

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

W1-00-001234 (Consolidated)
Contested Case No. **W1-11-002801**

ORDER ON MOTIONS FOR PARTIAL SUMMARY JUDGEMENT

CONTESTED CASE NAME: *In re ASARCO–Irrigation*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: This order addresses all dispositive motions and sets a **March 2, 2026** deadline for the parties to file a joint trial schedule.

NUMBER OF PAGES: 41

INTRODUCTION

In late August 2025, the following motions for partial summary judgment were filed:

- W1-11-002801, ASARCO LLC’s Motion for Partial Summary Judgment No. 1: Establishment of Pre-1919 Water Rights – Aravaipa Ranch (“ASARCO Aravaipa Motion”) (Aug. 22, 2025)
- W1-11-002801, ASARCO LLC’s Motion for Partial Summary Judgment No. 2: Establishment of Pre-1919 Water Rights – PZ Ranch (“ASARCO PZ Ranch Motion”) (Aug. 22, 2025)
- W1-11-002801, ASARCO LLC’s Motion for Partial Summary Judgment No. 3: Establishment of Pre-1919 Water Rights – Robinson Ranch (“ASARCO Robinson Motion”) (Aug. 22, 2025)
- W1-11-002801, ASARCO LLC’s Motion for Partial Summary Judgment No. 4: Changes in Points of Diversion Do Not Injure Downstream Users

(“ASARCO No Injury Motion”) (Aug. 22, 2025)

- W1-11-002801, U.S. Motion for Partial Summary Judgment – Aravaipa Ranch (“U.S. Aravaipa Motion”) (August 22, 2025)
- W1-11-002801, U.S. Motion for Partial Summary Judgment – Robinson Ranch (“U.S. Robinson Motion”) (August 22, 2025)
- W1-11-002801, U.S. Motion for Partial Summary Judgment – PZ Ranch (“U.S. PZ Ranch Motion”) (August 22, 2025)
- W1-11-002801, The San Carlos Apache Tribe’s Motion for Partial Summary Judgment (“Tribe Motion”) (August 22, 2025)
- W1-11-002801, Gila River Indian Community’s Motion for Summary Judgment (“Community Motion”) (August 22, 2025)

This order addresses all the above motions. The Special Master addresses, in turn, ASARCO's irrigation, domestic, and stock watering claims.

SUMMARY JUDGMENT STANDARD

The Special Master may grant a motion for summary judgment “if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P. 56(a). The Special Master must view “the evidence and reasonable inferences in the light most favorable to the party opposing the motion.” *Orme School v. Reeves*, 166 Ariz. 301, 309–10 (1990). After the movant makes “a prima facie showing that no genuine issue of material fact exists, the opponent of the motion has the burden to produce sufficient evidence that there is indeed an issue.” *W.J. Kroeger Co. v. Travelers Indem. Co.*, 112 Ariz. 285, 286 (1975).

Where the movant seeks to refute a claim or affirmative defense, the movant must show that “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.” *Brookover v. Roberts Enterprises, Inc.*, 215 Ariz. 52, 55 (Ct. App. 2007). Where the movant seeks to prove a claim or affirmative defense, the movant must show that the “undisputed admissible evidence . . . would compel any reasonable [fact finder] to

1 find in its favor on every element of its claim.” *Wells Fargo Bank v. Allen*, 231 Ariz.
2 209, 213 (Ct. App. 2012).

3 **GOVERNING LAW**

4 Under the doctrine of prior appropriation in Arizona, an owner or possessor of
5 land may establish rights to appropriable water through the application of that water
6 to beneficial use. *Tattersfield v. Putnam*, 45 Ariz. 156, 171 (1935). Prior to the
7 enactment of the Arizona water code in 1919, water users could obtain a water right
8 by “an intent to take,” “an open, physical demonstration of the intent,” and an
9 application of “the water to the use designed.” *Phelps Dodge Corp. v. Arizona Dep’t*
10 *of Water Res.*, 211 Ariz. 146, 149 (Ct. App. 2005) (citing *Clough v. Wing*, 2 Ariz.
11 371, 382–383 (1888)). Subsequently, the water code imposed a requirement that water
12 users must obtain a “permit to appropriate water” before “construction of the works
13 necessary for the appropriation.” *Parker v. McIntyre*, 47 Ariz. 484, 490 (1936);
14 A.R.S. §§ 45-152, 45-153.

15 An appropriative right is defined by beneficial use. A.R.S. § 45-141
16 (“Beneficial use shall be the basis, measure, and limit to the use of water.”).
17 Accordingly, under the water code’s statutory forfeiture provision, non-use of water
18 for five successive years will cause the water to “revert to the public,” unless a
19 statutory exception applies. A.R.S. §§ 45-141(C), 45-189.

20 Finally, changes to an appropriation are governed by the “no-injury rule.” In
21 Arizona, an appropriator “has the burden of establishing that a change in his diversion
22 or in his use of water has not negatively affected the rights of other appropriators.”
23 *Zannaras v. Bagdad Copper Corp.*, 260 F.2d 575, 577 (9th Cir. 1958).

24
25 **1.0 IRRIGATION CLAIMS**

26 ASARCO claims rights to beneficially use water from Aravaipa Creek and the
27 San Pedro River for irrigation purposes. For each field on Aravaipa Ranch, PZ Ranch,
28 and Robinson Ranch, ASARCO seeks to prove the date on which its predecessors first

1 initiated an appropriation, the historical extent of irrigation on each field, and the
2 quantity of water historically diverted per acre of each field.

3

4 **1.1 WATER DUTY**

5 ASARCO seeks to quantify irrigation rights by proving 1) the historical
6 acreage of irrigation associated with each claimed field and 2) the water duty
7 associated with that field.¹ “Water duty,” in this case, is the purported quantity of
8 water diverted per year, per acre of an irrigated field. Ultimately, any water duty in
9 this case must reflect the amount of water “historically withdrawn . . . over time” and
10 applied to beneficial use, “but not beyond that reasonably required and actually used.”
11 *Williams v. Midway Ranches Prop. Owners Ass'n, Inc.*, 938 P.2d 515, 522 (Colo.
12 1997) (“[T]he measure of a water right is the amount of water historically withdrawn .
13 . . over time in the course of applying water to beneficial use”); *Arizona v.*
14 *California*, 298 U.S. 558, 566 (1936) (“[D]iversion and application of water to a
15 beneficial use constitute an appropriation, and entitle the appropriator to a continuing
16 right to use the water, to the extent of the appropriation, but not beyond that
17 reasonably required and actually used.”).

18 In its motions for summary judgment, ASARCO seeks a uniform water duty of
19 7.4 acre-feet per acre per year based on alleged historical flood irrigation of alfalfa
20 crops on its claimed fields.² ASARCO bases this quantity on the “consumptive use
21 value” for alfalfa, 4.3 acre-feet/acre/year, divided by an “application efficiency of
22 58%.”³ According to ASARCO, this water duty “likely underestimates the amount of
23 water that would have been diverted” because it does not account for conveyance
24 losses that occur “from using ditches to convey water to the ranches.”⁴

25 Multiple genuine issues of material fact exist regarding ASARCO’s water duty

26
27 ¹ ASARCO Aravaipa Motion at 16–17; ASARCO PZ Ranch Motion at 16–17; Robinson Motion at 15–16.

28 ² ASARCO Aravaipa Motion at 16; ASARCO PZ Ranch Motion at 16; ASARCO Robinson Motion at 15.

³ Aravaipa Motion at 17; W1-11-2801, ASARCO LLC’s Amended Omnibus Statement of Fact in Support of Motions for Partial Summary Judgment No. 1, No. 2, No. 3, No. 4 (“ASARCO SOF”) ¶¶ 58, 60 (Aug. 25, 2025).

⁴ [ASARCO Exhibit 1 at PDF 29–30].

1 estimate. First, it is unclear whether the claimed water duty reflects the quantity of
2 water “reasonably required and actually used.” By ASARCO’s own admission, “in
3 2023, the ranches had 500.4 acres under cultivation, and ASARCO pumped only
4 2,733 acre-feet to irrigate these acres, which equates to an on-farm water duty of 5.46
5 AF/ac/yr.”⁵ To prevail on its 7.4 acre-foot water duty claim, ASARCO must resolve
6 at trial the apparent discrepancy between actual and claimed water duties.

7 Second, it is uncertain whether ASARCO’s claimed water duty reflects
8 historical water use. The U.S., for instance, points out that the claimed water duty
9 reflects “a full crop demand,” i.e. “crop water needs for greatest plant growth.”⁶ The
10 estimate also presumed an unlimited water supply. Historical surface water diversions
11 almost certainly did not provide such a supply.⁷ Moreover, ASARCO must justify its
12 assumptions that the crops historically grown on its claimed fields were alfalfa, and
13 that the historical method of irrigation on the fields was flood irrigation.

14 In conclusion, genuine disputes exist as to both historical and current water duties
15 on the ranches. ASARCO carries the burden of proving the historical water duty, but
16 if that water duty exceeds the current, actual water duty, the current water duty shall
17 govern.

19 **1.2 HISTORICALLY IRRIGATED ACREAGE**

20 ASARCO asserts in three motions for summary judgment that a reasonable
21 fact finder must accept the priority dates and quantities asserted in its irrigation claims
22 for Aravaipa Ranch, PZ Ranch, and Robinson Ranch. The U.S. filed cross-motions
23 seeking a finding that, for each ranch, ASARCO cannot prove essential historical
24 facts underlying its irrigation claims.

27 ⁵ ASARCO No Injury Motion at 5.

28 ⁶ W1-11-2801, U.S. Response to Motion for Partial Summary Judgment No. 1 – Aravaipa Ranch (“U.S.
Response Aravaipa Ranch”) at 14 (Sept. 18, 2025).

⁷ U.S. Response Aravaipa Ranch at 13.

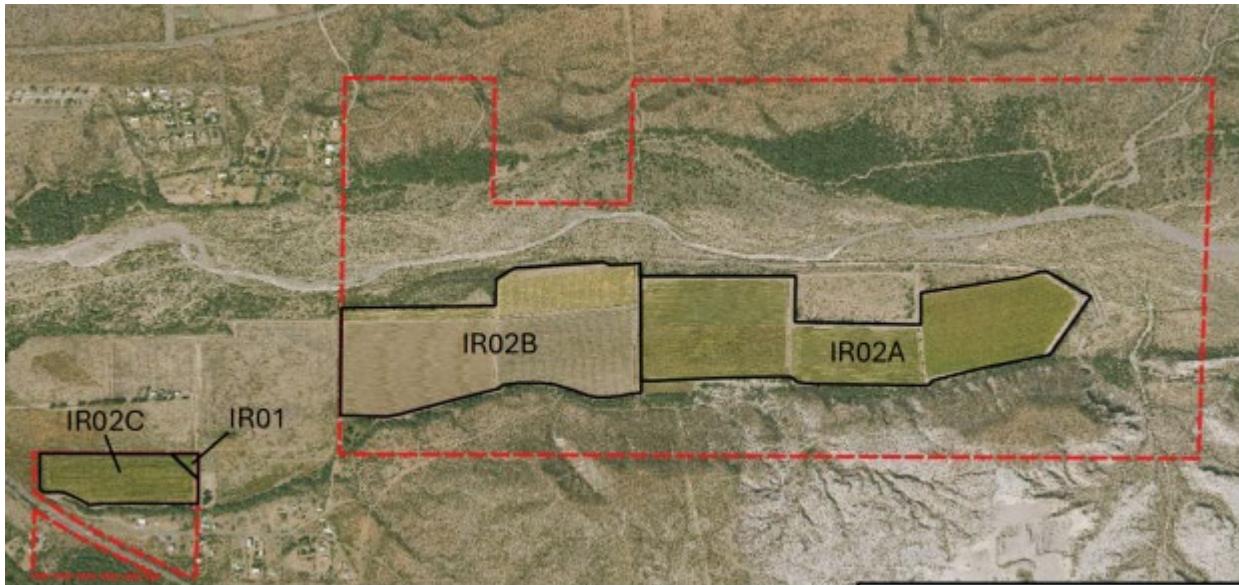


Figure 1 – Aravaipa Ranch property boundaries are outlined in red and claimed irrigation fields are outlined in black. [ASARCO Exhibit 6 at PDF 106].

To establish a pre-1919 water right, ASARCO must prove “the specific lands upon which the waters were used.” *Gillespie Land & Irr. Co.*, 75 Ariz. 377, 397 (1953). Evidence that an appropriator irrigated a certain number of acres within a significantly larger area of land is insufficient. *Id.* at 397–398 (holding that proof of irrigation of “21,000 acres located somewhere in a tract containing 82,000 acres” could not support intervenor’s claim).

