

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

01/15/2021

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

T. DeRaddo

Deputy

In re: Asarco-Diversion
Contested Case No. W1-11-2798

FILED: 4/8/2021

In Re: The General Adjudication
of All Rights to Use Water in the
Gila River System and Source
W-1, W-2, W-3 and W-4 (Consolidated)

In re: Status Conference

MINUTE ENTRY

Courtroom: CCB 301

2:00 p.m. This is the time set for a Status Conference before Special Master Susan Ward Harris.

The following attorneys and parties appear telephonically:

- Charles Cahoy on behalf of City of Phoenix
- Mark McGinnis and John Weldon on behalf of Salt River Project (“SRP”)
- Laurel Herrmann and Joe Sparks on behalf of the San Carlos Apache Tribe
- John Burnside on behalf of BHP Copper as an observer
- Kimberly Parks on behalf of Arizona Department of Water Resources (“ADWR”)
- Rhett Billingsley on behalf of ASARCO
- Lucas Christian on behalf of the Tonto Apache Tribe
- Sue Montgomery on behalf of the Yavapai-Apache Nation (and observing on behalf of the Pascua Yaqui Tribe)

Discussion is held regarding the amended Watershed File Report (“WFR”) 114-01-005 prepared by ADWR for the Hayden Wells. The Court notes that the dates of apparent first use changed from 1948 to 1909. The quantity claimed has changed from 1,138 to 3,727 acre-feet of water, and the place of use has not changed. At issue is whether the amended WFR 114-01-005 constitutes a supplemental contested case HSR because it is a new or changed use subject to Judge Ballinger’s 2004 Order.

Mr. Billingsley addresses the court. He feels that notice was sufficient. Mr. Billingsley’s position is that the Court should move forward with this case with objections and that notice should be provided to the mailing list in the contested case and the Gila River general mailing use. He states that there is no “change in use.”

Mr. Cahoy states that it may be best to stay the case until the supplemental HSR for the San Pedro Watershed is distributed to the parties. He states that due to the significant change in priority dates and change in water rights, notice should be given to parties who may have otherwise had an earlier priority date in claims for water rights (earlier than 1948).

Mr. McGinnis agrees with Mr. Billingsley. He states that this case required an Amended WFR and notice was required for the contested case and to the general W-1, W-2, W-3 and W-4 mailing list, which was done. Mr. McGinnis states that there is no due process problem because there is the objection period available with respect to the catalogue.

Ms. Parks states that she is not aware of any amended WFR that has been noticed to all parties in the Gila River Adjudication. Ms. Parks reports that she will examine the records to determine the answer.

Ms. Herrmann states that she is in agreement with Mr. McGinnis at this time based on the understanding that there has been no change in place of use.

Ms. Montgomery states that due to the significant change in both the priority date and quantity, she agrees with Mr. Cahoy’s position. She believes that the amended WFR requires broader notice.

Mr. Christian states that he agrees with Mr. Cahoy and Ms. Montgomery.

Discussion is held regarding the list of claimants in the Gila River Adjudication and in the San Pedro cases. Ms. Parks believes there are tens of thousands of claimants and notice would be very expensive.

Mr. Billingsley states that his interpretation of Judge Ballinger’s 2004 Order is that it refers to new uses. The matter at issue is not a new use, but is an existing use from the same wells that were in existence at the time.

Mr. McGinnis agrees with Mr. Billingsley's interpretation of Judge Ballinger's 2004 Order. He does not believe that giving additional notice is necessary. There are two reasonable approaches - an amended WFR and give notice as already done or push to San Pedro HSR II and give notice. What is being discussed today is creating a hybrid process that involves providing notice for just this case.

Ms. Montgomery states that she is not suggesting that there is a hybrid third position. She states that there is a substantial change in amount and priority date and argues that stating that it is not a new use does not change analysis.

Mr. Sparks states that he is not confident that there is no new use. He believes that the claim is substantially enlarged from the information that appeared in the original HSR, and believes that everyone should be given notice, at least in the San Pedro River watershed. He believes that the best way to proceed is to include the notice in the second HSR for San Pedro.

Further discussion is held regarding the best way to proceed.

Discussion is held regarding possibly bifurcating the cases and proceeding with the Ray Wells cases separately from the Hayden Well cases.

