

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF 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: November 8, 2012

CIVIL NO. W1-11-605

ORDER GRANTING IN PART
AND DENYING IN PART THE
MOTION OF THE UNITED
STATES FOR A PROTECTIVE
ORDER; GRANTING THE
CROSS-MOTION OF FREEPORT-
MCMORAN CORPORATION TO
COMPEL PRODUCTION TO THE
EXTENT CONSISTENT WITH
THE PROTECTIVE ORDER; AND
SETTING NEW TIME LINES

CONTESTED CASE NAME: *In re Fort Huachuca.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master grants in part and denies in part the United States' Motion for a Protective Order from Freeport-McMoRan Corporation's First Set of Written Discovery Requests to the United States, grants Freeport-McMoRan's Cross-Motion to Compel Production to the extent consistent with the protective order, and sets new time lines for the current briefing schedule.

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The United States moved for a protective order from Freeport-McMoRan Corporation's ("Freeport-McMoRan") first set of written discovery requests to the United States dated June 27, 2012. Freeport-McMoRan opposed the motion and filed a cross-motion to compel production. Because certain deadlines in the current schedule came up during the time these motions were being briefed, Freeport-McMoRan moved to extend the established deadlines and requested expedited consideration of its motion to extend the deadlines.

On September 19, 2012, the Special Master informed the parties by electronic message that the pending deadlines were suspended, and a written order would be issued setting new future time lines. This is the written order.

On September 20, 2012, the United States and Freeport-McMoRan filed a joint motion to extend the briefing deadlines and request for an expedited consideration. On September 24, 2012, the Special Master informed the parties by electronic message that the motion was granted. The briefing of the motion for a protective order and cross-motion to compel production closed on October 22, 2012.

I. Motion for a Protective Order

The United States raises four issues.

A. Request for Production No. 5

The United States claims that Freeport-McMoRan's Request for Production No. 5 is not related to the issues being considered in the second phase of this case.

The December 19, 2011, order, cited by these parties as the "Scheduling Order," states that "[d]iscovery shall be limited to matters concerning the issues designated in this order for consideration."¹ Disclosure statements are likewise "limited to matters concerning the three issues designated for consideration."² The practice of limiting disclosures and discovery in this respect has consistently been used to manage contested cases efficiently.

The designated issues are:

A. What is in detail the scope of water uses encompassed by the term "military purposes?"

B. What is the quantity of water reserved to fulfill the military purposes?, and

C. Are the sources of water other than groundwater adequate to

¹ Scheduling Order at 7 (Dec. 19, 2011).

² *Id.* at 4.

accomplish the military purposes, and if not, what is the quantity of groundwater required to accomplish those purposes?

The Special Master finds that “any analysis of the impacts of the Fort’s pumping on the San Pedro River or the water table, and any analysis regarding the relationship between groundwater pumping on and off of the Fort” are not relevant to the issues in this phase. Accordingly, the motion for a protective order concerning this request for production will be granted.

B. Interrogatory No. 4

The United States will provide to Freeport-McMoRan copies of several portions of the Programmatic Biological Assessment (“PBA”) which are currently in draft form. These documents will be part of the PBA that the United States Department of the Army will submit to the United States Fish and Wildlife Service (“Service”). The submission is expected to be made this month and will initiate the Army’s formal consultation with the Service in compliance with the Endangered Species Act of 1973, Pub. Law 93-205, 18 U.S.C. § 1536, as amended, and Title 50, U.S.C.F.R., pt. 402 (“ESA”).

The United States requests a protective order from producing the following portions of the draft and final PBA:

Executive Summary
Table 2-2 (Training Area Activities)
Section 2.13 (Conservation and Mitigation Measures to Avoid, Minimize, and/or Compensate for Effects to Listed Species and Critical Habitat Incorporated into the Proposed Action)
Section 3.2.2 (Climate Change)
Section 4 (Species/Critical Habitat Considered)
Section 5 (Potential Effects of the Proposed Action on Federally-Listed Species and Designated Critical Habitat)
Section 6 (Conclusion)
Appendix D (Mitigation Measures Plan)
Appendix F (Climate Change Review), and
Appendix G (Groundwater Modeling Report).

The Special Master spent substantial time considering the issues this motion raises. He read both federal district court opinions that Freeport-McMoRan deems “substantially similar” to this matter.³ He appreciates the importance of proper discovery and courts’ seemingly liberal disposition to allow discovery.

After considering all the arguments, the Special Master finds that the resolution of this discovery matter is in the Scheduling Order’s directive that discovery “shall be

³ Freeport-McMoRan’s Cross-Motion to Compel Production at 10 (Sept. 10, 2012). The cases are *Center for Biological Diversity v. U. S. Marine Corps*, 2003 WL 26121134 and 2005 WL 3262901 (“*Marine Corps* cases”) (unpublished).

limited to matters concerning the issues designated in this order for consideration.” The portions of the PBA for which the United States seeks a protective order are not relevant to the issues under consideration in this phase. Arizona Rule of Civil Procedure 26(b)(1)(A) allows litigants to “obtain discovery regarding any matter ... which is relevant to the subject matter involved in the pending action.”⁴ The documents sought do not overcome this hurdle.

