is strictly construed after careful examination." 201 Ariz. 313, 35 P.3d 74. No citation followed this holding. Later in the opinion, the Court cited Ninth Circuit Court of Appeals Judge William C. Canby, Jr.'s statement in a book he wrote that "[w]hile the purpose for which the federal government reserves other types of lands may be strictly construed, the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained. W. Canby, *American Indian Law* 245-46 (1981)." 201 Ariz. 316, 35 P.3d 77. The complete sentence (also found in the 1998 edition of AMERICAN INDIAN LAW 407) was: "[w]hile the purpose for which the federal government reserves other types of lands may be strictly construed, United States v. New Mexico, 438 U.S. 696 (1978) (national forest), the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained (emphasis added to show omitted citation)." W. C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 245-6 (1981). Judge Canby cited the *New Mexico* decision which appears to be a basis for the holding in *Gila V*.

[3] 438 U.S. 703.

[4] *Id*.

[5] *Id*. at 708.

[6] *Id*. at 708-9.

("[c]ontemporaneous administrative regulations of the officials responsible for administering the national forests confirm…").[7] In addition to the relevant Congressional legislation, the Court cited from these administrative records in its holdings concerning the reservation of national forests and the purposes of the reservation.

The State differentiates between two issues of intention - the purpose of the reservation and intent to reserve water - and submits that each inquiry of Congressional intention "require[s] different discovery procedures." Reply 5. To undertake that task will require the Special Master to decide substantive issues that are part of the request for summary judgment.

In its reply, the State argues that because "the United States Supreme Court has ruled specifically on the proper interpretation of the Arizona state land trust….there is no probative value…to any inquiry as to how the Land Department has interpreted the nature, extent or value of the trust asset it received from the federal government." Reply 13 and 14. The Opposing Claimants want to know how the Department has considered the issue of federal reserved water rights and not if its interpretations have been correct.

Based on *United States v. New Mexico*, the Special Master finds that the requested records of the Department's administration and management of State Trust Lands are subject to discovery in this contested case.

B. The Scheduling Order Should Provide a Mechanism for Making Discovery Requests and Filing Objections

The State requests that the Scheduling Order be revised to (1) "require that, prior to serving any further document production request, the proposing party must indicate in what manner each document requested may be indicative of a genuine issue of material fact and which of the referred issues the material fact relates to," and (2) "set out a procedure allowing the responding party to file objections with the Special Master to any such document production request." Obj. 5.

Placing such a requirement on discovery would be counter to the Arizona Supreme Court's stated "common principle that the rules of discovery are to be broadly and liberally construed to facilitate identifying the issues, promote justice, provide a more efficient and speedy disposition of cases, avoid surprise, and prevent the trial of a lawsuit from becoming a 'guessing game'."[8] The requirement could foster disputes as to the sufficiency of an explanation or of an answer. Discovery motions could "proliferate and become excessively costly, time consuming, and burdensome."[9] Furthermore, discovery motions could directly or unintentionally raise substantive issues that should be left for summary judgment.

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[7] *Id*. at 717-718.
[8] *Cornet Stores v. Superior Court,* 108 Ariz. 84, 86, 492 P.2d 1191, 1193 (1972).
[9] ANN. MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.4 (David F. Herr ed., 2001).

Although it does not cite a specific opinion, the State argues that "[t]his contested case has a number of unique aspects that…qualify the applicability of a number of the cases cited by the Responses" concerning the "breath and liberality in discovery." Reply 3. The Special Master disagrees that a long-accepted "common principle" of how courts must view discovery should be so sliced in this contested case.

As for a mechanism for filing objections to discovery, the Arizona Rules of Civil Procedure and the Rules for Proceedings Before the Special Master have sufficient procedures for objections and having them promptly heard. The Special Master will promptly consider discovery matters so this contested case is not delayed.

II. The State's Request for a Protective Order

A. Complying with the Opposing Claimants' Initial Discovery Will Be Unduly Burdensome and Expensive

The State filed a "request for a protective order" for "the good cause shown in the simultaneously filed memorandum of objections." Request for Protective Order 2. The memorandum argued that the discovery requests "seek voluminous and burdensome production of millions of publicly available documents." Obj. 4. To support this objection, the Department submitted a one-page affidavit of a manager stating that the total number of documents encompassed in the requests is 5,446,828, and 2,115,000 of those documents are in off-site storage in approximately 9,000 files.