2:36 p.m. Matter concludes.

LATER:

On December 16, 2020, the Arizona Department of Water Resources distributed copies of the amended watershed file reports 114-01-005 and 114-04-035 (collectively, the "Amended WFR") to all persons listed on the general court-approved mailing list for the Gila River adjudication ("General Mailing List") and on the mailing list for this contested case. The immediate issue presented at this stage of the contested case is whether additional notice of the amended WFR must be provided to a broad class of people and entities who did not object to the original watershed file reports and did not move to be included on the General Mailing List. The resolution of the question requires consideration of an order entered by Judge Ballinger on February 10, 2004 on an issue of broad legal importance briefed in Contested Case No. W1-11-1174 ("2004 Order")¹ and the due process rights of the class to additional notice during the litigation of a contested case.

¹ To date, the 2004 Order has not been applied in any case. The Arizona Department of Water Resources found only one contested case in which the watershed file report was classified as a supplemental contested case HSR. In that case, the Special Master declined to follow the notice provision in the 2004 Order. *See* Supplemental Contested Case Hydrographic Survey Report In Re Phelps Dodge Corporation (Show Low Lake) issued by ADWR on January 31, 2005 in Contested Case No. 6417-033-0060.

2004 Order

In 1991, ADWR distributed notice of the San Pedro HSR that includes more than a thousand individual reports on water uses in the watershed. The San Pedro HSR does not contain reports for all claimed rights to water in the watershed because people and entities have continued to initiate water uses and file Statements of Claimant for water rights after 1991. These post-1991 Statements of Claimant have not been the subject of a subsequent San Pedro HSR. In 2002, ADWR prepared a report detailing its reduced capacity to prepare a second comprehensive HSR². In 2003 the Special Master filed a report citing ADWR's inability to generate an "updated" 1991 HSR as one of the motivations for creating a document known as a "supplemental contested case HSR". Special Master Report, dated October 30, 2003, at 5. The Special Master also included recommended notice requirements that should be applied to those types of reports. In his 2004 Order, Judge Ballinger accepted and modified those recommendations. The 2004 Order directed ADWR to prepare supplemental contested case hydrological survey reports for new water uses and changes in water use. It also directed that notice be given to all claimants and nonclaimant water users in the San Pedro River watershed and to all claimants in the Gila River Adjudication. 2004 Order at 2. The correct delineation of the scope of the 2004 Order will further its purpose of providing a procedure to protect water users' due process rights and enable, rather than impede, the continued adjudication of claims for water rights when ADWR lacks the resources to prepare a new comprehensive hydrographic survey report.

The 2004 Order could potentially encompass two groups of water uses: water uses that did not exist prior to 1991 and water uses that did exist prior to 1991 but, at least according to one party, have sufficiently changed to constitute a new or changed use. The application of the 2004 Order to the first group of water uses not in existence at the time of the San Pedro HSR is not at issue here. Arizona Department of Water Resources investigated ASARCO's claims and included an extensive report about ASARCO's uses in the General Assessment portion of the San Pedro HSR in addition to its analysis in the individual watershed file reports. The second group can be further divided into two subgroups: uses about which all parties agree the claimant is seeking a water right that has so materially changed since 1991 that it constitutes a new or changed use and uses about which the parties dispute whether such a change has occurred since 1991. This contested case involves amended claims where a dispute exists among the parties as to whether ASARCO seeks new or changed uses. It is in this limited context that the applicability of the 2004 Order is examined.

² See ADWR's Report Concerning the Preparation of New and Updated Hydrographic Survey Reports and Related Matters (filed on December 5, 2002), Gila River Adjudication Docket No. 3023).

Pursuant to A.R.S. §45-256(A), ADWR was requested to investigate ASARCO's amended Statements of Claimant and produce amended watershed file reports. The determination to request the reports from ADWR did not require a finding that ASARCO seeks water rights for new or change uses or even that it materially or substantially changed its claims. Instead, the request was made consistently with the statute and the past practices followed in the general adjudication to order a variety of reports from ADWR to obtain the benefit of its scientific analysis and technical expertise. *United States v. Superior Court In & For Maricopa County*, 144 Ariz. 265, 280-281, 697 P. 2d 658, 672-674 (1985).³ On December 16, 2020, ADWR filed the Amended WFR. The amended WFR, as did the original WFR, analyzed filings and decrees and information based on field investigations and information provided by ASARCO. Using the same methodology employed original, ADWR provided information about the quantity of use based on the largest quantity of water used annually from the most recent five years of data. The Amended WFR constitutes evidence upon which a determination of a water use made be based but it is not a binding legal decision on the issue. A.R.S. §45-256(C). Accordingly, it does not resolve the question of whether the amended Statements of Claimant assert new uses or changes in use.

