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5

6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA
7

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

10 In re Fort Huachuca
11

DATE: April 4, 2008

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

Contested Case No. W1-11-605

12 REPORT OF THE SPECIAL MASTER;
13 MOTION FOR ADOPTION OF REPORT;
14 AND NOTICE FOR FILING OBJECTIONS
TO THE REPORT
15

16 CONTESTED CASE NAME: *In re Fort Huachuca*.

17 HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

18 DESCRIPTIVE SUMMARY: The Special Master files his report concerning whether federal
reserved water rights exist for Fort Huachuca. The report includes findings of fact, conclusions of
19 law, and recommendations for the issues the Special Master designated for briefing. Objections and
comments to this report must be filed with the Clerk of the Superior Court of Maricopa County on
20 or before **Wednesday, October 1, 2008**. Responses to objections shall be filed on or before
Monday, December 1, 2008. A hearing on any objections and comments will be held at a time and
21 place to be set by the Court.

22 NUMBER OF PAGES: 85.

23 DATE OF FILING: April 4, 2008.
24

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1 **I. INTRODUCTION AND SUMMARY**

2 This report addresses the four issues the Special Master designated for briefing arising from the
3 claims of the United States to federal reserved water rights for Fort Huachuca, a military installation in
4 Southern Arizona. The report contains a chronology of the proceedings, findings of fact, conclusions
5 of law, recommendations, and deadlines for filing objections and comments to the report.

6 The Special Master’s findings are summarized as follows:

7 1. President Chester A. Arthur’s Executive Orders of October 29, 1881, and May 14, 1883,
8 withdrew lands from the public domain and reserved them for a federal purpose.

9 A. President Arthur had implied authority to withdraw and reserve the lands.

10 B. The executive orders were not ineffective as withdrawals from the public domain
11 because the lands were not surveyed.

12 2. The lands within Public Land Orders 16 and 251 were withdrawn from the public domain
13 and reserved for the use of an artillery range.

14 A. The withdrawals and reservations of the lands for the artillery range effected by
15 Public Land Orders 16 and 251 lapsed not later than October 28, 1952.

16 3. Public Land Order 1471 did not effect a withdrawal or reservation of water rights.

17 4. The lands acquired by voluntary conveyances, condemnation, and land exchanges were
18 neither withdrawn from the public domain nor reserved for a federal purpose.

19 5. The actions of federal officials in disposing of Fort Huachuca to the State of Arizona were
20 not actions ultra vires with respect to the Act of July 5, 1884.

21 6. The United States retained a reversionary interest in the water rights it held for the lands
22 within the Executive Orders of October 29, 1881, and May 14, 1883, when the lands were disposed
23 as surplus to the State of Arizona.

1 7. The reversionary interest of the United States in the water rights extends to any reserved
2 water rights that exist for Fort Huachuca.

3 8. Any reserved water rights that exist for Fort Huachuca were not extinguished when the
4 Fort was declared surplus effective May 31, 1947.

5 9. Water is necessary to accomplish the purpose of the military reservation established by the
6 Executive Orders of October 29, 1881, and May 14, 1883. Without water the purpose would be
7 entirely defeated.

8 10. Water is not necessary to accomplish the purpose of the lands, namely, an artillery range,
9 withdrawn and reserved by Public Land Orders 16 and 251.

10 11. The date of priority of a reserved water right for the lands within the Executive Orders of
11 October 29, 1881, and May 14, 1883, are the respective dates on which each order was issued.

12 12. The issues concerning the claims of the United States to a reserved groundwater right and
13 to effluent are deferred for future consideration.

14 **II. CHRONOLOGY OF PROCEEDINGS**

15 This chronology relates to the briefing of the issues designated by Special Master Schade on
16 May 5, 2005. Special Master John E. Thorson initiated this contested case in February, 1995. The
17 progress of this case was affected by the litigation involving the 1995 legislative amendments which
18 concluded in January, 1999.¹ Special Master Schade began working on this matter in April, 2001.

19 Between April, 2001, and May, 2005, the United States amended one of its two statements of
20 claimant for Fort Huachuca, the Arizona Department of Water Resources (“ADWR”) filed a report,
21 motions to intervene were granted, and settlement discussions were conducted.

22 **A. Scheduling Order**

23 On March 8, 2005, a status conference was held to set case procedures. On May 5, 2005,
24

1 Special Master Schade issued a Scheduling Order (“Scheduling Order”) concerning the
2 determination of four issues, disclosure statements, discovery, motions, and settlement. The order
3 granted the Arizona Water Company’s motion to intervene.

4 The Special Master designated the following issues for briefing:

5 1. Whether, and to what extent does the evidence establish that the United States withdrew
6 land from the public domain and reserved the property of Fort Huachuca for a federal
7 purpose(s).

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

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

12 4. If unappropriated waters were reserved for the purpose of the reservation, what is the date
13 of priority of the reserved water rights?

14 On January 6, 2006, the City of Mesa withdrew its objection to the Final Hydrographic
15 Survey Report for the San Pedro River Watershed (“San Pedro HSR”). On January 10, 2006, the
16 Special Master granted the request. On January 9, 2006, the City of Phoenix withdrew its objection
17 to the San Pedro HSR, and on January 12, 2006, the Special Master granted the request.

18 **B. Disclosure Statements**

19 The Scheduling Order limited disclosure statements to matters concerning the four issues and
20 set a schedule for filing disclosure statements. All parties had a continuing duty to disclose as
21 required by Arizona Rule of Civil Procedure 26.1(b)(2).

22 The Arizona Water Company, ASARCO LLC (“ASARCO”),² Bella Vista Water Company,
23

24 ¹ See *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179 (1999).

² The Arizona Water Company and ASARCO LLC participated jointly. Bella Vista Water Company, Inc.,

1 Inc., Pueblo Del Sol Water Company, City of Sierra Vista, Phelps Dodge Corporation (“Phelps
2 Dodge”), Salt River Project (“SRP”), and the United States filed disclosure statements. The Arizona
3 Water Company, ASARCO, SRP, and the United States filed supplemental disclosures.

4 ADWR was directed to develop and maintain on its internet site an electronic data base and
5 index of all disclosed documents. All disclosing parties were directed to submit to ADWR an
6 electronic copy, paper copy, and index of all disclosed documents. ADWR made available to any
7 claimant, upon payment of the standard fee, a copy of a disclosed document.

8 **C. Discovery**

9 The Scheduling Order limited discovery to matters concerning the designated issues. Formal
10 discovery for the United States began on November 7, 2005, and for all other parties on January 9,
11 2006. Prior to those dates parties could engage in informal discovery. Discovery was allowed
12 according to Arizona Rules of Civil Procedure 26 through 37, and as applicable, pretrial orders
13 issued in the Gila River Adjudication and the Rules for Proceedings Before the Special Master.

14 The Arizona Water Company, ASARCO, and Phelps Dodge conducted discovery by requests
15 for admissions, interrogatories, and production or inspection of documents. Letters, historical reports,
16 congressional legislation, and executive documents were obtained by discovery.

17 **1. Motions for a Protective Order and to Compel Production**

18 On May 18, 2006, the United States filed a Motion for a Protective Order limiting the scope
19 of discovery sought by Phelps Dodge. Phelps Dodge filed a response and a Motion for Order to
20 Compel Production of Documents.

21 On July 5, 2006, the Special Master issued an Order Granting in Part and Denying in Part the
22 Motion of the United States for a Protective Order and the Motion of Phelps Dodge to Compel
23

24 Pueblo Del Sol Water Company, and the City of Sierra Vista also participated jointly, and they are collectively referred to as the “Sierra Vista Parties.”

1 Production of Documents. The motion of the United States was granted to the extent that certain
2 requests of Phelps Dodge for production or inspection were denied, and others were limited to
3 documents and information identifying the supply or source of water necessary to meet Fort
4 Huachuca's purposes as groundwater, surface water, and subflow but not the quantities of water
5 necessary for the Fort or the on or off the Fort impacts of groundwater pumping. In addition, the
6 United States was directed to disclose a report prepared by the United States Geological Survey if the
7 United States had the report in its possession, custody, or control.

8 **D. Motion for a Stay**

9 On June 8, 2007, the Sierra Vista Parties filed a Motion for Stay on the ground that ADWR
10 had not issued an updated report for Fort Huachuca's claims that complies with A.R.S. § 45-256. The
11 United States, Arizona Water Company, ASARCO, and SRP opposed the motion. On August 16,
12 2007, the Special Master denied the motion for stay but ruled that this "briefing will not replace or
13 supplant a supplemental contested case hydrographic survey report."³ The Special Master believes
14 that this briefing of legal issues can proceed in the absence of an updated A.R.S. § 45-256 report.

15 **E. Motions for Summary Judgment**

16 On June 15, 2007, the Arizona Water Company and ASARCO jointly filed a Motion for
17 Partial Summary Judgment Regarding the United States' Claims to Federal Reserved Water Rights
18 for Fort Huachuca, Phelps Dodge filed a Motion for Summary Judgment on Four Designated Issues,
19 SRP filed a Motion for Summary Judgment, and the United States filed a Motion for Partial
20 Summary Judgment. The Arizona Water Company, ASARCO, Phelps Dodge, SRP, the Sierra Vista
21 Parties, and the United States filed responses. The Arizona Water Company, ASARCO, Phelps
22 Dodge, SRP, and the United States filed replies.

23 On September 27, 2006, and again on June 12, 2007, the Gila River Indian Community
24

1 (“Community”) filed an Initial Position Statement In Re Fort Huachuca. The Community did not file
2 any other papers in this briefing and did not present oral argument.

3 **1. Affidavit of Mr. Shane Dolph**

4 SRP objected to the inclusion of the affidavit of Mr. Dolph in Arizona Water Company’s and
5 ASARCO’s motion for summary judgment on the grounds that the affidavit constituted an expert
6 report that had not been timely disclosed to allow other parties the opportunity to depose Mr. Dolph
7 or conduct other discovery to rebut his opinions. The affidavit contained three color coded maps
8 prepared by Mr. Dolph showing certain land chronologies. The Special Master allowed the affidavit
9 finding it useful in depicting the historical land assemblage of Fort Huachuca.

10 **F. Briefing and Oral Argument of Motions**

11 Extensions of the briefing schedule were granted as the case proceeded. On March 20, 2006,
12 the United States, Phelps Dodge, Arizona Water Company, ASARCO, and the Sierra Vista Parties
13 filed a joint motion requesting an extension of ninety days to the deadlines set in the Scheduling
14 Order. The request was based on the grounds that the additional time would allow these parties “to
15 conduct a more meaningful review of the voluminous documents and material disclosed and engage
16 in further settlement negotiations.” On April 3, 2006, the Special Master granted the request.

17 On July 14, 2006, and on September 25, 2006, the United States filed motions requesting an
18 extension of the briefing schedule. The latter request was prompted by the status of then ongoing
19 settlement discussions which were being influenced by anticipations of state legislation. The Special
20 Master granted both unopposed requests.

21 On May 30, 2007, the United States requested an extension of twelve days to file initial
22 summary judgment motions. The Special Master granted the request and extended the deadlines for
23 filing responses and replies.

24

³ Special Master Order 2 (Aug. 16, 2007).

1 On May 30, 2007, the Arizona Water Company and ASARCO requested an extension of ten
2 days to file responses to motions. On June 28, 2007, the Special Master granted the unopposed
3 request, likewise extended the times for filing responses and replies, and set a date for oral argument.

4 Telephonic conferences were held on January 18, 2007, March 20, 2007, and May 11, 2007.
5 The status of motions, oral argument schedule, need for evidentiary hearings, and the progress of
6 settlement negotiations were discussed at these conferences.

7 On November 20, 2007, the Special Master heard oral argument on all motions for a half
8 court day. The Arizona Water Company, ASARCO, Phelps Dodge, SRP, the Sierra Vista Parties, and
9 the United States presented oral arguments.

10 **G. Standard for Summary Judgment**

11 Arizona Rule of Civil Procedure 56(c)(1) provides that summary judgment shall be granted if
12 the papers filed “show that there is no genuine issue as to any material fact and that the moving party
13 is entitled to a judgment as a matter of law.” Summary judgment “should be granted if the facts
14 produced in support of the claim or defense have so little probative value, given the quantum of
15 evidence required, that reasonable people could not agree with the conclusion advanced by the
16 proponent of the claim or defense.”⁴ The briefing was limited to four issues, and all the parties
17 moving for summary judgment engaged in and completed discovery on those issues.

18 Conclusion of Law No. 1. The arguments made by the prevailing parties do not encompass
19 material factual disputes that preclude summary judgment. Summary judgment can be granted if the
20 probative value of the facts produced to support a claim, given the amount of evidence required, is
21 such that reasonable people could not agree with the conclusion advanced by the claim’s proponent.

22 **III. THE IMPLIED RESERVATION OF WATER RIGHTS DOCTRINE**

23 The United States claims it “is entitled to a reserved water right for the military installation”
24

1 because Fort Huachuca “meets all the requirements for a water right based on the implied federal
2 reserved water right doctrine.”⁵ The Special Master reviewed the contours of the doctrine in the
3 report concerning the claimed existence of reserved water rights for State of Arizona Trust Lands.⁶
4 That review is reiterated and amplified here. The relevant cases are *Winters, Arizona I, Cappaert,*
5 *New Mexico, and Gila V.*⁷

6 The “doctrine of implied-reservation-of-water is judicially created,” having been first recognized in
7 the United States Supreme Court’s decision in *Winters* which involved Indian reserved water rights.⁸ *Arizona I*
8 held that “the Federal Government had the authority both before and after a State is admitted into the Union
9 ‘to reserve waters for the use and benefit of federally reserved lands’.”⁹ *Arizona I* extended the doctrine by
10 holding that it “was equally applicable to other federal establishments such as National Recreation Areas and
11 National Forests” and national wildlife refuges.¹⁰ The “federally reserved lands include any federal enclave.”¹¹
12 “Among these reservations are national forests, national parks, national monuments, public springs and
13 waterholes, and public mineral hot springs.”¹² The “doctrine applies ... to ... military bases.”¹³

14 ⁴ *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

15 ⁵ United States (“U.S.”) Memo. In Support of Motion for Partial Summary Judgment Regarding Four Issues
16 Designated for Determination 1 (June 15, 2007) (hereinafter the “U.S. Motion for Partial Summary
17 Judgment”).

18 ⁶ See Report of the Special Master, *In re State Trust Lands*, Contested Case No. W1-104 and CV 6417-100,
19 11-14 (Sept. 28, 2007).

20 ⁷ *Winters v. United States*, 207 U.S. 564 (1908) (“*Winters*”), *Arizona v. California*, 373 U.S. 546 (1963)
21 (“*Arizona I*”), *Cappaert v. United States*, 426 U.S. 128 (1976) (“*Cappaert*”), *United States v. New Mexico*,
22 438 U.S. 696 (1978) (“*New Mexico*”), and *In re the General Adjudication of All Rights to Use Water in the*
23 *Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001) (“*Gila V*”).

24 ⁸ *Sierra Club v. Block*, 622 F. Supp. 842, 851 (D. C. Colo. 1985), *vacated on other grounds sub. nom. Sierra*
Club v. Yeutter, 911 F.2d 1405 (10th Cir. 1990) (The district court opined that the doctrine “had its beginnings
in dictum in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899)).” Although *Block* was
subsequently vacated, it was on grounds not related to any of the points for which it is cited in this report. A
respected water law treatise posits that the United States Supreme Court’s opinion in *United States v. Winans*,
198 U.S. 371 (1905), was “a harbinger of the *Winters* doctrine.” 4 WATERS AND WATER RIGHTS § 37.01(b)(1)
at 37-9 (Robert E. Beck ed., 1991, 2004).

⁹ *United States v. Dist. Court for Eagle County*, 401 U.S. 520, 522-523 (1971).

¹⁰ 373 U.S. at 601.

¹¹ 401 U.S. at 523.

¹² *United States v. City and County of Denver*, 656 P.2d 1, 5 (Colo. 1982) (“*Denver*”) (quoted in *Sierra Club v.*
Block, 622 F. Supp. at 854).

1 In *Cappaert* the Court reiterated its holdings concerning implied reserved water rights:

2 This Court has long held that when the Federal Government withdraws its land
3 from the public domain and reserves it for a federal purpose, the Government, by
4 implication, reserves appurtenant water then unappropriated to the extent needed to
5 accomplish the purpose of the reservation. In so doing the United States acquires a
6 reserved right in unappropriated water which vests on the date of the reservation and
7 is superior to the rights of future appropriators. Reservation of water rights is
8 empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of
9 navigable streams, and the Property Clause, Art. IV, § 3, which permits federal
10 regulation of federal lands. The doctrine applies to Indian reservations and other
11 federal enclaves, encompassing water rights in navigable and nonnavigable streams.

12
13 . . . [In *Winters*] the Court held that when the Federal Government reserves
14 land, by implication it reserves water rights sufficient to accomplish the purposes of
15 the reservation (footnote omitted).

16 In determining whether there is a federally reserved water right implicit in a
17 federal reservation of public land, the issue is whether the Government intended to
18 reserve unappropriated and thus available water. Intent is inferred if the previously
19 unappropriated waters are necessary to accomplish the purposes for which the
20 reservation was created (citations omitted).

21
22 The implied-reservation-of-water-rights doctrine, however, reserves only that
23 amount of water necessary to fulfill the purpose of the reservation, no more.¹⁴

24 In *New Mexico*, the Court dealt with the purposes of an implied reserved right and held that:

Each time this Court has applied the “implied-reservation-of-water doctrine,” it has
carefully examined both the asserted water right and the specific purposes for which
the land was reserved, and concluded that without the water the purposes of the
reservation would be entirely defeated (footnote omitted).

This careful examination is required both because the reservation is implied,
rather than expressed, and because of the history of congressional intent in the field of
federal-state jurisdiction with respect to allocation of water. Where Congress has
expressly addressed the question of whether federal entities must abide by state water
law, it has almost invariably deferred to the state law (footnote and citation omitted).
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,

¹³ *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) (“*Gila IIP*”).

¹⁴ 426 U.S. at 138, 139, and 141.

1 consistent with its other views, that the United States would acquire water in the same
2 manner as any other public or private appropriator.¹⁵

3 In *Gila V*, the Arizona Supreme Court citing *Cappaert and New Mexico* held that:

4 [N]on-Indian reserved rights are narrowly quantified to meet the original, primary
5 purpose of the reservation; water for secondary purposes must be acquired under state
6 law. [*New Mexico* citation omitted] Thus, the primary purpose for which the federal
7 government reserves non-Indian land is strictly construed after careful examination.
8 The test for determining such a right is clear.

9 For each federal claim of a reserved water right, the trier of fact must
10 examine the documents reserving the land from the public domain and the
11 underlying legislation authorizing the reservation; determine the precise
12 federal purposes to be served by such legislation; determine whether water is
13 essential for the primary purposes of the reservation; and finally determine
14 the precise quantity of water - the minimal need as set forth in *Cappaert and
15 New Mexico* - required for such purposes.¹⁶

16 The Arizona Supreme Court further held that “[a]ccording to *Winters* and its progeny, a
17 federal rights vests on the date a reservation is created, not when water is put to a beneficial use.”¹⁷

18 This case law frames the current contours of the implied reservation of water rights doctrine.
19 However, there “has been little interpretation of the nature and scope of reserved water rights for the
20 approximately 23 million acres of federal military reservations.”¹⁸

21 **IV. WHETHER, AND TO WHAT EXTENT, DOES THE EVIDENCE ESTABLISH THAT
22 THE UNITED STATES WITHDREW LAND FROM THE PUBLIC DOMAIN AND
23 RESERVED THE PROPERTY OF FORT HUACHUCA FOR A FEDERAL PURPOSE(S)**

24 The claim of the United States to a reserved water right is set forth in the statements of
claimant filed on behalf of Fort Huachuca.

Finding of Fact No. 1. On January 4, 1982, the United States Army Communications
Command and Fort Huachuca filed two statements of claimant which were docketed under numbers

¹⁵ 438 U.S. at 700-702. “A principal motivating factor behind Congress’ decision to defer to state law was thus the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality.” *California v. United States*, 438 U.S. 645, 668-69 (1978).

¹⁶ 201 Ariz. at 312-13, 35 P.3d at 73-74.

¹⁷ 201 Ariz. at 310, 35 P.3d at 71 (citing *Arizona I*).

¹⁸ 4 WATERS AND WATER RIGHTS § 37.03(a)(8) at 37-75, *supra*.

1 39-10774 and 39-10775.

2 Finding of Fact No. 2. Statement of Claimant No. 39-10774 was amended on August 5, 1991,
3 and on January 16, 2002. As amended, this statement of claimant states that the basis of the claimed
4 water right is “federal reserved water rights” for “military installation purposes,” with a date of
5 priority of October 28, 1881.¹⁹ The date of priority was part of the August 5, 1991, amendment.

6 Finding of Fact No. 3. Statement of Claimant No. 39-10775 was amended in or about August,
7 1989. The amendment was signed on August 21, 1989, but the date of filing with ADWR is not
8 shown on the copy filed in this briefing. The amendment was filed with the Maricopa County
9 Superior Court on May 7, 1992. The statement was amended again on August 5, 1991. As amended,
10 the statement of claimant states that the basis of the claimed water right is “federal reserved water
11 rights” for “military installation purposes,” with a date of priority of October 28, 1881.²⁰ The date of
12 priority was part of the August 5, 1991, amendment.

13 **A. Reservation and Withdrawal of Public Lands**

14 “In determining whether there is a federally reserved water right implicit in a federal
15 reservation of public land, the threshold question necessarily is whether the government has in fact
16 withdrawn the land from the public domain and reserved it for a federal purpose.”²¹ In order for a
17 federal reserved water right to be implied there must be a withdrawal of public domain and its
18 reservation for a specific federal purpose. “In each case dealing with federal reserved water rights, it
19 has been obvious that there has been a withdrawal and reservation of the subject lands.”²²

20 The “words ‘public lands’ are habitually used in our legislation to describe such as are subject
21

22 ¹⁹ See Statement of Claimant No. 39-10774. The Arizona Water Company and ASARCO Appendices to its
23 Motion for Partial Summary Judgment, Vol. Three, Tab 13. Vols. 1 through 5 of the appendices are
hereinafter designated the “ASARCO Appendices”.

24 ²⁰ See Statement of Claimant No. 39-10775. ASARCO Appendices, Vol. Three, Tab 14.

