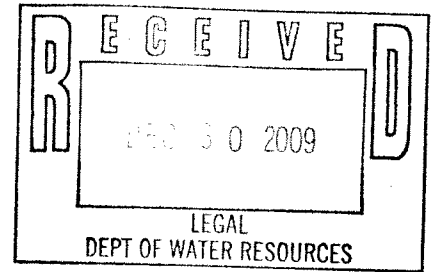


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9 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
10 IN AND FOR THE COUNTY OF MARICOPA

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

W-1 (Salt)
W-2 (Verde)
W-3 (San Pedro)
W-4 (San Pedro)
(Consolidated)

Contested Case No. W1-103

16 **OBJECTIONS/COMMENTS OF THE BELLA**
17 **VISTA WATER CO., PUEBLO DEL SOL**
18 **WATER COMPANY AND CITY OF SIERRA**
19 **VISTA TO THE SUBFLOW ZONE**
20 **DELINEATION REPORT FOR THE SAN**
PEDRO RIVER WATERSHED
(The Honorable Eddward P. Ballinger, Jr.)

21 **DESCRIPTIVE SUMMARY:** Bella Vista Water Co., Inc., Pueblo Del Sol Water Company
22 and the City of Sierra Vista (the "Sierra Vista Parties") file their Objections/Comments to the
23 Subflow Zone Delineation Report for the San Pedro River Watershed.

STATEMENT OF CLAIMANT NOS.:

24 Bella Vista Water Co., Inc.: 39-11-2739 through 39-11-2750; 39-11-2753; 39-11-2754

Pueblo Del Sol Water Co.: 39-11-4262 through 39-11-4264 and 39-11-12704

25 City of Sierra Vista: 39-1488-89; 39-2752; 39-5807; 39-7844-48; 39-2557-58 and 39-12469

NUMBER OF PAGES: 6

DATE OF FILING: December 28, 2009

1 Bella Vista Water Co. Inc., Pueblo Del Sol Water Company and the City of
2 Sierra Vista (the "Sierra Vista Parties"), through undersigned counsel, file their
3 Objections/Comments to Arizona Department of Water Resources' ("ADWR") Subflow Zone
4 Delineation Report for the San Pedro River Watershed dated June 2009 (the "Report"),
5 pursuant to the Court's order dated September 28, 2009 ("2005 Subflow Order"). The Sierra
6 Vista Parties are entitled to file objections/comments in this matter because they hold the
7 above referenced Statements of Claimant in the San Pedro River Watershed.

8 **OBJECTIONS/COMMENTS TO THE SUBFLOW ZONE DELINEATION REPORT**

9 **A. PRESERVATION OF LEGAL DEFICIENCIES IN THE PROCESS**
10 **FOLLOWED BY ADWR.**

11 The Report provides: "Objections must be limited to ADWR's findings
12 regarding the lateral extent of the subflow zone." As noted in the Report, significant legal
13 proceedings preceded the issuance of the Report. These objections and comments are limited
14 to referencing deficiencies in following the directives of the general adjudication court's order
15 dated September 28, 2005 ("2005 Subflow Order")¹ that resulted in errors in ADWR's
16 findings regarding the lateral extent of the subflow zone.

17 In so limiting the focus of these objections and comments to the Report, the
18 Sierra Vista Parties do not waive any challenge to the underlying deficiencies in the Report
19 arising from factual and legal deficiencies with the 2005 Subflow Order, the 2004 Subflow
20 Order or ADWR's March 29, 2002 Subflow Technical Report. The Sierra Vista Parties
21 hereby expressly incorporate the evidence and arguments presented before the Special Master,
22 the adjudication court and in Petitions and Cross-Petitions for Interlocutory Review of the
23

24
25 ¹ The 2005 Subflow Order adopted, clarified and amended the July 16, 2004 Report of the Special
Master ("2004 Subflow Decision") on ADWR's Subflow Technical Report, San Pedro Watershed
dated March 29, 2002.

