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LEGAL
DEPT OF WATER RESOURCES

10 SUPERIOR COURT OF ARIZONA
11 MARICOPA COUNTY

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

Civil Nos. W-1, W-2, W-3, and W-4
(Consolidated)

Contested Case No. W1-11-232

**ASARCO LLC'S INITIAL DISCLOSURE
STATEMENT FOR THE
QUANTIFICATION PHASE OF THE
UNITED STATES' CLAIM TO A
FEDERAL RESERVED WATER RIGHT
FOR THE SAN PEDRO RIPARIAN
NATIONAL CONSERVATION AREA**

(Assigned to the Hon. Mark Brain)

16 CONTESTED CASE NAME: *In re San Pedro Riparian National Conservation Area*

17 HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report

18 DESCRIPTIVE SUMMARY: ASARCO LLC files its initial disclosure statement for the
19 quantification phase of the United States' claim to a federal reserved water right for the
20 San Pedro Riparian National Conservation Area.

21 STATEMENT OF CLAIMANT NUMBERS: ASARCO LLC – Nos. 39-U8-62699 et al.

22 NUMBER OF PAGES: 20

23 DATE OF FILING: January 7, 2014

1 **I. INTRODUCTION**

2 ASARCO LLC (“ASARCO”) submits its initial disclosure statement for the
3 quantification phase of the United States’ claim to a federal reserved water right for the
4 San Pedro Riparian National Conservation Area (“SPRNCA”).

5 The Special Master organized this contested case in September 2006. *See* Case
6 Management Order (Sept. 26, 2006) at 1. Since that time, the Special Master has
7 designated specific issues for disclosure, discovery and briefing and has issued rulings on
8 issues designated for briefing. *See* Scheduling Order Designating Initial Issues for
9 Briefing (June 28, 2007); Order Determining Initial Issues Designated for Briefing
10 (March 4, 2009) (“March 4, 2009 Order”); Order Designating Issues For Briefing (May 1,
11 2009); Order Determining the Second Set of Issues Designated for Briefing (March 19,
12 2010) (“March 19, 2010 Order”); Order Designating the Issues for an Evidentiary Hearing
13 on Federal Reserved Water Rights Claims and Determining Related Issues (May 29,
14 2013) (“May 29, 2013 Order”); Order Determining the Issues Designated for Briefing in
15 the Order Dated May 29, 2013 (Oct. 17, 2013) (“Oct. 17, 2013 Order”).

16 ASARCO does not concede by filing this disclosure statement that all of the
17 Special Master’s prior rulings in this case are correct. As is particularly relevant to the
18 quantification phase of this case, ASARCO argued that any reserved right that may exist
19 for SPRNCA is subject to the standard of minimal need and that the Court must determine
20 the quantity of unappropriated water available on the dates of reservation prior to
21 quantifying any reserved right that may exist for SPRNCA.¹ ASARCO reserves the right

22 ¹ *See* ASARCO LLC’s Motion for Summary Judgment on Issues Designated for Briefing
23 by the Order Designating Issues for an Evidentiary Hearing on Federal Reserved Water
24 Rights Claims and Determining Related Issues (July 22, 2013) at 3-13; ASARCO LLC’s
25 Consolidated Response to the United States’ Motion and Memorandum in Support of an
26 Order Regarding the Issues Designated for Briefing and Salt River Project’s Motion for
Summary Judgment (Aug. 23, 2013) at 2-12; ASARCO LLC’s Consolidated Reply to the
United States’ Response to Motions and Memoranda Regarding the Two Issues
Designated for Briefing and Salt River Project’s Response to Motions Filed By Parties
Regarding Legal Issues Identified by the Special Master (Sept. 13, 2013) at 2-9.

1 to seek review of the Special Master's rulings to the contrary. ASARCO files this
2 disclosure to allow this case to proceed consistent with the Orders issued by Special
3 Master.

4 **II. DISCLOSURE STATEMENT**

5 The Special Master set three principal issues with sub-issues to be addressed in the
6 current quantification phase of this contested case:

- 7 1. Determination of the boundaries of the conservation area.
 - 8 A. Which lands were included within the conservation area
9 established on November 18, 1988?
 - 10 B. After November 18, 1988, which lands were acquired and
11 when were they formally incorporated within the SPRNCA?
- 12 2. Quantification of the federal reserved water rights claims.
 - 13 A. What is the quantity of water needed to fulfill the purposes of
14 the conservation area set forth in the Arizona-Idaho
15 Conservation Act of 1988?
 - 16 B. To what extent is groundwater required to meet those
17 purposes?
- 18 3. Interaction of Certificate of Water Right No. 90103.0000 with the
19 federal reserved water rights claims.
 - 20 A. Has any portion of Certificate of Water Right No. 90103.0000
21 been abandoned or forfeited?
 - 22 B. Is Certificate of Water Right No. 90103.0000 additive or
23 complementary to the adjudicated federal reserved water
24 rights?

