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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF MARICOPA
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10 IN RE THE GENERAL ADJUDICATION
11 OF ALL RIGHTS TO USE WATER IN
12 THE GILA RIVER SYSTEM AND
13 SOURCE

14 CONTESTED CASE NO. W1-11-2801

15 ORDER SETTING SCHEDULING
16 CONFERENCE

17 AND

18 DECISION REGARDING ADDITIONAL
19 NOTICE REQUIREMENTS FOR ADWR
20 REPORT ON AMENDED SOCS

21 CONTESTED CASE NAME: *In re ASARCO – Irrigation*

22 HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

23 DESCRIPTIVE SUMMARY: Notice of report to be prepared by ADWR to be provided to persons
24 on the court-approved mailing list for the Gila adjudication as well as to parties in this contested
25 case. Scheduling conference set for October 23, 2019 at **1:45 p.m.**

26 NUMBER OF PAGES: 33

27 DATE OF FILING: October 8, 2019
28

In these three consolidated cases, water rights will be adjudicated for Aravaipa Ranch, PZ
Ranch, and Robinson Ranch (collectively “the Ranch Properties”). Arizona Department of Water

Resources (“ADWR” or “the Department”) investigated water uses on the Ranch Properties and prepared watershed file reports that were properly noticed and distributed to the thousands of claimants and water users in the Gila River Adjudication, which includes the San Pedro River watershed. After the initiation of this case to resolve the objections to the watershed file reports and adjudicate the water rights associated with the Ranch Properties, the landowners filed amended Statements of Claimant (“SOCs”). The parties and ADWR have agreed that ADWR should prepare a report analyzing the water uses claimed in the amended SOCs (the “ADWR Report”). At issue is whether claimants and water users in the Gila River watershed other than the claimants participating in this contested case have a procedural due process right to notice and distribution of the ADWR Report that will effectively stay the adjudication of the claimed water rights for the Ranch Properties until an undefined future date.

I. Background

In 1980, ASARCO, Inc., now known as ASARCO, LLC (“ASARCO”), filed multiple SOCs as permitted by A.R.S. §45-254 for rights to water used on the Ranch Properties. Earlier, ASARCO and its predecessor had filed other forms with the State to establish rights to use water on the land. As part of its duties in this general adjudication of water rights, ADWR conducted an investigation of the past and present water uses on the Ranch Properties. It located historical photographs of the land, previously filed forms for water rights, and documents that contained information about past water use. It also inspected the land and mapped the boundaries of each Ranch Property, well locations, and the irrigated portions of the land.

The SOCs prepared by ASARCO did not limit the scope of ADWR’s examination of water uses on the Ranch Properties as evidenced by ADWR’s identifying and including in the watershed file report for Robinson Ranch a potential water right for an irrigation use that was not the subject of a Statement of Claimant. *See* Watershed File Report 114-01-CCD-001, PWR 114-01-CCD-001-IR007. The evaluation of water uses on the Ranch Properties unconstrained by SOCs is consistent with the comprehensive approach taken by ADWR in its analysis of water uses in the Winkelman subwatershed. For example, ADWR prepared watershed file reports in this

1 subwatershed that only included potential water rights with no corresponding SOC. *See, e.g.,*
2 Watershed File Reports 114-01-001, 114-03-006, 114-04-011, and 114-04-BAB-005. The scope
3 of the Department's examination of water uses in the Winkelman subwatershed is also
4 demonstrated by its list of 91 domestic uses found in this subwatershed for which no landowner
5 filed a SOC. San Pedro HSR, Vol. 6 at Table 1-Winkelman.

6 Based upon its independent examination of ASARCO's use of water on the Ranch
7 Properties, ADWR prepared a separate watershed file report for each Ranch Property. Watershed
8 file reports are single spaced, densely-packed compilations of information about water used and
9 claimed to have been used on a defined parcel of land. They summarize key water data extracted
10 from existing forms filed by landowners and lessees and decrees entered by the Court, provide
11 ADWR's comments and conclusions about those claimed uses, and report the results of ADWR's
12 investigations. Watershed file reports include general legal descriptions of places of use and points
13 of diversion, dates of apparent first use of the water, and in the case of irrigation, the amounts used
14 based on calculations using three different methods.

15 The watershed file reports prepared for the Ranch Properties were included in the San
16 Pedro Hydrographic Survey Report dated November 20, 1991 ("the San Pedro HSR"¹) under the
17 following identifying numbers:

<i>Property</i>	<i>Watershed File Reports (WFRs)</i>
Aravaipa Ranch	114-04-BDD-002
PZ Ranch	114-04-BDA-001
Robinson Ranch	114-01-CCD-001

27 ¹ The Department prepared the San Pedro HSR to allow claimants the "opportunity to inspect the
28 information which DWR has gathered and to file comments on its accuracy or other concerns." San Pedro HSR. Vol.
1 at 3.

1 After the initial proceeding in this case, ASARCO and its assignee amended ten SOC²,
2 moved to withdraw three SOC³, and filed a Statement of Claimant for a stockpond use⁴. As
3 agreed by the parties, ADWR will analyze the amended SOC²s and prepare a report (the “ADWR
4 Report”) that will be distributed to ASARCO, its assignee, the parties that objected to the WFRs
5 and the parties that moved to be added to the court-approved mailing list in this case. The
6 Department’s preparation of the ADWR Report is consistent with the Arizona Supreme Court’s
7 definition of ADWR’s duties in the general adjudication to provide “factual analysis and
8 administrative aid”. *United States v. Superior Court In & For Maricopa County*, 144 Ariz. 265,
9 280-281, 697 P. 2d 658, 672-74 (1985). The Department will also post the ADWR Report on its
10 website in accordance with its current practices where it will be readily available to all interested
11 persons with Internet access.
12

13 Pursuant to the Court’s minute entry dated May 23, 2019, (“Minute Entry”) the Department
14 filed a pleading on June 6, 2019, concluding that the claimants and water users in the Gila River
15 watershed who did not object to the WFRs have a due process right to notice of the ADWR Report.
16 *Arizona Department of Water Resources Report*, filed June 6, 2019 (“Report”). The Department
17 bases its position on its determination that ASARCO’s amended SOC²s materially differ from the
18 original SOC²s due to “significant changes to the claims’ attributes, including priority dates,
19 quantities, types of use, and places of use”. Report at 2. It prepared a detailed chart to compare the
20 original and amended SOC²s as well as the underlying claim filings. The Department determined
21 that “the extent of these changes effectively make ASARCO’s amended claims ‘new’ SOC²s
22 because many of the claimed attributes are entirely different than what was investigated and
23 reported in [the San Pedro HSR].” *Id.* Therefore, according to the Department, the ADWR Report
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27 ² SOC²s 39-2474, 39-2475, 39-2476, 39-2477, 39-2479, 39-2480, 39-2482, 39-2483, 39-4004, and 39-12969

28 ³ SOC²s 39-2481, 39-2485, and 39-2486

⁴ SOC²s 39-18019

1 must be noticed and/or provided to approximately 56,000 recipients in the San Pedro River
2 watershed and in the Gila River Adjudication. Due to the costs of providing notice, it proposes
3 that the ADWR Report should be distributed as part of a major hydrographic survey report referred
4 to as the San Pedro II HSR that was the subject of the Court's Order dated June 21, 2016. The
5 Department has advised that ADWR is not currently working on San Pedro II HSR and there is no
6 projected date for the completion San Pedro II HSR. Minute Entry at 2.