In its reply, the State indicates that its "request for a protective order was meant to act as a general platform the Special Master could use as a vehicle for adding additional procedures to the Scheduling Order to meet the needs for appropriately focusing and limiting discovery," and "was not intended to serve as a request for a protective order tolling specific discovery requests." The State concedes it "did not set out individual objections to particular discovery requests," a right it reserves. Reply 8. The Special Master finds that the number of 5,446,828 documents is awesome, but by itself it is also a general objection that is "insufficient."[10]

The State has the burden of persuasion that the items requested should not be produced.[11] As both sides agree, the "complexity of the issues presented by the litigation" is a factor to consider in "determining the issue of 'undue burden'."[12] The issues being heard in this case are of statewide importance and national interest. According to the State, it is a case of first impression. The history of the Congressional Acts upon which the State relies extends back to 1850. The size of the lands involved is substantial. "Although summary judgment is as appropriate in complex litigation as in routine cases…the court needs to be concerned with whether the record is adequately developed

[10] *Cornet Stores*, *supra*; *see Hine v. Superior Court,* 18 Ariz. App. 568, 571, 504 P.2d 509, 512 (1972).

[11] "[T]he burden of proving the validity of the objection is upon the objecting party (citations omitted)." *Cornet Stores, supra*.

[12] *Hine, supra,* 18 Ariz. App. 570, 504 P.2d 511.

to support summary judgment," and "[m]ore extensive discovery may be necessary to ensure an adequate record for decision."[13]

The responses of the Opposing Claimants and of the Gila River Indian Community are persuasive on this point. The Special Master finds that the burden of persuading has not been met that the Opposing Claimants' first requests for production and non-uniform interrogatories are unduly burdensome and expensive to answer.

The Special Master will, however, modify and deny certain requests for the reasons explained in section III. These modifications will move discovery forward and should satisfy any concerns the Department has about undue burden or expense.

B. The Opposing Claimants Have Not Complied with Rules for Proceedings Before the Special Master 9.04(2)(1)

The State argues that pursuant to Rule 9.04(2)(1) the Opposing Claimants "must certify that [they] made a search of 'publicly available documents'," and they failed to do so. Obj. 5. The Department correctly asserts that this rule directs a party to search public records and try to find the desired information prior to making a discovery request. However, as Opposing Claimants point out, Rule 9.00 was "established for contested cases concerning individual water rights after publication of Watershed File Reports ("WFR")." Resp. 11. This is not the situation in this contested case.

Rule 9.00 applies in a contested case involving claimants and "objectors," "discovery of Group 1 and 2 litigants," is triggered "[a]fter the issuance of the preliminary hydrographic survey report ("HSR")," with formal discovery beginning "after the statutory deadline for filing objections to the [final] HSR." Litigants are classified in Group 1 or 2 depending on the amount of water use described in a WFR.

The premise of Rule 9.04(2)(1) is that large amounts of information such as maps, photographs, technical findings, and copies of documents and court judgments have been collected during the course of the Arizona Department of Water Resources' ("ADWR") investigations of water uses, and under law the information is public. An example of what the term "publicly available documents" contemplates is the situation where a claimant desires information, learned from a WFR, about another claimant's grazing lease, recorded filings, or court decisions. This information may not be available in ADWR's Central Information Repository, but is available from a public agency. The claimant must search those public records prior to requesting the information through formal discovery.

Implicit in how Rule 9.04(2)(1) works in a contested case involving claimants and objectors is that the litigants have a good idea of what they are seeking, for example, the water right filings of a known person or entity, court judgments cited, or maps identified in a WFR. In this case, the Opposing Claimants do not have such specific descriptive information about what they wish to discover at the outset to prepare their case. It's the

[13] ANN. MANUAL FOR COMPLEX LITIGATION, *supra*, § 21.34.

difference between asking for all leases of water on trust lands and asking for a particular lease on a known parcel of land. Even though the documents are public information, a party needs a lead. The Opposing Claimants' first requests for production and non-uniform interrogatories are the best way to proceed at this stage of the case.

To address a suggestion made, the Special Master does not believe that claiming lack of due diligence by the serving party for not answering these first discovery requests is fair. The Special Master finds that the claimed lack of compliance with Rule 9.04(2)(1) is not good cause under Arizona Rule of Civil Procedure 26(c) to grant protective relief.

III. Modification of Opposing Claimants' Discovery Requests

Although a protective order will not be granted, several requests for production and one non-uniform interrogatory will be either modified or denied because this initial discovery can be accomplished and simplified while avoiding potentially acrimonious discovery motions or gamesmanship. The Opposing Claimants will be able to complete useful initial discovery while the Department will not feel it has been unduly burdened.

