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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

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

Contested Case No. W1-11-2798

Order Setting Dates for ADWR Report and
Status Conference

CONTESTED CASE NAME: *In re ASARCO – Diversions*
HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.
DESCRIPTIVE SUMMARY: Arizona Department of Water Resources shall file a Report by **November 2, 2020** with the court and provide copies to all parties on the Court-approved mailing lists for this case and for the Gila Adjudication. A status conference shall be held on **December 1, 2020** at 1:30 p.m.
NUMBER OF PAGES: 16
DATE OF FILING: December 9, 2019

In this consolidated case, water rights will be adjudicated for water pumped from eight wells located on land owned by ASARCO LLC along the San Pedro River (collectively “the Industrial

1 Wells”) and used for municipal, commercial, industrial, and mining uses. Arizona Department of
2 Water Resources (“ADWR” or “the Department”) reviewed claims filed by ASARCO Incorporated
3 and its predecessor-in-interest to water pumped from the Industrial Wells and prepared Watershed
4 File Reports 114-01-005 and 114-04-035 (collectively “the WFRs”). The claimants and water users
5 in the Gila River Adjudication received notice of the WFRs. Ten parties filed objections to the
6 WFRs.

7 After the initiation of this case to resolve the objections and adjudicate the claims for water
8 rights associated with the Industrial Wells, ASARCO LLC (“ASARCO”) filed amended Statements
9 of Claimant 39-12014, 39-12015, and 39-12019. Not at issue here is whether ADWR should
10 investigate the claimed water rights in the three amended Statements of Claimant and prepare a report
11 about the amended claims; the parties and ADWR have agreed that ADWR should submit a report
12 analyzing the claims made in the three amended Statements of Claimant (the “ADWR Report”). The
13 issue here is whether claimants and water users in the Gila River watershed, other than the claimants
14 who have already objected to the WFRs, have a procedural due process right to notice and
15 distribution of the ADWR Report that will effectively stay the adjudication of the claimed water
16 rights to water from the Industrial Wells until an undefined future date.

17 **I. Background**

18 In 1985, ASARCO, Incorporated, now known as ASARCO, LLC, and its predecessor
19 claimed rights to water for mining, domestic, industrial, and other uses. Those claims are the subject
20 of the WFRs. In Watershed File Report 114-01-005 (“Hayden WFR”), ADWR identified seven
21 relevant Statements of Claimant (SOCs): 39-2272¹, 39-2481, 39-2484, 39-2485, 39-2486, 39-12014,
22 and 39-12015. In Watershed File Report 114-04-035 (“Ray WFR”), ADWR considered SOC 39-
23 4004, 39-12019, 39-13817, and 39-13818. Specifically, it considered SOC 39-4004, 39-12019,
24 39-13817, and 39-13818. Due to the magnitude of the claims, ADWR also prepared a Major Users
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28 ¹ McFarland and Hullinger, a lessee of ASARCO, filed SOC 39-2272.

1 Report about ASARCO’s use of water primarily in connections with its mining operations at its
2 Hayden and Ray Units. See Vol. 1 Hydrographic Survey Report for the San Pedro River dated
3 November 20, 1991 at 356 - 361 (“the San Pedro HSR”). The Department reported that ASARCO
4 pumped water from a series of wells and transported the water for use in the Upper Gila watershed
5 for mining and municipal uses.

6 After the initial proceeding in this case, ASARCO amended four SOC²s, 39-4004², 39-12014,
7 39-12015, and 39-12019, and moved to withdraw three SOC³s. It did not amend SOC 39-13817 for
8 a well reportedly used for groundwater monitoring that is located in Pinal County in SWNESW 23
9 T5S R15E, which ADWR determined is located outside of the San Pedro River Watershed. Ray
10 WFR at 2. Nor did it amend SOC 39-13818 for water from a well that ASARCO represents is located
11 outside the San Pedro River watershed. Amended SOC²s 39-12014, 39-12015, and 39-12019 will
12 be the subject of the ADWR Report. The Department’s preparation of the ADWR Report is
13 consistent with the Arizona Supreme Court’s definition of ADWR’s duties in the general
14 adjudication to provide “factual analysis and administrative aid”. *United States v. Superior Court*
15 *In & For Maricopa County*, 144 Ariz. 265, 280-281, 697 P. 2d 658, 672-74 (1985).