7
8 Although Salt River Project and ASARCO agreed with ADWR that the Department should
9 prepare the ADWR Report, their positions diverge from ADWR's at that point. Salt River Project
10 argues that due process does not require an interim notice about an amended SOC filed in a
11 contested case. It argues that sufficient procedures have been provided and currently exist without
12 the need to issue yet another notice to claimants and water users in the adjudication who did not
13 object to the WFRs. *Salt River Project's Response to Arizona Department of Water Resources'*
14 *Report*, filed June 17, 2019. It specifically objected to the delay that would be occasioned by
15 issuing the ADWR Report as part of the San Pedro II HSR and the precedent that could be created
16 requiring ADWR to prepare serial hydrographic survey reports as amended SOC's are filed in
17 future individual contested cases.

18
19 While ASARCO generally acquiesced to the inclusion of the ADWR Report in San Pedro
20 II HSR provided that the scope of objections otherwise allowed by A.R.S. §45-256(B) would be
21 restricted, it contested the factual basis of ADWR's opinion. ASARCO objected to ADWR's
22 conclusion that the amended SOC's constitute new as opposed to amended SOC's. ASARCO
23 asserts that its amended SOC's do not claim new uses but describe "established uses that have been
24 in place for many decades." *ASARCO LLC's Response to Arizona Department of Water*
25 *Resources' Report about the Materiality of Amendment to Claims* at 1, filed June 17, 2019.
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1 The recharacterization of a claimed existing use as a new or a changed use can have serious
2 ramifications in an adjudication of claims for valuable water rights. In general, surface water rights
3 under state law with their attendant priority dates depend on continuous beneficial use. *In re the*
4 *Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 201 Ariz. 307, 310
5 ¶¶4-5, 35 P.3d 68, 71 (2001) (“The beneficial use is the basis, measure and limit of any such
6 entitlement. [citations omitted] So long as utilization continues, the right remains secure.”) In
7 particular, irrigation water rights under state law attach to a specific parcel of land and, subject to
8 limited conditions, cannot “in any manner be transferred to any land for which it was not originally
9 appropriated by the owner or possessor thereof”. *In re Determination of Relative Rights to Use of*
10 *Waters of Pantano Creek in Pima County (Tattersfield v. Putnam)*, 45 Ariz. 156, 169, 41 P.2d 228,
11 234 (1935).
12

13 Procedural consequences also flow from a recharacterization of an existing use to a new use
14 or a changed use. Judge Ballinger in his February 10, 2004 Order addressed the procedures to
15 notice “changes to water uses already investigated in the San Pedro I HSR and new uses.” Report
16 at 3. In this case, the issue of procedural due process involves amendments to SOC’s that have
17 been investigated by ADWR and for which the claimant asserts that the claims are neither new, nor
18 changed, but are the continuation of historical uses. Specifically, the question is whether the State
19 must distribute another notice to tens of thousands of individuals and entities in the Gila River
20 Adjudication about water uses on the Ranch Properties due to the amendment of SOC’s for the
21 same types of water uses with claimed priority dates that predate the San Pedro HSR on land that
22 ADWR investigated and for which watershed file reports were prepared, included in the San Pedro
23 HSR, and noticed to the same class of persons and entities.
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II. Due Process

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

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

At issue here is not notice at the pendency of the action but an additional notice in the midst of a contested case. A due process right to notice does not exist at all stages of the proceeding. *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. at 356, ¶ 20, 132 P.3d at 295 (App.

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

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

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

23 The second set of considerations focus on the likelihood that water rights could erroneously
24 be lost given the notices already provided and the procedures in place to provide notice and
25 information about the adjudication of individual water rights and the probable value, if any, of the
26 additional notice of the ADWR Report. The State has spent significant time and resources to
27 provide notice that satisfies the due process rights of claimants and water users in the Gila River
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1 Adjudication. At the inception of this general adjudication, ADWR provided notice and mailed
2 summons to 849,000 property owners, published notices of the commencement of the adjudication
3 in the newspapers, and recorded a general notice of *lis pendens* in all counties included within the
4 watersheds subject to this adjudication. *Id.* at 236, 830 P.2d at 448. Pretrial Order No. 1 filed May
5 30, 1986, instructed ADWR to “provide each water claimant with adequate notice when DWR’s
6 preliminary Hydrological Survey Reports—and, later, the Comprehensive Report—are available
7 for inspection and comment.” *Id.* at 241, 830 P.2d at 453. When ADWR completed its
8 investigation of the San Pedro River Watershed, the Department provided notices in 1990 of the
9 preliminary San Pedro HSR and in 1991 of the final San Pedro HSR that contained general
10 information about the watershed and the watershed file reports about individual claims and water
11 uses.
12

13 Additional procedural safeguards have already been implemented to protect the interested
14 claimant. As described by the Arizona Supreme Court: “In this case, any party that desired to
15 receive service of every document filed had only so to inform the court and be placed on the court-
16 approved mailing list. Other parties can keep themselves updated by consulting or subscribing to
17 the monthly docket sheets.” *Id.* at 240-241, 830 P.2d at 452-453. The order to initiate this
18 contested case was distributed to all persons who had moved to be included on the general court-
19 approved mailing list for the Gila River Adjudication in addition to the entities identified by the
20 county assessor as the owners of the Ranch Properties and claimants who filed objections to the
21 WFRs. Subsequently, BHP Copper, City of Tempe and Freeport Minerals Inc. moved to be added
22 and were added to the court-approved mailing list in this case.
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25 Citing to these procedures, the *Gila I* Court has already found that documents filed in the
26 course of the adjudication need not be served on every party to the adjudication because
27 procedures have been instituted to allow interested parties to monitor the proceedings and protect
28

1 their rights. *Gila I*, 171 Ariz. at 240, 830 P.2d at 452. Since the *Gila I* Court issued its decision
2 approving the procedures to assure due process in this adjudication, additional sources have been
3 created to enable interested parties to access information in the adjudication. The Department and
4 the Court both maintain and regularly update websites about the General Adjudication that make
5 reports prepared by ADWR and decisions entered by the Court in the individual contested cases
6 readily available to claimants and water users with access to the Internet.

7
8 It is within this factual setting where claimants and water users have received multiple
9 notices about the general adjudication and ADWR's reports on water uses in the San Pedro River
10 watershed and have several methods by which to track specific contested cases to protect their
11 interests that a determination must be whether satisfaction of their due process rights requires an
12 additional procedural safeguard in the form of another notice and, if given, the probable value of
13 the distribution of that notice. Essentially, the resolution of the question turns on whether the
14 amendments to the SOC's for water uses that predate the WFRs on land investigated by ADWR
15 render the original WFRs inadequate and insufficient for purposes of notice required by due
16 process and create a risk of loss of water rights for those persons and entities who did not file
17 objections to the WFRs or move to intervene in this case.

18
19 In the discussion that follows, the WFR for each Ranch Property will be examined to
20 ascertain whether it meets the due process standard set by *Gila I* that notice must "reasonably
21 inform" claimants or be "adequate" to allow the recipients to decide whether to take action to
22 protect their rights, which in this case means objecting to the claimed rights of others.

