

1 David A. Brown, SBN 006827
2 Douglas E. Brown, SBN 010791
3 Nick D. Patton, SBN 027942
4 BROWN & BROWN LAW OFFICES, P.C.
5 Post Office Box 1890
6 St. Johns, Arizona 85936
7 (928) 337-4225
8 dblaw@outlook.com
9 douglasbrown@outlook.com
10 npatton@b-b-law.com

11 *Attorneys for City of Cottonwood*

12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
13 **IN AND FOR THE COUNTY OF MARICOPA**

14 IN RE: THE GENERAL ADJUDICATION OF
15 ALL RIGHTS TO USE WATER IN THE GILA
16 RIVER SYSTEM AND SOURCE

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

21 **CITY OF COTTONWOOD'S RESPONSE
22 TO SRP's MOTION TO DESIGNATE
23 CONTESTED CASE ON VERDE RIVER
24 SUBLOW AND MOTION TO DESIGNATE
25 CONTESTED CASE TO DETERMINE
26 THE WATER RIGHTS OF THE YAVAPAI-
27 APACHE NATION**

28 DESCRIPTIVE SUMMARY: The City of Cottonwood files its response to SRP's motion requesting that the Court designate a contested case to address subflow issues in the Verde River Watershed and the City of Cottonwood moves to designate a contested case to determine the water rights of the Yavapai-Apache Nation.

STATEMENT OF CLAIMANTS NOS. 39-40765, 39-50130, 39-50131, 39-50132, 39-56032 and 39-56033, et al.

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NO. OF PAGES: 7

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2 The City of Cottonwood (Cottonwood), through undersigned counsel, hereby responds to the
3 Motion to Designate Contested Case on Verde River Subflow (the Motion) filed by Salt River Project
4 Agricultural Improvement and Power District and Salt River Valley Water Users' Association
5 (collectively SRP) and moves to designate a contested case to determine the water rights of the
6 Yavapai-Apache Nation.

7 **I. SRP's Motion Should Be Denied Because This Court Has Already Indicated That It Does**
8 **Not Believe It Would Be Helpful To Start Another Subflow Determination Before The San**
9 **Pedro Subflow Zone Is Determined.**

10 SRP correctly indicates that there is much frustration with the pace of the adjudications. Motion
11 at 4. Cottonwood is also frustrated. SRP points out that one of the limiting factors involves the Arizona
12 Department of Water Resources' (ADWR) preparation of the Hydrographic Survey Reports (HSRs).
13 Motion at 4. SRP argues that it would be best for this Court to move forward, allowing the parties to
14 hire experts and prepare their own reports, which ADWR would then review and advise the Court
15 regarding its comments. SRP maintains that it is willing to spend the funds required to undertake this
16 monumental task. There are very few other parties who would be able to spend the funds necessary to
17 complete such a task. Thus, accepting SRP's proposal would mean that SRP would develop its own
18 maps and reports, and others, without SRP's resources or immediate interests in a particular watershed,
19 would then be forced to either accept or, at a significant cost, attempt to refute SRP's maps and reports.
20 An advantage to the legislative-approved process whereby ADWR prepares an HSR is that the starting
21 report is prepared by a neutral entity, thereby at least partially leveling the playing field so that all
22 parties, even those with modest resources, have a somewhat better chance of meaningful participation
23 in establishing the subflow maps for the watersheds where they are located.

24 This Court has already determined it would not be helpful for parties to prepare their own expert
25 reports. In the minute entry, dated June 18, 2013, and filed on July 2, 2013, this Court stated that it
26 does not believe it would be appropriate for the parties to "submit their own expert reports regarding
27 such things as the subflow zone." Nothing has changed. SRP's Motion should be denied.

1 **II. SRP's Attempts To Claim That The Verde River Is In Danger Of Running Dry Are**
2 **Overstated And The Result Of Misinterpretation Of a Report by USGS.**

3 In the beginning of its Motion, SRP attempts to prove its case based upon a single report, which
4 SRP misinterpreted. Cottonwood recognizes that this Response is not the appropriate vehicle to argue
5 about the facts; however, Cottonwood feels it important to not let some of the "facts" asserted by SRP
6 in its Motion go unanswered.