1.2.1 ARAVAIPA RANCH

In its motion, ASARCO seeks findings regarding the acreages associated with four fields within Aravaipa Ranch: IR01, IR02a, IR02b, and IR02c. See Figure 1. All fields are in Township 7 South, Range 16 East. In its motion, ASARCO seeks irrigation rights for a 15.1-acre portion of fields IR01 and IR02c, located in SW $\frac{1}{4}$ SW $\frac{1}{4}$ Section 10;⁸ 73.1 acres for IR02b, spanning S $\frac{1}{2}$ NE $\frac{1}{4}$ & N $\frac{1}{2}$ SE $\frac{1}{4}$ Section 10; and 79.1 acres for IR02a, which sweeps across the middle of Section 11.⁹ In a cross-motion for summary judgment, the U.S. seeks findings that claimed acreages associated with IR01, IR02a, and IR02c must be reduced in accordance with Arizona

⁸ ASARCO’s total claim for fields IR01 and IR02c encompasses 16.4 acres, but ASARCO seeks summary judgement only for 15.1 acres.

⁹ ASARCO Aravaipa Motion at 17.

1 Water Commissioner mapping.¹⁰

2 ASARCO's claims for Aravaipa Ranch rely on multiple lines of historical
3 evidence: assorted deeds and homestead records, notices of appropriation, an 1869
4 Army Corps of Engineers survey, a 1915 U.S. Indian Service survey, and a 1920 State
5 Water Commissioner Map.

6 **Land Entry Records and Deeds**

7 In order to support its Aravaipa Ranch claims, ASARCO disclosed various
8 federal land entry records and deeds. With respect to IR01 and IR02c, ASARCO
9 disclosed the homestead files pertaining to Annie Gilbert's settlement of a 40-acre
10 portion of Section 10, Township 7 South, Range 16 East.¹¹ Using deeds, ASARCO
11 broadly traced the chain of title of Annie Gilbert's property until 1919.¹² Of these
12 documents, the only document to hint at extent of irrigation in the vicinity of IR01
13 and IR02c is a deed conveying a parcel encompassing the Annie Gilbert homestead as
14 well as the "water right referred to in a certain location of water right made by . . .
15 Thomas N. Wills."¹³ This oblique reference to the existence of water rights, alone,
16 cannot establish the historical extent of irrigated acreage in fields IR01 and IR02c.

17 To support its IR02b claim, ASARCO disclosed Emil Kielberg's Desert Land
18 Act patent file and a deed conveying the patented land. The patent file concerned
19 Kielberg's settlement of S½NE¼ & N½ SE¼ Section 10, beginning in April 1893.¹⁴
20 Affidavits by Kielberg state that, by April 1895, Kielberg was irrigating 25 acres, and
21 by January 1898, Kielberg was irrigating 50 acres of land within his settlement.¹⁵ The
22 1900 deed cited by ASARCO conveyed from Kielberg to Thomas N. Wills "all the
23 water rights belonging to said land."¹⁶ None of these documents describe with any

25 ¹⁰ U.S. Aravaipa Motion at 11.

26 ¹¹ [ASARCO Exhibits 8–9].

27 ¹² [ASARCO Exhibits 10, 12–14].

¹³ [ASARCO Exhibit 14].

¹⁴ ASARCO SOF ¶ 13; [ASARCO Exhibit 15].

¹⁵ ASARCO SOF ¶ 13; [ASARCO Exhibit 15 at PDF 22].

¹⁶ ASARCO SOF ¶ 14; [ASARCO Exhibit 16].

1 particularly the location of historical irrigation within IR02b or even within
2 Kielberg's 160 acre-homestead.

3 To support its IR02a claim, ASARCO disclosed Louis Land's Desert Land Act
4 patent file and a deed conveying the patented land. The most relevant part of the
5 patent file is the 1890 deposition of Land in which he stated that “[c]rops were raised
6 on SW $\frac{1}{4}$ of NW $\frac{1}{4}$ and SW $\frac{1}{4}$ of NE $\frac{1}{4}$ ” Section 11, Township 7 South, Range 16
7 East.¹⁷ A subsequent conveyance of the patented land conveyed a “1/3 interest in the
8 water ditch known as the Swingle-Wills and McVeigh ditch.”¹⁸ None of these
9 documents describe with any particularity the existence of historical irrigation within
10 IR02a or acreage of cultivation within the 80 acres mentioned in Land's deposition.

11 **Notices of Appropriation**

12 ASARCO also cites two notices of appropriation to support its claims for fields
13 IR02a and IR02b. The first is a March 24, 1894, notice of appropriation recorded by
14 Emil Kielberg. The second is an April 5, 1890, notice of appropriation for a
15 completed ditch recorded by Louis Land. These notices describe the capacities, and
16 approximate locations of two ditches in the vicinity of Aravaipa Ranch. While these
17 notices describe the characteristics of the irrigation ditches in detail, the notices fail to
18 describe extent of irrigation. Accordingly, neither notice serves as meaningful
19 evidence of the historical extent and location of irrigation on Aravaipa Ranch.

20 **Surveys**

21 ASARCO points to multiple surveys of varying probative value. These surveys
22 include an 1869 survey by the Army Corps of Engineers, a 1915 survey by the U.S.
23 Indian Service, and a 1920 Arizona Water Commissioner survey. In addition, in 1915,
24 the U.S. Indian Service published a survey that described the total acreage of irrigated
25 fields served by ditches in the vicinity of the San Pedro River and Aravaipa Creek.¹⁹

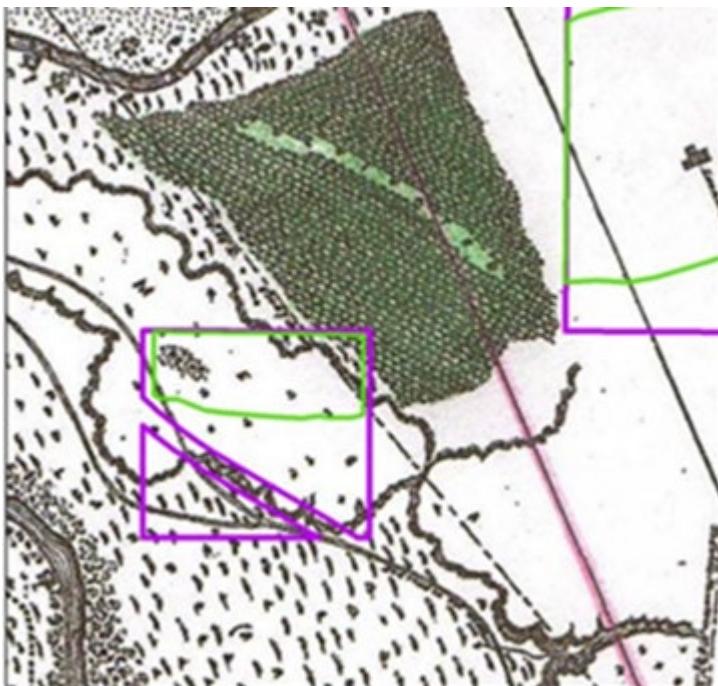
26 The 1869 survey, prepared by the Army Corps of Engineers, depicts the Camp

27
28¹⁷ ASARCO SOF ¶ 18; [ASARCO Exhibit 17 at PDF 35].

¹⁸ ASARCO SOF ¶ 21; [ASARCO Exhibit 19].

¹⁹ ASARCO SOF ¶ 22; [ASARCO Exhibit 20].

1 Grant military reservation.²⁰ As seen in Figure 2 below, the survey illustrates
2 irrigation taking place within a significant portion of IR01. This survey presents a
3 genuine issue of material fact regarding the extent of irrigation taking place in IR01
4 around 1869.



5 **Figure 2** – IR01 and IR02c are on the
6 left side of the image, outlined in
7 green. The Aravaipa Ranch property
8 boundary is outlined in purple.
9 [ASARCO Exhibit 4 at PDF 41].

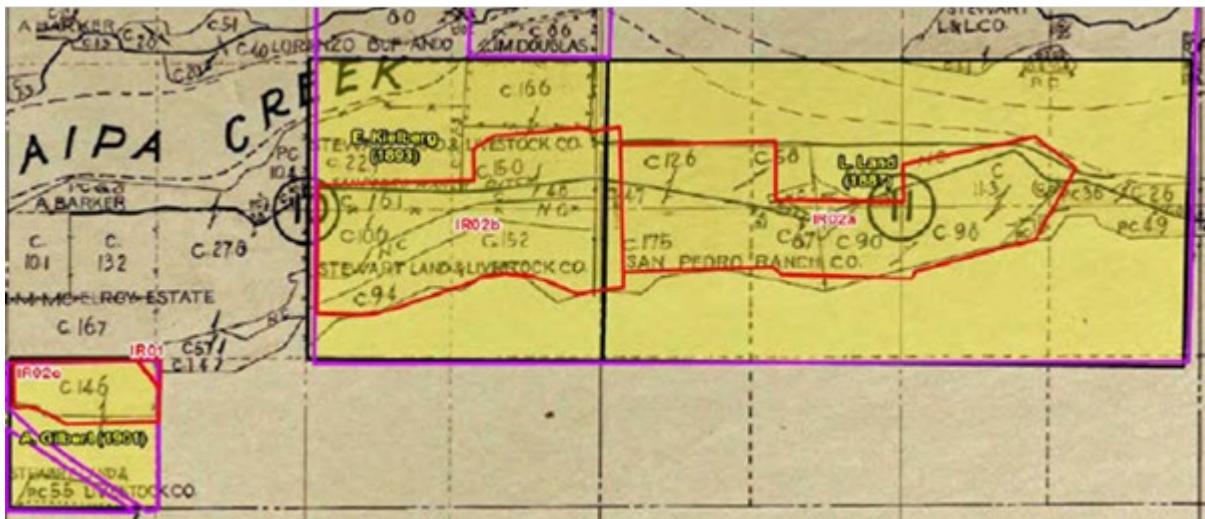
10 The 1915 survey states that “below [Aravaipa] Canyon, there is one ditch in
11 operation serving 500 acres.”²¹ While this survey describes the *region* surrounding the
12 fields claimed by ASARCO, the survey provides no detail regarding locations of
13 irrigation.

14 In 1920, the Arizona Water Commissioner issued a survey map of Township 7
15 South and Range 16 East encompassing the claimed fields on Aravaipa Ranch. The
16 survey map labels certain areas as “cultivated,” “previously cultivated,” and “never
17 cultivated.” These lands are identified by a “C,” “P.C.” and “N.C.” respectively. In its
18 1920 survey, the Arizona Water Commissioner clearly identified significant acreage
19 under cultivation within fields IR01, IR02a, IR02b, and IR02c. Therefore, this survey
20 presents genuine issues of material fact regarding pre-1919 irrigation on those fields.

21 ASARCO SOF ¶ 5; [ASARCO Exhibit 4 at PDF 40–41].

²⁰ *Id.*

1 See Figure 3.



10 **Figure 3** – Arizona Water Commissioner map overlaid on claimed fields. Aravaipa Ranch
11 property boundaries are outlined in purple; claimed fields are outlined in red. [ASARCO
12 Exhibit 21 at PDF 3].

13 Conclusion

14 ASARCO has disclosed two items of evidence substantiating its claims of pre-
15 1919 irrigation on Aravaipa Ranch: the 1920 Arizona Water Commissioner survey
16 and the February 1869 map prepared by the Army Corps of Engineers. These maps
17 establish that there are genuine issues of material fact regarding irrigation on Aravaipa
18 Ranch fields IR01, IR02a, IR02b, and IR02c prior to June 12, 1919.

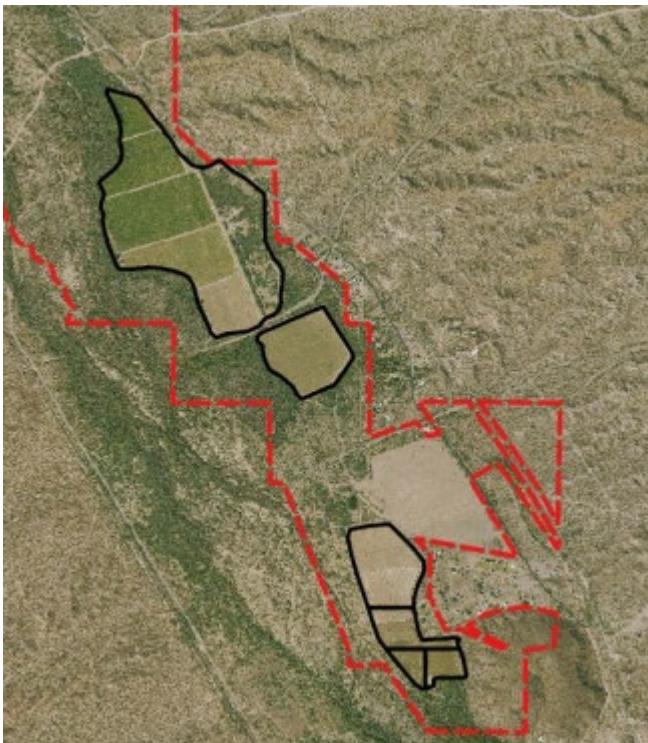
19 **1.2.2 PZ RANCH AND ROBINSON RANCH**

20 ASARCO seeks summary judgment regarding water rights claims on four
21 fields within PZ Ranch: IR01, IR02, IR04, and IR06, located in Sections 28 and 33 of
22 Township 6 South, Range 16 East. ASARCO also seeks summary judgment for
23 water rights claims on four fields within Robinson Ranch: IR01, IR03, and IR05,
24 located between Townships 5 South and 6 South and Ranges 15 East and 16 East.

