



September 8, 2023

Task Force on Rules of Procedure for Special Actions
Arizona State Courts Building
1501 West Washington
Phoenix, AZ 85007-3231
vgonzales@courts.az.gov

Re: Comment for the Task Force on Rules of Procedure for Special Actions

Justice King and members of the Task Force,

Thank you for commencing this timely and necessary update to Arizona's Rules of Procedure for Special Actions.

Per the requests of Chair Justice King and member David Euchner, this written comment memorializes oral comments made during the Call to the Public portion of the Task Force's first meeting on September 8, 2023.

The current special action rules raise unique challenges in the context of statutory special actions such as those arising under Arizona's Public Records Law, A.R.S. § 39-121 *et seq.*

The differences between regular special actions and statutory special actions are more complex than might be evident from the short explanation in Ariz. R.P. Spec. Act. 1.

For example, jurisdiction over regular special actions is discretionary—especially at the appellate level. But statutory special actions are, by definition, the statutorily prescribed form of action for such claims. This means litigants have no other avenue to bring claims arising under statutes such as Arizona's Public Records Law, as they might in the context of a regular special action. Therefore, jurisdiction should *not* be viewed as discretionary in the context of statutory special actions unless the underlying statute expressly grants such discretion.

Due to this and other differences, we suggest that the distinction between regular and statutory special actions should be made clearer in the rules.

To help with this, we propose that the Task Force add an express provision in the rules stating that the Rules of Civil Procedure shall apply where the special action rules are silent and a judge has not ordered otherwise.

For normal special actions brought in an appellate court, current Ariz. R.P. Spec. Act. 7(i)¹ specifically states that “[t]o the extent that they are not inconsistent with these rules, the Arizona Rules of Civil Appellate Procedure shall apply to special actions.”

But statutory special actions, including those under Arizona’s Public Records Law, are generally filed in the Superior Court, and even though the rules do reference the Rules of Civil Procedure in certain places,² there is no similar express requirement to apply the Rules of Civil Procedure or other court rules when not inconsistent with the Special Action rules.

The initial draft in the meeting materials seems to recognize at least one complication presented by this omission. The staff notes on page 5 of the draft acknowledge that there is *no* deadline for filing an answer to a special action complaint/petition in the Superior Court.

Relatedly, **we suggest that the Task Force clarify whether preliminary relief is available under a statutory special action.** The rules analogize to temporary restraining orders and preliminary injunctions in Ariz. R.P. Spec. Act. 5 when discussing interlocutory stays, but that’s it. We have operated on the assumption that the Civil Procedure rules fill in the gap and allow for preliminary relief, particularly when time is of the essence and the show cause procedure is used, but it is not expressly stated in the current rules.

One final point: the rules implicitly give courts a wide amount of discretion to shape special action proceedings.³ But how much discretion, and in what contexts? This is one additional area where the Task Force’s time and reasoned consideration would be well warranted.

The initial draft is a great starting point in the area of restylization, but more could be done substantively to address these issues and make the special action rules more “user-friendly,” as Judge Keeton mentions in his Preface to the Garner style guide in the meeting materials.

Thank you for your service on the Task Force and your consideration of these issues. Please feel free to reach out to me at pjackson@goldwaterinstitute.org if I can be of further assistance to the Task Force in any way.

Sincerely,



Parker Jackson
Staff Attorney
Scharf-Norton Center for
Constitutional Litigation at the
Goldwater Institute

¹ The meeting materials draft proposes moving this to Rule 7(a) in slightly modified form.

² See, e.g., Ariz. R.P. Spec. Act. 4(c) (regarding timelines for service).

³ See, e.g., Ariz. R.P. Spec. Act. 4(f) (allowing “special orders concerning discovery”).