

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23

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

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

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

Contested Case No. **W1-106**

**ORDER GRANTING FREEPORT
MINERAL CORPORATION'S
MOTION FOR SUMMARY
JUDGEMENT ON A PORTION OF
THE UNITED STATES' FEDERAL
RESERVED WATER CLAIMS
AND VACATING ORAL
ARGUMENT**

CONTESTED CASE NAME: *In re Subflow Technical Report, Verde River Watershed*
HSR INVOLVED: None
DESCRIPTIVE SUMMARY: Order granting Freeport Mineral Corporation's motion for summary judgment on the United States' federal reserved water claims for "all unappropriated water as a matter of law" and vacating oral argument scheduled for October 4, 2023.
NUMBER OF PAGES: 16
DATE OF FILING: September 27, 2023

1 The United States claims federal reserved water rights within five (5)
2 “Wilderness Areas” within the Verde River watershed:

- 3 1) Sycamore Canyon Wilderness Area - SOC No. 39-176075
- 4 2) Munds Mountain Wilderness Area - SOC No. 39-176074
- 5 3) Red Rock-Secret Mountain Wilderness Area - SOC No. 39-176079
- 6 4) West Clear Creek Wilderness Area - SOC No. 39-176076
- 7 5) Wet Beaver Wilderness Area - SOC No. 39-176077

8 The Statements of Claimant (“SOCs”) claiming reserved water rights for these
9 Wilderness Areas were filed February 23, 2023, as ordered by the Special Master on
10 March 4, 2020. The Sycamore Canyon Wilderness Area was designated as a
11 component of the National Wilderness Preservation System in 1972.¹ Subsequently,
12 in 1984, Congress created the Munds Mountain, Red Rock-Secret, West Clear Creek,
13 and Wet Beaver Wilderness Areas.² The 1984 act also added lands to the Sycamore
14 Canyon Wilderness Area.³ *Id.* All wilderness areas are managed for “the use and
15 enjoyment of the American people in such manner as will leave them unimpaired for
16 future use and enjoyment as wilderness.” Wilderness Act of 1964, 16 U.S.C.
17 §1131(a).

18 Each SOC seeks to quantify the relevant water right by two alternative
19 standards. Specifically, the United States claims “as a matter of law, all of the
20 unappropriated flow” within the wilderness areas and, in the alternative, enough
21

22 ¹ Pub. L. 92-241, March 1972, 86 Stat. 48 (“1972 Act”).

23 ² Pub. L. 98-406 August 1984, 98 Stat. 1485, Sec. 101 (a)(16), (18), (26), (27) (“1984 Act”).

³ *Id.*

1 water to “maintain the wilderness character” of the wilderness areas.

2 On May 23, 2023, Freeport Minerals Corporation (“Freeport”) filed a Motion
3 for Summary Judgement on the United States’ Federal Reserved Right Claims as a
4 Matter of Law to all Unappropriated Flow Within Wilderness Areas (“Motion”).
5 This Motion states that the United States’ claim of “all unappropriated flow” does not
6 meet the “minimal need” doctrine and amounts to a claim of “all the water, all the
7 time.”⁴ Freeport further asserts that the United States’ description of “all
8 unappropriated flow” was found unacceptably ambiguous in previous contested cases
9 for the Gila Adjudication; therefore, the United States is precluded from making such
10 claims here. The Court has reviewed the Motion, all Responses and Replies, and
11 grants the motion for summary judgement, dismissing only the United States’ claims
12 that are based on an “all unappropriated flow” standard. The United States may
13 pursue its claims that are based on the amount of water necessary to maintain the
14 wilderness character of the relevant wilderness areas.

15
16 **BACKGROUND**

17 **Federal Reserved Water Rights & the “Minimal Need Doctrine”**

18 The federal reserved water rights doctrine stems from the federal
19 government’s power “to reserve [unappropriated] waters and exempt them from
20 appropriation under the state laws.” *In re Gen Adjudication of All Rights to Use*

21
22 _____
23 ⁴ Freeport Minerals Corporation’s Motion for Summary Judgement on the United States’ Federal Reserved Right Claims as a Matter of Law to All Unappropriated Flow Within Wilderness Areas, W1-106 (“Motion”) at 2 (May 23, 2023).