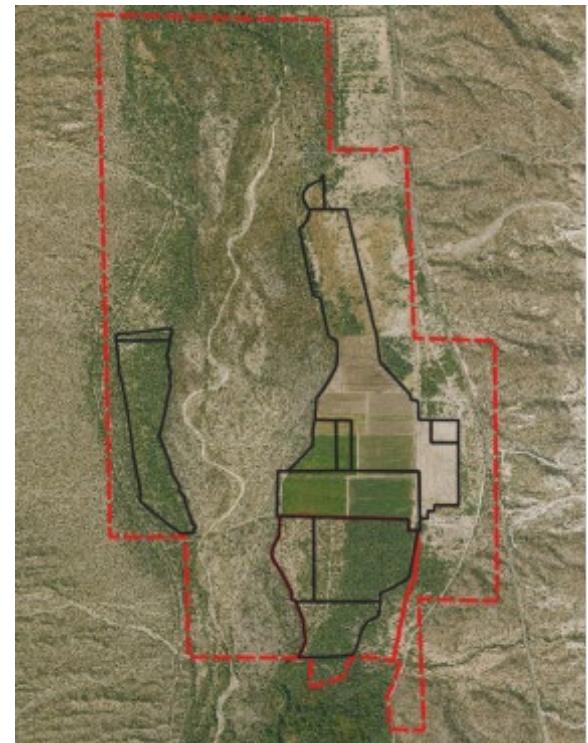
25 In a cross-motion for summary judgment, the U.S. seeks dismissal of claims
26 for PZ Ranch Fields IR03 and IR05 and a reduction in claimed acreage for field IR06
27 on the basis of Arizona Water Commissioner mapping in the vicinity of those fields.
28 In another cross-motion, the U.S. seeks a reduction in claimed acreage for Robinson

1 Ranch fields IR01 and IR04 on the same basis.

2 ASARCO's claims for PZ Ranch and Robinson Ranch rely on largely the same
3 types of historical evidence as its claims for Aravaipa Ranch: federal land entry
4 records, notices of appropriation, surveys, and maps.



17 **Figure 4** – Robinson Ranch property boundaries
18 are outlined in red; irrigation fields are outlined in
19 black. [ASARCO Exhibit 6 at PDF 66].



17 **Figure 5** – PZ Ranch property boundaries are
18 outlined in red; irrigation fields are outlined in
19 black. [ASARCO Exhibit 6 at PDF 86].

19 **Land Entry Records**

20 ASARCO's most supportive set of federal land entry records out of all those
21 proffered in support of PZ Ranch and Robinson Ranch claims are those associated
22 with Annie Gilbert's homestead. ASARCO cites Gilbert's homestead records to
23 support its claim to PZ ranch field IR01. Gilbert's records describe 75 acres of
24 irrigation occurring within NW $\frac{1}{4}$ Section 33, Township 6 South, Range 16 East
25 during the early 1900s.²² The records, if accurate, would establish irrigation occurring
26 within 50% of the settlement. Nonetheless, the northwest quarter of Section 33
27 encompasses an area more than twice the size of PZ Ranch field IR01. Other

28
22 ASARCO SOF ¶ 70; [ASARCO Exhibit 8].

1 homestead files proffered to support ASARCO’s claims in PZ Ranch and Robinson
2 Ranch establish historical irrigation with even less specificity.

3 Hence, the federal land entry records that ASARCO cites in support of its
4 claims within PZ Ranch and Robinson Ranch are no less vague than those supporting
5 ASARCO’s Aravaipa Ranch claims. While the proffered homestead files often
6 describe cultivation, they do not describe the specific location of that cultivation and
7 do not describe irrigated acreage within the boundaries of the claimed fields.

8 **Notices of Appropriation**

9 ASARCO cites various notices of appropriation in support of its claims within
10 PZ Ranch and Robinson Ranch.²³ Like the notices of appropriation cited in support of
11 ASARCO’s Aravaipa Ranch claims, these notices focus almost exclusively on the
12 lengths and locations of irrigation ditches. The notices presented provide sparse, if
13 any, details regarding the specific lands served by the ditches.

14 **Surveys**

15 ASARCO presents four maps issued by the U.S. General Land Office (“GLO”)
16 in 1878 depicting regions covering the ranches.²⁴ ASARCO also presents the
17 previously discussed 1915 survey prepared by the U.S. Indian Service.²⁵ Finally,
18 ASARCO presents maps from the previously discussed 1920 Arizona Water
19 Commissioner survey.²⁶

20 While the GLO maps depict the historical routes of irrigation ditches in the
21 vicinity of claimed fields, these maps provide no information as to historical extent of
22 irrigation. As discussed earlier, the 1915 survey provides only a regional account of
23 irrigation.

24 By contrast, the 1920 survey reveals, with some exceptions, correlation
25

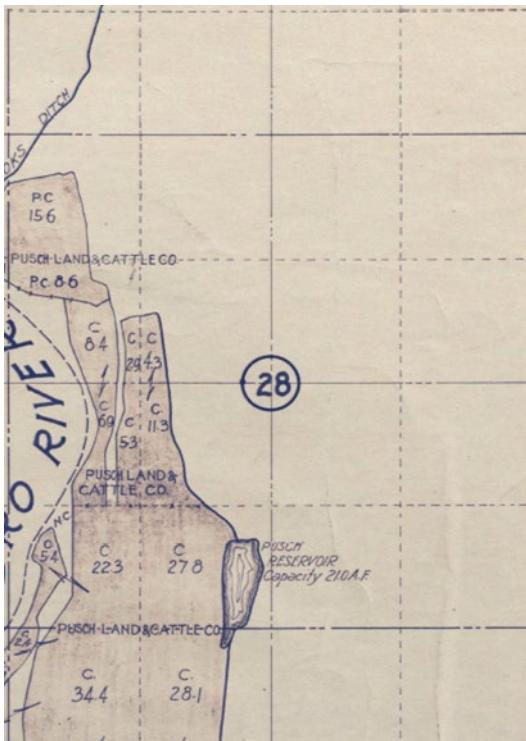
26²³ [ASARCO Exhibit 1 at PDF 15–16]; [ASARCO Exhibit 4 at PDF 33, 35, 37–38]; [ASARCO Exhibit 8];
[ASARCO Exhibit 10 at PDF 8].

27²⁴ [ASARCO Exhibit 29]; [ASARCO Exhibit 36]; [ASARCO Exhibit 43].

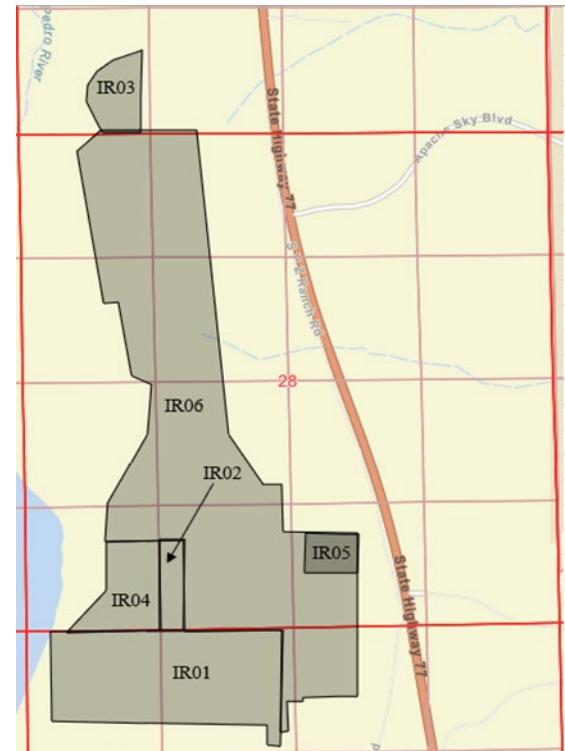
28²⁵ [ASARCO Exhibit 20 at PDF 6].

²⁶ [ASARCO Exhibit 1 at PDF 15]; [ASARCO Exhibit 4 at PDF 16]; [ASARCO Exhibit 3 at PDF 43]; [Exhibit 4 at PDF 15].

1 between fields cultivated in 1920 and fields claimed within Robinson Ranch and PZ
2 Ranch. As depicted in figures 5A and 5B below, there is significant overlap between
3 PZ Ranch fields IR01, IR02, IR04, and IR06 and cultivated areas identified in
4 Arizona Water Commissioner mapping. Likewise, in Figures 6A, 6B, 7A, and 7B,
5 Robinson Ranch fields IR01, IR03, and IR05 intersect cultivated areas identified in
6 Arizona Water Commissioner mapping.



19 **Figure 5A** – 1920 Arizona Water Commissioner
20 map in the vicinity of PZ Ranch.



21 **Figure 5B** – Approximate representation of
22 claimed PZ Ranch fields
23
24
25
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27
28

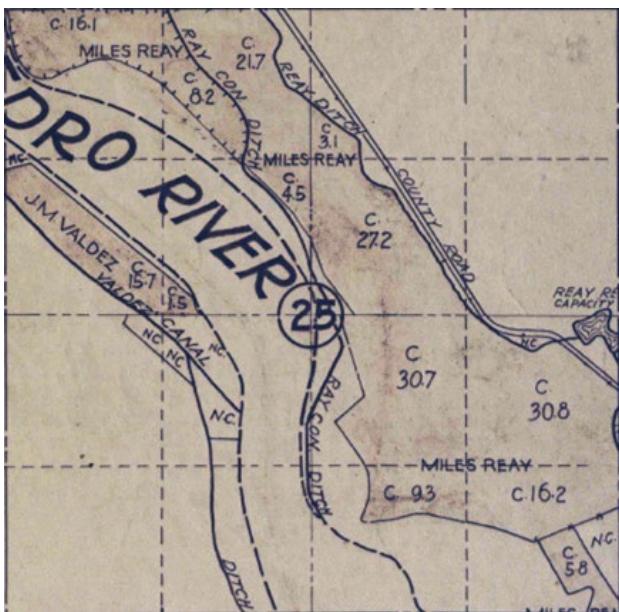


Figure 6A – 1920 Arizona Water Commissioner map in the vicinity of northern Robinson Ranch field IR01

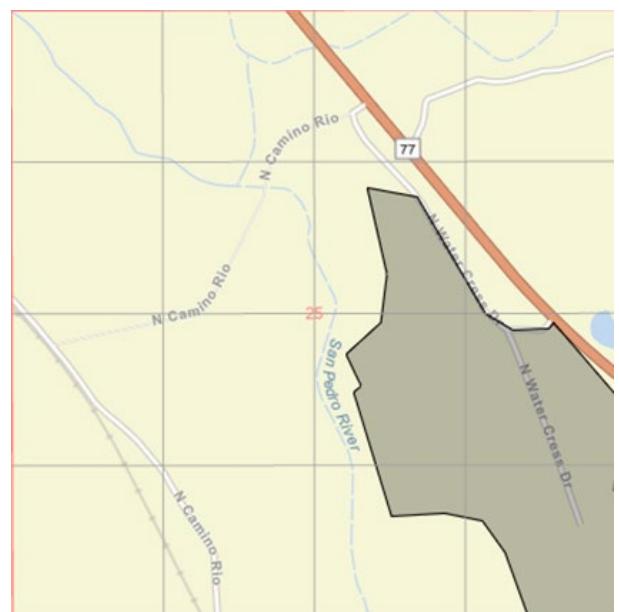


Figure 6B - Approximate representation of northern Robinson Ranch field IR01.