1 2005 Subflow Order as to the infirmities of the evidence and legal basis of the subflow
2 delineation process proposed by ADWR and approved, with modification, by the 2005
3 Subflow Order, including, without limitation, the evidence and argument presented by the
4 Sierra Vista Parties, Arizona Public Service Company, Phelps Dodge Corporation, Roosevelt
5 Water Conservation District, City of Safford, Paloma Irrigation and Drainage District, Rio
6 Rico Properties, Inc., ASARCO Incorporated, Arizona Water Company, Tucson Electric
7 Power Company, Gila Valley Irrigation District, Franklin Irrigation District, City of Sedona,
8 Town of Jerome, Town of Clarkdale, Central Arizona Irrigation and Drainage District, City of
9 Casa Grande and the cities of Chandler, Glendale, Mesa and Scottsdale.

10 The Sierra Vista Parties further note that the recap of proceedings leading to the
11 Report contained in Chapter 1 is incomplete and does not supersede the actual decisions and
12 orders referenced therein (or omitted therefrom).

13 **B. FAILURE TO BASE PREDEVELOPMENT STATE ON A SINGLE YEAR OR**
14 **A RANGE OF YEARS IMMEDIATELY PRIOR TO WIDESPREAD**
15 **DIVERSION AND DEPLETION OVERSTATES THE SUBFLOW ZONE.**

16 The 2005 Subflow Order adopts the recommendation that: “The Court should
17 define predevelopment stream flow conditions, for the purpose of subflow analysis, to mean a
18 chronological year or a range of years immediately prior to widespread diversion and
19 depletion of the stream’s flows as a result of human activity.”² The Report does not identify a
20 single year or a range of years where reliable data exists as the basis of its predevelopment
21 state determination. Rather the Report examines the eighty-year period from approximately
22 1860 to 1940. The Report indicates that the evidence relied on (e.g., the location of irrigation
23 ditches) “do[oes] not provide direct evidence of perennial and intermittent streamflows.” The
24 Report, however, states they “suggest a reliable water source.” In reaching its conclusion, the

25 ² The Report’s use of the “predevelopment state” as the standard for delineating the subflow zone is one of the issues preserved as inconsistent with Arizona law.

1 Report ignores the inverse conclusion that looking at water uses, over longer periods, tends to
2 make a water source appear more reliable because it ignores the impacts of years where
3 precipitation and snowmelt is unavailable. For example, a possible explanation for multiple
4 diversions developing at or near the same location over a long period is that none of them
5 were viable over the long term because the water source was ephemeral. The Report's
6 erroneous use of data is highlighted by Figures 3-20 through 3-23. Where many of the sources
7 identify no water or ephemeral flows, the Report concludes it was perennial or intermittent
8 because at least one of the sources indicate the availability of water for at least one year. Had
9 the Report used a single calendar year, or a specific series of years to determine the
10 predevelopment state, rather than a period spanning almost 80 years, the number of stretches
11 identified as ephemeral would likely have increased.

12 C. ADWR'S FAILURE TO INVESTIGATE THE ASSUMPTION OF
13 SATURATION RESULTS IN OVERSTATING THE SUBFLOW ZONE.

14 The Report assumes the entire floodplain Holocene alluvium is saturated. This
15 assumption was challenged as legally unsupportable before the Special Master and the
16 adjudication court. While preserved above, those arguments will not be repeated in these
17 objections/comments. However, the Sierra Vista Parties object to ADWR's failure to make
18 any attempt to investigate the assumption as part of the preparation of the Report. The 2005
19 Subflow Order at p. 41¶ 3 included a general directive that ADWR should use other criteria
20 that are geologically and hydrologically appropriate for the particular location where the
21 criteria approved by the adjudication court does not allow it to delineate a reasonably accurate
22 and reliable subflow zone. Because saturation is critical to a "subflow" determination,
23 ADWR, during its field work was required to test segments of the outer reaches of the
24 subflow zone to evaluate the reasonableness of its assumption. This ADWR did not do. As a
25 result, the entire width of the floodplain Holocene alluvium, (which can stretch "almost a mile
in some areas" Report at 4-3) is assumed to constitute the subflow zone. The Sierra Vista