25 May 29, 2013 Order at 2 (footnote omitted).

26 In the prior phases of this contested case, ASARCO disclosed numerous
documents, deeds, reports and other evidence that are relevant to the issues designated for
the current phase of this contested case. ASARCO will not re-disclose those documents,
deeds, reports and other evidence here, but instead ASARCO incorporates those prior
disclosures into this disclosure statement. *See* ASARCO LLC's Initial Disclosure

1 Statement Regarding the San Pedro Riparian National Conservation Area (Feb. 25, 2008)
2 (“February 25, 2008 Initial Disclosure”); ASARCO LLC’s First Supplemental Disclosure
3 Statement Regarding the San Pedro Riparian National Conservation Area (June 26, 2008)
4 (“June 26, 2008 First Supplemental Disclosure”); ASARCO LLC’s Second Supplemental
5 Disclosure Statement Regarding the San Pedro Riparian National Conservation Area
6 (Oct. 10, 2008); ASARCO LLC’s Third Supplemental Disclosure Statement Regarding
7 the San Pedro Riparian National Conservation Area (Aug. 31, 2009). ASARCO also
8 incorporates its statements of facts filed in the prior phases of this contested case. *See*
9 ASARCO LLC’s Separate Statement of Facts in Support of Its Motion for Partial
10 Summary Judgment Regarding the First Phase of Issues Designated for Briefing on
11 Reserved Right Claim for the San Pedro Riparian National Conservation Area (June 27,
12 2008); ASARCO LLC’s First Supplemental Statement of Facts in Support of Its Motion
13 for Partial Summary Judgment Regarding the First Phase of Issues Designated for
14 Briefing on Reserved Right Claim for the San Pedro Riparian National Conservation Area
15 (Oct. 10, 2008); ASARCO LLC’s Separate Statement of Facts in Support of Motion for
16 Partial Summary Judgment Regarding Issues Posed by the Special Master’s Order
17 Designating Issues for Briefing (May 1, 2009) Pertaining to Certificate of Water Right
18 No. 90103.0000 (Aug. 31, 2009); ASARCO LLC’s First Supplemental Statement of Facts
19 in Support of Its Motion for Partial Summary Judgment Regarding Issues Posed by the
20 Special Master’s Order Designating Issues for Briefing (May 1, 2009) Pertaining to
21 Certificate of Water Right No. 90103.0000 (Feb. 11, 2010).

22 **1. The factual basis of a party’s claim concerning each of the designated**
23 **issues.**

24 A. Designated Issues 1.A. and 1.B.

25 Designated issue 1.A. concerns SPRNCA’s boundaries and the lands included in
26 the conservation area at the time Congress established SPRNCA. Congress established

1 SPRNCA in Title I of the Arizona-Idaho Conservation Act of 1988, Pub. L. No. 100-696,
2 102 Stat. 4571, 4612 (Nov. 18, 1988) (the “Act”).² The Act described the area and lands
3 included within SPRNCA: “The conservation area shall consist of public lands as
4 generally depicted on a map entitled ‘San Pedro Riparian National Conservation Area—
5 Proposed’ numbered AZ-040-OZ, dated January 1988, and consisting of approximately
6 56,431 acres.” § 101(b), 102 Stat. at 4571.

7 The Act authorized the Secretary of the Interior to
8 acquire lands or interests in lands within the boundaries of the conservation
9 area by exchange, purchase or donation, except that any lands or interests
10 therein owned by the State or local government may be acquired by
11 donation or exchange only. Any purchase or exchange of lands to be added
12 to the conservation area shall require the consent of the owner of those lands
13 or rights.

14 § 105, 102 Stat. at 4573.

15 Congress ordered the Secretary of the Interior to file a map and legal description of
16 SPRNCA with the Committee on Interior and Insular Affairs of the United States House
17 of Representatives and the Committee on Energy and Natural Resources of the United
18 States Senate. § 101(c), 102 Stat. at 4571. The Act provides that “[s]uch map shall be on
19 file and available for public inspection in the Office of the Director of the Bureau of Land
20 Management, Department of the Interior, and the Bureau of Land Management offices of
21 the State Director for Arizona, and the district office responsible for the management of
22 the conservation area.” *Id.*

23 The United States reported to the Special Master that it was unable to locate
24 conclusive evidence that the Department of Interior filed the map with the Congress. *See*
25 Report of the United States Concerning Boundary Map (March 24, 2011) at 2. The

26 ² Congress passed the Act on October 20, 1988. *See* 102 Stat. at 4612 (legislative history
footnote). The President signed the Act on November 18, 1988. *See* Statement by
President Ronald Reagan upon signing S. 2840, 1988 U.S.C.C.A.N. 5955-1,
FCSPRNCA0145.

