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: October 17, 2013 CIVIL NO. W1-11-232 (Consolidated) ORDER DETERMINING THE ISSUES DESIGNATED FOR BRIEFING IN THE ORDER DATED MAY 29, 2013

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 decides the two issues designated for briefing in the order dated May 29, 2013.

NUMBER OF PAGES: 10.

DATE OF FILING: October 17, 2013.

The Special Master set for briefing the following issues:

A. Is the quantity of water needed to fulfill the purposes of the San Pedro Riparian National Conservation Area subject to the standard of minimal need?

B. Is it required to determine the quantity of unappropriated water

available for use on the conservation area as of November 18, 1988, and second, as of the dates that after acquired lands were incorporated within the SPRNCA?

ASARCO LLC; Freeport-McMoRan Corporation ("Freeport-McMoRan"); Salt River Project ("SRP"); Bella Vista Water Company, Inc., Pueblo Del Sol Water Company, and the City of Sierra Vista jointly (collectively "Sierra Vista Parties"); and the United States filed dispositive motions, responses, and replies. In order to expedite this matter, the Special Master waived oral argument. After carefully considering all pleadings, the Special Master makes the following findings and determinations.

I. IS THE QUANTITY OF WATER NEEDED TO FULFILL THE PURPOSES OF THE SAN PEDRO RIPARIAN CONSERVATION AREA SUBJECT TO THE STANDARD OF MINIMAL NEED?

The Special Master determines that the quantity of water needed to fulfill the purposes of the San Pedro Riparian National Conservation Area ("SPRNCA or conservation area") is not subject to the standard of minimal need. The applicable standard is a quantity of water sufficient to fulfill the purposes of the conservation area.

Resolution of this issue turns on the interpretation of the first sentence of section 102(d) (16 U.S.C. § 460xx-1(d)) of the Arizona-Idaho Conservation Act of 1988 ("the Act") which established the conservation area.[1] This section, which became effective on November 18, 1988, states in pertinent part as follows:

> "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.…"

On March 4, 2009, the Special Master found that:

> "[S]ection 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 (footnote omitted)."[2]

The United States Supreme Court has held that the implied reservation of water rights doctrine "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."[3] In *Cappaert*, the Court held that the federal district court had

---

[1] 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 the date "November 18, 1988," for the phrase "the date of enactment of this title."

[2] Special Master's Order Determining Initial Issues Designated for Briefing at 5 (Mar. 4, 2009). The text is available at http://tinyurl.com/k4hekmn. The relevant legislative history of the Act is described in the order.

[3] *Cappaert v. United States*, 426 U.S. 128, 141 (1976).

"tailored its injunction, very appropriately, to minimal need curtailing pumping only to the extent necessary to preserve an adequate water level at Devil's Hole, thus implementing the stated objectives of the" executive proclamation that established the national monument.[4]

Two years later, the Supreme Court held in *New Mexico* that while "many of the contours of what has come to be called the 'implied-reservation-of-water doctrine' remain unspecified, the Court has repeatedly emphasized that Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more.'"[5] This standard is often referred to as the "minimal need" for quantifying a reserved water right.

The United States and SRP argue that the quantity of water needed to fulfill the purposes of the SPRNCA is not subject to the "minimal need" standard because the Congress reserved "a quantity of water sufficient to fulfill the purposes" of the conservation area. And the term "sufficient" is not synonymous with "minimal need."

The other parties counter that the minimal need standard applies to both implied and express reserved water rights. It is argued that in *Cappaert*, the Supreme Court affirmed the federal district court's application of minimal need to quantify a reserved water right that the Supreme Court held was "explicit, not implied."[6]

The Special Master bases his determination that the applicable standard for the SPRNCA is sufficient water to fulfill the purposes of the conservation area, and not minimal need, on the following grounds.

