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12 *Improvement and Power District and Salt River*
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14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
15 **IN AND FOR THE COUNTY OF MARICOPA**

16 IN RE: THE GENERAL
17 ADJUDICATION OF ALL RIGHTS
18 TO USE WATER IN THE GILA
19 RIVER SYSTEM AND SOURCE

No. W-1 (Salt)
No. W-2 (Verde)
No. W-3 (Upper Gila)
No. W-4 (San Pedro)

20 **REPLY IN SUPPORT OF MOTION**
21 **TO DESIGNATE CONTESTED**
22 **CASE ON VERDE RIVER**
23 **SUBFLOW**

(Assigned to the Hon. Mark H. Brain)

24 Descriptive Summary: SRP submits its reply in support of its June 28, 2013 motion
25 requesting that the Court designate a contested case to address subflow issues in the
26 Verde River Watershed.

27 Statement of Claimant Nos.: 39-07-1040, -1041, -1998, -1206, -1207; 39-0550053,
-50054, -50055; 39-L8-35212 and -35213.

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1 The Salt River Project Agricultural Improvement and Power District and Salt River
2 Valley Water Users' Association (collectively, "SRP") hereby reply to the responses to their
3 motion requesting that the Court designate a contested case in this matter to address subflow
4 issues in the Verde River Watershed. SRP received seven responses to its motion.¹ As
5 perhaps should have been expected, the five parties (the United States, the Yavapai-Apache
6 Nation, Tempe, Phoenix, and various other cities) who claim senior appropriative or federal
7 reserved water rights on the Verde and Salt Rivers and feel the brunt of unadjudicated
8 pumping in the watershed support SRP's motion and advocate moving forward with
9 delineating the Verde River subflow zone. Two parties (Freeport-McMoRan Corporation and
10 the City of Cottonwood) who rely primarily upon underground water supplies oppose SRP's
11 motion and cite a litany of reasons why the Court should wait. For the reasons set forth in
12 SRP's motion, in the five affirmative responses, and in this reply, the time to wait is over.
13 The Court should move forward now with delineating the Verde River subflow zone.

14 Several of the parties refer to the Court's minute entry addressing the discussions at the
15 April 25 status conference. Some of the parties (Freeport and Cottonwood) argue that the
16 Court has already rejected the concept of having the parties provide technical input to ADWR
17 in its subflow delineation work. The Court's minute entry was dated June 18 but was not filed
18 until July 2, and SRP did not receive that minute entry until after it filed its June 28 motion.
19 Because SRP's motion (and the responses thereto) were not submitted until after the June 18
20 date of the minute entry, the Court likely did not have before it the motion or the responses. If
21 and to the extent that the Court's minute entry addressed (in advance) the arguments presented
22 in SRP's motion, SRP respectfully requests that the Court revisit those issues in light of the
23 information presented in the motion, the responses, and this reply.

24 ...

25 ...

27 ¹ SRP received no response to its motion from the Arizona Department of Water Resources ("ADWR").

1 **I. Cottonwood Understates the Past and Current Impacts on the Verde, and**
2 **Nothing in the Cottonwood Response Supports a Continuation of the Status Quo**
3 **with Respect to Verde River Subflow.**

4 In its response, Cottonwood presents three arguments why SRP's request should be
5 denied.² First, Cottonwood argues that "SRP's attempts to claim that the Verde River is in
6 danger of running dry are overstated and the result of misinterpretation of a report by the
7 USGS." Cottonwood Response, at 3. Cottonwood's position is mistaken because, among
8 other things, SRP's statements regarding the United States Geological Survey's ("USGS")
9 recent report on human effects on the Verde River are essentially direct quotes from that
10 report:

11 1. Cottonwood takes issue with SRP's statement that the USGS concluded that
12 "the flow of the river at the Camp Verde gage (on the downstream end of the Verde Valley)
13 had decreased by about 10,000 acre-feet per year between 1910 and 2005." See Cottonwood
14 Response, at 3.³ On page 22 of the USGS report, however, it expressly states: "As of 2005,
15 annual base flow at the Camp Verde gage had decreased by about 10,000 acre-feet/year (14
16 ft³/s) since 1910 because of human stresses." USGS Study, at 22.

17 2. Cottonwood also criticizes SRP's statement that the USGS report shows that
18 "the base flow will decrease by an additional 5,400 to 8,600 acre-ft/yr" by 2110. See
19 Cottonwood Response, at 3.⁴ Again, however, the USGS report itself specifically states:
20 "Over the same time period [2005 to 2110], base flow at the Camp Verde gage could decrease
21 by an additional 5,400 to 8,600 acre-feet/yr (7 to 12 ft³/s)." USGS Study, at 28.

22
23
24 ² See City of Cottonwood's Response to SRP's Motion to Designate Contested Case on Verde River
25 Subflow and Motion to Designate Contested Case to Determine the Water Rights of the Yavapai-
26 Apache Nation (August 6, 2013) ("Cottonwood Response").