1 United States further reported that it believed the legal description of SPRNCA prepared
2 in 1989 (FCSPRNCA0533-0548) contained errors. *Id.* The Bureau of Land Management
3 (“BLM”) undertook a new survey of the SPRNCA boundary, produced a new legal
4 description and map, and submitted the revised description and map to Congress in July
5 2010. *See id.* at 2; Notice of Submission of Third Amended Statement of Claimant
6 (April 15, 2011) at Exhibit 2.³ The United States has not explained how the revised legal
7 description and map, created over 20 years after SPRNCA’s designation, can override the
8 legal description and map made at or near the time of designation.

9 The United States has acquired lands within the boundaries of SPRNCA since the
10 time of designation (designated issue 1.B.). ASARCO disclosed copies of the relevant
11 deeds in its February 25, 2008 Initial Disclosure and the June 26, 2008 First Supplemental
12 Disclosure. The Department of Water Resources also included copies of the deeds (as
13 disclosed by ASARCO) in its report entitled Land Ownership Within the San Pedro
14 Riparian National Conservation Area (SPRNCA) (June 2010) (“ADWR SPRNCA Land
15 Ownership Report”). The ADWR SPRNCA Land Ownership Report discussed the dates
16 that the United States acquired the lands within SPRNCA’s boundaries, but did not
17 provide the date(s) that the lands were incorporated into the conservation area. The
18 Department later reported that it was unaware of any documentation that establishes when
19 the lands acquired by the United States were incorporated into the conservation area. *See*
20 Arizona Department of Water Resources Supplement to Report Entitled “Land Ownership
21 Within the San Pedro Riparian National Conservation Area” (April 15, 2011) at 3.⁴ No

22 ³ In the United States’ Initial Disclosures on Quantification of the Federal Reserved Water
23 Right (Dec. 3, 2013), the United States asserts that “[t]he boundaries of the SPRNCA
24 were analyzed by the BLM and a new report setting forth the boundaries of the
25 conservation area was received by Congress on or about April 15, 2011.” *Id.* at 2. The
26 United States did not provide a copy of this “new” report or detail any differences among
the 1989 legal description, the 2010 legal description, and the “new” report.

⁴ The United States argued to the Department that the deed signing date is the date of
formal incorporation into SPRNCA. Unsworn and unproven assertions of counsel are not
facts admissible in evidence. *Woerth v. City of Flagstaff*, 176 Ariz. 412, 420, 808 P.2d

1 federal reserved water right can attach to the lands acquired by the United States after
2 SPRNCA's designation unless and until those lands are incorporated into the conservation
3 area.⁵

4 B. Designated Issues 2.A. and 2.B.

5 Designated issue 2.A. focuses on the quantity of water needed to fulfill the
6 purposes of the conservation area as set forth in the Act.

7 The Special Master determined that the purposes of SPRNCA are "the protection
8 of the riparian area and the aquatic, wildlife, archeological, paleontological, scientific,
9 cultural, educational, and recreational resources of the conservation area." March 4, 2009
10 Order at 8. The Special Master rejected the well-established minimal need standard for
11 quantifying express federal reserved water rights and found that the United States'
12 reserved right claims for SPRNCA should be quantified in an amount "sufficient" to
13 fulfill SPRNCA's purposes. *See* October 17, 2013 Order at 2-7.

14 In considering the quantity of water sufficient to fulfill SPRNCA's purposes, the
15 Court must consider the United States' state-law based rights that existed prior to
16 SPRNCA's establishment, or for after-acquired lands, state-law based rights that existed
17 prior to the date the after-acquired lands were incorporated into the conservation area, that
18 may fulfill some or all the purposes of SPRNCA.

19 The Special Master already ruled in this case that: 1) Certificate of Water Right
20 No. 90103.0000 ("CWR No. 90103") must be considered a water right available to the
21 United States to serve the federal purposes of SPRNCA, and 2) the beneficial uses of
22 CWR No. 90103 are distinct and separate uses that partially, but not fully, fulfill the
23

24 297, 305 (App. 1990); *see also State v. Grounds*, 128 Ariz. 14, 15, 623 P.2d 803, 804
(1981) ("Argument of counsel is not evidence.").

25 ⁵ Furthermore, the other requirements for a federal reserved right, including but not
26 limited to the availability of unappropriated water available to reserve on the date(s) of
incorporation, must be met before any reserved water right can attach to the after-acquired
lands.

1 federal purposes of SPRNCA, to the extent water is required. *See* March 19, 2010 Order
2 at 7. The facts outlined below demonstrate that CWR No. 90103 fulfills at least some if
3 not all of the purposes of SPRNCA, to the extent those purposes require water.

4 The Huachuca Audubon Society, Chiricahua Sierra Club and Defenders of Wildlife
5 filed an application to appropriate instream flows of the San Pedro River on August 12,
6 1985. *See* Application for Permit to Appropriate Water 33-90103, FCSPRNCA1123.
7 Those entities assigned application number 33-90103 to BLM on May 22, 1986. *See*
8 Assignment of Application to Appropriate Public Waters No. 33-90103,
9 FCSPRNCA1056.

