

SUPERIOR COURT OF ARIZONA  
APACHE COUNTY

6/16/2022

CLERK OF THE COURT

SPECIAL WATER MASTER  
SUSAN WARD HARRIS

S. Ortega  
Deputy

FILED: 7/7/2022

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

CV6417-300

In Re: Navajo Nation

**MINUTE ENTRY**

Central Court Building – Courtroom 301

2:30 p.m. This is the time set for Oral Argument before Special Water Master Susan Ward Harris regarding Navajo Nation's March 25, 2022 Motion for Protective Order and the Response filed by the San Juan Southern Paiute Tribe on April 28, 2022.

A record of the proceedings is made digitally in lieu of a court reporter.

The following attorneys appear virtually and/or telephonically:

- Jeffrey S. Leonard, Judith M. Dworkin, Evan Hiller, Kate Hoover, and Candace French for the Navajo Nation; Michelle Brown Yazzi for the Navajo Nation Department of Justice is also attending
- Julia Kolsrude and Kate Schaeffer for the San Juan Southern Paiute Tribe
- Brian Heiserman for the LCR Coalition
- Carrie Brennan and Kevin Crestin for the Arizona State Land Department
- Mark McGinnis and Katrina Wilkinson for the Salt River Project (SRP)
- Alexandra Arboleda for the City of Flagstaff
- Andrew Guarino for the United States Department of Justice
- Phillip Londen for the Hopi Tribe; Payslie Bowman observing

- Kimberly R. Parks and Kome Akpolo observing for the Arizona Department of Water Resources (ADWR)
- Robyn Interpreter observing for the Yavapai Apache Nation

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Mr. Leonard states his position as to Navajo Nation's Motion for Protective Order, and argument is presented.

Discussion is held regarding the treaty lands and San Juan Southern Paiute Tribe's dispositive motions. Ms. Kolsrude requests a clear distinction between the water claims and water rights for the actual area of the Navajo Reservation versus the rights that are going to be decreed to the Navajo Nation as a tribe.

Further discussion is held regarding deposition examinations previously taken and further discovery requested.

The Arizona Rules of Civil Procedure shall apply to the time deadlines for motion practice in this contested case rather than the Rules for Proceedings before the Special Master.

The Court will issue in order in connection with this matter.

3:04 p.m. Matter concludes.

**LATER:**

The Navajo Nation (Nation) and the San Juan Southern Paiute Tribe (the "Tribe") are engaged in a long-standing dispute about beneficial ownership of a portion of the land reserved by the federal government pursuant to that act passed by Congress on June 14, 1934, 48 Stat. 960 (the "1934 Act"). The land dispute is the subject of a district court decision in *Masayesva v. Zah*, 794 F. Supp. 899 (D. Ariz. 1992). Although the district court made findings of fact about the location of the land that the Tribe used for farming or grazing included in the 1934 Act, it concluded that it lacked jurisdiction to partition land to the Tribe or to create a reservation for the Tribe:

This Court previously held that it did not have jurisdiction to partition land to the Paiute Tribe. A holding that the Paiute Tribe is entitled to the surface and subsurface estate in land which were exclusively used, occupied, or possessed by Paiutes in 1934 and to quiet title in the Paiute Tribe would be tantamount to a partition of that land to the Paiute Tribe. Thus, while the Court will make findings as to the lands held exclusively by Paiutes in 1934, the Paiute Tribe will not be entitled to an exclusive interest in the surface and subsurface estate.

*Id.* at 929.

The Tribe appealed the decision. Since the issuance of the district court decision, the parties worked to resolve the dispute with a treaty that would require Congressional approval. In 2000, the Tribe and the Nation signed a treaty that they amended in 2004. Navajo Motion for Protective Order at 2 (March 25, 2022). The treaty, as amended, has not been submitted to Congress for approval. As a result of the treaty, the Tribe's appeal of the district court order was dismissed subject to either party's request to reinstate. Joint Report at 3 (January 10, 2022). The current date to request reinstatement of the appeal or to stipulate to another extension was June 30, 2022. Joint Report at 3.

This continuing dispute about beneficial ownership of land within the boundaries of the Navajo Reservation was the subject of a proposal filed by the Tribe on March 21, 2021, regarding the adjudication of water rights for the Navajo Reservation. In response to the proposal, the Nation stated that it "does not dispute that the 1934 Act set aside lands explicitly for the Navajo Nation, and impliedly for the Tribe, as a tribe settled thereon by the Secretary." Navajo Nation's Response to San Juan Southern Paiute Tribe's Proposal Regarding Claims and Identification of Issues at 2 (August 31, 2021). It also confirmed that it does not dispute that "once lands are set aside out of the 1934 Act Reservation for the Tribe as a separate reservation, the Tribe will be entitled to water rights separate from the Navajo Nation." *Id.* at 3. As stated in the Order ruling on the Tribe's proposal, the absence of a definitive solution to the land dispute will cause the any decree issued to the United States for federal reserved water rights for the Navajo Reservation of behalf of the Navajo Nation to be clouded with an explicit recognition of the Tribe's outstanding claims. Order at 6 (November 2, 2021).

The parties in this case have acknowledged that the absence of a resolution of the land dispute will create a host of issues in this case. This discovery dispute is the first issue that has arisen since the November 2, 2021 Order. During a deposition on February 2, 2022, counsel for the Tribe asked a series of questions about the treaty, the status of the treaty, intentions with respect to the treaty, the decision in *Masayesva v. Zah*, and the claims on appeal. Counsel for the Nation instructed the witness not to answer. Neither party took any action regarding the February 2, 2022, deposition and, consequently, the actions or inactions of the parties concerning the February deposition are not at issue here.

