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

IN CHAMBERS (X) IN OPEN COURT ( )

SPECIAL MASTER GEORGE A. SCHADE, JR.
Presiding

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	DATE: November 2, 2011 CIVIL NO. W1-11-3342 ORDER DETERMINING THE INITIAL SEVEN ISSUES BRIEFED

CONTESTED CASE NAME: *In re Aravaipa Canyon Wilderness Area*.

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: The Special Master enters his determinations of the initial seven issues designated for briefing and sets a deadline for submission of new issues.

NUMBER OF PAGES: 19.

DATE OF FILING: November 2, 2011.

In the Case Initiation Order, the Special Master designated seven issues for briefing and set timelines for filing disclosure statements and conducting discovery limited to the issues.[1]

I. CHRONOLOGY OF PROCEEDINGS

The issues considered in this initial briefing are the following:

[1] Order (Aug. 17, 2009). The text of the order is available at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/_schade/ACWAcio081709.pdf.

1. Did Congress in enacting the legislation establishing the Aravaipa Canyon Wilderness Area expressly intend to reserve unappropriated waters to accomplish the purposes of the reservation?

2. If so, what were the purposes of the reservation?

3. If Congress did not expressly intend to reserve water, does the evidence establish that the United States withdrew land from the public domain and reserved the Aravaipa Canyon Wilderness Area for federal purposes?

4. If the land was withdrawn and reserved, what were the purposes of the reservation?

5. If the land was withdrawn and reserved, did the United States impliedly reserve unappropriated waters to accomplish the purposes of the reservation?

6. If unappropriated waters were reserved for the purposes of the reservation, what is the date or dates of priority of the reserved water rights? And,

7. If unappropriated waters were reserved for the purposes of the reservation, did Congress intend to reserve all unappropriated waters at the time of designation?

A. The Litigants and Briefing Schedule

ASARCO LLC ("ASARCO"), Freeport-McMoRan Corporation ("Freeport-McMoRan"), Salt River Project ("SRP"), San Carlos Apache Tribe and Tonto Apache Tribe jointly, Yavapai-Apache Nation, and the United States filed disclosure statements.

The Arizona Department of Water Resources ("ADWR") maintained on its Internet site an electronic data base and index of all disclosed documents. All disclosing parties were directed to submit to ADWR electronic copies, an index, and paper copies of all disclosures. ADWR made available to claimants copies of disclosed documents.

ASARCO, Freeport-McMoRan, SRP, and the United States filed motions for summary judgment, responses, and replies. The San Carlos Apache Tribe and Tonto Apache Tribe joined in portions of the United States' reply to the response of Freeport-McMoRan to the federal motion. Oral argument on all motions was heard on September 8, 2011. The parties who filed summary relief motions participated in the argument.

B. Form of the Special Master's Determinations

In accordance with the reasons set forth in the Special Master's March 4, 2009, order entered in the contested case *In re San Pedro Riparian National Conservation Area*, Contested Case No. W1-11-232, the Special Master at this time will not file an

Arizona Rule of Civil Procedure 53(g) report with the Court.[2]

C. Standard for Summary Judgment

Arizona Rule of Civil Procedure 56(c)(1) provides that summary judgment shall be granted if the papers filed "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense."[3]

Conclusion of Law No. 1. With the exception of the seventh issue, the arguments presented to resolve the issues briefed do not encompass material factual disputes that preclude summary judgment.

II. ARAVAIPA CANYON WILDERNESS AREA

Congress established the Aravaipa Canyon Wilderness Area by legislation enacted in 1984 and 1990. The following findings of fact provide a partial legislative background relevant to the resolution of the issues briefed.

In the Wilderness Act enacted in 1964 ("Wilderness Act of 1964"), the Congress established the National Wilderness Preservation System to be composed of congressionally designated wilderness areas.[4]

Finding of Fact No. 1. Federally owned lands are included within the National Wilderness Preservation System by Act of Congress.[5]

In pertinent part as codified, the Wilderness Act of 1964 contains the following "Congressional declaration of policy:"

> (a) In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an

---

2 Order (Mar. 4, 2009). The text of the order is available at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/_schade/SPRNCAord030409.pdf.

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

4 Pub. L. No. 88-577, 78 Stat. 890, codified as amended in 16 U.S.C. §§ 1131-1136 (2010) (Wilderness Act). *See* Freeport-McMoRan Exhibit ("Exh.") A attached to its Motion for Sum. Judg. For convenience, the Wilderness Act enacted in 1964 will be cited to the United States Code and at times in this order will be referred to as the "Wilderness Act of 1964." The other congressional acts considered in this order specified the year of enactment in their titles.

