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DEPT OF WATER RESOURCES

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7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
 8 **IN AND FOR THE COUNTY OF MARICOPA**

9 IN RE: THE GENERAL
 10 ADJUDICATION OF ALL
 11 RIGHTS TO USE WATER IN
 12 THE GILA RIVER SYSTEM
 13 AND SOURCE,

No. W-1 (Salt)
 No. W-2 (Verde)
 No. W-3 (Upper Gila)
 No. W-4 (San Pedro)

Contested Case No. W1-11-232

**FREEPORT-McMoRAN
 CORPORATION'S RULE 26.1
 INITIAL DISCLOSURE STATEMENT**

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

17 DESCRIPTIVE SUMMARY: Freeport-McMoRan Corporation submits its initial
 18 disclosure statement.

19 NUMBER OF PAGES: 8

20 STATEMENT OF CLAIMANT NOS: 39-02297 *et al.* (numerous claims)

21 DATE OF FILING: January 7, 2014
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1 Freeport-McMoRan Corporation (“Freeport”) submits its Rule 26.1 Initial
2 Disclosure Statement for the current phase of this contested case regarding the United
3 States claimed federal reserved right for the San Pedro Riparian National Conservation
4 Area (“SPRNCA”). Discovery is just beginning in this case. Freeport reserves the right
5 to supplement and / or amend each and every section of this initial disclosure statement
6 throughout the discovery process, and to rely upon any information disclosed by any other
7 party in this or any other phase of the contested case.

8 **1. FACTUAL BASIS OF THE CLAIMS AND DEFENSES**

9 As claimant, the United States bears the burden with respect to each of the issues
10 designated for this and every other phase of this contested case. However, in Section 1 of
11 its Initial Disclosure, the United States largely fails to set forth with reasonable specificity
12 the factual bases supporting its claims with respect to the following issues identified by
13 the Special Master for resolution pursuant to Order dated May 29, 2013 (“Issues for
14 Resolution”):

- 15 1. Determination of the boundaries of the conservation area.¹
 - 16 A. Which lands were included within the conservation area
17 established on November 18, 1988?
 - 18 B. After November 18, 1988, which lands were acquired and
19 when were they formally incorporated within the SPRNCA?
- 20 2. Quantification of the federal reserved water rights claims.
 - 21 A. What is the quantity of water needed to fulfill the purposes of
22 the conservation area set forth in the Arizona-Idaho
23 Conservation Act of 1988?

23 ¹ Pursuant to Order issued on March 4, 2009, the Special Master determined that there
24 was a genuine issue of material fact concerning which lands comprised the SPRNCA at
25 the time of the reservation, and ordered that a report be submitted identifying the location
26 of the lands within the SPRNCA and their dates of incorporation into the SPRNCA.
Order Determining Initial Issues Designated for Briefing at 14-16. To this date, the
United States has failed to meet its burden to establish how many (and which) acres of
federal land comprised SPRNCA on November 18, 1988 or how many (and which) acres
were subsequently incorporated and on which dates.

- 1 B. To what extent is groundwater required to meet those
2 purposes?
- 3 3. Interaction of Certificate of Water Right No. 90103.0000 with the
4 federal reserved water rights claims.
- 5 A. Has any portion of Certificate of Water Right No. 90103.0000
6 been abandoned or forfeited?
- 7 B. Is Certificate of Water Right No. 90103.0000 additive or
8 complementary to the adjudicated federal reserved water
9 rights?

10 Prior to this phase, Freeport has not been afforded the opportunity to obtain
11 discovery concerning the Issues for Resolution. Freeport will supplement this disclosure
12 throughout discovery.

13 **2. LEGAL THEORIES**

14 The United States is limited to “the minimal amount needed” for the original,
15 primary purpose of the reservation. *In re General Adjudication of All Rights to Use Water*
16 *in Gila Sys. & Source*, 201 Ariz. 307, 312-13 ¶ 14, 35 P.3d 68, 73-74 (2001) (“*Gila V*”).
17 The Special Master has indicated that the United States’ reserved right claims for
18 SPRNCA should be based upon the amount “sufficient” to fulfill SPRNCA’s purposes.
19 Freeport maintains that the minimal need standard is binding on these proceedings.
20 Regardless, the “sufficient” amount is no more than the “minimal amount....”

21 “[N]on-Indian reserved rights” like the one claimed by the United States for
22 SPRNCA “are narrowly quantified to meet the original, primary purpose of the
23 reservation; water for secondary purposes must be acquired under state law.” *Gila V*, 201
24 Ariz. 307, 312 ¶ 14, 35 P.3d 68, 73 (2001) (citation omitted). “[T]he primary purpose for
25 which the federal government reserves non-Indian land is strictly construed after careful
26 examination.” *Id.* at 313 ¶ 14, 35 P.3d at 74.

 To the extent that an existing water right serves the purposes of the reservation, the
United States may not obtain an overlapping (or “additive”) federal reserved right; such

1 an overlapping right would be abhorrent to the limitation that non-Indian federal reserved
2 rights be limited to “the minimal amount needed” for the original, primary purpose of the
3 reservation. *Gila V*, 201 Ariz. at 312-13 ¶ 14, 35 P.3d at 73-74. If minimal needs are
4 already met, no federal reserved right can be obtained. *Id.*; *Potlatch Corp. v. United*
5 *States*, 12 P.3d 1256, 1260 (Idaho 2000) (express reserved water rights are limited to the
6 minimum amount necessary to fulfill the purposes of the reservation).