16 Pursuant to the Court’s minute entry dated May 23, 2019, (“Minute Entry”) the Department
17 provided an explanation of its legal opinion that the claimants and water users in the Gila River
18 watershed who did not object to the WFRs have a due process right to notice of the ADWR Report.
19 *Arizona Department of Water Resources Report*, filed June 6, 2019 (“Report”). The Department
20 bases its position on its determination that ASARCO’s amended SOC²s materially differ from the
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25 ² Statement of Claimant 39-4004 originally included claims for water pumped from the Industrial Wells and
26 irrigation wells. The Department addressed the claims for irrigation separately from the claims for water used in mining
27 operations. See WFRs 114-04-BDA-001 and 114-04-035. ASARCO, following the approach taken by ADWR,
28 amended SOC 39-4004 to exclude the claims for water from the Industrial Wells and relied on SOC²s 39-12014 and 39-
12015 to claim water from the Industrial Wells. As a result, SOC 39-4004 is not at issue in this case.

³ 39-2481, 39-2485, and 39-2486

1 original SOCs due to “significant changes to the claims’ attributes, including priority dates,
2 quantities, types of use, and places of use”. Report at 2. The Department determined that “the extent
3 of these changes effectively make ASARCO’s amended claims “new” SOCs because many of the
4 claimed attributes are entirely different than what was investigated and reported in [the San Pedro
5 HSR].” *Id.* Therefore, according to the Department, the ADWR Report must be noticed and/or
6 provided to approximately 56,000 recipients in the San Pedro River watershed and in the Gila River
7 Adjudication. Due to the costs of providing notice, it proposes that the ADWR Report should be
8 distributed as part of a major hydrographic survey report referred to as the San Pedro II HSR that
9 was the subject of the Court’s Order dated June 21, 2016. The Department has advised that ADWR
10 is not currently working on San Pedro II HSR and there is no projected date for the completion of
11 the San Pedro II HSR. Minute Entry at 2.

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13 Although Salt River Project and ASARCO agreed with ADWR that the Department should
14 prepare the ADWR Report, their positions diverge from ADWR’s at that point. Salt River Project
15 argues that due process does not require an interim notice about amended SOCs filed in a contested
16 case. It argues that sufficient procedures have been provided and currently exist without the need
17 to issue yet another notice to claimants and water users who did not object to the WFRs. *Salt River*
18 *Project’s Response to Arizona Department of Water Resources’ Report*, filed June 17, 2019. It
19 specifically objected to the delay that would be occasioned by issuing the ADWR Report as part of
20 the San Pedro II HSR and the precedent that could be created requiring ADWR to prepare serial
21 hydrographic survey reports as amended SOCs are filed in future individual contested cases.

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24 While ASARCO generally acquiesced to the inclusion of the ADWR Report in San Pedro II
25 HSR provided that the scope of objections otherwise allowed by A.R.S. §45-256(B) would be
26 restricted, it contested the factual basis of ADWR’s opinion. ASARCO objected to ADWR’s
27 conclusion that the amended SOCs constitute new as opposed to amended SOCs. ASARCO asserts
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1 that its amended SOCs do not claim new uses but describe “established uses that have been in place
2 for many decades.” *ASARCO LLC’s Response to Arizona Department of Water Resources’ Report*
3 *about the Materiality of Amendment to Claims* at 1, filed June 17, 2019.

4 The recharacterization of a claimed existing use as a new or a changed use can have serious
5 ramifications in an adjudication of claims for water rights dependent upon historical usage. In
6 general, surface water rights under state law with their attendant priority dates depend on a
7 determination of an initial date that the water was put to a beneficial purpose and continuous
8 beneficial use thereafter. *In re the Gen. Adjudication of All Rights to Use Water in the Gila River*
9 *Sys. & Source*, 201 Ariz. 307, 310 ¶¶4-5, 35 P.3d 68, 71 (2001) (“The beneficial use is the basis,
10 measure and limit of any such entitlement. [citations omitted] So long as utilization continues, the
11 right remains secure.”) Procedural consequences also flow from a recharacterization of an existing
12 use to a new use or a changed use. Judge Ballinger in his February 10, 2004 Order addressed the
13 procedures to notice “changes to water uses already investigated in the San Pedro I HSR and new
14 uses.” Report at 3. Here, ASARCO asserts that the claims made in the amended SOCs are neither
15 new, nor changed, but are the continuation of historical uses.