²¹ 622 F. Supp. at 853.

²² 622 F. Supp. at 854.

1 to sale or other disposal under general laws.”²³ In common terms, public lands mean all lands owned
2 by the United States of America. “The public domain includes lands open to settlement, public sale,
3 or other disposition under the federal public land laws, and which are not exclusively dedicated to
4 any specific governmental or public purpose.”²⁴

5 “Although often used interchangeably, the terms ‘withdraw’ and ‘reserve’ have different
6 meanings.”²⁵ “It is important to note at the outset that ‘withdrawal’ and ‘reservation’ are not
7 synonymous terms.... A withdrawal makes land unavailable for certain kinds of private
8 appropriation under the public land laws” such as the operation of federal mining, homestead,
9 preemption, desert entry, and other federal land laws.²⁶ Withdrawn lands “are tracts that the
10 government has placed off-limits to specified forms of use and disposition,” but a withdrawn parcel
11 “may also be reserved for particular purposes, and often is.”²⁷

12 Conclusion of Law No. 2. A withdrawal of public domain removes the land from the
13 operation of federal public land laws and makes the land unavailable for disposition under the federal
14 public land laws.

15 “Reserved lands ... are those that have been expressly withdrawn from the public domain by
16 statute, executive order, or treaty, and are dedicated to a specific federal purpose.”²⁸ “A reservation
17 ... goes a step further: it not only withdraws the land from the operation of the public land laws, but
18 also dedicates the land to a particular public use ... [a] reservation necessarily includes a withdrawal;
19
20

21 ²³ *Minnesota v. Hitchcock*, 185 U.S. 373, 391 (1902) (quoting *Newhall v. Sanger*, 92 U.S. 761, 763 (1875)).

22 ²⁴ 622 F. Supp. at 854.

23 ²⁵ *Id.*

24 ²⁶ *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 784 (10th Cir. 2005).

25 ²⁷ 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.”).

26 ²⁸ 622 F. Supp. at 854.

1 but it also goes a step further, effecting a dedication of the land ‘to specific public uses’.”²⁹
2 Reservations or reserved lands “are the federal tracts that Congress or the Executive has dedicated to
3 particular uses (footnote omitted). The dedication removes them from availability for contrary use or
4 disposition.”³⁰

5 In *Southern Utah*, the Tenth Circuit Court of Appeals cited the definition of “reservation”
6 found in the first edition of Black’s Law Dictionary (1891), now in its eighth edition. The first
7 edition defined “reservation” as follows: “In public land laws of the United States, a reservation is a
8 tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or
9 settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands,
10 etc.”³¹ The conclusion is that at least as of the late 1880s, it was recognized that a reservation of
11 public domain consisted of a withdrawal of the land from disposal and its dedication to a specific
12 public use - requisites not inconsistent with today’s law of reserved water rights.

13 Conclusion of Law No. 3. A reservation of public domain is land expressly withdrawn by
14 statute, executive order, or treaty, and dedicated to a specific federal purpose.

15 **B. Establishment and Assemblage of Fort Huachuca**

16 The lands which comprise Fort Huachuca were assembled as a result of federal executive
17 orders and judicial actions over a period of nearly 80 years. The following findings of fact describe
18 the history of the assemblage.

19 **1. Executive Orders of 1881 and 1883**

20 Finding of Fact No. 4. By letter dated December 6, 1876, a group of “residents of Santa Rita,
21 Old Camp Crittenden, Barbacomari [sic], Sonoita, and the French Mine” expressed to Brevet Major-
22 General August V. Kautz, Commander, Headquarters Department of Arizona [Territory], their

23 ²⁹ 425 F.3d at 784.

24 ³⁰ 1 COGGINS & GLICKSMAN § 1:11 at 1-15, *supra*.

1 concerns about the activities of “Mexican outlaws” and “roaming Apaches.” The letter stated that
2 “until a military force is permanently located on the upper San Pedro or about the Huachuca
3 Mountains that Said Indians will continue to commit depredations.” The signers closed their letter
4 with the request that “[i]n view of these facts we respectfully ask you to consider the propriety of
5 establishing a military post as above indicated.”³²

6 Finding of Fact No. 5. On February 12, 1877, Brevet Major-General August V. Kautz ordered
7 that “a Camp with a view to the protection of the settlers in the San Pedro and Santa Cruz Valleys”
8 be established at “an available point in the vicinity of Old Camp Crittenden.”³³ Companies B and M
9 of the Sixth Cavalry were dispatched.

10 Finding of Fact No. 6. On March 3, 1877, Companies B and M “bivouaced at the site of ...
11 the present post.... By 1879 the camp boasted seven stockade buildings with mud roofs, two frame
12 buildings with shingle roofs, and tentage.”³⁴

13 Finding of Fact No. 7. On December 21, 1877, Captain Samuel Marmaduke Whitside issued
14 an order that “announced ... the limits of this Camp.” The order stated that “[t]he above described
15 limits, nine miles square - are plainly marked, and are set aside for the benefit of the United States,
16 until such time as a military Reservation shall be declared” and “[a]ll persons are forbidden to erect
17 buildings, establish Camps, or herd stock or cut timber within the boundary mentioned.”³⁵

18 Finding of Fact No. 8. Captain Whitside was the commanding officer at Camp Huachuca
19
20

21 ³¹ 425 F.3d at 784.

22 ³² Letter to Brevet Major-General August V. Kautz (Dec. 6, 1876). ASARCO Appendices, Vol. Two, Tab 1.

23 ³³ Special Orders No. 14, Headquarters, Dept. of Ariz. (Feb. 12, 1877). U.S. Exhibit to Motion for Partial
Summary Judgment (hereinafter “U.S. Exh.”) No. 1 and ASARCO Appendices, Vol. Two, Tab 2.

24 ³⁴ ANN. RPT. OF MEDICAL DEPT. ACTIVITIES AT FORT HUACHUCA, ARIZ., Office of the Post Surgeon ¶ 1(b)
(Feb. 10, 1943). U.S. Exh. No. 34.

³⁵ Orders No. 91, Camp Detachment 6th Cavalry (Dec. 21, 1877). U.S. Exh. No. 2.

1 from 1877 to 1881.³⁶ According to Fort Huachuca’s historian, “[o]ne of the first things Captain
2 Whitside did was to order a sawmill set up, and with timber cut from the mountains and canyons, he
3 began building barracks, stables and storehouses.”³⁷

4 Finding of Fact No. 9. On February 21, 1881, Arizona Territorial Governor John C. Fremont
5 sent the following message to the Territorial Council:

6 It is well known to the Legislative Assembly that life and property on both sides of the
7 [United States-Mexico] line are insecure, and that to prevent the rapid increase of this
8 insecurity and danger, decided measures must be adopted to break up and destroy the
9 organized bands of outlaws which now infest that region to the great danger and
10 detriment of our citizens.... Under these circumstances, daily becoming aggravated on
11 both sides of the line, I think it urgent to put into the field a force of one hundred men,
12 to be retained in service ... for such time as in the discretion of the Executive, the
13 safety of the citizens and the peace of the border may absolutely demand.³⁸

14 Finding of Fact No. 10. Between February 20, 1881, and March 30, 1881, First Lieutenant of
15 Engineers Carl F. Palfrey visited Southern Arizona including Camp Huachuca. In his written report,
16 he noted “the reported depredations of ‘Cowboys,’” but indicated that with his traveling party “no
17 interference was experienced, and no approach of suspicious persons observed,” and “at no time did
18 a guard appear necessary.” His report concluded in pertinent part as follows:

19 In view of the natural features of this country, and of the rail communications
20 present and immediately prospective, three points have appeared to me of military
21 importance; first, ... a point near the north spur of the Huachuca [Mountains]....

22 With its rail communications secured, the first named position is in my
23 opinion incomparably the best....

24 The facilities which these three sites offer for the establishment of a post are
also in the order in which I have named them. At each the grazing is excellent. Wood
for fuel and for timber is plentiful at Huachuca, scanty in the Dragoon Pass, and
almost entirely absent from the Railroad Pass. Water is found, of excellent quality,
and probably sufficient for six companies, mounted, in the cañon where Camp

³⁶ FORT HUACHUCA, ARIZ., A CENTURY OF DEVELOPMENT AND CHANGING MISSIONS, 1877-1977, Rand. F. Herbert, W. Turrentine Jackson, and Stephen R. Wee 25 (USFH40) (Aug. 1990). ASARCO Appendices, Vol. Three, Tab 8.

³⁷ SHORT HISTORY OF FORT HUACHUCA 2, Wayne E. Spangler (Jan. 1959). U.S. Exh. No. 35.

³⁸ JOURNALS OF THE ELEVENTH LEG. ASSEMBLY OF THE TERR. OF ARIZ. 679-80 (1881). ASARCO Appendices, Vol. Two, Tab 3.

1 Huachuca is now situated; this could easily be piped to the plateau proposed for the
2 new post. The water at Tanner's Cañon, now annexed by Department order to the
3 reservation, and the irrigable land in that cañon would furnish a post garden, and an
4 extension of the reservation to include the north spur of the mountain would take in
5 another fine spring valuable for watering the herd and securing a good grazing place,
6 as also for camping ground in case of concentration of troops. This extension is
7 earnestly recommended....

8 In view of the probable value of this position, I have the honor to respectfully
9 recommend that Tanner's Cañon be held as part of the Huachuca Reservation, that
10 this reservation be extended to include the north point of the mountain for the sake of
11 wood and water so gained and to secure control of a reasonable amount of land
12 beyond the proposed site for the post, and that, with the latter object, the lines of the
13 reservation be closed upon those of the Babacomari Grant or of the railroad lands. The
14 ground covered by this extension is now unoccupied; this cannot be expected, after
15 work on the railroad shall have begun....³⁹

16 Finding of Fact No. 11. In a letter to President Chester A. Arthur dated October 28, 1881,
17 Secretary of War Robert Todd Lincoln wrote in pertinent part as follows:

18 I have the honor, upon recommendation of the General of the Army, to request
19 that a Military Reservation be duly declared and set apart by the Executive for the
20 post of Camp Huachuca, Arizona Territory, with boundaries as surveyed by 1st
21 Lieutenant Carl F. Palfrey, Corps of Engineers and described in his report dated
22 August 24, 1881, as follows: [land markings and descriptions omitted in this report]

23 A map of the proposed reservation is enclosed herewith, and the General Land
24 Office reports that the lands included therein are unsurveyed public lands and that no
objection is known to their reservation for military purposes.⁴⁰

25 Finding of Fact No. 12. On October 29, 1881, President Arthur issued an order stating in
26 pertinent part that Secretary Lincoln's "request is approved and the reservation is made and
27 proclaimed accordingly."⁴¹ President Arthur's order referred to First Lieutenant Palfrey's report

28 ³⁹ Rpt. of Carl F. Palfrey, Engineer Office, Headquarters Dept. of Ariz. (Mar. 31, 1881). ASARCO
29 Appendices, Vol. Two, Tab 4 (USFH-00000600-03).

30 ⁴⁰ Letter of Sec. Lincoln to Pres. Arthur (Oct. 28, 1881). U.S. Exh. No. 3 and ASARCO Appendices, Vol.
31 Two, Tab 5. Sec. Lincoln, who was President Abraham Lincoln's son, served as Secretary of War from 1881
32 to 1885. The recommendation concerning Fort Huachuca was advanced by Commanding General of the Army
33 William T. Sherman who in 1882 "inspected the camp." U.S. Exh. No. 34 at 1.

34 ⁴¹ Exec. Order (Oct. 29, 1881). U.S. Exh. No. 4 and ASARCO Appendices, Vol. One, Tab 1. Counsel for the
35 Arizona Water Company and ASARCO indicated that the United States "was unable to locate the map of the
36 proposed reservation allegedly enclosed with the request granted by the President." Arizona Water Company
37 and ASARCO Motion for Partial Summary Judgment 5 (June 15, 2007).

1 dated August 24, 1881, and the “map of proposed reservation” enclosed with Secretary Lincoln’s
2 October 28, 1881, letter.

3 Finding of Fact No. 13. On November 16, 1881, Headquarters, Department of Arizona,
4 issued General Orders No. 35 that “announced” the “boundaries of the Military Reservation for the
5 post of Camp Huachuca.”⁴² The boundaries were described in such terms as a “post branded” with an
6 alphanumeric designation, posts “set in a mound of stone,” the “cañons known as ‘Tanner’s’ and
7 ‘Ramsey’s’,” a “water divide,” a “peak,” and “by most direct lines of water flow.”

8 Finding of Fact No. 14. In early 1882, Camp Huachuca was designated “Fort Huachuca.”⁴³

9 Finding of Fact No. 15. As of April 29, 1882, the water needs of Fort Huachuca were
10 satisfied by a spring or springs.⁴⁴

11 Finding of Fact No. 16. In a letter to President Chester A. Arthur dated May 12, 1883,
12 Secretary of War Robert Todd Lincoln recommended that the “Military Reservation of Camp (now
13 Fort) Huachuca, in the Territory of Arizona originally declared by Executive order dated October 29,
14 1881, may be enlarged to embrace the following described limits....” The letter enclosed “a map,” a
15 “re-survey” done “in February and March 1883,” and a “report ... showing the necessity for
16 extending the Northern side of the Reservation to the Southern boundaries of the Babacomari Grant,
17 as originally intended, for the purpose of securing to the Government the valuable grazing lands in
18 the vicinity of the post.”⁴⁵

19 Finding of Fact No. 17. On May 14, 1883, President Arthur issued an order that stated in
20 pertinent part that Secretary Lincoln’s “request is approved and this enlargement of the Reservation

21 _____
22 ⁴² General Orders No. 35, Headquarters, Dept. of Ariz. (Nov. 16, 1881). U.S. Exh. No. 5 and ASARCO
Appendices, Vol. Four, Tab 2.

23 ⁴³ See handwritten legend on map purportedly dated July 11, 1882. ASARCO Appendices, Vol. Two, Tab 7.
See also Phelps Dodge’s uncontroverted Statement of Fact No. 11 (June 15, 2007).

24 ⁴⁴ Letter to Chief Quartermaster, Dept. of Ariz. (Apr. 29, 1882). ASARCO Appendices, Vol. Two, Tab 6.

1 is made and proclaimed accordingly.”⁴⁶

2 Finding of Fact No. 18. On May 24, 1883, Headquarters of the Army, issued General Orders
3 No. 36 that “announced” the “enlarged” limits of “the military reservation at Fort Huachuca, Arizona
4 Territory (originally declared by Executive Order of October 29, 1881, and announced in General
5 Orders, No. 35, Headquarters Department of Arizona, series of 1881).”⁴⁷

6 An 1885 decision of the United States Court of Claims sheds contemporary light on the
7 enlargement. The *reporters* (not the court) reported the following in their “statement of the case:”

8 It had been the original intention to make the northern boundary of the reservation
9 coincide with the southern boundary of said grant, “for the purpose of securing to the
10 government the valuable grazing lands in the vicinity of the post,” but, owing to an
11 error in the first surveys, the part on which these claims were located was not
12 included; therefore, the enlargement of the reservation to include all the lands between
13 these two boundaries was made and proclaimed by executive order of May 14, 1883.⁴⁸

14 Finding of Fact No. 19. Neither the two requests of Secretary Lincoln nor President Arthur’s
15 orders referred to an act of Congress for authority.

16 Finding of Fact No. 20. President Arthur’s October 29, 1881, order included approximately
17 41,760 acres of land.⁴⁹ For purposes of preparing this report, the Special Master takes judicial notice
18 of the Major User Report for the Fort Huachuca Military Reservation set forth in volume one, pages
19 382 through 430, of the San Pedro HSR.

20 Finding of Fact No. 21. Comprising 41,760 acres of land, as of June 30, 1882, Fort Huachuca

21 ⁴⁵ Letter of Sec. Lincoln to Pres. Arthur (May 12, 1883). U.S. Exh. No. 6 and ASARCO Appendices, Vol.
22 Two, Tab 8.

23 ⁴⁶ Exec. Order (May 14, 1883). U.S. Exh. No. 7 and ASARCO Appendices, Vol. One, Tab 2. U.S. Exh. No. 8.
24 *See also* ASARCO Appendices, Vol. Four, Tab 3.

⁴⁷ General Orders No. 36, Headquarters, Dept. of the Army (May 24, 1883). U.S. Exh. No. 8 and ASARCO
Appendices, Vol. Four, Tab 3.

⁴⁸ *Maddux et al. v. United States*, 20 Ct. Cl. 193, 194 (1885) (“*Maddux*”) (rptrs. Chas. C. Nott and A.
Hopkins). ASARCO Appendices, Vol. Five, Tab 9.

⁴⁹ Vol. 1, San Pedro HSR 382-85 (Nov. 20, 1991). This finding of fact is confirmed by the Special Master’s
detailed review of all exhibits submitted which described land sizes.

1 was the third largest of the fourteen military reservations then existing in the Territory of Arizona.⁵⁰

2 Finding of Fact No. 22. President Arthur’s May 14, 1883, order included approximately 3,040
3 acres of land. By then, Fort Huachuca consisted of approximately 44,800 acres of land.⁵¹

4 Finding of Fact No. 23. A circular published by the United States in 1910 described Fort
5 Huachuca as “[p]ublic lands of the United States reserved for military purposes by Executive Orders
6 of the October 29, 1881; and May 14, 1883.”⁵²

7 Finding of Fact No. 24. The descriptions of the boundaries of Camp, later Fort Huachuca,
8 provided in the letters of Secretary of War Lincoln to President Arthur, the Executive Orders of
9 October 29, 1881, and May 14, 1883, and the announcements made in General Orders Nos. 35 and
10 36, Headquarters of the Army, were not stated in terms of section, range, and township. When the
11 orders were issued, the lands within both executive orders had not been surveyed in accordance with
12 the procedures of the General Land Office.

13 Finding of Fact No. 25. The deeds dated March 26, 1948, January 14, 1949, March 2, 1949,
14 and April 18, 1950, concerning the disposition of Fort Huachuca to the State of Arizona show that a
15 large portion of the lands within the Executive Orders of October 29, 1881, and May 14, 1883, had
16 been surveyed by the time those deeds were executed.

17 **a. Congressional Authority**

18 Phelps Dodge argued that President Arthur lacked the requisite authority to reserve
19 unappropriated waters for Fort Huachuca because there was no congressional authority for his
20 executive orders, and the “Executive is empowered to impliedly reserved water rights only when
21

22 ⁵⁰ THE PUBLIC DOMAIN: ITS HISTORY WITH STATISTICS, Thomas Donaldson 748 (*reprinted in* 1970, Johnson
23 Reprint Corp., 1884). ASARCO Appendices, Vol. Two, Tab 11.

24 ⁵¹ Acquisition History, Fort Huachuca Mil. Res., Cochise Co., Ariz. ¶ A.2. U.S. Exh. No. 11.

⁵² U.S. Military Reservations, National Cemeteries, and Military Parks 14 (SRP 759) (U.S. Army, rev. ed. 1910). *See* SRP Disclosure 748-61.

1 authorized by Congress to withdraw federal lands.”⁵³ The Special Master finds that President Arthur
2 had implied authority to withdraw from the public domain and reserve for a public purpose the lands
3 within the Executive Orders of October 29, 1881, and May 14, 1883.

4 Neither the requests of Secretary Lincoln nor President Arthur’s Executive Orders of October
5 29, 1881, and May 14, 1883, referred to an Act of Congress. However, this issue is resolved by the
6 doctrine of congressional acquiescence enunciated in *United States v. Midwest Oil Company*, 236
7 U.S. 459 (1915), where “the United States Supreme Court relied on its decisions upholding
8 withdrawals of land from the public domain by the President without express congressional
9 authorization finding such withdrawals to be a ‘long-continued practice, known to and acquiesced in
10 by Congress’.”⁵⁴

11 In *Midwest Oil*, the Supreme Court considered a presidential proclamation withdrawing
12 public lands from entry or location. The Court held that the proclamation was:

13 [B]y no means the first instance in which the Executive, by a special order, has
14 withdrawn lands which Congress, by general statute, had thrown open to acquisition
15 by citizens. And while it is not known when the first of these orders was made, it is
16 certain that “the practice dates from an early period in the history of the government.”
17 *Grisar v. McDowell*, 6 Wall. 381 [1867]. Scores and hundreds of these orders have
18 been made; and treating them as they must be (citation omitted) as the act of the
19 President, an examination of official publications will show that (excluding those
20 made by virtue of special congressional action, (citation omitted), he has during the
21 past 80 years, without express statutory authority - but under the claim of power so to
do - made a multitude of Executive Orders which operated to withdraw public land
that would otherwise have been open to private acquisition. They affected every kind
of land - mineral and nonmineral. The size of the tracts varied from a few square rods
to many square miles and the amount withdrawn has aggregated millions of acres. The
number of such instances cannot, of course, be accurately given, but the extent of the
practice can best be appreciated by a consideration of what is believed to be a correct
enumeration of such Executive Orders mentioned in public documents (footnote
omitted).

22 They show that prior to the year 1910 there had been issued

23 ⁵³ Phelps Dodge Motion for Summary Judgment on Four Designated Issues 14-17 (June 15, 2007).

24 ⁵⁴ *Id.* at 15. See *Grisar v. McDowell*, 73 U.S. (6 Wall.) 363 (1867).

1 99 Executive Orders establishing or enlarging Indian Reservations;

2 109 Executive Orders establishing or enlarging Military Reservations and
3 setting apart land for water, timber, fuel, hay, signal stations, target ranges and rights
4 of way for use in connection with Military Reservations....

5 In the sense that these lands may have been intended for public use, they were
6 reserved for a public purpose. But they were not reserved in pursuance of law or by
7 virtue of any general or special statutory authority.... There was no law for the
8 establishment of these Military Reservations or defining their size or location....

9 But when it appeared that the public interest would be served by withdrawing
10 or reserving parts of the public domain, nothing was more natural than to retain what
11 the Government already owned. And in making such orders, which were thus useful
12 to the public, no private interest was injured. For prior to the initiation of some right
13 given by law the citizen had no enforceable interest in the public statute and no
14 private right in land which was the property of the people. The President was in a
15 position to know when the public interest required particular portions of the people's
16 lands to be withdrawn from entry or location; his action inflicted no wrong upon any
17 private citizen, and being subject to disaffirmance by Congress, could occasion no
18 harm to the interest of the public at large. Congress did not repudiate the power
19 claimed or the withdrawal orders made. On the contrary, it uniformly and repeatedly
20 acquiesced in the practice....

