

APPENDIX A

APPENDIX A-1

Public Law 100-696
100th Congress

An Act

To provide for the designation and conservation of certain lands in the States of Arizona and Idaho, and for other purposes.

Nov. 18, 1988
[S. 2840]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act be cited as the "Arizona-Idaho Conservation Act of 1988".

Arizona-Idaho
Conservation
Act of 1988.

TITLE I—SAN PEDRO RIPARIAN NATIONAL CONSERVATION
AREA

ESTABLISHMENT OF SAN PEDRO RIPARIAN NATIONAL CONSERVATION
AREA

SEC. 101. (a) ESTABLISHMENT.—In order to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River in Cochise County, Arizona, there is hereby established the San Pedro Riparian National Conservation Area (hereafter in this title referred to as the "conservation area").

16 USC 460xx.

(b) AREA INCLUDED.—The conservation area shall consist of public lands as generally depicted on a map entitled "San Pedro Riparian National Conservation Area—Proposed" numbered AZ-040-OZ, dated January 1988, and consisting of approximately 56,431 acres.

(c) MAP.—As soon as is practicable after enactment of this title, a map and legal description of the conservation area shall be filed by the Secretary of the Interior (hereafter in this title referred to as the "Secretary") with the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. Each such map shall have the same force and effect as if included in this title. Such map shall be on file and available for public inspection in the Office of the Director of the Bureau of Land Management, Department of the Interior, and in the Bureau of Land Management offices of the State Director for Arizona, and the district office responsible for the management of the conservation area.

Public
information.

MANAGEMENT OF CONSERVATION AREA

SEC. 102. (a) GENERAL AUTHORITIES.—The Secretary shall manage the conservation area in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area. Such management shall be guided by this title and, where not inconsistent with this title, by the provisions of the Federal Land Policy and Management Act of 1976 (hereinafter in this title referred to as "FLPMA").

16 USC 460xx-1.

(b) USES.—The Secretary shall only allow such uses of the conservation area as he finds will further the primary purposes for

which the conservation area is established. Except where needed for administrative or emergency purposes, the use of motorized vehicles in the conservation area shall only be allowed on roads specifically designated for such use as part of the management plan prepared pursuant to section 103 of this title. The Secretary shall have the power to implement such reasonable limits to visitation and use of the conservation area as he finds appropriate for the protection of the resources of the conservation area, including requiring permits for public use, or closing portions of the conservation area to public use.

(c) **WITHDRAWALS.**—Subject to valid existing rights, all Federal lands within the conservation area are hereby withdrawn from all forms of entry, appropriation, or disposal under the public land laws; from location, entry, and patent under the United States mining laws; and from disposition under all laws pertaining to mineral and geothermal leasing and all amendments thereto.

(d) **WATER RIGHTS.**—Congress reserves for the purposes of this reservation, a quantity of water sufficient to fulfill the purposes of the San Pedro Riparian National Conservation Area created by this title. The priority date of such reserve rights shall be the date of enactment of this title. The Secretary shall file a claim for the quantification of such rights in an appropriate stream adjudication.

Claims.

(e) **ENFORCEMENT.**—Any person who violates any provision of this title or any regulation promulgated by the Secretary to implement this title shall be subject to a fine of up to \$10,000, or imprisonment for up to one year, or both.

MANAGEMENT PLAN

16 USC 460xx-2.

SEC. 103. (a) DEVELOPMENT OF PLAN.—No later than 2 years after the enactment of this title, the Secretary shall develop a comprehensive plan for the long-range management and protection of the conservation area. The plan shall be developed with full opportunity for public participation and comment, and shall contain provisions designed to assure protection of the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreation resources and values of the conservation area.

(b) **RECOMMENDATIONS.**—The Secretary shall, in the comprehensive plan referred to in subsection (a), develop recommendations to Congress on whether additional lands should be included in the conservation area.

(c) **COOPERATIVE AGREEMENTS.**—The Secretary may enter into cooperative agreements with appropriate State and local agencies, pursuant to section 307(b) of FLPMA, to better implement the plan developed pursuant to subsection (a).

(d) **RESEARCH.**—In order to assist in the development of appropriate management strategies for the conservation area, the Secretary may authorize research on matters including the environmental, biological, hydrological, and cultural resources of the conservation area, pursuant to section 307(a) of FLPMA.

ADVISORY COMMITTEE

16 USC 460xx-3.

SEC. 104. (a) ESTABLISHMENT.—The Secretary shall establish a San Pedro Riparian National Conservation Area Advisory Committee, whose purpose shall be to advise the Secretary with respect to the

preparation and implementation of the comprehensive, long-range plan required pursuant to section 103 of this title.

(b) **REPRESENTATION.**—There shall be 7 members of the Committee, who shall be appointed by the Secretary. Members of the Committee shall be appointed for terms of three years, except that of the members first appointed 2 shall be appointed for terms of 1 year and 3 shall be appointed for terms of 2 years. The Secretary shall appoint one member from nominations supplied by the Governor of the State of Arizona, and one member from nominations supplied by the Supervisors of Cochise County, Arizona. The other members shall be persons with recognized backgrounds in wildlife conservation, riparian ecology, archeology, paleontology, or other disciplines directly related to the primary purposes for which the conservation area was created.

LAND ACQUISITION

Sec. 105. The Secretary may acquire lands or interests in lands within the boundaries of the conservation area by exchange, purchase, or donation, except that any lands or interests therein owned by the State or local government may be acquired by donation or exchange only. Any purchase or exchange of lands to be added to the conservation area shall require the consent of the owner of those lands or rights.

16 USC 460xx-4.

REPORT TO CONGRESS

Sec. 106. No later than five years after the enactment of this title, and every ten years thereafter, the Secretary shall report to the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the United States Senate, on the implementation of this title. Such report shall include a detailed statement on the condition of the resources within the conservation area and of the progress of the Bureau of Land Management in achieving the purposes of this title.

16 USC 460xx-5.

AUTHORIZATION

Sec. 107. There are hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this title.

16 USC 460xx-6.

TITLE II—CITY OF ROCKS NATIONAL RESERVE

ESTABLISHMENT OF CITY OF ROCKS NATIONAL RESERVE

Sec. 201. (a) There is hereby established the City of Rocks National Reserve (hereinafter referred to as the "reserve"), in order to preserve and protect the significant historical and cultural resources; to manage recreational use; to protect and maintain scenic quality; and to interpret the nationally significant values of the reserve.

Historic
preservation.
16 USC 460yy.

(b) The reserve shall include approximately fourteen thousand three hundred and twenty acres as depicted on the map entitled "Boundary Map, City of Rocks National Reserve, Idaho" numbered P30-80,005 and dated October 1987. The map shall be on file in the offices of the National Park Service, Department of the Interior and the Offices of the Governor, State of Idaho.

(c) Within six months after the enactment of this title, the Secretary of the Interior (hereinafter in this title referred to as the

APPENDIX A-2

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

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

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

DATE: September 26, 2006

CIVIL NO. W1-11-232

CASE MANAGEMENT ORDER

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

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master issues a Case Management Order initiating this contested case.

NUMBER OF PAGES: 4, Attachment A - 3, Attachment B - 3; total 10 pages.

DATE OF FILING: September 26, 2006.

The Special Master has considered the comments previously filed and those made at the conference held on September 19, 2006. The Special Master has concluded that a formal contested case can be initiated, but the case should initially focus on implementing a settlement track. This case management order initiates a contested case and gives the potential parties an opportunity to explore the scope of a realistic settlement track.

IT IS ORDERED:

1. Contested Case Consolidation. This contested case will address the objections that were filed to the watershed file reports (“WFRs”) published in the Final San Pedro River Watershed Hydrographic Survey Report (1991) that are associated with the San Pedro Riparian National Conservation Area (“SPRNCA”). Those WFRs are

listed in Attachment A of this order. A unique contested case number was assigned to each WFR. All the WFRs listed in Attachment A are ordered consolidated with Contested Case No. W1-11-232.

2. Contested Case Designation and Docket Number. The objections filed to the WFRs listed in Attachment A will be resolved as part of *In re San Pedro Riparian National Conservation Area*, Contested Case No. W1-11-232.

3. Litigants. The litigants in this contested case are the claimant and owner of lands, namely the United States Bureau of Land Management, all persons who filed objections to the WFRs listed in Attachment A, and claimants who are allowed to intervene by order.

4. Lessees, Allottees, and Permittees. Regarding the inclusion as parties of lessees, allottees, or permittees of land reported in the listed WFRs, the United States Bureau of Land Management shall provide a list of names and addresses of lessees, allottees, or permittees associated with these WFRs on or before **January 31, 2007**.

5. Southern Pacific Transportation Company and the Arizona Nature Conservancy. As explained in Attachment A, these claimants might no longer be parties in this contested case. Both the Southern Pacific Transportation Company and the Arizona Nature Conservancy shall inform the Special Master on or before **November 6, 2006**, if they are parties in this contested case.

6. Court-Approved Mailing List.

A. The initial Court-approved mailing list for this case shall include all persons listed in Attachment B of this order (the list is dated July 7, 2006). The office of the Special Master will post the mailing list at <<http://www.supreme.state.az.us/wm>>. The list may be modified from time to time, and litigants are responsible for using the current Court-approved mailing list.

B. A copy of any pleading filed with the Clerk of the Maricopa County Superior Court in this case shall be served upon each person listed on the Court-approved mailing list.

C. Claimants wishing to be added or removed from the mailing list shall file a motion with the Special Master. Parties allowed to intervene will be automatically added to the mailing list.

D. If your name or address is incorrect, contact the office of the Special Master to make changes.

7. Pending Motions to Intervene.

A. Phelps Dodge Corporation: On March 2, 1995, Phelps Dodge Corporation filed a motion to intervene. Special Master Thorson deferred

ruling on the motion until a contested case was initiated. Responses to Phelps Dodge's motion to intervene shall be filed on or before **November 6, 2006**, and replies shall be filed on or before **December 1, 2006**. The motion will be granted if no objections are filed by November 6, 2006.

B. ASARCO Incorporated and Magma Copper Company: On September 29, 1995, ASARCO LLC (then ASARCO Incorporated) and Magma Copper Company filed a motion to intervene. These parties filed objections to several of the WFRs listed in Attachment A, hence they are parties in this contested case, and their motion to intervene is moot.

8. Settlement Track.

A. The United States shall immediately begin meeting and conferring with parties in this and any other pending cases to explore the feasibility and scope of implementing a comprehensive settlement track. The scope of a settlement track can include the appointment of a Settlement Committee and Chair, fixing the committee's optimal size, term limits, mandatory reports to the Special Master, use of a facilitator, drafting a settlement plan for further consideration, the possibility and nature of joint settlement discussions with the matter of *In re Fort Huachuca*, and the role of the Arizona Department of Water Resources in a settlement track.

B. The United States and other parties in this case will be asked to report on the progress of these efforts at the telephonic conference set on January 18, 2007.

9. Status Conference. A telephonic conference shall be held on **Thursday, January 18, 2007, at 10:00 a.m. (MST)** to discuss the progress of efforts to implement a settlement track. The call-in telephone number for the conference will be provided at a later time. Each participant will bear any long distance telephonic charges.

10. Disclosure Statements. The filing of disclosure statements pursuant to Arizona Rule of Civil Procedure 26.1 is stayed until further order of the Special Master.

11. Electronic Data Base and Index Provided by ADWR. At this time, ADWR will not be directed to develop and maintain an electronic data base and index of disclosed documents.

