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DEPT OF WATER RESOURCES

Attorneys for Salt River Project Agricultural
Improvement and Power District and
Salt River Valley Water Users' Association

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

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

Civil Nos. W-1, W-2, W-3 and W-4
(Consolidated)
Contested Case No. W1-11-232
**SRP'S RULE 26.1 INITIAL
DISCLOSURES**

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

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association's (collectively, "SRP") Initial Disclosures.

STATEMENT OF CLAIMANT NUMBERS: 39-07-1040, -1041, -1998, -1206, -1207; 39-0550053, -50054, -50055; 39-L8-35212 and 35213.

NUMBER OF PAGES: 8.

DATE OF FILING: January 7, 2014.

1 Pursuant to the Special Master's May 29, 2013 *Order Designating the Issues for an*
2 *Evidentiary Hearing on Federal Reserved Water Rights Claims and Determining Related*
3 *Issues* and Rule 26.1 ARCP, SRP hereby submits its Initial Disclosures. SRP's Initial
4 Disclosures set forth statements of SRP's positions on the three issues identified for decision
5 by the Special Master in his May 29, 2013 Order:

6 1. Determination of the boundaries of the conservation area.

7 A. Which lands were included within the conservation area established on
8 November 18, 1988?

9 B. After November 18, 1988, which lands were acquired and when were they
10 formally incorporated within the SPRNCA?

11 2. Quantification of the federal reserved water rights claims.

12 A. What is the quantity of water needed to fulfill the purposes of the conservation
13 area set forth in the Arizona-Idaho Conservation Act of 1988?

14 B. To what extent is groundwater required to meet those purposes?

15 3. Interaction of Certificate of Water Right No. 90103.0000 ("CWR 90103") with the
16 federal water rights claims.

17 A. Has any portion of CWR 90103 been abandoned or forfeited?

18 B. Is CWR 90103 additive or complementary to the adjudicated federal reserved
19 water rights?

20 **I. Factual Basis For Claims And Defenses Asserted**

21 Generally, SRP incorporates herein its Statement of Facts submitted with its Motion for
22 Summary Judgment on June 27, 2008, in which SRP set forth the factual background of
23 SPRNCA. Specifically, regarding Issue 1, SRP incorporates herein the BLM and ADWR
24 reports identified by the United States in its Initial Disclosures regarding SPRNCA boundaries
25 before and after 1988. *See* U.S. Initial Disclosures, at 2. Regarding Issue 2, SRP incorporates
26 the BLM and ADWR reports identified by the United States in its Initial Disclosures regarding
27 streamflow, groundwater and riparian habitat in SPRNCA. *See* U.S. Initial Disclosures, at 3.

1 Regarding Issue 3, SRP is not aware of any facts regarding whether CWR 90103 has been
2 abandoned or forfeited.

3 **II. Legal Theory Upon Which Claims/Defenses Are Based**

4 Regarding Issue 1, SRP agrees with the United States that the deeds and other evidence
5 of acquisition form the legal basis of SPRNCA boundaries. *See* U.S. Initial Disclosures, at 3.

6 Regarding Issue 2, the Special Master held in his October 17, 2013 *Order Determining*
7 *the Issues Designated for Briefing in the Order Dated May 29, 2013* that the Arizona-Idaho
8 conservation Act of 1988 expressly reserved a quantity of water sufficient to meet the purposes
9 of SPRNCA.¹ The Special Master had previously determined that the purposes of SPRNCA
10 are “the protection of the riparian area and the aquatic, wildlife, archeological, paleontological,
11 scientific, cultural, educational, and recreational resources of the conservation area.” *See*
12 Special Master’s March 4, 2009 *Order Determining Initial Issues Designated for Briefing*, at 8.
13 To the extent that there is insufficient surface water available to fulfill these purposes, then the
14 federal reserved right would extend to available groundwater. *See In re the General*
15 *Adjudication of all Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411,
16 420, 989 P.2d 739, 748 (Ariz. 1999). The question of how much water is sufficient to satisfy
17 the purposes of SPRNCA can only be determined by applying federal law regarding the nature
18 of a federal reserved right to an evidentiary record to be established at the forthcoming hearing.

19 Regarding Issue 3, the Special Master previously ruled that CWR 90103 “must be
20 considered a water right available to the United States to serve the federal purposes of the
21 SPRNCA,” and that the beneficial uses of CWR 90103 “are distinct and separate uses that
22 partially, but not fully, fulfill the federal purposes of the SPRNCA to the extent that water is
23 required.” March 19, 2010 *Order Determining the Second Set of Issues Designated for*
24 *Briefing*, at 7. The Special Master’s 2010 ruling, however, did not address whether or how the
25 existence of the CWR impacts the determination of the federal right as part of the adjudication.

