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14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
15 **IN AND FOR THE COUNTY OF MARICOPA**

16 IN RE: THE GENERAL  
17 ADJUDICATION OF ALL RIGHTS  
18 TO USE WATER IN THE GILA  
19 RIVER SYSTEM 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

**SALT RIVER PROJECT'S FIRST  
SUPPLEMENTAL DISCLOSURE  
STATEMENT FOR SECOND PHASE  
OF THIS CASE**

(Assigned to the Hon. Mark H. Brain)

20 Contested Case Name: *In re San Pedro Riparian National Conservation Area.*

21 HSR Involved: San Pedro River Watershed Hydrographic Survey Report.

22 Descriptive Summary: The Salt River Project submits its first supplemental disclosure  
23 statement for Phase II of this contested case.

24 Statement of Claimant Nos.: 39-07-1040, -1041, -1998, -1206, -1207; 39-05-50053, -  
25 50054, -50055; 39-L8-35212 and -35213.

26 Date of Filing: August 19, 2016.

27 Number of Pages: 9.

1 **I. Introduction**

2 This Supplemental Disclosure Statement is made on behalf of the Salt River Project  
3 Agricultural Improvement and Power District and the Salt River Valley Water Users'  
4 Association (collectively, "SRP"). SRP's Supplemental Disclosure Statement sets forth  
5 statements of its positions on the three issues identified for decision by the Special Master's  
6 May 29, 2013 *Order Designating the Issues for an Evidentiary Hearing on Federal Reserved*  
7 *Water Rights Claims and Determining Related Issues*. The three issues are:

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

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

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

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

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

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

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

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

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

22 The information and positions set forth in this Supplemental Disclosure Statement are  
23 based on materials disclosed by the United States and other parties to date. The information  
24 and positions are subject to change pending SRP's review of (1) documents disclosed by the  
25 United States and other parties in their Supplemental Disclosure Statements and (2) any  
26 information or documents disclosed in connection with the ongoing discovery process in this  
27 contested case, including through depositions.

1 With these reservations, and consistent with the requirements of Rule 26.1 of the  
2 Arizona Rules of Civil Procedure and the Special Master’s Order dated June 14, 2016 (the  
3 “Order”), SRP’s disclosures relevant to the above-referenced three issues are set forth below.

4 The Order provides that “[t]he sole purpose of the supplements shall be to provide  
5 information which was either not provided or is a change to the information provided in the  
6 initial Disclosure Statements or in the reports regarding experts due on July 29, 2016.”

7 Accordingly, only those sections that include additional information beyond what already has  
8 been disclosed in SRP’s initial disclosure statement are included in this disclosure. The  
9 specific information that has not been previously disclosed is set forth in **bold** herein.

## 10 **II. Legal Theory Upon Which Claims/Defenses are Based**

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

13 Regarding Issue 2, the Special Master held in his October 17, 2013 *Order Determining*  
14 *the Issues Designated for Briefing in the Order Dated May 29, 2013* that the Arizona-Idaho  
15 conservation Act of 1988 expressly reserved a quantity of water sufficient to meet the  
16 purposes of SPRNCA.<sup>1</sup> The Special Master had previously determined that the purposes of  
17 SPRNCA are “the protection of the riparian area and the aquatic, wildlife, archeological,  
18 paleontological, scientific, cultural, educational, and recreational resources of the conservation  
19 area.” *See* Special Master’s March 4, 2009 *Order Determining Initial Issues Designated for*  
20 *Briefing*, at 8. To the extent that there is insufficient **appropriable** water available to fulfill  
21 these purposes, then the federal reserved right would extend to available groundwater. *See In*  
22 *re the General Adjudication of all Rights to Use Water in the Gila River System and Source*,  
23 195 Ariz. 411, 420, 989 P.2d 739, 748 (Ariz. 1999) (“*Gila River IIP*”).