10 On December 3, 1987, BLM amended the “uses and amounts” specified in
11 application number 33-90103. *See* Letter dated December 3, 1987 to Lawrence A.
12 Ramsey from D. Dean Bibles, FCSPRNCA1053. BLM amended the beneficial uses to
13 include “wildlife and fisheries including wildlife and riparian habitat protection” and
14 “recreation, including aesthetics” as the beneficial uses under the application. *Id.* BLM
15 amended the flows requested under the application and stated:

16 The requested amounts of water are needed to maintain sufficient water
17 supplies to sustain the natural values of the San Pedro River. The natural
18 values of the San Pedro River are inextricably linked to available water.
19 Riparian vegetation, wildlife, aquatic values and recreation attributes are all
20 dependent upon instream flows (including floods and related groundwater
conditions). Through an intensive, interdisciplinary analysis of the critical
factors that affect water-dependent values, the BLM has determined these
amounts to be necessary to protect the proposed San Pedro Riparian
National Conservation Area.

21 *Id.* at FCSPRNCA1053-1054.

22 On February 16, 1989, BLM submitted the *Assessment of Water Conditions and*
23 *Management Opportunities in Support of Riparian Values: BLM San Pedro Properties,*
24 *Arizona Project Completion Report* (May 1987), USSPRNCA00747 (“BLM Report”) for
25 inclusion in the file for Application for Permit to Appropriate Water No. 33-90103. Letter
26

1 dated Feb. 16, 1989 to Lawrence A. Ramsey from Frank Rowley, FCSPRNCA0660. This
2 is the report “upon which the requested amounts of flow were based. . . .” *Id.*

3 BLM requested instream flow rates “expressed as a percentage of median daily
4 flows each month in the year. Median flows are believed to be more representative of
5 daily flow conditions than mean flows because of the highly skewed nature of daily flow
6 distributions.” BLM Report at 4, USSPRNCA00748. The flow rate requested by BLM
7 for the spring period represented the greater of “100% of the average median daily flow
8 for the period of record up to 1986 OR 60% of the natural storm flow. . . .” *Id.* at 5,
9 USSPRNCA00748. The flow rate requested by BLM for the summer period represented
10 the greater of “the mean winter period median monthly flow for the period of record up to
11 1986 or 60% of natural storm flow. . . .” *Id.* BLM explained:

12 Base flow recommendations correspond to winter-period base flow
13 conditions and are considerably lower than median daily flow conditions in
14 the summer period. However, it was judged that the higher summer-period
15 median flows – which largely reflect storm runoff – did not significantly
enhance water-dependent resource values and that all values were
adequately maintained at winter-period median flow conditions.

16 *Id.* at 6, USSPRNCA00749. The flow rate requested by BLM for the fall period
17 represented “100 percent of the average median daily flow for the period of record up to
18 1986.” *Id.* The flow rate requested by BLM for the winter period represented the greater
19 of “100 percent of the average median daily flow for the period of record, or 60 percent of
20 natural storm flow. . . .” *Id.*

21 BLM noted the impact of the senior downstream St. David Irrigation Company
22 water rights on the flow of the San Pedro River through the prospective conservation area:

23 Although this [BLM’s Application to Appropriate No. 33-90103] is a very
24 junior appropriation, there are no senior surface water rights above the BLM
25 properties or within the study corridor except for the St. David Irrigation
26 Company (SDIC) located at the terminus of the study corridor. The SDIC
rights are essentially sufficient to meet baseflow requirements in the study
corridor, while the BLM application would have provision for high flows.

1 *Id.* at 4, USSPRNCA00747. BLM continued:

2 As of this moment, there is de facto instream flow protection on the
3 San Pedro through the acquired properties. The Saint David Irrigation
4 District holds a water right which dates back to 1881, located at the northern
5 end of the acquired properties. Historically that right has taken the available
6 flow of the San Pedro River 10 months of the year and pumped ground
water when surface water was unavailable. . . . This kind of a water right
immediately below the acquired properties acts as a water magnet drawing
the available flows of the San Pedro through the critical stream sections to
the benefit of BLM.

7 *Id.* at 118, USSPRNCA00861.

8 The Department granted BLM's instream flow application number 33-90103 with a
9 priority of August 12, 1985. *See* CWR No. 90103, FCSPRNCA0590. CWR No. 90103
10 granted the flow rates requested by BLM. *Compare* CWR No. 90103, FCSPRNCA0591,
11 *with* BLM Report at 5, USSPRNCA00748.

12 In addition to CWR No. 90103, ASARCO identified a number of statements of
13 claimant held by the United States that may fulfill some or all of the purposes of
14 SPRNCA. *See* February 25, 2008 Initial Disclosure at 10-15. The rationale that CWR
15 No. 90103 must be considered a water right available to the United States to serve the
16 federal purposes of SPRNCA, *see* March 19, 2010 Order at 7, applies with equal force to
17 all of the United States' state law rights pre-existing the establishment of SPRNCA, or for
18 after-acquired lands, state law rights pre-existing the date those lands were incorporated
19 into the conservation area, that may fulfill some or all of the purposes of SPRNCA. No
20 federal reserved water right can exist for SPRNCA's purposes that are fulfilled by those
21 pre-existing rights.

