

GILA RIVER INDIAN COMMUNITY

Executive Office of the Governor & Lieutenant Governor

"Gila River Strong"

Stephen Roe Lewis
Governor



Regina Antone
Lieutenant Governor

April 2, 2024

VIA E-MAIL

Thomas Buschatzke
Director
Arizona Department of Water Resources
1110 W. Washington St., Suite 310
Phoenix, Arizona 85007
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Re: Enforcement against ASARCO's diversion of San Pedro River water in violation of the Gila River Indian Community's time-immemorial right to Gila River water

Director Buschatzke,

The Gila River Indian Community (Community) submits the following complaint seeking enforcement against ASARCO's use of surface water in violation of Arizona law.

Executive Summary

ASARCO and/or its lessees are pumping appropriable water in the San Pedro watershed upstream of the Community. Specifically, ASARCO is operating at least twelve wells that the Arizona Department of Water Resources ("ADWR") has already determined are in the subflow zone of the San Pedro River and Aravaipa Creek. These wells deplete the aquifer and reduce the water flowing downstream to the Community.

The Community has a superior, adjudicated right to the water ASARCO is pumping. As the Arizona Supreme Court has explained, the Community's superior right to mainstem Gila River water "include[s] the right to the waters of the tributaries," like the San Pedro, "above [its] points of diversion." *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (Gila VIII)*, 224 P.3d 178, 190 n.17 (2010) (en banc) (quoting Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights*, § 649, at 1137 (2d ed. 1912)). Yet ASARCO continues its pumping of subflow despite the Community's invocation of its superior right to the water.

ASARCO's actions violate A.R.S. § 45-112(A)(3) and other applicable law that prohibits the diversion of water to which another party has a superior right. And Arizona law is explicit in creating a **non-discretionary duty** for the Director of ADWR (Director) to investigate and take action on any complaint that alleges withdrawals that violate Arizona law. Section 105(B)(8) of Title 45 explicitly states that the ADWR Director "*shall* . . . [i]nvestigate and take appropriate

action on *any* complaints alleging withdrawals, diversions, impoundments or uses of surface water” that violate Arizona law. A.R.S. § 45-105(B)(8) (emphasis added).

The Community respectfully insists that you, as ADWR Director, carry out this duty by investigating ASARCO’s diversions and ordering ASARCO to cease pumping subflow in the San Pedro subwatershed when the Community is seeking to divert the waters of the mainstem of the Gila River under its time-immemorial right granted by the Globe Equity Decree and adjudicated in the Gila Adjudication.

I. The Community has an adjudicated, time-immemorial right to the waters of the Gila River and its tributaries upstream of the Gila River Indian Reservation.

The Gila River Indian Community, consisting of members of the Akimel O’otham (Pima) and Pee-Posh (Maricopa) Tribes, has irrigated its lands with waters of the Gila River since long before non-native settlers came to the area. Accordingly, the Community has the most senior right to waters of the Gila River, including any tributaries upstream of the Gila River Indian Reservation. It has an adjudicated, decreed right with a time-immemorial priority to divert 210,000 acre-feet per year (AFY) from the natural flow of the Gila River to irrigate 35,000 acres of land on the Gila River Indian Reservation. *See Gila River Indian Cmty. v. Cranford*, 459 F. Supp. 3d 1246, 1252–53 (D. Ariz. 2020). This right and several other rights to the waters of the mainstem of the Gila River were decreed in Articles V and VI of the Globe Equity Decree entered in 1935.¹ The Community’s Globe Equity Decree rights are federally derived reserved rights appurtenant to the Gila River Indian Reservation and are held in trust by the United States. *See id.* at 1252.

The Community’s federal Globe Equity Decree rights were adjudicated and confirmed by Arizona courts as part of the judicial approval of the Community’s congressionally approved water settlement in 2007. In 2004, Congress passed the Arizona Water Settlements Act (“AWSA”), Pub. L. No. 108-451, 118 Stat. 3478 (2004). Title II of the AWSA includes congressional approval of the Gila River Indian Community Water Rights Settlement Agreement (Settlement Agreement).