16 The specific issue to be decided, in the context of this case, is whether the State must
17 distribute another notice to tens of thousands of individuals and entities in the Gila River
18 Adjudication about claimed water rights from the Industrial Wells due to the amendment of SOCs
19 for the same types of water uses, from the same wells, with claimed priority dates that predate the
20 San Pedro HSR for which Watershed File Reports were prepared along with an extended narrative
21 in the Major Uses portion of the San Pedro HSR that were noticed to the same class of persons and
22 entities.
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1 **II. Due Process**

2 Due process requires that a party receive adequate notice of a proceeding that could deprive
3 a person of a protected property right and be given an opportunity to be heard. *Emmett McLoughlin*
4 *Realty, Inc. v. Pima County*, 212 Ariz. 351, 355, ¶ 17, 132 P.3d 290, 294 (App. 2006), *as corrected*
5 (Mar. 9, 2006); *Wallace v. Casa Grande Union High Sch. Dist. No. 82 Bd. of Governors*, 184 Ariz.
6 419, 429, 909 P.2d 486, 496 (App. 1995). The notice must contain sufficient information to
7 adequately inform potential claimants of the pendency and nature of the action. *Matter of Rights*
8 *to Use of Gila River*, 171 Ariz. 230, 238, 830 P.2d 442, 450 (1992) (“*Gila I*”); *Bank of New York*
9 *Mellon v. Log Cabin Manor Homeowner’s Association*, 362 F. Supp. 930, 937 (D. Nev. 2019)
10 (“notice need not be an exhaustive guidebook to preserving one's interest. Rather, it must ‘apprise
11 interested parties of the pendency of the action.’” [citation omitted]).

12 The procedures that must be implemented to accord due process rights are not absolute and
13 must be adapted to the surrounding factual circumstances. “[D]ue process is flexible and calls for
14 such procedural protections as the particular situation demands. ... Its flexibility is in its scope once
15 it has been determined that some process is due; it is a recognition that not all situations calling for
16 procedural safeguards call for the same kind of procedure.” *Morrissey v. Brewer*, 408 U.S. 471, 481,
17 (1972); *Gila I*, 171 Ariz. at 240, 830 P.2d at 452 (“due process ‘is not a technical concept that can
18 be reduced to a formula with a fixed content unrelated to time, place, and circumstances.’” (citation
19 omitted)); *Gaveck v. Arizona State Bd. of Podiatry Examiners*, 222 Ariz. 433, 437, ¶ 14, 215 P.3d
20 1114, 1118 (App. 2009) (“Due process requirements may vary depending on the setting.”)

21 Claimants and water users received notice at the pendency of the Gila Adjudication and
22 notice of the issuance of the San Pedro HSR. The question here is whether an additional notice must
23 be provided in the midst of an individual contested case. A due process right to notice does not exist
24 at all stages of the proceeding. *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. at 356, ¶

1 20, 132 P.3d at 295 (App. 2006), *as corrected* (Mar. 9, 2006) (requirement for due process for
2 rezoning of property does not extend to preliminary, “pivotal proceedings”). A requirement for
3 notice at the pendency of the action does not necessarily dictate notice of a subsequent proceeding
4 in the action that has been properly noticed. *Weigner v. City of New York*, 852 F.2d 646, 652 (2d
5 Cir. 1988) (once initial notice of foreclosure sent, no additional notice required for each step in the
6 proceedings); *Lu Ranching Co. v. United States*, 138 Idaho 606, 609, 67 P.3d 85, 88 (2003) (“The
7 United States Supreme Court has insisted on less exacting standards for notice of subsequent
8 procedures and actions when parties know proceedings may affect their rights.”)

10 The assessment of the need for an additional procedural due process safeguard requires an
11 evaluation of all the facts and circumstances that include “(1) the private interests affected; (2) ‘the
12 risk of an erroneous deprivation ... through the procedures used, and the probable value, if any, of
13 additional procedures; and (3) the governmental interests, including fiscal and administrative
14 burdens, if other procedural safeguards are imposed.’ (citation omitted).” *Mathews v. Eldridge*, 424
15 U.S. 319, 335 (1976); *State v. Stocks*, 227 Ariz. 390, 394, ¶ 8, 258 P.3d 208, 212 (App. 2011).