23 24 25 **Aravaipa Ranch WFR**

26 In Watershed File Report 114-04-BDD-002 ("Aravaipa WFR") the Department identified
27 seven SOC's as the applicable adjudication filings for potential water rights for Aravaipa Ranch.
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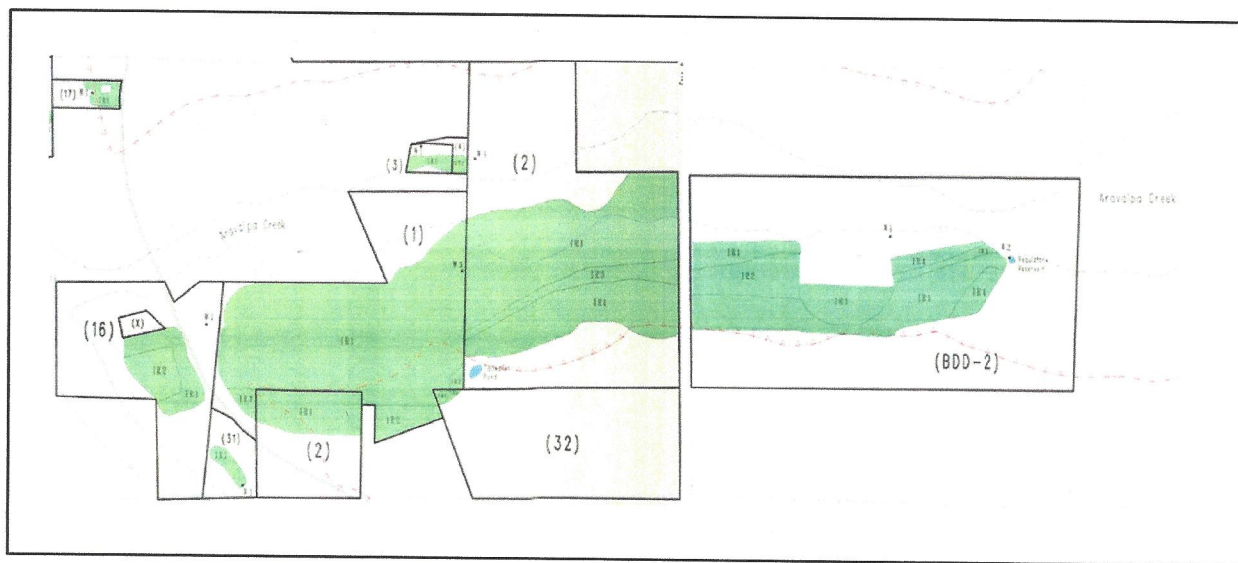


FIGURE 1. The land included in WFR 114-04-BDD-001 is labelled as (2) or (BDD-2). The land labelled as (1) located between the two parcels owned by ASARCO is owned by an Objector in this contested case. Source. San Pedro HSR, November 1991.

ASARCO did not file three of the SOC's, 39-1976, 39-1977, and 39-11836⁵. SOC's 39-1976 and 39-1977 have been assigned to one of the parties who objected to the Aravaipa WFR and is participating in this case. The Department also investigated those two SOC's as part of its preparation of WFR 114-04-BDD-002 that dealt with water claims and water uses on the land located between the two parcels that constitute Aravaipa Ranch. *Figure 1* shows the two parcels of land referred to as Aravaipa Ranch labelled as (2) and (BDD-2).

ASARCO amended three SOC's, 39-2475, 39-2476, and 39-2482 with respect to its claims for irrigation use. ASARCO identified the historical places of use in its Amended SOC's by referencing and attaching the maps created by ADWR, duplicated above as *figure 1*, with the explanation that the due to losses from flooding and changes in the course of Aravaipa Creek, the approximately 197 acres of irrigated fields reported by ADWR in the Aravaipa WFR have been reduced by approximately 14.6% to 168.6 acres.

The Aravaipa WFR included four potential water rights for irrigation use. As shown in Table 1, ADWR designated multiple SOC's as the applicable adjudication filings for each potential

⁵ Statement of Claimant 39-11836 was also investigated in connection with WFR 114-04-BDD-034.

1 water right for irrigation use. In its original filing, ASARCO filed separate SOC's to described
2 irrigation use on sections 10 and 11 in Township 7 Range 16. When ASARCO amended its SOC's
3 it effectively treated the SOC's as a single claim for multiple irrigation uses. It prepared one form
4 of amendment which it attached to the three SOC's. The change in the form of presentation of the
5 claims to conform to the practice generally adopted by ADWR does not affect the validity of the
6 information provided in the Aravaipa WFR.
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<i>Potential Water Right for Irrigation Use</i>	<i>SOC's designated by ADWR</i>
114-04-BDD-002-IR001	39-1976, 39-1977, 39-2475, 39-2476, 39-2482
114-04-BDD-002-IR002	39-1976, 39-2475, 39-2476, 39-2482
114-04-BDD-002-IR003	39-1976, 39-2475, 39-2476, 39-2482
114-04-BDD-002-IR004	39-2475, 39-2476

13 TABLE 1.

14
15 **1. Places of Use**

16 The Aravaipa WFR identified the places of use for the potential irrigation uses in sections
17 10 and 11 T7S R16E. The general legal description provided in the Aravaipa WFR of the locations
18 of the irrigated acreage is grouped by section in the second column of Table 2. Similarly, the legal
19 descriptions provided by ASARCO in the amended SOC's have been grouped by section and listed
20 in the third column of the table. As shown by a comparison of the second and third columns of
21 Table 2, the legal descriptions provided by the Aravaipa WFR include all places of use claimed in
22 ASARCO's amended SOC's. Thus, the Aravaipa WFR provides adequate notice to the claimants
23 and water users in the Gila Adjudication of the claimed places of use.
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<i>Location By Section</i>	<i>ADWR Location Description</i>	<i>ASARCO Location Description</i>
Section 10 T7S R16E	NE Section 10 7S R16E SENE Section 10 7S R16E SWNE Section 10 7S R16E SE Section 10 7S R16E NWSE Section 10 7S R16E NESE Section 10 7S R16E SW Section 10 7S R16E	S1/2 NE Section 10 7S R16E N1/2 SE Section 10 7S R16E SWSW10 Section 7S R16E
Section 11 T7S R16E	NE Section 11 7S R16E SENE Section 11 7S R16E SWNE Section 11 7S R16E NW Section 11 7S R16E SENE Section 11 7S R16E SWNW Section 11 7S R16E SE Section 11 7S R16E NESE Section 11 7S R16E NWSE Section 11 7S R16E SW Section 11 7S R16E NESW Section 11 7S R16E NWSW Section 11 7S R16E	S1/2N1/2 Section 11 7S R16E N1/2 S1/2 Section 11 7S R16E

TABLE 2.

2. Points of Diversion

The Aravaipa WFR determined that two wells provided water for three of the irrigated uses and that an additional well located on one of the Objector's land provided water for one of the places of use along with the two other wells. The amended SOC's also specify the points of diversion as two wells, both of which are located on Aravaipa Farm along Aravaipa Creek. ASARCO provided the following explanation about the points of diversion in its amended SOC's:

Surface diversion and delivery of water from Aravaipa Creek to the claimed places of used continued until the mid-1970s when flooding damage to the dam and closure of the ditch where it crossed Indian land required diversion to be change to ASARCO Wells F8 and F9.

Amended SOC's 39-2475, 39-2476, and 39-2482, Attachment at 3, filed April 5, 2019.

As shown by the maps prepared by ADWR and ASARCO in figure 2, the two wells are both located within the same square mile, south of the river, and generally in the middle of section 11 T7S R16E. The WFR and the amended SOC's both contain the same general legal descriptions for one well as located within a 10-acre parcel, i.e., the SWSENE Section 11 T7S R16E. The legal descriptions for the second well differ as to whether the well is located in one of two adjoining 10-acre tracts. The Aravaipa WFR describes the location as in SESENE Section 11 and the amended Statement of Claimant defines it, along with GPS coordinates, in the adjoining quarter quarter quarter section as the SWSWNE Section 11. Given that the standard to be applied is whether the WFR provided adequate information for a claimant or water user to determine if action were required to protect a water right, the legal description is sufficient to put a claimant or water user on notice as to a claimed point of.