21 This right of the President to make reservations - and thus withdraw land from
22 private acquisition - was expressly recognized in *Grisar v. McDowell*, (citation
23 omitted), where it was said that "from an early period in the history of the
24 Government, it has been the practice of the President to order, from time to time, as
the exigencies of the public service required, parcels of land belonging to the United
States to be reserved from sale and set apart for public uses."⁵⁵

25 In 1902, the Florida Supreme Court rejected the argument that "the president could not, by
26 mere order, without authority of an act of congress, reserve land for military purposes," holding that:

27 "It is well settled that the president of the United States, by executive order, could
28 reserve a part of the public domain for a specific lawful purpose, such as a military
29 reservation. (Citations omitted; *Grisar v. McDowell* cited). Lands thus reserved were
30 effectually segregated from the public domain...."⁵⁶

31 The "executive has long exercised derivative powers through the doctrine of congressional

32 ⁵⁵ 236 U.S. at 469-471.

33 ⁵⁶ *Florida Town Imp. Co. v. Bigalsky*, 33 So. 450, 451 (Fla. 1902). The executive orders that had reserved
34 public domain for military purposes were issued in 1842 and 1849.

1 acquiescence.”⁵⁷ The Congress has acknowledged the holding of *Midwest Oil* concerning the effect
2 of congressional acquiescence in executive withdrawals and reservations of public domain as evident
3 when Congress enacted the Federal Land Policy and Management Act in 1976. The act repealed “the
4 implied authority of the President to make withdrawals and reservations resulting from acquiescence
5 of the Congress (U.S. v. *Midwest Oil Co.*, 236 U.S. 459).”⁵⁸ The reference to *Midwest Oil* is telling.

6 Having been informed by Secretary Lincoln of the circumstances prevailing in Southern
7 Arizona in 1881 and 1883, President Arthur “was in a position to know when the public interest
8 required particular portions of the people’s lands to be withdrawn from entry or location,” and he
9 approved the initial military reservation and its enlargement.

10 There is no evidence in the record showing that President Arthur’s October 29, 1881, and
11 May 14, 1883, Executive Orders resulted in uncompensated harm or wrong to any person claiming
12 an interest in the lands within the orders or that the Congress repudiated the executive orders. In
13 considering this issue, the Special Master has not given any weight to the fact that Congress has
14 appropriated funds for the operations of Fort Huachuca but rather has given weight to the fact that
15 Congress has not repudiated or repealed either executive order.⁵⁹

16 Phelps Dodge argued that *New Mexico* stands for the proposition that the Executive cannot
17 “reserve water rights broader than express Congressional authorization.”⁶⁰ The Special Master
18 agrees, but this principle applies when the Congress has previously enacted legislation that
19 establishes the extent of executive authority to withdraw and reserve public domain. The Executive
20 cannot exceed the authority granted by Congress.

21 It was argued citing *Arizona I* that the doctrine of congressional acquiescence “is limited to
22

23 ⁵⁷ 4 WATERS AND WATER RIGHTS § 37.02 n.128 at 37-22, *supra*.

24 ⁵⁸ Pub. L. No. 94-579 § 704(a), 90 Stat. 2743, 2792 (1976).

⁵⁹ See *United States v. Fallbrook Pub. Util. Dist.*, 165 F. Supp. 806 (S.D. Cal. 1958).

⁶⁰ Phelps Dodge Motion for Summary Judgment 16 (June 15, 2007).

1 the special circumstances surrounding the reservation of water rights for Indian tribes.”⁶¹ *Midwest*
2 *Oil* rejected this claim as the Supreme Court considered executive orders that had established Indian
3 reservations in the same manner as those that had established military reservations. The dissenters in
4 *Midwest Oil* confirmed the Court’s prior decisions that did not distinguish between Indian and
5 military reservations created by executive order:

6 [I]n no instance has this court sustained a withdrawal of public lands for which
7 Congress has provided a system of disposition, except such withdrawal was (a) in
8 pursuance of a policy already declared by Congress as one for which the public lands
9 might be used, **as military and Indian reservations, for which purposes Congress**
10 **has authorized the use of the public lands from an early day**, or (b) in cases where
grants of Congress are in such conflict that the purpose of Congress cannot be known,
and therefore the Secretary of the Interior has been sustained in withdrawing the lands
from entry until Congress had opportunity to relieve the ambiguity of its laws by
specifically declaring its policy.⁶²

11 The Special Master does not find authority in either *Midwest Oil* or *Arizona I* to distinguish between
12 Indian and military reservations when applying the congressional acquiescence doctrine.⁶³

13 Conclusion of Law No. 4. President Arthur had implied authority to withdraw from the public
14 domain and reserve for a public purpose the lands included within the Executive Orders of October
15 29, 1881, and May 14, 1883.

16 **b. Survey**

17 The Arizona Water Company and ASARCO argued that President Arthur’s orders were
18 ineffective as withdrawals of public domain because the lands were unsurveyed at the time the orders
19 were issued. The Special Master agrees that the lands were not surveyed in accordance with the
20 procedures of the General Land Office but finds that this fact did not render the executive orders
21 ineffective as withdrawals and reservations of public domain.

23 ⁶¹ *Id.* at 15.

24 ⁶² 236 U. S. at 492 (emphasis added).

⁶³ See 373 U.S. at 598 (citing *Midwest Oil* and *Winters*).

1 The argument is based on the United States Supreme Court’s holding in *Lane v. Watts* that “a
2 survey [is] necessary to segregate the lands from the public domain,” citing to the Court’s decision in
3 *Stoneroad v. Stoneroad*, 158 U.S. 240 (1895).⁶⁴ Careful analysis of *Lane*, *Stoneroad*, and related
4 cases such as *Villalobos v. United States*, 51 U.S. 541 (1850), shows that these decisions involved a
5 grant of public lands to private owners, and their holdings apply to governmental grants of land. As
6 *Stoneroad* noted, “[t]he practice of the United States in dealing with the public domain and all
7 governmental grants of land is to survey and issue patent.”⁶⁵

8 When public domain is withdrawn and severed for a private grant, a survey is “essential for
9 the purpose of definitely segregating the land ... from the public domain, and thus finally fixing the
10 extent of the rights of the owners of the grant.”⁶⁶ A survey locates a grant, and the approval of the
11 survey precedes the transfer of title to a private owner.

12 The October 29, 1881, and May 14, 1883, Executive Orders did not involve or effect grants
13 of public lands to private individuals. The United States remained the owner of the lands following
14 both executive orders.

15 Conclusion of Law No. 5. The Executive Orders issued on October 29, 1881, and May 14,
16 1883, were not ineffective as withdrawals from the public domain because the lands within the orders
17 were not surveyed.

18 It is reasonable to believe that the lands comprising Fort Huachuca have by now been
19 surveyed. That information should be submitted before the Fort’s claimed water rights are
20 adjudicated. The Special Master recommends that before a judgment and decree adjudicating the
21 water rights of Fort Huachuca is entered, including a settlement agreement, the Court should direct
22 the United States to provide evidence of the land surveys of Fort Huachuca.

23 ⁶⁴ *Lane v. Watts*, 234 U.S. 525, 540 (1914), *reh’g denied*, 235 U.S. 17, 20 (1914).

24 ⁶⁵ 158 U.S. at 248.

1 The foregoing findings of fact and conclusions of law establish that President Arthur's orders
2 withdrew lands from the public domain and reserved them for a federal purpose.

3 Conclusion of Law No. 6. President Arthur's Executive Orders of October 29, 1881, and May
4 14, 1883, withdrew lands from the public domain and reserved them for a federal purpose.

5 **2. Public Land Orders 16 (1942) and 251 (1944)**

6 Finding of Fact No. 26. On July 21, 1942, Secretary of the Interior Harold L. Ickes issued
7 Public Land Order 16 which stated in pertinent part as follows:

8 The following-described public lands are hereby withdrawn, subject to valid
9 existing rights, from all forms of appropriation under the public-land laws, including
10 the mining laws, and reserved for the use of the War Department as a field artillery
range: [land descriptions by section, township, and range omitted in this report]
containing 3,853.18 acres.

11
12 It is intended that the lands described herein shall be returned to the
administration of the Department of the Interior when they are no longer needed for
the purpose for which they are reserved.⁶⁷

13 Finding of Fact No. 27. Public Land Order 16 was amended by President Franklin D.
14 Roosevelt's Executive Order No. 9526 issued on February 28, 1945. The amendment added the
15 following terms to Public Land Order 16:

16 The jurisdiction granted by this order shall cease at the expiration of the six months'
17 period following the termination of the unlimited national emergency declared by
Proclamation No. 2487 of May 27, 1941 (55 Stat. 1647). Thereupon, jurisdiction over
18 the lands hereby reserved shall be vested in the Department of the Interior, and any
other department or agency of the Federal Government according to their respective
19 interests then of record. The lands, however, shall remain withdrawn from
appropriation as herein provided until otherwise ordered.⁶⁸

20 Finding of Fact No. 28. A recital in Executive Order No. 9526 stated "that those departments
21 and agencies of the Federal Government which had prior jurisdiction over, interests in, or

22 ⁶⁶ 158 U. S. at 247.

23 ⁶⁷ Pub. Land Order 16 (July 21, 1942), 7 Fed. Reg. 5918 (July 31, 1942). U.S. Exh. No. 9 and ASARCO
Appendices, Vol. One, Tab 6.

1 administration of those lands should have restored to them such jurisdiction over, interests in, or
2 administration of the lands as existed prior to the withdrawal and reservation of the lands for
3 purposes incident to the national emergency and the prosecution of the war.”⁶⁹

4 Finding of Fact No. 29. On November 22, 1944, Acting Secretary of the Interior Michael W.
5 Strauss issued Public Land Order 251 which stated in pertinent part as follows:

6 Subject to valid existing rights, the following-described public land is hereby
7 withdrawn from all forms of appropriation under the public-land laws, including the
8 mining and mineral-leasing laws, and reserved for the use of the War Department as
an artillery range: [land description by section, township, and range omitted in this
report]. The area described contains 80 acres.⁷⁰

9 The last paragraph of Public Land Order 251 contained the same terms of the amendment that
10 Executive Order No. 9526 had made to Public Land Order 16.⁷¹

11 Finding of Fact No. 30. The lands comprising the “(field) artillery range” are also known as
12 the East Range of Fort Huachuca. Generally, Arizona Highway 90 separates the East Range from the
13 lands within the 1881 and 1883 executive orders.⁷²

14 In some documents, the East Range is referred to as the “Fort Huachuca Artillery Range.” To
15 avoid confusion, in this report the Special Master uses the term “artillery range” to refer only to the
16 lands withdrawn and reserved by Public Land Orders 16 and 251 for that use.

17 Finding of Fact No. 31. President Harry S. Truman declared terminated effective April 28,
18 1952, the national emergencies that were proclaimed on September 8, 1939, and May 27, 1941.⁷³

19 ⁶⁸ Exec. Order No. 9526 (Feb. 28, 1945), 10 Fed. Reg. 2424 (Mar. 2, 1945). ASARCO Appendices, Vol. One,
20 Tab 9.

⁶⁹ *Id.*

21 ⁷⁰ Pub. Land Order 251 (Nov. 22, 1944), 9 Fed. Reg. 14242 (Dec. 2, 1944). U.S. Exh. No. 10 and ASARCO
Appendices, Vol. One, Tab 8.

22 ⁷¹ The only difference in words is that Pub. Land Order 251 stated “the land hereby reserved” instead of “the
lands hereby reserved” found in the amendment to Pub. Land Order 16.

23 ⁷² See maps marked “Exhibit A” to Arizona Water Company and ASARCO Statement of Facts (June 15,
2007).

24 ⁷³ PrcImtn. No. 2974 (Aug. 28, 1952), 17 Fed. Reg. 3813 (Apr. 30, 1952). ASARCO Appendices, Vol. One,
Tab 15.

1 Finding of Fact No. 32. A period of six months following President Truman’s proclamation
2 of April 28, 1952, ended on or about October 28, 1952.⁷⁴

3 Although the artillery range lands were withdrawn and reserved pursuant to public land
4 orders, the issue is whether the withdrawals and reservations lapsed. Phelps Dodge argued that the
5 reservations were temporary and lapsed at least as of October, 1952. The United States and
6 ASARCO argued that both orders were superseded by the subsequent disposal of the lands to the
7 State of Arizona, although each attributed different outcomes to that action.

8 Under the terms of the two land orders and Executive Order No. 9526, the jurisdiction of the
9 War Department over the 3,933.18 acres would have ended on or about October 28, 1952, at which
10 time the jurisdiction over the lands would have returned to the Department of the Interior, although
11 the lands remained withdrawn from entry and location “until otherwise ordered.” This outcome
12 conforms to the recital in Executive Order No. 9526 and the expressed intent of Public Land Order
13 16 “that the lands ... shall be returned to the administration of the Department of the Interior when
14 they are no longer needed for the purpose for which they are reserved.”⁷⁵

15 If the lands withdrawn for the artillery range had not been disposed to the State of Arizona,
16 their use as an artillery range - and any reserved water right deemed to exist for those lands - would
17 have ended in October, 1952. But in 1949 the lands were disposed to the State of Arizona, and the
18 United States quitclaimed “all of its right, title, interest, claim and demand” to the lands for their use
19 by the state for the training of the National Guard of Arizona. The disposition is more amply
20 described later in this report.

21 Public Land Orders 16 and 251 contained three limitations, first, the use was for an artillery

22
23 ⁷⁴ Acquisition History, Fort Huachuca Mil. Res., Cochise Co., Ariz. ¶ B (6 and 10), *supra*, states October 28,
24 1952. This date appears to be calculated based on the date the proclamation was published in the Federal
Register. The Arizona Water Company and ASARCO claimed the effective date was October 25, 1952.

⁷⁵ Pub. Land Order 16, *supra*.

1 range, second, that use would end six months after the declaration of the end of the national wartime
2 emergency, and third, jurisdiction over the lands would return to the Department of the Interior. In
3 1949, the General Services Administration, successor agency to the War Assets Administration
4 which was involved in the disposition of Fort Huachuca to the State of Arizona, interpreted the
5 Surplus Property Act of 1944 (“Surplus Property Act”),⁷⁶ the congressional legislation used for the
6 disposal, to mean:

7 [T]hat Congress, by this legislation, has, in effect, superseded the limitations of the
8 withdrawals whether they were accomplished by Public Land Orders or Executive
9 Orders. The Department of the Interior has concurred in this construction of the
10 Act....

11 It is our opinion, therefore, that the limitations contained in the withdrawal
12 orders were superseded by the Surplus Property Act, and that conveyance of this
13 portion of land by this Administration was effective to transfer good merchantable
14 title to the State of Arizona.⁷⁷

15 The letter to Arizona Senator Carl Hayden was specifically discussing the 3,933.18 acres of public
16 domain lands withdrawn for military use by Public Land Orders 16 and 251.

17 According to this statutory interpretation of the United States, contemporary to the disposal of
18 Fort Huachuca, the withdrawals and reservations of Public Land Orders 16 and 251 lapsed at least as
19 of the date the lands were quitclaimed to the State of Arizona. The Special Master finds that the most
20 logical conclusion is that the withdrawals and reservations of public lands for the artillery range
21 lapsed not later than October 28, 1952.

22 Conclusion of Law No. 7. The 3,933.18 acres of land included within Public Land Orders 16
23 and 251 were withdrawn from the public domain and reserved for use for an artillery range.

24 Conclusion of Law No. 8. The withdrawals and reservations of public domain lands for an
artillery range effected by Public Land Orders 16 and 251 lapsed not later than October 28, 1952.

⁷⁶ Pub. L. No. 457, ch. 479, 58 Stat. 765 (Oct. 3, 1944). ASARCO Appendices, Vol. One, Tab 7.

1 The Arizona Water Company and ASARCO argued that some of the lands within both public
2 land orders may not have been owned by the federal government when withdrawn. The Special
3 Master cannot conclusively resolve this claim. For example, reference was made to Tract 45
4 described in a lis pendens (which is explained in the next section of this report), but the lis pendens
5 stated that the United States was the “owner,” not the “purported owner” of Tract 45, unlike all the
6 other described tracts (except Tract 44).⁷⁸

7 **3. Conveyances and Judgments on Declaration of Taking (1942-1945)**

8 Finding of Fact No. 33. Three Real Estate Directives dated March 14, 1942, August 21, 1943,
9 and September 7, 1943, authorized acquisition of fee land and leasehold interests for extensions of
10 Fort Huachuca for use as an artillery range.⁷⁹

11 Finding of Fact No. 34. On September 18, 1942, the United States recorded a lis pendens
12 giving notice of an action entitled *United States v. Hunt et al.* filed in the federal District Court of
13 Arizona “to acquire, by condemnation under judicial process, for public use for the establishment of
14 a field artillery range in connection with Fort Huachuca, Arizona, the fee simple title,” subject to
15 existing easements, of several tracts of land described in the lis pendens.⁸⁰

16 Finding of Fact No. 35. Between January, 1943, and April, 1945, the United States acquired
17 title through voluntary conveyances and condemnation to at least 9,588.66 acres of land which
18 became part of the East Range.⁸¹

20 ⁷⁷ Letter of General Services Administration to Sen. Carl Hayden 2 (July 5, 1949). ASARCO Appendices,
Vol. Two, Tab 30.

21 ⁷⁸ *United States et al. v. Hunt*, No. Civil 129, Tucson, D. Ariz., lis pendens at 206 (FCFH0011) (Sept. 12,
1942). ASARCO Appendices, Vol. Two, Tab 15.

22 ⁷⁹ Acquisition History, Fort Huachuca Mil. Res., Cochise Co., Ariz. ¶ B (5, 8, and 9), *supra*.

23 ⁸⁰ *United States et al. v. Hunt*, *supra*, lis pendens at 203 (FCFH0008). ASARCO Appendices, Vol. Two, Tab
15.

24 ⁸¹ Memo. 2 (Dec. 10, 1948). U.S. Exh. No. 12. *See* ASARCO Appendices, Vol. Three, Tab 8 at 132
(USFH147). Copies of several warranty deeds, quit claim deeds, and abstracts of condemnation judgments are
found in ASARCO Appendices, Vol. Two, Tabs 16 and 17.

1 Finding of Fact No. 36. There is no evidence in the record showing that the United States
2 through congressional act or executive order withdrew or reserved for a federal purpose these or any
3 other lands that were acquired for Fort Huachuca by voluntary conveyances and condemnation.

4 The United States claims a reserved water right in the lands acquired by conveyances and
5 condemnation. It argued that the “existence of a federal reserved right does not depend on a technical
6 examination of whether the land comprising a federal enclave was formerly public or private,” the
7 “crucial question is whether water is necessary to effect a federal purpose on federal property.”⁸² The
8 counter argument is that a “reserved water right must be based on a reservation of land.”⁸³

9 *Cappaert* held that:

10 “**This Court has long held that when the Federal Government *withdraws its land***
11 **from the public domain and reserves it** for a federal purpose, the Government, by
implication, reserves appurtenant water then unappropriated....”⁸⁴

12 *New Mexico* held that:

13 “Each time this Court has applied the ‘implied-reservation-of-water doctrine,’ it has
14 carefully examined both the asserted water right and the specific purposes **for which**
the land was reserved....”⁸⁵

15 In determining the existence of a federal reserved water right, “the threshold question
16 necessarily is whether the government has in fact withdrawn the land from the public domain and
17 reserved it for a federal purpose.”⁸⁶ The first question is whether there has been a formal withdrawal
18 and reservation of public domain. This question must be answered before determining the purpose of
19 a reservation and whether water is necessary to accomplish that purpose. The reason for this

21 ⁸² U.S. Cons’d Resp. 8 (Aug. 24, 2007). The United States cites to opinions of its own Office of Legal Counsel
to support its position.

22 ⁸³ *United States v. City of Challis*, 133 Idaho 525, 988 P.2d 1199, 1203 (1999), cited in Phelps Dodge Motion
for Summary Judgment 18 (June 15, 2007). See also *Potlatch Corp. v. United States*, 134 Idaho 916, 12 P.3d
23 1260, 1263 (2000). Both cases arose from Idaho’s Snake River Basin Adjudication.

24 ⁸⁴ 426 U.S. at 138 (emphasis added) (quoted in *City of Challis*, 988 P.2d at 1203.

⁸⁵ 438 U.S. at 700 (emphasis added).

⁸⁶ 622 F. Supp. at 853.

1 sequential analysis is that the legislation, executive order, or treaty that withdraws and reserves
2 governs the nature and extent of a reserved water right.

3 Conclusion of Law No. 9. The lands the United States acquired by voluntary conveyances
4 and condemnation were not withdrawn from the public domain and reserved for a federal purpose.

5 **4. Public Land Order 1471 (1957)**

6 Finding of Fact No. 37. On August 22, 1957, Assistant Secretary of the Interior Roger C.
7 Ernst issued Public Land Order 1471 which stated in pertinent part as follows:

8 1. Subject to valid existing rights, the following described public lands in Arizona are
9 hereby withdrawn from all forms of appropriation under the public land laws,
10 including the mining and mineral leasing laws, except as hereafter indicated, and
11 reserved for use by the Department of the Army, for military purposes: [land
descriptions by section, township, and range omitted in this report]. The areas
described aggregate 13,463.27 acres.

11

12 3. (i) The withdrawal made by this order shall not extend to any waters in or upon the
13 lands. Any waters not heretofore appropriated shall continue subject to appropriation,
as may be authorized by applicable law. The Department of the Army shall not
appropriate any of such waters except under applicable State law.⁸⁷

14 Finding of Fact No. 38. The lands withdrawn and reserved for military purposes by Public
15 Land Order 1471 are located in the East Range.

16 Conclusion of Law No. 10. By its express terms, Public Land Order 1471 did not effect a
17 reservation of water rights.

18 The United States avowed in its response that it “does not assert a reserved water right under
19 the withdrawal order PLO 1471.”⁸⁸ At oral argument, counsel avowed that the United States was not
20 claiming a reserved water right for the lands that Public Land Order 1471 withdrew and reserved.⁸⁹

22 _____
23 ⁸⁷ Pub. Land Order 1471 (Aug. 22, 1957), 22 Fed. Reg. 6916-17 (Aug. 28, 1957). ASARCO Appendices, Vol.
One, Tab 18.

24 ⁸⁸ U.S. Cons’d Resp. 16 (August 24, 2007).