26 _____
27 ¹ In determining that Congress expressly reserved a quantity of water sufficient to meet SPRNCA’s
needs, the Special Master rejected the “minimal need” standard set forth in *Cappaert v. United States*,
426 U.S. 128 (1976).

1 In the Aravaipa Canyon Wilderness Contested Case, the Special Master also left the issue open
2 for future determination, stating simply that “[t]his case presents the interaction of a federal
3 reserved water right and a vested state law based water right. . . . the scope of that interaction
4 must be considered.” *Order Determining the Initial Seven Issues Briefed*, dated November 2,
5 2011, at 18.

6 When the interaction of the two rights is considered, however, it becomes clear that the
7 existence of a CWR covering certain state law uses for the SPRNCA should have no bearing
8 on the quantification of the federal reserved right. First, *Cappaert v. United States*, 425 U.S.
9 128 (1976) unequivocally states that the “determination of reserved water rights is not
10 governed by state law but derives from the federal purpose of the reservation. . . .” *Cappaert*,
11 425 U.S. at 145. The Supreme Court specifically defined the reserved rights doctrine as an
12 exception to Congress’ deference to state water law. *See New Mexico*, 438 U.S. at 714. Thus,
13 a federal reserved right for the SPRNCA *must* be governed by federal law, and *must* derive
14 from the purposes of the Arizona-Idaho Conservation Act of 1988 (the “Act”). This is both
15 logical and necessary because neither the CWR, nor any other water right issued under
16 Arizona law, may be utilized for many of the purposes identified in the Act (a fact that the
17 Special Master recognized in his March 2010 Order). These uses must be protected under
18 federal law pursuant to a federal reserved right. *See* A.R.S. § 45-151(A); *see also In re*
19 *General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195
20 Ariz. 411, 423, 989 P.2d 739, 751 (Ariz. 1999) (“[W]e may not defer to state law where to do
21 so would defeat federal water rights”).

22 Second, because of the inherent differences between federal and state water rights, the
23 utilization of the state-based rights to satisfy, either partially or fully, the federal purposes set
24 forth in the Act would be inappropriate. Water rights under federal law are not subject to
25 forfeiture and abandonment, and, unlike state-based rights, receive protection against
26 groundwater withdrawals. *See Cappaert*, 425 U.S. at 143 (“[S]ince the implied-reservation-of-
27 water-rights doctrine is based on the necessity of water for the purpose of the federal

1 reservation, we hold that the United States can protect its water from subsequent diversion,
2 whether the diversion is of surface or groundwater”); *In re General Adjudication of All Rights*
3 *to Use Water in the Gila River System and Source*, 201 Ariz. 307, 311, 35 P.2d 68, 72 (Ariz.
4 2001) (“[a] federally reserved water right . . . retains its priority despite non-use”). Protection
5 against groundwater withdrawals is particularly important in this instance due to the United
6 States’ claim for preservation of groundwater levels, a claim that cannot be satisfied by any
7 state-based appropriative right. These critical differences between federal and state based
8 water rights preclude the use of a state-based right to satisfy the purposes of SPRNCA.

9 Third, it is important to note that none of the United States’ state-based water rights
10 claims has been adjudicated. If contested as part of the adjudication, it is certainly possible
11 that the amount currently certificated by ADWR for instream flows would be reduced or even
12 negated altogether. Moreover, state based water rights are subject to the whim of the state
13 legislatures, which, subject to constitutional limitations, wield the power to change the nature
14 of those water rights. Consequently, if, for whatever reason, a state court someday concluded
15 that the United States forfeited or abandoned its state law rights, or that the nature of the
16 United States’ state law water right had been legislatively altered, Congress’ intent to protect
17 the purposes of SPRNCA would maintain protection under its federal reserved water right.
18 *See Winters v. United States*, 207 U.S. 564, 577 (1908) (holding that federal reserved rights are
19 by nature intended to “continue[] through the years.”).