3. Quantity

The top section of the Aravaipa WFR correctly states that ASARCO claimed 1,659 acre-feet of water for irrigation. The Department estimated the amount of water used by ASARCO to irrigate land in Aravaipa Ranch using three methodologies: (1) the maximum observed; (2) regional; and, (3) maximum potential. The Department described the maximum potential methodology as follows:

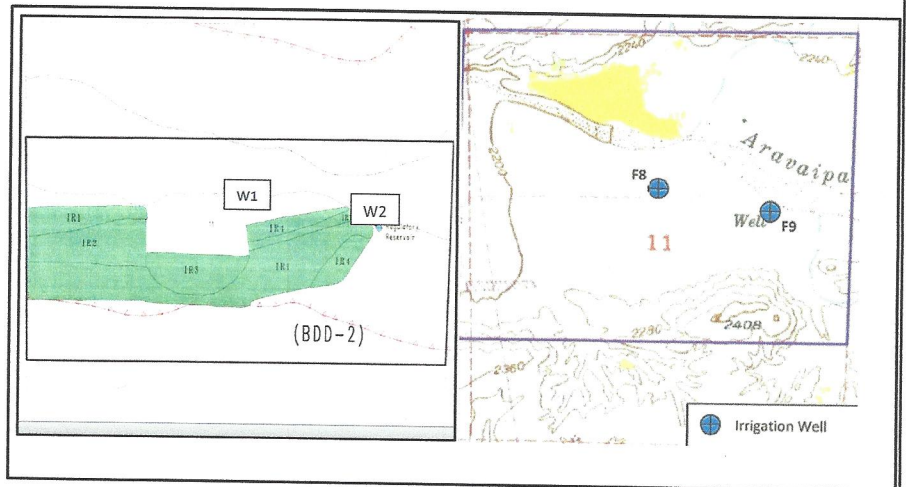


FIGURE 2. The map prepared by ADWR on the left shows the location of the two wells in Section 11. The labels, W1 and W2, have been enlarged for legibility. The map on the right shows the wells that ASARCO claims as points of diversion also located in Section 11.

Sources. San Pedro HSR; Amended SOC's 39-2475, 39-2476, and 39-2482, Exhibit A.

1 The maximum potential quantification is applied to each
2 irrigation water use equal to or greater than two acres and represents
3 DWR's estimation of maximum potential water use for an irrigation
4 potential water right. The maximum potential quantity is based on the
5 highest watering crop reasonably given in the area, region or watershed,
6 the total acres irrigated during DWR's five years investigation period
7 and the irrigation efficiency designated for the irrigation operation. For
8 the San Pedro River HSR, the "Maximum Potential" quantification is
9 based upon growing alfalfa.

10 San Pedro HSR, Vol. 1 at 142.

11 The Department quantified the use of irrigation on Aravaipa Ranch using each
12 methodology and recorded the results in the Aravaipa WFR. Applying the maximum potential
13 methodology, it estimated a volume of 1284.7 acre-feet per annum based on the amount of
14 irrigated land, irrigation efficiency, and the consumptive use of alfalfa. ASARCO's amended
15 Statement of Claimant conforms its quantification methodology to the maximum potential
16 methodology used by ADWR and claimed a right to 1,652.3 acre feet per annum, which 0.4% less
17 than the amount claimed in its SOC 39-2482 and sum of the amounts claimed in SOC's 39-2475
18 and 39-2476. The difference in estimated amounts using the same methodology results from using
19 different values for the three variables. The fact that ASARCO continues to claim a greater
20 amount of water than calculated in the Aravaipa WFR does not make the Aravaipa WFR defective.
21 It simply means that ASARCO objects to ADWR's conclusions although it has adopted ADWR's
22 methodology. The WFR provided adequate notice of the quantity of water at issue because it
23 reasonably informed the recipients of the amounts claimed, the acreage, and the methodology used
24 to calculate the estimated volume.

25 4. Priority Date

26 The Aravaipa WFR identified 13 applicable filings that ADWR deemed relevant to the
27 water use on Aravaipa Ranch. It attached a date of first apparent use of 1878 to water on land
28 described to the quarter section that effectively included all of the land described in the amended
SOCs. Later in the WFR, the Department more precisely stated that 152 acres of the irrigated land
fit within the category that had a date of first apparent use of 1878 to which it attributed 972.8 acre

1 feet of water per year under the maximum potential method. The Department listed dates of first
2 apparent use between 1941 to 1983 with respect to potential water rights for irrigation use on the
3 remaining 45.5 acres using approximately 24% of the estimated volume of water.

4 As reported in the Aravaipa WFR, ASARCO originally claimed priority dates of 1884 for
5 all 1,659 acre feet of water used on section 10 and 11 T7S R16E and it also claimed priority dates
6 of 1941 and 1958 for 1,659 acre feet of water used on section 10 and 11 T7S R16E. The amended
7 SOC's identified 0.8 acres and 0.47% of the claimed water use as having a priority date prior of
8 1869. ASARCO claimed a priority date of 1884, one of the priority dates originally claimed, for
9 15.6 acres using 9.2% of the claimed water and priority dates of 1890 and 1900 for 152.2 acres and
10 the remaining claimed water. The change made by ASARCO in priority dates to slightly earlier
11 for a very small portion of the land/water involved and approximately a decade later for the
12 majority of its claim does not render the information provided in the WFR inadequate to notify
13 potential claimants of the nature of the claims.

14 15 **5. Stockpond, Domestic and Stock Watering Uses**

16 In addition to irrigation, the Aravaipa WFR provides information about ASARCO's three
17 additional uses of water: a stockpond, domestic use, and stock watering. These uses are consistent
18 with the uses described in the amended SOC's. Recipients of the Aravaipa WFR were reasonably
19 informed that the types of water claimed for Aravaipa Ranch included water for stock and
20 domestic use.

21 ASARCO filed a new Statement of Claimant for a stockpond citing 38-27357 as the legal
22 basis, 1.85 acre feet as the quantity and September 30, 1941 as the priority date. The first section
23 of the Aravaipa WFR included Claim of Water Right for a Stockpond 38-27357 filed on June 29,
24 1979 as a claim for water for stock and fish and wildlife use in the amount of 2.8 acre feet with a
25 claim date of 1941. The Aravaipa WFR provides adequate notice of a claim for a stockpond and it
26 also provides the results of its investigation of that claim. The Department reported that it did not
27 find the claimed stockpond. The fact that ADWR could not earlier verify the claim does not mean
28

1 that the claim is new or that the Aravaipa WFR failed to provide adequate information about the
2 claimed water right.

