

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

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

NOS. W-1 – W- 4

CONTESTED CASE NO. W1-11-
2664

ORDER GRANTING MOTION
FOR PARTIAL SUMMARY
JUDGMENT IN PART AND
DENYING IN PART

In this contested case, *In re Redfield Canyon Wilderness Area*, the Court has considered the *Motion for Partial Summary Judgment* filed by Freeport Minerals Corporation (dated September 21, 2015), which was joined by the Arizona State Land Department and joined in part by Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association, the responses, replies and oral arguments made by the parties with respect to Statement of Claimant No. 39-14413 (the "SOC"). The motion and this Order only concern the United States' claims for federal reserved rights; neither addresses the United States' claims asserted under other statements of claimant.

In 1964, Congress enacted the Wilderness Act which established the National Wilderness Preservation System to be "composed of federally owned areas to be designated by the Congress as wilderness areas."¹ In the Arizona Desert Wilderness Act of 1990², Congress designated

¹ Pub. L. No. 88-577, 78 Stat. 890, codified as amended in 16 USCS §§ 1131-1136 (LexisNexis/Michie 2000).

approximately 6,600 acres of public lands in Graham and Cochise Counties, Arizona as a wilderness area, to be known as the Redfield Canyon Wilderness, and a component of the National Wilderness Preservation System. The United States filed the SOC to assert a federal reserved water claim for 3,909.44 acre feet of water per year plus “all water from sources not inventoried” in the Redfield Canyon Wilderness. The claimed sources of water include a stream in Redfield Canyon, tributary to the San Pedro River, 37 springs, one well and four tanks or storage areas (collectively “the contested flow”). Specifically, those water sources and their respective locations, where provided, are as follows:

Springs	Location						
Barrel Hoop Spring	T	11	S	R	20	E	Sec 36
Cedar Spring	T	11	S	R	20	E	Sec 32
Deer Seep	T	11	S	R	20	E	Sec 36
Haseanno Spring	T	12	S	R	20	E	Sec 01
Lost Trail Spring	T	11	S	R	20	E	Sec 34
Lower Tio Cruz Spring	T	11	S	R	20	E	Sec 35
Miller Spring	T	11	S	R	20	E	Sec 22
Rim Slope Spring	T	11	S	R	20	E	Sec 36
Swamp Springs Canyon Spring	T	11	S	R	20	E	Sec 34
Tio Cruz Spring	T	12	S	R	20	E	Sec 01
Unnamed Springs (20)							
Unnamed Spring	T	11	S	R	20	E	Sec 22
Unnamed Spring	T	11	S	R	20	E	Sec 32
Unnamed Spring	T	11	S	R	20	E	Sec 36
Unnamed Springs	T	11	S	R	20	E	Sec 36
Upper Walnut Spring							
Walnut Creek	T	11	S	R	20	E	Sec 31
Whiskey Spring	T	11	S	R	20	E	Sec 36
Well							
Miller Well	T	11	S	R	20	E	Sec 35
Stockponds							
Coati Masonry	T	11	S	R	20	E	Sec 30
Redfield Tank	T	11	S	R	19	E	Sec 36
Two Holer Masonary	T	11	S	R	20	E	Sec 29

² Pub. L. No. 101-628, § 101(a)(24), 104 Stat. 4471.

Upper Rim Tank

T 11 S R 21 E Sec 31

The United States can acquire a reserved right in unappropriated water when it withdraws its land from the public domain and reserves it for a federal purpose pursuant to its authority under the Commerce Clause, Art. I, § 8 (which permits federal regulation of navigable streams) and the Property Clause, Art. IV, § 3 (which permits federal regulation of federal lands). *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The Arizona State Land Department, which manages state trust land included within the boundaries of the Redfield Canyon Wilderness Area, argues that the United States is not entitled to a federal reserved water right for land that it does not own.