The "trial court has wide discretion in ordering discovery."[14] Rule 26(c) states in pertinent part that "[i]f the motion for a protective order is denied…the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery." This provision allows the Special Master to order the State to provide the requested discovery but put in place reasonable terms and conditions.

Just terms should make discovery useful and foreclose inefficiencies, waste, and gamesmanship. The modifications ordered below are intended to facilitate and ease the work of the Opposing Claimants' initial discovery. Some requests for production will be reasonably limited in order to expedite discovery, and others will be denied because they appear to lack the required relevancy for discovery in light of the issues being considered in this matter. In order to avoid a flood of documents at once, a phased timeline will be implemented.

IV. The State's Request for Clarification of Service of Discovery Process

On June 16, 2005, the State requested clarification regarding the procedures for service of discovery requests upon multiple parties. Parties were asked for comments; none were received. The State's proposed procedure to simplify service of its discovery requests is reasonable, and its request for clarification will be granted.

V. New Deadlines for First Discovery Requests

Because the determination of these objections took time, certain deadlines in the Scheduling Order for initial discovery requests will be changed.

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[14] *Porter v. Superior Court*, 144 Ariz. 346, 348, 697 P.2d 1096, 1098 (1985); *Brown v. Superior Court*, 137 Ariz. 327, 331-2, 670 P.2d 725, 729-30 (1983).

IT IS ORDERED:

1. The State's objections to the Scheduling Order are denied.

2. The State's Request for a Protective Order Against the Opposing Claimants' First Request for Production of Documents and Non-Uniform Interrogatories, dated May 31, 2005, is denied.

3. The Opposing Claimants' First Request for Production of Documents and Non-Uniform Interrogatories is modified as follows:

A. Requests for Production/Inspection Nos. 1, 2, 3, 5, 6, 7, 11, 15, and 16 are modified to the extent that the State shall select thirty (30) diverse and representative cases or transactions involving the matters sought to be discovered in these requests and produce the information contained in these 30 cases to the Opposing Claimants in accordance with their requests. For example, Request No. 1 addresses the Department's "sales or other conveyances or relinquishment of trust lands." The Department will select 30 cases where trust lands have been sold, conveyed, or relinquished and produce the files.

1. The diversity and representation of the 30 cases or transactions shall be by kind and time. For example, the Department should not provide 30 files of sales, if there are five non-sale conveyances, and all 30 files should not be from the same two-year period unless that is the only truthful response.

2. The Opposing Claimants are not being limited to 30 cases or transactions. If after reviewing the 30 cases or transactions, they identify other cases or transactions they want to review, they must identify them and can request that those files be produced.

B. Request for Production/Inspection No. 12 is modified such that if any court decision is published in an official reporter, the State may provide only the official citation. Copies of appellate memorandum decisions shall be produced.

C. Request for Production/Inspection No. 13 is limited to years after January 1, 1970, inclusive, but the State shall provide a complete listing and dates of all the Auditor General's performance audits. Opposing Claimants may request specific copies.

D. Request for Production/Inspection No. 14 is denied.

E. Non-Uniform Interrogatory No. 9 is denied.

4. All parties shall cooperate with each other as much as is reasonable to make this and all other discovery meaningful and productive. Staff, employees, and

others will likely do much of this work. Counsel are directed to inform those working for them of the cooperative spirit in which all discovery in this case shall be completed.

5. The State's Request for Clarification Regarding Service of Discovery is granted. If the State serves identical discovery requests upon one or more parties, the State need only send one original of such requests to each party with an attached certification stating that an identical request was sent to certain other parties and an identification of such parties.

6. On or before September 16, 2005, the State shall begin responding to the Opposing Claimants' First Request for Production of Documents and Non-Uniform Interrogatories, and responses shall be completed on or before October 25, 2005. The State and the Opposing Claimants should meet and discuss the most efficient ways to conduct the phased production of documents.

7. On or before August 23, 2005, the State may serve upon each party, or group of parties if so designated, not more than sixteen requests for production of documents and nine non-uniform interrogatories.

8. On or before November 22, 2005, all parties who have been served with the State's initial discovery requests shall respond. The State may specify an earlier date to respond if appropriate and reasonable for the discovery requested.

DATED: August 11, 2005.

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

On the 11th day of August 2005, 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 June 15, 2005.

/s/ KDolge
Kathy Dolge