24  
25  
26 <sup>1</sup> In determining that Congress expressly reserved a quantity of water sufficient to meet  
27 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 determining whether and to what extent the federal reserved right extends to  
2 available groundwater, it will be necessary to distinguish appropriable underground  
3 water (i.e., subflow) from percolating groundwater. *Gila River III* instructs that the  
4 relevant question is whether “other waters” are inadequate to serve the purposes of the  
5 reservation. *Gila River III*, 195 Ariz. at 420, 989 P.2d at 749. The term “other waters” is  
6 broader than merely “surface water” because Arizona law recognizes that “subflow,” a  
7 particular subset of underground water, is subject to appropriation under Arizona law.  
8 *See generally In re the General Adjudication of all Right to Use Water in the Gila River*  
9 *System and Source*, 198 Ariz. 330, 9 P. 3d 1069 (2000). Thus, the question before the  
10 Court in *Gila River III* was whether “federal reserved water rights extend to  
11 groundwater (underground water) that is not subject to prior appropriation under  
12 Arizona law.” *Gila River III*, 195 Ariz. at 413, 989 P.2d at 741 (emphasis added). In  
13 analyzing this issue, the Court recognized that “[t]he trial court held that federal  
14 ‘reserved rights’ apply not only to surface water and subflow, appropriable categories  
15 under Arizona law, but also to non-appropriable groundwater.” *Id.* at 414-15, 989 P.2d  
16 at 742-43 (emphasis added). In short, the *Gila River III* decision addresses the  
17 application of the federal reserved water rights doctrine to non-appropriable  
18 groundwater in addition to subflow. In this regard, subflow is among the “other waters”  
19 that must be “inadequate to accomplish the purpose of a reservation” in order for the  
20 federal reserved right to extend to non-subflow underground water. When applying this  
21 standard to SPRNCA, it will be necessary to determine whether the underground water  
22 needed to meet the purposes of SPRNCA is subflow. SPRNCA’s reserved right will  
23 include groundwater only to the extent that SPRNCA requires non-appropriable  
24 underground water, as opposed to subflow.

25           The question of how much water is sufficient to satisfy the purposes of SPRNCA can  
26 be determined only by applying federal law regarding the nature of a federal reserved right to  
27 an evidentiary record to be established at the forthcoming hearing. **In addition, it is**

1 anticipated that testimony that will be provided at the numerous upcoming depositions  
2 in this contested case will inform SRP's position on the quantity of water (including the  
3 quantity of groundwater) sufficient to accomplish the purposes of SPRNCA. SRP will  
4 further supplement this Supplemental Disclosure Statement after the discovery process  
5 in this contested case closes on November 30, 2016.

6       Regarding Issue 3(A), SRP is continuing to examine whether CWR 90103 has  
7 been forfeited or abandoned in light of the parties' disclosure statements and through  
8 the ongoing discovery process. SRP anticipates that testimony that will be provided at  
9 the numerous upcoming depositions in this contested case will inform SRP's position on  
10 this issue. SRP will further supplement this Supplemental Disclosure Statement after  
11 the discovery process in this contested case closes on November 30, 2016. In any event,  
12 the quantification of SPRNCA's appropriative right under CWR 90103 does not affect  
13 the quantification of SPRNCA's federal reserved water right for the reasons stated  
14 below with respect to Issue 3(B). Therefore, any abandonment or forfeiture of CWR  
15 90103 should not affect the quantity of SPRNCA's federal reserved water right.

16       Regarding Issue 3(B), the Special Master previously ruled that CWR 90103 "must be  
17 considered a water right available to the United States to serve the federal purposes of the  
18 SPRNCA," and that the beneficial uses of CWR 90103 "are distinct and separate uses that  
19 partially, but not fully, fulfill the federal purposes of the SPRNCA to the extent that water is  
20 required." March 19, 2010 *Order Determining the Second Set of Issues Designated for*  
21 *Briefing*, at 7. The Special Master's 2010 ruling, however, did not address whether or how the  
22 existence of CWR 90103 impacts the determination of the federal right as part of the  
23 adjudication. In the Aravaipa Canyon Wilderness Contested Case, the Special Master also left  
24 the issue open for future determination, stating simply that "[t]his case presents the interaction  
25 of a federal reserved water right and a vested state law based water right. . . . the scope of that  
26 interaction must be considered." *Order Determining the Initial Seven Issues Briefed*, dated  
27 November 2, 2011, at 18.

1           When the interaction of the two rights is considered, however, it becomes clear that the  
2 existence of a CWR covering certain state law uses for the SPRNCA should have no bearing  
3 on the quantification of the federal reserved right. First, *Cappaert v. United States*, 425 U.S.  
4 128 (1976) unequivocally states that the “determination of reserved water rights is not  
5 governed by state law but derives from the federal purpose of the reservation. . . .” *Cappaert*,  
6 425 U.S. at 145. The Supreme Court specifically defined the reserved rights doctrine as an  
7 exception to Congress’ deference to state water law. *See New Mexico*, 438 U.S. at 714. Thus,  
8 a federal reserved right for the SPRNCA *must* be governed by federal law, and *must* derive  
9 from the purposes of the Arizona-Idaho Conservation Act of 1988 (the “Act”). This is both  
10 logical and necessary because neither CWR 90103, nor any other water right issued under  
11 Arizona law, may be utilized for many of the purposes identified in the Act (a fact that the  
12 Special Master recognized in his March 2010 Order). These uses must be protected under  
13 federal law pursuant to a federal reserved right. *See* A.R.S. § 45-151(A); *see also In re*  
14 *General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195  
15 Ariz. 411, 423, 989 P.2d 739, 751 (Ariz. 1999) (“[W]e may not defer to state law where to do  
16 so would defeat federal water rights”).