7 In addition to being limited to a narrow quantification to satisfy the reservation’s
8 original, primary purpose, the United States is also limited to reservation of previously
9 unappropriated waters. *Cappaert v. United States*, 426 U.S. 128, 141 (1976).
10 Accordingly, the United States may not obtain a federal reserved water right if no
11 unappropriated waters existed as of the date of the reservation or on the date that lands
12 were subsequently incorporated into the conservation area, and the United States may not
13 obtain a federal reserved water right to waters that are already appropriated, including
14 waters that the United States (or any other entity) previously appropriated under state law.
15 This includes any waters appropriated pursuant to Certificate of Water Right No.
16 90103.0000. *Id.*

17 Freeport expressly reserves the right to supplement and amend this disclosure
18 throughout discovery.

19 **3. WITNESSES WHOM THE DISCLOSING PARTY EXPECTS TO**
20 **CALL AT TRIAL**

- 21 1. All witnesses identified pursuant to Rule 26.1(a)(3) of any initial or
22 supplemental disclosure statement submitted by any party in this
phase or any other phase of this contested case.
- 23 2. All persons identified pursuant to Rule 26.1(a)(4) of any initial or
24 supplemental disclosure statement submitted by any party in this
phase or any other phase of this contested case.
- 25 3. All persons who give statements identified pursuant to Rule
26 26.1(a)(5) in any initial or supplemental disclosure statement
submitted by any party in this phase or any other phase of this
contested case.

1 4. All persons necessary to lay foundation for any exhibit designated by
2 any party in this phase or any other phase of this contested case.

3 Freeport expressly reserves the right to supplement and amend this disclosure
4 throughout discovery.

5 **4. PERSONS WHO MAY HAVE RELEVANT KNOWLEDGE OR**
6 **INFORMATION**

7 1. All witnesses identified pursuant to Rule 26.1(a)(3) of any initial or
8 supplemental disclosure statement submitted by any party.

9 2. All persons identified pursuant to Rule 26.1(a)(4) of any initial or
10 supplemental disclosure statement submitted by any party.

11 3. All persons who give statements identified pursuant to Rule
12 26.1(a)(5) in any initial or supplemental disclosure statement
13 submitted by any party in this phase or any other phase of this
14 contested case.

15 Freeport expressly reserves the right to supplement and amend this disclosure
16 throughout discovery.

17 **5. PERSONS WHO HAVE GIVEN STATEMENTS**

18 1. None at this time other than those identified pursuant to Rule
19 26.1(a)(5) of disclosures by other parties.

20 Freeport expressly reserves the right to supplement and amend this disclosure
21 throughout discovery.

22 **6. EXPERT WITNESSES**

23 Freeport does not designate any expert witness in this initial disclosure. Freeport
24 expressly reserves the right to designate one or more expert witnesses in the future, in
25 which case this disclosure will be supplemented, and expert report(s) will be submitted.

26 **8. EXHIBITS**

 Freeport makes the following disclosure pursuant to Rule 26.1(a)(8) without
 waiving any objections concerning any documents, including, without limitation,
 objections as to admissibility.

1 Freeport discloses the following additional documents that Freeport may use at
2 hearing:

- 3 1. Certificate of Water Right No. 90103.0000.
- 4 2. All of the United States' statement of claimant or water claims or
5 water rights that may serve any of the purposes of the reservation.
- 6 3. All statements identified pursuant to Rule 26.1(a)(5) in any initial or
7 supplemental disclosure statement submitted by any party in this
8 phase or any other phase of this contested case.
- 9 4. All exhibits identified pursuant to Rule 26.1(a)(8) in any initial or
10 supplemental disclosure statement submitted by any party in this
11 phase or any other phase of this contested case.
- 12 5. All documents identified pursuant to Rule 26.1(a)(9) in any initial or
13 supplemental disclosure statement submitted by any party in this
14 phase or any other phase of this contested case.
- 15 6. All evidence disclosed or produced by any party in response to
16 discovery requests in this phase or any other phase of this contested
17 case.
- 18 7. All transcripts of all depositions taken in connection with this phase
19 or any other phase of this contested case.
- 20 8. All exhibits marked or used during any depositions taken in
21 connection with this phase or any other phase of this contested case.

22 Freeport is still in the process of identifying the documents that it will use at
23 hearing, and expressly reserves the right to supplement and amend this disclosure
24 throughout discovery.

25 **9. OTHER RELEVANT DOCUMENTS**

- 26 1. All exhibits identified pursuant to Rule 26.1(a)(8) in any initial or
supplemental disclosure statement submitted by any party in this
phase or any other phase of this contested case.
2. All documents identified pursuant to Rule 26.1(a)(9) in any initial or
supplemental disclosure statement submitted by any party in this
phase or any other phase of this contested case.

Freeport expressly reserves the right to supplement and amend this disclosure

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RESPECTFULLY SUBMITTED this 7th day of January, 2014.

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1 ORIGINAL of the foregoing filed
2 this 7th day of January, 2014 with:

3 Clerk of Maricopa County Superior Court
4 Attn: Water Case
5 601 West Jackson Street
6 Phoenix, Arizona 85003-2205

7 COPY hand-delivered this 7th day
8 of January, 2014 to:

9 Special Master George A. Schade
10 Arizona General Stream Adjudication
11 Maricopa County Superior Court
12 201 West Jefferson, Suite 5B
13 Phoenix, Arizona 85003-2205

14 COPY mailed this 7th day of January, 2014,
15 to all persons appearing on the Court
16 Approved Mailing List in *In Re San Pedro*
17 *Riparian National Conservation Area*,
18 W1-11-232, dated July 1, 2013.

19 By: Kathy Pouse

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