7 SRP, citing to page 22 of the United States Geological Survey's report, entitled, Human Effects
8 on the Hydrologic System of the Verde Valley, Central Arizona, 1910-2005 and 2005-2110 (the
9 "Report"), uses a regional groundwater flow model, to claim that the flow of the Verde River "had
10 decreased by about 10,000 acre-feet *per year* between 1910 and 2005." Motion at 2. The claim might
11 lead a reader to believe there was a 950,000 acre-ft decline in the base flow (10,000 acre-ft/yr x 95
12 years = 950,000 acre-ft). SRP's claim is based on a misinterpretation of the Report. The Report
13 indicated that, during the period spanning 1910 to 2005, the annual base flow of the Verde as *simulated*
14 by the model had decreased by about 10,000 acre-ft, *total*, leaving a base flow of about 80,000 acre-
15 ft/yr. Thus, according to the Report, and assuming a constant rate of decrease, the flow decreased only
16 about 105 acre-ft/yr (10000 acre-ft/yr / 95 years = approx. 105 acre-ft decline each year). While the
17 105 acre-ft/yr decrease in base flow suggested by the model is not insignificant, the suggestion also
18 belies any claim that a crisis exists that requires this Court to dramatically change the adjudication
19 process by letting SRP do what ADWR would otherwise do.

20 SRP also cites to the report to claim that the base flow will decrease by an additional 5,400 to
21 8,600 acre-ft/yr. The claim provides the basis for SRP's statement that "[t]he Verde River is danger
22 [sic] of being pumped dry during the most critical time for senior right holders (summer season)."
23 However, SRP makes the same error as it did regarding the historic decrease in base flow. Based on the
24 Report, and assuming a constant level of decrease, the future base flow in 2110 (as simulated by the
25 model) will decrease by between approximately 51 and 82 acre-ft/yr. In contrast to SRP's
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1 misinterpretation of the model outputs, according to the Report, the annual average base flow in 2005 at
2 the Camp Verde gage was 80,000 acre-ft/yr—the Verde River is hardly about to be “pumped dry.”¹

3 Additionally, the reduction in flows projected by the model in the Report does not necessarily
4 establish the causes of the reduction. For example, factors such as long-term drought and variable
5 precipitation year-to-year can affect the flow. But, as noted in Table 3 of the Report, natural recharge
6 from precipitation values were *assumed* to be a constant of 44,000 acre-ft/yr. Report at 12. It is well
7 known, however, that precipitation is not constant and differing amounts of precipitation will vary the
8 amounts of recharge, inflow, and, outflow and will thereby affect the amount of base flow. Because the
9 Report’s model assumes a constant rate of recharge due to precipitation, any change (that in reality is
10 caused by more or less precipitation) will be incorrectly attributed by the model to other factors. Thus,
11 because it does not take into account changes in precipitation-related recharge, the modeled reduction
12 in base flow may not be accurate and, in any event, the reduction cannot be fully attributed to local
13 human stresses in the Verde Valley. It is well known that Arizona is currently in a long-term drought
14 situation. It cannot be reasonably argued that this drought would not have an effect on the base flow
15 level of the Verde River. Yet, the Report does not take this change into account.

16 SRP may disagree with Cottonwood’s view of the model in the Report. But, at best, there is a
17 factual dispute regarding what the model says, regarding whether the assumptions in the model are an
18 appropriate basis for a decision by this Court, and whether the model correctly attributes changes in
19 base flow to local human activity in the Verde River Valley. SRP’s reliance on the Report in its
20 Motion to attempt to prove the substance of its case at this stage of the proceeding is not appropriate
21 and is misplaced. This is not the time for the parties and Court to resolve factual differences regarding
22 the impacts and causes of changes in base flow in the Verde River. Those issues can and should be
23 resolved after ADWR has had a chance to do its work on the Verde River.

25
26 ¹ This is true even when you consider that the base flow average for the summer months, according to
27 data provided in the Report, was approximately 33,000 acre-ft/yr.