3 The final two uses, domestic and stock watering, total seven acre-feet which is
4 approximately the amount by which ASARCO reduced its claim for irrigation water and
5 constitutes less than one-half of one percent of the total water claimed. The Aravaipa WFR
6 reported that ASARCO claimed water rights for both types of use. As to domestic use, the
7 Aravaipa WFR included a reference to ASARCO's SOC for three acre-feet of water per year for
8 domestic use with a 1940 priority date. The WFR listed a potential water right for domestic use
9 but, as it has done in many watershed file reports, provided no quantity or date of apparent first
10 use. ASARCO filed amended Statement of Claimant 39-2474 for domestic use claiming less water
11 than originally reported in the Aravaipa WFR, two acre-feet instead of three, from the same point
12 of diversion, Well 10, and claimed the same priority date of 1940. ASARCO also included a more
13 general statement that it was entitled to an earlier priority date of 1869 date based on allegations
14 that the land had been settled by that date and water put to domestic purposes. As to stock
15 watering, the Aravaipa WFR reported in the first section of the report that ASARCO claimed water
16 for stock in one pre-adjudication filing and two SOC's but did not include a quantity of water. In
17 the section of the report that includes the investigation results, ADWR stated that it found
18 "incidental" use for stock. It did not quantify the use or propose a potential water right for stock
19 watering. ASARCO amended four of its SOC's to assert a right to 5.0 acre-feet of water per year
20 for stock watering.
21
22
23

24 These two uses present, in the case of domestic use, an alternative theory for priority date
25 of 1869 for two acre-feet of water and, in the case of stock watering, a quantification of the claim
26 at five acre-feet of water with a 1900 priority date. These two priority dates and the quantity
27 claimed for stock watering are not including in the WFR. To avoid any misunderstanding, the
28

1 following discussion does not stand for the proposition that priority dates and seven acre-feet of
2 water are not important. They are important and both priority dates and quantities will be
3 adjudicated in accordance with the rules of these contested case. This decision, to reiterate,
4 focuses exclusively on due process rights of claimants that have not objected to the Aravaipa WFR.

5 Assuming the absence of this specific information about a reported type of use creates a
6 possibility of the risk of loss of a water right, the second part of the *Mathews* analysis focuses on
7 the probable value of a second notice to protect due process rights. The Aravaipa WFR provided
8 notice of the claims and findings about water uses on Aravaipa Ranch involving more than 1,600
9 acre-feet of water with priority dates reaching back almost 141 years. It is not reasonable to
10 believe that the recipient of a notice of claim for such a large amount of water with such an old
11 priority date would decide not to object to the Aravaipa WFR perceiving little or no risk to loss of
12 the recipient's claimed water rights but would reach a different decision if informed that an older
13 priority date was asserted in the alternative for a claimed domestic use for two acre-feet of water or
14 that the claimant attached a quantity of five acre-feet to the stock watering claim. Thus, there is
15 little probable value to the issuance of a second notice.
16
17

18 19 **PZ Ranch WFR**

20 Watershed File Report 114-04-BDA-001 ("PZ Ranch WFR") identified 17 Applicable
21 Filings and Decrees that ADWR deemed relevant to water uses on five sections of land known as
22 PZ Ranch and recorded the results of its investigation of water uses for irrigation, domestic and
23 stock purposes on that land. In the PZ Ranch WFR, ADWR identified ASARCO as the
24 landowner who filed SOC 39-4003 and 39-4004 to assert claims for water for irrigation, stock
25 watering and domestic uses. After the initiation of this case, ASARCO amended SOC 39-4004 to
26 represent that portions of the land had been conveyed to two governmental entities, the United
27
28

1 States Bureau of Reclamation and Arizona Game and Fish Commission, and that a charitable gift
2 of a portion of the land had been made to ASARCO Conservation Foundation, Inc., a non-profit
3 corporation. Amended SOC 39-4004, Attachment at 1, filed May 6, 2019. The amended SOC
4 filed by ASARCO only asserts water rights to that portion of the land owned by it and the United
5 States. ASARCO Conservation Foundation also filed an amendment to SOC 39-4004 to assert
6 claims for water uses on the land it received from ASARCO. ASARCO represents that water
7 rights for the land transferred to Arizona Game and Fish were the subject of SOC 39-4003. *Id.*
8

9 10 **1. Places of Use**

11 The PZ Ranch WFR determined that ASARCO used water for irrigation purposes on those
12 locations with the general legal descriptions set forth column two of Table 3 below. The specific
13 places of use within PZ Ranch identified in the amended SOC as irrigated land⁶ are located with
14 the legal descriptions contained in the PZ Ranch WFR with the exception of a 3.9 acre parcel
15 located in SWNE Section 29 T6S R16E. The Department identified the southeastern quarter of
16 Section 29 as irrigated acreage but did not include any acreage in the northeastern quarter.
17 Claimants asserted in the original Statement of Claimant and in the amended Statement of
18 Claimant that the irrigated acreage is located in the western one-half of the southeastern quarter
19 and extends into the southwestern quarter of the northeastern quarter of section 29. Although the
20 WFR does not include the legal descriptions of the places of use from the original SOC 39-4004 that
21 specifically referenced a 107 irrigated parcel “within the SW1/4NE1/4 and SE1/4 of Section 29”, it
22 did report an early filing that referenced irrigated acreage in the eastern half of section 29 T6S
23
24
25

26 ⁶ To again emphasize, this decision only concerns procedural due process. No factual findings or legal
27 conclusions can be made based on the current record as to whether the claims made by ASARCO Conservation
28 Foundation, Inc. which it characterizes as irrigation use are in fact irrigation use or a change in use. If it is determined
prior to or at the time of the issuance of the ADWR Report that the claims are either new or changed uses, then the
issue of due process will be addressed in light of the facts as developed.

1 R16E. *Statement of Claimant 39-4004*, Attachment at 3 filed May 6, 2019; 10-1105312.1100.

2 Thus, the information provided in the existing WFR provides sufficient notice of the places for
3 which ASARCO claims irrigated acreage to allow potential claimants to determine whether to take
4 action to protect their rights.

5

6 Location By Section	ADWR Location Description	ASARCO Location Description
7 Section 21 T6S R16E	Section 21 T6S R 16E	S2SW Section 21 T6S R16E
8 Section 28 T6S R16E	Section 28 T6S R16E 9 NW Section 28 T6S R16E 10 NWNW Section 28 T6S R16E 11 SENW Section 28 T6S R16E 12 SE Section 28 T6S R16E 13 SW Section 28 T6S R16E 14 NESW Section 28 T6S R16E 15 SWSW Section 28 T6S R16E	NW Section 28 T6S R16E E2NW Section 28 T6S R16E S2NW Section 28 T6S R16E SWSE Section 28 T6S R16E SW Section 28 T6S R16E N2SW Section 28 T6S R16E
16 Section 29 T6S R16E	SE Section 29 T6S R16E	SWNE Section 29 T6S R16E W2 SE Section 29 T6S R16E
17 Section 32 T6S R16E	NE Section 32 T6S R16E	N2NE Section 32 T6S R16E
18 Section 33 T6S R 16E	Section 33 T6S R 16E 19 NE Section 33 T6S R 16E 20 NW Section 33 T6S R 16E 21 SW Section 33 T6S R 16E	NWNE Section 33 T6S R16E N2NW Section 33 T6S R16E NW Section 33 T6S R 16E N2SW Section 33 T6S R16E

22 **TABLE 3.**

23
24 **2. Points of Diversion**

25 In the PZ Ranch WFR, the Department associated five separate points of diversion for
26 potential water rights for irrigation use: surface water from Israel Spring and four wells. It
27 identified three of the wells as located within section 33 T6S R16E and one of the wells as located
28 in section 28 T6S R16E. In the Zone 2 Well Report prepared by the Department in conjunction

1 with the PZ Ranch WFR and included in the San Pedro HSR, the Department also stated each
2 irrigation use “is partially supplied by surface water and Zone 1 groundwater.”