No dispute exists that the legal descriptions provided in the SOC for certain of the contested flows describe land not owned by the federal government. The Arizona State Land Department identified the following land as land to which State of Arizona holds title: (1) certain parcels of land in Section 20, Township 11 South, Range 20 East and Section 31, Township 11 South, Range 20 East; (2) Section 36, Township 11 South, Range 19 East; and (3) Section 32, Township 11 South, Range 20 East. The Court agrees that federal government cannot reserve water rights with respect to land that the federal government did not own at the time of the passage of the Wilderness Area and has not acquired in the intervening 25 years. Thus, the United States is not entitled to federal reserved water rights for contested flows on non-federal land. The federal reserved water claims for water are dismissed for the following contested flows:

Redfield Tank	T 11 S R 19 E Sec 36
Cedar Spring	T 11 S R 20 E Sec 32
Unnamed Spring	T 11 S R 20 E Sec 32

Freeport Minerals Corporation moves to dismiss the federal reserved water rights for the remaining contested flows arguing that the United States has failed to provide any evidence

quantifying the flow or proving that the absence of the claimed water would entirely defeat the purpose of the reservation. The United States responds that neither the location of point sources nor the quantity of water must be determined in a wilderness area because it is entitled to federal reserved water rights for all springs and naturally occurring water where Congress has expressly reserved water rights. The Court declines to accept this argument because it is not consistent with the language of the controlling statute and no evidence has been presented showing that the sustainability of the wilderness area depends upon a reservation of all of the water.

The language of the Wilderness Act does not support a finding that all of the unappropriated water in the Redfield Wilderness Area is reserved as a matter of law. Whether there has been a federal reservation of water, and the quantity of water reserved, are questions of legislative intent. *United States v. New Mexico*, 438 U.S. 696, 699 (1978). The Arizona Desert Wilderness Act of 1990 states in pertinent part:

(g) WATER. - (1) With respect to each wilderness area designated by this title, Congress hereby reserves a quantity of water sufficient to fulfill the purposes of this title. The priority date of such reserved rights shall be the date of the enactment of this Act.

(2) The Secretary and all other officers of the United States shall take steps necessary to protect the rights reserved by paragraph (1), including the filing by the Secretary of a claim for the quantification of such rights in any present or future appropriate stream adjudication in the courts of the State of Arizona in which the United States is or may be joined and which is conducted in accordance with the McCarran Amendment (43 U.S.C. 666).

Based on this clear and unambiguous language, Congress explicitly reserved water and it identified the amount water reserved as that “quantity of water sufficient to fulfill the purposes of this title.” As noted at the hearing of March 2, 2017, the Court cannot find that Congress reserved all available waters though such language without evidence establishing that all available waters are needed to fulfill the needs of the reservation. Even when Congress passed a

law that reserved the “lands and waters” of a national recreational area, the court required a “quantification of the amount necessary to fulfill the purposes of the reservation.” *Potlatch Corp. v. United States*, 12 P.3d 1260, 1270 (Idaho, 2000). See also, *In re the General Adjudication of All Rights to Use Water in Gila River System and Source*, 195 Ariz. 411, 422 989 P.2d 739,750 (1999) (“To solve the conflict and uncertainty that [federal] reserved rights engender, we must quantify them, for we may not ignore them.”). More importantly, the Wilderness Act expressly directs that quantification of the reserved water should occur in this adjudication. It also defines the appropriate test to be used in the quantification process. The United States has the obligation to present evidence that quantifies that amount of water sufficient to fulfill the purposes of the Wilderness Act, which are to protect designated wilderness areas, preserve their wilderness character, and gather and disseminate information regarding their use and enjoyment as wilderness.

The claims for federal reserved water right for contested flows that are attributed to constructed impoundments and reservoirs, as opposed to naturally arising sources, are not consistent with the stated purpose of preserving the wilderness character of the Redfield Canyon Wilderness. Thus, the claims for Miller Well and the stockponds are dismissed:

Well

Miller Well	T	11	S	R	20	E	Sec	35
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Stockponds

Coati Masonry	T	11	S	R	20	E	Sec	30
Redfield Tank	T	11	S	R	19	E	Sec	36
Two Holer Masonary	T	11	S	R	20	E	Sec	29
Upper Rim Tank	T	11	S	R	21	E	Sec	31

The United States next contends that it has provided evidence of quantification for eight springs:

Deer Seep	T	11	S	R	20	E	Sec	36
Haseanno Spring	T	12	S	R	20	E	Sec	1
Lost Trail Spring	T	11	S	R	20	E	Sec	34
Lower Tio Cruz Spring	T	11	S	R	20	E	Sec	35
Rim Slope Spring	T	11	S	R	20	E	Sec	36
Swamp Springs Canyon Spring	T	11	S	R	20	E	Sec	34
Tio Cruz Spring	T	12	S	R	20	E	Sec	1
Whiskey Spring	T	11	S	R	20	E	Sec	36

Freeport Minerals Corporation challenges the adequacy of the documents submitted by the United States to create a material issue of fact. Freeport Minerals Corporation has the burden of showing that no genuine issue of material fact exists. *Schwab v. Ames Construction*, 207 Ariz. 56, ¶ 15 (App. 2004).

The United States submitted copies of public documents which are sworn statements signed by and based on the personal knowledge of Delbert Molitor on behalf of the Bureau of Land Management-Safford District that reports the diversion of thousands of gallons of water annually by wildlife for five of the springs. With respect to the remaining three springs, the United States produced a notice issued by the Arizona Department of Water Resources stating that the United States intended to appropriate 4,000 gallons per year for wildlife, and two reports quantifying spring discharge. The Court finds a triable issue of fact regarding the following:

Deer Seep	T	11	S	R	20	E	Sec	36
Haseanno Spring	T	12	S	R	20	E	Sec	1
Lost Trail Spring	T	11	S	R	20	E	Sec	34
Lower Tio Cruz Spring	T	11	S	R	20	E	Sec	35
Rim Slope Spring	T	11	S	R	20	E	Sec	36
Swamp Springs Canyon Spring	T	11	S	R	20	E	Sec	34
Tio Cruz Spring	T	12	S	R	20	E	Sec	1
Whiskey Spring	T	11	S	R	20	E	Sec	36

The United States did not request additional time under Rule 56(f), Ariz. R. Civ. P., to complete discovery before filing a response to the motion and provides no information related to

the quantification of the remaining contested flows. Accordingly, the claims for federal reserved rights are dismissed with respect to the following:

Barrel Hoop Spring	T	11	S	R	20	E	Sec	36
Miller Spring	T	11	S	R	20	E	Sec	22
Unnamed Spring	T	11	S	R	20	E	Sec	22
Unnamed Spring	T	11	S	R	20	E	Sec	36
Unnamed Springs	T	11	S	R	20	E	Sec	36
Unnamed Springs (20)								
Upper Walnut Spring								
Walnut Creek	T	11	S	R	20	E	Sec	31

IT IS ORDERED that Freeport Mineral Corporation’s Motion for Partial Summary Judgment (dated September 21, 2015) is GRANTED with respect to:

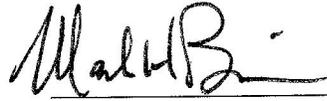
Springs	Location							
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Unnamed Springs (20)								
Unnamed Spring	T	11	S	R	20	E	Sec	22
Unnamed Spring	T	11	S	R	20	E	Sec	32
Unnamed Spring	T	11	S	R	20	E	Sec	36
Unnamed Springs	T	11	S	R	20	E	Sec	36
Upper Walnut Spring								
Walnut Creek	T	11	S	R	20	E	Sec	31
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Coati Masonry	T	11	S	R	20	E	Sec	30
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Two Holer Masonary	T	11	S	R	20	E	Sec	29
Upper Rim Tank	T	11	S	R	21	E	Sec	31

Freeport Minerals Corporation for Partial Summary Judgment is DENIED with respect to:

Deer Seep	T	11	S	R	20	E	Sec	36
Haseanno Spring	T	12	S	R	20	E	Sec	1
Lost Trail Spring	T	11	S	R	20	E	Sec	34
Lower Tio Cruz Spring	T	11	S	R	20	E	Sec	35

Rim Slope Spring	T	11	S	R	20	E	Sec	36
Swamp Springs Canyon Spring	T	11	S	R	20	E	Sec	34
Tio Cruz Spring	T	12	S	R	20	E	Sec	1
Whiskey Spring	T	11	S	R	20	E	Sec	36

DATED: March 2, 2017



The Honorable Mark H. Brain
Judge of the Superior Court