Figure 7A – 1920 Arizona Water Commissioner map in the vicinity of Robinson Ranch fields IR03, IR04, and IR05, and the southern tip of IR01

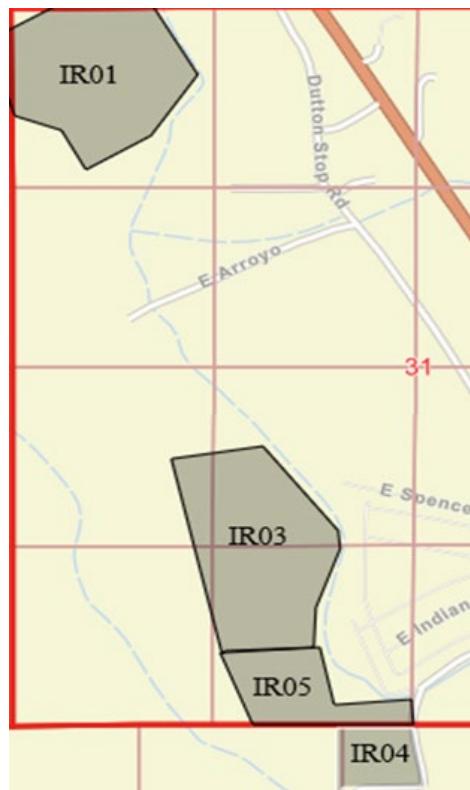


Figure 7B – Approximate representation of Robinson Ranch fields IR03, IR04, and IR05, and the southern tip of IR01

1 However, no such overlap exists with respect to Robinson Ranch field IR04,
2 PZ Ranch fields IR03 and IR05, and the portion of PZ Ranch field IR06 crossing into
3 the eastern halves of Sections 28 and 33. Because no other evidence demonstrates
4 historical irrigated acreage on those fields or portions of fields, ASARCO cannot
5 prove its irrigation claims there.

6 **Conclusion**

7 Other than the Arizona Water Commissioner map, ASARCO has disclosed
8 little evidence in support of pre-1919 irrigation on PZ Ranch and Robinson Ranch.
9 The 1920 survey, however, establishes a genuine issue of material fact concerning
10 pre-1919 irrigation on PZ Ranch fields IR01, IR02, IR04, and IR06 and Robinson
11 Ranch fields IR01, IR03, and IR05. It is clear, however, that ASARCO cannot prove
12 pre-1919 irrigation on Robinson Ranch field IR04, PZ Ranch fields IR03 and IR05,
13 and the portion of PZ Ranch field IR06 within the eastern halves of Sections 28 and 33.

14

15 **IT IS ORDERED** dismissing irrigation claims for the following:

16 • Robinson Ranch field IR04
17 • PZ Ranch field IR03
18 • PZ Ranch field IR05
19 • The portion of PZ Ranch field IR06 within the eastern halves of sections 28
20 and 33.

21

22 **1.3 PRIORITY DATES**

23 Before the enactment of Arizona's current water code on June 12, 1919, the
24 priority date of a water right related back to "the initiation of the appropriation" if the
25 water user "exercise[d] reasonable diligence in every step required" to perfect his or
26 her appropriation. *Maricopa Cty. Mun. Water Conservation Dist. No. 1 v. Southwest*
27 *Cotton Co.*, 39 Ariz. 65, 102–103 (1935). If the water user failed to use reasonable
28 diligence, the priority date would correspond to the date of perfection. *Id.* at 103.

1 Prior to 1893, an appropriation could be initiated through application of water
2 to beneficial use or an “open, physical demonstration of intent to take for beneficial
3 use.” *Phelps Dodge Corp.*, 211 Ariz. 146, 149 (Ct. App. 2005). Between 1893 and the
4 enactment of the water code, an appropriation could be initiated “by posting and filing
5 a notice of intent with the county recorder” or “simply by applying the water to a
6 beneficial use.” *Id.* at 149.

7 Therefore, in accordance with the common law, any claimant seeking to
8 establish a pre-1919 priority date must, at the very least, establish the date on which
9 the relevant appropriation was perfected. To apply the relation-back doctrine, the
10 claimant must prove an additional two threshold facts: the date on which the
11 appropriation was initiated and reasonable diligence in perfecting the appropriation.

12 In its motions for summary judgment, ASARCO seeks the following priority
13 dates under the relation-back doctrine:

Ranch	Field(s)	Priority Date
Aravaipa ²⁷	IR01/IR02c	July 24, 1901
	IR02b	April 11, 1893
	IR02a	December 14, 1887
PZ ²⁸	IR01	December 15, 1877
	IR02	June 27, 1884
	IR04	January 7, 1886
	IR06	September 3, 1895
Robinson ²⁹	IR01	June 26, 1877
	IR03	February 8, 1892
	IR05	April 27, 1915

24 ASARCO argues that federal land entry records, surveys, and deeds establish
25 the dates on which appropriations were initiated or perfected.³⁰ To the extent that
26

27 ASARCO Aravaipa Motion at 17.

28 ASARCO PZ Ranch Motion at 17.

29 ASARCO Robinson Motion at 16.

30 ASARCO Aravaipa Motion at 7-12; ASARCO PZ Ranch Motion at 9-12; ASARCO Robinson Motion at 8-11.

1 ASARCO relies on the relation-back doctrine for its claimed priority dates, ASARCO
2 states that its predecessors employed reasonable diligence in perfecting their
3 appropriations.³¹

4 In its motions for summary judgment, the U.S. seeks a finding that ASARCO
5 “should be permitted to proceed to trial only on . . . irrigation water right claim[s] no
6 earlier than June 11, 1919.”³² The U.S. argues that none of the claimed priority dates
7 are obtainable because 1920 Arizona Water Commissioner mapping, produced after
8 the June 12, 1919, is the only potential evidence of pre-1919 irrigation presented by
9 ASARCO.³³ According to the U.S., Arizona Water Commissioner mapping, produced
10 decades after most of the claimed priority dates, cannot prove that water “was first
11 applied to the identified land” on any of the claimed priority dates.³⁴

12 The United States’ and ASARCO’s cross-motions present three issues pertinent to
13 determination of priority dates:

- 14 1. Must ASARCO prove application of water to beneficial use on each of
15 its claimed priority dates?
- 16 2. Does each of ASARCO’s claimed priority dates represent either the
17 perfection or initiation of an appropriation?
- 18 3. Did ASARCO’s predecessors perfect their appropriations with
19 reasonable diligence?

20 First, ASARCO need not prove application of water to beneficial use on each
21 of its claimed priority dates. As discussed above, prior to June 12, 1919, an individual
22 could initiate an appropriation by properly demonstrating an intent to appropriate.
23 Therefore, a notice of appropriation recorded on a claimed priority date can support
24 that priority date.

25 Second, it is indisputable that ASARCO cannot prove that appropriations on
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27 ³¹ ASARCO Aravaipa Motion at 7-12; ASARCO PZ Ranch Motion at 9-12; ASARCO Robinson Motion at 8-11.

28 ³² U.S. Robinson Motion at 14; U.S. Aravaipa Motion at 14; U.S. PZ Ranch Motion at 13.

³³ U.S. Robinson Motion at 13

³⁴ U.S. Robinson Motion at 12

1 Aravaipa Ranch field IR02a, PZ Ranch fields IR02 and IR04, and Robinson Ranch
2 fields IR03 and IR05, were initiated on the claimed priority dates. Genuine issues of
3 material fact exist regarding claimed priority dates for Aravaipa Ranch fields IR01,
4 IR02b, and IR02c; PZ Ranch fields IR01 and IR06; and Robinson Ranch field IR01.

5 With respect to the former fields, ASARCO supports its claimed priority dates
6 by citing federal land entry records and deeds. These documents do not demonstrate
7 beneficial use within any of the claimed fields, nor do they indicate that a predecessor
8 properly demonstrated an intent to appropriate on any of the claimed priority dates.
9 The earliest possible priority date for each of those fields is June 11, 1919, the earliest
10 priority date inferable from Arizona Water Commissioner mapping. With respect to
11 the latter fields, ASARCO supports claimed priority dates by citing contemporaneous
12 notices of appropriation. Those documents present genuine issues of material fact as
13 to the dates on which ASARCO's predecessors initiated their appropriations.³⁵

14 Finally, genuine issues of material fact exist regarding whether ASARCO
15 perfected its appropriations with "reasonable diligence." The United States' motions
16 do not raise the issue of reasonable diligence, and while ASARCO's motions assert
17 that ASARCO's predecessors pursued appropriations with reasonable diligence,
18 ASARCO does not support those assertions with any evidence. Accordingly, the
19 Special Master reserves the issue of reasonable diligence for trial.

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21 **1.4 FORFEITURE**

22 The U.S. asserts forfeiture claims with respect to ASARCO's irrigation claims
23 on each of the ranches. The primary evidence regarding forfeiture is a series of aerial
24 photographs taken over the course of 19 years between 1935 and 2023.³⁶ U.S. expert
25 Thomas Ley reviewed these photographs for evidence of active irrigation. The U.S.
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28 ³⁵ Aravaipa Ranch fields IR01, IR02b, and IR02c are supported by an Army Corps of Engineer survey and an
1894 notice of appropriation. PZ Ranch fields IR01 and IR06 are supported by 1878 and 1895 notices of
appropriation. Robinson Ranch field IR01 is supported by a notice of appropriation.

³⁶ U.S. Robinson Motion at 15; U.S. Aravaipa Motion at 16; U.S. PZ Ranch Motion at 15.

1 supplements the photographic evidence with records documenting foreclosures of the
2 ranches within this period.³⁷ ASARCO’s expert, Chris Garrett, provides the most in-
3 depth analysis of water use on the fields by using the aerial imagery to estimate the
4 areal extent of cultivation over the years.³⁸

5 Citing ASARCO’s own interpretation of the aerial photographs, the U.S. seeks
6 a finding on summary judgment that, even if ASARCO can prove the establishment of
7 water rights on the ranches, ASARCO, or its predecessors, forfeited parts of those
8 rights. Accordingly, the U.S. requests that the irrigation water rights claims be limited
9 to 117.5 acres, 146 acres, and 145.7 acres for Aravaipa Ranch, Robinson Ranch, and
10 PZ Ranch respectively.³⁹

11 Citing the same evidence, ASARCO argues that “Garrett establishes that
12 ongoing patterns of cultivation . . . demonstrate continuous irrigation over time.”⁴⁰
13 ASARCO seeks a finding on summary judgment that forfeiture cannot be established
14 with respect to any of the fields on any of the three ranches at issue in this contested
15 case.⁴¹ As discussed below, the Special Master finds there is no genuine issue of
16 material fact that continuous non-use for a period longer than five years has occurred
17 on Robinson Ranch field IR01 and PZ Ranch fields IR03, IR06, and IR07–11.
18 However, there are genuine issues of material fact regarding the existence or extent of
19 forfeiture on all other fields within ASARCO’s three ranches

20 **1.4.1 BURDEN OF PROOF**

21 The U.S. argues that the claimant of a water right must establish “proof of
22 continuous use in subsequent years from the right’s inception,” and that ASARCO has
23 not disclosed sufficient evidence to make this showing for any of its irrigation
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25 ³⁷ U.S. Response Aravaipa Ranch at 12; W1-11-2801, U.S. Response to Motion for Partial Summary Judgment
26 No. 2 – PZ Ranch (“U.S. Response PZ Ranch”) at 12 (Sept. 18, 2025).

27 ³⁸ [ASARCO Exhibit 6 at PDF 16].

28 ³⁹ U.S. Aravaipa Motion at 17; U.S. Robinson Motion at 17; U.S. PZ Ranch Motion at 17. Note that the U.S.
29 states in its motion regarding PZ Ranch that ASARCO may claim, at most, 117.5 acres on PZ Ranch.

⁴⁰ ASARCO Robinson Motion at 12.

⁴¹ ASARCO Aravaipa Motion at 12–16; ASARCO PZ Ranch Motion at 12–16; ASARCO Robinson Motion at
12–16.

1 claims.⁴²

2 Courts across prior appropriation jurisdictions have expressly declared that the
3 burden of proof regarding forfeiture lies with the proponent of forfeiture.⁴³ In the
4 order on summary judgment in *In re Claridge*, the Special Master expressly adopted
5 that rule. W1-11-3394, Order (March 17, 2023) (stating that the objector “has not met
6 its burden to show that forfeiture . . . has occurred as a matter of law”).

7 Arguing that the typical allocation of the burden of proof does not apply to
8 Arizona’s general stream adjudications, the U.S. cites two subsections of A.R.S. § 45-
9 254, governing the elements of a statement of claimant: 45-254(C)(5) and (7).
10 Subsection (C)(5) states that, for irrigated land, the claimant must state “the amount of
11 land reclaimed the first year and in subsequent years.”⁴⁴ Subsection (C)(7) requires
12 the claimant to describe “the purpose and extent of use.”⁴⁵

13 Subsections 45-254(C)(5) and (7) do not alter the traditional rule. Section 45-
14 254(C)(5) accounts for a statement of claimant that may cover a single parcel of land
15 on which irrigation has expanded over time. Subsection (C)(7) also does not reverse
16 the traditional burden of proof for forfeiture. Neither “purpose” nor “extent of use”
17 points to temporal continuity.