17 The private interests that are the subject of this due process analysis are the water rights of
18 claimants and water users in the Gila Adjudication who did not file objections to the WFRs and who
19 have not moved to be added to the Court-approved mailing list for this case. The Arizona Supreme
20 Court has determined that the holders of water rights have due process rights in this adjudication.
21 *Gila I*, 171 Ariz. at 235, 830 P.2d at 447.

23 The second set of considerations focus on the likelihood that water rights could erroneously
24 be lost absent an additional notice taking into consideration the notices already provided and the
25 procedures in place to provide notice and information about the adjudication of individual water
26 rights and the probable value, if any, of the additional notice of the ADWR Report. The State has
27 spent significant time and resources to provide notice that satisfies the due process rights of claimants
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1 and water users in the Gila River Adjudication. At the inception of this general adjudication, ADWR
2 provided notice and mailed summons to 849,000 property owners, published notices of the
3 commencement of the adjudication in the newspapers, and recorded a general notice of *lis pendens*
4 in all counties included within the watersheds subject to this adjudication. *Id.* at 236, 830 P.2d at
5 448. Pretrial Order No. 1 filed May 30, 1986, instructed ADWR to “provide each water claimant
6 with adequate notice when DWR’s preliminary Hydrological Survey Reports and, later, the
7 Comprehensive Report—are available for inspection and comment.” *Id.* at 241, 830 P.2d at 453.
8 When ADWR completed its investigation of the San Pedro River Watershed, the Department
9 provided notices in 1990 of the preliminary San Pedro HSR and in 1991 of the final San Pedro HSR
10 that contained general information about the watershed and the Watershed File Reports that provide
11 detailed information about individual claims and water uses.
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13 Additional procedural safeguards beyond the multiple notices have been implemented to
14 protect the interested claimant in the adjudication. As described by the Arizona Supreme Court: “In
15 this case, any party that desired to receive service of every document filed had only so to inform the
16 court and be placed on the Court-approved mailing list. Other parties can keep themselves updated
17 by consulting or subscribing to the monthly docket sheets.” *Id.* at 240-241, 830 P.2d at 452-453.
18 The order to initiate this contested case was distributed to all persons who had moved to be included
19 on the general Court-approved mailing list for the Gila River Adjudication in addition to ASARCO
20 and claimants who filed objections to the WFRs. Subsequently, BHP Copper, City of Tempe and
21 Freeport Minerals Corporation moved to be added and were added to the Court-approved mailing
22 list in this case.
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25 Citing to these procedures, the *Gila I* Court concluded that documents filed in the course of
26 the adjudication need not be served on every party to the adjudication because procedures have been
27 instituted to allow interested parties to monitor the proceedings and protect their rights. *Gila I*, 171
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1 Ariz. at 240, 830 P.2d at 452. Since the *Gila I* Court issued its decision approving the procedures to
2 assure due process in this adjudication, additional sources have been created to enable interested
3 parties to access information in the adjudication. The Department and the Court both maintain and
4 regularly update websites dedicated to the General Adjudication that make reports prepared by
5 ADWR and decisions entered by the Court in the individual contested cases readily available to
6 claimants and water users with access to the Internet. As a result, interested parties have a variety
7 of tools to track the proceedings in this adjudication for the purpose of moving to intervene where
8 necessary to protect their interests, which in this case means intervening in a case to object to the
9 claimed rights of others. It is in this context that an examination is made as to whether the absence
10 of another notice about ASARCO's claims for water from the Industrial Wells creates a possibility
11 of the erroneous risk of loss of a water right and the probable value, if any, of notice of the ADWR
12 Report.
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14 **III. The Industrial Wells**

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17 The Industrial Wells provide water for ASARCO's mining operations at its Hayden and Ray
18 operations in the Upper Gila watershed and municipal water for the Town of Hayden. The
19 Department explained that the Industrial Wells located on the P-Z Ranch pump water for the Ray
20 Unit mining operations where the pumped water is commingled with Ray Mine water and excess
21 water is distributed to the Hayden Unit twelve miles to the southeast. Vol. 1 San Pedro HSR at 361.
22 ASARCO also pumps water from the two Industrial Wells located closest to the border of the Upper
23 Gila Watershed that it transports to the Hayden mining operation where the water is comingled with
24 water from other sources at the Hayden Unit. *Id.* At 358. Excess water is delivered from the Hayden
25 Unit to the Town of Hayden. *Id.* at 358-359, 361. According to ADWR's explanation, all of the
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1 Industrial Wells provide water for the Hayden Unit and the Town of Hayden and the Industrial Wells
2 on P-Z Ranch also provide water for the Ray Unit.