First, as the Special Master stated in March 2009, 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 quantity of water reserved is a question of congressional intent. "Legislative intent is reflected first and foremost in the language of the statute itself," and there "is no need to go beyond the language of the statute, when that language is clear and unambiguous."[8]

The word "sufficient" is plain and unambiguous. The word "sufficient" cannot be overlooked or faded; it must be given effect.[9]

---

[4] *Id*.

[5] *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

[6] 426 U.S. at 140.

[7] Special Master's Order, *supra*, n.2, at 5 (citing *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009)).

[8] *Potlatch Corp. v. United States*, 134 Idaho 912, 914, 12 P.3d 1256, 1258 (Idaho 2000).

[9] 134 Idaho at 915, 12 P.3d at 1259 ("Standard rules of statutory interpretation require this Court to give effect to the legislature's intent and purpose, and to every word and phrase employed."). The Idaho Supreme Court was interpreting the federal Wild and Scenic Rivers Act of 1968.

Second, the Act was enacted in 1988, twelve years after *Cappaert* and ten after *New Mexico*. As the Sierra Vista Parties state, "when the Act was passed the minimal need standard - as set forth in *Cappaert* and *New Mexico* (citations omitted) - was well known by Congress," and "[e]ven if they were not, in construing statutes, courts presume Congress is aware of prior judicial decisions."[10] The Congress not only did not choose to remain silent on the issue but specified "a quantity of water sufficient to fulfill the purposes" of the SPRNCA.

We do not have to presume that Congress was aware of *Cappaert* and *New Mexico* because it appears Congress was indeed aware of these decisions. The legislative history shows that members of Congress who actively worked for passage of the Act understood federal reserved water rights and their interpretation by courts. Then Arizona Representative Jon Kyl participated in the passage of the Act. The Special Master could take judicial cognizance of former Senator Kyl's reputation in water law, but the legislative record settles this point.

On April 30, 1987, Arizona Senator Dennis DeConcini, in a written statement submitted to the Subcommittee on Public Lands, National Parks and Forests of the Senate Committee on Energy and Natural Resources, stated that "Representative Kyl has a long history of experience in Federal reserve water rights."[11] On the same day, Representative Kyl testified before the subcommittee as follows:

> I, too, am strongly in support of this bill, and when I first considered co-sponsoring it with Congressman Kolbe I inquired about the matter of reserved water rights because that had been a matter of concern to me during the time that I practiced law in Arizona.…
>
> 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, the legislative branch, which specifies what it intends to create when it creates some kind of a Federal reservation and not leave that issue up to the courts because I happen to believe that the Congress has a better ability to determine what the test for determining how much that water right should be and the circumstances of it and so forth than do the courts.
>
> As result, 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.[12]

---

[10] Sierra Vista Parties' Resp. at 2 (Aug. 23, 2013).

[11] *Hearing Before Subcomm. on Public Lands, Nat'l Parks and Forests of S. Comm. on Energy and Nat. Res.*, 100th Cong. 1st Sess. at 43 (Apr. 20, 1987). A copy of this document is available in initial disclosure no. 10 of the U.S. (Errata Jan. 23, 2008).

[12] *Id*. at 50 (statement of Rep. Kyl, Member, House of Rep.).

Representative Kyl's written statement dated April 30, 1987, said in pertinent part as follows:

> "I believe Congress should deal with water rights if it intends that a right be reserved for a particular Federal use. If not, we should make the point so that the courts will not later infer such right."[13]

Representative Kyl was not the only one who recognized the importance of a federal reserved water right for the SPRNCA. Wyoming Senator Malcolm Wallop submitted a written statement dated April 30, 1987, to the same subcommittee stating as follows:

> This is the first statutory withdrawal from the public domain and with it comes an implied federal reserved water right. Many Members of the Senate feel that the right should be defined by Congress rather than the courts. I intend to offer an amendment when the measure comes before the Committee.[14]

Representative Kyl agreed with Senator Wallop that the Congress must be clear and specific as to its intent concerning the scope of the reserved water right that the Congress intended for the conservation area to enjoy.