1 *Water in the Gila River System Source*, 195 Ariz. 411,419 (1999) (quoting *Winters v.*
2 *United States*, 207 U.S. 564, 577 (1908)). The standard for proper quantification of
3 these federal reserved water rights was established in *Cappaert v. United States* as
4 “that amount of water necessary to fulfill the purpose of the reservation.” 426 U.S.
5 128, 139, 141 (1976). The *Cappaert* Court used the phrase “minimal need” when
6 describing the amount of water needed to fulfill the purposes of the reservation of
7 land. *Id.* It is the United States’ burden to present evidence to quantify what is the
8 least amount of water necessary to meet the needs of any particular wilderness area.

9
10 **ISSUE**

11 The question before the Court in this matter is the legal standard applicable to
12 the federal reserved water rights claims at issue. Specifically, whether the law
13 supports an “all unappropriated flow” standard, which preserves flow without
14 providing an ecological needs analysis of the wilderness areas. Alternatively, under a
15 “minimal need” standard, the United States has the burden to establish,
16 unambiguously, the precise water needs of plants, animals, or other features of the
17 wilderness areas.

18 This order does not limit the quantity of the reserved water rights at issue; it
19 only determines the evidentiary showing that the United States must make to obtain
20 those rights.

21
22 **SUMMARY JUDGEMENT STANDARD**

23 Freeport has the burden to prove that “there is no genuine dispute as to any

1 material fact to the issue at hand,” and that Freeport “is entitled to a judgment on the
2 facts as a matter of law.” Ariz. R. Civ. P. 56(a). Notwithstanding the fact that the
3 United States claims in its Separate Statement of Facts that there is a factual
4 dispute,⁵ the disagreement is whether “all unappropriated water” means “all the water
5 all the time.” The United States does not dispute the fact that their SOCs include the
6 language, “The United States claims as a matter of law, all of the unappropriated
7 flow within the [specific] Wilderness Area, with a priority date of March 6, 1972.”⁶

8 While there is disagreement between the parties regarding the timing of the
9 Motion, the Court is comfortable that Freeport is entitled to judgment for the
10 following reasons:

- 11 1) The Order applies **only** to that United States’ language claiming “all
12 unappropriated water.”
- 13 2) The Order does not apply to the United States’ claims in the alternative.
- 14 3) If the Court did not grant the Motion now, the standard governing the
15 claims at issue will still be “minimal need” and the ambiguous language of
16 “all unappropriated flow” would be dismissed unless the United States
17 amended the SOCs prior to the adjudication of the claims.
- 18 4) Because the United States’ SOCs are not being dismissed in entirety, the
19 Court is not engaging in a premature determination of any potential water
20 right. When the final HSR is filed, the full breadth of information
21

22 ⁵ United States’ Separate Statement of Facts, W1-106 at 3 (August 4, 2023).

23 ⁶ United States Statements of Claimant Nos. 39-176074 through 39-176077 and 39-176079, each
filed February 23, 2023.

1 regarding the United States' SOCs in the alternative will be available for
2 review and any potential objectors will still have an opportunity to file
3 objections.
4

5 **FEDERAL RESERVED WATER RIGHTS STANDARD**

6 As the law of the case, *In re Aravaipa Canyon* and *In re Redfield Canyon*
7 apply to the claims at issue. In both *Aravaipa* and *Redfield*, the Court held that the
8 minimal need standard applies to claims for express reserved water rights under the
9 Arizona Wilderness Act of 1990, rejecting the application of an “all unappropriated
10 flow” standard. W1-11-3342, Order at 6 (Dec. 17, 2018); W1-11-2664, Order at 8
11 (Aug. 10, 2022). The Court held that “federal reserved water rights should be
12 precisely quantified using an objective, measurable standard,” and that the United
13 States “must demonstrate the water demand of those aspects of the [wilderness area]
14 that Congress intended to preserve by its reservation of the land.” *Id.*