5 16 U.S.C. §§ 1131(a and b).

> enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by the Congress as "wilderness areas," and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness; and no Federal lands shall be designated as "wilderness areas" except as provided for in this Act or by a subsequent Act.
>
> (b) The inclusion of an area in the National Wilderness Preservation System notwithstanding, the area shall continue to be managed by the Department and agency having jurisdiction thereover immediately before its inclusion in the National Wilderness Preservation System unless otherwise provided by Act of Congress.…[6]
>
> The Wilderness Act of 1964 defines the term "wilderness" as follows:
>
> A wilderness, in contrast with those areas where man and his works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.[7]

Finding of Fact No. 2. In the Arizona Wilderness Act of 1984, the Congress designated as wilderness and a component of the National Wilderness Preservation System approximately 6,670 acres of public lands in Graham and Pinal Counties, Arizona, known as the Aravaipa Canyon Wilderness Area.[8]

Finding of Fact No. 3. In the Arizona Desert Wilderness Act of 1990, the Congress designated as wilderness and as a component of the National Wilderness

---

6 *Id*. As originally enacted, this provision contained the term "statement of policy."

7 16 U.S.C. § 1131(c).

8 Pub. L. No. 98-406, § 202, 98 Stat. 1485, 1491 (Ariz. Wilderness Act of 1984). *See* Freeport-McMoRan Exh. D.

Preservation System approximately 12,711 acres of public lands in Pinal and Graham Counties, Arizona, are incorporated and deemed to be a part of the Aravaipa Canyon Wilderness Area designated in 1984.[9]

Finding of Fact No. 4. The Bureau of Land Management, an agency of the United States Department of the Interior, manages the Aravaipa Canyon Wilderness Area.

III. DID CONGRESS IN ENACTING THE LEGISLATION ESTABLISHING THE ARAVAIPA CANYON WILDERNESS AREA EXPRESSLY INTEND TO RESERVE UNAPPROPRIATED WATERS TO ACCOMPLISH THE PURPOSES OF THE RESERVATION?

The Arizona Wilderness Act of 1984 did not clearly and expressly reserve water for the Aravaipa Canyon Wilderness Area. On the other hand, in the Arizona Desert Wilderness Act of 1990, the Congress expressly reserved water for the purposes of the wilderness additions designated that year.

A. Arizona Wilderness Act of 1984

SRP argued that the United States Supreme Court's decision in *Cappaert*, the language of the 1984 Act, that Act's legislative history, and the purposes of the Wilderness Act of 1964 and the need for water to serve those purposes compel "the conclusion that the 1984 Act expressly created a federal reserved water right for the" Aravaipa Canyon Wilderness Area.[10]

The Wilderness Act of 1964 does not contain clear and unambiguous language that reserves water for wilderness areas. The question of what the Act means for reserved water rights has generated considerable controversy. In the briefing, there was much argument concerning the purposes of the legislation and whether the Congress impliedly reserved water rights for lands included in the National Wilderness Preservation System.

The Special Master believes it is not necessary to join the debate because this question can be answered by examining the specific legislation that established the Aravaipa Canyon Wilderness Area. This fact may not be found in other contested cases, but here it facilitates a resolution.

Second, if *Cappaert* is to be applied to answer this issue as SRP suggests, the analysis must give higher importance to the language of the Arizona Wilderness Act of 1984 than to its legislative history. Although *Cappaert* involved a presidential proclamation, the Supreme Court based its decision on the language of President Truman's proclamation without reference to its executive history or administrative background.

In *Cappaert* Chief Justice Burger described President Truman's Proclamation No.

---

9 Pub. L. No. 101-628, § 101(a)(39), 104 Stat. 4469, 4472 (Ariz. Desert Wilderness Act of 1990). *See* Freeport-McMoRan Exh. F.

10 SRP's Motion for Sum. Judg. at 14.

2961 as follows:

> The 1952 Proclamation notes that Death Valley was set aside as a national monument "for the preservation of the unusual features of scenic, scientific, and educational interest therein contained." The Proclamation also notes that Devil's Hole is near Death Valley and contains a "remarkable underground pool." Additional preambulary statements in the Proclamation explain why Devil's Hole was being added to the Death Valley National Monument:
>
> "Whereas the said pool is a unique subsurface remnant of the prehistoric chain of lakes which in Pleistocene times formed the Death Valley Lake System, and is unusual among caverns in that it is a solution area in distinctly striated limestone, while also owing its formation in part to fault action; and
>
> "Whereas the geologic evidence that this subterranean pool is an integral part of the hydrographic history of the Death Valley region is further confirmed by the presence in this pool of a peculiar race of desert fish, and zoologists have demonstrated that this race of fish, which is found nowhere else in the world, evolved only after the gradual drying up of the Death Valley Lake System isolated this fish population from the original ancestral stock that in Pleistocene times was common to the entire region; and,
>
> "Whereas the said pool is of such outstanding scientific importance that it should be given special protection, and such protection can be best afforded by making the said forty-acre tract containing the pool a part of the said monument.…"
>
> The Proclamation provides that Devil's Hole should be supervised, managed, and directed by the National Park Service, Department of the Interior. Devil's Hole is fenced off, and only limited access is allowed by the Park Service.[11]