12. Discovery. All formal discovery pursuant to Arizona Rule of Civil Procedure 26.1 is stayed until further order of the Special Master.

13. Investigations. At this time, ADWR will not be directed to conduct any technical investigations of the WFRs listed in Attachment A.

14. Motions. Until further order of the Special Master, the filing of motions except for motions to intervene is discouraged so that the parties can explore the implementation of a settlement track.

15. Additional Information. If you desire more information about the Gila River Adjudication, you may contact the following offices, but none of these offices can give you legal advice:

A. For information about hydrographic survey reports, specific WFRs, copies of court filings, ordering a monthly docket subscription for the Gila River Adjudication, or obtaining other publications concerning the adjudications:

Arizona Department of Water Resources
3550 North Central Avenue
Phoenix, AZ 85012
(602) 771-8635 (Phoenix area)
1-(800) 352-8488 (toll free within Arizona)
1-(866) 246-1414 (toll free within the United States)

B. For information about filing pleadings, reviewing contested case court files, obtaining copies of court filings, or ordering a docket for an individual contested case:

Clerk of the Maricopa County Superior Court
Attn: Water Case
601 West Jackson Street
Phoenix, AZ 85003

DATED: September 26, 2006.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On September 26, 2006, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court-approved mailing list for this contested case dated September 26, 2006, a copy of which is attached hereto as Attachment A and to all persons listed on the Court-approved mailing list for W-1, W-2, W-3, and W-4 (Consolidated) dated July 7, 2006.

/s/ KDolge
Kathy Dolge

Attachment A

A. WATERSHED FILE REPORTS IN THE FINAL SAN PEDRO RIVER WATERSHED HYDROGRAPHIC SURVEY REPORT (1991) ASSOCIATED WITH THE SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA

No.	Watershed File Report Number	Claimant or Landowner	Contested Case Number ¹
1	111-20-032	United States Bureau of Land Management (“BLM”)	232
2	111-20-065	BLM	252
3	111-20-DD-001 ²	Southern Pacific Transp. Co.	419
4	111-23-AAA-001	BLM	629
5	111-23-DDA-004	Church of Jesus Christ, LDS	1154
6	111-24-082	BLM	1211
7	111-24-CBB-002 ³	Edward F. & Ethelyn Lehner	1343
8	111-24-CBB-003 ⁴	McDowell Craig Manuf. Co.	1344
9	111-24-CBB-005	Robert W. Boucher	1346
10	111-24-CCB-011	BLM	1374
11	111-17-063	BLM	1655
12	112-17-088	St. David Irrigation District	1675
13	112-17-DB-096 ⁵	Edith K. Donlevy, Steven M. Shields, and John P. Shields	2066
14	112-17-DCA-010 ⁶	Arizona Nature Conservancy	2187
15	112-17-DCD-001	BLM	2193
16	112-20-013	BLM	2239

Notes

1. Special Master Thorson assigned a unique Contested Case Number to each watershed file report (“WFR”) published in the Final San Pedro River Watershed HSR (1991).

2. The Company claims it may have assigned the well associated with this WFR to the BLM’s predecessor in interest. It is not clear if the statement of claimant associated with this WFR is 39-011829 as stated in Southern Pacific Transportation Company’s comments (Sept. 29, 1995) or 39-011831 as stated in the WFR. The Southern Pacific Transportation Company might not be a party in this case.

3. These claimants assigned two of their statements of claimant to the BLM but retained four statements of claimant associated with this WFR.

4. This claimant assigned the five statements of claimant associated with this WFR to the Arizona Nature Conservancy which, in turn, assigned the five claims to Walter R. Kolbe and Mayola C. Kolbe. Hence, the McDowell Craig Manufacturing Company might not be a party in this case, but the Kolbes may be parties.

5. These claimants sold their property to the Arizona Nature Conservancy which assigned the statements of claimant to the BLM. Hence, Ms. Donlevy and the Shields might not be parties in this case. The Arizona Nature Conservancy, which filed objections to this WFR, might also not be a party in this case.

6. The claimant Arizona Nature Conservancy, which objected to this WFR, assigned the statements of claimant associated with this WFR to the BLM. Hence, the Arizona Nature Conservancy might not be a party in this case.

B. OBJECTORS

According to the records compiled by the office of the Special Master, these claimants objected to all or some of the watershed file reports listed in Table A above:

1. Arizona Nature Conservancy
2. Arizona State Land Department
3. ASARCO LLC formerly ASARCO, Incorporated
4. Bella Vista Water Company, Bella Vista Ranches, L.L.L.P., and Pueblo del Sol Water Company formerly identified in this adjudication as a group consisting of the Bella Vista Limited Partnership, Nicksville Water Company, Bella Vista Water Company, Bella Vista Ranches Limited Partnership, Dan Cracchiolo, and Pueblo Del Sol Water Company
5. City of Benson
6. BHP Copper, Inc. formerly Magma Copper Company
7. United States Bureau of Land Management
8. Church of Jesus Christ of Latter-Day Saints
9. Gila River Indian Community
10. City of Mesa
11. George E. Monzingo, Jr. and Katherine H. Monzingo
12. City of Phoenix
13. Salt River Project
14. San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai Apache Nation (formerly Yavapai-Apache Indian Community, Camp Verde Reservation)

15. City of Sierra Vista

C. LESSEES, ALLOTTEES, AND PERMITTEES

According to the records compiled by the office of the Special Master, these claimants may have been or are lessees or permittees of lands associated with the San Pedro Riparian National Conservation Area and may be parties in this case; however, the accuracy or completeness of this information is not claimed:

1. Brookline Ranch, Inc.
2. John L. Casalena
3. Gordon H. Coulter
4. Joseph John Escapule
5. Charles Goff and Joseph Goff
6. Jack K. Hughes
7. Edward F. Lehner and Ethelyn Lehner
8. Ross Meracle
9. Sierra Ready Mix & Contracting
10. Ted R. Smith and Rose A. Clinton Smith

Attachment B
Court-approved Mailing List
In re San Pedro Riparian National Conservation Area (SPRNCA)
W1-11-232 (37 names)
Prepared by the Office of the Special Master
July 7, 2006

Benson, City of
P.O. Box 2223
Benson AZ 85602

U.S. Bureau of Land Management (BLM)
Safford District
711 14th Ave.
Safford AZ 85546

Brookline Ranch, Inc.
Route 1, Box 275
Huachuca City AZ 85616

U.S. Bureau of Land Management (BLM)
San Pedro Project Office
1763 Paseo San Luis
Sierra Vista AZ 85635

Clerk of the Superior Court
Maricopa County
Attn: Water Case
601 W. Jackson Street
Phoenix AZ 85003

LDS Church
**Attn: Bruce Findlay or Real Estate
Dep't**
60 East South Temple, Suite 1800
Salt Lake City UT 84111-1004

Sierra Ready Mix & Contracting
P.O. Box 450
Waddell AZ 85355-0450

U.S. Dep't of Justice
Environment & Natural Resources Div.
F. Patrick Barry
P. O. Box 44378
Washington DC 20026-4378

St. David Irrigation District
P. O. Box 463
St. David AZ 85630

Robert W. Boucher
10906 E. Hereford Rd.
Hereford AZ 85615

U.S. Bureau of Land Management (BLM)
Arizona State Office
222 N. Central Ave.
Phoenix AZ 85004

St. David Irrigation District
c/o Brown & Brown Law Offices, P.C.

U.S. Bureau of Land Management (BLM)
Phoenix Field Office
21605 N. 7th Ave.
Phoenix AZ 85027

Attn: David A. Brown
P. O. Box 3128
Pinetop AZ 85935

Mesa, City of
City Attorney's Office
Attn: Charles L. Cahoy
P. O. Box 1466
Mesa AZ 85211-1466

LDS Church
c/o Cavanagh Law Firm, P.A.
Attn: Ralph E. Hunsaker
1850 N. Central Ave., Suite 2400
Phoenix AZ 85012-1656

Phoenix, City of
City Attorney's Office
Attn: M. James Callahan
200 W. Washington, 13th Floor
Phoenix AZ 85003-1611

Walter R. & Mayola C. Kolbe
8348 Hereford Rd.
Hereford AZ 85615

ASARCO LLC; Southern Pacific Transportation Co.
c/o Fennemore Craig, P.C.
Attn: Lauren J. Caster
3003 N. Central Ave., Suite 2600
Phoenix AZ 85012-2913

BHP Copper Inc. (fmr. Magma Copper Co.)
c/o DeConcini McDonald Yetwin & Lacy, P.C.
Attn: John C. Lacy
2525 E. Broadway, Suite 200
Tucson AZ 85716-5303

Joseph John Escapule
P.O. Box 1047
Tombstone AZ 85638

Edward & Ethelyn A. Lehner
4871 N. Territory Loop
Tucson AZ 85750

Gila River Indian Community
Office of Water Rights
**Jennifer Giff, R. Lewis, J.
Hestand, T.
Pierson, R. Koester,**
5350 N. 48th St., Suite 130
Chandler AZ 85226

U.S. Dep't of Justice
Environment & Natural Resources Div.
Attn: R. Lee Leininger
1961 Stout St., 8th Floor
Denver CO 80294

Charles & Joseph Goff
P. O. Box 50186
Tucson AZ 85703

Salt River Project
c/o Salmon, Lewis & Weldon, P.L.C.
**Attn: M. Byron Lewis, J.B. Weldon,
M.A. McGinnis**
2850 E. Camelback Rd., Suite 200
Phoenix AZ 85016

Jack K. Hughes, et al.
HCR Box 750
Benson AZ 85602

The Nature Conservancy
c/o Lewis and Roca, L.L.P.
Linda C. McNulty
One S. Church Ave., Suite 700
Tucson AZ 85701

Ross Meracle

c/o Beatrice Meracle
446 E. Meisterhaus St.
St. David AZ 85630-6237

George E. & Katherine H. Monzingo

4180 S. Curtis Flats Rd.
St. David AZ 85630

BHP Copper Inc. (fmr. Magma Copper Co.)
c/o Bryan Cave, L.L.P.

**Attn: Lucas J. Narducci & Stanley
B. Lutz**

Two N. Central Ave., Suite 2200
Phoenix AZ 85004-4406

AZ Dep't of Water Resources
Legal Division

Janet L. Ronald

3550 N. Central, 4th Floor
Phoenix AZ 85012

Special Master

Arizona General Stream Adjudication

George A. Schade, Jr.

1501 W. Washington, Suite 228
Phoenix AZ 85007

Tenneco West, Inc. and Tenneco Arizona Properties
Corporation

c/o Norling, Kolsrud, Sifferman & Davis, P.L.C.

Attn: Mark S. Sifferman

16427 N. Scottsdale Rd., #210
Scottsdale AZ 85254

AZ Attorney General's Ofc representing
AZ State Land Dep't

Attn: Patrick B. Sigl

Natural Resources Section
1275 W. Washington
Phoenix AZ 85007-2926

Ted R. and Rose A. Clinton Smith

Box 34
Hereford AZ 85615

Apache Tribes

c/o Sparks, Tehan & Ryley, P.C.

**Attn: Joe P. Sparks & John H.
Ryley**

7503 First Street
Scottsdale AZ 85251-4573

Bella Vista Ltd. Partnership; Nicksville Water Co.; Bella Vista
Water Co.; Bella Vista Ranches Ltd. Partnership; Dan
Cracchiolo; Pueblo Del Sol Water Co.; City of Sierra Vista
c/o Curtis, Goodwin, Sullivan, Udall & Schwab, P.L.C.