⁸⁹ Transcript of Oral Argument at 20, lines 9-11 (Nov. 20, 2007).

1 **5. State Trust Lands, Conveyances, and Current Assemblage**

2 Finding of Fact No. 39. State of Arizona Trust Lands have been, and are currently situated,
3 within the East Range. As of August, 1947, these lands were reportedly used under an “implied
4 lease” pending land exchanges with the Department of the Interior.”⁹⁰

5 Finding of Fact No. 40. In August, 1947, and in December, 1948, the number of State of
6 Arizona Trust Lands inside the East Range was reported to be 14,999.74 acres.⁹¹

7 Finding of Fact No. 41. With regard to these 14,999.74 acres, the State of Arizona and the
8 United States had an informal agreement under which the United States would be permitted to use
9 the lands, and the State of Arizona would apply to the federal Department of the Interior for an
10 exchange of such lands for other public domain lands under the jurisdiction of the Department of the
11 Interior. Several exchange applications were submitted by the State of Arizona to the Department of
12 the Interior, but as of the date of declaration of Fort Huachuca as surplus (May 16, 1947), none of the
13 exchanges had been completed.⁹² The applications were completed in subsequent years.

14 Finding of Fact No. 42. As of 1991, there were 1,536.47 acres of State of Arizona Trust
15 Lands within the East Range.⁹³

16 Based on the acreage reported in 1947 and 1991, it is clear that during that period State Trust
17 Lands were exchanged for the use of Fort Huachuca. The San Pedro HSR reported that in “August
18 1957, 13,463 acres of [Bureau of Land Management] land were removed from the public domain and
19 transferred to Fort Huachuca....”⁹⁴ Because the Bureau is part of the Department of the Interior, it
20 appears that the 13,463 acres of Public Land Order 1471 (note: 14,999.74 - 1,536.47 = 13,463.27)

21 _____
22 ⁹⁰ Tract Register, Office of the Chief of Engineers, Real Estate Div. at USFH-00002442-43 (Aug. 6, 1947).
ASARCO Appendices, Vol. Two, Tab 25.

23 ⁹¹ *Id.* See also Memo. to Deputy Administrator 2-3, *supra*.

24 ⁹² Letter of General Services Administration to Sen. Carl Hayden 2-3 (July 5, 1949), *supra*.

⁹³ Compare Vol. 1, San Pedro HSR 385 (1,536.00 acres) with Audit No. 410, Fort Huachuca, Ariz. 2 (May 29, 1967) (1,536.47 acres). ASARCO Appendices, Vol. Three, Tab 5.

1 were former State Trust Lands that had been exchanged with the Department of the Interior.

2 Conclusion of Law No. 11. Any State Trust Lands transferred to the United States as a result
3 of land exchanges, which were included in Public Land Order 1471 do not have reserved water rights
4 as expressly stated in the order.

5 Conclusion of Law No. 12. There is no evidence in the record showing that any State Trust
6 Lands transferred to the United States as a result of land exchanges, with the exception of the lands
7 within Public Land Order 1471, were thereafter withdrawn and reserved for a federal purpose.

8 Finding of Fact No. 43. By deeds dated September 16, 1982, and August 31, 1989, the United
9 States quitclaimed 72 acres of land to the City of Sierra Vista for airport purposes.⁹⁵

10 Finding of Fact No. 44. On May 3, 2001, the United States quitclaimed approximately 130
11 acres to the State of Arizona for a proposed cemetery for veterans.⁹⁶

12 Finding of Fact No. 45. Throughout its history, Fort Huachuca has been a party to a variety of
13 realty interests such as easements, rights-of-way, and trackage agreements with railroad companies.⁹⁷

14 Finding of Fact No. 46. Following Public Land Order 1471, no public domain has been
15 withdrawn or reserved by congressional legislation or executive order for the use of Fort Huachuca.

16 Finding of Fact No. 47. The current land area of Fort Huachuca is approximately 71,606 acres
17 of land owned by the United States and approximately 1,536.47 acres of State of Arizona Trust
18 Lands for a total of 73,142.47 acres of land.⁹⁸

19 **C. Disposition of Fort Huachuca to the State of Arizona**

20 Following the end of World War II, Fort Huachuca was declared surplus and disposed to the
21

22 ⁹⁴ Vol. 1, San Pedro HSR 385.

⁹⁵ *Id.* See also U.S. Disclosures USFH-00004426-45.

⁹⁶ See U.S. Disclosure USFH-00004446-58.

⁹⁷ See Acquisition History, Fort Huachuca Mil. Res., Cochise Co., Ariz. ¶ D (22, 23, and 32), *supra*.

⁹⁸ Vol. 1, San Pedro HSR 382-85. See also Statement of Claimant No. 39-10774. ASARCO Appendices, Vol. Three, Tab 13. This total includes the May 3, 2001, conveyance to the State of Arizona.

1 State of Arizona.

2 **1. Declaration of Fort Huachuca as Surplus**

3 Finding of Fact No. 48. On May 16, 1947, the War Department issued a circular declaring
4 that “[e]ffective 31 May 1947, Fort Huachuca, Arizona, will be placed in the category of surplus.”⁹⁹

5 Finding of Fact No. 49. On June 14, 1947, the Arizona Legislature adopted a Joint Memorial
6 on the Transfer of the Fort Huachuca Military Reservation directed to the Secretary of War. The
7 Governor approved the memorial.¹⁰⁰ The memorial requested “[t]hat in the event the War
8 Department concludes to abandon the Fort Huachuca military reservation and the military installation
9 thereon, it be transferred to the State of Arizona by such means and under such conditions as the law
10 permits.”

11 Finding of Fact No. 50. In a letter dated July 7, 1947, Secretary of War Robert P. Patterson
12 responded to Arizona Congressman Richard F. Harless, who had sent the War Department a copy of
13 the Arizona Legislature’s memorial. Secretary Patterson wrote in pertinent part as follows:

14 [F]ort Huachuca was declared surplus to the needs of the War Department, effective
15 May 31, 1947. Therefore, within the near future this installation will be certified to the
16 War Assets Administration for final disposition. Under existing law, the War
17 Department has no authority to transfer properties such as Fort Huachuca to the
various states, and, therefore, must certify these facilities to the War Assets
Administration for disposition in accordance with the Surplus Property Act of 1944,
as amended.¹⁰¹

18 Finding of Fact No. 51. Effective September 15, 1947, “accountability” for the “Fort
19 Huachuca Military Reservation including Artillery Range” and all improvements thereon was
20

21 _____
22 ⁹⁹ Circular No. 124, War Dept. 3 (USFH-00000666) (May 16, 1947). U.S. Exh. No. 13 and ASARCO
Appendices, Vol. One, Tab 10. The circular was issued under the signature of Chief of Staff Dwight D.
Eisenhower.

23 ¹⁰⁰ Sen. Jnt. Memo. No. 1, 1947 Ariz. Sess. Laws 398 (18th Leg., First Spec. Sess.). ASARCO Appendices,
Vol. Two, Tab 23.

24 ¹⁰¹ Letter of Sec. Patterson to U.S. Rep. Harless (July 7, 1947). ASARCO Appendices, Vol. Two, Tab 24.

1 transferred to the Los Angeles District Engineer.¹⁰²

2 Finding of Fact No. 52. Effective March 30, 1948, the Los Angeles District Engineer
3 transferred “Fort Huachuca Military Reservation, including the Artillery Range, all improvements
4 thereon, and personal property ... to the War Assets Administration.”¹⁰³

5 Finding of Fact No. 53. On May 19, 1948, the Congress enacted Public Law No. 537 which
6 provided in pertinent part:

7 That, upon request, real property which is under the jurisdiction or control of a
8 Federal agency and no longer required by such agency, (1) can be utilized for wildlife
9 conservation purposes by the agency of the State exercising administration over the
10 wildlife resources of the State wherein the real property lies or by the Secretary of the
11 Interior; and (2) is chiefly valuable for use for any such purpose, and which, in the
12 determination of the War Assets Administrator, is available for such use may,
13 notwithstanding any other provisions of law, be transferred without reimbursement or
14 transfer of funds ... by the Federal agency having jurisdiction or control of the
15 property to (a) such State agency if the management thereof for the conservation of
16 wildlife relates to other than migratory birds....¹⁰⁴

17 Finding of Fact No. 54. On August 5, 1948, Arizona Governor Sidney P. Osborn wrote a
18 letter to Mr. Robert Bradford, Regional Director of the War Assets Administration, which stated in
19 pertinent part as follows:

20 As Governor of Arizona, I am deeply interested that the various agencies of this State
21 shall acquire the lands, buildings and utilities of Fort Huachuca which have been
22 requested by the Game and Fish Commission, the National Guard and the Industrial
23 School in letters of intent attached hereto.

24 While I am aware that there has been a question whether War Assets was obligated to
return to the Department of the Interior the lands withdrawn from the unsurveyed
public lands of the Territory and from the Public Domain, I have requested that the
Department of the Interior release all such claims to War Assets in order that these
lands now surplusd to the needs of national defense by the Federal government shall
be made available to the agencies of the State of Arizona.

It is the purpose and intention of these applications in combination to request the
transfer of all of the acreage of Fort Huachuca from whatever sources title may have

¹⁰² Surplus Real Estate Directive, SPD No. 4805-1, Los Angeles Dist. No. 2321-1, Acquisition History, Fort
Huachuca Mil. Res., Cochise Co., Ariz. ¶ C.13, *supra*.

¹⁰³ *Id.* at ¶ C.14.

¹⁰⁴ Pub. L. No. 537, ch. 310, 62 Stat. 240 (May 19, 1948). ASARCO Appendices, Vol. One, Tab 12.

1 been derived by the government ... all the buildings in the old fort area ... and the
2 utilities....¹⁰⁵

3 Finding of Fact No. 55. On August 28, 1948, H. L. Reid, Arizona State Game and Fish
4 Director, wrote a letter to the Chief of Engineers, Corps of Engineers, U.S. Army. The letter stated in
5 pertinent part as follows:

6 This office is intensely interested in acquiring the [“area of 44,760 acres, withdrawn
7 by executive order for military use”] since it is no longer needed by the War
8 Department and accurate knowledge concerning the disposal method applicable to it
9 is vital to our efforts. Investigations to date indicate that subject area title is not vested
10 in the War Department, and that it will probably revert to public domain status under
11 the Department of the Interior upon its release.

12

13 This possibility is strongly supported by statements and opinions in the 1910
14 publication ... entitled, “United States Military Reservations, National Cemeteries and
15 Military Parks.”

16

17 ... [T]he publication states that the subsequent disposal of [Fort Huachuca] is
18 prescribed by Acts of Congress, one of which is quoted as follows: [quotation of
19 Section 1 of the Act of July 5, 1884, is omitted in this report].¹⁰⁶

20 If neither the original executive orders [nor] the above authority have been
21 superseded by subsequent legislation, it appears to us that the disposition of the
22 subject 44, 760 acres withdrawal is clearly prescribed.

23 It is requested that you advise us whether or not you concur in the belief that
24 the lands in question will be returned to the Department of Interior....¹⁰⁷

25 Finding of Fact No. 56. In a letter to Secretary of the Interior J. A. Krug, dated August 28,
26 1948, Director Reid quoted the same portion of the 1910 publication and the Act of July 5, 1884, that
27 he had provided in his letter of same date to the Chief of Engineers. The letter to Secretary Krug
28 stated in pertinent part as follows:

29 The State of Arizona has, for several months, been aggressively interested in
30 acquiring the lands of Ft. Huachuca, Arizona upon its disposition by the War
31 Department....

32

¹⁰⁵ Letter of Gov. Osborn to War Assets Administration Regional Director Bradford (Aug. 5, 1948). Exh. 3, SRP Notice of Service of Disclosure (Nov. 19, 2007).

33 ¹⁰⁶ See n.52, *supra*. The Act of July 5, 1884, is discussed hereinafter.

34 ¹⁰⁷ Letter of Director Reid to Chief of Engineers (Aug. 28, 1947). Exh. 1. SRP Notice of Service of Disclosure (Nov. 19, 2007).

1
2 Active request to and negotiations with the War Department and War Assets
3 Administration have, to date, failed to offer assurance that the State's desire may be
4 realized....

5
6 If neither the original executive orders [nor] the above authority have been
7 superseded by subsequent legislation, it appears to us that the disposition of the
8 subject 44, 760 acres withdrawal is clearly prescribed.

9 In the event that this area is returned to the jurisdiction of your Department,
10 the State of Arizona respectfully requests the aid of your office in acquiring
11 ownership or the control of its use by whatever method may be most expedient.¹⁰⁸

12 Finding of Fact No. 57. On July 15, 1948, Thomas Peyton of the War Assets Administration
13 wrote a letter to Arizona Senator Carl Hayden which stated in pertinent part as follows:

14 [T]he War Assets Administration's San Francisco Regional Office advise that plans in
15 the form of tentative recommendations have been formulated to effect the disposal of
16 Fort Huachuca in accordance with the following scheduled program:

17 1. The entire land area be transferred to the State of Arizona and various sections
18 thereof used by the below listed state instrumentalities, provided applications from
19 higher priority holders are not filed....

20 c. Fish and Wild Life Commission for the preservation of game and a
21 sanctuary for birds.¹⁰⁹

22 Finding of Fact No. 58. In a letter dated November 27, 1948, Brigadier General Garrison H.
23 Davidson, Army Chief of Staff, wrote that "[t]he transfer of Fort Huachuca to the Arizona National
24 Guard is deemed essential...."¹¹⁰ The reasons given were that (1) the State of Arizona's National
Guard summer training site was inadequate in terms of "facilities for field artillery or tank firing,"
training areas, buildings, and water sources, (2) an economic cost-benefit analysis favored the use of
Fort Huachuca, and (3) Fort Huachuca "would offer a possible training site for" other military units.

Finding of Fact No. 59. In a memorandum dated December 3, 1948, U.S. Army Major
General Kenneth F. Cramer, Chief, National Guard Bureau, wrote to Jess Larson, Administrator of

¹⁰⁸ Letter of Director Reid to Sec. of the Interior Krug (Aug. 28, 1947). Exh. 2. SRP Notice of Service of Disclosure (Nov. 19, 2007).

¹⁰⁹ Letter of Thomas Peyton to Sen. Hayden (July 15, 1948). U.S. Exh. No. 14.

¹¹⁰ Memo. of Brig. Gen. Davidson (Nov. 27, 1948). U.S. Exh. No. 15.

1 the War Assets Administration, that Fort Huachuca “is the only suitable installation available for
2 Arizona National Guard use and its loss would seriously hamper the training and development of the
3 Arizona National Guard.”¹¹¹ Major General Cramer requested that the War Assets Administration
4 favorably consider the recommendation of the National Guard Bureau, conveyed by the Secretary of
5 the Army, “that the property requested by the Governor of Arizona in the aforementioned application
6 is suitable for and needed by the State of Arizona in the training of the Arizona National Guard as
7 required by Public Law 829.”

8 Finding of Fact No. 60. In a letter dated August 13, 1948, Assistant Secretary of the Interior
9 Girard Davidson wrote in pertinent part as follows to Senator Carl Hayden:

10 When this Department was notified that Fort Huachuca was being declared surplus it
11 appeared that a large amount of the former public domain lands should be returned to
12 the public domain, since the improvements embraced only a rather small portion of
13 the large area. We raised this question with the War Assets Administration and
14 requested that any unimproved public lands be returned. However, it developed that
15 the State agencies which were interested in the land would require all or a substantial
16 amount of it for their purpose. Because of the public and beneficial nature of the work
17 of the State agencies, there was no desire on our part to handicap them in obtaining
18 the surplus lands at Fort Huachuca which they needed to complement the use of the
19 improvements.

20 ... Since the disposal procedure had progressed so far and it appeared that the State
21 agencies would require a substantial amount of the lands in Fort Huachuca to properly
22 utilize the improvements and conduct their activities, it was decided that the War
23 Assets Administration should proceed with the disposal and return any of the lands in
24 the surplus declaration to this Department which were not needed by the State
agencies.¹¹²

19 Finding of Fact No. 61. In his August 13, 1948, letter to Senator Hayden, Assistant Secretary
20 Davidson described a meeting held on August 2, 1948, “between representatives of our Bureau of
21 Land Management and the War Assets Administration” where the pending “disposal procedure” of
22

23 ¹¹¹ Letter of Major Gen. Cramer to Administrator Larson (Dec. 3, 1948). U.S. Exh. No. 16.

24 ¹¹² Letter of Asst. Sec. Davidson to Sen. Hayden 1-2 (Aug. 13, 1948). ASARCO Appendices, Vol. Two, Tab 26.

1 the War Assets Administration was discussed.¹¹³ The War Assets Administration described the same
2 meeting as follows: “At a conference on August 2, 1948 between representatives of the Bureau of
3 Land Management and of this Administration, it was mutually agreed that the Department of the
4 Interior would not request the return of any of the former public domain lands that might be needed
5 and transferred to the interested State agencies of the State of Arizona.”¹¹⁴

6 Conclusion of Law No. 13. Under Article 16 § 2 and Article 5 § 3 of “the Arizona
7 Constitution, the National Guard [of Arizona], except when actually activated for service by the
8 President [of the United States], is a State organization,” and “[i]ts members are paid by the State and
9 under the command of the Governor.”¹¹⁵

10 **a. The Act of July 5, 1884**

11 SRP argued that “the War Department’s declaration of Fort Huachuca as surplus, and the War
12 Assets Administration’s subsequent conveyance of the property to the State of Arizona were *ultra*
13 *vires* actions, taken in disregard of the reversionary interest in Fort Huachuca held by the Secretary
14 of the Interior pursuant to the Act of July 5, 1884.”¹¹⁶

15 Finding of Fact No. 62. The Congress enacted the Act of July 5, 1884, “to provide for the
16 disposal of abandoned and useless military reservations.” Section 1 provided in pertinent part:

17 That whenever, in the opinion of the President of the United States, the lands, or any
18 portion of them, included within the limits of any military reservation heretofore or
19 hereafter declared, have become or shall become useless for military purposes, he
20 shall cause the same or so much thereof as he may designate, to be placed under the
21 control of the Secretary of the Interior for disposition as hereinafter provided, and
22 shall cause to be filed with the Secretary of the Interior a notice thereof.¹¹⁷

23 Finding of Fact No. 63. The President never issued an executive order pursuant to the Act of
24

22 ¹¹³ *Id.* at 1.

23 ¹¹⁴ Memo. 4 (Dec. 10, 1948). U.S. Exh. No. 12 and ASARCO Appendices, Vol. Two, Tab 27.

24 ¹¹⁵ *Williams v. Superior Court in and for Co. of Pima*, 108 Ariz. 154, 158, 494 Ariz. 26, 30 (1972).

¹¹⁶ SRP Motion for Summary Judgment 2-3 (June 15, 2007).

1 July 5, 1884, declaring Fort Huachuca “useless for military purposes.”

2 Finding of Fact No. 64. Sections 1, 2, and 3 of the Act of July 5, 1884, were repealed by
3 Public Law No. 247 enacted on October 31, 1951.¹¹⁸ The Act consisted of six sections.

4 Finding of Fact No. 65. A report of the House of Representatives concerning Public Law No.
5 247 stated as follows:

6 The purpose of S. 1952 is to repeal, in whole or in part, laws which have become
7 obsolete, inoperative, or are in conflict with recent legislation enacted to provide the
8 Government with a more efficient system of procurement and distribution of supplies
9 and materials, property management, utilization of surplus property, and other
10 legislation affecting the administration of departments and agencies of the
11 Government.

12 Some of the proposed repealers ... will remove from the statutes obsolete
13 provisions of law which date back to 1882....

14 The original bill was drafted ... for the purpose of removing from the statutes
15 those provisions of law which have become obsolete by reason of the enactment of the
16 Federal Property and Administrative Services Act of 1949, as amended.¹¹⁹

17 The other congressional act relevant to this issue is the Surplus Property Act of 1944 which
18 after March 25, 1946, was administered by the War Assets Administration.

19 Finding of Fact No. 66. On October 3, 1944, the Congress enacted Public Law No. 457
20 known as the Surplus Property Act of 1944.¹²⁰ The act, consisting of thirty-eight substantive sections,
21 established a Surplus Property Board to regulate and facilitate the disposal of surplus property. The
22 board was later renamed the Surplus Property Administration.

23 Finding of Fact No. 67. On January 31, 1946, President Harry S. Truman issued Executive
24 Order No. 9689 which established the War Assets Administration “as a separate agency directly

21 ¹¹⁷ Act of July 5, 1884, ch. 214, 23 Stat. 103 (July 5, 1884) (repealed in part 1951). ASARCO Appendices,
22 Vol. Four, Tab 5.

23 ¹¹⁸ Pub. L. No. 247, ch. 654, 65 Stat. 701, 706 (sub. 114) (Oct. 31, 1951). ASARCO Appendices, Vol. Four,
24 Tab 16.

21 ¹¹⁹ H.R. Rpt. No. 1105, Govt. Property Laws (Oct. 8, 1951), *reprinted in* Vol. 2, 1951 U.S.C.C.A.N. 2576-78.
22 ASARCO Appendices, Vol. Four, Tab 15.

23 ¹²⁰ Pub. L. No. 457, 58 Stat. 765.

1 responsible to the President to exercise consolidated functions relating to the disposal of domestic
2 surplus property.”¹²¹ The War Assets Administration assumed the functions of the Surplus Property
3 Administration to administer the Surplus Property Act.

4 Between 1948 and 1950, the United States disposed to the State of Arizona all the lands and
5 over 1,100 buildings of Fort Huachuca. One of the deeds and a bill of sale stated that the United
6 States was acting pursuant to the Surplus Property Act.¹²² A second deed referred to the authority of
7 the Federal Property and Administrative Services Act of 1949, which repealed most of the provisions
8 of the Surplus Property Act, abolished the War Assets Administration, and transferred its functions to
9 the newly created General Services Administration.¹²³ The Act of July 5, 1884, was not referred to as
10 authority in any of the deeds or the bill of sale of the disposal of Fort Huachuca.

11 The United States called SRP’s position novel. The Special Master believes it to be
12 reasonable but not persuasive. The starting points for the Act of July 5, 1884, were the “opinion” of
13 the President that lands within a “military reservation” had become “useless for military purposes,”
14 the President’s discretionary designation of all or some of the lands for placement under the control
15 of the Secretary of the Interior, and the filing of a notice with the Secretary. The President had to take
16 each of these actions in order to vest in the Secretary of the Interior the authority to dispose of
17 abandoned properties in accordance with the Act of July 5, 1884.