On March 25, 2022, the Navajo Nation filed a Motion for Protective Order seeking to limit the scope of depositions for future witnesses and obtain a protective order pursuant to Ariz. R. Civ. P. 26 (c)(1) forbidding inquiry into matters related to the land dispute between the Nation and the Tribe that is the subject of a district court decision in *Masayesva v. Zah*. The Navajo Nation argues that the questions are not permitted because the court does not have jurisdiction over the land dispute, the questions are relevant only to the land dispute and not to the issues to be adjudicated in this case, and discovery cannot extend to actions a party intends to take in the future.

The Tribe concurs that the land dispute will not be resolved in this case. San Juan Southern Paiute Tribe's Response to the Navajo Nation's Motion for Protective Order at 10 (April 28, 2022). It, nevertheless, argues that it is entitled to ask questions

about the land dispute because of its belief that the Nation seeks a determination of its water rights as if the entirety of the 1934 Act land (excluding the portion partitioned to the Hopi Tribe) belongs exclusively to the Nation. It asserts that “[t]his Court cannot, at the Nation’s request, simply grant away the Tribe’s water rights where there is indisputable evidence that the Tribe has joint and exclusive use to the Remaining 1934 Act Lands to which the water is appurtenant.” *Id.* at 4. It concludes that the Nation’s intentions with respect to the treaty and the appeal in *Masayesva v. Zah* directly impact the legitimacy of the Nation’s claims and the accuracy of the water claims calculation.

The resolution of the Tribe’s claim to beneficial ownership of land within the Navajo Reservation will not be decided in this contested case. This issue can only be resolved by the Nation and the Tribe, with the consent of Congress, or by the appellate federal court. Thus, discovery focused on the Tribe’s claims to a beneficial interest in the land within the Navajo Reservation is not relevant to any issue which can be currently decided in this contested case, i.e., federal reserved water rights for that amount of water necessary to effectuate the purpose of the reservation for the Navajo Nation, tailored to the Nation’s minimal need. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 320, ¶ 48, 35 P.3d 68, 80 (2001). Similarly, discovery with respect to past and future efforts to settle the land dispute through the treaty are not relevant to the adjudication of federal reserved water rights.

The Tribe argues that the Nation must demonstrate harm or prejudice before it is entitled to a protective order and that this determination requires a balancing of public and private interests citing to *Phillips ex. Rel Estates of Byrd v. General Motors Corp*, 307 F. 3d 1206, 1210-11 (9<sup>th</sup> Cir. 2002). In that case, the court considered whether a good cause existed to release a sealed document to the public. This case does not concern a document filed with the court to which a presumption of public access attaches. Here, the Tribe seeks testimony to support its objections that are based on its claimed rights to land, an issue that will not be resolved in this case.

Under Arizona law, the court has broad discretion to control the scope and extent of discovery, which includes limiting the scope of discovery through the use of a protective order. *Gullett on behalf of Estate of Gullett v. Kindred Nursing Centers W., L.L.C.*, 241 Ariz. 532, 542, ¶ 34, 390 P.3d 378, 388 (App. 2017); *see also Cornet Stores v. Superior Court In & For Yavapai Cnty.*, 108 Ariz. 84, 86, 492 P.2d 1191, 1193 (1972). Rule 26(c) is a uniquely appropriate tool because it permits judicial restrictions to be imposed on the discovery process and confers upon the courts considerable flexibility and discretion in selecting various means to protect a party or person from annoyance, embarrassment, oppression, or undue burden and expense. *Jolly v. Superior Court of Pinal Cnty.*, 112 Ariz. 186, 192, ¶ 44, 540 P.2d 658, 664 (1975). For example, a court has discretion to stay discovery, using Rule 26(c), of an issue until an underlying critical issue has been decided. § 2040 Limitation of Scope of Discovery, 8A Fed. Prac. & Proc. Civ. § 2040 (3d ed.) The issue presented here is whether the discovery sought is unreasonably or outside the permissible scope of discovery. *Gullett* 241 Ariz. at 542, ¶34, 390 P.2d at 388.

The scope of discovery in this case cannot extend to discover facts relevant to whether the Tribe has an interest in the land or a portion of the land in the Navajo Reservation. Or, in the terms of the Objections asserted by the Tribe, whether the Navajo Nation lacks an interest in portions of the land in the Navajo Reservation due to the claims of the Tribe. It also cannot extend to terms or timing of any settlement of the issue. At oral argument, counsel for the Navajo Nation requested that the protective order preclude any further examination concerning the treaty, the intent of the Navajo Nation with respect to the treaty, and any claim of entitlement of the Tribe to any land within the Navajo Reservation. He also said that it would also be appropriate to preclude discussions about the witness' awareness of the presence of the members of the Tribe within the geographical borders of the Reservation and their knowledge about the use of resources by the members of the Tribe. Given that discovery must be limited to the evidence relevant to the case or likely to lead to evidence relevant to the case,

IT IS ORDERED granting the Nation's Motion for a Protective Order. The Tribe may not engage in discovery in this case concerning the existence of the treaty, the terms of the treaty, the intent of the Navajo Nation with respect to the treaty, or the opinions of any witness about the claims asserted by the Tribe to land within the borders of the Navajo Reservation.