As stated in the December 9, 2019 decision entered in this case, a legal determination that a claimed use is a new or a changed use can seriously affect the water right characteristics applicable to the claimed appropriable water. *See In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 201 Ariz. 307, 310 ¶¶4-5, 35 P.3d 68, 71 (2001). Due to the potential consequences of such a determination, a factual finding should not be made without allowing the parties the opportunity to present evidence in support of their respective positions that the amended claim is or is not a continued historic use. Consequently, the 2004 Order must be understood to be based on the implicit assumption that no dispute exists that the use in question is either new or changed. A contrary interpretation of the 2004 Order would only cause the 2004 Order to compound the problems it attempted to solve and, instead of expediting the adjudicative process, it would inject an additional time and resource-intensive evidentiary proceeding into the determination of water rights solely to determine whether additional notice must be given. Thus, the 2004 Order does not apply to contested cases where a dispute exists as to whether the amended claim constitutes a new or changed use.

³ A report may be prepared solely for a single contested case such as the Land Ownership Report for the San Pedro Riparian National Conservation Area dated June 2010 ("Ownership Report") that was only noticed to the court approved mailing list for the contested case. Ownership Report at 1-5.

The resolution of the applicability of the notice procedures set forth in the 2004 Order does not, as pointed out by at least one of the Objectors, resolve the question of whether additional notice must be given to all of the water users and claimants in the Gila River watershed. Several Objectors argued that the Amended WFR should be included in the San Pedro HSR II that Judge Brain ordered to be prepared in 2016. Arizona Department of Water Resources has neither completed the San Pedro HSR II nor by all accounts made any significant progress on the report due to a lack of resources. Given this state of affairs, the proposal to provide additional notice of the Amended WFR in the San Pedro HSR II would effectively stay the adjudication of water rights of this Claimant for years. Such an approach is not consistent with the Court's admonition that due process procedures for providing notice in this adjudication cannot impose impractical obstacles. *In re the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 237, 830 P.2d 442, 449 (1992) ("*Gila I*").

General Court-Approved Mailing List

The Claimant and Salt River Project take the position that notice of the Amended WFR to all persons on the General Mailing List satisfies the due process rights of the other water users in the Gila River Adjudication. As more thoroughly discussed in the December 9, 2019 decision, the extent (and frequency) of the notice necessary to avoid depriving a water user or claimant of due process rights depends on a balance of factors including, the risk of an erroneous loss of a property right, the fairness and reliability of existing procedures, the probable value of the additional notice, and the fiscal and administrative burden of providing the notice. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In *Gila I*, the Court found, "the most significant factor in this case is the sheer multitude of the parties to the adjudication." *Gila I*, 171 Ariz. at 241, 830 P.2d at 453.

When the *Gila I* Court addressed due process requirements in the adjudication, it did not impose uniform notice requirements on all phases of the adjudication. At the initial phase, it approved notice of the adjudication to all property owners. Notice of the hydrographic survey reports was required to be given to the more conscribed class that did not include all property owners but did include claimants and successors-in-interest to claimants. It approved notice of pleadings in individual cases to a smaller group consisting of the parties listed on the court approved mailing list. In its analysis, the Court recognized that the adjudication court provides interested parties with an array of options to remain informed and receive notice about the proceedings in the general adjudication. The General Mailing List is among those options that the *Gila I* Court specifically identified.

