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

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

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

CIVIL NO. W1-11-1174 (Consolidated)

PARTIAL REPORT OF THE SPECIAL
MASTER CONCERNING PUBLIC WATER
RESERVE NO. 107 CLAIMS OF THE
UNITED STATES OF AMERICA IN THE
SAN PEDRO RIVER WATERSHED

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15 CONTESTED CASE NAME: *In re PWR 107 Claims.*

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

17 DESCRIPTIVE SUMMARY: The Special Master files a partial report on water rights of the United
States located on lands managed by the United States Department of the Interior, Bureau of Land
18 Management, within the San Pedro River Watershed which have been settled by stipulation and
moves the Court to adopt the report and enter a partial decree adjudicating these rights.

19 Objections to this report and to the proposed partial decree must be filed with the Clerk of the
Maricopa County Superior Court on or before **August 13, 2007**. Responses to objections shall be
20 filed by **September 12, 2007**. A hearing on any objections will be held at a time and place to be set
by the Court.

21 NUMBER OF PAGES: 28 pages including Appendix A; lodged Order and Partial Decree - 2
22 pages; total 30 pages.

23 DATE OF FILING: June 12, 2007.

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2 **I. INTRODUCTION**

3 This report covers the water right claims of the United States to twenty-two springs located
4 on federal public lands managed by the United States Department of the Interior, Bureau of Land
5 Management (“BLM”), within the San Pedro River Watershed.¹ The Special Master recommends
6 that the proposed abstracts of water rights for fourteen springs be approved as well as the withdrawal
7 of the claims to eight springs. This case, organized during the normal course of the adjudication of
8 the San Pedro River Watershed, addressed the objections filed to forty water right claims reported in
9 the Final San Pedro River Watershed Hydrographic Survey Report (1991) (“San Pedro HSR”).

10 The forty claims involve springs for which the United States asserts a federal reserved water
11 right pursuant to Public Water Reserve No. 107 (“PWR 107”), an Executive Order of President
12 Calvin Coolidge dated April 17, 1926. PWR 107 states in pertinent part as follows:

13 [E]very smallest legal subdivision of the public-land surveys which is vacant
14 unappropriated unreserved public land and contains a spring or water hole, and all
15 land within one quarter of a mile of every spring or water hole located on unsurveyed
16 public land be, and the same is hereby, withdrawn from settlement, location, sale, or
17 entry, and reserved for public use in accordance with the provisions of section 10 of
18 the act of December 29, 1916 (39 Stat. 862), and in aid of pending legislation.²

19 The parties entered into stipulated agreements which include proposed abstracts of water
20 rights for fourteen springs and the withdrawal of eight statements of claimant of the United States.

21 A.R.S. § 45-257(A)(2) states that “[t]he master shall...[f]or all determinations,
22 recommendations,...prepare and file with the court a report in accordance with rule 53(g) of the
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24 ¹ The pleadings, orders, and technical reports are available at the office of the Clerk of the Maricopa County Superior Court, 601 West Jackson Street, Phoenix, Arizona 85003, under the docket of Contested Case No. W1-11-1174. Copies of all orders and reports of the Special Master are available on the Special Master’s Web site on the *Gila River Adjudication (In re PWR 107 Claims)* page (the Internet address is not cited because it will soon change).

² The executive order was reprinted in Circular No. 1066, 51 Pub. Lands Dec. 457 (May 25, 1926). PWR 107 is quoted here as it appeared in the circular.

1 Arizona rules of civil procedure, which shall contain those determinations, recommendations,....”
2 With certain corrections and amendments, the Special Master has accepted the stipulations and
3 proposed abstracts of water rights. The Special Master recommends that the Court approve the
4 stipulated agreements, proposed abstracts of water rights, including corrections and amendments, and
5 the withdrawal of claims, and enter a partial decree.³

6 **II. CHRONOLOGY OF PROCEEDINGS**

7 This case was initiated on May 2, 2002, to resolve the objections to forty statements of
8 claimant filed by the BLM’s Safford District that claimed a federal reserved water right in springs
9 pursuant to PWR 107 (collectively, “PWR 107 claims”). At the outset, it became necessary to resolve
10 two issues of broad legal importance regarding the procedures for contested cases.⁴ That process
11 began in June, 2002, and concluded on February 9, 2004, with the Court’s order adopting and
12 modifying the Special Master’s report. The resolution of those two issues and corollary ones applies
13 to all contested cases.