18 The President did not take any of these actions with respect to Fort Huachuca. President
19 Truman, who served from 1945 to 1953 (the period of Fort Huachuca’s disposal), could have started
20 the process even after May 16, 1947, when the War Department issued its circular declaring Fort
21 Huachuca surplus. There is no indication in the record that he did so. President Truman by his

22 ¹²¹ Exec. Order No. 9689 (Jan. 31, 1946), 11 Fed. Reg. 1265 (Feb. 2, 1946). SRP Disclosure 648-649.

23 ¹²² See Finding of Fact No. 87, *infra*.

1 executive order created the War Assets Administration which was “directly responsible” to the
2 President so it can reasonably be inferred that the President knew the agency’s scope of authority.

3 As stated in Assistant Secretary Davidson’s August 13, 1948, letter, the Department of the
4 Interior knew that the War Department had designated Fort Huachuca surplus, and because many of
5 the Fort’s lands were vacant “it appeared that a large amount of the former public domain lands
6 should be returned to the public domain.” Section 7 of the Surplus Property Act required the War
7 Assets Administration to “advise and consult with other interested Government agencies with a view
8 to obtaining all aid and assistance possible in coordinating the functions of the several agencies
9 affected by the disposition of surplus property.”¹²⁴ The Secretary of the Interior and others, including
10 Arizona’s Governor and the Director of the Arizona Game and Fish Department, were aware of the
11 potential applicability of the Act of July 5, 1884. There is no indication in the record that the
12 Secretary of the Interior brought the Act of July 5, 1884, to the President’s attention, or if he did, that
13 the President took the requisite actions to comply with the Act.

14 The State of Arizona had expressed interest in obtaining the lands of Fort Huachuca for
15 wildlife conservation and a training site for the state National Guard, the latter an interest shared with
16 the United States Army. The Surplus Property Act facilitated accomplishing these objectives more
17 efficiently than the Act of July 5, 1884, under which Fort Huachuca would have been either sold to
18 private individuals or returned to the public domain under the jurisdiction of the Department of the
19 Interior. The 1884 Act provided for surveys, appraisals, and public or private sales of abandoned
20 military lands and improvements. The Surplus Property Act provided “a comprehensive scheme for
21 disposing of the [surplus] property in a most effective manner, and.... a most detailed system of
22

23 ¹²³ Pub. L. No. 81-152, ch. 288, 63 Stat. 377 (June 30, 1949). ASARCO Appendices, Vol. Four, Tab 13. *See*
24 Finding of Fact No. 91, *infra*. The Surplus Property Act provided that unless extended, the Act would expire
three years after the declaration of “cessation of hostilities in the present war.” 58 Stat. at 784, § 38.

¹²⁴ Pub. L. No. 457, § 7, 58 Stat. at 768.

1 dealing with surplus property....”¹²⁵ Of key importance, the Act allowed “the disposition of surplus
2 property to States,” a provision not found in the Act of July 5, 1884.¹²⁶

3 The 1884 Act addressed the disposal of lands that the President had opined were “useless for
4 military purposes.” The fact that the State of Arizona and the United States Army desired to use a
5 portion of the lands as a training site for the National Guard of Arizona raises the question of whether
6 those lands had truly “become useless for military purposes.” The lands may have been surplus
7 following the end of World War II, but were they useless for military purposes? Although the
8 National Guard of Arizona is a state organization, the Guard can, upon federal orders, become a
9 component of federal military forces to carry out duties at home and abroad.¹²⁷

10 The Special Master finds that these actions and circumstances evince a deliberate decision on
11 the part of the President, the War Assets Administration, and the Secretary of the Interior to utilize
12 the Surplus Property Act and its succeeding legislation to dispose of Fort Huachuca.

13 The parties opposing SRP’s position cited *Delta Development* for the proposition that the Act
14 of July 5, 1884, was not the exclusive means to dispose of abandoned military reservations.¹²⁸ The
15 District Court rejected the “contention that the 1884 Act provided the exclusive method of selling
16 abandoned military reservation lands” and upheld a mineral reservation required by a 1914 mineral
17 law that had been placed on a patent of lands acquired pursuant to the Act of July 5, 1884.¹²⁹

18 The Special Master finds this holding of *Delta Development* persuasive. If arguably before,

19 ¹²⁵ *United States v. Jones*, 176 F.2d 278, 289 (9th Cir. 1949) (“This is not a casual statute, enacted in haste to
20 cover an unexpected situation.”).

21 ¹²⁶ Pub. L. No. 457, § 13(a), 58 Stat. at 770.

22 ¹²⁷ “Since 1933 all persons who have enlisted in a State National Guard unit have simultaneously enlisted in
the National Guard of the United States. In the latter capacity they became a part of the Enlisted Reserve
Corps of the Army, but unless and until ordered to active duty in the Army, they retained their status as
members of a separate State Guard unit.” *Perpich v. Department of Defense*, 496 U.S. 334, 345 (1990).

23 ¹²⁸ *United States v. Delta Dev. Co.*, 322 F. Supp. 121 (E.D. La. 1970), *aff’d per curiam*, 447 F.2d 989 (5th Cir.
1971), *cert. denied*, 405 U.S. 974 (1972). See *Arizona Water Company and ASARCO Resp. to SRP Motion*
24 *for Summary Judgment 3-6* (Aug. 24, 2007) for a discussion of this case.

1 clearly after the enactment of the Surplus Property Act in 1944, the United States had two distinct
2 statutory means to dispose of military installations and property no longer needed for national
3 defense. The Special Master does not see any conflict between the two acts that must or should be
4 reconciled “as though they constituted one law.”¹³⁰

5 No contention is made that federal officials failed to comply with, or exceeded their authority,
6 under either the Surplus Property Act or the Federal Property and Administrative Services Act in the
7 manner they carried out the disposal of Fort Huachuca. SRP’s position is based on ultra vires - acting
8 without authority - and not on grounds of arbitrariness and capriciousness.

9 Conclusion of Law No. 14. After the enactment of the Surplus Property Act of 1944, the Act
10 of July 5, 1884, was not the exclusive means for the United States to dispose of Fort Huachuca.

11 Conclusion of Law No. 15. The actions of federal officials in disposing of Fort Huachuca to
12 the State of Arizona without complying with the Act of July 5, 1884, were not actions ultra vires.

13 **2. Disposition to the State of Arizona**

14 Four deeds dated March 26, 1948, January 14, 1949, March 2, 1949, and April 18, 1950, and
15 a bill of sale dated March 2, 1949, evidenced the disposal of Fort Huachuca to the State of Arizona.

16 Finding of Fact No. 68. By Quitclaim Deed dated March 26, 1948, the United States, acting
17 by the Secretary of the Army, quitclaimed to the State of Arizona the “cemetery at Fort Huachuca
18 Military Reservation ... [i]ncluding the graves and monuments contained therein and the approach
19 road and appurtenances thereto....”¹³¹

20 Finding of Fact No. 69. The area quitclaimed to the State of Arizona was 57.39 acres of
21 land.¹³² The cemetery contained 7.44 acres of land.

22 ¹²⁹ *Id.* at 130 n.10.

23 ¹³⁰ See SRP Reply 3 (Oct. 23, 2007) (citing *Moreno v. Jones*, 213 Ariz. 94, 99, 139 P3d 612, 617 (2006)).

24 ¹³¹ Quitclaim Deed (Mar. 26, 1948) at 1 (518). U.S. Exh. No. 17.

¹³² See Quitclaim Deed (Mar. 2, 1949) at 429 (USFH-00001218). ASARCO Appendices, Vol. Two, Tab 29.

1 Finding of Fact No. 70. The deed stated that the United States was acting “pursuant to ...
2 Pub[lic] Law 148, 80th Congress [1st Sess.]....”¹³³

3 Finding of Fact No. 71. Public Law No. 148 provided that “the Secretary of War is ...
4 authorized ... to transfer and convey all right, title, and interest of the United States in or to any
5 historic military cemetery ... located on military posts or reservations which have ... become
6 abandoned or useless for military purposes including the graves and monuments ... to any State ... in
7 which. ... such cemetery ... is located....”¹³⁴

8 Finding of Fact No. 72. By Quitclaim Deed dated January 14, 1949, the United States, acting
9 by and through the War Assets Administrator, quitclaimed “all of its right, title, interest, claim and
10 demand” to approximately 42,000 acres of land and eighteen buildings to the State of Arizona “for
11 the use and benefit of the state agency, having the management for the conservation of wild life,
12 other than migratory birds....”¹³⁵

13 Finding of Fact No. 73. The deed stated that the United States was acting “under and pursuant
14 to the authority contained in Public Law 537 ... approved May 19, 1948....”¹³⁶

15 Finding of Fact No. 74. The deed stated that the quitclaimed lands were “a part of the same
16 property ... known as Fort Huachuca Military Reservation, and withdrawn from the public domain
17 for military purposes by” the Executive Orders of October 29, 1881, and May 14, 1883.¹³⁷

18 Finding of Fact No. 75. The quitclaimed lands did not include the area of the original post
19

20 *See also* Acquisition History, Fort Huachuca Mil. Res., Cochise Co., Ariz. ¶ D(19.c), *supra*.

21 ¹³³ Quitclaim Deed (Mar. 26, 1948) at 1 (518). U.S. Exh. No. 17.

22 ¹³⁴ Pub. L. No. 148, ch. 187, 61 Stat. 234 (July 1, 1947). Arizona Water Company and ASARCO Disclosure
FCFH00799-98.

23 ¹³⁵ Quitclaim Deed (Jan. 14, 1949) at 422 (USFH-00001289). U.S. Exh. No. 18. *See also* ASARCO
Appendices, Vol. Two, Tab 28.

24 ¹³⁶ *Id.* at 422 (USFH-00001289). U.S. Exh. No. 18. Pub. L. No. 537, 62 Stat. 240 (May 19, 1948) authorized
the transfer of federal real property for wildlife conservation or other purposes. ASARCO Appendices, Vol.
One, Tab 12.

¹³⁷ Quitclaim Deed (Jan. 14, 1949) at 424 (USFH-00001291). U.S. Exh. No. 18.

1 known also as the “old post” and the cantonment.

2 Finding of Fact No. 76. The deed stated that the United States reserved the following
3 interests:

4 [T]hose developed springs, and the water rights appertaining thereto, located on the
5 land herein conveyed and known as Garden Canyon and Huachuca Canyon, and all
6 pipe lines connecting the aforesaid springs with water reservoirs located on that
7 portion of the area excepted from this conveyance as above described and known as
8 Reservoir Hill....

9 ... [E]asements on, over and across a strip of land 15 feet on either side of the
10 said pipelines for the use, operation, maintenance, repair and relocation of the above-
11 mentioned pipelines as they now exist, together with rights of ingress and egress for
12 maintenance, operation, repair and relocation thereof.¹³⁸

13 Finding of Fact No. 77. The deed provided that the State of Arizona had “the right to tap into”
14 the water pipelines at no cost “for the purpose of furnishing water” to the range lands conveyed.¹³⁹

15 Finding of Fact No. 78. The deed stated that the lands “conveyed are to be continuously used
16 only as and for the conservation of wildlife, other than migratory birds, and ... in the event they are
17 no longer used for such purpose, the title thereto shall revert to the United States, and upon which
18 reversion the title of the state thereto shall cease and ... the United States shall have the immediate
19 right of possession thereof.”¹⁴⁰

20 Conclusion of Law No. 16. The condition concerning the reversion of title was required by
21 Public Law No. 537, which provided that any transfer of real property “to other than the United
22 States ... shall be subject to the ... condition that the property shall continue to be used for wildlife
23 conservation ... and in the event it is no longer used for such purposes or in the event it is needed for
24 national defense purposes title thereto shall revert to the United States.”¹⁴¹

25 Finding of Fact No. 79. The deed stated “that in the event the President of the United States

26 ¹³⁸ *Id.*

27 ¹³⁹ *Id.*

28 ¹⁴⁰ *Id.* at 425 (USFH-00001292).

29 ¹⁴¹ Pub. L. No. 537, 62 Stat. 241-42.

1 of America, the Congress thereof, the Secretary of Defense of the United States, or the Secretaries of
2 the Army, Navy or Air Forces, or either of them determines that the said premises are needed for
3 national defense purposes, the title thereto shall revert to the United States, and upon which reversion
4 the title of the state thereto shall cease and ... the United States shall have the immediate right of
5 possession thereof.”¹⁴²

6 Finding of Fact No. 80. By Deed dated March 2, 1949, the United States, acting by and
7 through the War Assets Administrator, quitclaimed “all of its right, title, interest, claim and demand”
8 to lands and buildings to the State of Arizona for “the continuous use of the premises” by the State of
9 Arizona “for the training and maintaining of civilian components of the armed forces of the United
10 States of America.”¹⁴³ The deed included 1,164 buildings described in an attached schedule.

11 Finding of Fact No. 81. The deed stated that the quitclaimed lands included the lands that had
12 been “withdrawn from the public domain for military purposes by” the Executive Orders of October
13 29, 1881, and May 14, 1883, and the lands comprising the Fort Huachuca Artillery Range which had
14 been (1) withdrawn by Public Land Orders 16 and 251, (2) acquired by condemnation (and voluntary
15 conveyances), and (3) acquired by exchanges of State Trust Lands.¹⁴⁴

16 Finding of Fact No. 82. The quitclaimed lands included the original post (the “old post”) and
17 the cantonment.

18 Finding of Fact No. 83. The deed quitclaimed the following “utilities located” on the lands:

19 1. Water system consisting of:

20 A. Those springs, water rights and pipelines hereinafter specifically referred
21 to.

22 B. All of the water distribution system contained in Areas 1-6, inclusive, and
Areas 7, 10, 13 and 14, and all pipe lines in Areas 8, 9, 11 and 12 necessary to
active service with the water system, and all wells located in Areas 12 and 14

23 ¹⁴² Quitclaim Deed (Jan. 14, 1949) at 425 (USFH-00001292). U.S. Exh. No. 18.

24 ¹⁴³ Deed (Mar. 2, 1949) at 427 (USFH425). U.S. Exh. No. 19 and ASARCO Appendices, Vol. Two, Tab 29.

¹⁴⁴ *Id.* at 429 (USFH-00001218). U.S. Exh. No. 19.

1 with pumps, chlorinators and all connecting services coordinated with the
2 water system of Fort Huachuca.

3
4 TOGETHER with those developed springs and the water rights appertaining thereto,
5 known as Garden Canyon and Huachuca Canyon situate on the following described
6 property, heretofore conveyed by the United States of America to the State of Arizona
7 for the use and benefit of its State Game and Fish Commission by deed dated January
8 14, 1949.

9
10 TOGETHER with all existing pipelines located on the above-described land of the
11 Arizona State Game and Fish Commission, connecting the aforesaid springs with
12 water reservoirs located on the property herein conveyed and known as "Reservoir
13 Hill." Together with easements on, over and across a strip of land 15 feet on either
14 side of the said pipelines for the use, operation, maintenance, repair and re-location of
15 the above-mentioned pipe lines ... which said easements were reserved in that certain
16 conveyance between the United States as grantor and the State of Arizona as grantee,
17 dated January 14, 1949.

18 Reserving, however, to the [United States] the right to tap into the above-mentioned
19 water pipe lines, without any cost or charge, for the purpose of furnishing water to the
20 range areas of the property of the Arizona State Game and Fish Commission as above
21 described.¹⁴⁵

22 Finding of Fact No. 84. The deed stated that:

23 1. For a period of 20 years from the date of this conveyance, the premises above
24 described shall be continuously used and maintained for the training and maintaining
of civilian components of the armed forces of the United States, and for incidental
purposes pertaining thereto, but for no other purpose.

2. [The State of Arizona] will not sell, lease, or otherwise dispose of, any of the
premises above described within 20 years from the date of this conveyance, without
first obtaining the written authorization of the Administrator, or his successor in
function, to such sale, lease, or other disposal....

3. [The State of Arizona] may during the said 20 years period secure abrogation of all
the said conditions and covenants, together with all rights of re-entry herein contained,
except the right to repossess the premises as provided for in paragraph 4 hereinafter
set forth....

4. [The United States] shall have the right during the existence of any national
emergency declared by the President of the United States of America, or the Congress
thereof, to the full, unrestricted possession, control and use of the premises, or any
part thereof, without charge;

EXCEPT THAT the [United States] shall be responsible during the period of such
use, if occurring within a period of 20 years from the date of this conveyance, for the

¹⁴⁵ *Id.* at 429-31 (USFH-00001218-20). *See* 435 (USFH-00001224) regarding the use of the developed springs and pipelines to provide water to the lands used by the Arizona Game and Fish Commission.

1 entire cost of maintaining the premises, or any portion thereof, so used, and shall pay
2 a fair rental for the use of any installations or structures which have been added
thereto without Federal aid;

3 PROVIDED ... that if such use is required after the expiration of a period of 20 years
4 from the date of this conveyance, or the [State of Arizona has] secured the abrogation
of the conditions subsequent together with all rights of re-entry as hereinabove
5 provided, the [United States] shall pay a fair rental for the entire portion of the
premises so used.¹⁴⁶

6 Finding of Fact No. 85. The deed stated that “[i]n the event there is a breach of any of the
7 conditions and covenants [by the State of Arizona] ... during said 20 year period, all right, title and
8 interest in and to the said premises shall revert to and become the property of the United States at its
9 option, and it shall have the immediate right of entry upon said premises and the [State of Arizona]
10 shall forfeit all right, title and interest in said premises and in any and all of the tenements,
11 hereditaments and appurtenances thereunto belonging;...¹⁴⁷ The deed provided that “[i]n the event of
12 a breach of any condition or covenant herein imposed, the [War Assets] Administrator, or his
13 successor in function, may immediately enter and possess himself of title to the herein conveyed
14 premises for and on behalf of the United States of America.”¹⁴⁸

15 Finding of Fact No. 86. By Bill of Sale dated March 2, 1949, the United States, acting by and
16 through the War Assets Administrator, disposed of personal property to the State of Arizona. The bill
17 of sale contained substantively the same terms and conditions concerning the twenty-year limitation
18 of use and reversion and right of entry of the United States contained in the March 2, 1949, deed.¹⁴⁹

19 Finding of Fact No. 87. Both the Deed and Bill of Sale dated March 2, 1949, stated that the
20 United States was acting “under and pursuant to Reorganization Plan No. 1 of 1947 (12 F.R. 4534,
21 4535) and ... the Surplus Property Act of 1944 (58 Stat. 755), as amended ... by Public Law

22 _____
23 ¹⁴⁶ *Id.* at 433-34 (USFH-00001222-23).

24 ¹⁴⁷ *Id.* at 433 (USFH-00001222).

¹⁴⁸ *Id.* at 434 (USFH-00001223).

¹⁴⁹ Bill of Sale at 457-58 (USFH-00001206-07) (Mar. 2, 1949). U.S. Exh. No. 20.

1 829....”¹⁵⁰

2 Finding of Fact No. 88. The March 2, 1949, deed disposed 40,471.63 acres of land and 1,164
3 buildings to the State of Arizona.¹⁵¹

4 Finding of Fact No. 89. On or before May, 1949, the State of Arizona learned of potential
5 defects in title to some of the lands the United States had disposed to the State of Arizona.
6 Discussions ensued between Arizona Governor Dan E. Garvey, Senator Carl Hayden, the War Assets
7 Administration, and the Department of the Interior. The claimed defects involved lands withdrawn
8 by Public Land Orders 16 and 251 and the then 14,999.74 acres of State of Arizona Trust Lands.¹⁵²

9 Finding of Fact No. 90. On April 18, 1950, the United States, acting by the Secretary of the
10 Army, issued a Correction Deed to the State of Arizona. The deed corrected the “ambiguous” land
11 descriptions, contained in the March 2, 1949, deed, concerning the State of Arizona Trust Lands and
12 a land parcel omitted from the deed.¹⁵³ The provisions corresponding to those of the March 2, 1949,
13 deed quoted in the foregoing findings of fact remained substantively the same.

14 Finding of Fact No. 91. The Correction Deed stated that the United States was acting “under
15 and pursuant to the powers and authority contained in Section 203(k)(2)(D)(ii) of the Federal
16 Property and Administrative Services Act of 1949.”¹⁵⁴

17 Finding of Fact No. 92. Section 203(k)(2)(D)(ii) of the Federal Property and Administrative
18 Services Act of 1949 authorized “the Secretary of Defense, in the case of property transferred
19 pursuant to the Surplus Property Act of 1944 ... to States. ... for use in the training and maintenance
20

21 ¹⁵⁰ U.S. Exhs. Nos. 19 at 427 (USFH425) and 20 at 457 (USFH-00001206). Surplus Property Act, Pub. L. No.
457, 58 Stat. 765, *supra*.

22 ¹⁵¹ Letter of General Services Administration to Sen. Carl Hayden 1 (July 5, 1949), *supra*.

23 ¹⁵² *Id.*

24 ¹⁵³ Correction Deed (Apr. 18, 1950) at 177 (USFH-00001246). U.S. Exh. No. 21 and ASARCO Appendices,
Vol. Two, Tab 31.

¹⁵⁴ Correction Deed (Apr. 18, 1950) at 176 (USFH-00001245). U.S. Exh. No. 21. *See* ch. 288, 63 Stat. 377,
ASARCO Appendices, Vol. Four, Tab 13.

1 of civilian components of the armed forces ... to reform, correct, or amend any such instrument by
2 the execution of a corrective, reformative, or amendatory instrument where necessary to correct such
3 instrument or to conform such transfer to the requirements of applicable law.”¹⁵⁵

4 **D. Reversion and Return of Fort Huachuca to the United States**

5 Finding of Fact No. 93. In a letter dated January 18, 1951, to Arizona Governor John Howard
6 Pyle, Acting Secretary of the Air Force John A. McCone informed that:

7 I have determined [sic] that the land and facilities conveyed by the [January 14,
8 1949] deed are required for purposes of national defense. In view of this
9 determination, title to the land and facilities described in the deed dated January 14,
10 1949, reverts to the United States in accordance therewith.