22 Designated issue 2.B. asks whether groundwater is required to meet the purposes of
23 SPRNCA. A reserved right extends to groundwater only if other waters are inadequate to
24 accomplish the purposes of the reservation. *See In Re General Adjudication of All Rights*
25 *to Use Water in Gila River Sys. & Source*, 195 Ariz. 411, 420 ¶ 31, 989 P.2d 739, 748
26 (1999), *cert denied*, 530 U.S. 1250 (2000). If the United States' state-law based water

1 rights that pre-exist the establishment of SPRNCA, or for after-acquired lands, state-law
2 based water rights that pre-exist the date those lands were incorporated into the
3 conservation area, are adequate to accomplish the purposes of SPRNCA, no federal
4 reserved water right can extend to groundwater for SPRNCA.

5 C. Designated Issues 3.A. and 3.B.

6 Designated issue 3.A. concerns whether any portion of CWR No. 90103 has been
7 abandoned or forfeited. There is no evidence that any portion of CWR No. 90103 has
8 been abandoned or forfeited. *See infra* at 16.

9 Designated issue 3.B. addresses whether CWR No. 90103 is additive or
10 complementary to the adjudicated federal reserved water right.⁶ CWR No. 90103 is an
11 appropriative state-law based water right held by the United States for instream flows of
12 the San Pedro River. As noted *supra* at 7-8, the Special Master ruled that CWR No.
13 90103 must be considered a water right that is available to the United States to fulfill
14 SPRNCA's purposes. March 19, 2010 Order at 7. The Special Master also ruled that any
15 reserved right that may exist for SPRNCA is limited to water that was unappropriated at
16 the time of reservation. *See* March 4, 2009 Order at 7 ("The Special Master agrees that a
17 reserved water right is limited to unappropriated water and this issue is now
18 determined."); October 17, 2013 Order at 7-8 ("A federal reserved water right is limited to
19 unappropriated water available when a reservation is established").

20
21
22 ⁶ The issue as framed by the Special Master assumes that a federal reserved water right
23 exists or has already been adjudicated for SPRNCA. The Special Master has stated
24 repeatedly that he has not concluded that a federal reserved water right exists for
25 SPRNCA. *See* Oct. 17, 2013 Order at 9; *id.* at 9 n.31; March 4, 2009 Order at 8. Rather,
26 his rulings have focused on the attributes of a reserved right for SPRNCA, should one
ultimately be found to exist. *Id.* Consistent with the Special Master's prior rulings, the
designated issue should more appropriately address whether CWR No. 90103 is additive
or complementary to a federal reserved right for SPRNCA, should such a right be found to
exist.

1 CWR No. 90103 is not additive to any federal reserved water right that may exist for
2 SPRNCA. It is an appropriative right with a priority predating establishment of
3 SPRNCA. Any water appropriated under CWR No. 90103 was not available for
4 reservation by Congress.⁷ Because CWR No. 90103 must be considered a water right
5 available to the United States to serve the federal purposes of SPRNCA, it satisfies any
6 demand that otherwise might justify the existence of a reserved right to serve those
7 purposes, thereby diminishing any basis for a reserved right claim.

8 **2. The legal theory upon which each claim is based including, where**
9 **necessary for a reasonable understanding of the claim, citations of**
10 **pertinent legal or case authorities.**

11 A. Designated Issues 1.A. and 1.B.

12 Regarding the proper boundary of SPRNCA and the lands included in SPRNCA on
13 the date of designation (designated issue 1.A.), Congress established the boundaries of
14 SPRNCA through § 101(b) of the Act. 102 Stat. at 4571. *See supra* at 4-5.

15 BLM does not have the authority to alter the boundaries established by Congress
16 by submitting revised legal descriptions or maps to Congress. The decision in *National*
17 *Ass'n of Property Owners v. United States*, 499 F. Supp. 1223 (D. Minn. 1980), *aff'd sub*
18 *nom. Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007
19 (1982), makes this clear. That case involved the Boundary Waters Canoe Area
20 Wilderness Act ("BWCAW Act"), the boundaries of which were established in a manner
21 similar to those of SPRNCA. Section 3 of the BWCAW Act designated the area by
22 referring to lands depicted on a map dated September 1978. *Id.* 499 F. Supp. at 1240.
23 That section directed the Secretary of Agriculture to "publish a detailed legal description
24 and map showing the boundaries of the wilderness in the Federal Register." *Id.* The court
25 explained: "It seems clear that this section of the Act does not delegate any authority to
26 the Secretary; it merely directs the Secretary to publish a map of the boundaries already

⁷ The quantity of flows appropriated by CWR No. 90103 is discussed *supra* at 8-9.

1 established by reference in the Act. Congress has determined the boundaries; the
2 Secretary's only duty outlined in § 3 is to *publish* the map of the boundaries." *Id.*
3 at 1240-41. Similarly, only Congress has the authority to alter the boundaries of
4 SPRNCA. *See* Act §§ 101(b)-(c), 102 Stat. at 4571.