14 On February 3, 2003, the United States filed amended statements of claimant updating the
15 PWR 107 claims. Thereafter, the United States began negotiations with the objectors. In 2003 and
16 2004, the United States and ASARCO Incorporated, City of Benson, Gila River Indian Community,
17 City of Phoenix, Salt River Project, and the City of Sierra Vista executed stipulations resolving all
18 the objections involving these parties.

19 The United States was unable to execute the same stipulation with the San Carlos Apache
20 Tribe (“Tribe”) for sixteen springs for the reason that the Tribe claims that until the southwest

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22 ³ The Court used a similar procedure to enter partial decrees in *In re Coronado National Memorial*, W1-11-
23 556 and W1-11-1132 (Mar. 9, 2004) and *In re Saguaro National Monument (Rincon Mountain Unit)*, W1-11-
24 2782 (July 11, 2001). Both decrees are available on the Special Master’s Web site on the *Gila River*
Adjudication (Judge Eddward P. Ballinger, Jr.) page.

⁴ The reasons for that process are explained in the Special Master’s report filed on January 24, 2003. The
briefing was opened to all claimants in the Gila River Adjudication.

1 boundary of its reservation is determined, it is not known if these springs are located inside or outside
2 the reservation. The United States claims that the springs are located on federal public domain.

3 The Special Master directed the Arizona Department of Water Resources (“ADWR”) to
4 prepare a technical report and maps (filed on May 16, 2005) regarding the location of all the springs,
5 directed the United States to exchange site information with the Tribe, requested the United States
6 and the Tribe to confer and file a joint report, and heard briefing on their positions concerning the
7 Court’s jurisdiction to act on this issue although both parties “agree[d] that a judicial determination
8 of the boundary of the Reservation is outside the jurisdiction of this Court.”⁵

9 The Special Master concluded that the Court does not have jurisdiction to establish the
10 boundary of an Indian reservation and stayed the adjudication of the sixteen springs “until such time
11 as the southwest boundary of the San Carlos Indian Reservation has been established or is no longer
12 in dispute between the United States and the Tribe.”⁶ A schedule was set for the adjudication of the
13 remaining fourteen springs. Subsequently, the United States and the Tribe resolved their differences
14 and executed stipulations that contain provisions concerning the boundary issues.

15 The United States filed all the stipulations with the Clerk of the Superior Court. Because
16 ADWR can review its water right records and other information, including that provided by the
17 parties, related to these claims, ADWR was directed to review the stipulations and proposed abstracts
18 of water rights and advise of its recommendations regarding the settlement agreements. The Special
19 Master did not request a comprehensive technical report but a review of the accuracy and
20 completeness of the factual information contained in the stipulated abstracts of water rights. ADWR
21 filed its Technical Review (“Technical Review”) on April 12, 2007. The Special Master found the
22 review very helpful.

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24 ⁵ U.S. Memo. Regarding Claims Affected by Boundary Issues 2 (Feb. 27, 2006).

⁶ Order 6 (July 19, 2006).

1 The parties were allowed to file objections or comments to ADWR's recommendations. Only
2 the United States filed a response to ADWR's Technical Review.

3 **III. STIPULATIONS AND PROPOSED ABSTRACTS OF WATER RIGHTS**

4 The stipulations and proposed abstracts of water rights are described in ADWR's Technical
5 Review. Chapter 3 summarizes the provisions of the stipulations and lists the springs associated with
6 each stipulation. Copies of the stipulations are contained in Appendices A-1 and A-2 of the Technical
7 Review and in ADWR's notice of filing the review and will not be duplicated in this report.