3 The amended SOC asserts rights to divert water from Israel Spring and two wells. It
4 identified the location of one well in section 33 T6S R16E and the other well in section 29 T6S
5 R16E. The legal descriptions of the two claimed wells do not match the description given by the
6 PZ Ranch WFR. In 1992 ASARCO objected to the PZ Ranch WFR on the grounds that the legal
7 descriptions of four wells were incorrect. It provided different legal descriptions for three wells in
8 section 33, one of which is included in the amended SOC, and described the well that the PZ
9 Ranch WFR listed in section 28 as further to the west and located in section 29.
10

11 In making a determination whether the differences in legal description for the two wells
12 cause the PZ Ranch WFR to be ineffective for purposes of giving notice, it must be recognized that
13 procedures adopted to provide for due process must account for “the practicalities and peculiarities
14 of the case.” (citation omitted) *Gila I* at Ariz. 241, 830 P.2d at 453. One of the practical
15 considerations that must be taken into account is this adjudication is that legal descriptions given to
16 the nearest 10-acre or 40-acre parcel can result in error especially when those legal descriptions
17 were created without access to readily available satellite mapping technology. In this case, the PZ
18 Ranch is a large ranch extending at least six sections north-south along the river with irrigated land
19 on both sides of the river. It pumps water to irrigate that land from wells located along the river.
20
21

22 The PZ Ranch WFR notified the recipients in the Gila Adjudication that there were three
23 wells within section 33 and one well in section 28 to the north within the boundaries of a ranch
24 covering multiple sections of land. The amended SOC does not render the notice invalid by
25 reducing the number of wells in half, reiterating its 1992 objection to the legal description of a
26 well, and identifying the location of the wells on its property within the same section or in the
27 adjoining section.
28

1 The PZ Ranch WFR also provided sufficient notice of the claim made by ASARCO in its
2 amended SOC's as follows:

3 ASARCO continues to assert the right to directly divert San Pedro River surface
4 flows in the future up to the maximum diversion rate and annual use volume
5 listed in Response 9. Claimed points of diversion begin where the San Pedro
6 River enters ASARCO's property (NE1/4SE1/4, Section 32, T6S, R16E) and
extending downstream to where the river leaves the property (SE1/4NE1/4,
Section 20, T6S, R16E).

7 Amended SOC's 39-4004, Attachment at 3.

8 In the first section of the PZ Ranch WFR that summarizes the claims previously for water uses,
9 ADWR repeated the description of this extended diversion location from the San Pedro River
10 seven times.

13 3. Quantity

14 The PZ Ranch WFR reported that ASARCO claimed 4,243 acre feet of water for irrigation
15 use. Earlier filings included in the PZ Ranch WFR report much greater amounts of water used for
16 irrigation. Although not included in the PZ Ranch WFR, the original SOC claimed that the
17 landowner irrigated 700 acres. Referencing the map prepared by ADWR as part of the San Pedro
18 HSR, ASARCO states:

20 During the late 1980s, the Arizona Department of Water Resources
21 ("ADWR") investigated this and other farms in the San Pedro River Watershed in
22 connection with its preparation of a hydrographic survey report ("HSR"). It
23 determined that approximately 476 acres were being irrigated at that time (Exhibit
24 I). Portions of some ranch fields have subsequently been lost due to flooding and
change in the course of the San Pedro River. Presently, there are approximately
357.2 historically irrigated acres with PZ Ranch for which ASARCO is asserting a
water right under this amended claim.⁷

25 Statement of Claimant 39-4004, Attachment at 3, filed May 6, 2019.

27
28 ⁷ It appears that ASARCO and ASARCO Conservation Foundation, Inc. believe that the total irrigated
acreage claims is approximately the same as the amount found by ADWR. The acreage included in the PZ Ranch
WFR, however, totals 363.4 acres.

1 The primary change between the original and amended SOC, is that ASARCO, as it did
2 with respect to its claim for irrigation water for Aravaipa Ranch, and ASARCO Conservation
3 Foundation, Inc. changed the methodology to calculate the quantity of water uses. They applied
4 the maximum potential methodology used by ADWR in its evaluation of irrigation use in the San
5 Pedro River watershed. As in the case of Aravaipa Ranch, differences exist between ADWR's
6 calculation and the amount claimed in the amended SOC due to differences in acreage and the
7 values assigned to the variables used in the maximum potential methodology. The PZ Ranch WFR
8 provided sufficient notice of the methodologies that ADWR used to calculate irrigation as
9 evidenced by the many objections filed in this adjudication to those methodologies and by the
10 objections filed in this case to those methodologies.
11

12 13 **4. Priority Date**

14 In the PZ Ranch WFR, the Department reported that ASARCO claimed a priority date of
15 1873 for the claimed use of water for irrigation. The amended SOC does not include any date
16 earlier than January 31, 1876, which is later than the date originally claimed and reported in the
17 WFR. It claims priority dates between January 31, 1876 and September 3, 1895 for its claimed
18 uses except for 78.6 acres of irrigated land for which it claims a priority date of October 14, 1977.
19 The PZ Ranch WFR provided adequate notice about the claimed priority dates in this case.
20
21

22 23 **5. Domestic and Stock watering Uses**

24 As in the case of Aravaipa Ranch, ASARCO, in addition to its claims for water for
25 irrigation use, amended its SOC for PZ Ranch to claim water for domestic and stock watering uses.
26 The PZ Ranch WFR investigated the same types of claims: irrigation, domestic and stock watering.
27
28

1 The PZ Ranch WFR provided adequate notice to recipients of the types of claims made for PZ
2 Ranch.

3 The PZ Ranch WFR noted in the front section of the report that ASARCO claimed two acre
4 feet of water annually for domestic use and ten-acre feet for stock watering in the original
5 Statement of Claimant. The Amended SOC repeats the original claim for 2 acre-feet of water for
6 domestic use and reduces its claim for stock watering by 15% from 10 acre-feet to 8.5 acre-feet of
7 water. Adequate notice was provided with respect to claims for domestic and stock watering.
8

9 10 **Robinson Ranch**

11 Watershed File Report 114-01-CCD-001 (the "Robinson WFR") provides information on
12 water uses on land known as Robinson Ranch and named ASARCO as the landowner. The
13 Robinson WFR identified nine SOC as the relevant adjudication filings in its investigation of
14 water uses. The SOC, as reported on the Robinson WFR, claimed water for domestic, irrigation,
15 and stock uses. After the initiation of this contested case to resolve objections to the Robinson
16 WFR and adjudicate ASARCO's water rights for Robinson Ranch, ASARCO amended five of the
17 SOC and moved for the withdrawal of one SOC⁸ and the exclusion of one SOC.⁹ Two of the
18 SOC¹⁰ were not filed by ASARCO.
19

20 As shown in Table 4, ADWR identified multiple SOC as the applicable adjudication
21 filings for each potential water right for irrigation use. In its original filing, ASARCO filed
22 separate SOC to describe irrigation use on the ranch property. When it amended its SOC for
23 water for irrigation use, it adopted the approach taken by ADWR to essentially file a single
24 Statement of Claimant for multiple irrigation uses. It prepared one form of amendment which it
25
26

27 ⁸ 39-2481

28 ⁹ 39-2478

¹⁰ 39-3426 and 39-12569

1 attached to its four SOC's that claim water for irrigation use. The change in the form of
2 presentation of the claims to conform to the practice generally adopted by ADWR does not affect
3 the validity of the information provided by the Robinson WFR.