The *Marine Corps* cases involved a request made pursuant to the Freedom of Information Act, 5 U.S.C. § 552. This phase involves three discrete issues related to the adjudication of reserved water rights.

It is noted that the PBA will have a specific duration for consultation of the ten years from 2012 to 2022, a time period subject to change. In short, the extent and quality of the information in the PBA is temporally qualified and segmented.

It is further noted that it is public knowledge that federal and state agencies and other institutions have devoted many years, if not decades, to technical investigations concerning hydrology and water uses within, without, and near Fort Huachuca. Much of this information is public. Furthermore, Freeport-McMoRan’s first set of discovery requests asked for a large amount of information regarding the scope and extent of Fort Huachuca’s water uses; no disputes concerning these requests have been presented. We are not in a vacuum of technical data and information.

However, the United States will be ordered to identify each person involved in preparing, or providing information, for the final PBA submitted to the Service. Furthermore, the United States will be ordered to provide to Freeport-McMoRan a complete copy of the final Biological Opinion the Service issues, regardless of litigation challenging the opinion. No additional discovery pursuant to Interrogatory No. 4 will be required.

Freeport-McMoRan has requested that the discovery deadline be extended until after the Service issues its Biological Opinion, which in a normal process would occur within a maximum of 90 plus 45 days after the Service receives a PBA and request for formal consultation. However, the Service may request additional information, and the submitted PBA may be revised or supplemented, actions which could delay the Biological Opinion past this time frame and possibly to an unpredictable future.

Moreover, the history of the litigation involving a Biological Opinion for Fort Huachuca shows that fourteen and a half years have passed since the Army submitted its first PBA to the Service, and three lawsuits have resulted in no final Biological Opinion to date. Completion of discovery in this case will not be delayed until after the Service issues a final Biological Opinion. Such a delay could eviscerate this case.

⁴ Ariz. R. Civ. P. 26(b)(1)(A).

C. Limitations Stemming from The Endangered Species Act

The United States argues that Freeport-McMoRan “appears to take the position ... that the amount of water implicitly reserved by the Congress as necessary for the Fort to conduct its military purposes is limited by the Endangered Species Act.”⁵ The United States requests that briefing be set on the issue of whether “ESA compliance requirements” is a factor in the decree of a water right. The Special Master does not find it necessary to brief this issue.

D. Request for Production No. 7 and Stay of All Electronic Discovery Until Ruling is Made

The United States requests that all electronic discovery be stayed until the Special Master rules on the motion for a protective order. The United States will not be required to produce documents in any manner inconsistent with the foregoing findings.

Freeport-McMoRan is willing to work with the United States on electronic discovery issues. The Special Master asks all the litigants to meet, confer, and exert best efforts to resolve discovery disputes, including those related to electronic discovery.

II. Cross-Motion to Compel Production

The cross-motion to compel production will be granted to the extent it is consistent with the protective order issued and otherwise will be denied.

III. New Time Lines for the Briefing Schedule

The future time lines in the briefing schedule were suspended pending this order. New time lines for completing discovery, exchanging expert reports, and holding a telephonic conference are now set.

For the foregoing reasons, IT IS ORDERED:

1. Granting in part and denying in part the United States’ Motion for Protective Order from Freeport-McMoRan’s First Set of Written Discovery Requests to the United States dated June 27, 2012, as follows:

A. Freeport-McMoRan’s Request for Production No. 5 - The United States is not required to produce “any analysis of the impacts of the Fort’s pumping on the San Pedro River or the water table, and any analysis regarding the relationship between groundwater pumping on and off of the Fort, including all modeling and groundwater analysis performed by Laurel J. Lacher, Pd.D., RG.”

⁵ U. S. Motion for a Protective Order at 8 (Aug. 20, 2012).

B. Freeport-McMoRan's Interrogatory No. 4 - The United States shall provide copies of the draft PBA it has agreed to produce as well as copies of their final version in the PBA submitted to the Service. The United States shall identify each person involved in preparing, or providing information, for the final PBA submitted to the Service. The United States shall provide to Freeport-McMoRan a complete copy of the final Biological Opinion issued by the Service. No additional discovery pursuant to Interrogatory No. 4 is required.

C. Freeport-McMoRan's Request for Production No. 7 - The United States is not required to produce documents in its answer to this request in any manner inconsistent with the foregoing determinations.

2. Granting Freeport-McMoRan's Cross-Motion for Production to the extent consistent with the foregoing determinations and otherwise denying the cross-motion.

3. Modifying Section II, Paragraph 4 (Discovery) of the December 19, 2011, order to provide that all discovery including depositions shall be completed by **Friday, May 31, 2013**.

4. Modifying Section II, Paragraph 5 (Expert Reports) of the December 19, 2011, order to provide that on or before **Friday, March 22, 2013**, all parties will exchange expert reports that a party considers relevant to the designated issues. And,

5. Modifying Section II, Paragraph 6 (Conference) of the December 19, 2011, order to reset the telephonic conference from January 15, 2013, to **Tuesday, June 11, 2013, at 9:00 a.m. (MST)**.

DATED: November 8, 2012.

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

On November 8, 2012, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-605 dated July 17, 2012.

/s/ Barbara K. Brown
Barbara K. Brown