**Attn: William P. Sullivan & Nancy A.
Mangone**

2712 N. 7th St.
Phoenix AZ 85006-1003

APPENDIX A-3

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

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

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

DATE: March 4, 2009

CIVIL NO. W1-11-232
(Consolidated)

ORDER DETERMINING INITIAL
ISSUES DESIGNATED FOR
BRIEFING

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

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master issues his determinations on the initial six issues designated for briefing, requests a report from the Arizona Department of Water Resources, and sets a telephonic conference on April 23, 2009.

NUMBER OF PAGES: 17.

DATE OF FILING: March 4, 2009.

After considering comments from parties, the Special Master designated six initial issues for briefing, requested disclosure statements, and allowed discovery.

I. CHRONOLOGY OF PROCEEDINGS

The issues in this briefing are:

1. Did Congress in enacting the legislation establishing the San Pedro Riparian

National Conservation Area expressly intend to reserve unappropriated waters to accomplish the purposes of the reservation?

2. If so, what were the purposes of the reservation?

3. If Congress did not expressly intend to reserve water, does the evidence establish that the United States withdrew land from the public domain and reserved the San Pedro Riparian National Conservation Area for a federal purpose(s)?

4. If the land was withdrawn and reserved, what was the purpose(s) to be served by the reservation?

5. If the land was withdrawn and reserved, did the United States intend to reserve unappropriated waters to accomplish the purpose(s) of the reservation? and,

6. If unappropriated waters were reserved for the purpose(s) of the reservation, what is the date of priority of the reserved water right?

ASARCO LLC (“ASARCO”), Babacomari Ranch Company, LLLP (“Babacomari”), Phelps Dodge Corporation (hereinafter “Freeport-McMoRan” following the change of corporate name to Freeport-McMoRan Corporation), Salt River Project (“SRP”), and the United States filed disclosure statements. The Bella Vista Water Company, Inc., Pueblo Del Sol Water Company, and the City of Sierra Vista (collectively “Sierra Vista Parties”) filed a joint disclosure statement.

The Arizona Department of Water Resources (“ADWR”) maintained on its Internet site an electronic data base and index of all disclosed documents. All disclosing parties were directed to submit to ADWR an electronic copy, an index, and a paper copy of all disclosures. ADWR made available to claimants copies of disclosed documents.

ASARCO, SRP, and the United States filed motions for summary relief. The Sierra Vista Parties filed a statement of position and a partial joinder in ASARCO’s motion for partial summary judgment. Babacomari and Freeport-McMoRan filed responses to motions.¹ ASARCO, SRP, Sierra Vista Parties, and the United States filed responses and replies. Oral argument on all motions was heard on November 6, 2008.

A. Form of the Special Master’s Determinations

ASARCO requested that the Special Master issue his decision on the initial issues in a minute entry and not in a report to the Court on the ground that the Special Master’s report “should issue only after the Special Master has reviewed all the issues and evidence necessary to determine whether a federal reserved right exists for SPRNCA.”² The request requires a look at prior practice and A.R.S. § 45-257.

¹ On June 27, 2008, Babacomari and Freeport-McMoRan filed a motion to stay the briefing of the designated issues. On August 4, 2008, the Special Master denied the request.

² ASARCO Motion for Partial Summary Judgment 14.

In the contested cases *In re State Trust Lands* and *In re Fort Huachuca*, the Special Master filed reports containing extensive findings of fact, conclusions of law, and recommendations.³ Parties had 180 days to file objections to each report.

The *State Trust Lands* report addressed specific issues of broad legal significance relevant to all watersheds under adjudication. The report was prepared pursuant to an order of reference from the Court to address those issues.⁴ These circumstances mandated that the Special Master file a report with the Court.

The *Fort Huachuca* report addressed legal issues similar to those initially briefed in this matter. That case, as this one, arose from objections filed to the findings of a hydrographic survey report. Both are contested cases organized by the Special Master.

A.R.S. § 45-257(A) and (B) provide in pertinent part as follows:

A. The master shall:

1. After due notice, conduct such hearings and take such testimony as shall be necessary to determine the relative water rights of each claimant.
2. For all determinations, recommendations, findings of fact or conclusions of law issued, prepare and file with the court a report in accordance with rule 53(g) of the Arizona rules of civil procedure, which shall contain those determinations, recommendations, findings of fact and conclusions of law.... If the report covers an entire ... federal reservation, each claimant may file with the court written objections to the report within one hundred eighty days of the date on which the report was filed with the court.

....

B. The court, upon review of the report (emphasis added) and in accordance with rule 53 of the Arizona rules of civil procedure, shall:

1. Determine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and source
2. Establish, in whatever form determined to be most appropriate by the court, one or more tabulations or lists of all water rights and their relative priorities on the river system and source.

....

4. Refer the final judgment or decree to the director for administration and enforcement under the continuing jurisdiction of the court.

Statutes must be interpreted “as a whole, giving effect to each word and making

³ The Special Master’s reports are pending consideration by the Court.

⁴ Order 3-4 (Jan. 20, 2005).

every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.”⁵ Considering A.R.S. § 45-257 in its entirety, the Special Master finds that this statutory process is mandatory after he has considered all issues, heard all evidence, and obtained a record sufficient to adjudicate claimed water rights and their attributes. However, it is not an exclusive process.

Subsection B supports this conclusion. As stated in subsection B, it is the Special Master’s report that the Court uses to “[d]etermine the extent and priority date of and adjudicate any interest in or right to use the water of the river system and source.” The Court cannot begin this phase until the Special Master completes his work for a watershed or an entire federal reservation.

The phrase “all determinations” in subsection A means that the report submitted to the Court must contain all determinations the Special Master made during the course of a contested case concerning the adjudication of the relative rights of claimants. The phrase concerns the contents of the report rather than a requirement that a report must be filed with the Court every time the Special Master determines a legal issue.

However, the Special Master can elect to file a partial report with the Court as done in *Fort Huachuca*. The election allows the Court to give guidance as a contested case proceeds, but when *In re Fort Huachuca* concludes, the Special Master will file a final report with the Court.

A stricter interpretation of A.R.S. § 45-257 could result in delays impacting the progress of a contested case. We are at the beginning of this case. We seek to clarify the nature of a reserved water right, if one exists. For the foregoing reasons, the Special Master will issue an order and not file a Rule 53(g) report with the Court.

II. DID CONGRESS IN ENACTING THE LEGISLATION ESTABLISHING THE SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA EXPRESSLY INTEND TO RESERVE UNAPPROPRIATED WATERS TO ACCOMPLISH THE PURPOSES OF THE RESERVATION?

The Congress established the San Pedro Riparian National Conservation Area (“SPRNCA” or “conservation area”) as part of the Arizona-Idaho Conservation Act of 1988 (“the Act”) which became effective on November 18, 1988.⁶

Section 102(d) (16 U.S.C. § 460xx-1) of the Act provides that:

(d) WATER RIGHTS. Congress reserves for the purposes of this reservation, a quantity of water sufficient to fulfill the purposes of the San

⁵ *Boise Cascade Corp. v. U.S. Env'tl. Prot. Agency*, 942 F.2d 1427, 1432 (9th Cir. 1991) (citations omitted).

⁶ Pub. L. No. 100-696, 102 Stat. 4572, codified in 16 U.S.C. §§ 460xx - 460xx-6. Subsequent editions of the United States Code substituted the word “subchapter” for “title” and “November 18, 1988,” for “the date of enactment of this title.” See United States (“U.S.”) Appendix Exhibit (“App. Exh.”) No. 8, ASARCO App. Exh. No. 20, and SRP App. Exh. No. 1.

Pedro Riparian National Conservation Area created by this title. The priority date of such reserved rights shall be the date of enactment of this title. The Secretary shall file a claim for the quantification of such rights in an appropriate stream adjudication.

Section 102(d) distinguishes this case from prior ones in this adjudication concerning reserved water rights. In prior cases, we dealt with implied reserved rights. In this case, not only the language of the Act but also relevant legislative history shows that the Congress expressly intended to reserve water for the purposes of the SPRNCA.

This “case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. (citation omitted). If it is, we must apply the statute according to its terms.”⁷ The Special Master finds that section 102(d) is plain and unambiguous. The Congress “reserve[d] ... a quantity of water sufficient to fulfill the purposes of the” SPRNCA. A reservation of water is expressly intended. Legislative history supports this finding.⁸

On September 15, 1988, the Senate Committee on Energy and Natural Resources recommended that the Senate pass Senate Bill 252, as amended, a predecessor of the Act. The Committee amended the proposed legislation by adding the following subsection:

(d) WATER RIGHTS. Congress reserves for the purposes of this reservation, a quantity of water sufficient to fulfill the purposes of the San Pedro Riparian National Conservation Area created by this Act. The priority date of such reserved rights shall be the date of enactment of this Act. Such rights shall be perfected in the ongoing general stream adjudication now pending in the Superior Court of the State of Arizona and to which the United States has been joined pursuant to the McCarran Amendment (43 U.S.C. 466).⁹

The Committee’s report stated in pertinent part concerning “Water rights” as follows:

The Committee also added a new subsection to the bill which asserted a **reservation of water** sufficient to fulfill the purposes of the San Pedro Riparian National Conservation Area.

In making determination to include **language expressly reserving water for the San Pedro Riparian Area**, the Committee has taken into account the hydrologic circumstances and water regime of this area....

⁷ *Carcieri v. Salazar*, ___ U.S. ___, No. 07-526, 2009 WL 436679, at 4 (Feb. 24, 2009).

⁸ The Act’s pertinent legislative history is referenced to show it supports the determination that section 102(d) expressly and unambiguously reserved water.

⁹ S. Rep. No. 100-525, at 1 (1988). See U.S. App. Exh. No. 14, ASARCO App. Exh. No. 19, and SRP App. Exh. No. 3.

Because of the bill sponsors' desire to establish strong Federal protections for the water resources of this area, **the Committee believes it is appropriate in this circumstance to create an express Federal reserved water right for the purposes of this unique riparian conservation area.** The amount of **water reserved** is that quantity.... Prior to asserting **its reserved right**, the BLM shall make a determination regarding The priority date of the **reserved water right** shall be the date of this Act.

The statutory language approved by the Committee directs the Secretary to perfect the **reserved right created by this legislation** in the ongoing general stream adjudication pursuant to the McCarran Amendment....

....

Subsection (d) reserves water sufficient to fulfill the purposes of the San Pedro National Conservation Area.¹⁰

On October 20, 1988, the House of Representatives took up the proposed SPRNCA legislation. The congressional record shows Arizona Representative Morris K. Udall stated that “[t]he Senate has added acceptable language regarding Federal reserved water rights,” and Minnesota Representative Bruce F. Vento noted that the proposed legislation as amended in the Senate “includes an explicit reservation of water.”¹¹ Arizona Representative James T. Kolbe, a proponent of the SPRNCA legislation, stated that although the “issue of Federal reserved water rights” had been “intractable,” “those problems have been resolved, and “this section can be considered noncontroversial.”¹²

Based on the express language of section 102(d) and the legislative history concerning the issue of reserved water for the SPRNCA, the Special Master finds that the Congress expressly intended to reserve water to accomplish the purposes of the conservation area.