15 In the contested cases here, Congress impliedly reserved water under the
16 Arizona Wilderness Act of 1984. The 1984 and 1990 Acts are nearly identical in
17 form, and the purposes of the initial 1964 Wilderness Act and its legislative history
18 apply as forcefully here as they applied in *Aravaipa* and *Redfield*. Compare 1984
19 Act, Pub. L. No. 98-406, sec. 101(a), with 1990 Act, Pub. L. No. 101-628, sec.
20 101(a). The only distinction that the U.S. highlights to justify treating the reserved
21 water rights here differently from those in *Aravaipa* and *Redfield* is that the water
22 rights in *Aravaipa* and *Redfield* were expressly reserved, while the rights at issue here
23

1 are impliedly reserved. The argument that a less direct statement by Congress would
2 justify a lighter evidentiary burden on the United States is unpersuasive.

3
4 **CONCLUSION**

5 The amount of water needed to allow flora and fauna to naturally flourish in
6 the Arizona desert, as required by any Wilderness Act (1964, 1972, or 1984) cannot
7 be accepted lightly and without expert evidence. The amount of water needed for a
8 federal reservation is, as noted by Freeport, an “inherently fact-intensive” inquiry that
9 cannot be supported for any party with conclusory statements and ambiguous
10 terminology.

11
12 **IT IS ORDERED** granting Freeport Minerals Corporation’s May 23, 2023,
13 Motion for Summary Judgement on the United States’ Federal Reserved Right
14 Claims as a Matter of Law to All Unappropriated Flow Within Wilderness Areas.
15 The following language only for the United States’ claims within the wilderness
16 areas of Sycamore Canyon Wilderness Area, Munds Mountain Wilderness Area, Red
17 Rock-Secret Mountain Wilderness Area, West Clear Creek Wilderness Area, and
18 Wet Beaver Wilderness Area is dismissed:

19 *“The United States claims as a matter of law, all of the*
20 *unappropriated flow within the [specific] Wilderness Area, with a*
21 *priority date of March 6, 1972.”*

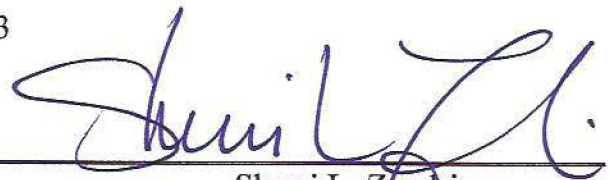
22
23 Because the Court grants the motion solely on the issue of the appropriate

1 standard for a claim, there is no need to evaluate Freeport's claim of issue preclusion
2 at this time.


3
4 **IT IS FURTHER ORDERED** the United States' alternative claims for the
5 wilderness areas on the basis of minimal need are outside the scope of this Motion;
6 therefore, each of the United States' SOC claims in the alternative will remain and
7 the United States is not required to refile any SOCs.

8
9 **IT IS FURTHER ORDERED** vacating the Thursday, October 4, 2023, oral
10 argument.

11
12 Signed this 27 day of September 2023

13
14 
15 Sherri L. Zendri
16 Special Water Master

17 The original of the foregoing was delivered
18 to the Clerk of the Maricopa County Superior
19 Court on September 27, 2023,
20 for filing and distributing a copy to all
21 persons listed on the Court Approved
22 Mailing List for this case.