1 Parties object to the resulting overstatement of the lateral extent of the subflow zone without
2 the clear and convincing evidence required by Arizona law to overturn the presumption that
3 underground waters are percolating and not subject to appropriation. *See, Maricopa County*
4 *Mun. Water Conservation District v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931); *In*
5 *re General Adjudication of All Rights to Use Water In Gila River System & Source*, 175 Ariz.
6 382, 857 P.2d 1236 (1993), *In re General Adjudication of All Rights to Use Water In Gila*
7 *River System & Source*, 198 Ariz. 330, 9 P.3d 1069 (2000).

8 **D. THE METHOD OF DETERMINING THE LOCATION OF FLOODPLAIN**
9 **HOLOCENE ALLUVIUM OVERSTATES THE SUBFLOW ZONE.**

10 The Report recognizes that the boundary of the floodplain Holocene Alluvium is
11 being depicted with varying degree of accuracy. Figures 4-8 and 4-9 highlight that a
12 significant portion of the delineation is between plus or minus 25 feet to 250 feet inaccurate.
13 This is because “[t]he contact between floodplain Holocene alluvium and the other geologic
14 units was not always well defined in the field.” Report at 4-10. Even where the contact is
15 clear and well defined, the delineation is still plus or minus 25 feet. Where the contact was
16 subtle or gradational, the inaccuracy is estimated at plus or minus 50 feet. Where the contact
17 has been disturbed, the delineation is estimated inaccurate of plus or minus 250 feet. It is
18 necessary to review the individual Quad Maps set forth in Appendix D-1 of the Report to
19 appreciate the extent to which the Report is providing ADWR’s guess as to what constitutes
20 the subflow zone for the San Pedro and Babocomari Rivers and the Aravaipa Creek.

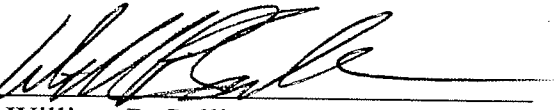
21 **E. CONCLUSION**

22 ADWR has generally followed the 2005 Subflow Order in preparing its Report.
23 As a result, the Report has the legal and evidentiary infirmities that have previously been
24 presented to the Special Master and the general adjudication court. In the end, the lateral
25 extent of the subflow zone depicted by the Report is overstated. The Report does not provide
clear and convincing evidence of the lateral extent of the subflow zone along the San Pedro

1 clear and convincing evidence of the lateral extent of the subflow zone along the San Pedro
2 and Babocomari Rivers and the Aravaipa Creek. Certainly, the Report does not legally justify
3 shifting the legal presumption (and thus the burden of proof) that all underground water within
4 the depicted zone is unappropriable percolating groundwater to a presumption that it is
5 appropriable surface water.

6 DATED this 28th day of December, 2009.

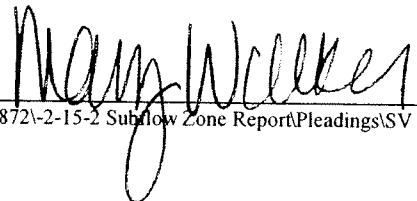
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9
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16 Original of the foregoing filed this
17 28th day of December, 2009 with:

18 Clerk of the Maricopa County Superior Court
19 601 West Jackson
20 Phoenix, Arizona 85003
21 Attention: Water Case

22 Copies of the foregoing mailed this 28th
23 day of December, 2009 to those parties who
24 appear on the Court-approved mailing list
25 for Case No. W1, W-2, W-3 and W-4 (consolidated)
dated July 27, 2009.

26 
27 872\2-15-2 Subflow Zone Report\Pleadings\SV Parties Objection