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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

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

Case No. CV 6417-203

ORDER DENYING MOTION FOR
A PROTECTIVE ORDER

CONTESTED CASE NAME: *In re Hopi Reservation HSR*
HSR INVOLVED: Hopi Reservation Hydrographic Survey Report
DESCRIPTIVE SUMMARY: Motion for entry of a contested form of general protective order is denied.
NUMBER OF PAGES: 6
DATE OF FILING: May 22, 2018

On January 16, 2018, the Hopi Tribe filed its third Motion for a Protective Order¹ to limit the disclosure and use of unspecified documents that have been or it anticipates may be requested

¹ The first protective order granted to the Hopi Tribe protects certain personal information of its tribal members. A second motion for a stipulated protective order was granted without opposition filed by any party.

1 to produce. The Motion, joined by the Navajo Tribe, does not identify any specific documents for
2 which protection is sought and requires that confidentiality be maintained beyond the pretrial state
3 through the trial and appellate review. Instead, the Motion is a request for entry of a 14-page
4 general protective order that permits the Hopi Tribe or any other party to designate documents as
5 confidential, restricts distribution of the certain documents among all the parties in the case and
6 defines procedures for the use of the documents in the litigation. The LCR Coalition, joined by
7 Arizona Public Service, City of Flagstaff, Arizona State Land Department, and Salt River Project
8 Agricultural Improvement and Power District, opposes the entry of the Hopi Tribe's general
9 protective order and lodged its own 15-page proposed form of order. The LCR Coalition argues
10 that the Hopi Tribe did not make the requisite showing of good cause for the need for
11 confidentiality required by Rule 26(c), Ariz. R. Civ. P. In addition, the LCR Coalition and several
12 of the parties opposing the motion contend that the form of order submitted by the Hopi Tribe
13 should be denied because it could create potential liability for parties subject to public disclosure
14 laws. The pleadings and competing forms of protective orders also raise a host of other issues
15 including whether the burden of proof has been improperly transferred and whether certain parties
16 will be improperly denied access to documents.

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20 Arizona Rule of Civil Procedure 26(c) authorizes the court to grant a protective order in
21 favor of a party who the court finds demonstrated good cause for the requested confidentiality.
22 *BNSF Ry. Co. v. Buttrick*, 228 Ariz. 449, 451 ¶15 (App. 2011). In the absence of a stipulation by
23 the parties, the court must make findings of relevant facts concerning the need to maintain
24 confidentiality, a non-party's need to obtain access to the information and the possible risk to the
25 public health, safety or financial welfare. The Hopi Tribe contends that the court has the
26 discretion to enter a "blanket protective order" without requiring the party to demonstrate the need

1 for “confidentiality in the first instance on a document-by-document basis.” Hopi Tribe’s
2 Consolidated Reply in Support of Its Motion for a Protective Order, filed March 6, 2018, at 4
3 (“Reply”). In support of its position, the Hopi Tribe relies on *Cipollone v. Liggett Group, Inc.*,
4 785 F.2d 1108, 1122 (3d Cir. 1986). In *Cipollone*, the court stated:

5 That does not mean, however, that the party seeking the protective order
6 must necessarily demonstrate to the court in the first instance on a
7 document-by-document basis that each item should be protected. It is
8 equally consistent with the proper allocation of evidentiary burdens for the
9 court to construct a broad “umbrella” protective order upon a threshold
10 showing by one party (the movant) of good cause. Under this approach,
11 the umbrella order would initially protect all documents that the producing
12 party designated in good faith as confidential.

10 While it may not be necessary in the Third Circuit to demonstrate good cause with respect
11 to each document before the issuance of a blanket protective order, the *Cipollone* court did
12 contemplate that there would be an initial showing of good cause required by Rule 26(c) for at
13 least a class or group of documents. As explained in treatise referenced by the Hopi Tribe:

14 But such [blanket protective] orders are not authorized simply on the
15 requesting parties' say—so. As Judge Becker also recognized in 1981, “[i]n
16 practical terms, it may well be that courts apply a less rigorous standard to
17 consent orders, although we doubt any judge would approve a consent
18 order not demonstrably rooted in Rule 26(c),” and the Manual for
19 Complex Litigation Fourth also acknowledges that some courts believe
20 that such orders do not reduce the review burden imposed on judges. A
21 number of courts have therefore held that entering a protective order based
22 solely on the parties' consent is improper. Even when the parties consent,
23 the court may not enter an order unless Rule 26(c) is satisfied.

21 8A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Richard L. Marcus, A. Benjamin
22 Spencer, & Adam N. Steinman, Procedure for Obtaining Protective Orders, *Fed. Prac. & Proc.*
Civ. § 2035 (3d ed. 2018)(footnotes omitted).