11 Reference is made also to deed from the United States dated March 2, 1949, as
12 amended by deed dated April 18, 1950.... I have determined also that there is a
13 military requirement for the full, unrestricted possession, control and use of certain
14 portions of the area conveyed by these deeds. Accordingly, you are notified, in
15 accordance with the provisions of the deed dated April 18, 1950, that the United
16 States hereby exercises its right to the immediate use of the following described
17 areas....¹⁵⁶

18 Finding of Fact No. 94. In a telegram dated March 5, 1951, to Governor Pyle, Under
19 Secretary of the Army Archibald S. Alexander stated that the United States Army “had no objection
20 to temporary use of Fort Huachuca by the Department of the Air Force but that ultimate use of the
21 installation and which service should acquire title would be worked out by the Army and the Air
22 Force,” although “[a] decision has been reached that the Army will reacquire title and reoccupy Fort
23 Huachuca in the immediate future.”¹⁵⁷

24 Finding of Fact No. 95. The United States submitted a memorandum dated on or about March
6, 1951, showing the author’s name and position of Colonel Francis B. Shearer and sent on behalf of

¹⁵⁵ Pub. L. No. 152, ch. 288, 63 Stat. 377, 388 (June 30, 1949). ASARCO Appendices, Vol. Four, Tab 13.

¹⁵⁶ Letter of Act’g Sec. McCone to Gov. Pyle (Jan. 18, 1951). U.S. Exh. No. 22 and ASARCO Appendices, Vol. Two, Tab 33.

¹⁵⁷ Telegram (Mar. 5, 1951). U.S. Exh. No. 23. During the Korean Conflict, the Department of the Army used Fort Huachuca to train aviation engineers to be eventually assigned to the Air Force. Arizona Water Company and ASARCO Response to SRP Statement of Fact No. 64 at 14 (Aug. 24, 2007).

1 the Acting Chief, National Guard Bureau, which stated in pertinent part as follows:

2 “1.b. Conference conducted by the Vice Chairman of the Munitions Board on 2
3 March 1951 during which a decision was made that the Air Force would vacate Fort
4 Huachuca not later than 15 May 1951 and that the Department of the Army would
5 acquire and reactivate the installation.”¹⁵⁸

6 Finding of Fact No. 96. In response to a letter from Governor Pyle, by letter dated March 27,
7 1951, Acting Secretary of the Air Force John A. McCone informed Governor Pyle that:

8 Since receipt of your letter the Department of the Army has indicated an urgent
9 requirement for [Fort Huachuca], and accordingly it has been determined to assign the
10 facility to that Department.

11

12 Pursuant to provisions contained in the deeds of conveyance, and by virtue of
13 my letter of January 18, 1951, title to the premises conveyed in the deed dated January
14 14, 1949, reverted to the Government; whereas, the Government has only the right to
15 unrestricted use of the premises conveyed in the deed of April 18, 1950. Use of the
16 property by the Department of the Army does not affect the reversion of title.¹⁵⁹

17 Finding of Fact No. 97. On April 5, 1951, the United States Sixth Army issued General Order
18 No. 62 “designating Fort Huachuca as a Class I Army Installation, effective 20 April 1951.”¹⁶⁰

19 Finding of Fact No. 98. The Arizona Legislature enacted Chapter 44, House Bill No. 170,
20 which the Governor approved on March 13, 1952. The legislation, which became effective
21 immediately, stated in pertinent part as follows:

22 Section 1. AUTHORIZATION TO GOVERNOR. The Governor ... is hereby
23 authorized to execute on behalf of the State of Arizona the necessary instruments of
24 conveyance to transfer the title to all the real and personal property comprising Fort
Huachuca to the United States for the use and benefit of the Department of the Army,
which property was conveyed to the State of Arizona by deeds and bill of sale
executed by the Office of Real Property Disposal, War Assets Administration, under
Public Laws 537 and 829, by deeds dated January 14, 1949, March 26, 1948, March
2, 1949 and April 18, 1950, and by a bill of sale dated March 2, 1949, and by deed
executed by the Department of the Army conveying the post cemetery, dated March
26, 1948.

Section 2. PURPOSE. The purpose of this authority is to clear the title to said
real and personal property, which property, with the exception of the post cemetery

¹⁵⁸ Memo. (dated on or about Mar. 6, 1951). U.S. Exh. No. 24.

¹⁵⁹ Letter of Act'g Sec. McCone to Gov. Pyle (Mar. 27, 1951). U.S. Exh. No. 26.

¹⁶⁰ Memo. 2 (USFH-00001331) (dated May 11, 1951 but “S May 28, 1951”). U.S. Exh. No. 25.

1 described in deed dated March 26, 1948, has been repossessed by the United States
2 under reservations contained in the above-described deeds and bill of sale, authorizing
3 such repossession during a national emergency, but which reservations provide only
4 for the retaking of possession of the personal property and portions of the real estate
5 with the legal title thereto remaining in the State of Arizona. It is therefore the desire
6 of the United States that full title to said real and personal property should be vested in
7 the United States in order that it will not be hampered in its use and operation of the
8 said Fort.¹⁶¹

9 Finding of Fact No. 99. On June 5, 1953, the Department of the Army announced that Fort
10 Huachuca, “a class I installation,” had been “placed in an inactive status” effective May 1, 1953.¹⁶²

11 Finding of Fact No. 100. On January 14, 1954, the Department of the Army redesignated Fort
12 Huachuca “a class II installation under the jurisdiction of the Chief Signal Officer and placed [Fort
13 Huachuca] in an active status” effective February 1, 1954.¹⁶³

14 Finding of Fact No. 101. In a telegram dated May 26, 1954, addressed to Robert B. Bradford,
15 General Services Administration, Governor Pyle requested “a complete explanation of the delay, a
16 report on the status of transfer papers, and any recommendation you might have on what Arizona
17 might do to expedite [the] transfer” of Fort Huachuca to the United States as the State “most
18 positively want it to be fully in military use and control.”¹⁶⁴

19 **1. Return of Fort Huachuca to the United States**

20 In 1954 and 1957, the State of Arizona returned the lands it owned to the United States.

21 Finding of Fact No. 102. By Indenture Deed dated September 9, 1954, the State of Arizona
22 quitclaimed “all its rights, title and interests, claim and demand” to the United States to an area of
23 approximately 10,540.80 acres of land, another area of approximately 3,377.31 acres of land, and all
24 improvements thereon.¹⁶⁵

22 ¹⁶¹ 1952 Ariz. Sess. Laws 80, ch. 44 (effective Mar. 13, 1952). U.S. Exh. No. 27.

23 ¹⁶² Gen. Orders, No. 47, Dept. of the Army (June 5, 1953). ASARCO Appendices, Vol. One, Tab 16.

24 ¹⁶³ Gen. Orders, No. 2, Dept. of the Army (Jan. 14, 1954). ASARCO Appendices, Vol. One, Tab 17.

¹⁶⁴ Telegram (May 26, 1954). U.S. Exh. No. 29.

¹⁶⁵ Indenture Deed (Sept. 9, 1954). U.S. Exh. No. 30 and ASARCO Appendices, Vol. Three, Tab 3.

1 Finding of Fact No. 103. The lands described in the deed included in portions of the lands
2 within the Executive Orders of October 29, 1881, and May 14, 1883, and a portion of the East
3 Range.¹⁶⁶

4 Finding of Fact No. 104. The deed did not identify or refer to water rights or water sources.

5 Finding of Fact No. 105. By Quitclaim Deed dated May 28, 1957, the State of Arizona
6 quitclaimed “all its rights, title and interests, claim and demand” to the United States to five tracts of
7 land aggregating approximately 10,200.40 acres of land and all improvements thereon.¹⁶⁷

8 Finding of Fact No. 106. The lands described in the May 28, 1957, deed were located entirely
9 inside the East Range.¹⁶⁸

10 Finding of Fact No. 107. The March 28, 1957, deed did not identify or refer to water rights or
11 water sources.

12 Finding of Fact No. 108. A. R. S. § 26-252 as enacted in 1951 provided that:

13 Exclusive jurisdiction over any land in this State so acquired for any of the purposes
14 aforesaid and over any public domain land in this state, now or in the future reserved
15 or used for military purposes is hereby ceded to the United States; but the jurisdiction
16 so ceded shall continue no longer than the said United States shall own or lease such
17 acquired land, or shall continue to reserve or use such public domain land for military
18 purposes.¹⁶⁹

19 Finding of Fact No. 109. In a letter dated March 8, 1956, Secretary of the Army Wilber M.
20 Brucker informed Arizona Governor Ernest W. McFarland that:

21 [N]otice is hereby given that the United States accepts exclusive jurisdiction over the
22 entire area of the military installation designated as Fort Huachuca ... with the
23 exception of 160 acres of school land of the State of Arizona leased to the United
24 States and 960 acres of public domain land not yet transferred from the Department of

21 ¹⁶⁶ See Maps marked “Exhibit 1” and “Exhibit 3” attached as part of “Exhibit A” to Arizona Water Company
22 and ASARCO Statement of Facts.

23 ¹⁶⁷ Quitclaim Deed (May 28, 1957). U.S. Exh. No. 32 and ASARCO Appendices, Vol. Three, Tab 4.

24 ¹⁶⁸ Map marked “Exhibit 3” attached as part of “Exhibit A” to Arizona Water Company and ASARCO
Statement of Facts.

¹⁶⁹ 1951 Ariz. Sess. Laws 220, ch. 96 (effective Mar. 27, 1951). The current statute is substantively the same
as enacted in 1951.

1 the Interior. The area over which the United States hereby accepts exclusive
2 jurisdiction comprises approximately 48,177 acres of lands acquired by the United
States for military purposes.¹⁷⁰

3 Finding of Fact No. 110. In his March 8, 1956, letter Secretary Brucker explained that federal
4 statutes provided “that unless and until the United States has accepted jurisdiction over lands
5 acquired after 1 February 1940, it shall be conclusively presumed that no jurisdiction has been
6 accepted.”¹⁷¹

7 The Special Master does not make any finding of fact or conclusion of law as to whether
8 Secretary Brucker’s interpretation of the relevant federal statutes was correct or reasonable.

9 **2. Reversionary Interest of the United States in Water Rights**

10 An important aspect of this briefing is whether the declaration of Fort Huachuca as surplus
11 and the disposition of lands and over 1,100 buildings to the State of Arizona extinguished any
12 reserved water rights the Fort may have had. The United States argued that the break in title neither
13 divested it of a reserved water right nor defeated the claimed 1881 priority. The Arizona Water
14 Company, ASARCO, Phelps Dodge, and the Sierra Vista Parties responded that assuming a reserved
15 water right existed, the withdrawals and reservations of lands and any reserved water rights in those
16 lands terminated upon the declaration of surplus and disposal to the State of Arizona, and if a
17 reserved right survived, there is no basis for inferring the retention of a reversionary interest, and
18 furthermore, a reserved right was not created when the United States reacquired Fort Huachuca.

19 The Special Master resolved this issue by applying the case law of reserved water rights,
20 analyzing the documents of disposition, determining the congressional intent for the disposal of
21 surplus property, and considering that this case involves non-Indian reserved rights.

22 Although its disposal as surplus occurred many years before courts began to fashion the

23 _____
¹⁷⁰ Letter of Sec. Brucker to Gov. Pyle (Mar. 8, 1956). U.S. Exh. No. 31.

24 ¹⁷¹ *Id.*

1 reserved water rights doctrine, Fort Huachuca had existed for nearly 70 years. There is a history of
2 withdrawals and reservations of public domain, development of water sources, construction of
3 distribution systems, and water uses. Documents exist from which the intent of Congress and of
4 federal officials can be inferred.

5 The availability of water was a factor in the selection of Fort Huachuca's location, water
6 distribution systems were built, and wells drilled. Water was an important consideration for the
7 people at Fort Huachuca. The documents evidencing the disposal of Fort Huachuca to the State of
8 Arizona show that the officials involved gave attention to the water sources, systems, and water
9 rights.

10 The water sources, the distribution systems, "and the water rights appertaining thereto" were
11 specifically included in the deeds disposing of Fort Huachuca to the State of Arizona. At the time of
12 its disposal, Fort Huachuca's primary water sources included the developed springs in Garden and
13 Huachuca Canyons.

14 The January 14, 1949, deed reserved to the United States the following interests:

15 [T]hose developed springs, **and the water rights appertaining thereto**, located on
16 the land herein conveyed and known as Garden Canyon and Huachuca Canyon, and
17 all pipe lines connecting the aforesaid springs with water reservoirs located on that
18 portion of the area excepted from this conveyance as above described and known as
19 Reservoir Hill....

18 ... [E]asements on, over and across a strip of land 15 feet on either side of the
19 said pipelines for the use, operation, maintenance, repair and relocation of the above-
20 mentioned pipelines as they now exist, together with rights of ingress and egress for
21 maintenance, operation, repair and relocation thereof.¹⁷².

20 The March 2, 1949, deed quitclaimed to the State of Arizona the interests in the developed
21 springs and the water rights that the United States had reserved in the January 14, 1949, deed.
22 However, the March 2, 1949, deed reserved to the United States the right to use the developed
23

24 ¹⁷² Quitclaim Deed (Jan. 14, 1949) 424 (USFH-00001291) (emphasis added). U.S. Exh. No. 18.

1 springs to furnish water to the lands conveyed by the prior deed. The March 2, 1949, deed
2 quitclaimed to the State of Arizona the:

3 1. Water system consisting of:

4 A. Those springs, **water rights** and pipelines hereinafter specifically referred
5 to.

6 B. All of the water distribution system....

7

8 TOGETHER with those developed springs and **the water rights appertaining**
9 **thereto**, known as Garden Canyon and Huachuca Canyon ... heretofore conveyed by
10 the United States of America to the State of Arizona for the use and benefit of its State
11 Game and Fish Commission by deed dated January 14, 1949.

12

13 TOGETHER with all existing pipelines located on the above-described land of the
14 Arizona State Game and Fish Commission, connecting the aforesaid springs with
15 water reservoirs located on the property herein conveyed and known as "Reservoir
16 Hill." Together with easements on, over and across a strip of land 15 feet on either
17 side of the said pipelines for the use, operation, maintenance, repair and re-location of
18 the above-mentioned pipe lines ... which said easements were reserved in that certain
19 conveyance between the United States as grantor and the State of Arizona as grantee,
20 dated January 14, 1949.

21 Reserving, however, to the [United States] the right to tap into the above-mentioned
22 water pipe lines, without any cost or charge, for the purpose of furnishing water to the
23 range areas of the property of the Arizona State Game and Fish Commission as above
24 described.¹⁷³

25 The deeds show that the United States claimed "the water rights appertaining to" the primary
26 water sources of Fort Huachuca and intended to reserve them and later to dispose of those rights to
27 the State of Arizona. The deeds must be examined to determine if it can be reasonably inferred that
28 the United States retained a reversionary interest in the water rights, including reserved water rights.

29 The January 14, 1949, deed provided that title to the lands would revert to the United States
30 in the event the Secretary of the Air Force (among other specified federal authorities) determined that
31 the property was needed for national defense purposes, and upon the reversion of title the United
32 States would have the immediate right of possession. Congress required this condition for reversion

33 _____
34 ¹⁷³ Deed at 429-31 (USFH-00001218-20) (emphasis added). U.S. Exh. No. 19 and ASARCO Appendices,
Vol. Two, Tab 29.

1 of title when federal lands were transferred to a state for wildlife conservation purposes.¹⁷⁴ Federal law
2 required the reversion of title provision.

3 The January 14, 1949, deed intended to create a fee simple determinable in the State of
4 Arizona because the deed expressly provided for the “possibility of reverter upon the occurrence of
5 [a] stated event,” namely, the determination of the United States that Fort Huachuca was needed for
6 national defense purposes.¹⁷⁵ The State of Arizona’s title to these lands of Fort Huachuca would
7 automatically end upon the occurrence of the specified event, which is what happened in 1951.

8 The March 2, 1949, deed provided that the lands and buildings would be continuously used
9 for 20 years for the training of “civilian components of the armed forces of the United States,” and
10 the State of Arizona could not dispose of the property during that period without authorization from
11 federal officials.¹⁷⁶ However, the United States had “the right during the existence of any national
12 emergency declared by the President of the United States of America, or the Congress thereof, to the
13 full, unrestricted possession, control and use of the premises, or any part thereof.”¹⁷⁷ The State of
14 Arizona could during the 20-year period obtain the abrogation of all the conditions and covenants
15 except the right of the United States to repossess Fort Huachuca during the existence of a national
16 emergency declared by the President. If the State of Arizona breached any of the conditions and
17 covenants during the 20-year period, “at its option” title would revert to the United States.

18 The March 2, 1949, deed conveyed to the State of Arizona a fee simple subject to a condition
19 subsequent because the reversion of title to the United States was not automatic but depended upon
20 the option of the federal government, exercised during the 20-year period, to take back title to the
21

22 ¹⁷⁴ Pub. L. No. 537, 62 Stat. 241.

23 ¹⁷⁵ *City of Tempe v. Baseball Facilities, Inc.*, 23 Ariz. App. 557, 560, 534 P.2d 1056, 1059 (1975).

24 ¹⁷⁶ Deed (Mar. 2, 1949) 433-34 (USFH-00001222-23). U.S. Exh. No. 19 and ASARCO Appendices, Vol. Two, Tab 29.

¹⁷⁷ *Id.* at 434 (USFH-00001223).

1 property if the State of Arizona breached a condition or covenant.¹⁷⁸

2 Conclusion of Law No. 17. The State of Arizona did not receive fee simple absolute title. The
3 January 14, 1949, deed created a fee simple determinable in the State of Arizona. The March 2, 1949,
4 deed created a fee simple subject to a condition subsequent.

5 The case law of reserved water rights holds that the intent of Congress is a pertinent inquiry.
6 While *Cappaert* and *New Mexico* examined the documents that created a reservation, in this case the
7 congressional authorization for the disposal of surplus property must be examined. The Surplus
8 Property Act reflected the intent of Congress concerning the disposal of surplus property.

9 The Surplus Property Act set forth twenty objectives “to facilitate and regulate the orderly
10 disposal of surplus property;” the first one was “to assure the most effective use of such property for
11 war purposes and the common defense.”¹⁷⁹ This objective evinces a Congressional intent that the
12 future usefulness of surplus property for national defense purposes be considered when surplus
13 property was disposed. A military installation may have been surplus after demobilization following
14 the end of World War II, but the installation, in whole or in part, might remain useful for national
15 defense. The Congress intended that federal officials consider this possibility and potential when
16 disposing of surplus property. This intent is reinforced when it is considered that Fort Huachuca was
17 an important post where over 40,000 soldiers had been housed during World War II.

18 The facts that the State of Arizona did not receive fee simple absolute title and that a large
19 portion of Fort Huachuca was disposed for a training area for the National Guard of Arizona show
20 that federal officials were aware of, and sought to meet, this objective of the Surplus Property Act.

21 Conclusion of Law No. 18. Congress intended when it enacted the Surplus Property Act of

22
23 ¹⁷⁸ See *Lacer v. Navajo County*, 141 Ariz. 396, 401, 687 P.2d 404, 409 (App. 1983) (“The reversion is not
24 automatic but depends upon a decision on the part of the grantor to re-enter.”). See BLACK’S LAW
DICTIONARY 648 (8th ed. 2004) for a review of fee simple estates.

¹⁷⁹ Pub. L. No. 457, § 2(a), 58 Stat. at 766.

1 1944 that federal officials had to consider the most effective use of surplus property for national
2 defense before its disposal.

3 Parties opposing the position of the United States cited to *Leo Sheep Co. v. United States*, 440
4 U.S. 668 (1979), and *Hash v. United States*, 403 F.3d 1308 (Fed. Cir. 2005), for the proposition that
5 courts have rejected claims of the federal government to implicit reservations in analogous
6 circumstances. These cases did not involve water rights, but rather railroad land grants and rights-of-
7 way, and second, the decisions turned on the interpretation of the Congressional legislation
8 concerning those land grants and rights-of-way. Likewise, the Special Master did not find *Wiltbank*
9 *v. Lyman Water Co.*, 13 Ariz. App. 485, 477 P.2d 771 (1970), *review denied*, 107 Ariz. 252, 485 P.2d
10 822 (1971), (cited by the United States) persuasive because its facts are distinguishable from this
11 case.

12 Considering that water rights were included in the deeds of disposition, the United States
13 reserved those water rights in the first deed, the State of Arizona did not receive fee simple absolute
14 title, the United States retained in one deed the right to reversion of title and in the other deed a right
15 to reenter, and at its option, a right of title reversion, and the congressional legislation used for the
16 disposal of Fort Huachuca to the State of Arizona directed that federal officials had to consider the
17 most effective use of surplus property for national defense before disposal, the Special Master
18 concludes that these facts provide a basis to find that the United States retained a reversionary
19 interest in the water rights of Fort Huachuca when the Fort was disposed to the State of Arizona, and
20 that this reversionary interest extends to reserved water rights.

21 Conclusion of Law No. 19. The United States retained a reversionary interest in the water
22 rights it held when Fort Huachuca was disposed as surplus to the State of Arizona.

23 Conclusion of Law No. 20. The reversionary interest of the United States in the water rights
24

1 extends to any reserved water rights that may exist for Fort Huachuca.

2 **a. Declaration of Surplus**

3 It was argued that any reserved water right was extinguished when Fort Huachuca was
4 declared surplus effective May 31, 1947. This position is not persuasive for the reason that until Fort
5 Huachuca was formally disposed by sale, exchange, lease, or transfer, the classification of surplus
6 property could have been amended or revoked, in whole or in part, and lacked finality.

7 Under the Surplus Property Act, “[i]mmediately after the reporting of surplus property to the
8 [Surplus Property] Board ... the Board shall classify such property ... as it may deem advisable. The
9 classification may be revised from time to time.”¹⁸⁰ Furthermore, the Act provided that the Surplus
10 Property Board “shall determine on the basis of need what transfers shall be made” to local
11 governments.¹⁸¹ Not only could the classification of surplus property be revised but also how much
12 property and when it could be transferred remained open matters until a formal transaction had been
13 executed. The “methods of disposition” were “sale, exchange, lease, or transfer.”¹⁸² The Federal
14 Property and Administrative Services Act of 1949, successor to the Surplus Property Act, provided
15 for disposal of surplus property “by sale, exchange, lease, permit, or transfer.”¹⁸³ These transactions
16 finalized the disposal of surplus.

17 Conclusion of Law No. 21. Any reserved water rights that may exist for Fort Huachuca were
18 not extinguished when the Fort was declared surplus effective May 31, 1947.