After analyzing the "reserved-water-rights-doctrine," the Court agreed with the decisions of the district court and court of appeals "that the 1952 Proclamation expressed an intention to reserve unappropriated water," and held that:

> The Proclamation discussed the pool in Devil's Hole in four of the five preambles and recited that the "pool … should be given special protection." Since a pool is a body of water, the protection contemplated is meaningful only if the water remains; the water right reserved by the 1952 Proclamation was thus explicit, not implied.[12]

---

11 *Cappaert v. United States*, 426 U.S. 128, 132-33 (1976) ("*Cappaert*").

12 *Id*. at 139-40.

In the Arizona Wilderness Act of 1984, the Congress made the following findings:

> The Congress finds that -
>
> (1) the Aravaipa Canyon, situated in the Galiuro Mountains in the Sonoran desert region of southern Arizona, is a primitive place of great natural beauty that, due to the presence of a rare perennial stream, supports an extraordinary abundance and diversity of native plant, fish, and wildlife, making it a resource of national significance; and
>
> (2) the Aravaipa Canyon should, together with certain adjoining public lands, be incorporated within the National Wilderness Preservation System in order to provide for the preservation and protection of this relatively undisturbed but fragile complex of desert, riparian and aquatic ecosystems, and the native plant, fish, and wildlife communities dependent on it, as well as to protect and preserve the area's great scenic, geologic, and historical values, to a greater degree than would be possible in the absence of wilderness designation.[13]

In the first finding, the Congress noted "the presence of a rare perennial stream." The stream "supports an extraordinary abundance and diversity of native plant, fish, and wildlife." The second finding refers to the "fragile complex" of "riparian and aquatic ecosystems" and "the native plant, fish, and wildlife communities dependent on it."

In *Cappaert* the Supreme Court noted that the "Proclamation discussed the pool in Devil's Hole in four of the five preambles." In both of its findings in the 1984 Act, the Congress mentioned the presence of water and its vital effect.

In *Cappaert* the Court noted that the proclamation directed that the "pool is of such outstanding scientific importance that it should be given special protection." In the 1984 Act, the Congress stated that the environment supported by the perennial stream "is a resource of national significance" that should be preserved and protected.

In *Cappaert* the Court noted the existence of a "remarkable underground pool." In the 1984 Act, the Congress noted "the presence of a rare perennial stream." The adjectives "remarkable" and "rare" highlight the uniqueness of each water source.

In *Cappaert* the Court noted that President Truman's proclamation stated that "protection can be best afforded by making the said forty-acre tract containing the pool a part of the said monument." In the 1984 Act, the Congress noted the need to protect Aravaipa Canyon "to a greater degree than would be possible in the absence of wilderness designation."

In *Cappaert* the Court commented that "Devil's Hole is fenced off, and only

---

[13] Pub. L. No. 98-1485, § 201, 98 Stat. 1491. The Congress designated forty new wilderness areas, but made findings only for the designation of the Aravaipa Canyon Wilderness Area.

limited access is allowed by the Park Service." The Special Master, who has known this fact for many years, takes judicial notice that access to the Aravaipa Canyon Wilderness Area is limited to a specific number of daily visitors who require reservations and permits.[14]

Finding of Fact No. 5. The wilderness area designated in 1984 bordered Aravaipa Creek, the perennial stream, approximately 0.5 to 1.5 miles wide on both sides.[15]

The extent of the 1984 boundary shows Congress adhered to its objective of protecting the riparian ecosystem of Aravaipa Creek.

Finding of Fact No. 6. A perennial stream that maintains a riparian and aquatic ecosystem supporting native plant, fish and wildlife is a body of water.

Finding of Fact No. 7. The protection and preservation contemplated by the Arizona Wilderness Act of 1984 is meaningful only if water is available.

The Special Master recognizes that wilderness areas are established because each possesses a unique and special character. The Special Master has carefully analyzed this issue to assure that his analysis and determinations accord with *Cappaert's* holdings.