The cattle growers shared the opinion. The representative of the National Cattlemen's Association testified before the subcommittee as follows:

> [T]his is the first withdrawal of public domain lands, and with it comes the implied Federal Reserve water right. Congress, we believe, does have the responsibility to define what that right is rather than leaving it up to the future courts to interpret or misinterpret the intent of Congress. … We believe Congress should spell out its intent.…[15]

To summarize, the Congress was aware of *Cappaert*, *New Mexico*, and the law of federal reserved water rights. The term "sufficient" was not chosen in a vacuum.

The legislative history offers some guidance as to how the Congress considered the word "sufficient." When the House of Representatives was considering the Senate's

---

[13] *Id*., *supra*, n.11, at 52-53 (written statement of Rep. Kyl, Member, House of Rep.).

[14] *Id*., *supra*, n.11 at 64 (statement of Sen. Wallop, Member, Senate). As initially considered by the House of Representatives in 1986, the bill that led to the establishment of the SPRNCA did not contain an express reservation of water. The Senate, upon the recommendation of the S. Comm. on Energy and Nat. Resources, adopted an amendment that added section 102(d). Proceedings of the House of Representatives in 1986 are reported in the transcript of hearing on H.R. 4811, 99th Cong. 2d Sess., before the Subcomm. on Public Lands of the H. R. Comm. on Interior and Insular Affairs. A copy of the transcript is available in initial disclosure no. 5 of ASARCO LLC (Feb. 25, 2008). *See also* initial disclosure no. 13 of the U.S. (Errata).

[15] *Id*., *supra*, n.11, at 79 (statement of J. Burton Eller, Jr.).

amended bill that became the Act, Minnesota Representative Bruce Vento testified that:

> The only major differences between title I of this bill and H.R. 568 as passed by the House in [sic] that title I includes an explicit reservation of water - which the House bill did not….
>
> With respect to the water language, title I **reserves enough water to fulfill the purposes** for which the national conservation area would be established.… (Emphasis added.)[16]

The Congress believed that "sufficient" was synonymous with "enough."

Third, while *Cappaert* affirmed the district court's tailoring of its injunction to "minimal need," the Supreme Court twice used the word "sufficient" to describe the quantity or amount of a federal reserved water right. First, the Court described its holding in *Winters v. United States*, 207 U.S. 564 (1908), as follows: "The Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation."[17] Second, *Cappaert* ends as follows:

> "We hold, therefore, that as of 1952 when the United States reserved Devil's Hole, it acquired by reservation water rights in unappropriated appurtenant water sufficient to maintain the level of the pool to preserve its scientific value and thereby implement Proclamation No. 2961."[18]

The federal district court's ruling did not use the phrase "minimal need." The court's relevant conclusion of law stated in part that through President Truman's Proclamation designating Devil's Hole Monument "the unappropriated waters in, on, under and appurtenant to Devil's Hole were withdrawn from private appropriation as against the United States and **reserved to the extent necessary for the requirements and purposes of the said reservation**." (Emphasis added.)[19] The decision of the Ninth Circuit Court of Appeals, affirmed by the United States Supreme Court, held that President Truman's Proclamation had "reserved **enough** groundwater to assure preservation of the pupfish." (Emphasis added.)[20]

ASARCO LLC cited the *Potlach* decisions of the Idaho Supreme Court in support of the argument that minimal need has been used to quantify an express reserved water

---

[16] 134 CONG. REC. 22, 32189 (Oct. 20, 1988) (statement of Rep. Vento, Member, House of Rep.). A copy of this document is available in initial disclosure no. 15 of the U.S. (Errata).

[17] 426 U.S. at 139.

[18] 426 U.S. at 147. *Cappaert* cited *Arizona v. California*, 373 U.S. 546, 601 (1963) ("We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.").

[19] *U. S. v. Cappaert*, 375 F. Supp. 456, 460 (D.C. Nev. 1974) (Conclusion of Law No. 2).