Turning to the *Mathews* factors, the determination of appropriate due process procedures requires a consideration of whether the process could create the risk of serious loss. Here, the loss is not that a water user or claimant will lose the opportunity to claim a water right; it is the risk that a claimant will lose the opportunity to object to the Amended WFR to protect the claimant's asserted water right. This risk is weighed against the fairness and reliability of the General Mailing List procedure to provide sufficient notice of the opportunity to object. The General Mailing List is a fair procedure. As the *Gila I* Court observed, any party who desires to receive service of documents in the adjudication has "only so to inform the court and be placed on the court-approved mailing list." *Id.* at 240-241, 830 P.2d at 452-453. The court imposes no fees or costs on a claimant who requests to be included on the General Mailing List. Persons listed on the General Mailing List may receive documents by email or regular postal service. The procedure is also reliable. The General Mailing List has been operational for decades. It is regularly used for a variety of court documents, pleadings filed by parties, and reports from ADWR. The court routinely updates the General Mailing List as requests for changes and additions are made to insure that names and addresses are correct. The General Mailing List provides a well-established and readily available method to allow interested parties to receive notice of documents filed in the adjudication.

Objectors taken the position that notice of the Amended WFR to all persons on the General Mailing List is not sufficient because of the number of persons included on the General Mailing List. While it is true that notice to the General Mailing List will not put an envelope in the mailboxes of all 56,000 water users and claimants in the Gila River watershed, it does provide notice to a broad sweep of persons with interests in water rights in the San Pedro Watershed. Owners of more than 72% of the land in the San Pedro watershed are included on the General Mailing List. According to the San Pedro HSR, 71.4% of the land in the San Pedro River watershed is owned by the federal or state government. 1 San Pedro HSR at 45. The General Mailing List includes representatives of the United States Army, United States Department of Justice, United States Department of the Interior, United States Department of Agriculture, the Arizona State Land Department, and the Arizona Attorney General. The San Carlos Indian Reservation occupies almost 1% of the land in the watershed and is a major landholder in the vicinity of the land owned by ASARCO in Township 5S Range 15E and Township 6S Range 16E. *See figure 1 below.* Counsel for the San Carlos Indian Reservation is named on the mailing list for this contested case and on the General Mailing List. They have actively participated throughout each stage of this proceeding. The General Mailing also includes representatives and counsel for the Fort McDowell Yavapai Nation, Gila River Indian Community, the Navajo Nation, Pascua Yaqui Tribe, the Tonto Apache Tribe, White Mountain Apache Tribe, and the Yavapai Apache.

The remaining land, consisting of approximately 28% of the watershed, is held privately and is located in cities, towns and developed areas within the San Pedro watershed's municipalities and counties. 1 San Pedro HSR at 46-47. The General Mailing List includes representatives of numerous towns, cities and counties located in the watershed including the City of Tombstone, the City of Sierra Vista,

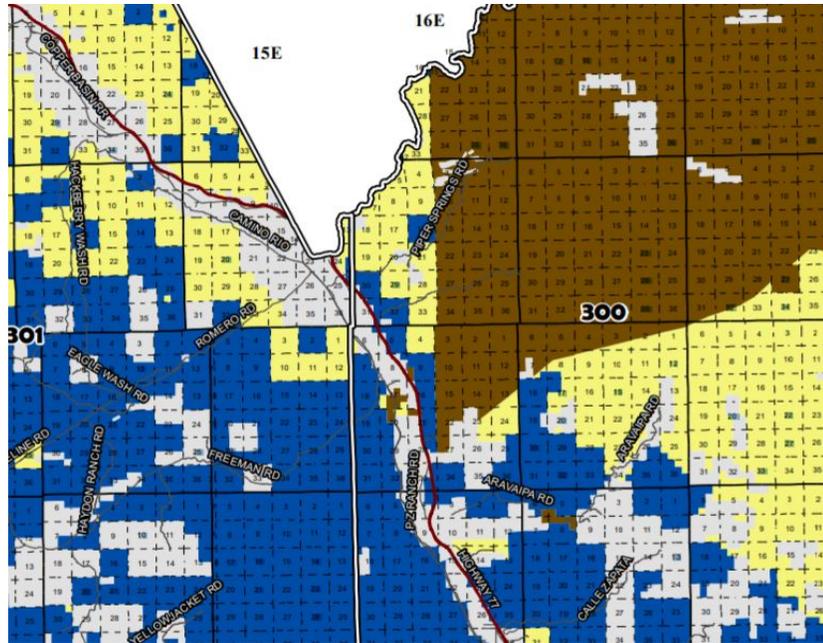


Figure 1. Land Ownership Map prepared by Pinal County of the area including and surrounding the land owned by ASARCO. It identified the area shown in brown as Indian Community; the area shown in yellow as BLM land; the area in blue as State Land; and, the area in gray as private land.