5 With respect to designated issue 1.B., the United States has the burden of proving
6 the dates after-acquired lands were incorporated into SPRNCA. *See Arizona v.*
7 *California*, 460 U.S. 605, 637 (1983). Federal ownership of land is not sufficient to create
8 a federal reserved water right. *Cf. Sierra Club v. Watt*, 659 F.2d 203, 206 (D.C. Cir.
9 1981) (concluding that the Federal Land Policy and Management Act did not confer
10 federal reserved water rights in water appurtenant to land managed by BLM). Land must
11 be withdrawn from the public domain and reserved for a federal purpose before any
12 federal reserved water right can attach to the land. *See In Re General Adjudication of All*
13 *Rights to Use Water in Gila River Sys. & Source*, 231 Ariz. 8, 17 ¶ 36, 289 P.3d 936, 945
14 (2012). As the Special Master previously ruled in this case, "[t]he after acquired non-
15 federal lands became subject to the Congress' powers of withdrawal and reservation only
16 after the United States acquired their ownership." March 5, 2009 Order at 15. No federal
17 reserved water right can attach to the after-acquired lands unless and until the lands are
18 formally incorporated into SPRNCA. Mere federal acquisition of the lands is insufficient
19 to create a federal reserved water right for those lands.

20 B. Designated Issues 2.A. and 2.B.

21 With regard to the quantity of water needed to fulfill the purposes of SPRNCA
22 (designated issue 2.A.), the Special Master has ruled in this case that "[s]ufficient water is
23 the standard for quantification that we must use in this case." October 17, 2013 Order at 7.
24 "Sufficient" is defined in as "[a]dequate; of such quality, number, force or value as is
25 necessary for a given purpose." *Black's Law Dictionary* 1571 (9th ed. 2009). Although
26 the Special Master rejected the use of the "minimal need" standard for quantifying the

1 United States' claim to a federal reserved right for SPRNCA, it is important to emphasize
2 that non-Indian reserved water rights are "narrowly quantified to meet the original,
3 primary purpose of the reservation; water for secondary purposes must be acquired under
4 state law." See *In Re General Adjudication of All Rights to Use Water in Gila River Sys.*
5 *& Source*, 201 Ariz. 307, 312 ¶ 14, 35 P.3d 68, 73 (2001). Any argument that the United
6 States is entitled a quantity of water above that needed to fulfill the purposes of SPRNCA
7 must be rejected.

8 To decide how much water, if any, is needed or sufficient to fulfill SPRNCA's
9 purposes, the Court must determine how much water is available to the Government under
10 its pre-SPRNCA state-law water rights to advance those purposes. See *United States v.*
11 *Alpine Land & Reservoir Co.*, 697 F.2d 851, 859 (9th Cir.), cert. denied sub nom. *Pyramid*
12 *Lake Paiute Tribe of Indians v. Truckee-Carson Irrigation Dist.*, 464 U.S. 863 (1983); cf.
13 *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 219 P.3d 774, 781 (Colo.
14 2009) (The evidence did not support an application for instream and bypass flows where
15 an existing instream flow right protected the reach of the river affected by the pumping
16 station, and the districts' expert agreed that the districts would be required to honor that
17 preexisting senior right); *United States v. City & County of Denver*, 656 P.2d 1, 22 & n.35
18 (Colo. 1982) (The United States failed to prove that instream flows were necessary to
19 serve the national forest purposes of watershed and timber protection); *United States v.*
20 *State*, 23 P.3d 117 (Idaho 2001) (The primary purposes of a wildlife refuge established
21 under the Migratory Bird Conservation Act were to prevent the possible extinction of
22 migratory birds, to create a sanctuary where migratory birds could rest, feed and nest
23 without the threat of hunters, and to promote the increase of migratory bird populations to
24 assist farmers with insect control. *Id.* at 127. No federal reserved water right was
25 necessary because the Government prohibited hunting within the refuge, and the sanctuary
26 existed without such a right. *Id.* at 126.); *Potlatch Corp. v. United States*, 12 P.3d 1260,

1 1267 (Idaho 2000) (The Wilderness Act does not support an implied reserved right
2 because the “components of the Wilderness Act that prevent development of the
3 wilderness areas will preclude claimants from tapping into the water while in the
4 wilderness.”); *State v. United States*, 12 P.3d 1284, 1290-91 (Idaho 2000) (The Sawtooth
5 National Recreational Area Act did not create a reserved right because its purposes were
6 met by government regulations.). The Special Master has already ruled that CWR
7 No. 90103 must be considered a right available to the United States that partially fulfills
8 the federal purposes of SPRNCA. March 19, 2010 Order at 7.⁸ If the United States’ state-
9 law based rights that pre-exist the relevant dates of reservation are sufficient to fulfill
10 some or all the purposes of SPRNCA, no federal reserved right can exist for purposes
11 fulfilled by those pre-existing state law rights.