[20] *United States v. Cappaert*, 508 F.2d 313, 318 (9th Cir. 1974).

right.[21] In *Potlatch I*, the trial court held "that the United States must 'prove the minimum quantity necessary to fulfill [the] general purposes'" of the express reserved water right the trial court found.[22] The United States did not appeal this portion of the trial court's ruling. Therefore, it cannot be said that the Idaho Supreme Court held that the minimal need standard applies to an express reserved water right. The issue was not on appeal.

In *Potlatch II*, the Idaho Supreme Court framed the issue before it as the "question presented is what quantity of water is expressly reserved absent any statutory indication?"[23] In this case, the Act states that the amount of water reserved is "sufficient."

Furthermore, in *Potlatch II*, the trial court had "ruled without allowing the parties to develop a factual record" as to the amount of water reserved, and "[c]onsequently, the factual determination is not supported by competent evidence."[24] The Supreme Court remanded the case to the trial court "to determine the amount of water necessary to fulfill the purpose of the reservation in the Hells Canyon National Recreation Area."[25] The Court did not use the phrase "minimal need." Although the subheading of the subject is entitled "The United States Must Quantify the Minimum Amount of Water Necessary to Fulfill the Purpose of the Reservation," the Court did not clearly hold that minimal need is the standard for quantification in that case. Considered as a whole, *Potlatch II* is not the clearest case for the proposition argued.

A federal reserved water right reserves water to the extent needed to accomplish the purpose of the reservation. In this case, the Congress expressly reserved sufficient water to fulfill the purposes of the SPRNCA. Sufficient water is the standard for quantification that we must use in this case.

II. IS IT REQUIRED TO DETERMINE THE QUANTITY OF UNAPPROPRIATED WATER AVAILABLE FOR USE ON THE CONSERVATION AREA AS OF NOVEMBER 18, 1988, AND SECOND, AS OF THE DATES THAT AFTER ACQUIRED LANDS WERE INCORPORATED WITHIN THE SPRNCA?

The Special Master finds that it is necessary to determine the quantity of unappropriated water available for use as of the dates of reservation, but it is not required to do so prior to quantifying the reserved water right.

---

[21] *Potlatch Corp. v. United States*, 134 Idaho 912, 12 P.3d 1256 (Idaho 2000) (*Potlatch I*) and 134 Idaho 916, 12 P.3d 1260 (Idaho 2000) (*Potlatch II*). Both decisions arose in the Snake River Basin Adjudication. The trial court was the Water Court.

[22] 134 Idaho at 916, 12 P.3d at 1260.

[23] 134 Idaho at 926, 12 P.3d at 1270.

[24] *Id*.

[25] *Id*.

A federal reserved water right is limited to unappropriated water available when a reservation is established. The United States Supreme Court has 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," and in "so doing the United States acquires a reserved right in unappropriated water…".[26]

Citing this holding, in March 2009, the Special Master "agree[d] that a reserved water right is limited to unappropriated water, and this issue is now determined" in this case.[27] That order noted that the "Arizona Supreme Court cited this holding to describe what the 'reserved water rights doctrine provides.'"[28]

No authority has been cited holding that the reservation of "appurtenant water then unappropriated" does not apply to an express Congressional reservation of water.

The United States and SRP advance several arguments why it is not necessary to quantify the amount of unappropriated water existing on the date of the reservations. First, argued by the United States, an adjudicated reserved water right takes its place in the priority system and cannot be used to take, impair, or injure a senior appropriative water right. Second, in order to satisfy due process for the protection of vested water rights, the quantification of unappropriated water will require extensive technical and hydrological investigations that at this time are practically impossible due to funding and staff limitations of the Arizona Department of Water Resources. Third, undertaking the adjudication of the legion of claimed water rights would frustrate the Arizona Legislature's policy that a primary purpose of the general stream adjudication is to adjudicate Indian and non-Indian federal claims. Four, due to the variable flow regime of the San Pedro River Watershed it is not appropriate to limit a federal reserved water right based on arbitrary amounts of flows available in 1988.