8 Chapter 4 describes ADWR's verification of the stipulated water right abstracts. Although
9 copies of the proposed abstracts of water rights are contained in ADWR's Technical Review, copies
10 of all abstracts, including corrected and amended abstracts, are included in this report's Appendix A.
11 ADWR recommended that with certain exceptions addressed below, "the stipulations be approved."⁷

12 A. ADWR's Recommendations Concerning the Stipulations

13 The Department made two recommendations concerning the stipulations.

14 1. ADWR recommended that the reference in one stipulation to Contested Case No. W1-11-
15 2681 be corrected to W1-11-2861. The Special Master accepts this recommendation to correct a
16 typographical error as Contested Case No. W1-11-2861 is associated with Statement of Claimant No.
17 39-14439 (Tar Wash Spring).

18 2. ADWR's recommendation concerning the filing of a properly executed stipulation by the
19 Gila River Indian Community was satisfied by the time ADWR filed its Technical Review. The
20 stipulation was filed with the Clerk of the Superior Court on April 12, 2007, as an attachment to
21 ADWR's notice of filing its review. The United States filed all the other stipulations with the Clerk
22 of the Superior Court on April 6, 2007.

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24 ⁷ ADWR Tech. Review 5-5.

1 The Special Master recommends that the Court approve the stipulated agreements. The
2 agreements are reasonably narrow to meet the parties' desires to settle these claims.

3 B. ADWR's Recommendations Concerning the Proposed Abstracts of Water Rights

4 ADWR reviewed the following information contained in the proposed abstracts: legal
5 descriptions, water source, ownership, water use, quantification, basis of claim and date of priority,
6 and other water right claims associated with each water source. The Department made four
7 recommendations concerning the abstracts.

8 1. ADWR recommended that the legal descriptions of the places of use for Miller Spring and
9 Lime Peak Spring be corrected or clarified due to the presence of the letter "S" in the Range
10 description contained in the two abstracts. The United States agreed that the letter "S" in these
11 abstracts were "typographical errors" and should be deleted.⁸ The United States submitted corrected
12 abstracts for both springs which the Special Master accepts.

13 2. ADWR recommended that discrepancies in the legal descriptions of the points of diversion
14 of Copper Creek Spring and McEwen Spring be resolved. The Special Master finds that the United
15 States has presented sufficient evidence resolving the discrepancies in Global Positioning System
16 readings taken by the United States and ADWR for the point of diversion of Copper Creek Spring
17 and accepts the stipulated abstract for Copper Creek Spring.

18 Concerning the legal description of the point of diversion of McEwen Spring, the United
19 States agreed with ADWR's description and submitted an amended abstract. The Special Master
20 accepts the amended abstract for McEwen Spring.

21 3. ADWR recommended that the United States be required to explain the basis of the
22 stipulated abstract flow rates. The Special Master finds that the United States has sufficiently

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24 ⁸ The United States responded to ADWR's recommendations on May 12, 2007. All references in this section
to the responses of the United States cite to this document.

1 explained how it measured the spring flows taking into account drought conditions after the year
2 2000 and the presence of a defined channel with some springs. It is noted that the first reported
3 measured flow rate for the fourteen springs ranged from 1979 to 1993, a reasonable water history for
4 these sources.⁹

5 4. ADWR recommended that the United States be required to explain why the stipulated flow
6 rate for Ursula Capt Spring is higher than the measured flow rate and to provide evidence to support
7 the stipulated flow rate. The United States conceded that an error had been made, agreed with
8 ADWR “that the amount claimed and included in the abstracted water right is inaccurately
9 described,” and requested that the stipulated flow rate/volume be reduced from that stated in the
10 initial abstract, namely, from 0.27 acre feet of water per annum to 0.042 AFA (an 84% reduction).
11 The United States submitted an amended abstract which states 0.042 AFA. The Special Master
12 accepts the amended abstract for Ursula Capt Spring.