12 Similarly, with regard to designated issue 2.B., a federal reserved right extends to
13 groundwater only if other waters are inadequate to accomplish the purpose of the
14 reservation. *In Re General Adjudication of All Rights to Use Water in Gila River Sys. &*
15 *Source*, 195 Ariz. at 420 ¶ 31, 989 P.2d at 748. Accordingly, the United States may only
16 claim a federal reserved right to groundwater for SPRNCA if other waters are inadequate
17 to accomplish SPRNCA’s purposes. The United States bears the burden of establishing
18 its claims that other waters are inadequate to accomplish the purposes of SPRNCA.
19 *Arizona v. California*, 460 U.S. at 637. As noted previously, ASARCO has disclosed
20 many water right claims held by the United States that may fully or partially fulfill the
21 purposes of SPRNCA. *See supra* at 10.

22
23 ⁸ In earlier briefing, ASARCO argued that the beneficial uses authorized by CWR
24 No. 90103 fulfilled all the Congressionally designated purposes of SPRNCA to the extent
25 that water is necessary to fulfill those purposes. *See ASARCO LLC’s Motion for Partial*
26 *Summary Judgment Regarding Issues Posed by the Special Master’s Order Designating*
Issues for Briefing (May 1, 2009) Pertaining to Certificate of Water Right No. 90103.0000
(Aug. 31, 2009) at 10-14. ASARCO does not concede by filing this disclosure statement
that CWR No. 90103 only partially fulfills the purposes of SPRNCA. ASARCO reserves
the right to seek review of the Special Master’s findings.

1 C. Designated Issues 3.A. and 3.B.

2 Designated issue 3.A. addresses whether any portion of CWR No. 90103 has been
3 abandoned or forfeited. Forfeiture or abandonment of an instream flow right is
4 theoretically possible. *See Phelps Dodge Corp. v. Arizona Dep't of Water Resources*, 211
5 Ariz. 146, 151 ¶ 20, 118 P.3d 1110, 1115 (App. 2005). “Abandonment and forfeiture are
6 shown not through absence of diversion, but through cessation of beneficial use. ‘So long
7 as utilization [of the legal water right] continues, the right remains secure.’” *Id.* (citation
8 omitted). There is no evidence of a lack of diligence by the United States in utilizing the
9 waters of the San Pedro River pursuant to CWR No. 90103.

10 Subsection 102(a) of the Act directs that “[t]he Secretary shall manage the
11 conservation area in a manner that conserves, protects, and enhances the riparian area and
12 the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and
13 recreational resources of the conservation area.” 102 Stat. at 4571. CWR No. 90103
14 could only be forfeited or abandoned if the Secretary of the Interior ignored Congress’s
15 mandate in § 102(a). There is no evidence that the Secretary did so. Furthermore, the
16 Secretary is entitled to a presumption that she will act properly and according to law. *See*
17 *Federal Communications Comm’n v. Schreiber*, 381 U.S. 279, 296 (1965). There is no
18 evidence that any portion of CWR No. 90103 has been forfeited or abandoned.

19 Regarding whether CWR No. 90103 is additive or complimentary to any federal
20 reserved water right that may exist for SPRNCA (designated issue 3.B), as discussed
21 previously CWR No. 90103 is a separate appropriative water right held by the United
22 States that predates SPRNCA’s designation and satisfies at least some if not all of
23 SPRNCA’s purposes, to the extent those purposes require water. *See supra* at 12. No
24 federal reserved water right can extend to waters appropriated by CWR No. 90103 and no
25 federal reserved water right can exist for any of SPRNCA’s purposes that are fulfilled by
26 CWR No. 90103.

1 **3. The names, address, and telephone numbers of any witnesses whom the**
2 **disclosing party expects to call to substantiate its claims with a fair**
3 **description of the substance of each witnesses' expected testimony.**

4 At this time, ASARCO has not determined if it will call any witnesses to testify on
5 the designated issues. ASARCO reserves the right to call any witnesses or persons
6 identified by any party pursuant to Ariz. R. Civ. P. 26.1(a)(3)-(5) and paragraphs
7 1.D.(3)-(5) of the Order Setting Time Lines for Disclosure Statements, Discovery, Expert
8 Reports, Motions, Technical Investigations, and a Status Conference (Aug. 7, 2013)
9 ("Aug. 7, 2013 Order") at 2-3. ASARCO will supplement and amend this disclosure
10 throughout discovery consistent with Ariz. R. Civ. P. 26.1, the May 29, 2013 Order and
11 the Aug. 7, 2013 Order.