ASARCO raised two issues related to a reserved water right for the SPRNCA. First, the congressional intent to reserve water is limited to unappropriated water, and second, the Special Master cannot determine whether a federal reserved water right exists without considering whether other water rights held by the United States for the conservation area are sufficient to fulfill the purposes of the SPRNCA. The Sierra Vista parties joined in ASARCO's positions.

SRP argued that the Special Master excluded both issues from this initial briefing. The Scheduling Order for this briefing stated as follows:

¹⁰ *Id.* at 3-5 (emphasis added).

¹¹ 134 (Part 22) CONG. REC. 32188 H.R. 568 (daily ed. Oct. 20, 1988) (statement of Rep. Udall) and 32189 (statement of Rep. Vento). *See* U.S. App. Exh. No. 16 and SRP App. Exh. No. 6.

¹²*Id.* at 32194 (statement of Rep. Kolbe).

There was much discussion concerning the issue of whether Congress expressly or the United States impliedly reserved “all unappropriated waters” as of the date of the reservation. Until a supplemental HSR is completed, we will not know the extent of unappropriated waters as of November 18, 1988, the date the Congress said was the “date of priority of such reserve rights” for the SPRNCA. However, we can address whether Congress or the United States intended to reserve unappropriated waters to accomplish the purposes of the reservation.

....

Phelps Dodge has submitted an issue concerning the existence and offsetting use of other water rights that might be sufficient to accomplish the purposes of the reservation. Until a supplemental HSR is completed, the full factual dimensions of this issue will not be clear, and hence the issue should wait until the HSR is filed.¹³

The Special Master agrees that a reserved water right is limited to unappropriated water, and this issue is now determined. In *Cappaert*, the United States Supreme Court reiterated its holdings concerning reserved water rights as follows:

This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, **reserves appurtenant water then unappropriated** to the extent needed to accomplish the purpose of the reservation....

....

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve **unappropriated and thus available water**.¹⁴

The Arizona Supreme Court cited this holding to describe what the “reserved water rights doctrine provides.”¹⁵

The Special Master has not changed his opinion. Whether the Special Master can determine if a reserved right exists for the SPRNCA without considering if other water

¹³ Scheduling Order 2 (June 28, 2007).

¹⁴ *Cappaert v. United States*, 426 U.S. 128, 138-9 (1976) (“*Cappaert*”) (emphasis added); see *United States v. New Mexico*, 438 U.S. 696, 698 (1978) (“*New Mexico*”) (“[C]ongress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on appurtenant lands withdrawn from the public domain for specific federal purposes.”)

¹⁵ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 417, 989 P.2d 739, 745 (1999), cert. denied sub nom. *Phelps Dodge Corp. v. U.S. and Salt River Valley Water Users' Assn. v. U.S.*, 530 U.S. 1250 (2000).

rights held by the United States are sufficient to fulfill the purposes of the SPRNCA is better addressed when the technical evidence and additional briefing, needed to determine all the attributes of a reserved water right, are available. We are still in the process of determining whether all the attributes of a reserved water right exist for the SPRNCA.

III. IF SO, WHAT WERE THE PURPOSES OF THE RESERVATION?

The Act states in three sections as follows:

1. Section 101(a) (16 U.S.C. § 460xx) ESTABLISHMENT. In order to protect the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the public lands surrounding the San Pedro River in Cochise County, Arizona, there is hereby established the San Pedro Riparian National Conservation Area (hereafter in this title referred to as the “conservation area”).
2. Section 102(a) (16 U.S.C. § 460xx-1) GENERAL AUTHORITIES. The Secretary shall manage the conservation area in a manner that conserves, protects, and enhances the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area.
3. Section 103(a) (16 U.S.C. § 460xx-2) DEVELOPMENT OF PLAN. No later than 2 years after the enactment of this title, the Secretary shall develop a comprehensive plan for the long-range management and protection of the conservation area. The plan ... shall contain provisions designed to assure protection of the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreation resources and values of the conservation area.

The Act is plain and unambiguous as to the purposes of the SPRNCA. Based on the Act’s express language, the Special Master determines that the purposes of the SPRNCA are the protection of the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area.

The “Sierra Vista Parties acknowledge that Section 101(a) of the Act ... sets forth the purposes of the SPRNCA.” However, they argued that the Act “does not define the listed purposes, specify any hierarchical order for the listed purposes, or specify the purposes as either primary or secondary in nature,” and does not provide guidance as to which, if any, of these purposes requires a reserved water right.¹⁶

These arguments are advanced without citation to legal authorities. The Special

¹⁶ Sierra Vista Parties Joint Reply 7 and Joint Response 8.

Master has not found case law precedent or commentary that supports the arguments.

In *Cappaert*, the United States Supreme Court held that “Devil’s Hole was reserved ‘for the preservation of the unusual features of scenic, scientific, and educational interest’.”¹⁷ In *New Mexico*, the Court held that “Congress intended that water would be reserved ... to preserve the timber or to secure favorable water flows for private and public uses under state law.”¹⁸

The Court found sufficient definitiveness in these terms set forth in a presidential proclamation and congressional legislation, respectively. The Court did not speak of the need for, or imperative, of a hierarchy or ranking for the purposes. Arguably, the Act provides more specificity in the purposes of the SPRNCA than in those the Supreme Court found in *Cappaert* and *New Mexico*.

The Act uses the term “primary purposes” in two sections. Section 102(b) mandates that the Secretary of the Interior “shall only allow such uses of the conservation area as he finds will further the primary purposes for which the conservation area is established.” Section 104(b) (16 U.S.C. § 460xx-3) provides for a seven person advisory committee, of which five “members shall be persons with recognized backgrounds in wildlife conservation, riparian ecology, archeology, paleontology, or other disciplines directly related to the primary purposes for which the conservation area was created.”

New Mexico formulated the “primary-secondary purpose test.”¹⁹ This “distinction applies to non-Indian federal reservations.”²⁰ The Act was enacted four and a half months after the decision in *New Mexico*. Congress is presumed to have been informed of the primary-secondary purpose distinction and its scope when it enacted the Act.²¹

The Sierra Vista Parties argued that if all the purposes listed in section 101(a) were intended to be primary, the word “primary” would be superfluous. The Special Master, to the contrary, finds that Congress intended to make it clear and unambiguous that the purposes listed in section 101(a) are primary as that concept governs non-Indian reserved water rights. Water for purposes other than those listed in sections 101(a), 102(a), and 103(a) - secondary purposes - must be obtained pursuant to state law.

¹⁷ 426 U.S. at 141.

¹⁸ 438 U.S. at 718.

¹⁹ “Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress’ express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.” 438 U.S. at 702.

²⁰ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 316, 35 P.3d 68, 77 (2001).

²¹ *Morissette v. United States*, 342 U.S. 246, 263 (1952); see *Evans v. United States*, 504 U.S. 255, 259-60 (1992).

IV. IF CONGRESS DID NOT EXPRESSLY INTEND TO RESERVE WATER, DOES THE EVIDENCE ESTABLISH THAT THE UNITED STATES WITHDREW LAND FROM THE PUBLIC DOMAIN AND RESERVED THE SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA FOR A FEDERAL PURPOSE(S)?

The Special Master has determined that Congress expressly intended to reserve unappropriated water. The Special Master finds that the Act withdrew public domain lands and reserved those lands for the purposes specified in section 101(a) of the Act.

“Although often used interchangeably, the terms ‘withdraw’ and ‘reserve’ have different meanings.”²² “It is important to note at the outset that ‘withdrawal’ and ‘reservation’ are not synonymous terms.... A withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws” such as the operation of federal mining, homestead, preemption, desert entry, and other federal land laws.²³ Withdrawn lands “are tracts that the government has placed off-limits to specified forms of use and disposition,” but a withdrawn parcel “may also be reserved for particular purposes, and often is.”²⁴

The Act withdrew federal lands within the SPRNCA from entry, appropriation, and disposal. Section 102(c) (16 U.S.C. § 460xx-1) of the Act states as follows:

WITHDRAWALS. Subject to valid existing rights, all Federal lands within the conservation area are hereby withdrawn from all forms of entry, appropriation, or disposal under the public land laws; from location, entry, and patent under the United States mining laws; and from disposition under all laws pertaining to mineral and geothermal leasing and all amendments thereto.

“Reserved lands ... are those that have been expressly withdrawn from the public domain by statute, executive order, or treaty, and are dedicated to a specific federal purpose.”²⁵ “A ... reservation goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use ... [a] reservation necessarily includes a withdrawal; but it also goes a step further, effecting a dedication of the land ‘to specific public uses’.”²⁶ Reserved lands “are the federal tracts

²² *Sierra Club v. Block*, 622 F. Supp. 842, 854 (D. C. Colo. 1985), *vacated on other grounds sub. nom. Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990). *Block* was vacated on grounds not related to any of the points for which it is cited in this order.

²³ *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 784 (10th Cir. 2005).

²⁴ 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *Public Natural Resources Law*, § 1:12 at 1-16 (2004) (“The main distinction between withdrawn and reserved lands is that a withdrawal is negative, forbidding certain uses, while a reservation is a positive declaration of future use.”).

²⁵ 622 F. Supp. at 854; *see also* 425 F.3d at 784.

²⁶ 425 F.3d at 784.

that Congress or the Executive has dedicated to particular uses (footnote omitted). The dedication removes them from availability for contrary use or disposition.”²⁷

Section 102(a) states that the Secretary of the Interior “shall manage the conservation area in a manner that conserves, protects, and enhances” all the purposes of the conservation area. Section 102(d) refers to “this reservation” and thereafter names the SPRNCA. Its order of placement in section 102(d) shows that the term “this reservation” refers to the conservation area and not to the reservation of water.

The Act’s legislative history sheds light on this issue. Arizona Senator Dennis DeConcini, a co-sponsor of the legislation that became the Act, spoke in support of the proposal noting that the SPRNCA would be managed differently than other federal lands. He stated that:

A great deal of effort has gone into crafting a bill which will guarantee the property is managed in a manner different from other public domain lands. Specific provisions have been included in the legislation restricting use so that the delicate riparian resources will not be harmed in any way.²⁸

Senator John S. McCain, also a co-sponsor of the legislation, urged that “[t]his area deserves special designation.”²⁹ These statements show awareness that the proposed conservation area was to be dedicated or reserved for specific purposes.

Then Arizona Representative and now Senator Jon Kyl submitted a prepared statement and spoke before the House of Representatives Subcommittee on Public Lands, National Parks and Forests that was hearing the proposed SPRNCA legislation. Mr. Kyl addressed “the question of reserved water rights” as follows:

The second inquiry is a bit more theoretical but it is important to me as a water lawyer. That was the question of how the Congress specifically dealt with the issue of water rights. I have always felt that it should be the Congress ... which specifies what it intends to create when it creates some kind of a Federal reservation. ... [I] preferred to see **in any legislation which creates a Federal reservation of one kind or another** a specific treatment of the water rights issue.³⁰

Congressman Kyl, who had practiced water law, understood that the proposed legislation to designate the SPRNCA involved the establishment of a federal reservation of land.

Section 102(c) and the Act’s legislative history support the finding that the

²⁷ 1 COGGINS & GLICKSMAN § 1:11 at 1-15, *supra*.

²⁸ 134 (Part 21) CONG. REC. 30276 S. 252 (daily ed. Oct. 13, 1988) (statement of Sen DeConcini). See U.S. App. Exh. No. 15 and SRP App. Exh. No. 4.

²⁹ *Id.* at 30280 (statement of Sen. McCain).