17           Second, because of the inherent differences between federal and state water rights, the  
18 utilization of the state-based rights to satisfy, either partially or fully, the federal purposes set  
19 forth in the Act would be inappropriate. Water rights under federal law are not subject to  
20 forfeiture and abandonment, and, unlike state-based rights, receive protection against  
21 groundwater withdrawals. *See Cappaert*, 425 U.S. at 143 (“[S]ince the implied-reservation-  
22 of-water-rights doctrine is based on the necessity of water for the purpose of the federal  
23 reservation, we hold that the United States can protect its water from subsequent diversion,  
24 whether the diversion is of surface or groundwater”); *In re General Adjudication of All Rights*  
25 *to Use Water in the Gila River System and Source*, 201 Ariz. 307, 311, 35 P.2d 68, 72 (Ariz.  
26 2001) (“[a] federally reserved water right . . . retains its priority despite non-use”). Protection  
27 against groundwater withdrawals is particularly important in this instance due to the United

1 States' claim for preservation of groundwater levels, a claim that cannot be satisfied by any  
2 state-based appropriative right. These critical differences between federal and state-based  
3 water rights preclude the use of a state-based right to satisfy the purposes of SPRNCA.

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

15 The existing state-based rights, if ultimately adjudicated, would merely complement,  
16 not add to, the federal reserved right for SPRNCA. There is no reason why the United States  
17 could not concurrently hold both a federal reserved right with a 1988 priority date for the  
18 purposes set forth in the Act, as well as a state law right with a 1985 priority date for claimed  
19 state law purposes (*e.g.*, instream flow, recreation and wildlife/fish). To the extent that the  
20 CWR 90103 beneficial uses partially overlap with the purposes of the federal reserved right,  
21 these rights would not be additive; rather, they would coexist as distinct rights (with different  
22 characteristics and different priority dates), either of which could be utilized to meet the  
23 requirements of the mutual state law uses/federal purposes. **In other words, the federal  
24 reserved right and CWR 90103 are not duplicative. This is because state water rights  
25 are based on "beneficial use," while federal reserved rights are based upon the amount  
26 of water sufficient to fulfill the purposes of SPRNCA. See A.R.S. § 45-141(B). To the  
27 extent that utilization of the right under CWR 90103 meets some of the purposes**


1 associated with SPRNCA's federal reserved right, the United States could take  
2 additional water under the federal reserved right *only to the extent that additional water*  
3 *was needed to provide water sufficient to accomplish the purposes of SPRNCA.* On the  
4 other hand, the United States could forgo utilizing water under CWR 90103 altogether  
5 and satisfy all the purposes of SPRNCA with its federal reserved right. Both CWR  
6 90103 and the federal reserved rights are for instream flows. Therefore, regardless of  
7 whether the water is taken under CWR 90103, the federal reserved right, or both, the  
8 water will flow through SPRNCA and be made available to both junior and senior right  
9 holders downstream of SPRNCA.

10 **III. The Existence, Location, Custodian, and General Description of Any Tangible**  
11 **Evidence or Relevant Documents that the Disclosing Party Plans to Use to**  
12 **Support Its Claims.**

13 See documents previously disclosed by SRP in this matter, SRP 1 – SRP 394. SRP  
14 also reserves the right to use: (1) all documents disclosed by any party in this contested  
15 case in any initial or supplemental disclosure; (2) all written discovery requests and  
16 responses served by any party in this contested case; (3) the transcripts of all depositions  
17 that occur in this contested case, including all exhibits to any such depositions; (4) all  
18 documents filed with the Court or the Special Master in connection with this contested  
19 case; and (5) all documents produced in response to any subpoena or request for  
20 production of documents that any party serves in connection with this contested case.

21 DATED this 19<sup>th</sup> day of August, 2016.

22  
23 Salmon, Lewis & Weldon, PLC

24 By: 

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1 Original and one copy of the foregoing  
2 hand-delivered this 19<sup>th</sup> day of August, 2016 to:

3 Clerk of the Superior Court  
4 Maricopa County  
5 Attn: Water Case  
6 601 West Jackson Street  
7 Phoenix, AZ 85003

8 One copy of the foregoing hand-delivered  
9 this 19<sup>th</sup> day of August, 2016 to:

10 Hon. Mark H. Brain  
11 Judge of the Superior Court  
12 Central West Building, Suite 12A  
13 201 West Jefferson Street  
14 Phoenix, AZ 85003

15 Susan Ward Harris  
16 Special Master  
17 Central Court Building, Suite 3A  
18 201 West Jefferson Street  
19 Phoenix, AZ 85003

20 Copies of the foregoing mailed this 19<sup>th</sup> day of  
21 August, 2016 to all persons appearing on the court-approved  
22 mailing list for W1-11-232 dated June 14, 2016.

23  
24  
25  
26  
27  
By: 