3 In the original SOCs, ASARCO identified the eight Industrial Wells by number, well
4 registration number, and location. Statements of Claimant 39-12014 and 39-12015 listed two wells
5 (the “Hayden Wells”) and SOC 39-12019 listed six wells (the “Ray Wells”). Watershed File Report
6 114-01-005 (the “Hayden WFR”) analyzed SOCs 39-12014 and 39-12015 (the “Hayden SOCs”),
7 and WFR 114-04-035 (the “Ray WFR”) analyzed SOC 39-12019 (the “Ray SOC”).
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9 **A. Location**

10 In the original Hayden SOCs, ASARCO described the location of the two Hayden Wells in
11 NESWSE section 25 T5S R15E and SWNESE Section 25 T5S R15E. The Hayden WFR placed
12 the wells in the NESESE and SESESE quarters of section 25 T 5S R15E. The amended Hayden
13 SOCs revised the legal descriptions for the two wells to match the legal descriptions in the Hayden
14 WFR. Accordingly, the Hayden WFR provided sufficient notice of the points of diversion to
15 claimants and water users in the Gila River adjudication.
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17 ASARCO described the location of the six Ray Wells on the P-Z Ranch in its original Ray
18 SOC. Its description included the ADWR Well Registration number for each well in addition to the
19 legal descriptions to the nearest quarter quarter section in sections 28 and 33 Township 6S Range
20 16E. In the Ray WFR, the Department listed the six wells claimed by ASARCO as the relevant
21 points of diversion plus one additional well in Township 5S Range 17E. It concluded that five wells
22 were used to supply water for mining and other uses outside of the San Pedro Watershed and
23 determined that two of the wells listed by ASARCO were not in use. It, however, included a map
24 in the Major Water Users section of the San Pedro HSR that discussed ASARCO’s water use in its
25 mining operations illustrating the location of six wells. *See figure 1.*
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ASARCO's amendment to the Ray SOC identified the same six wells by the same well registration numbers used in the original Ray SOC and included legal descriptions of the wells to the quarter quarter quarter section. The legal descriptions provided match the legal descriptions reported in the Ray WFR except there is a discrepancy as to the precise 10-acre parcel in which two wells are located. ASARCO also provided GPS coordinates in the amended Ray SOC for the well locations and a map of the well locations shown in *figure 1*.

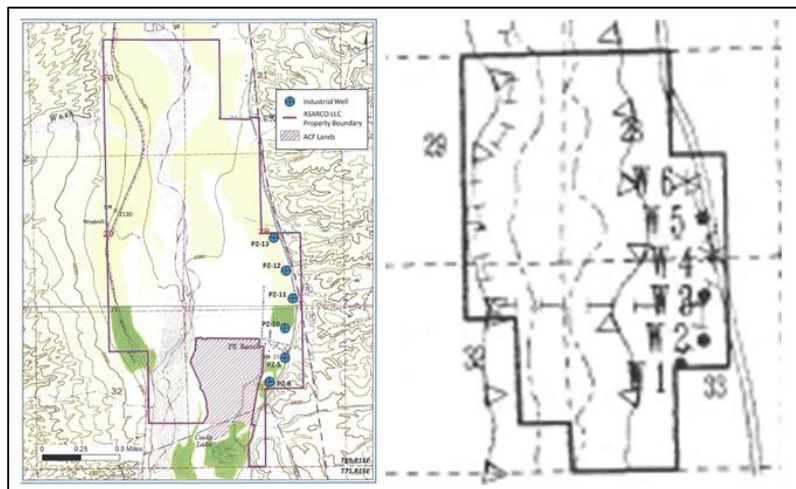


FIGURE 1. Map prepared by ASARCO and attached to amended SOC 39-39-12019 is shown on the left. The map prepared by ADWR and included in the San Pedro HSR is shown on the right.

Figure 1 shows a comparison of

the maps prepared by ADWR and the map attached to the amended Ray SOC. The Ray WFR and the information in the San Pedro HSR provide adequate notice to the claimants and water users in the Gila Adjudication about the location of the Ray Wells.