³⁰ *San Pedro Riparian National Conservation Area, Hearing on S. 252, H.R. 568, and S. 575 before the S. Subcomm. on Public Lands, National Parks & Forests, 100th Cong., 1st Sess. 50 (1987) (statement of Rep. Kyl) (emphasis added). See U.S. App. Exh. No. 13.*

Congress withdrew public domain lands and reserved them for the purposes specified in section 101(a).

V. IF THE LAND WAS WITHDRAWN AND RESERVED, WHAT WAS THE PURPOSE(S) TO BE SERVED BY THE RESERVATION?

The determinations made in section III answer this issue.

VI. IF THE LAND WAS WITHDRAWN AND RESERVED, DID THE UNITED STATES INTEND TO RESERVE UNAPPROPRIATED WATERS TO ACCOMPLISH THE PURPOSE(S) OF THE RESERVATION?

The Special Master has determined that the Congress expressly intended to reserve unappropriated water.

VII. IF UNAPPROPRIATED WATERS WERE RESERVED FOR THE PURPOSE(S) OF THE RESERVATION, WHAT IS THE DATE OF PRIORITY OF THE RESERVED WATER RIGHT?

A federal reserved water right “vests on the date a reservation is created, not when water is put to a beneficial use.”³¹ The “priority date for a federal reserved water right is the date of the statute, executive order, or public land order establishing the reservation.”³²

Section 102(d) which reserved water for the purposes of the SPRNCA states that, “[t]he priority date of such reserve rights shall be the date of enactment of this title.” The Congress enacted the Act on October 20, 1988, but the Act became law when President Ronald Reagan signed it on November 18, 1988.³³ Section 16 U.S.C. § 460xx-1, a later codification of section 102(d), states that the priority date “shall be November 18, 1988.”

The Special Master finds that the date of priority of a reserved water right for the SPRNCA, should a right be determined to exist, is November 18, 1988. The key issue is whether this priority attaches to all the federal lands that comprise the SPRNCA.

A. A Single or Multiple Dates of Priority

ASARCO and the Sierra Vista Parties argued that a single date of priority does not attach to all the lands of the conservation area because the United States did not own all the federal lands that comprise the SPRNCA on November 18, 1988. The United States has been adding lands to the conservation area by various means since November 18, 1988, some as recently as February 2005.

³¹ 201 Ariz. at 310, 35 P.3d at 71 (citing *Arizona v. California*, 373 U.S. 546, 600 (1963)); see *Cappaert*, 426 U.S. at 138.

³² 4 WATERS AND WATER RIGHTS § 37.03(B) at 37-76 (Robert E. Beck ed., 2004).

³³ Arizona-Idaho Conservation Act of 1988, Pub. Law No. 100-696, 1988 U.S.C.C.A.N. (102 Stat. 4571) 5955-1. See ASARCO App. Exh. No. 21 and SRP App. Exh. No. 8.

The United States and SRP argued that pursuant to section 102(d) November 18, 1988, is the single date of priority of a reserved water right for all federal lands within the boundaries of the SPRNCA.

1. The Size of the Conservation Area

The acres of land within the exterior boundaries of the SPRNCA on both November 18, 1988, and presently must be determined. The briefing produced a series of diverging numbers that cannot be reconciled.

Sections 101(b) and (c) (16 U.S.C. § 460xx) state in pertinent part as follows:

(b) AREA INCLUDED. The conservation area shall consist of public lands as generally depicted on a map entitled “San Pedro Riparian National Conservation Area - Proposed” numbered AZ-040-OZ,³⁴ dated January 1988, and consisting of approximately 56,431 acres.

(c) MAP. As soon as is practicable after enactment of this title, a map and legal description of the conservation area shall be filed by the Secretary of the Interior ... with the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Energy and Natural Resources of the United States Senate. Each such map shall have the same force and effect as if included in this title....

In a memorandum dated November 7, 1989, the Bureau of Land Management (“BLM”) Safford District finalized the submission to the BLM State Director of the “map and legal description” required by section 101(c). The “legal description of [the] San Pedro Riparian National Conservation Area” as shown on a set of maps stated that the “total acreage of public lands in the San Pedro Riparian National Conservation Area within the above-described boundary is 54,188.69 acres.”³⁵

The January 1988 and November 1989 maps depict a discrepancy of 2,241.31 acres (56,431 acres (Jan. 1988) - 54,188.69 acres (Nov. 1989)). Assuming for the sake of argument that the January 1988 map evidenced a desired maximum size of 56,431 acres for the SPRNCA, the November 1989 maps showed that the United States did not own all of these lands as of November 18, 1988.

The United States submitted the following statements of fact to support its motion for partial summary judgment:

Statement of Fact No. 10: On the date of the enactment of the legislation, approximately 47,749 acres of federal land were withdrawn and reserved for the San Pedro Riparian National Conservation Area (exhibit numbers

³⁴ The map in SRP’s appendix is marked “AZ-040-02 (not “Z”).” *See* SRP App. Exh. No. 2.

³⁵ Memo. from Ray A. Brady, District Manager, Safford to State Director, Arizona, at 9 of the attachment (Nov. 7, 1989). *See* SRP App. Ex. No. 9. The record does not show the date(s) on which the United States filed the maps and legal descriptions with the congressional committees.

omitted).

Statement of Fact No. 11: Approximately 2,498 acres within the SPRNCA boundary have been acquired from private land owners after the enactment of the legislation.

Statement of Fact No. 12: Currently, 50,247 acres of the 56,431 acres designated as the San Pedro Riparian National Conservation Area are owned and managed by the United States....³⁶

At oral argument, the United States indicated it owned approximately 51,234 acres of land on November 18, 1988, when the SPRNCA was established.

Subsequently, the United States filed the affidavit of an employee of the BLM. The affidavit is discussed below. The affiant opined that the BLM held 54,087 acres of land at the time of designation of the SPRNCA, and that currently, the SPRNCA contains 56,170 acres of federal land.

Section 105 (16 U.S.C. § 460xx-4) states in pertinent part as follows:

LAND ACQUISITION. The Secretary may acquire lands or interests in lands within the boundaries of the conservation area by exchange, purchase, or donation, except that any lands or interests therein owned by the State or local government may be acquired by donation or exchange only....

The Special Master finds that Congress intended that the SPRNCA could be enlarged after November 18, 1988, by exchanges, purchases, or donations. The record shows these activities have been ongoing since then. This finding explains the expansion of the SPRNCA, after its creation, but the conflicting acreage numbers remain.

The Special Master finds that a genuine issue of material fact exists as to how many acres of federal land comprised the SPRNCA on November 18, 1988.

2. The Priority of a Reserved Water Right

It is established that a federal reserved water right “vests on the date a reservation is created.” The United States Supreme Court “has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water **which vests on the date of the reservation** and is superior to the rights of future appropriators.”³⁷

³⁶ U.S. Statement of Undisputed Material Facts Nos. 10, 11, and 12. SRP denied these statements of fact and claimed they are immaterial in this briefing.

³⁷ 426 U.S. at 138. *See infra* n.31 and n.32 (emphasis added).

The Special Master finds that the date of priority of November 18, 1988, does not attach to lands acquired and added to the conservation area after that date. The date of priority of a federal reserved water right for non-federal lands acquired by the United States after November 18, 1988, and added to the SPRNCA is the date of their incorporation within the conservation area.

The Act's proponents may have envisioned the enlargement of the SPRNCA in order to reach a desired size. This vision is not perfectly clear from the legislative history of the enacted legislation, but is more evident in the legislative history of the first bill introduced in May 1986, in the House of Representatives that was not enacted.³⁸ Even if true, the vision cannot trump the established principle of a reserved right's priority.

The Special Master cannot find that Congress intended to attach the November 18, 1988, date of priority to non-federal lands subsequently acquired and incorporated within the SPRNCA. The Special Master has not seen competent legal authority to support a finding that the Congress can attach a non-Indian reserved right date of priority to lands the United States does not own but might acquire in the future. The after acquired non-federal lands became subject to the Congress' powers of withdrawal and reservation only after the United States acquired their ownership.

Section 102(d) is posited as expressing a congressional intent of a single priority. The Special Master interprets this provision to be a congressional statement of the then established principle that the date of priority of a reserved water right is the date of the reservation and not to mean that the priority fixed in the Act extends to after acquired lands. This interpretation puts the Act in harmony with the law of reserved water rights that a right vests on the date of the reservation.

B. The Affidavit of Mr. Jackson C. Johnson

After the oral argument, the United States filed an affidavit prepared by Mr. Jackson C. Johnson, a specialist in geographic information systems employed by the BLM. The United States filed the affidavit pursuant to a request of the Special Master. The affidavit contains Mr. Johnson's opinions concerning the total number of acres of federal land within the SPRNCA at various historical points. Freeport-McMoRan objected to the admission of the affidavit on the grounds it does not comply with the Special Master's request and prejudices the other parties.

Arizona Rule of Civil Procedure 56(c)(1) states that summary judgment shall be granted if the papers filed "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Special Master has found that the number of acres of federal land within the exterior boundaries of the SPRNCA on November 18, 1988, is a disputed issue of material fact. Definitive evidence

³⁸ *San Pedro Riparian National Conservation Area, Hearing on H.R. 4811 before the H.R. Subcomm. on Public Lands of the Comm. on Interior and Insular Affairs*, 99th Cong., 2d Sess. 18-20 (1986) (note comments of Rep. Kolbe). See U.S. Motion for Partial Summary Judgment 3-4 and App. Exh. No. 9.

is needed to reconcile the conflicting numbers in the record. Accordingly, Mr. Johnson's affidavit is not admitted at this time, but its admission may be considered later.

VIII. REQUEST TO ADWR FOR A REPORT

Definitive information regarding the size of the SPRNCA is necessary to resolve an important issue in this case. ADWR has the expertise to collect the data. Accordingly, the Special Master will request ADWR to file a report on or before September 8, 2009, containing the following information:

1. The total number of acres of federal land within the exterior boundaries of the SPRNCA on November 18, 1988,
2. A summary description of each transaction, its nature, and the number of acres of lands acquired by the United States after November 18, 1988, and incorporated within the SPRNCA,
3. The total number of acres of federal land currently within the exterior boundaries of the SPRNCA,
4. The total number of acres of private land currently within the exterior boundaries of the SPRNCA, and
5. Any other information ADWR considers relevant and helpful concerning the history of the land area comprising the SPRNCA.

IX. FUTURE PROCEEDINGS AND TELEPHONIC CONFERENCE

This case presents a unique fact, namely, the United States holds for the benefit of the SPRNCA a certificated appropriative water right, issued pursuant to state law, "to the use of the waters flowing in the San Pedro River ... for recreation and wildlife, including fish."³⁹ The date of priority of this vested right is August 12, 1985, earlier than the priority of a reserved water right, if one is found to exist. The United States and ASARCO touched upon the effect of this state law water right.

A telephonic conference will be scheduled on April 23, 2009, at 9:30 a.m. (EST) to discuss future proceedings. These could involve more focused briefing of the relationship of the state law water right and a potential reserved right. Parties may have other issues that merit briefing or technical investigations by ADWR. Other matters for review could be the relationship between this case and *In re Fort Huachuca* and the prospects for settlement. A conference will help to plan future proceedings.

Based upon the foregoing, IT IS ORDERED:

1. Granting and denying the motions for full and partial summary judgment consistent with the determinations contained in this order,

³⁹ See Certificate of Water Right No. 90103.0000, ASARCO App. Exh. No. 23.