<i>Potential Water Right for Irrigation Use</i>	<i>SOC's</i>
114-01-CCD-001-IR001	39-2477, 39-2480, 39-2481, 39-12969
114-01-CCD-001-IR002	39-2480, 39-2481, 39-12969
114-01-CCD-001-IR003	39-2477
114-01-CCD-001-IR004	39-2477, 39-2479
114-01-CCD-001-IR005	39-2426, 39-12969
114-01-CCD-001-IR006	39-3426, 39-12569
114-01-CCD-001-IR007	None

10 **TABLE 4.**

11 **1. Places of Use**

12 The Robinson WFR stated that ADWR found 240 to 260 acres of irrigated land on
13 Robinson Ranch, depending on the methodology applied, at the time ADWR conducted its
14 investigation. ASARCO explained that since ADWR examined water uses on the ranch, flooding
15 and changes in the course of the San Pedro River have caused the loss of some of the ranch fields.
16 Amended Statement of Claimant, Attachment at 2, filed April 5, 2019. The amended SOC's claim
17 that approximately 239.5 acres of land are currently irrigated, which is 0.2% to 7.8% less than the
18 amount reported by ADWR in 1991.
19

20 The Robinson WFR identified the places of use for the potential water rights for irrigation
21 as shown in Table 5. The legal descriptions provided in the Robinson WFR of the locations of the
22 irrigated acreage are grouped by section in the second column of Table 5. Similarly, the legal
23 descriptions provided by ASARCO have been grouped by section and listed in the third column of
24 the table. As shown by a comparison of the second and third columns of Table 5, the legal
25 descriptions provided by the Robinson WFR include all places of use claimed in ASARCO's
26
27
28

1 amended SOCs. The Robinson WFR provides adequate notice to the claimants and water users in
2 the Gila Adjudication of the claimed places of use.

3 4 5	Location By Section	ADWR Location Description	ASARCO Location Description
6 7	Section 25 T5S R15E	Section 25 T5S R15E NWNW Section 25 T5S R15E SE Section 25 T5S R15E	S1/2NE 25 5S T15E SE Section 25 T5S R15E
8 9	Section 36 T5S R15E	Section 36 T5S R15E	NENE Section 36 R5S R15E
10 11	Section 30 T5S R16E	Section 30 T5S R16E SW Section 30 T5S R16E	SWSW Section 30 T5S R16E
12 13 14 15	Section 31 T5S R16E	NE Section 31 T5S R16E NW Section 31 T5S R16E SE Section 31 T5S R16E SW Section 31 T5S R16E NESW Section 31 T5S R16E NWSW Section 31 T5S R16E	SWNE Section 31 T5S R16E S1/2NW Section 31 T5S R16E NWNW Section 31 T5S R16E NWSE Section 31 T5S R16E SWSE Section 31 T5S R16E SW Section 31 T5S R16E N1/2 SW Section 31 T5S R16E
16 17	Section 6 T6S R16E	Section 6 T6S R16E	NENW Section 6 T6S R16E NWNE Section 6 T6S R16E

18 **TABLE 5.**

2. Points of Diversion

In the Robinson WFR, the Department found that five wells served as points of diversion. The amended SOC's state that while water in the past had been diverted directly from the San Pedro River, "[w]ater diversion for irrigation uses were changed to well starting in the 1940s." *Id.* at 3. ASARCO claimed four wells as the points of diversion in the amended SOC's. The legal descriptions listed in the Robinson WFR match to within the same 10 acre parcel for two

wells¹¹ claimed by ASARCO and match to within a 40 acre parcel for one well¹². The final well claimed by ASARCO is Well F1A, ADWR well registration number 55-517918. The Robinson WFR identifies W09 as F-1A and identifies it as located in NWSWSE 25 T5S R15E. According to ADWR's records, the well registered as 55-517918 has the same legal description as W09 in the Robinson WFR. The amended SOC's, however, place the well further south in the NW quarter of Section 31 T5S Range 16E. The discrepancy in the description of the well along the river within the boundaries of the Robinson Ranch is between the two quarter sections that intersect (the corner of the SE quarter of Section 25 T5S R15E meets the corner of the NW quarter of Section 31 T5S

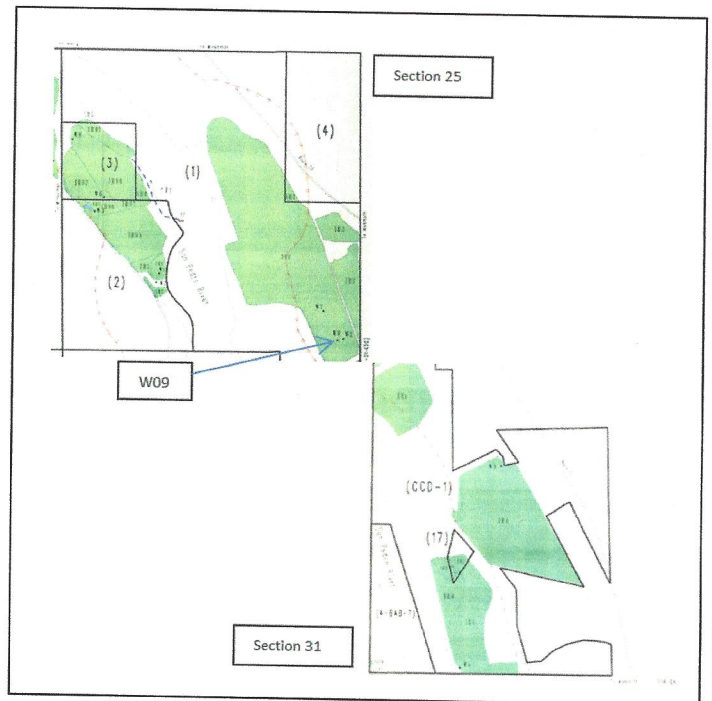


FIGURE 3. The location of the well in question is shown close to the corners of sections 25 and 31.
Source. San Pedro HSR.

¹¹ Well F2 in the amended SOC corresponds to W07 in the WFR and Well F5 corresponds to W05 in the WFR.

¹² Well F3 in the amended SOC and W03 in the WFR are both described in the SESE 25 T5S R15E, but the description of the final 10-acre parcel differs with ASARCO placing it in the SE quarter and ADWR placing it in the NE quarter.

1 R15E). *See figure 3.* As discussed above, legal descriptions given to the nearest 10-acre or 40-
2 acre parcel can result in error. Relatively minor errors as to the legal description of the location of
3 a well within a large ranch should be resolved during the course of the contested case and should
4 not be elevated in importance to invalidate a notice that provides notice that the well exists on the
5 ranch and its general location. Given that the standard to be applied is whether the WFR provided
6 adequate information for a claimant or water user to determine if action were required to protect a
7 water right, the legal descriptions in the Robinson WFR are sufficient to put a claimant or water
8 user on notice as to a claimed point of diversion.
9

10 11 **3. Quantity**

12 The Robinson WFR reported that ASARCO claimed 2,680 acre feet of water for irrigation
13 associated with the four SOC's that have been amended. As it did in its amended SOC's for its other
14 two ranches, ASARCO changed its method of calculating the amount of water used for irrigation
15 to the maximum potential methodology used by ADWR in the Robinson WFR. Different results
16 occurred because ASARCO assigned different value to the variables to calculate the final amounts.
17 Using the maximum potential methodology, ASARCO claimed 2,921.9 acre-feet of water, a nine
18 percent increase in the amount of water originally claimed. As discussed above, notice provided
19 by the Robinson WFR is sufficient because it provided adequate information to the recipients about
20 the original amount claimed, acreage, and methodologies that ADWR used to calculate the amount
21 of irrigation.
22
23
24

25 **4. Priority Date**

26 The Robinson WFR identified the applicable filings deemed relevant by ADWR to the
27 water use on Robinson Ranch. According to those filings, ASARCO claimed a priority date of
28

1 1900 for 900 acre feet of water used in SE section 25 T5S R15E and priority dates ranging from
2 1946 to 1974 for water rights claimed in the remaining SOC's. The Robinson WFR reported that
3 the irrigated land, using legal descriptions containing only section, township and range that include
4 all of the land described in the amended SOC's, had a date of first apparent use of 1900. In a later
5 section of the WFR, the Department more precisely stated that 169.9 acres of the irrigated land
6 within those sections had a date of first apparent use of 1900 to which it attributed 1,444.2 acre feet
7 of water per year under the maximum potential method. It reported the dates of first apparent use
8 of 1947 to 1975 to two smaller parcels (21.7 and 1.8 acres, respectively) and 1955 to a 65.8 acre
9 parcel.