18 **1.4.2 ARAVAIPA RANCH**

19 In its motion for partial summary judgment, the U.S. asserts forfeiture with
20 respect to Aravaipa Ranch fields IR02a, IR02b, and IR02c.⁴⁶ In its cross-motion for
21 partial summary judgment, ASARCO asserts that, as a matter of law, objectors cannot

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42 U.S. Robinson Motion at 14.

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42 U.S. Robinson Motion at 14.

43 *Town of Eureka v. Office of State Engineer*, 826 P.2d 948, 952 (Nev. 1992) (The protestant “bears the burden
44 of proving, by clear and convincing evidence, a statutory period of nonuse.”); *State ex rel. Off. of State Eng’r v.
45 Intrepid Potash, Inc.*, 2025 WL 1821806, at *5 (N.M. July 2, 2025) (The burden of proof is “on the party
46 asserting abandonment.”); *Gilbert v. Smith*, 552 P.2d 1220, 1223 (Idaho 1976) (“One who seeks to alter decreed
water priorities has the burden to demonstrate the elements of abandonment.”); *Rencken v. Young*, 711 P.2d 954,
961 (Or. 1985) (“The proponents of cancellation have the burden to prove [nonuse of] the water appropriated
for a period of five successive years.”).

44 A.R.S. § 45-254(C)(5).

45 A.R.S. § 45-254(C)(7).

46 U.S. Aravaipa Motion at 16.

1 establish forfeiture with respect to fields IR01, IR02a, IR02b, and IR02c.⁴⁷

2 The U.S. cites Chris Garrett's estimates of irrigated acreage from imagery
3 captured in 1935, 1947, 1956, 1964, and 1969.⁴⁸ ASARCO does not dispute the
4 accuracy of these estimates, but merely states that "even if an aerial photograph does
5 not show irrigation on a particular day, the parcel could have nonetheless been
6 irrigated the previous or next day, week, or month."⁴⁹

7 For each year, ASARCO's claimed acreage exceeds the irrigated acreage
8 estimated by Mr. Garrett. Nonetheless, the data obtained from the imagery is
9 fragmented and incomplete. The minimum gap between imagery for IR02a is five
10 years. The minimum gap between imagery photographs for IR02b and IR02c is
11 approximately eight years. Given this fragmentation and the uncertainty of conditions
12 in the intervening years, Mr. Garrett's analysis of the imagery does not compel a
13 finding of forfeiture for Aravaipa Ranch fields IR02a, IR02b, and IR02c.

14 Nonetheless, genuine issues of material fact exist regarding forfeiture on all
15 fields within Aravaipa Ranch. From 1935 to 2023, multiple years of imagery reveal
16 irrigated acreage falling short of claimed acreage. For instance, with respect to field
17 IR02a, the maximum estimate of irrigated acreage between 2003 and 2021, over the
18 course of ten images, is 78.8 acres. Less precise imagery from the early to mid-20th
19 century also indicates irrigation that is less than claimed. Evidence of foreclosure in
20 the mid-1920s and title transfer to a bank in the mid-1930s, however, may bolster
21 inferences from that relatively incomplete set of images.⁵⁰

22 **1.4.3 ROBINSON RANCH**

23 In its Robinson Ranch motion for partial summary judgment, the U.S. claims
24 forfeiture on Robinson Ranch fields IR01, IR02, IR03, IR04, and IR05. For IR01, the
25 U.S. cites aerial imagery dated between 1935 and 2023.

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27 ⁴⁷ ASARCO Aravaipa Motion at 12.

28 ⁴⁸ U.S. Aravaipa Motion at 16.

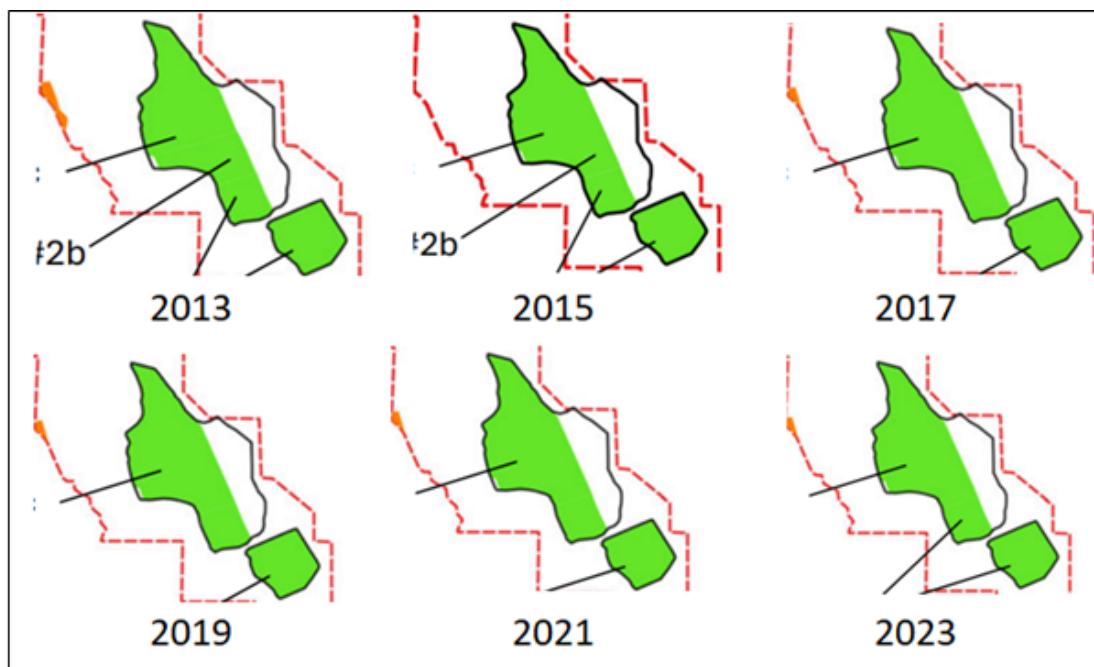
⁴⁹ *Id.* at 15.

⁵⁰ U.S. Response Aravaipa Ranch at 12.

1 Mr. Garrett's illustrations, included in Figure 8 below, indicate a consistent
2 absence of cultivation of approximately 25 acres on the east side of field IR01 between
3 2013 and 2023. During this approximately ten-year period, the longest gap in imagery
4 is approximately 2 years, and the maximum estimated irrigation is 119.7 acres.

5 **IT IS ORDERED** finding that ASARCO or its predecessors partially forfeited
6 appropriative rights for irrigation on Robinson Ranch field IR01. ASARCO, therefore,
7 may obtain appropriative rights for a maximum of 119.7 acres within field IR01.

8 With respect to IR02, IR03, IR04, and IR05, evidence of forfeiture is sparser,
9 but nonetheless creates genuine issues of material fact. Although the timeline contains
10 significant gaps, ASARCO's own expert reveals less historical irrigated acreage than
11 claimed for multiple years. For IR04, estimates of irrigated acreage for the years
12 1935, 1947, 1964, and 1969 reveal significantly less irrigated acreage than the 5.7
13 acres claimed. Imagery for the years following 1972 shows irrigated acreage that is
14 marginally less than claimed on a consistent basis. Imagery for fields IR02, IR03, and
15 IR05 exhibit a similar pattern.



27 **Figure 8** – Chris Garrett's interpretation of aerial imagery for Robinson Ranch field IR01.
[Exhibit 6 at PDF 61–66].

1 **1.3.4 PZ RANCH**

2 In its motion for summary judgment for PZ Ranch, the U.S. seeks findings of
3 forfeiture for fields IR03, IR05, IR06, and IR07–IR11. The U.S. cites Mr. Garrett’s
4 estimates of historical acreage for those fields.⁵¹

5 Mr. Garrett estimates that each available photograph between 2003 and 2023
6 depicted zero irrigation on IR03 and IR07–IR11. The longest gap between
7 photographs during this period is approximately three years. Between 2013 and 2023,
8 the longest gap is approximately two years. The only reasonable inference here is that
9 water has not been used on any of these fields for at least five successive years

10 **IT IS ORDERED** finding that ASARCO or its predecessors forfeited
11 appropriative rights for irrigation on PZ Ranch field IR03.

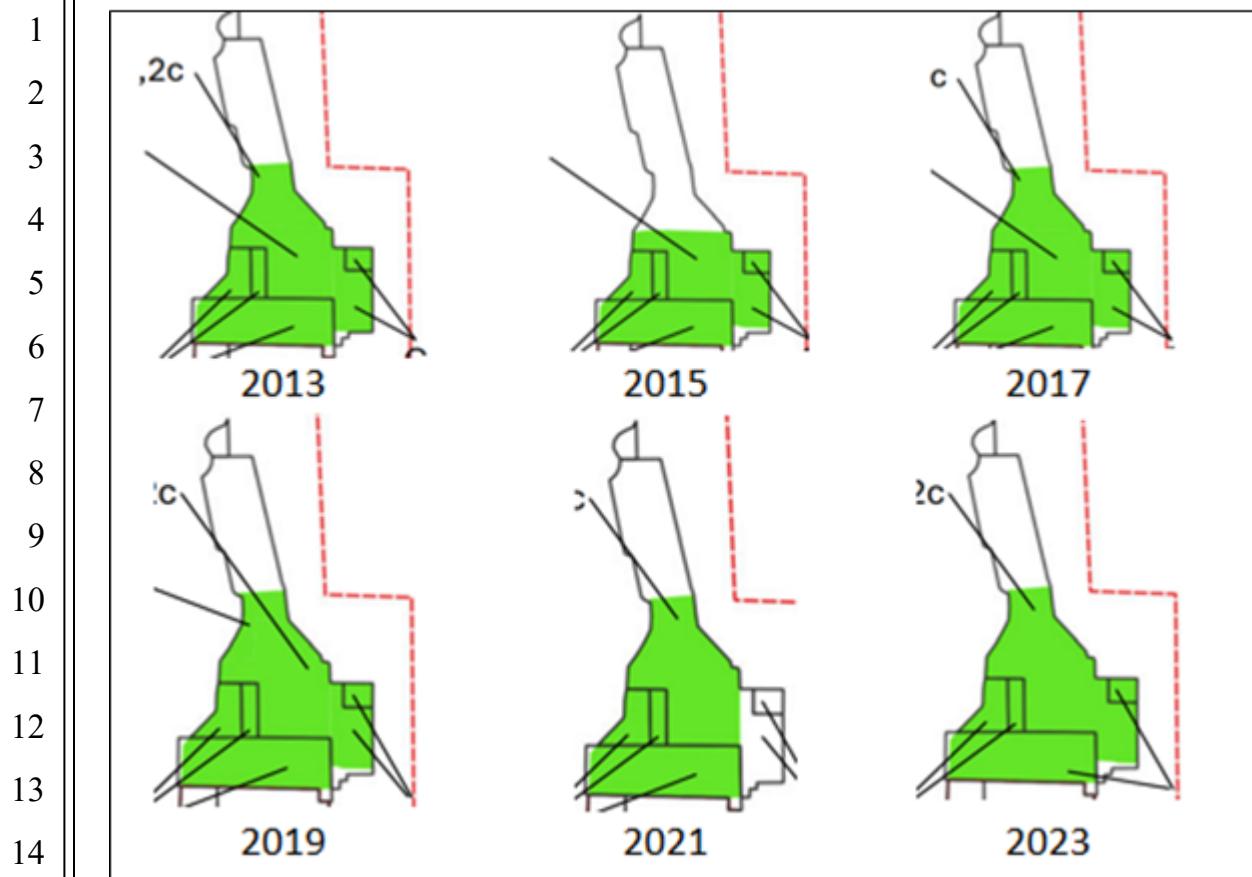
12 **IT IS ORDERED** finding that ASARCO or its predecessors ceased using
13 water for irrigation purposes for five successive years on PZ Ranch fields IR07–IR11.
14 Whether there was sufficient cause for non-use under A.R.S. § 45-189(E)(5) and
15 (E)(9) is reserved for trial.⁵²

16 Next, imagery available between 2013 and 2023 indicates consistent non-use
17 of the northern tail and southeast corner of field IR06. Mr. Garrett’s interpretation of
18 the aerial imagery, as shown in Figure 9, illustrates this well. The maximum irrigated
19 acreage during this period is 94.9 acres.

20 **IT IS ORDERED** finding that ASARCO or its predecessors partially forfeited
21 appropriative rights for irrigation on PZ Ranch field IR06. ASARCO, therefore, may
22 obtain appropriative rights for a maximum of 95 acres within field IR06.

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27 ⁵¹ U.S. PZ Ranch Motion at 16.

28 ⁵² As a condition of permits issued by the Army Corps of Engineers under section 404 of the Clean Water Act,
ASARCO is required to dedicate water rights appurtenant to “mitigation lands” for the “creation, restoration,
and/or maintenance of riparian/wetland habitat.” [ASARCO Exhibit 89]; [ASARCO Exhibit 90].