23

24 Emily Natale

Court Approved Mailing List
In re Subflow Technical Report, Verde River Watershed, Case No. W1-106
W1-106 (95 Names)
Prepared by the Special Master
9/27/2023

Nicholle Harris
City of Avondale
City Attorney
11465 West Civic Center Drive
Avondale, AZ 85323

Carl Hendrickson
1112 Woburn Green
Bloomfield Hills, MI 48302

Alexander B. Ritchie
San Carlos Apache Tribe
Office of the Attorney General
PO Box 40
San Carlos, AZ 85550

Carla A. Consoli
May Potenza Baran & Gillespie
P.C
1850 N. Central Avenue, 16th
Floor
Phoenix, AZ 85004

Andrew J. Corimski
U. S. Army Legal Services
Environmental Law Division
9275 Gunston Road
Fort Belvoir, VA 22060

Carlos D. Ronstadt
Law Office of Carlos D.
Ronstadt, PLLC
7000 North 16th Street, Suite
120, No. 510
Phoenix, AZ 85020-5547

Brandon R & Natasha M.
Pacheco
Pacheco Brandon & Natasha
Living Trust
19400 N. Lower Territory Rd.
Prescott, AZ 86305

Charles L. Cahoy, Asst. City
Attorney
Phoenix City Attorney's Office
200 W. Washington 13th Flr.
Phoenix, AZ 85003

Brian Murphy
PO Box 2
Sedona, AZ 86339

Clerk of the Superior Court
Maricopa County
Attn: Water Case
601 West Jackson Street
Phoenix, AZ 85003

Burch & Cracchilo, P.A.
1850 North Central, Suite 1700
Phoenix, Az 85004

Cottonwood Ditch Association
Peter Andrew Groseta,
President
PO Box 445
Cottonwood, AZ 86326

Cuomo Kelsch Ranch LLC
221 N. Roper Lane
Payson, AZ 85541

D. A. Brown, D. E. Brown, J. A.
Brown
Brown & Brown Law Offices,
P.C.
P. O. Box 1890
St. Johns, AZ 85936

Daniel Brenden /Peter Muthig
Maricopa County Attorney's
Office
222 North Central Avenue, Ste.
1100
Phoenix, AZ 85004

Daniel D. Haws
U. S. Army
Environmental Attorney
2387 Hatfield Street
Fort Huachuca, AZ 85613

Daniel F. McCarl
U.S. Department of Justice
ENRD
Indian Resources Section
999 18th Street, So Terrace,
Suite 370
Denver, CO 80202

Dara Mora
Liberty Utilities, Inc.
1225 West Frontage Road
Rio Rico, AZ 85648

David F. Jacobs, Carrie J.
Brennan
and Kevin P. Crestin
Arizona Attorney General
Natural Resources Section
2005 North Central
Phoenix, AZ 85004

David Gehlert
United States Department of
Justice
Environment & Natural
Resources Division
999 18th Street, South Terrace
Ste 370
Denver, CO 80202

David J. Owens
Owens Trust
7127 N. 66th Street
Paradise Valley, AZ 85253

Desert Spice Tea, LLC
14888 SR 25
Langley, WA 98260

Diandra D. Benally
Fort McDowell Yavapai Nation
Legal Department
P. O. Box 17779
Fountain Hills, AZ 85269-7779

Duane C. Wyles
205 Farm Circle Drive
P. O. Box 1537
Cornville, AZ 86325-1537

Emily Jurmu
City of Peoria, City Attorney
Office
8401 West Monroe Street,
Room 280
Peoria, AZ 85345-6560

Henry D. & Barbara A. Cuomo
231 N. Roper Lane
Payson, AZ 85541

Eric C. Anderson & Karen Tyler
City of Scottsdale
City Attorney's Office
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

Irving John Goulette
389 West Burnt Point Trail
Payson, AZ 85541

Frances Scurei
32105 N. 168th Street
Rio Verde, AZ 85263

J. B. Weldon, M. A. McGinnis,
M. K. Foy
Salmon, Lewis & Weldon
2850 E. Camelback Rd. Suite
200
Phoenix, AZ 85016

Greg Stowe
26321 N. Vineyard Lane
Paulden, AZ 86334

Jacob Kavkewitz
Pima County Attorney's Office
Civil Division
32 N. Stone Avenue, Ste 2100
Tucson, AZ 85701