The United States and SRP suggest that the amount of water sufficient to satisfy the purposes of the conservation area be quantified, and the reserved right be placed in line with all other adjudicated rights and administered as part of the final decree. The SPRNCA's decreed reserved water right may not injure senior appropriative water rights. Under this approach, no determination of the amount of unappropriated water existing on the dates of reservation would be made.

---

[26] 426 U.S. at 138.

[27] Special Master's Order, *supra*, n.2 at 7.

[28] *Id*. *See 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 (¶ 14, 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). The opinion is available at http://tinyurl.com/m9w7spt. *See also United States v. New Mexico*, 438 U.S. at 698 ("The Court has previously concluded that whatever powers the States acquired over their waters as a result of congressional Acts and admission into the Union, however, Congress 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.").

The Special Master has carefully considered these arguments and finds they cannot overcome the United States Supreme Court's holding that a reserved water right reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of a reservation. The Special Master cannot (as the Sierra Vista Parties put it) "simply write-out" this requirement.[29] Even SRP "recognizes that a federal reserved right reserves only water that is unappropriated at the time of reservation."[30]

Freeport-McMoRan proposes a "conditional decree." The SPRNCA's reserved water right would be quantified and conditionally decreed subject to future reduction, if necessary, after the extent of unappropriated water is determined. The United States and SRP oppose this alternative because it requires a re-quantification of the reserved right in a future proceeding, and second, it is inappropriate to reduce potentially a reserved right based on water flows that can vary from period to period.

Credit is given for fashioning a way to move this case forward. However, the Special Master is concerned that if and when the conditional decree becomes the subject of an enforcement action that all these issues will be brought forth again exposing the decree as nothing more than "paper water rights" as ASARCO LLC argues. Eliminating paper water rights is a major goal of this adjudication. Whenever possible, we should do our best to reach one final decree rather than draft interlocutory decrees.

Furthermore, we have been engaged in determining the attributes of the SPRNCA's claimed reserved water right. Quantifying the right resolves another attribute. This process can continue until all the attributes are established.[31]

It has already been noted "that determining the amount of unappropriated water as of November 18, 1988, will require the adjudication of not only all the claimed water rights of the United States for the conservation area but also the senior claims of other claimants," and adjudicating "all these claims will require, at a minimum, a comprehensive report from ADWR and the adoption of a subflow zone map."[32] The reality is we could wait several years for these actions to be completed. While holding this case in abeyance might be an alternative, we can continue to move forward.

Fortunately, there is no legal impediment to proceed to quantify the reserved water right and resolve the issues designated in May 2013. We can quantify the reserved right without first determining the existence of unappropriated water.

---

[29] Sierra Vista Parties' Reply at 4 (Sept. 13, 2013).

[30] SRP's Resp. to Freeport-McMoRan's, ASARCO LLC's, and Sierra Vista Parties' Motions at 4 (Aug. 23, 2013).

[31] *See* Special Master's Order, n.2, *supra*, at 8 ("We are still in the process of determining whether all the attributes of a reserved water right exist for the SPRNCA.").

[32] Special Master's Order at 3 (May 29, 2013). The text is available at http://tinyurl.com/lobgom2.

III. DETERMINATIONS OF THE SPECIAL MASTER

The Special Master finds and determines that:

1. The quantity of water needed to fulfill the purposes of the conservation area is not subject to the standard of minimal need. The applicable standard is sufficient water to fulfill the purposes.

2. It is necessary to determine the quantity of unappropriated water available for use as of the dates of reservation, but it is not required to do so prior to quantifying the reserved water right.

IT IS ORDERED granting and denying all dispositive motions consistent with the foregoing determinations.

DATED: October 17, 2013.

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

On October 17, 2013, 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 1, 2013.

/s/ Barbara K. Brown
Barbara K. Brown