15 **Figure 9** – Mr. Garrett's interpretation of aerial imagery of PZ Ranch field IR06. [Exhibit 6
 16 at PDF 81–86].

17 With respect to IR05, evidence of forfeiture is sparser, but nonetheless creates
 18 a genuine issue of material fact. Although the timeline contains significant gaps, the
 19 available imagery reveals no more than 0.7 acres of cultivated land between 1935 and
 20 1972.⁵³ Clarifying some of the uncertainty, the U.S. also presents evidence of an
 21 approximately five-year period of foreclosure coinciding with a period of decreased
 22 irrigation.⁵⁴ Hence, the imagery, coupled with evidence of foreclosure, could lead to a
 23 reasonable inference of forfeiture with respect to field IR05.

24 **1.4.5 RESUMPTION OF USE**

25 ASARCO argues that, even assuming non-use of water for five years on the

27 ⁵³ U.S. PZ Ranch Motion at 15; [ASARCO Exhibit 6 at PDF 21].

28 ⁵⁴ Both the U.S. and ASARCO acknowledge that “the aerial photograph from 1935” falls during the foreclosure
 time frame of “1931 to 1936.” ASARCO PZ Ranch Motion at 16; ASARCO SOF ¶ 122; [ASARCO Exhibit 6 at
 PDF 27].

1 ranches, section 45-188(B) of the Arizona Revised Statutes and the common law
2 resumption-of-use doctrine prevent forfeiture in this case. Section 45-188(B) states
3 that “failure by the appropriator to use water within a five-year period does not result
4 in a forfeiture . . . if water use is resumed before . . . the filing by a third party of a
5 statement of claimant in a general adjudication . . . that asserts the right to use water
6 from the stream in which the subject nonuse has occurred.”⁵⁵ ASARCO asserts that,
7 under the common law, a resumption of use is valid so long as it is accomplished
8 before a third party has “instituted proceedings to declare a forfeiture” or beneficially
9 used the unused water.⁵⁶

10 Section 45-188(B) does not excuse the non-use recognized on Robinson Ranch
11 field IR01 and PZ Ranch fields IR03 and IR06–IR11. The non-use recognized on
12 those fields occurred long after the filing of the first statements of claimant on
13 Aravaipa Creek and the San Pedro River, “the stream[s] in which the subject nonuse
14 has occurred.”⁵⁷

15 The common law resumption-of-use doctrine also does not apply to the non-
16 use recognized above. It is a core legal principle that “when a substantive statute
17 conflicts with the common law, the statute prevails.” *Seisinger v. Siebel*, 220 Ariz. 85,
18 92 (2009); *see also* A.R.S. § 1-201. Section 45-188(B) sets out an exclusive, bright-
19 line rule by which to determine the validity of the resumption of an appropriation.
20 Therefore, to the extent that a more permissive, common-law resumption of use
21 doctrine existed in Arizona, the legislature effectively repealed that doctrine by
22 promulgating A.R.S. § 45-188(B).

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⁵⁵ A.R.S. § 45-188(B)(3).

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⁵⁶ W1-11-2801, ASARCO LLC’s Response to United States’ Motion for Partial Summary Judgment – Robinson Ranch Area (“ASARCO Response to U.S. Robinson Motion”) at 9 (Sept. 18, 2025).

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⁵⁷ The court takes judicial notice of statement of claimant nos. 39-329 and 39-330. Statement of claimant 39-329, filed in 1979, asserts a right to Aravaipa Creek. Statement of claimant 39-330, also filed in 1979, asserts a right to the San Pedro River.

1 **1.5 NO-INJURY INQUIRY**

2 Under the prior appropriation doctrine, appropriators “acquire rights to the
3 stream . . . as it exists when they find it.” *Montana v. Wyoming*, 563 U.S. 368, 375
4 (2011); *see also Farmers Highline Canal & Reservoir Co. v. City of Golden*, 272 P.2d
5 629, 631 (1954). Accordingly, junior water users may prevent senior users from
6 changing certain characteristics of their water rights “to the junior users’ detriment.”
7 *Montana*, 563 U.S. at 377. In Arizona, an appropriator “has the burden of establishing
8 that a change in his diversion or in his use of water has not negatively affected the
9 rights of other appropriators.” *Zannaras*, 260 F.2d 575, 577 (9th Cir. 1958).

10 The no-injury rule generally applies to changes to a “place of diversion, or
11 place or purpose of use.” *Montana*, 563 U.S. at 379. The no-injury rule generally does
12 not apply to “improvements to irrigation systems” and “ordinary . . . operational
13 changes.” *Id.* at 379. Where the no-injury rule applies, it precludes changes of use that
14 increase the consumptive use of water. *See 3G AG LLC v. Idaho Dep’t of Water Res.*,
15 509 P.3d 1180, 1193 (2022); *see also* 1 Waters and Water Rights § 14.04(c)(1) (2024).
16 The no-injury rule also precludes changes to timing of use that “are detrimental to
17 other appropriators’ rights.” *R.D. Merrill Co. v. State*, 969 P.2d 458, 464 (Wash.
18 1999). To the extent that a past change of use has harmed other appropriators, the
19 Special Master need not reject a water right claim altogether, but may limit the claim
20 in order to avoid that harm going forward. *See City of Roswell v. Berry*, 452 P.2d 179,
21 181 (N.M. 1969); *Merrill*, 969 P.2d at 464.

22 There is no argument that every irrigation claim at issue in this contested case
23 involves a historical change from surface water diversions to wells. Filing cross-
24 motions, the Gila River Indian Community (“the Community”) and ASARCO dispute
25 whether ASARCO’s predecessors’ substitution of wells for surface water diversions
26 caused harm.⁵⁸ The Community first argues, as a general matter, that ASARCO

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28 ⁵⁸ Community Motion at 6; ASARCO No Injury Motion at 4. The Community also seeks a decision on two
undisputed issues. First, the Community seeks to limit the points of diversion that ASARCO may claim for
irrigation to “the six wells currently in operation.” Community Motion at 5. The Community also seeks a
finding that those wells “pump only subflow.” Community Motion at 5. As to the first issue, ASARCO has not

1 cannot meet its burden to prove non-injury because ASARCO has failed to disclose
2 direct evidence of historical surface water diversion and use.⁵⁹ The remaining
3 arguments in the cross-motions center on the existence of harms related to
4 consumptive use, timing of diversions, groundwater elevations, and water quality.⁶⁰

5 **1.5.1 STANDARD OF PROOF & USE OF CIRCUMSTANTIAL EVIDENCE**

6 The Community argues that ASARCO has not presented any *direct* evidence
7 that consumptive use did not increase and that timing of use did not change “as a
8 result of the change to wells.”⁶¹ The Community specifically points out that
9 “ASARCO has not presented any records directly demonstrating quantity of
10 consumptive use,” and that “ASARCO cannot prove the timing of its historical
11 diversions because it lacks any records of such diversions.”⁶² ASARCO does not
12 dispute that it has not offered direct proof regarding consumptive use and timing of
13 use, e.g. records of streamflow or diversion. In a deposition, in fact, ASARCO’s
14 expert on the issue, Scott Snyder, stated that he “didn’t do a quantitative analysis of
15 consumptive use.”⁶³ As discussed below, ASARCO need not provide direct evidence
16 of non-injury; ASARCO may prove non-injury by relying on indirect evidence.

17 Generally, the burden of proving a fact lies with the party who asserts, rather
18 than denies, the fact,⁶⁴ and the standard of proof in a civil case is generally the

20 claimed points of diversion for irrigation other than the “wells currently in operation.” If a well is not claimed as
21 a point of diversion in one of ASARCO’s SOCs, the Special Master will not consider that well in this contested
22 case. Next, whether the wells pump only subflow is wholly undisputed. W1-11-2801, ASARCO’s Response to
Gila River Indian Community’s Motion for Partial Summary Judgment (“ASARCO Response to Community
Motion”) at 14 (Sept. 18, 2025). The Special Master therefore concludes that all irrigation wells at issue in this
contested case pump only subflow.

23 ⁵⁹ Community Motion at 7, 10.

24 ⁶⁰ Community Motion at 7, 10; ASARCO No Injury Motion at 4, 6, 7.

25 ⁶¹ Community Motion at 6, 10

26 ⁶² Community Motion at 7, 10.

27 ⁶³ W1-11-2801, Gila River Indian Community’s Separate Statement of Facts in Support of Motion for Partial
Summary Judgment (“Community SOF”) ¶ 33 (Aug. 22, 2025); [Community Exhibit 4, 04292025:35 (Snyder)].

28 ⁶⁴ See *Yeazell v. Copins*, 98 Ariz. 109, 116 (1965) (“The party who asserts a fact has the burden to establish the
fact.”); *Durazo v. Ayers*, 21 Ariz. 373, 381 (1920); *Philadelphia Co. v. Securities and Exchange Comm’n*, 175 F.2d
808, 818 (D.C. Ct. App. 1948) (“[T]he burden of proof lies upon him who affirms, not him who denies.”); *Porter
Twp. Initiative v. E. Stroudsburg Area Sch. Dist.*, 44 A.3d 1201, 1209 (Pa. Commw. Ct. 2012) (“[R]arely, if ever
does our legal system impose a burden upon one party to parry a potentially limitless series of accusations of
wrongdoing by repeatedly proving the negative.”); *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419 (Ct. App. 1990).

1 “preponderance of the evidence.” *Harvey v. Aubrey*, 53 Ariz. 210, 213 (1939).
2 Unusually, with respect to changing an appropriative right, the burden of proof is
3 allocated to the party denying, rather than asserting, injury.⁶⁵ Courts justify this
4 allocation on the grounds that a change of use “disturbs the existing order,” and it is
5 therefore “fitting that a party who asks such relief should bear the burden.” *New*
6 *Cache La Poudre Irr. Co. v. Water Supply & Storage Co.*, 111 P. 610, 611 (1910).
7 Nonetheless, proving non-injury is often a challenging, expensive endeavor.⁶⁶ After
8 the passage of many decades, the difficulties inherent in proving non-injury under the
9 default preponderance of the evidence standard can become insurmountable.

10 The staleness of the claims in this contested case therefore informs the
11 appropriate standard of proof. While not directly applicable to this case, the equitable
12 doctrine of laches provides a helpful guidepost. Applying the doctrine, courts have
13 declared that “evidentiary prejudice” caused by an unreasonable delay in raising a
14 claim is sufficient to bar the claim. *See Danjaq v. Sony Corp.*, 263 F.3d 942, 955 (9th
15 Cir. 2001). Evidentiary prejudice includes “lost, stale, or degraded evidence, or
16 witnesses whose memories have faded or who have died.” *Id.*

17 In a 2018 case, the U.S. District Court for the District of Arizona barred, on the
18 grounds of laches, a breach of contract claim asserted by Salt River Project (“SRP”)
19 against Roosevelt Irrigation District. *Roosevelt Irrigation District v. U.S.*, 2018 WL
20 4568745 at *5 (Sept. 14, 2018). SRP entered a contract in 1921 with Roosevelt
21 Irrigation District (“Roosevelt”) that restricted “pumping of water such that the water

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⁶⁵ *Zannaras*, 260 F.2d 575, 577 (9th Cir. 1958) (“It is axiomatic in water law that the appropriator . . . always has the burden of establishing that a change in his diversion or in his use of water has not affected the rights of other appropriators.”); *U.S. v. Gila Valley Irrigation District*, 859 F.3d 789, 794 (9th Cir. 2017) (“The applicant shall have the burden of establishing a *prima facie* case of no injury to the rights of other parties under the Gila Decree and a right to transfer.”); *Barron v. Idaho Dep’t of Water Resources*, 18 P.3d 219, 226 (Idaho 2001); *Searle v. Milburn Irr. Co.*, 133 P. 3d 382, 396 (Utah 2006); *New Cache La Poudre Irr. Co. v. Water Supply & Storage Co.*, 111 P. 610, 611 (Colo. 1910); *but see Barnes v. Hussa*, 136 Cal.App.4th 1358, 1366 (Ct. App. 2006).

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⁶⁶ Charles J. Meyers and Richard A. Posner, *Market Transfers of Water Rights: Toward an Improved Market in Water Resources* 33–44 (1972) (“Proof of a sweeping negative—that no other users will be injured by the transfer—is difficult and costly.”); *Tanner v. Humphreys*, 48 P.2d 484, 489 (Utah 1935) (“[A]s a practical matter those who protest will most likely be better situated to know wherein they will be injured than will the plaintiff.”); *Bumble Bee Seafoods v. Director*, 629 F.2d 1327, 1329 (9th Cir. 1980) (describing difficulty in proving *absence* of employment opportunities); *U.S. v. Wylie*, 625 F.2d 1371, 1377 (9th Cir. 1980) (“It should be remembered that, as a practical matter, it is oftentimes difficult to prove a negative.”).