Gregory L. Adams
Central Arizona Water
Conservation District
P. O. Box 43020
Phoenix, AZ 85080-3020

Jason Simon
Lewis Roca Rothgerber
Christie L.L.P.
One South Church Avenue,
Ste. 2000
Tucson, AZ 85701-1611

Harold Cowles
PO Box 2800-177
Carefree, AZ 85377

Jenny J. Winkler
City Attorney
821 N. Main St.
Cottonwood, AZ 86326

Jeremiah Weiner, Kent
Millward,
Brett J. Stavin, & Lauren
Mulhern
ROSETTE, LLP.
120 S. Ash Avenue, Suite 201
Tempe, AZ 85281

Joe P. Sparks and Laurel A.
Herrmann
The Sparks Law Firm, P.C.
7503 First Street
Scottsdale, AZ 85251-4573

John Brink
7522 139th St Ct E
Puyallup, WA 99373

John C. Lacy and Paul M.
Tilley
2525 East Broadway Blvd,
Suite 200
Tucson, AZ 85716-5303

John C. Lemaster
CLARK HILL PLC
3200 North Central Ave., Suite
1600
Phoenix, AZ 85012

John D. Burnside
Snell & Wilmer, L. L. P.
One E. Washington Street,
Suite 2700
Phoenix, AZ 85004-2556

Johnnie L. Martin
7215 E. Knobby Lane
Prescott Valley, AZ 86315

Joseph Young, Chris Resare,
& Matthew Podracky
City of Prescott Legal
Department
221 S. Cortez St.
Prescott, AZ 86303

Josh Edelstein Phoenix Field
Solicitor
Office of the Solicitor
U.S. Department of the Interior
Sandra Day O'Connor U.S.
Courthouse
401 W. Washington St., Ste.
404, SPC 44
Phoenix, AZ 85003

Judy Mikeal
San Pedro NRCD
P. O. Box 522
St. David, AZ 85630

Justine Schaible
4001 E. Perkenville Road
Chino Valley , AZ 86232

Kamille Mulcaire
9535 E. Mulcaire Rd.
Cornville, AZ 86325

Kathleen Henkel
1870 E. Pointer Trail
Paulden, AZ 86334

L. J. Caster, B.J. Heiserman, B.
J. Pew
Fennemore Craig, P.C.
2394 East Camelback Road
Ste 600
Phoenix, AZ 85016-3429

Kathy Masters-Jaeckel &
Lawrence Jaeckel
30 Serendipity Trail
Sedona, AZ 86336

L. Richard Mabery
L. Richard Mabery, P.C.
234 North Montezuma Street
Prescott, AZ 86301

Kelly Schwab & Daniel L.
Brown
City of Chandler
City Attorney's Office
Mail Stop 602, P. O. Box 4008
Chandler, AZ 85244-4008

L. William Staudenmaier
Snell & Wilmer, L. L. P.
One E. Washington Street
Suite 2700
Phoenix, AZ 85004

Kimberly R. Parks and Karen J.
Nielsen
Arizona Department of Water
Resources
1110 West Washington, Suite
310
Phoenix, AZ 85007

Larry Bullard
1580 S. Grandview Rd
Cornville, AZ 86325

KLUMP RANCHES, L.L.C.
c/o Wayne D. Klump
P. O. Box 357
Bowie, AZ 85605

Lee Storey & Alexandra
Arboleda
TSL Law Group, PLC
8767 E. Via De Ventura, Suite
126
Scottsdale, AZ 85258

Kristie L. Kreutzfeld
3075 E. Martin Way
Cottonwood, AZ 86326

Lewallen Family Trust
Gary W., Katharine S. Lewallen
1101 S. Crown Key Ave.
Gilbert, AZ 85233

Lucas J. Narducci
Snell & Wilmer, L.L.P.
One E. Washington Street,
Suite 2700
Phoenix, AZ 85004-2556

