

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

UNITED STATES,

Plaintiff,

vs.

NO. CIV-01-0072 BB/WWD

STATE OF NEW MEXICO ENGINEER, et al.,  
Defendants.

**BRIEF IN SUPPORT OF MOTION BY DEFENDANT PAUL PETRANTO TO  
REVOKE REFERENCE TO SPECIAL MASTER AND  
TO STAY FURTHER PROCEEDINGS BEFORE SPECIAL MASTER**

**1. Background.**

On January 19, 2001, the United States filed a water rights complaint against numerous defendants, including Defendant Paul Petranto.

On March 12, 2001, on its own motion, and with no prior notice to the parties, this Court filed an Order of Reference to special master Vickie Gabin, stating: "Water rights adjudications involve exceptional conditions which necessitate the appointment and use of a special master." However, there is no enunciation of what the "exceptional conditions" are in this case.

This Court directed the special master "to hear and to determine all claims and contentions of the parties relating to their rights to the surface and underground waters of the stream systems encompassed by this case and all other related matters that may arise in connection with such rights."

**2. Defendant's objection to the appointment of a special master is timely.**

This objection to the appointment of a special master is raised now, because the objection must be raised at the earliest possible time, or the objection may be deemed waived. Hayes v. Foodmaker, Inc. (5<sup>th</sup> Cir. 1981) 634 F.2d 802, 803.

**3. Appointment of a special master is generally disfavored.**

Rule 53 specifically states "reference to a master shall be the exception and not the rule." FRCP 53(b). Accordingly, appointment of a special master is generally disfavored and is made only in rare cases. La Buy v. Howes Leather Co. (1957) 352 U.S. 249, 77 S. Ct. 309.

**4. No exceptional condition or complicated issues require reference to a special master in this litigation.**

Rule 53(b) of the Federal Rules of Civil Procedure provides in pertinent part:

"In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it."

The Supreme Court has interpreted Rule 53's "exceptional condition" requirement very narrowly. In La Buy v. Howes Leather Co., 352 U.S. 249, 259 (1957), the Supreme Court affirmed a writ of mandamus vacating the district court's *sua sponte* reference of a complex antitrust case to a special master. The Court held in La Buy that court "congestion," the "unusual complexity of issues of both fact and law," and the "great length

of time" that a trial could take do not constitute valid "exceptional conditions" that require the appointment of a special master under Rule 53. *Id.*

In interpreting the Supreme Court's decision in La Buy, the courts of appeals have consistently adhered to a narrow reading of Rule 53 and have routinely overturned references to special masters when the reference was ordered *sua sponte* or over the objection of one of the parties. See, e.g., Prudential Ins. Co. v. U.S. Gypsum Co., 991 F.2d 1080, 1080-81 (3d Cir. 1993) (noting "exceedingly high standard" that must be met under Rule 53(b) and rejecting district court's *sua sponte* appointment of special master on grounds that factual and legal complexity does not constitute "exceptional condition"); McCormick v. Western Ky. Navigation, Inc., 993 F.2d 568, 570 (6th Cir. 1993) (overturning reference to special master on grounds that "emergency situation" caused by overcrowded docket does not constitute "exceptional condition"); Burlington Northern R.R. Co. v. Department of Revenue, 934 F.2d 1064, 1068-74 (9th Cir. 1991) (overturning *sua sponte* reference to special master on grounds that "judicial efficiency" does not meet "exceptional condition" requirement); In re United States, 816 F.2d 1083, 1088 (6th Cir. 1987) (rejecting "public interest in the quickest feasible resolution" of case as constituting "exceptional condition" under Rule 53); Liptak v. United States, 748 F.2d 1254, 1257 (8th Cir. 1984) (invalidating reference to special master and stating that "[b]eyond matters of account, difficult computation of damages, and unusual discovery, "it is difficult to conceive

of a reference of a nonjury case that will meet the rigid standards of the *La Buy* decision” (quoting 9 Charles Alan Wright & Arthur B. Miller, *Federal Practice and Procedure* §§ 2605, at 791 (1971)); Bartlett-Collins Co. v. Surinam Navigation Co., 381 F.2d 546, 550-51 (10th Cir. 1967) (rejecting "complex issues of fact and law" as valid basis for appointment of special master). These cases demonstrate the continued vitality of La Buy and the extent to which the courts of appeals have construed Rule 53 very narrowly.

This Court’s blanket reference to a special master is unsustainable under La Buy and its progeny. Certainly, the court is congested and, absent an outright dismissal, resolution of this matter may be quite lengthy. However, court congestion, complexity of the case, and anticipated lengthy trial usually do not constitute “exceptional conditions” allowing reference to a special master without the parties’ consent. La Buy v. Howes Leather Co. (1957) 352 U.S. 249, 258, 77 S. Ct. 309, 315. Neither does a judge’s lack of expertise in the area justify a reference to a special master. Madrigal Audio Labs., Inc. v. Cello, Ltd. (2d Cir. 1986) 799 F.2d 814, 818, fn.1.

**5. The Order of Reference Confers on the special master powers that properly should be exercised by the District Court.**

The Order of Reference states that the Special Master is directed “to hear and to determine all claims and contentions of the parties relating to their rights to the surface and underground waters of the stream systems encompassed by this case and all other related

matters that may arise in connection with such rights." The power to resolve the fundamental factual and legal disputes in this case, however, "must be exercised by courts having the attributes prescribed in Art. III." Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (plurality opinion). The Order of Reference is therefore plainly improper under Article III because it delegates such power to a special master.