1 table was not lowered more than 50 feet below the surface.” *Id.* In 2017, SRP, for the
2 first time, sought to enforce the “50-foot provision” against Roosevelt for alleged
3 violations dating back to the 1940s. *Id.* The court held that “[b]ecause 90 years have
4 passed since [the contract], it is irrefutable that all—or nearly all—of those who
5 negotiated [it] have long passed. With such a long delay, evidentiary prejudice need
6 not be explicitly demonstrated, but may be assumed.” *Id.*

7 While evidentiary prejudice does not bar claims of injury in this case,
8 evidentiary prejudice should inform the standard of proof. The changes in points of
9 diversion are being litigated in the first instance nearly a century after the changes
10 were made. Any records directly establishing return flows and consumptive use are
11 almost certainly lost to time, and the individuals who installed the wells have certainly
12 passed on. As it was unfair to make Roosevelt divine the century-old intentions of its
13 agents, it is unfair to require ASARCO here to establish precise details concerning
14 long-established changes to its points of diversion.

15 With respect to long-completed changes of use, a preponderance of the
16 evidence standard of proof is simply unworkable and unfair. As the Utah Supreme
17 Court recognized in *Crafts v. Hansen*, uncertainty is the rule when evaluating
18 *proposed* changes of use. 667 P.2d 1068, 1081 (Utah 1983) (“We are not dealing so
19 much with ‘facts’ . . . as with the opinion of experts about the accuracy and legitimacy
20 of the projections based upon the available facts.”). This uncertainty is also inherent,
21 if not stronger, in the evaluation of historical changes. Accordingly, the applicable
22 standard of proof here is “evidence sufficient to support a reasonable belief” that the
23 change did not cause injury. *Searle v. Milburn Irr. Co.*, 133 P.3d 382, 395 (Utah 2006).
24 Once the claimant has made a *prima facie* showing of non-injury, the burden shifts to
25 the objector to prove injury by a preponderance of the evidence. To meet its *prima
26 facie* burden of proving non-injury, a party may rely on indirect evidence.⁶⁷

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28
67 Whenever possible, however, quantitative evidence is best.

1 **1.5.2 GROUNDWATER ELEVATIONS AND WATER QUALITY**

2 In its motion for summary judgment, ASARCO discusses whether the
3 installation of wells on the ranches has resulted in “water level declines” and
4 “downstream water quality degradation.”⁶⁸ With respect to groundwater elevations,
5 the Community and ASARCO cite competing expert interpretations of Groundwater
6 Site Inventory data obtained from Arizona Department of Water Resources
7 (“ADWR”). Regarding water quality, the Community and ASARCO dispute whether
8 ASARCO’s expert analysis is sufficiently supported.

9 First, Scott Snyder’s review of the Groundwater Site Inventory data reveals
10 long-term stability in groundwater elevations after installation of the irrigation
11 wells.⁶⁹ The Community does not dispute this conclusion, acknowledging a
12 “pervasive observation of relative long-term stability of water levels in the subflow
13 zone of the San Pedro River and Aravaipa Creek.”⁷⁰ Instead, the Community asserts
14 that the groundwater elevation argument overlooks the wells’ effect on streamflow.⁷¹
15 Hence, no genuine issue of material fact exists as to the stability of groundwater
16 elevations in the vicinity of the ranches. Issues regarding downstream water
17 availability are discussed in sections below.

18 Second, as to water quality, ASARCO again cites the analysis of its expert,
19 Scott Snyder. Mr. Snyder states that “streamflow and subflow are the same water” and
20 that “excess water infiltrates downward and back into the hydrologic system.”⁷² The
21 Community’s rebuttal primarily focuses on an absence of water quality data from
22 before the installation of wells.⁷³ Further, the Community cites Mr. Snyder’s
23 statement that increases in consumptive use are a “potential reason” for changes in

24
25 ⁶⁸ ASARCO No Injury Motion at 6.

26 ⁶⁹ ASARCO SOF ¶ 218; [ASARCO Exhibit 47 at PDF 27].

27 ⁷⁰ [Community Exhibit 8 at PDF 10].

28 ⁷¹ While the parties don’t dispute the fact of water level stability, they disagree regarding its significance to the
general no-injury inquiry.

29 ⁷² [ASARCO Exhibit 47 at PDF 10].

30 ⁷³ Community SOF ¶ 220; [ASARCO Exhibit 47 at PDF 33] (“[T]here is not a good historical record of water
quality data preceding or following the 1950 to 1965 period . . .”).

1 water quality.⁷⁴

2 As discussed above, a claimant can meet its burden of proving no injury
3 without presenting direct evidence. ASARCO’s evidence pertaining to water quality,
4 though inferential, presents a genuine issue of material fact as to the effect of the
5 wells on water quality. A genuine issue of material fact also exists as to the effect of
6 increases in consumptive use, to the extent that they occurred, on water quality.

7 **1.5.3 TIME OF USE**

8 The Community and ASARCO’s dispute regarding timing of use boils down to
9 whether “on demand” diversions enabled by the installation of wells allowed
10 ASARCO’s predecessors to extend their irrigation season.⁷⁵ To the extent that the
11 irrigation season expanded, ASARCO seeks to prove that that change did not cause
12 harm to other appropriators.⁷⁶ As described below, ASARCO has not disclosed
13 sufficient evidence to make a *prima facie* case of no harm.

14 **1.5.3.1 Existence of Change in Time of Use**

15 The Community argues that, before the installation of irrigation wells,
16 ASARCO’s predecessors’ made minimal, if any, diversions during the “extremely dry
17 period . . . of April, May, and June.”⁷⁷ Moreover, the Community argues that
18 “flooding inhibited diversions from July to November because ditch headings were
19 often washed out.”⁷⁸ Ultimately, the Community argues that use of the wells, which
20 facilitate “on demand, year-round diversions,” allowed ASARCO’s predecessors to
21 overcome those temporal limitations.⁷⁹

22 ASARCO largely concurs with the Community that installation of wells
23 enabled its predecessors to divert water during the late spring and early summer
24 months. ASARCO’s own expert, Scott Snyder, affirmed that the wells made water

26 ⁷⁴ [04292025:101 (Snyder)]

75 Community Motion at 10.

27 ⁷⁶ ASARCO No Injury Motion at 4.

28 ⁷⁷ Community Motion at 11; Community SOF ¶ 22.

⁷⁸ Community Motion at 12.

⁷⁹ Community Motion at 10.

1 available “on demand.”⁸⁰ According to Mr. Snyder, that on-demand availability
2 allowed ASARCO’s predecessors to avoid intensive use of water during the “winter
3 and springtime” and instead “spread out the demand on the river [even] during times
4 when there is lesser flow.”⁸¹

5 ASARCO, therefore, does not meaningfully dispute that its predecessors
6 changed the timing of their water use. At a minimum, the predecessors extended their
7 time of use into the relatively untapped dry season comprising late spring and early
8 summer. Whether ASARCO’s predecessors extended their use into the flood season
9 remains a genuine issue of material fact.

10 **1.5.3.2 Harm Caused by Change in Time of Use**

11 The Community and ASARCO also argue as to whether the change in timing
12 of use, to the extent that it occurred, has harmed other appropriators. The Community
13 contends that ASARCO’s changes in time of use increase pressure on the San Pedro
14 River and Aravaipa Creek by increasing depletions between April and July.⁸² Per the
15 Community, these diversions “caus[e] depletions at exactly the time when other
16 irrigators in the system downstream most need the water.”⁸³

17 ASARCO makes two responses. First, ASARCO claims that use of irrigation
18 ditches depletes the hydrologic system in the same manner as use of irrigation wells.⁸⁴
19 In the alternative, ASARCO argues that delayed “depletive impacts” resulting from
20 wells (as opposed to immediate impacts from surface water diversions) are a *benefit*
21 to downstream water users during the dry season.⁸⁵

22 ASARCO does not deny that predecessors’ diversion schedule expanded into
23 the dry season for Aravaipa Creek and the San Pedro River. It is almost certain that a
24

25 ⁸⁰ [Community Exhibit 4, 05212025:23 (Snyder)].

26 ⁸¹ Community SOF ¶ 41; [Community Exhibit 4, 04292025:65–66 (Snyder)].

27 ⁸² Community Motion at 12.

⁸³ *Id.*

28 ⁸⁴ ASRCO Response to the Community at 5; W1-11-2801, ASARCO LLC’s Omnibus Response to Statements of Fact in Support of Motions for Partial Summary Judgment (“ASARCO Responsive SOF”) ¶ 211 (Sept. 18, 2025).

⁸⁵ ASARCO No Injury Motion at 10; ASARCO SOF ¶ 221.

1 given depletion of those hydrologic systems during the dry season has a more
2 deleterious impact on other appropriators than the same depletion outside the dry
3 season.

4 ASARCO's responses do not address this fact. Under ASARCO's first theory,
5 new diversions during the dry season cause new, immediate depletions during that
6 season. Under ASARCO's second theory, operation of irrigation wells prior to the dry
7 season would cause delayed, but still new depletions during the dry season. In either
8 scenario, there are new depletions during the dry season that harm downstream users.

9 In conclusion, there is no genuine issue of material fact that ASARCO's
10 predecessors' extension of the irrigation season into late spring and early summer has
11 harmed other appropriators. Genuine issues of material fact remain regarding whether
12 and how to limit ASARCO's water rights claims in light of that harm.

13 ***1.5.4 CONSUMPTIVE USE***

14 ASARCO and the Community dispute the net effect of the ranches' wells on
15 consumptive use. ASARCO seeks to prove that its switch to wells caused significant
16 increases in water efficiency and decreases in water demand.⁸⁶ The Community, in
17 response, contends that increases in crop yields enabled by the switch to wells caused
18 an overall increase in consumptive use.⁸⁷ Further, the Community and ASARCO
19 dispute who carries the burden with respect to the "crop yield" argument.⁸⁸ The
20 motions present the following issues:

- 21 1. Whether ASARCO or the Community carries the burden of proof with
22 respect to the "crop yield" issue.
- 23 2. Whether an increase in crop yields occurred.
- 24 3. Whether increases in crop yields were the result of the switch to wells.
- 25 4. Whether the switch to wells caused a net increase in consumptive use.

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27
28⁸⁶ ASARCO No Injury Motion at 4.

⁸⁷ Community Motion at 7.

⁸⁸ Community Motion at 7; ASARCO Response to the Community at 8–11.

1.5.4.1 Burden of Proof

2 In this case, ASARCO carries the burden of proving that its predecessors'
3 switch to wells did not increase consumptive use by way of increased crop yields. As
4 discussed above, it is indisputable that predecessors' installation of wells permitted
5 them more flexibility regarding the timing of water application. That flexibility would
6 certainly allow ASARCO's predecessors to irrigate and grow crops under more
7 optimal conditions. Hence, good reason exists to presume an increase in crop
8 production resulting from ASARCO's predecessors' transition to wells. In making its
9 *prima facie* case, ASARCO therefore must consider whether its predecessors' switch
10 to wells affected consumptive use through improved crop production.

1.5.4.2 Existence of Increase in Crop Yields

12 As to actual increases in crop yields on the Ranches, the Community points to
13 “three-fold” increases in crop yields in Arizona “after high capacity wells became
14 common in the 1940s.”⁸⁹ Assuming that the Community bears the burden of proving
15 harm, ASARCO responds that the Community’s disclosure of “general statewide and
16 countywide data [describing] alfalfa yields” provides no information regarding crop
17 yields on the ranches.⁹⁰

18 As described above, ASARCO bears the burden regarding the issue of
19 increased crop yields. Because ASARCO has presented no evidence, direct or
20 indirect, regarding crop yields on the ranches, no genuine issue of material fact exists
21 regarding the existence of crop yield increases on the ranches.

1.5.4.3 Cause of Increased Crop Yields

23 An increase in consumptive use is outside the scope of the no-injury rule to the
24 extent that it is the result of “ordinary, day-to-day operational changes or repairs.”
25 *Montana v. Wyoming*, 563 U.S. 368, 379 (2011). ASARCO and the Community,
26 accordingly, dispute whether the switch to irrigation wells was the cause of purported

⁸⁹ Community Motion at 7.

⁹⁰ ASARCO Response to Community at 9.