Michele Guy
PO Box 2800-177
Carefree, AZ 85377

M'Leah Woodard and Leigh
Sellari
United States Department of
Agriculture
P. O. Box 586
Albuquerque, NM 87103-0586

Morgan Joesph Langan
PO Box 741
Cornville, AZ 86325

Marcus & Twyla Petropoulos
24520 N. Patricia Road
Paulden, AZ 86334

Nancy Shiew
23755 N. Hwy 89
Paulden, AZ 86334

Marjorie Kish
1902 N. Montezuma Heights
Rd.
Camp Verde, AZ 86322

R. Lee Leininger, David W.
Gehlert
U.S. Department of Justice
Environment & Natural
Resources Division
Natural Resources Section
999 18th Street, S. Terrace,
Suite 370
Denver, CO 80202

Maryland S. McKinney
PO Box 1244
Paulden, AZ 86334

Randall L. Russell
26338 N. Cabernet Ln.
Paulden, AZ 86334

Meghan H. Grabel & Elias J.
Ancharski
OSBORN MALEDON, P.A.
2929 North Central Avenue,
Ste. 2100
Phoenix, AZ 85012

Rebecca M. Ross
U. S Department of Justice
P. O. Box 7611
Ben Franklin Station
Washington, D. 20044

Resolution Copper Mining LLC
c/o Karlene Martorana
One Gateway
426 N. 44th St, Suite 320
Phoenix, AZ 85008

Rita M. Cantu
862 W. Gina Marie Blvd
Paulden, AZ 86334

Robert B. Hoffman
6035 North 45th Street
Paradise Valley, AZ 85253

Robert G. Sumner
PO Box 1290
Cornville, AZ 86325

Roric V. Massey
City of Goodyear
Office of the City Attorney
1900 N. Civic Sq
Goodyear, AZ 85395-2012

Susan B. Montgomery, Robyn
Interpreter,
Kristyne M. Schaaf-Olson
Montgomery & Interpreter PLC
3301 E. Thunderbird Road
Phoenix, AZ 85032

Sean Hood
Fennemore Craig, P.C.
2394 E Camelback Rd, St 600
Phoenix, AZ 85016-3429

Sonia M. Blain & Janis L.
Bladine
Tempe City Attorney's Office
21 E. Sixth Street #201
Tempe, AZ 85281

Starr Bennett as Trustee
Starr Bennett Living Trust
PO Box 606
Paulden, AZ 86334

Steve Wene
Moyes Sellers & Sims
1850 North Central Avenue,
Suite 1100
Phoenix, AZ 85004

Sherri L. Zendri
Special Master
Central Court Building, Ste 3A
201 West Jefferson
Phoenix, AZ 85003-2205

Terrence M. Sullivan Living
Trust
Sheila A. Victorino
PO Box 212
Cottonwood, AZ 86326

The 7's Ranch LLC
23755 N. Hwy 89
Paulden, AZ 86334

William H. Anger
Engelman Berger, P.C.
2800 N. Central Ave. Ste. 1200
Phoenix, AZ 85004

Thomas L. Murphy
Gila River Indian Community
Office of the General Counsel
P. O. Box 97
Sacaton, AZ 85147

William Sasser
PO Box 793
Seligman, AZ 86337

Todd V. Scantlebury
2413 W Middle Verde Rd
Camp Verde, AZ 86322

Wolfgang Koehler
275 W. Eleanor Rd
Paulden, AZ 86334

Toni M. Brown
9905 E. Catalina Dr.
Prescott Valley, AZ 86314

Yolanda Moneglia
870 Sycamore Vista Dr.
Chino Valley, AZ 86323

Vito T. Greco
Colleen Corrigan Greco
1410 S. Mullen Way
Prescott, AZ 86303

Yosef M. Negose
U.S. Department of Justice -
ENRD
Indian Resources Section
P.O. Box 7611
Washington, DC 20044

Watercrest, Inc
14888 SR 25
Langley, WA 98260