Conclusion of Law No. 2. In the Arizona Wilderness Act of 1984, the Congress explicitly intended to reserve water to accomplish the purposes of the Aravaipa Canyon Wilderness Area designated by the Act**.**

B. Arizona Desert Wilderness Act of 1990

The Arizona Desert Wilderness Act of 1990 states in pertinent part as follows:

> "WATER. - (1) With respect to each wilderness area designated by this title, Congress hereby reserves a quantity of water sufficient to fulfill the purposes of this title."[16]

The Special Master agrees with the movants that the Arizona Desert Wilderness Act of 1990 expressly reserved a quantity of water sufficient to fulfill the purposes of the wilderness additions designated that year.

Conclusion of Law No. 3. In the Arizona Desert Wilderness Act of 1990, the Congress expressly intended to reserve water to accomplish the purposes of the lands added to the Aravaipa Canyon Wilderness Area.

---

14 "A permit is required to visit Aravaipa Canyon Wilderness. The fee is $5.00 per person per day. Canyon use is limited to 50 people per day, 30 from the West end and 20 from the East end. This system helps to reduce the potential impacts to the environment caused by human use and allows visitors to enjoy the canyon's solitude." http://www.blm.gov/az/st/en/arolrsmain/aravaipa/permits.html (visited on Nov. 2, 2011).

15 The exterior boundary of the Aravaipa Canyon Wilderness Area as designated in 1984, is shown on a map dated 1987. *See* Freeport-McMoRan Exh. E.

16 Pub. L. No. 101-628, § 101(g)(1), 104 Stat. 4473.

Because the question has arisen in other contested cases, the Special Master reiterates that a non-Indian reserved water right is limited to unappropriated water. This point need not be briefed. In *Cappaert* the Supreme Court held as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.…
>
> . . . .
>
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water.[17]

IV. IF SO, WHAT WERE THE PURPOSES OF THE RESERVATION?

In order to resolve this issue, the three congressional acts must be examined. "This case requires us to apply settled principles of statutory construction under which we must first determine whether the statutory text is plain and unambiguous. (citation omitted). If it is, we must apply the statute according to its terms."[18]

A. Wilderness Act of 1964

The first act to consider is the Wilderness Act which states as follows:

> In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, **it is hereby declared to be the policy of the Congress** to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. (Emphasis added.)[19]

The second sentence of the Act, this statement expresses the congressional policy underlying the legislation.

In the third sentence, the Act states that "for this purpose:"

[T]here is hereby established a National Wilderness Preservation System

---

17 426 U.S. at 138-39; *see United States v. New Mexico*, 438 U.S. 696, 698 (1978) ("*New Mexico*"); *see In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 417, 989 P.2d 739, 745 (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).

18 *Carcieri v. Salazar*, 555 U.S. 379, 385, 129A S. Ct. 1058, 1063-64 (2009).

19 16 U.S.C. § 1131(c).

> to be composed of federally owned areas designated by Congress as "wilderness areas", and these shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness….[20]

The Special Master interprets the second sentence to express the congressional policy underlying the Wilderness Act and the third sentence to state the purposes of wilderness areas designated in furtherance of the Wilderness Act.

Conclusion of Law No. 4. The language of the Wilderness Act enacted in 1964 is plain and unambiguous concerning the purposes of wilderness areas.

Conclusion of Law No. 5. The purposes of the Wilderness Act enacted in 1964 are to protect designated wilderness areas, preserve their wilderness character, and gather and disseminate information regarding their use and enjoyment as wilderness.

B. Arizona Wilderness Act of 1984

In 1984, the Congress designated approximately 6,670 acres of federal land as the Aravaipa Canyon Wilderness Area. The Congress made this designation "[i]n furtherance of the purposes of the Wilderness Act of 1964" and "in order to provide for the preservation and protection of this relatively undisturbed but fragile complex of desert, riparian and aquatic ecosystems, and the native plant, fish, and wildlife communities dependent on it, as well as to protect and preserve the area's great scenic, geologic, and historical values."[21]

Conclusion of Law No. 6. The language of the Arizona Wilderness Act of 1984 is plain and unambiguous concerning the purposes of the Aravaipa Canyon Wilderness Area.

Conclusion of Law No. 7. The purposes of the Aravaipa Canyon Wilderness Area designated in 1984 are the following:

1. The protection of the area,

2. The preservation of its wilderness character,

3. The gathering and dissemination of information regarding the area's use and enjoyment as wilderness,

4. The preservation and protection of the complex of desert, riparian and aquatic ecosystems,

---

[20] *Id.*

[21] Pub. L. No. 98-1485, §§ 201 and 202, 98 Stat. 1491.