12 **4. The names and addresses of all persons whom the disclosing party**
13 **believes may have knowledge or information relevant to the events,**
14 **transactions, or occurrences that gave rise to each claim, and the nature**
15 **of the knowledge or information each such individual is believed to**
16 **possess.**

17 The persons and organizations listed below gave deeds to the United States for land
18 within the current boundaries of SPRNCA. Those individuals and organizations may
19 have information relevant to Special Master's issue "1" concerning the boundaries of the
20 conservation area and the United States' acquisitions of land within the boundaries of the
21 conservation area. ASARCO does not have the current addresses of these individuals or
22 organizations. The relevant deeds were disclosed in ASARCO LLC's Initial Disclosure
23 Statement Regarding the San Pedro Riparian National Conservation Area (Feb. 25, 2008)
24 and ASARCO LLC's First Supplemental Disclosure Statement Regarding the San Pedro
25 Riparian National Conservation Area (June 26, 2008).

- 26 a. Tenneco West, Inc.
- b. Arizona White Tanks Associates
- c. Talley Realty Development, Inc.
- d. San Pedro Investment Group

- 1 e. Roy O. McCaldin
- 2 f. Dean McCaldin
- 3 g. Harriette Glenn
- 4 h. Nagin C. Patel
- 5 i. Shobha N. Patel
- 6 j. Joseph Mirabile
- 7 k. The Nature Conservancy
- 8 l. Edward F. Lehner, co-trustee of Lehner Family Trust
- 9 m. Ethelyn A. Lehner, co-trustee of Lehner Family Trust
- 10 n. John D. McAulay, personal representative of the estate of Margaret
11 McAulay Sublette
- 12 o. Alvin Joseph Anderson
- 13 p. Sandy Susan Anderson
- 14 q. William H. Lloyd
- 15 r. Barbara J. Lloyd

16 **5. The names and addresses of all person who have given statements,**
17 **whether written or recorded, signed or unsigned, and the custodian of**
18 **the copies of those statements.**

19 ASARCO is unaware of any persons who have given statements, whether written
20 or recorded, signed or unsigned, regarding the designated issues. ASARCO will
21 supplement and amend this disclosure throughout discovery consistent with Ariz. R. Civ.
P. 26.1, the May 29, 2013 Order and the Aug. 7, 2013 Order.

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- 1 **6. The name and address of each person whom the disclosing party**
2 **expects to call as an expert witness, the subject matter on which the**
3 **expert is expected to testify, the substance of the facts and opinions to**
4 **which the expert is expected to testify, a summary of the grounds for**
 each opinion, the qualifications of the witness, and the name and
 address of the custodian of copies of any reports prepared by the
 expert.

5 At this time, ASARCO does not designate any expert witnesses in this initial
6 disclosure, but reserves the right to designate one or more expert witnesses in the future.
7 In the event ASARCO designates an expert witness in this contested case, it will
8 supplement this disclosure and will submit an expert report pursuant to Ariz. R. Civ. P.
9 26.1 and the Aug. 7, 2013 Order.

- 10 **7. The existence, location, custodian, and general description of any**
11 **tangible evidence, relevant documents, or electronically stored**
 information that the party plans to use to support its claims.

12 ASARCO intends to rely on any admissible document disclosed by ASARCO or
13 any other party in the current phase and any prior phase of this contested case. ASARCO
14 will supplement and amend this disclosure throughout discovery consistent with Ariz. R.
15 Civ. P. 26.1, the May 29, 2013 Order and the Aug. 7, 2013 Order.

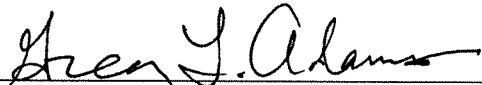
- 16 **8. A list of the documents or, in the case of voluminous documentary**
17 **information, a list of the categories of documents, known by the**
18 **disclosing party to exist whether or not in its possession, custody, or**
19 **control and which it believes may be relevant to any of its claims**
20 **concerning the designated issues, and those which appear reasonably**
21 **calculated to lead to the discovery of admissible evidence, and the**
 date(s) upon which those documents will be made, or have been made,
 available for inspection and copying. If production is not made, the
 name and address of the custodian of the document shall be indicated.
 Any document produced for inspection shall be produced as it is kept in
 the usual course of business.

22 ASARCO incorporates by reference the documents, deeds, reports and other
23 evidence disclosed by all parties in the prior phases of this contested case. ASARCO will
24 supplement and amend this disclosure throughout discovery consistent with Ariz. R. Civ.
25 P. 26.1, the May 29, 2013 Order and the Aug. 7, 2013 Order.

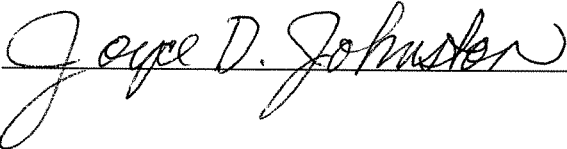
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DATED this 7th day of January, 2014.

FENNEMORE CRAIG, P.C.

By 
Lauren J. Caster
Gregory L. Adams
Attorneys for ASARCO LLC

COPIES OF THE FOREGOING,
mailed this 7th day of January, 2014,
to all persons on the court-approved
mailing list for the San Pedro Riparian National
Conservation Area contested case dated
July 1, 2013.



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