13 C. Basis of Claim, Date of Reservation, and Use

14 The basis of the stipulated abstracts is President Calvin Coolidge’s Executive Order entitled
15 Public Water Reserve No. 107 dated April 17, 1926. The Idaho Supreme Court¹⁰ and the Colorado
16 Supreme Court¹¹ have interpreted this executive order to provide the basis for a federal reserved
17 water right, with a date of priority of April 17, 1926, for stockwatering.

18 All the proposed abstracts state that the United States owns the lands wherein the springs are
19 located, the basis of the claim is “Federal reserved water right - PWR 107,” the date of the
20

21 ⁹ ADWR Tech. Review Table 4 and Statement of Claimant No. 39-14440 (Ursula Capt Spring).

22 ¹⁰ *United States v. Idaho*, 131 Idaho 468, 959 P.2d 449, 453 (1998) (“We hold that PWR 107 is a valid basis
23 for a federal reserved water right for the limited purpose of stockwatering.”), *cert. denied Idaho v. United
24 States*, 526 U.S. 1012 (1999), *cert. denied sub nom. Hoagland et al. v. United States*, 526 U.S. 1012 (1999).
The Court noted the benefit of a consistent date of priority for these water rights, namely, April 17, 1926. This
case arose in the Snake River Basin Adjudication, a proceeding similar to the Gila River Adjudication.

¹¹ *United States v. City and County of Denver*, 656 P.2d 1, 31 (Colo. 1982) (“We agree that the federal
government has reserved rights to provide a watering supply for animal and human consumption.”).

1 reservation or priority is April 17, 1926, and the use is “stockwater.” ADWR confirmed this
2 information as well as “that each of the springs is located within a grazing allotment managed by
3 BLM and appears to be used for stockwatering purposes as stated in the stipulations and the
4 abstracts.”¹²

5 D. Flow Rate/Volume

6 ADWR reported that “one or more of the flow rates measured by BLM at each of the spring
7 sites was significantly higher than the flow rates included in the stipulated abstracts, with one
8 exception.”¹³ The exception was Ursula Capt Spring whose stipulated flow rate was higher than the
9 measured flow rate. As stated above, the United States has submitted, and the Special Master has
10 accepted, an amended abstract that sets forth a lower flow rate/volume than originally indicated.

11 In 1979, the Solicitor of the United States Department of the Interior released Solicitor’s
12 Opinion M-36914 which interpreted PWR 107.¹⁴ In Opinion M-36914, Solicitor Krulitz opined that
13 PWR 107 had reserved “the total yield of each source.”¹⁵ In 1983, Solicitor Coldiron modified this
14 opinion based on the holding of the Colorado Supreme Court in *United States v. City and County of*
15 *Denver* that “[t]he federal government’s assertion...that the entire yield must be reserved is not well-
16 founded.”¹⁶ Solicitor Coldiron agreed with the Colorado Supreme Court’s holding that PWR 107 had
17 reserved “only the minimum amount of water from those sources necessary to serve the needs of the
18 homesteaders and their livestock.”¹⁷

21 ¹² ADWR Tech. Review 5-3, ¶ 6 (discussion of Table 3).

22 ¹³ *Id.* at 5-4, ¶ 9 (discussion of Table 4).

23 ¹⁴ Solicitor Leo M. Krulitz released Opinion M-36914, 86 Interior Dec. 553 (June 25, 1979). Solicitor William
24 H. Coldiron released Supplement II, 90 Interior Dec. 81 (Feb. 16, 1983). In between, a Supplemental Opinion,
88 Interior Dec. 253 (Jan. 16, 1981), and Supplement I, 88 Interior Dec. 1055 (Sept. 11, 1981), were released.

¹⁵ 86 Interior Dec. at 582.

¹⁶ 656 P.2d at 32. This assertion was an issue the United States raised on appeal.

¹⁷ 90 Interior Dec. at 83.