27 ³ See Motion to Designate Contested Case on Verde River Subflow, at 2 (June 28, 2013) ("Motion")
(citing U.S. Geological Survey, *Human Effects on the Hydrologic System of the Verde Valley, Central
Arizona, 1910-2005 and 2005-2110, Using a Regional Groundwater Flow Model*, at 22 (Scientific
Investigations Report No. 2013-5029) ("USGS Study")).

⁴ See Motion, at 3 (citing USGS Study, at 28).

1 It is difficult to ascertain how Cottonwood could, in good faith, accuse SRP of
2 “overstating” and “misinterpreting” the USGS report when SRP’s assertions were taken so
3 directly from the language of that report itself.

4 Cottonwood also attempts to downplay the results of the USGS study by contending
5 that the *annual* flow of the Verde has not declined by 10,000 acre-feet (“AF”) *per year*, but
6 rather that annual flow has been reduced by “only” 10,000 AF over the last ninety-five years.
7 *See* Cottonwood Response, at 3-4. Neither the USGS nor SRP ever said that the *annual* flow
8 was reduced by 10,000 AF *each year* over that period. Among other things, that would be
9 impossible because the annual flow of the Verde was only about 90,000 AF in 1910, so if that
10 number dropped by 10,000 AF each year, the river would have been completely dry by
11 around 1920. *See* USGS Study, at 19.

12 What is important, and what is missing from Cottonwood’s strained calculations, is
13 that the amount of water flowing each year in the Verde decreased by approximately 10,000
14 AF between 1910 and 2005. Thus, if the flow in 1910 was 90,000 AF, the flow in 2005 was
15 about 80,000 acre-feet. That amounts to more than 10,000 AF of total water lost, however,
16 because the annual numbers reflect the amount of water that flows in the river *each year*.
17 Using Cottonwood’s assumption that the 10,000-AF drop in annual flow was spread evenly at
18 105 AF per year over the ninety-five year period, for example, that constitutes a large amount
19 of water. The 105 AF of water was lost in the first year, that same 105 AF *plus another 105*
20 *AF* was lost in the second year, and so forth. Using that calculation, the total amount of lost
21 flow in the Verde between 1910 and 2005 would be 478,790 AF, or the amount of water that
22 would cover 478,790 acres to a depth of one foot. The cumulative amount of water lost over
23 the years is particularly important to entities (such as SRP, Phoenix, and others) who have
24 storage capacity downstream that could have captured that water in wet years for use in
25 subsequent dry years. Despite Cottonwood’s protestations to the contrary, the USGS report
26 shows that a substantial amount of water has been lost over time to downstream users due to
27 decreased flows in the Verde.

1 Cottonwood's second argument is less extreme but no more persuasive. Cottonwood
2 contends that allowing parties to present technical information to ADWR in order to help get
3 the process moving will harm small parties to the Adjudication who lack sufficient resources
4 to compile such information. *See* Cottonwood Response, at 2. Freeport makes a similar
5 argument, raising concerns that SRP is suggesting that the Court entirely usurp the statutory
6 role of ADWR on subflow issues.⁵ What Cottonwood and Freeport ignore, however, is that
7 SRP has not suggested that ADWR's role in the subflow delineation process be deleted
8 entirely. SRP's motion acknowledges that delineating the subflow zone likely comes within
9 the scope of the agency's expertise under A.R.S. § 45-256(A). *See* Motion, at 7-8. What SRP
10 is proposing is that the parties be allowed to start now in assisting ADWR with that work.
11 SRP acknowledges that ADWR will need to review the parties' submissions, provide
12 technical advice to the Court, and eventually prepare its own report. *Id.* at 8. The question is
13 whether the Court can start the process now, or whether it must wait more years or decades
14 until ADWR has the time and resources to start the process entirely on its own. SRP contends
15 that, when it comes to delineating the Verde River subflow zone, sooner is better than (much)
16 later.

17 Cottonwood's final argument is an attempt to deflect consideration of the Verde River
18 subflow zone by diverting attention to a proposed contested case to determine the rights of the
19 Yavapai-Apache Nation ("YAN"). SRP agrees that the YAN rights will need to be
20 adjudicated and that should be done as soon as possible, but one of the purposes of SRP's
21 motion was to request that the Court move away from a strategy of adjudicating federal rights
22 at the expense of all other issues. Designating a contested case for the YAN rights (even if
23 the Court decides to do that) should not require the Court to put off the Verde River subflow
24 zone for another decade or more.

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27 ⁵ *See* Response to SRP's Motion to Designate Contested Case on Verde River Subflow submitted by
Freeport-McMoRan Corporation, at 7-9 (August 7, 2013) ("Freeport Response").