the Town of Huachuca, the City of Tucson, Pima County, Cochise County. Counsel for several water utilities and the Salt River Project, which also owns land in the area around ASARCO's land, are also included on the list. A few individuals associated with particular ranches, farms or residences have chosen to be added to the General Mailing List along with counsel who represent or have represented in this adjudication a number of individual homeowners, farmers and ranchers in the watershed.

The General Mailing List includes representatives of many of the major water users identified by ADWR. Counsel for three of the four major irrigation water providers is on the General Mailing List. The fourth major irrigation water provider is actually a group of irrigators, as opposed to a formal irrigation district, that rely on the Aravaipa Creek and tributaries. The group includes the Arizona Chapter of the Nature Conservancy⁴, the Bureau of Land Management, the Arizona State Land Department, and the owners of approximately 20 parcels of land. The General Mailing List contains the names of counsel and representatives for the Arizona Chapter of the Nature Conservancy, the Bureau of Land Management, the Arizona State Land Department, and at least a half dozen of the remaining landowners. Similarly, a number of representatives of industrial and mining water users are on the General Mailing List. At the time of the filing of the San Pedro

⁴ The Nature Conservancy has also filed claims for instream use along with the Bureau of Land Management and Arizona State Land Department.

HSR, ADWR identified seven major industrial users and six mining operations. It reported that three of the reported users of water for mining collectively consumed less than three acre feet of water. The remaining three mining operations that ADWR reported as using in excess of 25,000 acre-feet of water per year all have representatives on the General Mailing List.

As to those claimants who have not chosen to be included on the General Mailing List, it is not clear that an individual notice about the Amended WFR offers significant potential value. Notwithstanding the widely and repeatedly distributed notices of the San Pedro HSR, the only objections to the WFR were filed by entities who were major water users, large landowners, or claimants listed on the General Mailing List. This case has now been on the court's webpage for the General Adjudication as an Active Case for three years and no party has moved to intervene in the case that it not also on the General Mailing List. The minimal likelihood that an additional notice to 56,000 claimants and water users would garner substantive objections to the Amended WFR is offset by the administrative and fiscal burden that sending the notice would impose. Arizona Department of Water Resources has estimated the cost of providing notice could approach \$70,000 in 2019 dollars. This amount cannot be justified in this contested case given the existence of the fair and reliable method provided by the General Mailing List to claimants who are interested in filing objections to watershed file reports that analyze rights claimed by other water users. Based on the foregoing, the notice of the Amended WFR has been properly notice by ADWR's distribution of it to all persons on the General Mailing List.

Motion for Clarification and to Set Deadline to File Objections to Amended Watershed File Reports

On March 23, 2021, ASARCO filed a motion seeking clarification regarding the deadline for filing objections to the Amended WRF. ASARCO correctly identified the source of the confusion about the deadline as a clerical error in an order filed in *In re ASARCO-Irrigation*, contested case no. W1-11-2801. The order contained the correct contested case number but the wrong case name. As ASARCO, LLC also correctly stated, no deadline has been set in this case before the issuance of this minute entry for the filing of objections to the Amended WFR.

IT IS ORDERED that objections to the Amended WFRs shall be filed by **June 10, 2021**.

IT IS FURTHER ORDERED that stipulated abstracts or a status report shall be filed by ASARCO, LLC by **August 11, 2021**.

IT IS FURTHER ORDERED that a status conference shall be held on **August 18, 2021** at 3:30 p.m.

Instructions for telephonic participation:

Dial: 602-506-9695 (local)

1-855-506-9695 (toll free long distance)

Dial Collaboration (conference) Code 357264#

NOTE: All court proceedings are recorded digitally and not by a court reporter. The parties or counsel may request a CD of the proceedings. For copies of hearings or trial proceedings recorded previously, please call Electronic Records Services at 602-506-7100.

A copy of this order is mailed to all parties on the Court-approved mailing list for this contested case and for W-1, W-2, W-3 and W-4.