In In re Bituminous Coal Operators' Ass'n, 949 F.2d 1165 (D.C. Cir. 1991), the Court of Appeals, in an opinion written by Justice (then-judge) Ruth Bader Ginsburg, overturned a blanket reference to a special master on the ground that the reference was improper under Article III. *Id.* at 1168. Justice Ginsburg concluded that "it is the function of the district judge, in a non-jury civil case, to decide dispositive issues of fact and law genuinely disputed by the parties." *Id.* at 1169. See also Meeropol v. Meese, 790 F.2d 942, 961 (D.C. Cir. 1986) (criticizing use of special master to decide core elements of case as contrary to Article III); Stauble v. Warrob, Inc., 977 F.2d 690, 691 (1st Cir. 1992) (concluding that "referring fundamental issues of liability to a master for adjudication, over objection, is impermissible" under Article III). Defendant Petranto should not be "depriv[ed] . . . of a trial before the court on the basic issues involved in th[is] litigation." La Buy, 352 U.S. at 256.

Making factual determinations and applying legal standards are the very essence of the judicial function and, as such, must be performed by an Article III court. See La Buy,

352 U.S. at 256; see also Prudential Ins. Co., 991 F.2d at 1086 (noting that "district court has no discretion to delegate its adjudicatory responsibility in favor of a decision maker who has not been appointed by the President and confirmed by the Senate"). Accordingly, Defendant Petranto opposes the "blanket reference" of this case to a special master. In re Bituminous Coal Operators' Ass'n, 949 F.2d at 1165.

**6. The Order of Reference denied Defendant Petranto an opportunity to object to potential bias on the part of the special master.**

Defendant Petranto received no notice that the Court was contemplating the appointment of a special master. Nor did Defendant Petranto have any notice of the identity of the special master whom the Court determined to appoint on a *sua sponte* basis. As a result, Defendant Petranto had no opportunity to object to the procedure generally or to make an informed decision as to whether Vickie Gabin is a suitable candidate to discharge the broad adjudicatory powers bestowed on her by the Order of Reference.

The procedure typically observed in these circumstances is to ask the parties to nominate candidates to serve as special master or, at a minimum, to give the parties an opportunity to object to a special master proposed by the court after full disclosure of his or her background. See, e.g., Reich v. Priba Corp., 890 F. Supp. 586, 598 (N.D. Tex. 1995) (establishing procedure for parties to select special master to resolve complex damages

computation); In re Sunrise Securities Litig., 124 F.R.D. 99, 101 (E.D. Pa. 1989) (allowing parties to submit list of proposed candidates for special master to handle complicated discovery proceedings); see also Manual for Complex Litigation (Third) §§ 21.52 (1995). Defendant Petranto had no such opportunity here.

There has been no disclosure of Vickie Gabin's background. Defendant Petranto knows about Ms. Gabin only what he has been able to find on the internet. Given the importance of the role the Court seeks to delegate to Ms. Gabin, Defendant Petranto is entitled to comprehensive disclosure of her views regarding water rights and the use and control of both public and private lands in the western United States.

Based on the information that Defendant Petranto has been able to obtain so far from public sources, he is concerned that Ms. Gabin may have already formed views about the water rights at issue in this case that may make her an inappropriate candidate for special master.

For example, much of the land in question is ranch land. Ms. Gabin worked for the Sierra Club in providing volunteer work to The New Mexico Interstate Stream Commission in developing a Regional Water Planning Handbook in December 1994. The Sierra Club has expressed its desire to restrict ranchers' ability to obtain water rights. Ms. Gabin's affiliation with the Sierra Club may mean that she has preconceived ideas about what water rights ranchers in the area should be entitled to.

Additionally, public records reveal that Ms. Gabin has donated to the Conservation Fund, a group with an expressed goal of “protecting America’s legacy of land and water resources” “through land acquisition”. Defendant Petranto is concerned that the federal government is trying to take his water rights away to make his land valueless and then acquire his land. Such a scheme would fit in with the Conservation Fund’s goal of “protecting” America’s legacy of land and water resources through land acquisition. Ms. Gabin’s donations to the Conservation Fund would tend to indicate an acceptance of its goals.

Ms. Gabin was also formerly employed by the State Engineer’s office, which is a party to this lawsuit. Former employment by one of the parties is a cause of concern.

Although special masters are not Article III judges, they are subject to all of the provisions of the Code of Judicial Conduct. See Jenkins v. Sterlacci (D.C. Cir. 1988) 849 F.2d 627, 632 (holding that "special master must hold himself to the same high standards applicable to the conduct of judges"). Under the Code, as well as under 28 U.S.C. §§ 455(b), judicial officers are subject to disqualification if they have formed views about a case based on sources other than the evidence admitted in the action or if they make statements about a case outside the courtroom. Until Defendant has been given complete information in order to determine whether Ms. Gabin is in full compliance with these strictures, she should not be allowed to take any actions that affect Defendant’s rights.



**7. This Court should immediately stay further proceedings before the special master until the propriety of the reference is resolved.**

Defendant Petranto should not be forced to proceed before a special master, who was appointed *sua sponte*, while his objections to the Order of Reference are pending. This Court should therefore stay any further proceedings before the special master until the propriety of the reference is resolved.

**CONCLUSION**

For the foregoing reasons, Defendant Petranto respectfully requests that this Court revoke its order referring the case to a special master and stay further proceedings before the special master until the propriety of the reference is resolved.

Date: March 16, 2001

Respectfully submitted,

----signed electronically-----

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**CERTIFICATE OF MAILING**

This is to certify that on March 16, 2001 this pleading was served on the following individuals by placing it into envelopes with postage prepaid and addressed as follows:

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