19 Although the determination that the United States retained a reversionary interest in the water
20 rights for Fort Huachuca obviates further discussion of this issue, the Special Master provides the
21 following analysis for the Court’s benefit. The United States argued that assuming it did not hold a

22 _____
23 ¹⁸⁰ Pub. L. No. 457, § 23(c), 58 Stat. at 777. The War Assets Administration, involved in the disposition of
24 Fort Huachuca, succeeded the Surplus Property Board.

¹⁸¹ *Id.* at § 13(a), 58 Stat. at 770-71.

¹⁸² *Id.* at § 15(a), 58 Stat. at 772.

1 reversionary interest in the water rights the United States acquired a reserved water right when it
2 reacquired Fort Huachuca in 1951 and 1954. This argument gives rise to a further issue concerning
3 the date of priority of a reacquired reserved water right - is it the date of reacquisition (1951 and
4 1954), the date of the original reservation (1881), or the date when the State of Arizona ceded
5 exclusive jurisdiction over Fort Huachuca to the United States (1956)?

6 The position of the United States is not persuasive. The case law cited in support of this
7 position pertains to Indian reservations, Indian reserved water rights, and allotment property interests
8 based on congressional legislation.¹⁸⁴ For a variety of reasons, “Indian reservations, however, are
9 different,” and in some aspects their reserved water rights are treated differently than non-Indian
10 reserved rights.¹⁸⁵ The cases cited by the United States are based on congressional legislation and
11 legal principles distinguishable from those relevant to Fort Huachuca.

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

14 Because “non-Indian reserved rights are narrowly quantified to meet the original, primary
15 purpose of the reservation,” the Court must “determine the precise federal purposes to be served.”¹⁸⁶

16 Finding of Fact No. 111. On February 12, 1877, two cavalry companies “were ordered to the
17 Huachuca Mountains to protect the new settlers, maintain the neutrality of the International
18 Boundary, and stop the marauding of the Indians and desperados.”¹⁸⁷

19 Finding of Fact No. 112. Fort Huachuca “was a training center during the war with Spain and
20

21 ¹⁸³ Pub. L. No. 152, § 203(c), 63 Stat. at 385.

22 ¹⁸⁴ The United States cited to *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981), and *United States v. Anderson*, 736 F.2d 1358 (9th Cir. 1984).

23 ¹⁸⁵ 201 Ariz. at 313, 35 P.3d at 74.

24 ¹⁸⁶ 201 Ariz. at 312-13, 35 P.3d at 73-74.

¹⁸⁷ ANN. RPT. OF MEDICAL DEPARTMENT ACTIVITIES AT FORT HUACHUCA, ARIZ. ¶ 1(a), *supra*. See also U.S. Exh. No. 1.

1 when Mexican revolutionaries became active during the next few years....”¹⁸⁸

2 Finding of Fact No. 113. In December, 1913, “the 10th Cavalry ... took over the Fort which
3 then became completely garrisoned by colored troops for the first time.”¹⁸⁹

4 Finding of Fact No. 114. In 1916, the 10th Cavalry “joined [Major General John J.]
5 Pershing’s Punitive Expedition into Mexico after Pancho Villa, to return in February, 1917, where
6 they remained for the duration of World War I on border patrol duty assisted by the 25th
7 Infantry....”¹⁹⁰

8 Finding of Fact No. 115. Fort Huachuca “had several of the first companies of machine gun
9 troops before World War I and was testing this weapon as a sort of novelty in that period.”¹⁹¹

10 Finding of Fact No. 116. In 1928, “a battalion of the 25th Infantry was assigned from Camp
11 Little [located in Nogales, Arizona]; the Tenth Cavalry left [Fort Huachuca] in September, 1931, and
12 the other battalion of the 25th joined the regiment two years later. The 25th maintained its traditional
13 state of training, and when war clouds over Europe cast their shadows over the Huachucas, it
14 furnished cadres for its third battalion and heavy weapons company early in 1941 and in March of
15 the same year for the reactivated 368th Infantry.”¹⁹²

16 Finding of Fact No. 117. When the 25th Infantry arrived in Fort Huachuca in 1931, the role of
17 horse mounted cavalry at Fort Huachuca declined.¹⁹³

18 Finding of Fact No. 118. During World War II, Fort Huachuca “was the training site for the
19

20 ¹⁸⁸ ANN. RPT. OF MEDICAL DEPARTMENT ACTIVITIES AT FORT HUACHUCA, ARIZ. ¶ 1(c), *supra*.

21 ¹⁸⁹ *Id.* Until 1942, cavalry primarily meant horse mounted troops. The troops of the 10th cavalry at Fort
Huachuca became known as the Buffalo Soldiers.

22 ¹⁹⁰ *Id.*

¹⁹¹ SHORT HISTORY OF FORT HUACHUCA 1, *supra*.

¹⁹² ANN. RPT. OF MEDICAL DEPT. ACTIVITIES AT FORT HUACHUCA, ARIZ. ¶ 1(d), *supra*.

23 ¹⁹³ HISTORY OF FORT HUACHUCA, ARIZ., Bruno J. Rolak and Jean Daugherty, 27 (FCFH0259) (1972).
24 ASARCO Appendices, Vol. Three, Tab 7. *See* ASARCO and Arizona Water Company Statement of Fact No.
44 for more on the history of the horse cavalry (June 15, 2007).

1 92nd and 93rd Infantry Divisions prior to their deployment to Italy and the South Pacific.”¹⁹⁴

2 Finding of Fact No. 119. The deactivation of Fort Huachuca after being designated surplus
3 “resulted in the final disbanding of a U.S. Army unit, the Indian Scouts.... The last company of them
4 was stationed at Fort Huachuca, and eight of them remained on duty to pass in final review and be
5 retired when Fort Huachuca closed.”¹⁹⁵

6 Finding of Fact No. 120. During the Korean Conflict, the Department of the Army used Fort
7 Huachuca to train aviation engineers to be eventually assigned to the Air Force.¹⁹⁶

8 Finding of Fact No. 121. From 1949 to 1951, the lands that were disposed to the State of
9 Arizona for use “for the conservation of wildlife, other than migratory birds,” were used for that
10 purpose.

11 Finding of Fact No. 122. From 1949 to 1951, the lands that were disposed to the State of
12 Arizona for use “for the training and maintaining of civilian components of the armed forces of the
13 United States of America” were used as a training post for the National Guard of Arizona.¹⁹⁷ The
14 National Guard’s use occurred during the summer and year-round as needed.¹⁹⁸

15 Finding of Fact No. 123. On January 7, 1954, the Department of Defense “announced ... the
16 establishment of the United States Army Electronic Proving Ground at Fort Huachuca, Arizona....
17 [F]ort Huachuca ... was selected as the only suitable and economical site of the many studied.”¹⁹⁹

19 ¹⁹⁴ 1877 Fort Huachuca 1968 at 6. U.S. Exh. No. 36. The 92nd Infantry Division saw action in Europe, and the
20 93rd Infantry Division at Guadalcanal. The 25th Cavalry was incorporated into the 93rd Infantry Division.
U.S. Statement of Fact No. 42 (June 15, 2007).

¹⁹⁵ SHORT HISTORY OF FORT HUACHUCA 3, *supra*.

21 ¹⁹⁶ See Arizona Water Company and ASARCO Resp. to SRP Statement of Fact No. 64 at 14 (Aug. 24, 2007).

22 ¹⁹⁷ FORT HUACHUCA, ARIZONA, A CENTURY OF DEVELOPMENT AND CHANGING MISSIONS, 1877-1977 149
(USFH164), *supra*. See SRP Statement of Fact No. 56 at 17 (June 15, 2007).

23 ¹⁹⁸ See Letter of Major Gen. Cramer to Administrator Larson (Dec. 3, 1948). U.S. Exh. No. 16.

24 ¹⁹⁹ Press Release, Dept. of Defense, Office of Public Information (Jan. 7, 1954). U.S. Exh. No. 28. “Fort
Huachuca’s involvement with the latest in communications technology thus dates from the early 1880s, when
one of the heliograph stations was established here.” 1877 Fort Huachuca 1968 at 5, *supra*. A heliograph used
bursts of sunlight as signals.

1 Finding of Fact No. 124. In December, 1957, the U.S. Army Combat Surveillance School and
2 Training Center was activated at Fort Huachuca.²⁰⁰

3 Finding of Fact No. 125. A historical review of Fort Huachuca written in January, 1959,
4 states that the “Post is now engaged in testing television for battlefield surveillance, infra-red
5 detection devices, [and] pilotless airplanes (drones) also for battlefield photography. A large
6 department is devoted to electronic warfare.... Another department ... is engaged in developing the
7 use of small planes and helicopters in tactical support of troops.”²⁰¹

8 Finding of Fact No. 126. From 1954 to July, 1967, the U.S. Army Electronic Proving
9 Grounds was the host command at Fort Huachuca. On July 1, 1967, garrison and administrative
10 responsibilities were transferred to the U.S. Army Strategic Communications Command whose
11 “primary job was to function as the principal U.S. Army manager for strategic communications, to
12 establish, engineer, install, and operate the Army portions of the global Defense Communications
13 System (DCS) and provide communications support for other government agencies as directed.”²⁰²

14 Finding of Fact No. 127. In 1971, Fort Huachuca became the home post of the U.S. Army
15 Intelligence Center and School.²⁰³

16 Finding of Fact No. 128. In October, 1990, the U.S. Army Training and Doctrine Command
17 became the host command.²⁰⁴

18 The United States argued that Fort Huachuca was reserved for “military purposes.” The
19 Arizona Water Company, ASARCO, and Phelps Dodge argued that the following were the purposes
20 of each withdrawal and reservation:

21 _____
22 ²⁰⁰ 1877 Fort Huachuca 1968 at 13, *supra*.

23 ²⁰¹ SHORT HISTORY OF FORT HUACHUCA 3-4, *supra*.

24 ²⁰² 1877 Fort Huachuca 1968 at 8 and 11, *supra*. The Strategic Communications Command became the U.S.
Army Communications Command in 1973 and in 1984 the U.S. Army Information Systems Command.

²⁰³ Uncontroverted U.S. Statement of Fact No. 45 at 8(June 15, 2007).

²⁰⁴ *Id.*

1	October 29, 1881, Executive Order	Small military installation to protect the Mexican border and provide local security
2	May 14, 1883 Executive Order	Grazing rights for horses
3	Public Land Order 16	Field Artillery Range
3	Public Land Order 251	Artillery Range.

4 To determine the purpose of a reservation, the Court “must examine the documents reserving
5 the land from the public domain.”²⁰⁵ These documents are the Executive Orders of October 29, 1881,
6 and May 14, 1883, and Public Land Orders 16 and 251.

7 Secretary of War Lincoln requested President Arthur to set apart “a Military Reservation ...
8 for the post of Camp Huachuca, Arizona Territory.... [f]or military purposes.”²⁰⁶ On October 29,
9 1881, President Arthur approved the request.

10 Almost two years later, President Arthur approved the request of Secretary Lincoln to enlarge
11 the reservation. Although Secretary Lincoln stated that the enlargement was necessary “for the
12 purpose of securing to the Government the valuable grazing lands in the vicinity of the post,” he
13 explained that the “necessity” of the enlargement was to set “the Northern side [boundary] of the
14 Reservation to the Southern boundaries of the Babacomari Grant **as originally intended.**”²⁰⁷ This
15 intent is reflected in First Lieutenant Palfrey’s March 31, 1881, report.

16 The March 31, 1881, report of First Lieutenant of Engineers Carl F. Palfrey stated in pertinent
17 part as follows:

18 [W]ater is found, of excellent quality, and probably sufficient for **six companies,**
19 **mounted, in the cañon where Camp Huachuca is now situated....** [a]n extension of
20 the reservation to include the north spur of the mountain would take in another fine
21 spring valuable for watering the herd and securing a good grazing place, **as also for**
22 **camping ground in case of concentration of troops.** This extension is earnestly
recommended (emphasis added)....

21 In view of the probable value of this position, I have the honor to respectfully
22 recommend that ... this reservation be extended to include the north point of the

23 ²⁰⁵ 201 Ariz. at 313, 35 P.3d at 74.

24 ²⁰⁶ See Finding of Fact No. 11, *supra*.

²⁰⁷ See Finding of Fact No. 16, *supra* (emphasis added).

1 mountain for the sake of wood and water so gained and to secure control of a
2 reasonable amount of land beyond the proposed site for the post, and that, with the
3 latter object, the lines of the reservation be closed upon those of the Babacomari Grant
4 or of the railroad lands.²⁰⁸

5 The “statement of the case” set forth in the 1885 *Maddux* decision of the United States Court
6 of Claims sheds a contemporary light on the reason for the enlargement of Fort Huachuca:

7 It had been the original intention to make the northern boundary of the reservation
8 coincide with the southern boundary of said [San Ignacio del Babocomari Land]
9 grant, “for the purpose of securing to the government the valuable grazing lands in the
10 vicinity of the post,” but, owing to an error in the first surveys, the part on which these
11 claims were located was not included; therefore, the enlargement of the reservation to
12 include all the lands between these two boundaries was made and proclaimed by
13 executive order of May 14, 1883.²⁰⁹

14 The Special Master finds that the May 14, 1883, Executive Order intended to include lands
15 that were omitted from the October 29, 1881, Executive Order, and second, the additional lands were
16 to be used not only for watering and grazing horses and livestock but also for encampment of troops.
17 In 1881, Camp Huachuca reported holding 53 horses and in 1883, 142 horses and livestock.²¹⁰
18 During those years and until about 1931, Fort Huachuca housed mounted cavalry units.

19 The Special Master interprets the term “herd” in Lieutenant Palfrey’s report to refer to the
20 horses, ponies, and livestock used by troops at Fort Huachuca. Neither the use of grazing for horses
21 nor the use for encampment of troops prevails over the other in importance. When viewed in the
22 factual context of Fort Huachuca, these uses were interrelated and complemented each other.

23 Public Land Orders 16 and 251 stated the purpose for which public domain was withdrawn
24 and reserved. Public Land Order 16 withdrew and reserved 3,853.18 acres of land for “a field
artillery range,” and Public Land Order 251 withdrew and reserved 80 acres for “an artillery range.”

The Special Master takes judicial notice that an artillery range which is part of a military

23 ²⁰⁸ See Finding of Fact No. 10, *supra* (emphasis added).

24 ²⁰⁹ 20 Ct. Cl. at 194, *supra*. See n.48, *supra*.

²¹⁰ See Findings of Fact Nos. 140 and 141, *infra*.

1 installation means an area where members of the armed forces conduct training exercises and fire,
2 use, and test a variety of guns, cannons, missiles, tanks, vehicles, land mines, and their accessories,
3 whether mobile by ground or air, stationary, or mounted, with a reasonable degree of safety to the
4 public.²¹¹

5 Arguably, an artillery range serves a military purpose and should be incorporated within the
6 broader ambit of a military reservation purpose. The argument calls for the inference that an artillery
7 range is synonymous with a military reservation. On the other hand, the public land orders that
8 withdrew and reserved public domain for the artillery range were specific. In matters of reserved
9 water rights, courts give precedence to the express terms of the documents of reservation. As *Gila V*
10 directed, “the primary purpose for which the federal government reserves non-Indian land is strictly
11 construed after careful examination.”²¹² In this case, the express terms of the public land orders must
12 be accorded precedence over an inference. The purpose of the reservations of Public Land Orders 16
13 and 251 was an artillery range, an area set aside for a specific use.

14 Conclusion of Law No. 22. The public domain lands within the Executive Order of October
15 29, 1881, were withdrawn and reserved for a military reservation.

16 Conclusion of Law No. 23. The public domain within the Executive Order of May 14, 1883,
17 was withdrawn and reserved for a military reservation. The lands withdrawn and reserved were used
18 for watering and grazing horses and livestock and for encampment areas for troops. These uses
19 served the purpose of the military reservation.

20 Conclusion of Law No. 24. The public domain lands within Public Land Orders 16 and 251
21 were withdrawn and reserved for an artillery range.

22
23
24 ²¹¹ See WEBSTER’S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 78 (3rd ed. 1988). The Special Master has not visited the Fort Huachuca artillery range but has been on other artillery ranges.

1 **1. Scope of “Military Purposes”**

2 The United States provided the following definition of the term “military purposes:” “to
3 supply the domestic, municipal and quasi-municipal requirements of its armed forces, and the
4 civilian personnel performing in connection with said armed forces.”²¹³ The United States argued
5 that the term military purpose “is a broad descriptive term covering the activities of the military, and
6 is not restricted to a narrow particular use.”²¹⁴ The United States cited case law for the proposition
7 that the term is “a general description,” and is “intended to describe the use to be made of the
8 premises and not to be restrictive.”²¹⁵

9 *Fallbrook* involved a description of water uses, proposed for trial by the utility district which
10 provided water to what is today Marine Corps Base Camp Pendleton. *Sharpe* was an eminent domain
11 case; the court’s full holding was that the term “military purposes” is “a general description, and
12 would cover its use as a parade ground, officers’ quarters, barracks, etc.,”²¹⁶ the uses tend to limit the
13 “general description.” *Royce* dealt with the contractual interpretation of the term “military purposes”
14 used in a lease. Moreover, these cases predated *Arizona I*, *Cappaert*, *New Mexico*, and *Gila V*.

15 *New Mexico* established the “primary-secondary purpose test” - “this distinction applies to
16 non-Indian federal reservations.”²¹⁷ *New Mexico* held that stockwatering was not a primary purpose
17 set forth in the Congressional legislation for the establishment of national forests, and water rights for
18 stockwatering in national forests must be obtained in accordance with state law. The test is:

19 Where water is only valuable for a secondary use of the reservation, however, there

20 ²¹² 201 Ariz. at 313, 35 P.3d at 74.

21 ²¹³ *United States v. Fallbrook Pub. Util. Dist.*, 109 F. Supp. 28, 65 (S.D. Cal. 1952) (“*Fallbrook*”). *See also*
22 *United States v. Fallbrook Pub. Util. Dist.*, 110 F. Supp. 767 (S.D. Cal. 1953), *partially rev’d on other*
grounds, People of the State of California v. United States, 235 F.2d 647 (9th Cir. 1956).

23 ²¹⁴ U.S. Consol. Resp. 19 (Aug. 24, 2007).

24 ²¹⁵ *Sharpe v. United States*, 112 F. 893, 897 (3d Cir. 1902) (“*Sharpe*”) and *Royce, Inc. v. United States*, 126 F.
Supp 196, 203 (Ct. Cl. 1954) (“*Royce*”).

²¹⁶ 112 F. at 897.

²¹⁷ 201 Ariz. at 316, 35 P.3d at 77.

1 arises the contrary inference that Congress intended, consistent with its other views,
2 that the United States would acquire water in the same manner as any other public or
private appropriator.²¹⁸

3 Citing *New Mexico*, the Arizona Supreme Court held in *Gila V* that “non-Indian reserved
4 rights are narrowly quantified to meet the original, primary purpose of the reservation; water for
5 secondary purposes must be acquired under state law.”²¹⁹

6 In 1991, the San Pedro HSR reported the following uses of water at Fort Huachuca:
7 municipal, domestic, effluent irrigation of the parade field and a golf course, recreation, wildlife, and
8 impoundments for recreation including fishing, wildlife, game management, erosion control, sewage
9 evaporation, fire prevention, vehicle washing, and dust control uses.²²⁰ Several of these water uses
10 conceivably could come under the scope of “municipal” or “quasi-municipal” uses, if the definition
11 in *Fallbrook* is adopted, but that definition is not adopted in this report. Admittedly, water uses in
12 residential housing and administrative offices are analogous to municipal uses.

13 Which water uses come under municipal use was not fully briefed, and this issue will be
14 deferred until the quantification phase. The Special Master does not define the scope and extent of
15 military water uses in this report, but he finds that the purpose of the lands withdrawn and reserved
16 by the October 29, 1881, and May 14, 1883, Executive Orders was a military reservation.

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

19 The United States Supreme Court held in *Cappaert* that:

20 In determining whether there is a federally reserved water right implicit in a federal
21 reservation of public land, the issue is whether the Government intended to reserve
unappropriated and thus available water. Intent is inferred if the previously

22
23 ²¹⁸ 438 U.S. at 700-02.

²¹⁹ 201 Ariz. at 312-13, 35 P.3d at 73-74.

24 ²²⁰ Vol. 1, San Pedro HSR at 405-10.

1 unappropriated waters are necessary to accomplish the purposes for which the
2 reservation was created.²²¹

3 In *New Mexico*, the Supreme Court amplified that “[e]ach time this Court has applied the
4 ‘implied-reservation-of-water doctrine,’ it has carefully examined both the asserted water right and
5 the specific purposes for which the land was reserved, and concluded that without the water the
6 purposes of the reservation would be entirely defeated.”²²²

7 Finding of Fact No. 129. As amended last on January 16, 2002, Statement of Claimant No.
8 39-10774 states that the claimant U.S. Army Intelligence Center and Fort Huachuca “claims 7,549
9 acre-feet of groundwater per year.”²²³

10 Finding of Fact No. 130. As amended last on August 5, 1991, Statement of Claimant No. 39-
11 10775 states that the claimant U.S. Army Intelligence Center and Fort Huachuca claims “435 acre
12 feet” and “[i]n addition to the water [claimed in Statements of Claimant Nos. 39-10774 and 39-
13 10775], the claimant asserts its right to all effluent generated by the installation.” Fort Huachuca was
14 then producing effluent “at a rate in excess of 1,600 acre feet per year, and the rate will increase in
15 future years.”²²⁴ The amendment identified wells, springs, and a variety of ponds as sources of water.

16 Finding of Fact No. 131. Both amendments filed on August 5, 1991, stated that the “claimant
17 asserts its right to all and any portion of that total [quantity of water claimed] as changing conditions
18 dictate regardless of where on the installation, and by what means, the water may be diverted or
19 withdrawn in future years.”²²⁵

20 Finding of Fact No. 132. In March 31, 1881, report First Lieutenant of Engineers Carl F.
21 Palfrey reported the following concerning the area of Fort Huachuca:

22 ²²¹ 426 U.S. at 139.

23 ²²² 438 U.S. at 700-02.

24 ²²³ *Other Uses’ Amendment Attachment* (Jan. 16, 2002). ASARCO Appendices, Vol. Three, Tab 13.

²²⁴ *Other Uses’ Amendment Attachment 2* (Aug. 5, 1991). ASARCO Appendices, Vol. Three, Tab 14.