1 Because the proposed abstracts do not reserve the entire measured flow rate/volume of each
2 spring, the stipulated amounts of the water rights conform to the interpretations of PWR 107 made by
3 both the two state supreme courts that have addressed PWR 107 and the Department of the Interior.

4 E. Other Water Right Claims

5 ADWR identified four certificates of water right, two statements of claim, and six
6 adjudication statements of claimant filed by non-federal claimants that are in the vicinity of five of
7 the fourteen springs.¹⁸ The four certificates of water right evidence vested appropriative water rights
8 with a date of priority subsequent to April 26, 1917. The two statements of claim list a date of
9 priority earlier than April 17, 1926, but these claimed water rights have not yet been adjudicated and
10 are not part of this case. The information contained in the six statements of claimant is insufficient to
11 show that these claims are associated with any of the springs involved in this case.

12 The Special Master recommends that the Court adjudicate and decree the water rights of the
13 United States as set forth in the fourteen proposed abstracts of water rights stipulated by the parties,
14 including corrections and amendments.

15 F. Withdrawal of Eight Statements of Claimant

16 The United States stipulated to withdraw the following statements of claimant:

<u>Statement of Claimant (Water Source)</u>	<u>Contested Case Number</u>
1. 39-11161 (Coati Spring)	W1-11-1532
2. 39-11188 (Black Canyon Spring)	W1-11-3284
19 3. 39-11189 (Unnamed Spring)	W1-11-3284
4. 39-11208 (Princess Pat Mine Spring)	W1-11-3290
20 5. 39-11217 (Weeping Spring)	W1-11-2411
6. 39-11221 (Minnow Spring)	W1-11-2408
21 7. 39-11243 (Unnamed Spring)	W1-11-1175
22 8. 39-14443 (Saltuna Spring)	W1-11-3342

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24 ¹⁸ The five springs are Bisbee No. 1, Bootlegger, Brandenburg, Tar Wash, and Ursula Capt. See ADWR Tech. Review sec. 4.7, 5-4 ¶ 12, and Table 5.

1 The Special Master recommends that the Court accept the withdrawal of these claims.

2 **IV. SPECIAL PROCEDURAL ORDER PROVIDING FOR THE APPROVAL OF**
3 **FEDERAL WATER RIGHTS SETTLEMENTS, INCLUDING THOSE OF INDIAN TRIBES**

4 Special proceedings to consider the stipulations and proposed abstracts are not warranted
5 under the Arizona Supreme Court's Special Procedural Order Providing for the Approval of Federal
6 Water Rights Settlements, Including Those of Indian Tribes¹⁹ for the reasons that the settlement of
7 these claims was reached in the normal course of the adjudication of the San Pedro River Watershed,
8 and there are no special circumstances preventing the Court from considering the settlement
9 agreements in the normal course of the adjudication.

10 These claims were settled following the preparation of the San Pedro HSR, the filing of
11 objections to the HSR, the organization of a contested case, and the completion of negotiations begun
12 in 2003. Special proceedings are warranted when "[t]here are special circumstances preventing the
13 consideration of the settlement agreement in the normal course of the adjudication."²⁰ There has been
14 no showing of special circumstances that would prevent the Court from considering these agreements
15 in the normal course of the adjudication.

16 **V. RECOMMENDATIONS**

17 The Special Master recommends that the Court:

- 18 1. Find that notice of this report was given as required by law and prior orders of this
19 Court, and the time allowed for claimants to file objections to the report was as required by law.
- 20 2. Approve the stipulated agreements of the parties.
- 21 3. Adjudicate and decree the water rights of the United States of America as set forth in
22 the fourteen abstracts of water rights stipulated by the parties, including corrections and amendments.

23 ¹⁹ The Special Procedural Order (May 16, 1991) is available on the Special Master's Web site on the *Arizona*
24 *Supreme Court: Decisions and Orders* page.

²⁰ *Id.* at ¶ A(5).

1 4. Accept the withdrawal of the eight statements of claimant listed in the stipulations.