20 The existing state-based rights, if ultimately adjudicated, would merely complement,
21 not add to, the federal reserved right for SPRNCA. There is no reason why the United States
22 could not concurrently hold both a federal reserved right with a 1988 priority date for the
23 purposes set forth in the Act, as well as state law right with a 1985 priority date for claimed
24 state law purposes (*e.g.*, instream flow, recreation and wildlife/fish). To the extent that the
25 CWR’s beneficial uses partially overlap with the purposes of the federal reserved right, these
26 rights would not be additive; rather, they would coexist as distinct rights (with different
27

1 characteristics and different priority dates), either of which could be utilized to meet the
2 requirements of the mutual state law uses/federal purposes.

3 **III. The Names, Addresses and Telephone Numbers of any Witnesses Whom the**
4 **Disclosing Party Expects to Call to Substantiate Its Claims with a Fair Description**
5 **of the Substance of Each Witness' Expected Testimony.**

6 At this time, SRP does not intend to call any witnesses to testify. If SRP subsequently
7 decides to call a witness or witnesses, SRP will supplement these Initial Disclosures to provide
8 the names, addresses and telephone numbers of any such witnesses, along with a description of
9 the substance of their expected testimonies.

10 **IV. The Names and Addresses of all Persons Whom the Disclosing Party Believes May**
11 **Have Knowledge or Information Relevant to the Events, Transactions, or**
12 **Occurrences that Gave Rise to Each Claim, and the Nature of the Knowledge or**
13 **Information Each Such Individual is Believed to Possess.**

14 None.

15 **V. The Names and Addresses of All Persons Who Have Given Statements, Whether**
16 **Written or Recorded, Signed or Unsigned, and the Custodian of the Copies of**
17 **Those Statements.**

18 SRP has no knowledge of anyone who has given written or recorded statements
19 regarding this action.

20 **VI. The Name and Address of Each Person Whom the Disclosing Party Expects to Call**
21 **as an Expert Witness, the Subject Matter on Which the Expert is Expected to**
22 **Testify, a Summary of the Grounds for Each Opinion, the Qualifications of the**
23 **Witness, and the Name and Address of the Custodian of Copies of Any Reports**
24 **Prepared By the Expert.**

25 SRP does not expect to call any expert witnesses.
26
27

1 **VII. The Existence, Location, Custodian, and General Description of Any Tangible**
2 **Evidence or Relevant Documents that the Disclosing Party Plans to Use to Support**
3 **Its Claims.**

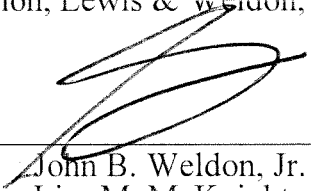
4 See documents previously disclosed by SRP in this matter, SRP 1 – SRP 394. SRP also
5 reserves the right to utilize all other documents disclosed by the other parties to this contested
6 case.

7 **VIII. A List of Documents or, in the Case of Voluminous Documentary Information, a**
8 **List of the Categories of Documents, Known by the Disclosing Party to Exist**
9 **Whether or Not in Its Possession, Custody, or Control and Which It Believes May**
10 **Be Relevant to Any of Its Claims Concerning the Designated Issues, and Those**
11 **Which Appear Reasonably Calculated to Lead to the Discovery of Admissible**
12 **Evidence, and the Dates Upon Which Those Documents Will Be Made, or Have**
13 **Been Made, Available for Inspection and Copying. If Production Is Not Made,**
14 **The Name and Address of the Custodian of the Document Shall Be Indicated. Any**
15 **Document Produced for Inspection Shall be Produced as it is Kept in the Usual**
16 **Course of Business.**

17 *See Section VII.*

18 DATED this 7th day of January, 2014.

19 Salmon, Lewis & Weldon, P.L.C.

20 By 
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22 Lisa M. McKnight
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24 2850 East Camelback Road, Suite 200
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26 Attorneys for Salt River Project
27

28 **ORIGINAL** of the foregoing filed
29 this 7th day of January, 2014 to:

30 Clerk of the Arizona Superior Court
31 Attn: Water Case
32 601 W. Jackson Street
33 Phoenix, Arizona 85009

1 **COPIES** of the foregoing hand-delivered
2 this 7th day of January, 2014 to:

3 Special Master George A. Schade, Jr.
4 Arizona General Stream Adjudication
5 201 West Jefferson
6 Phoenix, AZ 85003

7 Janet L. Ronald
8 Arizona Department of Water Resources
9 Legal Division
10 3550 North Central Avenue
11 Phoenix, AZ 85012-2105

12 A copy of the foregoing mailed this
13 7th day of January, 2014 to all
14 Parties on the Court-approved
15 W1-11-232 mailing list dated July 1, 2013.

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