B. Place of Use

In its original Hayden SOC, ASARCO described the place of use as ASARCO's copper smelting plant in Hayden, Arizona. SOC 39-12014 at 2 (filed January 4, 1985); SOC 39-12015 at 2 (filed January 4, 1985) and provided no legal descriptions. The Hayden WFR described the place of use as "ASARCO mining operation at Hayden, which is located in the Upper Gila River watershed" and also did not provide any legal descriptions of the land involved. Hayden WFR at 2. The Department further described the site of the Hayden operation as "one mile northwest of the confluence of the Gila and San Pedro Rivers." Vol. 1 San Pedro HSR at 358. The amendments to

1 the Hayden SOC's repeat much the same language as in the original SOC's, but included a list of legal
2 descriptions, all of which are also attached to the amendment to the Ray SOC.

3 ASARCO described the place of use in the Ray SOC as the "land occupied by Kennecott's
4 mining, milling, metallurgical recovery and related operations. The precise boundaries of those areas
5 change from time to time, as is the nature of an ongoing mining operation." SOC 39-12019 at 6
6 (filed January 4, 1985). It also included in the original Ray SOC an extended list of legal
7 descriptions of places of use, all of which are outside the San Pedro River watershed according to
8 the map prepared by ADWR and included as *figure 5-18* in Vol. 1 San Pedro HSR at 360, with the
9 exception of land in section 23 T5S R15E, a portion of SW24 T5S R15E, and W2, SWNE, W2SE,
10 SESE section 26 T5S R15E that borders on the Upper Gila watershed. The Ray WFR generally
11 states that the place of use is "ASARCO mining operations in Ray, which is located in the Upper
12 Gila River Watershed." Ray WFR at 2. The Major Users Report states that the claimed water is
13 used at the Ray Unit located in the Upper Gila watershed, that the Ray Unit exports excess water to
14 the Hayden Unit, and that excess water from Hayden Unit is delivered to the Town of Hayden. Vol.
15 1 San Pedro HSR at 358-361. The amended Ray SOC describes the place of use as ASARCO's
16 mining and industrial operations in Pinal and Gila Counties and municipal uses by the Town of
17 Hayden. It also included the general language, "[t]he precise boundaries of the areas of use change
18 from time to time, as is the nature of ongoing mining and industrial operations and municipal uses."
19 Amended SOC 39-12019 at 4. As it did in the original Ray SOC, ASARCO provides an extended
20 list of legal descriptions which included section 23, a portion of SW24 T5S R15E, and W2, SWNE,
21 W2SE, SESE section 26 T5S R15E that borders on the Upper Gila watershed. The only land located
22 in the San Pedro Watershed that differs from the original statement of claimant are three parcels in
23 the east half of Section 26 T5S R15E.
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1 Given that the amended SOC's continue to assert claims for use for mining and municipal
2 operations consistent with the language in the Ray and Hayden WFRs, the inclusion of specific legal
3 descriptions of the land does not render the Ray and Hayden WFRs inadequate for the purpose of
4 providing notice to claimants and water users in the Gila Adjudication that the water will be used at
5 ASARCO's mining operations with excess water transported to the Town of Hayden.

7 **C. Quantities and Priority Dates**

8 The total claim for water in the Hayden SOC's amounted to 1,111 acre feet per year with
9 priority dates of 1946 and 1968. Relying upon the data provided by ASARCO for the time period
10 1976-1989, ADWR concluded that ASARCO diverted 1,138 acre-feet of water per year. *See* Vol. 1
11 San Pedro HSR at 359. Based on "Claimant Info," ADWR set the date of apparent first use at 1948.
12 In April 2019, ASARCO amended the Hayden SOC's to increase the amount claimed to 3,300 acre-
13 feet of water per year and moved the priority date back to October 18, 1909 or, in the alternative,
14 July 31, 1913. A month later, ASARCO again amended the Hayden SOC's for the sole purpose of
15 increasing the claimed quantity of water by an additional 1,620 acre-feet. Amended Statement of
16 Claimant 39-12019, Attachment at 3 (filed May 6, 2019). ASARCO's current claim for water rights
17 exceeds its original claim by 3,809 acre-feet per year subject to a priority date 33 years before the
18 earlier date originally claimed.