5. The preservation and protection of the native plant, fish, and wildlife communities dependent on the foregoing complex of ecosystems, and

6. The protection and preservation of the area's scenic, geologic, and historical values.

C. Arizona Desert Wilderness Act of 1990

In 1990, the Congress incorporated within the existing Aravaipa Canyon Wilderness Area approximately 12,711 acres of federal land "[i]n furtherance of the purposes of the Wilderness Act."[22] Unlike the 1984 legislation, the Congress did not provide additional specific purposes for the wilderness designation of these lands. At oral argument, it was stated that the added lands are located away from Aravaipa Creek, and while these lands might contain water sources, the areas are generally more arid than the original 6,670 acres.

Conclusion of Law No. 8. The language of the Arizona Desert Wilderness Act of 1990 is plain and unambiguous concerning the purposes of the lands added to the Aravaipa Canyon Wilderness Area.

Conclusion of Law No. 9. The purposes of the wilderness additions designated in 1990 are the following:

1. The protection of the added area,

2. The preservation of its wilderness character, and

3. The gathering and dissemination of information regarding the added area's use and enjoyment as wilderness.

V. IF CONGRESS DID NOT EXPRESSLY INTEND TO RESERVE WATER, DOES THE EVIDENCE ESTABLISH THAT THE UNITED STATES WITHDREW LAND FROM THE PUBLIC DOMAIN AND RESERVED THE ARAVAIPA CANYON WILDERNESS AREA FOR FEDERAL PURPOSES?

A withdrawal of federal lands and their reservation for a federal purpose are necessary in order to determine if Congress reserved unappropriated water to accomplish the purpose of the reservation. This question pertains to the 1984 wilderness designation.

"It is important to note at the outset that 'withdrawal' and 'reservation' are not synonymous terms.… A withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws" such as the operation of federal mining, homestead, preemption, desert entry, and other land laws.[23] Withdrawn lands "are tracts that the government has placed off-limits to specified forms of use and disposition," but a

---

22 Pub. Law No. 101-628, § 101(a)(39), 104 Stat. 4469 and 4472.

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

"withdrawn parcel may also be reserved for particular purposes, and often is."[24]

The Wilderness Act of 1964 provides in pertinent sections that:

> 1. Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter and, except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter … there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area. 16 U.S.C. § 1133(c).
>
> 2. Subject to valid rights then existing, effective January 1, 1984, the minerals in lands designated by this chapter as wilderness areas are withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto. 16 U.S.C. § 1133(d)(3).
>
> 3. [T]he grazing of livestock, where established prior to September 3, 1964, shall be permitted to continue subject to such reasonable regulations as are deemed necessary by the Secretary of Agriculture. 16 U.S.C. § 1133(d)(4).
>
> 4. Commercial services may be performed within the wilderness areas designated by this chapter to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas. 16 U.S.C. § 1133(d)(5).

Conclusion of Law No. 10. The prohibition and restriction of uses and disposition within the Aravaipa Canyon Wilderness Area show that the Congress withdrew the wilderness lands from the public domain.

"A reservation … goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use.… [a] reservation necessarily includes a withdrawal; but it also goes a step further, effecting a dedication of the land 'to specific public uses'."[25] Reserved lands "are the federal tracts that Congress or the Executive has dedicated to particular uses (footnote omitted). The dedication removes them from availability for contrary use or disposition."[26]

The purposes of the Aravaipa Canyon Wilderness Area designated in 1984 and

---

[24] 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, Public Natural Resources Law, § 1:12 at 1-17 (2d ed. 2010), § 1:12 at 1-16 (1st ed. 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.").

[25] 425 F.3d at 784.

[26] 1 COGGINS & GLICKSMAN § 1:11 at 1-16 (2d ed.), *supra*, § 1:11 at 1-15 (1st ed.), *supra*.

1990 are set forth above in section IV.

Conclusion of Law No. 11. The purposes of the Aravaipa Canyon Wilderness Area are sufficiently specific to show that the Congress removed the lands from availability for contrary uses.

Conclusion of Law No. 12. The 1984 and 1990 designations of the Aravaipa Canyon Wilderness Area constituted a withdrawal and reservation of federal lands.

VI. IF THE LAND WAS WITHDRAWN AND RESERVED, WHAT WERE THE PURPOSES OF THE RESERVATION?

This question is answered above in section IV.

VII. IF THE LAND WAS WITHDRAWN AND RESERVED, DID THE UNITED STATES IMPLIEDLY RESERVE UNAPPROPRIATED WATERS TO ACCOMPLISH THE PURPOSES OF THE RESERVATION?