²²⁵ *Id.*

1 Water is found, of excellent quality, and probably sufficient for six companies,
2 mounted, in the cañon where Camp Huachuca is now situated; this could easily be
3 piped to the plateau proposed for the new post. The water at Tanner's Cañon, now
4 annexed by Department order to the reservation, and the irrigable land in that cañon
5 would furnish a post garden, and an extension of the reservation to include the north
6 spur of the mountain would take in another fine spring valuable for watering the herd
7 and securing a good grazing place, as also for camping ground in case of
8 concentration of troops. This extension is earnestly recommended....²²⁶

9 It was reported in the San Pedro HSR that Captain Whitside, the commanding officer at
10 Camp Huachuca from 1877 to 1881, who "chose the Fort Huachuca site primarily for its abundant
11 water supply," "reported on September 7, 1878, that there was 'water, water everywhere from July to
12 September and drought for the remainder of the year'."²²⁷

13 Finding of Fact No. 133. A report of Fort Huachuca's Quartermasters Office in March, 1884,
14 stated as follows:

15 The present means of supplying this post with water consists of the ordinary
16 water wagon and team of six mules.... The wagon [carries] ... a barrel-shaped
17 wooden tank, of about 40 barrels capacity.

18 The water which is used at the post - and it is used for all purposes - is
19 obtained from the bed of a creek - the Huachuca Creek - which runs (?) through the
20 post.

21 The creek for the greater part of the year is dry on the surface; but a well has
22 been sunk on the border of the creek to obtain water for an engine....

23 From this well is also obtained, or rather has been obtained, the supply of
24 water for the post....

.....

The animals obtain their drinking water from Huachuca Creek....

Last fall ... when it became difficult to supply all the needs of the post by
means of the water wagon ... on account of the scarcity of water in the well, water
pipe was laid to the first spring - about half a mile from the post - and water from it
was conducted to the barracks for the troops, and to the three cavalry corrals.²²⁸

Finding of Fact No. 134. For "a period of almost thirty-four years," between March, 1877,
and 1911, the "water supply was obtained from springs in Huachuca Canyon.... In 1911, a collecting

²²⁶ See Finding of Fact No. 10, *supra*.

²²⁷ Vol. 1, San Pedro HSR 403.

1 works was constructed near the junction of Garden and McClure Canyons with small pipe lines up
2 the canyons to several springs.”²²⁹ The pipe line was 45,000 feet long.²³⁰

3 Finding of Fact No. 135. In 1912, a well was placed at “the mouth of Garden Canyon to
4 augment the water supply.”²³¹ In 1934, a well was brought into production at the mouth of Garden
5 Canyon.²³² By February, 1943, five wells were contributing to the water supply.²³³

6 Finding of Fact No. 136. In 1983, the springs in Garden Canyon and Huachuca Canyon were
7 disconnected from the main potable water distribution system.²³⁴ The pipeline system to the springs
8 in Garden Canyon and Huachuca Canyon exists but is not used for potable water.

9 No finding of fact is made as to the current water uses of the Garden Canyon and Huachuca
10 Canyon springs. According to the United States, some water from the springs in Garden Canyon is
11 used for fire fighting purposes, and according to the San Pedro HSR, in the past that water has been
12 used for the golf course and a gravel pit.²³⁵ According to Phelps Dodge based on discovery responses
13 of the United States, “[u]se of water from the springs in Garden Canyon for any purpose was
14 apparently discontinued in 2000.”²³⁶

15 Finding of Fact No. 137. There are eight production wells for potable water.²³⁷

16 Finding of Fact No. 138. Production wells 1 through 6 are located on lands included within
17 the Executive Order of May 14, 1883.²³⁸ Production wells 7 and 8 are located inside the East

18 ²²⁸ Rpt. of Capt. D. H. Floyd, Asst. Quartermaster (Mar. 12, 1884). U.S. Exh. No. 42.

19 ²²⁹ GROUNDWATER SUPPLIES IN THE FORT HUACHUCA AREA, COCHISE AND SANTA CRUZ COS., ARIZ., S. F.
Turner and E. M. Cushing, 1 (USFH-00000890) (Feb. 9, 1943). ASARCO Appendices, Vol. Two, Tab. 19.

20 ²³⁰ U.S. War Office, Vol. 1, War Dept. Ann. Rpt. 542 (1912) (USFH 1883). *See* U.S. First Supplemental
Disclosure Index (Nov. 4, 2005).

21 ²³¹ ANN. RPT. OF MEDICAL DEPT. ACTIVITIES AT FORT HUACHUCA, ARIZ. ¶ 1(c), *supra*.

22 ²³² Uncontroverted U.S. Statement of Fact No. 49 at 9 (June 15, 2007).

23 ²³³ ANN. RPT. OF MEDICAL DEPT. ACTIVITIES AT FORT HUACHUCA, ARIZ. ¶ 8(b), *supra*.

24 ²³⁴ Vol. 1, San Pedro HSR 405.

²³⁵ *Id.* and uncontroverted U.S. Statement of Fact No. 53 at 10 (June 15, 2007).

²³⁶ Uncontroverted Phelps Dodge Statement of Fact No. 132 at 27 (June 15, 2007)

²³⁷ Vol. 1, San Pedro HSR 399-400 and 405.

²³⁸ Uncontroverted Arizona Water Company and ASARCO Statement of Fact No. 58 at 11 (Aug.24, 2007).

1 Range.²³⁹

2 Finding of Fact No. 139. Fort Huachuca uses water from the wells located in the East Range
3 for uses outside the East Range.²⁴⁰

4 Finding of Fact No. 140. In 1881, Camp Huachuca reported a military population of
5 approximately 90 soldiers utilizing 53 horses.²⁴¹

6 Finding of Fact No. 141. In 1883, Fort Huachuca reported a military population of
7 approximately 205 soldiers and 142 horses and livestock.²⁴² Both the 1881 (for example, a
8 postmaster, post trader, and laundresses) and 1883 populations included some civilians.²⁴³

9 Finding of Fact No. 142. Between 1881 and 1910, the reported military population of Fort
10 Huachuca ranged between a low of 90 soldiers in 1881 and a high of 401 soldiers in 1897.²⁴⁴

11 Finding of Fact No. 143. Between 1911 and 1916, the reported military population of Fort
12 Huachuca ranged between 500 and 1,100 persons.²⁴⁵

13 Finding of Fact No. 144. Between 1928 and 1931, the reported military population of Fort
14 Huachuca ranged between 750 and 2,000 persons.²⁴⁶

15 Finding of Fact No. 145. In 1940, the reported population of Fort Huachuca was
16 approximately 5,500.²⁴⁷

17 Finding of Fact No. 146. In 1942-1944, Fort Huachuca housed approximately 40,500 troops,

18 _____
19 ²³⁹ Uncontroverted Phelps Dodge Statement of Fact No. 135 at 27 (June 15, 2007) and ASARCO and Arizona
20 Water Company Statements of Fact Nos. 59 and 60 at 11-12 (Aug.24, 2007).

21 ²⁴⁰ Uncontroverted Phelps Dodge Statement of Fact No. 136 at 27 (June 15, 2007).

22 ²⁴¹ FORT HUACHUCA, ARIZ., A CENTURY OF DEVELOPMENT AND CHANGING MISSIONS, 1877-1977, 237,
23 Table A.3 (USFH252), *supra*.

24 ²⁴² *Id.*

²⁴³ Uncontroverted Arizona Water Company and ASARCO Statement of Fact No. 38 at 21 (June 15, 2007) in
which proof of this fact was obtained through discovery.

²⁴⁴ FORT HUACHUCA, ARIZ., A CENTURY OF DEVELOPMENT AND CHANGING MISSIONS, 1877-1977, 237,
Table A.3 (USFH252), *supra*.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 239, Table A.4 (USFH254).

²⁴⁷ Vol. 1, San Pedro HSR 404.

1 its highest population level.²⁴⁸

2 Finding of Fact No. 147. In 1952, the reported population of Fort Huachuca was
3 approximately 10,300 troops.²⁴⁹

4 Finding of Fact No. 148. In 1958, the reported population of Fort Huachuca was
5 approximately 11,000 troops.²⁵⁰

6 Finding of Fact No. 149. In 1980, the reported military population of Fort Huachuca was
7 9,301, and in 1990, it was 9,210.²⁵¹

8 In its motion papers, the United States indicated that the “current daily population (including
9 employees working and military families residing on post) is approximately 16,000.”²⁵²

10 The resolution of this issue must consider the specific purposes of the reservations that
11 comprise Fort Huachuca and the water right asserted to determine if water is necessary to accomplish
12 the purpose for which the reservation was created. Fort Huachuca has been assembled as a result of
13 two executive orders, three public land orders, voluntary conveyances, condemnation, land
14 exchanges, and leases. The Special Master has concluded as a matter of law that the public domain
15 lands within the two executive orders and Public Land Orders 16 and 251 were formally withdrawn
16 and reserved, and thus meet the first requirement for the implied existence of reserved water rights
17 for those lands. That requirement is not met by the lands acquired by voluntary conveyances,
18 condemnation, land exchanges, and leases as they were not withdrawn and reserved from the public
19 domain for a public purpose. Public Land Order 1471 expressly did not reserve water rights.

20 The Special Master has further concluded as a matter of law that the public domain lands

21 _____
22 ²⁴⁸ *Id.*

23 ²⁴⁹ FORT HUACHUCA, ARIZ., A CENTURY OF DEVELOPMENT AND CHANGING MISSIONS, 1877-1977, 239,
24 Table A.4 (USFH254), *supra*.

25 ²⁵⁰ *Id.* at 239-40, Table A.4 (USFH254-55).

26 ²⁵¹ Vol. 1, San Pedro HSR 385.

27 ²⁵² U.S. Motion for Partial Summary Judgment 3 (June 15, 2007)

1 within the Executive Orders of October 29, 1881, and May 14, 1883, were withdrawn and reserved
2 for the purpose of a military reservation, and the lands within Public Land Orders 16 and 251 were
3 reserved for an artillery range. However, the Special Master has concluded as a matter of law that the
4 reservations of Public Land Orders 16 and 251 lapsed not later than October 28, 1952.

5 The lands within the executive orders have been used to house troops and civilians since at
6 least 1881 when the first reservation of public domain was made, but cavalry troops had been
7 stationed at Camp Huachuca since March, 1877. Between 1881 and 1931, cavalry troops and their
8 mounts were stationed at the original post and cantonment located within lands reserved by the
9 October 29, 1881, Executive Order. The lands reserved by the May 14, 1883, Executive Order
10 provided water sources for grazing and areas for troop encampment. From the time the military
11 reservation was established until its disposition to the State of Arizona, the surface water sources and
12 wells were located within the lands reserved by the executive orders. Throughout its history, Fort
13 Huachuca has housed a fluctuating, but at times substantial, population. The United States claims
14 water rights to serve the needs of the military personnel and civilians working at Fort Huachuca.

15 Finding of Fact No. 150. The record does not show sufficient material and relevant evidence
16 to find that water is necessary to accomplish the purpose of the lands withdrawn and reserved by
17 Public Land Orders 16 and 251, namely, an artillery range, or that without water the purpose would
18 be entirely defeated.

19 Conclusion of Law No. 25. Water is necessary to accomplish the purpose of the military
20 reservation established by the Executive Orders of October 29, 1881, and May 14, 1883. Without
21 water that purpose would be entirely defeated.

22 Conclusion of Law No. 26. Water is not necessary to accomplish the purpose of the lands
23 withdrawn and reserved by Public Land Orders 16 and 251.

1 **VII. IF UNAPPROPRIATED WATERS WERE RESERVED FOR THE PURPOSE OF**
2 **THE RESERVATION, WHAT IS THE DATE OF PRIORITY OF THE RESERVED WATER**
3 **RIGHTS?**

4 A “federal right vests on the date a reservation is created, not when water is put to beneficial
5 use.”²⁵³

6 On October 29, 1881, President Arthur issued an order that stated in pertinent part that “the
7 reservation [of Fort Huachuca] is made and proclaimed accordingly.”²⁵⁴ On May 14, 1883, President
8 Arthur issued an order that stated in pertinent part that the “enlargement of the [Fort Huachuca]
9 Reservation is made and proclaimed accordingly.”²⁵⁵

10 On July 21, 1942, Secretary of the Interior Harold L. Ickes issued Public Land Order 16
11 withdrawing and reserving public domain for a field artillery range.²⁵⁶ On November 22, 1944,
12 Acting Secretary of the Interior Michael W. Strauss issued Public Land Order 251 withdrawing and
13 reserving public domain for an artillery range.²⁵⁷

14 The United States argued that the date of priority of Fort Huachuca’s reserved water rights
15 should be the single date of October 29, 1881, because that is “the date the executive order
16 establishing Fort Huachuca was signed.”²⁵⁸ The Special Master finds that this position is correct but
17 only as to the lands within that executive order.

18 Reserved water rights can have multiple dates of priority. For example, “the Rocky Mountain
19 National Park, which originally was a national forest, has priority dates of 1897 for watershed
20 protection and timber production but 1915 and 1930 priority dates for park purposes because on

21 ²⁵³ 201 Ariz. at 310, 35 P.3d at 71. A federal reserved water right “vests on the date of the reservation.” 426
22 U.S. at 138. *See also* 373 U.S. at 600.

23 ²⁵⁴ *See* Finding of Fact No. 12, *supra*.

24 ²⁵⁵ *See* Finding of Fact No. 17, *supra*.

²⁵⁶ *See* Finding of Fact No. 26, *supra*.

²⁵⁷ *See* Finding of Fact No. 29, *supra*.

²⁵⁸ U.S. Motion for Partial Summary Judgment 1 (June 15, 2007).

1 those dates the forest lands were transferred to park status.”²⁵⁹

2 This holding of the Colorado Supreme Court, which involved subsequent reservations for
3 additional purposes, extends to subsequent reservations for the same purpose as is the case for Fort
4 Huachuca. In *Denver*, the Colorado Supreme Court examined each document that created a
5 reservation to determine the reserved water right’s date of priority. The holding adheres to the
6 directive of the United States Supreme Court that a federal reserved water right “vests on the date of
7 the reservation,” namely, when each reservation is created.

8 The Special Master has determined that only the lands within the Executive Orders of
9 October 29, 1881, and May 14, 1883, meet the requisites for an implied reserved water right and
10 therefore, dates of priority are established only for those rights.

11 Conclusion of Law No. 27. The date of priority for the approximately 41,760 acres of lands
12 within the Executive Order of October 29, 1881, is October 29, 1881.

13 Conclusion of Law No. 28. The date of priority for the approximately 3,040 acres of lands
14 within the Executive Order of May 14, 1883, is May 14, 1883.

15 The Special Master has concluded as a matter of law that the withdrawals and reservations
16 effected by Public Land Orders 16 and 251 for an artillery range lapsed not later than October 28,
17 1952. The following conclusions of law are provided for the benefit of the Court if the Court
18 determines that reserved water rights may exist for those lands.

19 Conclusion of Law No. 29. The date of priority for the approximately 3,853.18 acres of lands
20 within Public Land Order 16 is July 21, 1942.

21 Conclusion of Law No. 30. The date of priority for the approximately 80 acres of lands within
22 Public Land Order 251 is November 22, 1944.

23 _____
24 ²⁵⁹ 4 WATERS AND WATER RIGHTS § 37.03(b) at 37-76-77, *supra*. See *United States v. City and County of Denver*, 656 P.2d at 30, *supra*.

1 **VIII. OTHER ISSUES**

2 **A. Claims to a Reserved Groundwater Right**

3 The United States argued that “groundwater is necessary to meet the Fort’s military purpose”
4 because surface water shortages afflict Fort Huachuca.²⁶⁰ The genesis of this argument is *Gila III*,
5 where the Arizona Supreme Court affirmed the trial court’s ruling that “the federal reserved water
6 rights doctrine applies not only to surface water but to groundwater.”²⁶¹

7 The Supreme Court further held that:

8 **A reserved right to groundwater may only be found where other waters are**
9 **inadequate to accomplish the purpose of a reservation.** To determine the purpose
10 of a reservation and to determine the waters necessary to accomplish that purpose are
11 inevitably fact-intensive inquiries that must be made on a reservation-by-reservation
12 basis.²⁶²

13 Phelps Dodge relied on the emphasized language to argue that this Court must determine if
14 “surface water sources are adequate to meet the original, primary purpose of the reservation” before
15 it can address whether Fort Huachuca can claim a reserved groundwater right. In short, before this
16 Court can address the reserved groundwater right issue, it must determine whether a valid reservation
17 exists, and if so, the purpose of the reservation.

18 This briefing addresses those front issues which must be resolved in order to address the
19 groundwater claim. Although Fort Huachuca’s assertion that groundwater is necessary to meet its
20 water needs may appear to be self-evident based on quantities of water used and historical incidents
21 of water shortages, there is insufficient relevant and material information before the Special Master
22 to conclude that the Fort’s reserved water rights extend to groundwater. Accordingly, this issue is
23 deferred for future consideration.

24 ²⁶⁰ U.S. Motion for Partial Summary Judgment 16 (June 15, 2007). The United States asserts that “there is no
possibility based on either the record of water pumped or the amount of water claimed that the United States’
reserved water right can be satisfied without groundwater.”

²⁶¹ 195 Ariz. at 420, 989 P.2d at 748.

1 **B. Claims to Effluent**

2 The Arizona Water Company and ASARCO pointed that the United States claimed in both of
3 its statements of claimant the use of effluent, but did not “elaborate on the location of the effluent in
4 relation to surface streams or the groundwater aquifer, nor did it state specifically that the claim to
5 effluent is based on a federal reserved right.”²⁶³ They argued that Fort Huachuca’s “claims to effluent
6 must be dismissed” because the United States has “failed to provide sufficient information to
7 establish that the effluent it claims is subject to the Court’s jurisdiction.”²⁶⁴

8 This position did not generate much response as parties focused on other issues. To properly
9 resolve this issue technical and hydrologic data of sources, quantities, and uses is needed,
10 information which may come from the parties or ADWR. Accordingly, this issue is deferred.

11 **IX. RECOMMENDATIONS**

12 The Special Master recommends that the Court:

- 13 1. Approve and adopt these findings of fact, conclusions of law, and recommendations.
- 14 2. Grant and deny to the extent consistent with this report the following motions:
- 15 a). Arizona Water Company’s and ASARCO’s Motion for Partial Summary Judgment
16 Regarding the United States’ Claims to Federal Reserved Water Rights for Fort
17 Huachuca
- 18 b). Phelps Dodge’s Motion for Summary Judgment on Four Designated Issues
- 19 c). SRP’s Motion for Summary Judgment, and the
- 20 d). United States’ Motion for Partial Summary Judgment, and
- 21 3. Direct the Arizona Department of Water Resources to implement the determinations
22 adopted by the Court in future technical reports involving Fort Huachuca.

23 ²⁶² *Id.* (emphasis added).

24 ²⁶³ Arizona Water Company and ASARCO Motion for Partial Summary Judgment 4-5 (June 15, 2007).

1 **X. AVAILABILITY OF THE REPORT**

2 This report and a transcript of the oral argument held on November 20, 2007, will be filed
3 with the Clerk of the Superior Court of Maricopa County. A copy of the report will be distributed to
4 all the persons listed on the Court approved mailing list for this case dated April 4, 2008, and as
5 updated in the future, that is posted online at
6 <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/maillingLists.asp>. The list
7 includes all the parties in this case and all persons listed on the Gila River Adjudication mailing list.

8 All papers and orders are available at the Clerk of the Maricopa County Superior Court, 601
9 West Jackson Street, Phoenix, Arizona 85003, under Civil No. W1-11-605; contact Deputy Clerk
10 Sonja Olmos at 602-506-4869. Ms. Patty Connolly (retired) reported the oral argument. Electronic
11 copies of all orders are posted online on the page titled *Gila River Adjudication (In re Fort*
12 *Huachuca)* at <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/>.

13 **XI. TIME TO FILE OBJECTIONS AND COMMENTS TO THE REPORT**

14 A.R.S. § 45-257(A)(2) provides in pertinent part that the “master shall:”

15 For all determinations, recommendations, findings of fact or conclusions of law
16 issued, prepare and file with the court a report in accordance with rule 53(g) of the
17 Arizona rules of civil procedure, which shall contain those determinations,
18 recommendations, findings of fact and conclusions of law. Each claimant may file
19 written objections with the court to any rule 53(g) report.... If the report covers an
20 entire ... federal reservation, each claimant may file with the court written objections
21 to the report within one hundred eighty days of the date on which the report was filed
22 with the court.

19 This report covers the entire federal reservation claimed for Fort Huachuca and presents
20 issues of first impression in this adjudication. The Special Master finds that the 180-day period
21 specified by A.R.S. § 45-257(A)(2) for filing objections to a Rule 53(g) report applies. The Special
22 Master will provide a period of sixty days to file responses to objections and comments.
23

24 ²⁶⁴ *Id.* at 5.

1 **XII. MOTION FOR ADOPTION OF THE REPORT**

2 The Special Master moves the Court under A.R.S. § 45-257(B) and Arizona Rule of Civil
3 Procedure 53(h) to adopt the findings of fact, conclusions of law, and recommendations contained in
4 this report. A proposed order will be lodged as the Court may direct upon consideration of the report.

5 **XIII. NOTICE OF SUBSEQUENT PROCEEDINGS**

6 Any claimant in the Gila River Adjudication may file a written objection or comment to this
7 report on or before **Wednesday, October 1, 2008**. Responses to objections and comments shall be
8 filed by **Monday, December 1, 2008**. All papers must be filed with the Clerk of the Maricopa
9 County Superior Court, Attn: Water Case, 601 West Jackson Street, Phoenix, Arizona 85003.

10 A copy of all papers filed must be served on all persons listed on the Court approved mailing
11 list for this contested case dated April 4, 2008, and as updated in the future, that is posted online at
12 <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/maillingLists.asp>.

13 Rule 53(h)(5) states that the Court “may adopt or affirm, modify, wholly or partly reject or
14 reverse, or resubmit to the master with instructions.” The Special Master’s motion to approve the
15 report and any objections and comments will be taken up as ordered by the Court.

16 Submitted this 4th day of April, 2008.

17
18 /s/ George A. Schade, Jr.
19 GEORGE A. SCHADE, JR.
Special Master

20 On April 4, 2008, the report was delivered to the
21 Clerk of the Maricopa County Superior Court
22 for filing and distributing a copy to the persons
23 who appear on the Court approved mailing list
24 for this contested case dated April 4, 2008.

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