21 At its upstream location at P-Z Ranch, ASARCO's predecessor originally claimed 7,272
22 acre-feet of water per year in the Ray SOC with a 1965 priority date. The Department determined,
23 again based on data supplied by ASARCO, that ASARCO diverted 1,053 acre-feet per year and
24 found an apparent date of first use of 1964. The Ray WFR did report that ASARCO had claimed a
25 priority date of 1873 in multiple Statements of Claim and one Statement of Claimant and a 1965
26 priority date in another Statement of Claimant. In the amended Ray SOC, ASARCO claimed 4,838
27 acre-feet per year with a July 31, 1913 priority date. ASARCO has reduced its original claim by
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1 2,434 acre-feet per year and claimed a priority date 40 years after the date asserted in the Statements
2 of Claim.

3 The determination of whether the amended Statements of Claimant generate a risk of an
4 erroneous deprivation of a water right due to an inability to protect that right in the absence of another
5 notice sent to all claimants and water users depends upon whether the Hayden SOC's and the Ray
6 SOC are considered separately or jointly and the results of ADWR's investigation. If the claims are
7 considered separately, then the quadrupled claims in the Hayden SOC's involving thousands of acre-
8 feet of water with the earlier priority dates potentially creates a risk of an erroneous deprivation due
9 to a claimant's lack of sufficient notice of the claims necessary to intervene in the case. In contrast,
10 the reduced claims made in the Ray SOC and later priority date create no risk of an erroneous
11 deprivation or, at least, present the situation where an additional notice has little probable value.
12 Alternatively, if the claims are considered jointly, then the situation must be viewed as one where a
13 single entity filed claims to water rights for established mining and municipal uses and has amended
14 its claims to divert less water upstream and more water farther downstream and closer to its mining
15 operations and apparently settled on a 1913 priority date, at least as an alternative position. The net
16 result of the first amended Hayden SOC's and the amended Ray SOC was a slight decrease in the
17 amount of water originally claimed and a common priority date between the dates earlier claimed.
18 After the filing of the second amended Hayden SOC's, the net result, in terms of quantity, is a 13%
19 increase in the amount of water originally claimed. In the context of considering ASARCO's claims
20 jointly, it is more difficult to assess the risk of an erroneous deprivation or the probable value of
21 another notice. Claimants and water users are already on notice that ASARCO, an entity that ADWR
22 classified as a Major User in the San Pedro Watershed, claims water rights to thousands of acre-feet
23 of water and there are procedures in place to allow claimants and other water users to readily monitor
24 the adjudication of ASARCO's water rights.
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1 The ADWR Report will provide an additional source of information to determine whether
2 another notice is required as the result of ASARCO's amended SOCs. At this point, it is unclear
3 whether ADWR's recommended water rights in the ADWR Report will materially differ from the
4 recommendations in the earlier WFR. Unlike other investigations of large numbers of similar claims
5 for water rights where ADWR used data it collected and consistently applied a methodology and
6 formulas it devised, ADWR's investigation of ASARCO's claims involved a type of beneficial use
7 for which there are a very limited number of claims and the WFRs indicate that ADWR relied on
8 data and information provided by ASARCO or its predecessor.
9

10 Thus, the better approach is to defer a decision about due process right to an additional notice
11 until the Department completes its analysis and files the ADWR Report. The ADWR Report will
12 clearly identify the methodology applied and data used to recommend water rights. Once a more
13 complete record is available, the factors set forth by the *Mathews* Court can be applied to make a
14 determination whether the State must incur the cost of providing additional notice to claimants and
15 water users in the Gila River Adjudication.
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17 **IT IS ORDERED** that the Department will file the ADWR Report by **November 2, 2020**,
18 and will send copies of the ADWR Report to the parties listed on the Court-approved mailing list for
19 this contested case and to the persons and entities listed on the Court-approved mailing list for the
20 Gila Adjudication. The Department will also post the ADWR Report on its website in accordance
21 with its current practices to make the ADWR Report readily available to all interested persons with
22 Internet access.
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24 **IT IS FURTHER ORDERED** that the parties shall be prepared to state their positions with
25 regard to the need for additional notice of the ADWR Report to claimants and water users who are
26 not parties in this case at a Status Conference to be held on **December 1, 2020 at 1:30 p.m.** in
27 Superior Court, Central Court Building, Courtroom 301, Phoenix, Arizona 85003.
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Instructions for telephonic appearance:
Dial: 602-506-9695 (local)
1-855-506-9695 (toll free long distance)
Dial Participant Pass Code 357264#


SUSAN WARD HARRIS
Special Master

On December 9, 2019, 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 this contested case.