

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 If the land was withdrawn and reserved, what was the purpose(s) to be served by the reservation?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 If the land was withdrawn and reserved, did the United States intend to reserve unappropriated waters to accomplish the purpose(s) of the reservation?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.<sup>1</sup> 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.”<sup>2</sup> The request requires a look at prior practice and A.R.S. § 45-257.

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<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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

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<sup>3</sup> The Special Master’s reports are pending consideration by the Court.

<sup>4</sup> 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.”<sup>5</sup> 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.<sup>6</sup>

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

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

<sup>6</sup> 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.”<sup>7</sup> 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.<sup>8</sup>

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).<sup>9</sup>

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....

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<sup>7</sup> *Carcieri v. Salazar*, \_\_\_ U.S. \_\_\_, No. 07-526, 2009 WL 436679, at 4 (Feb. 24, 2009).

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

<sup>9</sup> 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.<sup>10</sup>

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.”<sup>11</sup> 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.”<sup>12</sup>

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:

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<sup>10</sup> *Id.* at 3-5 (emphasis added).

<sup>11</sup> 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.

<sup>12</sup>*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.

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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.<sup>13</sup>

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**.<sup>14</sup>

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

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

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<sup>13</sup> Scheduling Order 2 (June 28, 2007).

<sup>14</sup> *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.”)

<sup>15</sup> *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.<sup>16</sup>

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

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<sup>16</sup> 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’.”<sup>17</sup> 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.”<sup>18</sup>

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.”<sup>19</sup> This “distinction applies to non-Indian federal reservations.”<sup>20</sup> 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.<sup>21</sup>

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.

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<sup>17</sup> 426 U.S. at 141.

<sup>18</sup> 438 U.S. at 718.

<sup>19</sup> “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.

<sup>20</sup> *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).

<sup>21</sup> *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.”<sup>22</sup> “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.<sup>23</sup> 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.”<sup>24</sup>

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.”<sup>25</sup> “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’.”<sup>26</sup> Reserved lands “are the federal tracts

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<sup>22</sup> *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.

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

<sup>24</sup> 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.”).

<sup>25</sup> 622 F. Supp. at 854; *see also* 425 F.3d at 784.

<sup>26</sup> 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.”<sup>27</sup>

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.<sup>28</sup>

Senator John S. McCain, also a co-sponsor of the legislation, urged that “[t]his area deserves special designation.”<sup>29</sup> 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.<sup>30</sup>

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

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<sup>27</sup> 1 COGGINS & GLICKSMAN § 1:11 at 1-15, *supra*.

<sup>28</sup> 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.

<sup>29</sup> *Id.* at 30280 (statement of Sen. McCain).

<sup>30</sup> *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.”<sup>31</sup> The “priority date for a federal reserved water right is the date of the statute, executive order, or public land order establishing the reservation.”<sup>32</sup>

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.<sup>33</sup> 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.

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<sup>31</sup> 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.

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

<sup>33</sup> 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,<sup>34</sup> 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.”<sup>35</sup>

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

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

<sup>35</sup> 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....<sup>36</sup>

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.”<sup>37</sup>

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<sup>36</sup> 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.

<sup>37</sup> 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.<sup>38</sup> 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

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<sup>38</sup> *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."<sup>39</sup> 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,

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<sup>39</sup> 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