1 **II. The Fact that Much Work Needs to Be Done is a Good Reason to Start Now.**

2 Most of the Freeport's response is taken up by statements of how much work remains
3 to be done on the San Pedro River subflow issues and how much work will need to be done
4 on Verde River subflow. *See* Freeport Response. Ironically, Freeport uses the significant
5 amount of work that needs to be done as support for its contention that the Court must wait
6 before it does anything. To the contrary, SRP contends that the fact that much "difficult" and
7 "time-consuming" work needs to be done is an important reason why that work should
8 commence as soon as possible. *See* Freeport Response, at 6.

9 As the Arizona Supreme Court noted in one of the several interlocutory review
10 proceedings that have arisen from this Adjudication, "the best way out is always through."
11 *See In re General Adjudication of All Rights to Use Water in the Gila River System and*
12 *Source*, 195 Ariz. 411, 422, 989 P.2d 739, 750 (1999) (citation omitted). Freeport contends,
13 among other things, that any substantive work on the Verde River should wait at least until
14 after ADWR issues its revised subflow report on the San Pedro in April 2014. *See* Freeport
15 Response, at 3. Given the usual pace of this Adjudication, it is difficult to imagine how any
16 proceedings on the Verde River could commence in earnest before that date, even if the Court
17 decides now to start that process. If we (as Freeport suggests) wait until mid-2014 or later to
18 even begin thinking about the Verde, that just puts the whole thing that much further behind.

19 **III. SRP Continues to Support Designating a Contested Case to Delineate Verde River**
20 **Subflow, but the Important Point is to Just Get On With It.**

21 In its motion, SRP requested that the Court designate a contested case to address
22 subflow issues in the Verde River Watershed. *See* Motion. SRP suggested this approach
23 primarily because a contested case is the method that has been most commonly used to deal
24 with specific issues in this Adjudication in the past. Several of the parties who agree with
25 SRP that delineation of the Verde River subflow zone should begin now advocate other
26 procedural vehicles for accomplishing that task. Although SRP continues to believe that a
27 contested case is the preferable approach, some of the suggestions by other parties have

1 considerable merit. SRP would not oppose these other procedural vehicles as long as they
2 have the proper support and authority in the statutes and rules for this Adjudication. The
3 important point is that the Verde River subflow zone delineation process get moving as
4 expeditiously as possible, given the limitations on time and resources that all the parties
5 recognize exist.

6 The United States, for instance, suggests that the Court can move the work along by
7 directing ADWR to accept for review technical reports from the parties addressing the Verde
8 River subflow.⁶ The Yavapai-Apache Nation makes a similar suggestion, focusing on the
9 Court's existing statutory authority and current pre-trial orders that give it the power to
10 undertake this effort.⁷ Certain Valley cities caution that, whatever approach is taken,
11 sufficient notice should be given to all claimants of proceedings regarding subflow
12 boundaries.⁸

13 All of those are good suggestions and topics that need to be considered. SRP
14 recognizes that certain procedural issues will need to be addressed before the actual work
15 begins. As stated above, however, nothing will be accomplished by waiting to start, and the
16 time to start is now.

17 **IV. Summary and Requested Action**

18 For the reasons set forth in its motion, the responses thereto, and this reply, SRP
19 requests that the Court consider the issues raised and arguments presented by the parties and
20 move forward with delineating the Verde River subflow zone as expeditiously as possible.

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24 ⁶ See United States' Response to Salt River Project's Motion to Designate Contested Case on Verde
25 River Subflow, at 3-4 (August 7, 2013).

26 ⁷ See Yavapai-Apache Nation's Response to SRP's Motion to Designate Contested Case on Verde
27 River Subflow, at 7 (August 7, 2013).

⁸ See Cities' Response to SRP's Motion to Designate Contested Case on Verde River Subflow, at 3
(August 7, 2013).

1 DATED this 29th day of August, 2013.

2 SALMON, LEWIS & WELDON, P.L.C.

3
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11 ORIGINAL of the foregoing hand-delivered
12 for filing this 29th day of August, 2013 to:

13 Clerk of the Superior Court of Maricopa County
14 Attn: Water Case
15 601 W. Jackson Street
16 Phoenix, AZ 85003

17 AND COPIES hand-delivered this 29th day of
18 August, 2013 to:

19 Honorable Mark H. Brain
20 Maricopa County Superior Court
21 101 W. Jefferson, Suite 413
22 Phoenix, Arizona 85003

23 Arizona Department of Water Resources
24 Legal Division
25 Janet L. Ronald
26 3550 North Central Avenue
27 Phoenix, AZ 85012

28 Special Master George A. Schade
29 Arizona General Stream Adjudication
30 Maricopa County Superior Court
31 201 W. Jefferson, Suite 5B
32 Phoenix, AZ 85003

33 ...
34 ...

1 AND COPIES mailed this 29th day of August,
2 2013 to all parties appearing on the Court-approved
3 mailing list for W-1 through W-4 dated July 1, 2013.

4 Francine Ford Bush

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