2. Declining admission of Mr. Jackson C. Johnson's affidavit, but its admission may be considered later,
3. Directing ADWR to file a report on or before **Friday, September 11, 2009**, containing the information described in Section VIII, and,
4. Setting a telephonic conference on **Thursday, April 23, 2009, at 9:30 a.m. (MST)** to discuss future proceedings in this case. Parties who wish to participate in the conference shall call 1-866-921-2203 and dial room number * 2743132 * (enter the * star key before and after the room number) from the telephone they will use. Each participant will bear any long distance telephonic charges.

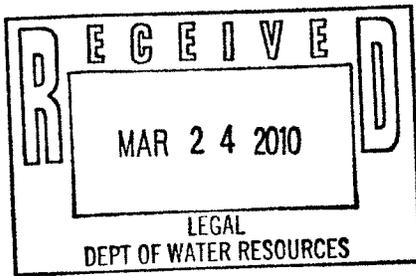
DATED: March 4, 2009.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On March 4, 2009, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-232 dated January 23, 2009.

/s/ Barbara K. Brown
Barbara K. Brown

APPENDIX A-4



RECEIVED

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MAR 18 '10

MAR 19 '10

DIST. CENTER

Clerk of the Court

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

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

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

DATE: March 19, 2010

CIVIL NO. W1-11-232
(Consolidated)

ORDER DETERMINING THE
SECOND SET OF ISSUES
DESIGNATED FOR BRIEFING

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

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master determines the second set of issues designated on May 1, 2009, for briefing.

NUMBER OF PAGES: 7.

DATE OF FILING: March 19, 2010.

Two rounds of briefing of legal issues have been held. The first round concluded with an order issued on March 4, 2009. This order concerns the second round of briefing.

I. CHRONOLOGY OF PROCEEDINGS

After considering comments from the parties, on May 1, 2009, the Special Master set for briefing the following issues:

A. Must Certificate of Water Right No. 90103.0000 be considered a water

right available to the United States to serve the stated purposes of the San Pedro Riparian National Conservation Area (“SPRNCA”)?, and

B. Are the beneficial uses of Certificate of Water Right No. 90103.0000 distinct and separate uses or do they fulfill the stated purposes of the SPRNCA?

ASARCO LLC (“ASARCO”) filed a Motion for Partial Summary Judgment. The Salt River Project (“SRP”) filed a Motion for Summary Judgment. The United States filed a Supplemental Briefing Regarding the Effect of the State Law Instream Flow Right on the Federal Reserved Water Right. The Bella Vista Water Company, Inc., Pueblo Del Sol Water Company, and the City of Sierra Vista (collectively “Sierra Vista Parties”) filed a Statement of Position.

ASARCO, Freeport-McMoRan Corporation (“Freeport-McMoRan”), Babacomari Ranch Company, LLP (“Babacomari”), SRP, San Carlos Apache Tribe and Tonto Apache Tribe (collectively “Apache Tribes”), Sierra Vista Parties, and the United States filed responsive memoranda. ASARCO, SRP, Sierra Vista Parties, and the United States filed replies. The Special Master heard argument on all motions on February 18, 2010.

For the reasons stated in the March 4, 2009, order that are incorporated in this ruling, the Special Master will issue an order and not an Arizona Rule of Civil Procedure 53(g) report at this time.

II. MUST CERTIFICATE OF WATER RIGHT NO. 90103.0000 BE CONSIDERED A WATER RIGHT AVAILABLE TO THE UNITED STATES TO SERVE THE STATED PURPOSES OF THE SAN PEDRO RIPARIAN NATIONAL CONSERVATION AREA?

The Special Master determines that Certificate of Water Right No. 90103.0000 (“CWR No. 90103.0000”) must be considered a water right available to the United States to serve the federal purposes of the SPRNCA.

A. Certificate of Water Right No. 90103.0000

The Special Master makes the following findings of fact concerning CWR No. 90103.0000:

Finding of Fact No. 1. On August 12, 1985, the Huachuca Audubon Society, Chiricahua Sierra Club, and Defenders of Wildlife filed with the Arizona Department of Water Resources (“ADWR”) an application to appropriate instream flows of the San Pedro River.

Finding of Fact No. 2. ADWR docketed the application as number 33-90103.

Finding of Fact No. 3. On May 22, 1986, the Huachuca Audubon Society, Chiricahua Sierra Club, and Defenders of Wildlife assigned Application No. 33-90103 to the Bureau of Land Management (“BLM”), an agency within the United States

Department of the Interior.

Finding of Fact No. 4. On April 3, 1992, ADWR issued to the United States Department of the Interior, BLM, Safford District Office, CWR No. 90103.0000. Permit to Appropriate No. 33-90103.0000 preceded the certificate.

Finding of Fact No. 5. CWR No. 90103.0000 grants the United States “a right to the use of the waters flowing in the San Pedro River ... for recreation and wildlife, including fish.”

Finding of Fact No. 6. The quantities of water granted by CWR No. 90103.0000 are based on the seasonal stream flow rates requested by the United States.

Finding of Fact No. 7. CWR No. 90103.0000 states that “the amount of water to which such right is entitled and hereby confirmed, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed an amount expressed as specified flow rates and cumulative totals” based on stream flows measured at two identified gages of the United States Geological Survey. The certificate enumerates the flow rates in cubic-feet per second.

Finding of Fact No. 8. CWR No. 90103.0000 states that “[t]he beneficial use will occur instream along the meandering course of the San Pedro River” and provides a general description of the main stem of the river and the lands under such right and to which the water right is appurtenant and put to beneficial use.

Finding of Fact No. 9. The date of priority of the water right vested by CWR No. 90103.0000 is August 12, 1985, the date ADWR received the application.

Finding of Fact No. 10. CWR No. 90103.0000 specifies several conditions concerning the physical use of the water right.

Conclusion of Law No. 1. ADWR granted CWR No. 90103.0000 pursuant to the surface water laws codified in title 45, chapter 1, Arizona Revised Statutes (2003).

B. Legal Analysis

The Order Designating Issues for Briefing explained that “we can brief if [CWR No. 90103.0000] must be included in the inventory of water rights available to the United States to serve” the federal purposes.¹ Diverse arguments were presented, but there is little disagreement, if any, that CWR No. 90103.0000 should be included in the inventory of rights available to the United States to provide water as required for the purposes of the conservation area.

Although the United States argued that the answer to the first issue is “no,” it explained “the state law right is also needed, notwithstanding the federal reserved right,” and “it is important for the BLM to receive water rights based on both state and federal

¹ Order Designating Issues for Briefing 2 (May 1, 2009).

law.... [b]oth of these distinct water rights must be given effect.”² SRP acknowledged that CWR No. 90103.0000 “is ... part of the inventory of water rights available to the United States to satisfy the federal purposes of the SPRNCA.”³ The other parties agreed.

The Arizona Supreme Court has held that vested appropriative water rights “are property rights” of the holder entitled to due process constitutional protections.⁴ CWR No. 90103.0000 is a substantive property right of the United States that cannot be overlooked or disregarded in the analysis of water rights available to serve the purposes of the conservation area.

Conclusion of Law No. 2. CWR No. 90103.0000 is a perfected vested appropriative property right of the United States to surface water.

ASARCO argued that CWR No. 90103.0000 must be considered in order to determine if this water right and others are sufficient to fulfill all the federal purposes of the riparian area. As explained in the analysis of the second issue, there is an overlap between the beneficial uses of CWR No. 90103.0000 and the federal purposes of the SPRNCA.

The certificate’s beneficial uses are recreation and wildlife, including fish. This water right should be examined to determine if it fulfills the federal purposes of protection of “wildlife” and “recreational resources.” No implication or insinuation is made that CWR No. 90103.0000 fulfills any of the other federal purposes of the SPRNCA. However, because the vested beneficial uses and, strictly speaking, two of the federal purposes appear to be similar, this is a reason to include CWR No. 90103.0000 in the inventory of available water rights.

Freeport-McMoRan and Babacomari argued that CWR No. 90103.0000 must be examined to determine if unappropriated water was available for the Congress to reserve when it designated the SPRNCA in November 1988. The United States addressed this argument in its reply. The question of whether unappropriated water existed on the date of the establishment of the SPRNCA will likely be raised in the quantification phase of this case when evidentiary light will be shed on the issue. In this order, the Special Master does not make any findings concerning this issue.

III. ARE THE BENEFICIAL USES OF CERTIFICATE OF WATER RIGHT NO. 90103.0000 DISTINCT AND SEPARATE USES OR DO THEY FULFILL THE STATED PURPOSES OF THE SAN PEDRO RIPARIAN NATIONAL

² U. S. Supplemental Briefing Regarding the Effect of the State Law Instream Flow Right on the Federal Reserved Water Right 2, 3 and 5 (Aug. 31, 2009).

³ SRP’s Reply in Support of Motion for Summary Judgment 10 (Feb. 11, 2010).

⁴ *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992); *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 205, 972 P.2d 179, 189 (1999) (“[T]he water rights of the parties in the Gila and Little Colorado general stream adjudications are vested substantive property rights.”).

CONSERVATION AREA?

The Special Master determines that the beneficial uses of CWR No. 90103.0000 are distinct and separate uses that partially, but not fully, fulfill the federal purposes of the SPRNCA to the extent water is required.

Parties focused on the extent to which CWR No. 90103.0000 fulfills all the federal purposes of the conservation area. In the first briefing round, the Special Master determined that the federal purposes of the SPRNCA “are the protection of the riparian area and the aquatic, wildlife, archeological, paleontological, scientific, cultural, educational, and recreational resources of the conservation area.”⁵

On the other hand, the beneficial uses of CWR No. 90103.0000 are “recreation and wildlife, including fish.” These are the beneficial uses authorized in A.R.S. §§ 45-151(A), 45-157(B)(4), and 45-181(1) for the appropriation of surface water.

Arguments posited that the United States planned, as it amended and perfected its Application to Appropriate No. 33-90103, that the beneficial uses of the application were meant to serve the broader purposes of the SPRNCA that Congress subsequently legislated. It was argued that CWR No. 90103.0000 fulfills the federal purposes. One response to this position conceded “there is some overlap” between the beneficial uses of CWR No. 90103.0000 and the federal purposes of the SPRNCA.⁶

ASARCO cited several of the BLM’s reasons in support of the instream flow application reported in the BLM’s *Assessment of Water Conditions and Management Opportunities in Support of Riparian Values* (“Assessment Report”).⁷ ASARCO argued that the “BLM’s justification for this instream flow right also commends an expansive interpretation of the Certificate’s authorized uses.”⁸

Finding of Fact No. 11. The BLM’s Assessment Report is dated May 1987.

Finding of Fact No. 12. By letter dated February 16, 1989, the BLM submitted a copy of its Assessment Report to ADWR to include in the file of Application to Appropriate No. 33-90103.⁹ ADWR received the report on March 1, 1989.

Finding of Fact No. 13. The preface of the Assessment Report states in part that “[w]hereas water resources in the San Pedro River properties provide a useful focal point for many resource values and management issues, the report by no means reflects all of

⁵ Order Determining Initial Issues for Briefing 8 (Mar. 4, 2009).

⁶ SRP’s Response to Motions for Summary Judgment 7 (Dec. 7, 2009). The Apache Tribes agreed. *See* Apache Tribes’ Response to Motions for Summary Judgment 4 (Dec. 21, 2009).

⁷ A copy of a portion of the report is provided in ASARCO’s Appendices to its Motion for Partial Summary Judgment (hereinafter designated “ASARCO Appendices”), Vol. 1, Tab 1.