2 5. Order that the fourteen stipulated abstracts shall be incorporated in the tabulations or
3 lists of all water rights and their relative priorities on the Gila River System and Source in the form
4 that the Court shall determine to be most appropriate.

5 **VI. SUBMISSION AND AVAILABILITY OF REPORT**

6 This report will be filed with the Clerk of the Maricopa County Superior Court. A copy of the
7 report will be distributed to all the parties in this case and the persons listed on the Gila River
8 Adjudication Court Approved Mailing List. An electronic copy will be posted on the Special
9 Master's Web site at <http://www.supreme.state.az.us/wm/> on the *Gila River Adjudication (In re PWR*
10 *107 Claims)* page.

11 **VII. TIME TO FILE OBJECTIONS**

12 A.R.S. § 45-257(A)(2) provides in pertinent part that when the Special Master submits a
13 report to the Court in accordance with Rule 53(g), Ariz. R. Civ. P., “[e]ach claimant may file written
14 objections with the court to any rule 53(g) report within...sixty days after the report is filed with the
15 court.... If the report covers an entire...federal reservation, each claimant may file with the court
16 written objections to the report within one hundred eighty days of the date on which the report was
17 filed with the court.”

18 The stipulated agreements and proposed abstracts do not cover an entire federal reservation
19 but pertain to a portion of the water rights claimed for the BLM's lands within the San Pedro River
20 Watershed. Hence, the 180-day period specified by A.R.S. § 45-257(A)(2) for filing objections to
21 this report is not applicable. The period for filing objections to this report is sixty days. In the order
22 dated July 19, 2006, the Special Master informed the parties that claimants would be given sixty days
23 to file objections to this report.

1 **VIII. MOTION FOR ADOPTION OF THE SPECIAL MASTER’S PARTIAL REPORT**

2 The Special Master recommends that the Court approve the stipulations, the proposed
3 abstracts of water rights, including corrections and amendments, and the withdrawal of claims
4 described in this report. The Special Master moves the Court, under A.R.S. § 45-257(B) and Rule
5 53(h), Ariz. R. Civ. P., to adopt the recommendations contained in this report and adjudicate the
6 water rights in a partial decree in the San Pedro River Watershed adjudication. A proposed Order and
7 Partial Decree of Stipulated Public Water Reserve No. 107 Water Rights of the United States of
8 America in the San Pedro River Watershed is lodged with this report.

9 **IX. NOTICE OF SUBSEQUENT PROCEEDINGS**

10 Any claimant in the Gila River Adjudication may file a written objection to this report and the
11 proposed partial decree on or before **Monday, August 13, 2007**. Responses to objections shall be
12 filed by **Wednesday, September 12, 2007**. Objections and responses must be filed with the Clerk of
13 the Maricopa County Superior Court, Attn: Water Case, 601 West Jackson Street, Phoenix, Arizona
14 85003. Copies of objections and responses must be served on all persons listed on the Court
15 approved mailing list for this contested case that is available at <http://www.supreme.state.az.us/wm> on
16 the *Court Approved Mailing Lists* page.

17 The hearing on the Special Master’s motion to approve the report and any objections to the
18 report and the proposed partial decree will be taken up as ordered by the Court. Rule 53(h)(5), Ariz.
19 R. Civ. P., provides that “[t]he court may adopt or affirm, modify, wholly or partly reject or reverse,
20 or resubmit to the master with instructions.”

21 Submitted this 12th day of June, 2007.

22
23 /s/ George A. Schade, Jr.
24 GEORGE A. SCHADE, JR.
Special Master

1 On June 12, 2007, the report was delivered to
2 the Clerk of the Maricopa County Superior
3 Court for filing and distributing a copy to all
4 persons listed on the Court approved mailing
5 lists for Contested Case No. W1-11-1174 and
6 the Gila River Adjudication dated January
7 26, 2007. On the same date, a proposed form
8 of Order and Partial Decree of Stipulated
9 Public Water Reserve No. 107 Water Rights
10 of the United States of America in the San
11 Pedro River Watershed was lodged with the
12 Court.

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