It was determined in section III that Congress in the Arizona Wilderness Act of 1984 explicitly intended to reserve water to accomplish the purposes of the Aravaipa Canyon Wilderness Area designated that year, and second, that Congress expressly intended to reserve water to accomplish the purposes of the lands added in 1990. Because the 1990 Act expressly reserved water, the question concerning whether an implied reserved water right exists pertains to the 1984 legislation.

The Arizona Supreme Court has held that in determining the existence of an implied reserved water right "the trier of fact:"

> [M]ust examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water - the minimal need as set forth in *Cappaert* and *New Mexico* - required for such purposes.[27]

In *Cappaert* the United States Supreme Court held that:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created (citations omitted).[28]

---

27 *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 313, 35 P.3d 68, 74 (2001) ("*Gila V*").

28 426 U.S. at 139.

In *New Mexico*, the Supreme Court held that "[e]ach 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).[29]

The analysis set forth above in section III concerning the Arizona Wilderness Act of 1984 is adopted and incorporated by reference for the resolution of this issue.

Conclusion of Law No. 13. Water is necessary to accomplish the purposes of the Aravaipa Canyon Wilderness Area.

Conclusion of Law No. 14. The purposes of the Aravaipa Canyon Wilderness Area would be defeated without water.

Conclusion of Law No. 15. In the Arizona Wilderness Act of 1984, the Congress impliedly reserved unappropriated water to accomplish the purposes of the Aravaipa Canyon Wilderness Area designated that year**.**

Freeport-McMoRan argued that a provision common to both the Wilderness Act of 1964 and the Arizona Wilderness Act of 1984 precludes finding that either legislation reserved water for a wilderness area. The United States Code designates the provision "State water laws exemption." In briefing, the United States referred to it as a "neutrality clause," but it has also been called a "disclaimer" and the "no claim or denial language."

Section 4(d)(6) (the section was originally numbered section 4(d)(7)) of the Wilderness Act of 1964 states as follows:

> "Nothing in this chapter shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws."[30]

Section 101(e)(1) of the Arizona Wilderness Act of 1984 states as follows:

> "As provided in [section 4(d)(7)] of the Wilderness Act, nothing in this Act or in the Wilderness Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from Arizona State water laws."[31]

In 1987, the District Court for the District of Colorado was presented arguments similar to the ones made here. There and here the parties examined legislative history and other congressional acts to answer whether this provision precludes finding the existence of a reserved water right for a wilderness area.

---

29 438 U.S. at 700.

30 16 U.S.C. § 1133(d)(6) ("State water laws exemption").

31 Pub. L. No. 98-1485, § 101, 98 Stat. 1488.

District Court Judge John L. Kane, Jr. ruled as follows:

> I need not delve into the labyrinthine complexities of each of these arguments. It is axiomatic that "[w]here, as here, resolution of a question of federal law turns on a statute and the intention of Congress, [I] look first to the statutory language and then to the legislative history if the statutory language is unclear." (Citation omitted). I do not find the statutory language of § 4(d)(7) to be unclear. Hence, there is no need to resort to the legislative history of that section. (footnote omitted).…
>
> A plain reading of § 4(d)(7) indicates that section is simply a disclaimer. "By its drafting and passage of section 4(d)(7) of the Wilderness Act, 16 U.S.C. § 1133(d)(6), Congress meant to do nothing more than to maintain the *status quo* of basic water law....
>
> By its own terms, § 4(d)(7) does not purport to work any substantive change in the rights parties may acquire under the various doctrines of water law, including the reserved rights doctrine. Any decisions in that regard are properly left to case-by-case adjudication.[32]

The Idaho Supreme Court considered this issue and held that:

> Section 4(d)(6) (footnote omitted) of the Wilderness Act states that "[n]othing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws." (citation omitted). The "no claim or denial" language used in section 4(d)(6) has been included in other congressional acts dealing with the disposition of federal lands. *See, e.g.*, *Sawtooth National Recreation Area Act* § 9, (citation omitted); *Wildlife Refuge System Administration Act* § 4(i), (citation omitted); *Wild and Scenic Rivers Act* § 13(b), (citation omitted). In the Wild and Scenic Rivers Act Congress used the "no claim or denial" language and then expressly reserved water in another section of the Act. **The language of 4(d)(6) neither establishes a federal water right nor precludes the recognition of such a right if water is otherwise reserved**. (Emphasis added.)[33]

These rulings are persuasive authority for the determination that the "no claim or denial" provision, found in the Wilderness Act and the Arizona Wilderness Act of 1984, does not preclude finding that the Congress reserved water when the facts show otherwise. Judge Kane was correct that whether the Congress reserved water for a wilderness area is "properly left to case-by-case adjudication."