⁸ ASARCO’s Motion for Partial Summary Judgment 14 (Aug. 31, 2009). The citations are provided in ASARCO’s statements of fact nos. 4 - 16 in support of its motion.

⁹ A copy of the letter is provided in ASARCO Appendices, Vol. 1, Tab 3.

the issues and concerns involved in land use planning and management.”

The dates of the Assessment Report, establishment of the SPRNCA, and submission of the report to ADWR occurred within a period of 22 months. The Assessment Report mentioned the “proposed [Congressional] legislation” and quoted provisions concerning the purposes of the SPRNCA that turned out to be correct.¹⁰ The references indicate that when it was preparing the Assessment Report the BLM was aware of proposed Congressional legislation of purposes and management plans.

The Special Master has carefully read the submitted portions of the Assessment Report. The Special Master cannot find that CWR No. 90103.0000 and its history commend “an expansive interpretation” of the authorized uses of recreation and wildlife, including fish to encompass all the purposes of the SPRNCA. Such an interpretation requires a quantum leap of reasoning that cannot be made.

First, although aware of proposed legislation concerning purposes and management plans, the BLM never amended its application to include specifically the protection of archeological, paleontological, scientific, cultural, and educational values. The Assessment Report mentioned some of these terms, but the application to appropriate did not request the protection of these values as proposed beneficial uses.

Finding of Fact No. 14. By letter dated December 3, 1987 (eleven months prior to the establishment of the SPRNCA), the BLM amended the proposed uses of its appropriative application to “wildlife and fisheries including wildlife and riparian habitat protection” and “recreation, including aesthetics.”¹¹

Second, the beneficial uses of CWR No. 90103.0000 are recreation and wildlife, including fish. The certificate is silent about other uses or values.

Reference was made to the definition of “instream flow” articulated in ADWR’s *A Guide to Filing Applications for Instream Flow Water Rights in Arizona* (Dec. 1991) (“ADWR’s Guide”).¹² The guide provided criteria for granting CWR No. 90103.0000.

Finding of Fact No. 15. ADWR’s Guide states on page 1 that “[i]nstream flow, as defined in this report, is the maintenance flow necessary to preserve instream values such as aquatic and riparian habitats, fish and wildlife and water-based recreation in a particular stream or stream segment.”

ADWR’s Guide defines the term “instream flow” and not “instream flow water right.” An instream flow is a maintenance flow that preserves instream values, while a water right possesses discrete attributes and serves approved beneficial uses.

¹⁰ Assessment Report 51 and 52, n.7, *supra*. One reference is to “a management plan” for the “protection of the riparian area and the aquatic, wildlife, archaeological, paleontological, scientific, cultural, educational, and recreation resources and values of the conservation area.”

¹¹ A copy of the letter is provided in ASARCO Appendices, Vol. 1, Tab 2.

¹² A copy of ADWR’s Guide is provided in ASARCO Appendices, Vol. 1, Tab 6.

The Special Master cannot find that ADWR's Guide defines, as expansively as claimed, the uses of recreation and wildlife, including fish when they involve an instream flow water right. Supporting this determination are the facts that (1) the guide refers to recreation and wildlife, including fish on pages 5, 8, and 12, (2) the glossary (page 35) defines a "beneficial use" that can be accomplished without diversion as "fish, wildlife and recreation uses," and (3) Appendix A (page 37) is a sample application that lists only these uses. The definition of instream flow on the first page is not repeated thereafter.

The Special Master finds no reasonable basis to conclude that the authorized uses of CWR No. 90103.0000 include or encompass the protection of archeological, paleontological, scientific, cultural, and educational values. The Special Master further finds, based on the record of this briefing, that CWR No. 33-90103.0000's beneficial uses overlap with some of the federal purposes of the conservation area.

IV. DETERMINATIONS OF THE SPECIAL MASTER

The Special Master finds and determines that:

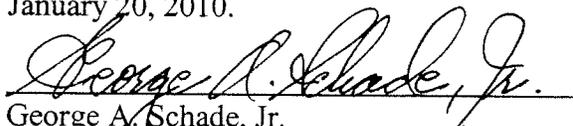
1. CWR No. 90103.0000 must be considered a water right available to the United States to serve the federal purposes of the SPRNCA, and
2. The beneficial uses of CWR No. 90103.0000 are distinct and separate uses that partially, but not fully, fulfill the federal purposes of the SPRNCA to the extent water is required.

Accordingly, IT IS ORDERED granting and denying all motions for summary judgment consistent with the determinations contained in this order.

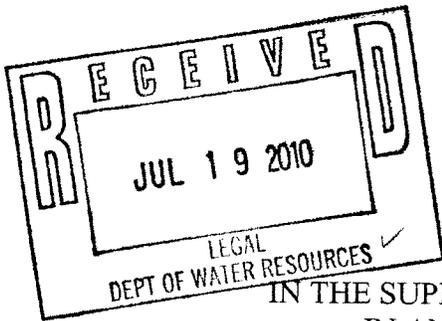
DATED: March 19, 2010.


GEORGE A. SCHADE, JR.
Special Master

On March 19, 2010, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-232 dated January 20, 2010.


George A. Schade, Jr.

APPENDIX A-5



RECEIVED PROCESSED
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DIST. CENTER Clark of the Court

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

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

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

DATE: July 14, 2010

CIVIL NO. W1-11-232
(Consolidated)

ORDER DIRECTING THE
UNITED STATES TO AMEND
ALL ITS STATEMENTS OF
CLAIMANT, DIRECTING THE
ARIZONA DEPARTMENT OF
WATER RESOURCES TO
COMPLETE TECHNICAL WORK,
AND DESIGNATING A
STEERING COMMITTEE

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

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master directs the United States to amend its statements of claimant to identify all claimed water rights and their attributes, including reserved and state law rights, for the San Pedro Riparian National Conservation Area, directs the Arizona Department of Water Resources to complete certain technical work concerning the claims of the United States, and designates a steering committee.

NUMBER OF PAGES: 5.

DATE OF FILING: July 14, 2010.

The Special Master invited the parties to submit comments and recommendations concerning the next phase of this case. The Special Master has considered all the comments in crafting the following steps to advance this case.

A. Amendments to the Claims of the United States

The 1991 Final Hydrographic Survey Report for the San Pedro River Watershed (“San Pedro HSR”) provides a 31-page report and two primary watershed file reports describing the water right claims of the United States for the conservation area.¹ The Special Master believes the information is not only limited in light of subsequent statutory amendments to A.R.S. §45-256 but also is likely outdated in large part.

The legislature amended A.R.S. §45-256 in 1995. The amendments direct ADWR to provide information that was not required for the 1991 San Pedro HSR. The information in the HSR is at least 20 years old. Proceeding on the basis of incomplete and outdated information does not fulfill the objectives of a general stream adjudication.

On February 1, 2006, the United States filed a second amendment to its Statement of Claimant No. 39-13610 “quantify[ing] the federal reserved water right” for the San Pedro Riparian National Conservation Area (“SPRNCA”).² The amendment lists dams, ponds, seeps, springs, tanks, and wells. The Arizona Department of Water Resources (“ADWR”) has not reported on this information.

Since then, the Special Master has determined issues of federal law withdrawal, reservation, uses, and priority and the status of a vested state law water right. This case has progressed to a point where the quantification of claimed rights must be addressed.

A common thread running through the majority of the comments is the need to have a comprehensive updated statement of all the water rights and their attributes, including reserved and state law rights, which the United States claims for the SPRNCA. Furthermore, the updated information should allow ADWR to prepare a report consistent with A.R.S. § 45-256.

The United States suggests an evidentiary hearing process while other parties suggest the filing of comprehensive updated claims and their review by ADWR. An evidentiary hearing process might speed this case, but it would entail jumping over steps required by the adjudication statutes, thereby injecting potentially fatal elements into this case.³

The Special Master will request the United States to amend its statements of

¹ Vol. 1, Hydrographic Survey Report for the San Pedro River Watershed 465-96 (Nov. 20, 1991); vol. 3, 2-45 (WFR 111-23-AAA-001) and 2-52 (WFR 111-24-CCB-011).

² Letter of Patrick Madigan, Field Manager, Arizona Bureau of Land Management, to ADWR (Jan. 31, 2006). The letter is part of the amendment submitted to ADWR.

³ Although not adopted, the suggestion of the United States is inventive which the Special Master asked the parties to be in their comments.

claimant for all water rights and their attributes for the conservation area, including claimed reserved and state law rights, taking into consideration the determinations made in the two rounds of issue briefing. The Special Master will provide the United States nine months to file its amendments, but earlier compliance is strongly encouraged.

B. ADWR Technical Report

The majority of the comments suggest that ADWR prepare a report consistent with A.R.S. § 45-256. The legislature amended A.R.S. § 45-256(B) to require that an HSR contain certain information that was not required when the 1991 San Pedro HSR was prepared. For example:

“The report shall list all information that is obtained by the director and that reasonably relates to the water right claim or use investigated. The report shall also include the director’s proposed water right attributes for each individual water right claim or use investigated as prescribed by this article.”

The 1991 HSR does not contain information regarding ADWR’s “proposed water right attributes for each” claimed right. This information should be compiled at this time, as the adjudication is subject to the amended statutes.⁴

ADWR indicates it can complete the following technical work:

“(1) summarizing the federal claims as amended, as well as the current state-based water rights and claims, (2) evaluating the methodologies used by the United States to quantify its federal claims, and (3) evaluating the quantities claimed for the state-based water rights and claims through field investigations.”⁵

Some parties commented that ADWR does not have the expertise to analyze the quantification of federal reserved rights.⁶ ADWR is charged with providing the requisite technical studies and investigations.⁷ Examining the attributes of reserved water rights is within the scope of its statutory duties set forth in A.R.S. § 45-256. It is premature to assume it is not within its competency. Moreover, the adjudication of reserved water claims is a crucial task Arizona has undertaken. Until proven otherwise, the expectation is that ADWR can do its job.

The Special Master will direct ADWR both to prepare a report consistent with

⁴ See *In re Dos Cabezas Power Dist.*, 17 Ariz. App. 414, 420, 498 P.2d 488, 494 (1972).

⁵ ADWR’s Response to Comments Regarding the Next Phase of this Contested Case 2 (May 7, 2010).

⁶ The position is based on A.R.S. § 45-256(A) which states that “the master shall request technical assistance from [ADWR] in all aspects of the general adjudication with respect to which [ADWR] possesses hydrological or other expertise.”

⁷ *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 214, 972 P.2d 179, 198 (1999).

A.R.S. § 45-256(B) and undertake the specific work ADWR indicates it can do.

The United States commented regarding the Court's October 21, 2003, order concerning the notice requirements for a contested case supplemental HSR. The United States posits that ADWR does not have the staff and funds to generate and distribute the report as the order directs. While understandable, this issue does not have to be addressed now because circumstances could change by the time ADWR's report is due.

C. Contested Case Steering Committee

This case presents substantive legal and procedural issues whose resolution would benefit by having a formal process that facilitates litigation management. Pre-Trial Order No. 1 Re: Conduct of Adjudication encourages the use of steering committees.⁸ The Special Master will designate a steering committee consisting of the parties who have so far actively participated in this case to discuss proper and feasible ways to resolve legal and procedural issues that exist currently or may arise in the future. The committee can submit recommendations to the Special Master that concern briefing of issues, completion of technical work by ADWR, and other matters that will advance this case.