23 Here, the Hopi Tribe has only generally referenced a need for confidentiality with respect
24 to documents requested by The LCR Coalition concerning its “strategic policies and plans, as well
25 as its future plans for the expansion of electrical transmission lines, water pipelines and other
26 critical infrastructure”. Reply at 3. It also states that “there may be additional documents relating
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1 to the Hopi's cultural practices - including sacred religious ceremonies relating to water – that
2 merit protection.” *Id* at 10. These statements are too general and vague to provide a basis upon
3 which a reasoned decision can be made as to whether good cause exists for the issuance of a Rule
4 26(c) protective order. If the Hopi Tribe desires to obtain a protective order with respect to a
5 particular discovery request, then that discovery request should be the focus of a motion and at
6 least a threshold showing made as to good cause.

7 The Hopi Tribe further argues that its form of a general protective order should be entered
8 because “[i]t is commonplace in both federal and state court to enter blanket protective orders
9 allowing each party to designate particular documents as confidential and subject to protection.”
10 Reply at 5. It listed a form of order issued by Judge John Tuchi for the United States District
11 Court for the District of Arizona, a Model Stipulated Protective Order Standard Litigation for the
12 United States District Court for the Northern District of California, and an order enter in the Silver
13 Creek HSR. It also referenced a Protective Order issued on August 22, 2012, in *Arizona v.*
14 *Tohono O’odham Nation*, No. CV11-0296-PHX-DGC that appears to have been granted in
15 response to a Joint Motion for Entry of Stipulated Protective Order and Request for Expedited
16 Consideration by Salt River Pima-Maricopa Indian Community, dated August 20, 2012. The list
17 of form federal protective orders referenced by the Hopi Tribe certainly supports its general
18 assertion, however, in those cases, unlike in this case, the parties agreed or stipulated to the entry
19 of the protective orders.

20 The Ninth Circuit has concluded that under the federal rules of civil procedure applicable to
21 protective orders, if all of the parties have stipulated to the form of the order, a showing of good
22 cause may not be necessary: “While courts generally make a finding of good cause before issuing a
23 protective order, a court need not do so where (as here) the parties stipulate to such an order. When
24 the protective order ‘was a stipulated order and no party ha[s] made a good cause showing,’ then
25 ‘the burden of proof ... remain[s] with the party seeking protection.’” *In re Roman Catholic*
26 *Archbishop of Portland in Oregon*, 661 F.3d 417, 424 (9th Cir. 2011) quoting *Phillips v. Gen.*

1 *Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir.2002). This holding is similar to the 11th Circuit
2 decision cited by the Hopi Tribe in *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d
3 1304, 1307 (11th Cir. 2001) (“At the beginning of the litigation, in what has become commonplace
4 in the federal courts, the parties stipulated to a protective order allowing each other to designate
5 particular documents as confidential and subject to protection under Federal Rule of Civil
6 Procedure 26(c)(7).”) Here, unlike the cases cited above, the parties in the litigation have not
7 agreed to the entry of the order and, in fact, they affirmatively disagree on a number of its
8 provisions. A protective order cannot be entered in absence of both a determination of good cause
9 and agreement of the parties as to the form of the order. The remaining issues presented by the
10 Hopi Tribe’s form of order will not be addressed because the absence of a showing of good cause
11 for the issuance of the protective order renders them moot².

12 The authorization of protective orders under Rule 26(c), Ariz. R. Civ. P. and the federal
13 courts willingness to adopt a form of protective order stem from the recognition that parties
14 engaged in litigation do not sacrifice all aspects of privacy or protection for proprietary information
15 simply because of a lawsuit. Similarly, the Hopi Tribe, as has already been demonstrated in this
16 case, will not be required to forego all aspects of privacy or ability to protect confidential
17 information during the litigation of this contested case necessary for the establishment of its water
18 rights. Requests for protective orders that make a showing of good cause and comply with Rule
19 26 will be granted as will those reasonable protective orders requested by the stipulation of the
20 parties.

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23 SUSAN WARD HARRIS
24 Special Master

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26 ² In its Reply and at oral argument on March 29, 2018, the Hopi Tribe proposed alternative language to its
27 form of order in response to certain parties’ claims of potential liability under public disclosure laws. The offered
28 revisions may alleviate the responding parties concerns. This statement should not be interpreted as a decision on the
merits; simply an observation that the issue may be resolved in a future stipulated form of order.

1 On May 22, 2018, the original of the foregoing was
2 mailed to the Clerk of the Apache County Superior
3 Court for filing and distributing a copy to all persons
4 listed on the Court approved mailing list for Contested
5 Case No. 6417-203.

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