10 The amended SOC's describes the land more specifically than found in the Robinson WFR
11 and claimed that 191.4 acres have priority dates between 1877 and 1916. ASARCO claims a
12 priority date of 1955 with respect to water used on the remaining 48.1 acres located in section 31.
13 The description of this land appears to fit within the 55.8 – 65.8 acres of land for which ADWR
14 found a first apparent date of use of 1955. The change made by ASARCO in priority dates to
15 slightly earlier for a very small portion of the land/water involved and approximately a decade later
16 for the majority of its claim does not render the information provided in the WFR inadequate to
17 notify potential claimants of the nature of the claims.

18

19 **5. Stockpond, Domestic and Stock Watering Uses**

20 In addition to irrigation, the Robinson WFR provides information about ASARCO's two
21 additional uses of water: domestic use, and stock watering. These uses are consistent with the
22 uses described in the amended SOC's. Recipients of the Robinson WFR were reasonably informed
23 about the types of water claimed for Robinson Ranch.
24

25 The Robinson WFR reported that ASARCO claimed 50 acre-feet per year for domestic use
26 in SOC 39-2478, which was not amended, and three acre-feet in SOC 39-2482, which was
27 amended. ASARCO has since requested that the determination of water rights associated with
28 SOC 39-2478 should be excluded from this contested case. The WFR for Robinson Ranch, like the

1 Aravaipa WFR and the Robinson WFR, listed a potential water right for domestic use but did not
2 include a quantity or date of apparent first use. ASARCO amended SOC 39-2483 to reduce its
3 original claim for domestic use to two acre feet and to claim a priority date of December 31, 1877,
4 1892 or 1964. As to stock watering, the Aravaipa WFR reported in the first section of the report a
5 claim for water for stock in one pre-adjudication filing but did not associate a quantity of water. In
6 the section of the report that includes the investigation results, ADWR stated that it found an
7 "incidental" use for stock. It did not quantify the use or propose a potential water right for stock
8 watering. ASARCO amended four of its SOC's to assert a right to 2.15 acre feet of water per year
9 for stock watering with a priority date of December 31, 1877 or 1892.

11 Assuming that the absence of information about the priority date for two acre-feet of water
12 for domestic use and the quantity and priority date for a claim for a stock watering use creates a
13 possibility of the risk of loss of a water right, the second part of the *Mathews* analysis focuses on
14 the probable value of a second notice to protect due process rights. The Robinson WFR provided
15 notice of the claims and findings about water uses on Aravaipa Ranch involving more than 2,000
16 acre-feet of water with priority dates reaching back almost 120 years. It is not reasonable to
17 believe that the recipient of a notice of claim for such a large amount of water with such an old
18 priority date would decide not to object to the Aravaipa WFR perceiving little or no risk to loss of
19 the recipient's claimed water rights but would arrive at a different decision if provided with the
20 missing information. Thus, there is little probable value in the issuance of a second notice.

23 In sum, the conclusion that can be drawn from the application of the second prong of the
24 *Mathews* Court test is that the three WFRs at issue here, in most instances, provided adequate
25 notice of ASARCO's claims made in the amended SOC's and, in those instances where they did not
26 provide complete information about the claim, there is little, if any, probable value in distributing
27 another notice. Turning to the third factor identified in the *Mathews* Court test, consideration must
28

1 be given in this case to the imposition of fiscal and administrative burdens on the State from the
2 issuance of an additional notice. The Department reports that the amount that would be spent in
3 postage alone to provide notice to the recipients in the Gila adjudication would be approximately
4 \$20,000. Report at 6. Additional administrative costs would also be incurred with the sending of
5 notice. The Department, well-aware of the costs involved, proposed that the issuance of the notice
6 and therefore the proceedings in this case should await the issuance San Pedro II HSR. While that
7 proposal would alleviate the burden on the State of an individual notice, it would, however, impose
8 a significant cost in terms of time and delay in the resolution of these contested cases.
9

10 The United States Supreme Court has already instructed that due process requirements
11 cannot be justified when they impose “impossible or impractical obstacles.” *Mullane* 339 U.S. at
12 313-14. In large water cases, the courts have seriously considered the cost of imposing additional
13 due process requirements after initial notices of the commencement of the case have been provided
14 to the potential parties and found that sheer number can constitute an “impractical obstacle” to
15 imposition of due process procedures. *State, Dept. of Ecology v. Acquavella*, 100 Wash. 2d 651,
16 657, 674 P.2d 160, 163 (1983). In its approval of procedures for this adjudication that modified
17 the Arizona Rules of Civil Procedure, the Arizona Supreme Court found that the “most significant
18 factor in this case is the sheer multitude of the parties to the adjudication.” *Gila I* 176 Ariz. at 241,
19 830 P.2d at 453. Since the issuance of *Gila I*, the numbers have only increased. The Department
20 reports that there are approximately 56,000 recipients in the San Pedro River watershed and the
21 Gila River adjudication. Report at 6. In this case, an additional procedural requirement of a new
22 notice faces the significant obstacles that either the State must spend tens of thousands of dollars in
23 postage and administrative costs to send the notice or the adjudication of a claimant’s water rights
24 must be indefinitely delayed until a new major report is prepared and the notice can be sent as part
25 of that report.
26
27
28

1 The Arizona Supreme Court has approved the additional procedural safeguard that can be
2 used in this situation: the general court-approved mailing list for the adjudication. Notice can be
3 sent to the parties in this case as well as those persons and entities on the court-approved mailing
4 list for the adjudication without significant additional cost.

5 Based on the foregoing notice will be given of the ADWR Report to the parties listed on
6 the court-approved mailing list for this contested case and to the persons and entities listed on the
7 court-approved mailing list for the Gila Adjudication and ADWR shall post the Report of its
8 website maintained for the adjudication.
9

10 **IT IS ORDERED** setting a Scheduling Conference for October 23, 2019 at 1:45 p.m. in
11 the Superior Court of Arizona, Central Court Building, Courtroom 301, 201 West Jefferson Street,
12 Phoenix, AZ 85003-2202.

13 At the Scheduling Conference the following actions will be determined:

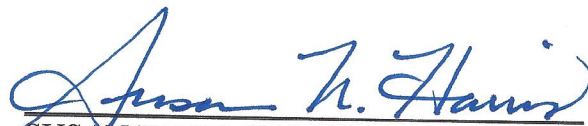
- 14 1. Whether to separate this case into three separate cases so that the discovery,
15 motions, and trials will be held separately for water rights for Aravaipa Ranch,
16 PZ Ranch, and Robinson Ranch.
17 2. A date for objections to be filed to the ADWR Report.
18 3. A schedule for discovery deadlines, dispositive motions, and trial.
19

20 Instructions for telephonic participation:

21 Dial: 602-506-9695 (local)

22 1-855-506-9695 (toll free long distance)

Dial Collaboration (conference) Code 357264#

23
24
25 

26 SUSAN WARD HARRIS

27 Special Master
28

1 On October 8, 2019, the original of the foregoing was
2 delivered to the Clerk of the Maricopa County Superior
3 Court for filing and distributing a copy to all persons listed
4 on the Court-approved mailing list for this contested case.
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