1 **III. Instead Of Attempting To Determine The Subflow Zone, This Court Should Designate A**
2 **Contested Case To Determine The Rights Of The Yavapai-Apache Nation.**

3 Cottonwood believes that, due to the current lack of an HSR for the Verde River, the next
4 logical step is to resolve some of the issues revolving around the Yavapai-Apache Nation (the Nation).
5 The Nation's headquarters is located on the Verde River downstream from Cottonwood but upstream
6 from the Phoenix area. The Nation claims federal reserved water rights, which directly affect both SRP
7 and Cottonwood.

8 The Arizona Legislature has already made clear its desire that tribal and other federal claims be
9 determined with a high priority. Ariz. Sess. Laws, Ch. 9 § 25(C) (1995); *See also* ADWR's Comments
10 Concerning Improvements to the Adjudication Process, filed April 15, 2013. The legislature stated that:

11 C. The legislature further finds that a primary purpose of the general stream adjudication is to
12 quantify and prioritize claims made by the United States government and Indian tribes to waters
13 from the river systems and sources in this state. It is the express intent of the legislature that the
14 department of water resources proceed to prepare and present the director's reports on Indian
15 and non-Indian reservations to the general stream adjudication courts as expeditiously as
16 possible.

17 The legislature further finds that an early focus by the general stream adjudication courts on the
18 trial of Indian and non-Indian federal water claims will increase the probability of earlier
19 settlement negotiations with the United States and the Indian tribes, thereby increasing the
20 possibility of an earlier resolution of these difficult issues. The legislature further finds that an
21 early quantification and prioritization of Indian and non-Indian federal claims are prudent
22 objectives in order to plan for the impacts that the federal water rights may have on the welfare
23 of this state.

24 Cottonwood agrees with the legislature. Because the Nation is claiming federal reserved water
25 rights, determination of the Nation's claims may further the possibility of settlement and move the
26 adjudication of the Verde River forward.

27 Additionally, designating a contested case for the Nation will help resolve concerns expressed
28 by the Court that, if the Court decides to dedicate more time to the adjudication, it would not have
enough work to do. Resolving the Nation's claims to federal reserved water rights will require the
Court's time and will mean real progress in the adjudication of the Verde River.

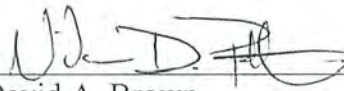
1 **IV. Conclusion**

2 This Court has already recognized the shortcomings of designating another subflow case prior
3 to completion of the San Pedro River subflow zone. Cottonwood agrees that it would not be helpful to
4 attempt to determine the subflow zone for the Verde River at this time. Cottonwood, however, is
5 interested in advancing the adjudication, and therefore, requests that this Court designate a contested
6 case to determine to the water rights of the Yavapai-Apache Nation.

7 Based on the foregoing, the SRP Motion to designate a contested case on the Verde River
8 should be denied, and the Court should instead designate a contested case to determine the water rights
9 of the Yavapai-Apache Nation.

10 RESPECTFULLY SUBMITTED this 6th day of August, 2013.

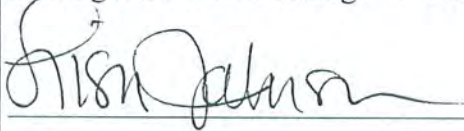
11 BROWN & BROWN LAW OFFICES, P.C.

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13
14 By 
15 David A. Brown
16 Douglas E. Brown
17 Nick D. Patton
18 *Attorneys for City of Cottonwood*

1 ORIGINAL of the foregoing
Sent via UPS this 6th day of August, 2013, to:

2 Clerk of the Court
3 Attn: Water Case
4 Maricopa County Superior Court
601 W. Jackson St.
5 Phoenix, Arizona 85003

6 COPY of the foregoing mailed
7 this 7th day of August, 2013, to all
parties appearing on the Court-approved
8 mailing list for W-1 through W-4 dated July 1, 2013.

9 
A handwritten signature in cursive script, appearing to read "Brian Johnson", is written over a horizontal line.

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