1 increases in crop yields. While the Community argues that “irrigating crops when they
2 most need the water,” enabled by the installation of wells, caused increases in crop
3 yields, ASARCO attributes increases in crop yields to improvements in agricultural
4 technology and crop management practices.⁹¹

5 ASARCO has disclosed substantial evidence to support its theory. Most
6 notably, ASARCO cites the Community’s own expert, Brian Westfall, who states that
7 “fertilizers, different varieties of pest management, . . . irrigation management, [and]
8 general crop management . . . are contributing factor[s] to crop yields.”⁹²

9 Clearly, both ASARCO and the Community concur that crop yield depends on
10 a multitude of factors. The extent to which the ranchers’ switch to wells, versus other
11 factors, influenced crop yield increases, however, is a genuine issue of material fact.

12 **1.5.4.4 Net Effect of Wells on Consumptive Use**

13 Finally, the Community and ASARCO dispute whether increases in crop yields
14 caused net increases in consumptive use on the ranches. Acknowledging the
15 phenomenon of transpiration, the Community makes the commonsense argument that
16 “[c]onsumptive use . . . increases as crop yields go up.”⁹³ ASARCO responds that
17 improvements in water efficiency balance any increases in consumptive use resulting
18 from growth in crop yields.⁹⁴

19 ASARCO backs up its assertion with testimony from its expert, Scott Snyder.
20 Mr. Snyder explains that the switch to wells eliminated two wasteful irrigation
21 practices: “over-irrigat[ion] with surface water before the dry season” and “storage
22 reservoirs that were able to store water for use during the dry season.”⁹⁵ In another
23 report, Snyder describes diminution of transmission losses, including water
24 consumption by vegetation along miles-long unlined ditches and “evaporat[ion] to the

26 ⁹¹ Community Motion at 7; ASARCO Response to Community at 10.
27 ⁹² ASARCO No Injury Motion at 8; ASARCO SOF No. 227; [06172025:41–44 (Westfall)].
28 ⁹³ Community Motion at 7, 11; Community SOF ¶ 35.
 ⁹⁴ ASARCO No Injury Motion at 4–5.
 ⁹⁵ [ASARCO Exhibit 49 at PDF 10]

1 atmosphere” of water flowing through the same.⁹⁶

2 The expert analysis described above presents genuine issues of material fact as
3 to whether ASARCO can meet its burden to prove no harm. Genuine issues of
4 material fact exist as to whether the transition to wells reduced water demand on the
5 ranches and, in turn, balanced any increases in consumptive use resulting from
6 enhanced crop yields.

7 ***1.5.5 CONCLUSION***

8 Genuine issues of material fact exist with respect to the effect of ASARCO’s
9 predecessors’ transition to wells on water quality and consumptive use. There is no
10 genuine dispute that the installation of wells harmed downstream water users by
11 affecting the timing of flows. Further, there is no genuine dispute that the installation
12 of wells did not affect groundwater elevations. To the extent that harm has resulted
13 from the transition to wells, ASARCO bears the burden of revising its claims to avoid
14 that harm.

15

16 **2.0 DOMESTIC CLAIMS**

17 ASARCO makes a single domestic claim for each of its three ranches, each
18 claim with a single priority date: January 31, 1876, for Aravaipa Ranch, December
19 14, 1887, for PZ Ranch, and June 26, 1877, for Robinson Ranch. Each claim seeks 2
20 acre-feet of water annually. ASARCO currently leases the three ranches and identifies
21 a single structure on each of the Robinson Ranch and Aravaipa Ranch properties.⁹⁷
22 ASARCO does not identify any structure on PZ Ranch. ASARCO has not disclosed
23 whether or how many individuals currently live on any of their ranches, or in what
24 manner any structures on the properties are currently used for residential or
25 commercial purposes. To establish a pre-1919 domestic water right, ASARCO must
26 establish, at minimum, the date on which the appropriation was perfected, and the

27

28 ⁹⁶ ASARCO SOF ¶ 214; [ASARCO Exhibit 47 at PDF 16–17].

⁹⁷ W1-11-2801, San Carlos Apache Tribe’s Statement of Facts in Support of its Motion for Summary Judgment (“Tribe SOF”) ¶¶ 4, 22, 36 (Aug. 22, 2025).

1 “quantity of water beneficially used and the specific lands upon which the waters
2 were used.” *Gillespie*, 75 Ariz. 377, 397 (1953).

3 In its motion for partial summary judgment, the San Carlos Apache Tribe (“the
4 Tribe”) asserts that ASARCO’s claims to water for domestic use are not supported by
5 sufficient evidence.⁹⁸ The Tribe further asserts that even if ASARCO can establish
6 pre-1919 domestic uses, “any claims to domestic uses beyond the current farmhouses
7 have been abandoned or forfeited.”⁹⁹

8 ASARCO bases its 2 acre-foot per year quantification on an assumption that an
9 average of 10 people historically lived on all the combined acreage of each ranch and
10 that each of those individuals used approximately 180 gallons of water per day.¹⁰⁰
11 ASARCO derives past ranch populations from land entry filings associated with
12 Aravaipa Ranch, PZ Ranch, and Robinson Ranch.¹⁰¹ ASARCO then assumes an
13 average population for each ranch of approximately 10 individuals to “account for
14 employees and seasonal workers as well as the subsequent consolidation of the
15 ASARCO Ranch lands.”¹⁰²

16 Because ASARCO has not disclosed any probative evidence supporting its
17 claimed water use rate or evidence describing the specific locations of historical
18 domestic use on the ranches, the Special Master dismisses ASARCO’s domestic use
19 claims. Accordingly, any issue pertaining to forfeiture of domestic rights on the
20 ranches is moot.

22 **2.1 WATER USE RATE**

23 ASARCO discloses no evidence shedding light on the domestic water demand
24 of a 19th century homestead but simply adopts ADWR’s “standard domestic use”

26 ⁹⁸ Tribe Motion at 12–13.

27 ⁹⁹ *Id.*

28 ¹⁰⁰ [ASARCO Exhibit 1 at PDF 32].

¹⁰¹ ASARCO states that initial populations on Aravaipa Ranch, PZ Ranch, and Robinson Ranch were 5, 14, and 15 individuals, respectively. *Id.* at 28.

¹⁰² *Id.*

rate, an estimate for the water demand of a contemporary household.¹⁰³ Accordingly, ASARCO cannot prove a historical water use rate for any of its domestic claims.

2.1.1 ARAVAIPA RANCH

5 ASARCO proffers Louis Land's patent file, describing Louis Land's
6 December 14, 1887, settlement of S½N½ & N½S½ Section 11, Township 7 South,
7 Range 16 East, as evidence of historical domestic use on Aravaipa Ranch.¹⁰⁴ While it
8 is reasonable to infer that Louis Land used water for domestic purposes on the
9 patented property, the patent file does not describe with any specificity where in the
10 320-acre tract Land's domestic use took place. Moreover, as to population size,
11 ASARCO does not respond to the Tribe's motion with records documenting anyone
12 other than Mr. Land residing on the property.

2.1.2 PZ RANCH

14 ASARCO cites homestead records associated with NE $\frac{1}{4}$ Section 32, Township
15 6 South, Range 16 East, and a December 15, 1877, GLO Survey of Township 6
16 South, Range 16 East. According to ASARCO, the homestead records reveal that, by
17 at least January 31, 1876, Dodson “and his family of five” had settled NE $\frac{1}{4}$ Section
18 32.¹⁰⁵ The December 15, 1877, GLO Survey does appear to reference the “Dodsons”
19 and show structures attributed to “A. McVeigh” and “Klob” in NE $\frac{1}{4}$ Section 32 and
20 NW $\frac{1}{4}$ Section 33 and near the current boundaries of PZ Ranch. On the evidence
21 presented in ASARCO’s response to the Tribe’s motion, seven individuals, at most,
22 resided in the area comprising PZ Ranch when the area was first settled.

2.1.3 ROBINSON RANCH

24 Lastly, ASARCO claims that historical records of early settlement for

²⁶ 103 W1-11-2801, ASARCO LLC’s Response to San Carlos Apache Tribe’s Motion for Partial Summary
²⁷ Judgment (“ASARCO Response to Tribe”) at 11 (Sept. 18, 2025). The Special Master takes judicial notice of
ADWR’s “Worksheet for Determining Quantities of Use,” attached to the agency’s “Application for Certificate
of Water Right.”

¹⁰⁴ ASARCO Response to Tribe at 9.

¹⁰⁵ ASARCO PZ Ranch Motion at 10; [ASARCO Exhibit 1 at PDF 43]; ASARCO Robinson Ranch Motion at 10.

1 Robinson Ranch indicate that an appropriation of water for domestic use was made by
2 June 26, 1877. Settlement of Robinson Ranch began with William Harrington in June
3 1877 and continued with William Cunningham, George Scott, William Selleck, and
4 Anton Hogvall through 1906.¹⁰⁶ As with the other federal land entry records cited by
5 ASARCO, these records do not establish the locations of domestic use with any
6 specificity. In its response, ASARCO also does not substantiate its claims that 15
7 individuals initially resided on the ranch, and that 10 individuals have resided on the
8 ranch since.

9 **IT IS ORDERED** dismissing claims for domestic use associated with
10 Aravaipa Ranch, PZ Ranch, and Robinson Ranch.

11

12 **3.0 STOCKWATERING CLAIMS**

13 Finally, ASARCO has set forth one stockwatering claim for each of its three
14 ranches. For its Aravaipa Ranch and Robinson Ranch claims, ASARCO alleges a
15 single priority date for “the entirety” of each ranch.¹⁰⁷ For PZ Ranch, ASARCO
16 seeks a stock watering right for a portion of the ranch. Though ASARCO has
17 disclosed evidence of the historical presence of other livestock on the ranches,
18 ASARCO’s stock watering claims appear to be based solely on the water needs of
19 cattle.¹⁰⁸

20 Mr. Burtell calculated water demand values for cattle on each ranch by
21 multiplying a water use rate of “12 gallons per head per day” (“gphd”) by number of
22 cattle. To estimate the historical number of cattle on the ranches, Mr. Burtell
23 consulted a local rancher, Jack Mann, who indicated that the ranches can “reasonably
24 support” 590, 180, and 220 head of cattle at Aravaipa Ranch, PZ Ranch, and
25 Robinson Ranch respectively.¹⁰⁹ Mr. Burtell multiplied those head counts by the 12

26

27 ¹⁰⁶ ASARCO Robinson Motion at 10.

¹⁰⁷ ASARCO SOF ¶¶ 64-65, 74.

¹⁰⁸ ASARCO Response to Tribe at 13-14; [ASARCO Exhibit 1 at PDF 31-32].

¹⁰⁹ Jack Mann currently leases lands from ASARCO on all three ASARCO ranches. W1-11-2801, San Carlos

1 gphd water use rate to arrive at ASARCO's claimed quantities of 7.9 AFA (Aravaipa
2 Ranch), 2.4 AFA (PZ Ranch), and 3.0 AFA (Robinson Ranch).¹¹⁰

3 In its motion for summary judgment, the Tribe asserts that ASARCO's claims
4 of water for stock use are not supported by sufficient evidence.¹¹¹ Specifically, the
5 Tribe asserts that ASARCO's only disclosed evidence regarding historical cattle
6 populations on the ranches is irrelevant.

7 Stock watering rights on the ranches cannot be quantified according to the
8 maximum number of cattle that could theoretically graze on the ranches. Because
9 ASARCO has not disclosed any evidence of historical cattle populations on the
10 ranches, ASARCO cannot prove its stock watering claims.

11 **IT IS ORDERED** dismissing stock watering claims on Aravaipa Ranch, PZ
12 Ranch, and Robinson Ranch.

13

14 **CONCLUSION**

15 **IT IS ORDERED:**

16

17 1. GRANTING in part and DENYING in part the Community's motion for
18 partial summary judgment.

19 2. GRANTING in part and DENYING in part each of the U.S.'s motions for
partial summary judgment.

20 3. DENYING each of ASARCO's Motions for Partial Summary Judgment
Nos. 1–3.

21 4. GRANTING in part and DENYING in part ASARCO's Motion for Partial
Summary Judgment No. 4.

22 5. GRANTING the Tribe's motion for partial summary judgment.

23

24 **IT IS FURTHER ORDERED** that parties shall file no later than March 2,

25

26

27 Apache Tribe's Reply in Support of its Motion for Partial Summary Judgment at 5 (December 9, 2025).

28 ¹¹⁰ ASARCO Response to Tribe at 14; [ASARCO Exhibit 1 at PDF 31-32].

¹¹¹ Tribe Motion at 15.

1 2026, a joint schedule to complete proceedings for this contested case. The Special
2 Master has reserved the entire month of May for trial.

3 Signed this 3rd day of February 2026
4
5
6 Sherri L. Zendri
7 Special Water Master
8
9
10

11 The original of the foregoing was delivered to
12 the Clerk of the Maricopa County Superior
13 Court on February 3rd, 2026,
14 for filing and distributing a copy to all persons
15 listed on the Court approved mailing list for this
16 contested case.

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Emily Natale