Conclusion of Law No. 16. Section 4(d)(6) of the Wilderness Act and section 101(e)(1) of the Arizona Wilderness Act of 1984 do not preclude the existence of a

---

32 *Sierra Club v. Lyng*, 661 F.Supp. 1490, 1493-94 (D. Colo. 1987).

33 *Potlach Corp. v. United States*, 134 Idaho 916, 922, 12 P.3d 1260, 1266 (Idaho 2000).

federal reserved water right for the Aravaipa Canyon Wilderness Area.

VIII. IF UNAPPROPRIATED WATERS WERE RESERVED FOR THE PURPOSES OF THE RESERVATION, WHAT IS THE DATE OR DATES OF PRIORITY OF THE RESERVED WATER RIGHTS?

The United States Supreme Court "has long held" that a federal reserved water right "vests on the date of the reservation."[34] The "federal right vests on the date a reservation is created, not when water is put to a beneficial use."[35]

Finding of Fact No. 8. President Ronald Reagan signed into law the Arizona Wilderness Act of 1984 on August 28, 1984.

Finding of Fact No. 9. Section 101(g)(1) of the Arizona Desert Wilderness Act of 1990, which expressed the Congress' intent to reserve water for the lands added to the Aravaipa Canyon Wilderness Area, states that "[t]he priority date of such reserved rights shall be the date of enactment of this Act."[36]

Finding of Fact No. 10. President George H. W. Bush signed into law the Arizona Desert Wilderness Act of 1990 on November 28, 1990.

Conclusion of Law No. 17. The date of priority of the explicit or implied reserved water right for the Aravaipa Canyon Wilderness Area designated in 1984 is August 28, 1984.

Conclusion of Law No. 18. The date of priority of the express reserved water right for the lands the Arizona Desert Wilderness Act of 1990 added to the Aravaipa Canyon Wilderness Area is November 28, 1990.

The United States argued that the November 28, 1990, priority date of the express reserved water right extends to the lands designated wilderness in 1984. The reason is that when the wilderness area was enlarged and water was reserved, the Congress provided that the water rights were "incorporated in and shall be deemed to be a part of the [existing] Aravaipa Canyon Wilderness Area.[37]

Section 101(g)(4) of the Arizona Desert Wilderness Act of 1990 states as follows:

---

34 *Cappaert*, 426 U.S. at 138.

35 *Gila V*, 201 Ariz. at 310, 35 P.3d at 71 (citing *Arizona v. California*, 373 U.S. 546, 600 (1963)); *see also* 2 Waters and Water Rights § 37.03(b) (Robert E. Beck and Amy L. Kelley, eds., 3rd ed. LexisNexis/Matthew Bender 2010) ("The priority date for a federal reserved water right is the date of the statute … establishing the reservation.").

36 Pub. L. No. 101-628, § 101(g)(1), 104 Stat. 4473.

37 *See* U.S. Motion for Sum. Judg. at 13-14 and Statement of Fact No. 25 (Feb. 14, 2011); *see also* U.S. Reply at 5 (June 16, 2011). The statutory phrase is in Pub. L. No. 101-628, § 101(a)(39), 104 Stat. 4472.

> WATER. - (4) The Federal water rights reserved by this title are specific to the wilderness areas located in the State of Arizona designated by this title. Nothing in this title related to reserved Federal water rights shall be construed as establishing a precedent with regard to any future designations, nor shall it constitute an interpretation of any other Act or any designation made pursuant thereto.[38]

Section 101(g)(4) clearly states that the water rights reserved by the Act "are specific to the wilderness areas … designated by" the legislation. Second, the clause states that "[n]othing … related to reserved Federal water rights" stated in the Act "shall constitute an interpretation of any other Act or any designation made pursuant thereto."

Furthermore, the phrase "are hereby incorporated in and shall be deemed to be a part of the Aravaipa Canyon Wilderness Area (designated [in 1984])" must be read as a whole. The term "shall be deemed to be a part of" is not independent from "incorporated in." The Special Master interprets the complete phrase to say that Congress added lands to the 1984 wilderness area, and thereafter, the original and added land portions would be geographically considered to constitute the singular Aravaipa Canyon Wilderness Area.

Having set the geographic boundary of the enlarged wilderness area in section 101(a), the Congress clearly legislated in section 101(g)(4) that the express reserved water rights are "specific" to the added lands. There is no proper way to conclude other than the November 28, 1990, priority date does not extend to the wilderness area designated in 1984.

IX. IF UNAPPROPRIATED WATERS WERE RESERVED FOR THE PURPOSES OF THE RESERVATION, DID CONGRESS INTEND TO RESERVE ALL UNAPPROPRIATED WATERS AT THE TIME OF DESIGNATION?