The steering committee is not expected to function strictly in accordance with all the requirements set forth in Paragraph 9 of Pre-Trial Order No. 1 as modified, as this committee is limited to acting in this contested case. The committee is neither a settlement nor a trial committee. It is intended to foster discussions, generate ways to resolve disputed legal and procedural issues, and manage litigation as the issues become more complex, and we undergo a period of limited resources. A party may decline, without explanation, to participate on the committee. A replacement will be appointed. The Special Master will not appoint a chair leaving that decision and selection to the members. The committee's meetings shall be open to all claimants.

D. ADWR Land Status Report

On July 2, 2010, ADWR filed its Land Ownership Within the San Pedro Riparian National Conservation Area Report that will help to determine the land size and ownership status of the area. Depending on the comments parties may file concerning the report, further hearings may be held.

IT IS ORDERED:

1. Designating a steering committee consisting of the following parties: United States Bureau of Land Management, ASARCO LLC, Babacomari Ranch Company, LLLP, Freeport-McMoRan Corporation, Salt River Project, San Carlos Apache Tribe and Tonto Apache Tribe, and the Sierra Vista Parties. Each party shall have one representative on the committee. A party may decline, without explanation, to be a member of the committee. The Special Master will appoint a replacement.

⁸ Pre-Trial Order No. 1 Re: Conduct of Adjudication ¶ 9 (May 30, 1986), modified (Apr. 14, 2010).

On or before **October 15, 2010**, the steering committee shall meet initially to discuss proper and feasible ways to resolve legal and procedural issues that exist currently or may arise in the future. The committee is not expected to function strictly in accordance with all the requirements set forth in Paragraph 9 of Pre-Trial Order No. 1 as modified.

The committee shall meet as often as the members deem appropriate. Meetings shall be open to all claimants. The committee can present recommendations that concern issue briefing, completion of technical work by ADWR, and other matters that will advance this case.

2. On or before **April 15, 2011**, the United States shall amend its statements of claimant to identify all claimed water rights and their attributes, including reserved and state law rights, for the conservation area. The amendments shall provide information and data that will allow ADWR to prepare a report consistent with A.R.S. § 45-256. The amendments shall take into account the determinations made in the Special Master's orders dated March 4, 2009, and March 19, 2010.

3. On or before **April 16, 2012**, ADWR shall review the amended claims and file a report consistent with A.R.S. § 45-256. The report shall include summarizing the amended claims for reserved and state law water rights, evaluating the methodologies used by the United States to quantify its federal claims, and evaluating the quantities claimed for the state law water rights and claims through field investigations.

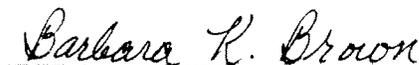
4. The foregoing deadlines for the United States and ADWR are maximum timelines. If feasible, earlier compliance is strongly encouraged.

5. The Special Master may schedule telephonic conference as requested.

DATED: July 14, 2010.


GEORGE A. SCHADE, JR.
Special Master

On July 14, 2010, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-232 dated January 20, 2010.


Barbara K. Brown

APPENDIX A-6

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

IN CHAMBERS (X) IN OPEN COURT ()

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

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

DATE: August 16, 2011

CIVIL NO. W1-11-232
(Consolidated)

ORDER CONCERNING THE
COMPLIANCE OF THE UNITED
STATES WITH THE SPECIAL
MASTER'S JULY 14, 2010 ORDER

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

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master rules on the compliance of the United States with the July 14, 2010 order.

NUMBER OF PAGES: 5.

DATE OF FILING: August 16, 2011.

ASARCO LLC ("ASARCO") asked the Special Master to determine whether the United States' Notice of Submission of Third Amended Statement of Claimant and Accompanying Exhibit 1 ("Notice") filed on April 19, 2011, complies with the Special Master's July 14, 2010 order. The United States and the Salt River Project ("SRP") filed responses to ASARCO's motion. The San Carlos Apache Tribe and Tonto Apache Tribe joined in SRP's response. Freeport-McMoRan Corporation joined in ASARCO's replies to the responses of the United States and SRP.

I. Compliance of the United States with the July 14, 2010 Order

ASARCO claims that the United States should have:

A. Amended the federal reserved right claim to account for the State of Arizona's Certificate of Water Right No. 90103.0000 and, second, conform to the federal purposes of the conservation area determined in the March 4, 2009 order,

B. Amended its claims to state law based rights with current information,

C. Limited the amount of water claimed for the reserved right to unappropriated water when the conservation area was established or when lands acquired after November 18, 1988 ("after-acquired lands"), were incorporated within the area, and

D. Identified the dates on which after-acquired lands were incorporated within the conservation area.

Concerning the first alleged shortcoming, the Special Master has not ruled that the state certificated water right knocks out or trumps the claimed reserved water right. The Special Master determined that the certificated right "must be considered a water right available to the United States to serve the federal purposes of the SPRNCA."¹ Both water rights remain in cue for adjudication.

The issues of water quantities, water uses, and federal purposes raised by the existence of the certificated right and the federal reserved water right claim will either be litigated or resolved by agreement. The Arizona Department of Water Resources ("ADWR") is tasked with "evaluating the methodologies used by the United States to quantify its federal claims, and evaluating the quantities claimed for the state law water rights and claims through field investigations."² Evidence and briefing will be required to resolve these issues which promise to be complex.

Concerning the second alleged deficiency, in its Notice, the United States stated that it will provide to ADWR "all necessary technical information enabling it to report the amount of water necessary to meet federal purposes on or before April 16, 2012."³ As the report is due on that date, it is expected that the United States will provide the information with sufficient time for ADWR to analyze it and prepare its report.

The United States also stated in the Notice that "the information supporting the United States' Statements of Claimant for its state law based claims as well as its reserved right claim will be made available to ADWR in order that the Department may

¹ Special Master's Order Determining the Second Set of Issues Designated for Briefing 2 (March 19, 2010).

² Special Master's Order (full title omitted) 5 (July 14, 2010).

³ Notice 3 (April 19, 2011).

issue its report in compliance with new statutory requirements.”⁴ These avowals were repeated in the response of the United States as follows:

[T]o the extent ADWR needs any information from the United States supporting these claims, assistance will certainly be provided [to] the Department....

The July 2010 Order, at 3-4, directed ADWR “both to prepare a report consistent with A.R.S. § 45-256(B) and undertake the specific work ADWR indicates it can do.” The United States is prepared to assist the Department in this task....

The United States contacted the Department and informed its counsel that it will share information necessary for the Department to report and recommend the SPRNCA claim, and to do so on or before the April 16, 2012 deadline.⁵

The Special Master is concerned that ADWR’s investigatory process not be derailed or disrupted by excessive hovering over it. Taking up arguments concerning the need for and compliance with providing information, on a rolling basis, will delay, if not stymie, this case. General stream adjudications will succeed if claimants live up to their avowals, and unnecessary litigiousness is curtailed. However, intervention will be made if appropriate.

Concerning the third alleged shortcoming, the Special Master agrees with ASARCO that “[u]ntil the state law-based rights existing on November 18, 1988 (or later, for after-acquired lands) are evaluated and taken into consideration, there is no way to know how much unappropriated water (if any) was available to be reserved.”⁶ We will be in a stronger position to resolve this issue after ADWR files its report, and the adjudication of state law rights begins.

Concerning the fourth alleged deficiency, the United States claims it submitted with the Third Amended Statement of Claimant the information it asserts to be the dates of incorporation of after-acquired lands. ASARCO points to ADWR’s supplemental report filed on April 19, 2011, to show inconsistencies between the United States’ information and ADWR’s report regarding the dates of incorporation.

It appears that when ADWR filed the supplement it had not received the information the United States submitted with the third amendment. In its supplemental report, ADWR stated it had:

⁴ *Id.*

⁵ U. S. Response to ASARCO’s Motion 3, 6, and 7 (July 5, 2011).

⁶ ASARCO’s Reply to U.S. Response 10 (July 18, 2011).

“requested additional information from BLM, but no further documentation was provided. By email, counsel for BLM asserted that the deed signing date is the date of formal incorporation into SPRNCA.”⁷

ADWR now has additional information which ADWR will be directed to review and, if deemed needed and useful, include in the upcoming report. ADWR’s further analysis might resolve the discrepancies. If data discrepancies or legal arguments concerning incorporation remain, these can be taken up at a future time.

In its Notice, the United States indicated that:

“Land parcels within the SPRNCA acquired since the 1991 HSR may contain claims to water rights that were subsequently assigned to the BLM. The BLM is reviewing these parcels and will provide information on these claims, if any, that will assist ADWR in its reporting.”⁸

The relevant date is November 18, 1988. The United States should use that date in its review rather than the November 1991 date of the Final San Pedro River Watershed Hydrographic Survey Report.

II. Disclosure of Information to ADWR and Litigants

ASARCO argues that the United States is obligated, pursuant to Arizona Rule of Civil Procedure 26.1(b)(2), to disclose to the litigants in this case the information supporting the government’s water right claims that will be provided to ADWR.

The June 28, 2007 order directed that “[d]isclosure statements shall be limited to matters concerning the issues designated for briefing.”⁹ The order designated six issues for briefing. It is argued that subsequently the scope of disclosures was expanded when the Special Master ordered the United States to amend its statements of claimant in order to proceed with the quantification phase.

The Special Master disagrees. So far in this case, disclosure statements and the continuing duty to disclose run when specific issues are designated for briefing. The directive to amend the claims, taking into consideration the rulings previously made, neither expanded the scope of disclosures nor triggered the continuing duty to disclose.

This framework assures efficiency, economy, and timeliness, important considerations in adjudications. In order to produce useful and timely reports, ADWR’s investigation of water right claims - a continuously moving process with many parts - must have a an appropriate and reasonable degree of freedom from litigiousness.

⁷ ADWR’s Supplement to Report Entitled “Land Ownership Within the San Pedro Riparian National Conservation Area” 3 (April 19, 2011).

⁸ Notice 3-4, fn. 2.

⁹ Scheduling Order Designating Initial Issues for Briefing 4, ¶ 2(A) (June 28, 2007).

ASARCO avows it did not receive a copy of the read-only CD-ROM that the United States submitted to ADWR with the Third Amended Statement of Claimant (part of Attachment D). The Special Master will direct the United States to provide a copy of the CD-ROM to ASARCO, and upon request, to any other litigant in this case.

III. Correction of the September 26, 2006 Case Management Order

ASARCO correctly notes that Watershed File Report No. 111-17-063, listed on the first page of Attachment A, no. 11, of the September 26, 2006 Case Management Order, should be Watershed File Report No. 112-17-063. The order will be corrected.

IT IS ORDERED:

1. Directing the United States to provide ASARCO a copy of the read-only CD-ROM that was part of the Third Amended Statement of Claimant. Upon request, the United States shall provide a copy of the CD-ROM to any other litigant in this case.
2. Directing the United States to work with ADWR in a timely and responsive manner to provide information for ADWR's report due on April 16, 2012.
3. Directing ADWR to review the land ownership information submitted by the United States in the Third Amended Statement of Claimant and supplement ADWR's land ownership reports if deemed needed and useful.
4. Denying ASARCO's motion consistent with the foregoing determinations.
5. Correcting nunc pro tunc the September 26, 2006 Case Management Order to show Watershed File Report No. 112-17-063 listed on page 1 of Attachment A.

DATED: August 16, 2011.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On August 16, 2011, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-232 dated July 25, 2011.

/s/ George A. Schade, Jr.
George A. Schade, Jr.