In *Cappaert* the Supreme Court held that "[t]he implied-reservation-of-water-rights doctrine … reserves only that amount of water necessary to fulfill the purpose of the reservation, no more."[39] Two years later, Chief Justice Rehnquist reiterated that "the Court has repeatedly emphasized that Congress reserved 'only that amount of water necessary to fulfill the purpose of the reservation, no more'."[40]

The Arizona Supreme Court held that one of the tests for determining whether a non-Indian reserved water right exists is to "determine the precise quantity of water - the minimal need as set forth in *Cappaert* and *New Mexico* - required for such purposes."[41] The "allocation [of water] must be tailored to the 'minimal need' of the reservation." The Court held that this "limitation makes good sense because federally reserved water rights are implied (citation omitted), uncircumscribed by the beneficial use doctrine, and

---

38 Pub. L. No. 101-628, § 101(g)(4), 104 Stat. 4474.

39 426 U.S. at 141.

40 *New Mexico*, 438 U.S. at 700 (citing *Cappaert*, 426 U.S. at 141); *see Arizona v. California*, 373 U.S. 546, 600-01 (1963).

41 *Gila V*, 201 Ariz. at 313, 35 P.3d at 74.

preemptive in nature. (Citation omitted)."[42]

The United States argued that the minimal need of Aravaipa Canyon Wilderness Area is all the unappropriated water constituting the natural flow in the area as of August 28, 1984. Without evidence establishing the quantity of available water and water needed to fulfill the purposes of the wilderness area, the Special Master cannot answer this question.

The United States submitted a decision of the State of Colorado District Court, Water Division No. 1, which granted the United States a ruling like the one it requests on this issue. In that decision, the Water Judge stated that in another recent matter he had experienced "more than one hundred days of trial," during which he "received a liberal education in the somewhat arcane science of fluvial geomorphology," and had had "the opportunity to be instructed by internationally renowned experts in the application of fluvial morphology principles."[43] The Water Court took judicial notice of principles learned in that trial to enter the decision the United States cites.

This question raises genuine issues of material fact for which no evidence has been presented. Therefore, summary judgment is not proper at this time.

This case presents the interaction of a federal reserved water right and a vested state law based water right. The United States holds Certificate of Water Right No. 87114.0000 for the use of the waters flowing in Aravaipa Creek, inside the Aravaipa Canyon Wilderness Area, for recreation and wildlife, including fish, with a priority date of June 1, 1981 (before the wilderness area was designated).[44] In order to resolve this issue, the scope of that interaction must be considered.

The Special Master cannot determine whether the Congress intended to reserve all the unappropriated water flowing naturally within the Aravaipa Canyon Wilderness Area. This question will be answered after applying the guidance of *Cappaert*, *New Mexico*, *Gila V*, and other relevant law to an evidentiary record.

X. FUTURE PROCEEDINGS

The Special Master requests parties to submit issues for consideration in the next round of briefing which will follow the procedures used in this initial round.

The briefs and arguments raised questions as to whether the United States Department of the Interior has filed the required maps and legal descriptions with the congressional committees, the true acreage of the Aravaipa Canyon Wilderness Area,[45]

---

[42] 201 Ariz. at 312, 35 P.3d at 73, fn1.

[43] Memo. Dec. and Order Concerning App. of U.S. for Reserved Rights in Rocky Mt. Natl. Park at 3 and 4, Water Div. No. 1 (Colo.), Case No. W-8439-76 (W-8788-77) (Dec. 29, 1993). A copy of the decision was submitted with the U. S. Motion for Sum. Judg.

[44] A copy of the certificate of water right is provided in Freeport-McMoRan Exh. J.

[45] In its summary judgment motion, the United States indicated the Aravaipa Canyon Wilderness Area contains 19,410 acres of land; the designating legislations total 19,381 acres; and the Final

and the interaction of a federal reserved water right with state law based water claims and rights. The Special Master would like to know which issues would expedite this matter and if a contested case steering committee should be appointed.

Based upon the foregoing, IT IS ORDERED:

1. Granting and denying the motions for summary judgment consistent with the determinations contained in this order, and

2. Directing parties to submit on or before **February 3, 2012**, issues for consideration in the next round of briefing.

DATED: November 2, 2011.

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

On November 2, 2011, the original of the foregoing was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for Contested Case No. W1-11-3423 dated July 25, 2011.

/s/ Barbara K. Brown
Barbara K. Brown

San Pedro River Watershed Hydrographic Survey Report (vol. 1, p. 447, 1991) indicated 20,089 acres. All acreages are approximate.