¹The Community also has four other Globe Equity Decree rights with more junior priorities, described in Articles V and VI of the Decree, which are not at issue here; some are shared among the lands of the San Carlos Indian Irrigation Project (SCIIP), which include the Gila River Indian Reservation and the San Carlos Irrigation and Drainage District (SCIDD):

- Article VI(3): A 1916 priority right for 372,000 AFY from the natural flow of the Gila River to irrigate 35,000 acres of irrigable land on the Reservation and 27,000 acres of so-called “White lands,” most of which are within SCIDD;
- Article VI(4): A June 7, 1924 priority right to divert 603,276 AFY for the irrigation of 50,546 acres on the Reservation and 50,000 acres within SCIDD, including but not limited to using stored water released from Coolidge Dam;
- Article VI(5): A 1924 right to store waters in the San Carlos Reservoir, and to release these waters for conveyance to the Ashurst-Hayden and Sacaton Dams for diversion to the 100,546 acres under the paragraph (4) right; and
- Article VI(6): Rights to return flow for 2,992.5 acres of Reservation lands within the Gila Crossing District.

AWSA § 203. The Settlement Agreement provides that “the [Community’s] rights described in articles V and VI of the Globe Equity Decree . . . shall be binding upon all parties to the Gila River Adjudication Proceedings.” *Id.* ¶ 6.3; *see Gila VIII*, 224 P.3d at 188–89; *see also* A.R.S. § 45-257(B)(1) (“when rights to the use of water or dates of appropriation have previously been determined in a prior decree of a court, the [Adjudication] court shall accept the determination of such rights and dates of appropriation as found in the prior decree unless such rights have been abandoned.”). The Gila Adjudication Court confirmed the rights set out in the Community’s Settlement Agreement in an order dated September 13, 2007, that was affirmed on appeal to the Arizona Supreme Court. *In Re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, Nos. W-1, W-2, W-3, W-4 (Consolidated), Contested Case No. W1-207, Judgment and Decree (Sept. 13, 2007) (“2007 Judgment”), *aff’d*, *Gila VIII*, 224 P.3d 178 (Ariz. 2010).

The Globe Equity Decree, entered long before the 1952 McCarran Amendment authorized state courts to adjudicate federal water rights and decades before the Gila Adjudication was authorized by state law, was a comprehensive adjudication as to all rights to the waters of the mainstem of the Gila River upstream of its confluence with the Salt River. “[T]he Decree was intended to resolve all claims to the Gila River mainstem. The United States included as defendants in the Globe Equity litigation all those with claims to the mainstem of the Gila River, and the Decree includes all water rights theories that the parties could have asserted. Thus, as to the mainstem of the Gila River, the Decree is comprehensive.” *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source (Gila VI)*, 127 P.3d 882, 902 (Ariz. 2006) (en banc). The Decree “continues to govern the use of Gila River water from its source in New Mexico to its confluence with the Salt River.” *Cranford*, 459 F. Supp. 3d at 1249.

Although claims to the waters of the tributaries upstream of the Community’s reservation were not adjudicated by the Globe Equity Decree and await adjudication in the Gila Adjudication, those waters are also subject to the Community’s senior Decree rights. In *Gila VIII*, the Arizona Supreme Court addressed arguments raised by ASARCO that in light of the settlement’s confirmation of “GRIC’s Globe Equity Decree rights with time immemorial priority,” ASARCO and other “users of the San Pedro River are now arguably bound by GRIC’s time immemorial priority on that tributary, even though the relative priority of rights must still be determined in the adjudication.” 224 P.2d at 190. In response, the Court held that ASARCO would be subject to enforcement of state law under the existing law of prior appropriation, without altering (and irrespective of) ASARCO’s claims in the Adjudication. It held that (1) “ASARCO’s claims to the San Pedro are unaffected,” (2) the Globe Equity Decree did not adjudicate any rights on the San Pedro, and (3) “ASARCO remains free to assert its claim of senior rights to the San Pedro River when the relative water rights of that tributary are determined in the general stream adjudication.” *Id.* It also held that ASARCO’s rights on the San Pedro are necessarily subject to the Community’s superior right downstream on the mainstem of the Gila River:

Because the judgment and decree provides GRIC with the right to divert water from the Gila River mainstem, however, the water users of the tributaries may be affected due to the limited amount of available Gila River water. “[P]rior appropriations of the water of the main stream include the right to the waters of the tributaries, above the points of diversion, to the full extent of those prior appropriations.” Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights*, § 649, at 1137 (2d ed. 1912).

Id. n.17.

In times of shortage, the Community, with the most senior right to mainstem Gila River water, is entitled to receive each year all 210,000 acre-feet of Gila River water under its time-immemorial right before ASARCO may divert any appropriable water at all from its wells on the San Pedro River. ASARCO does not claim any priorities as senior as the Community's time immemorial right. And "[i]n Arizona, surface water is subject to the doctrine of prior appropriation." *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source (Gila V)*, 35 P.3d 68, 71 (Ariz. 2001) (citing A.R.S. § 45-141(A)). As the Arizona Supreme Court has explained:

Prior appropriation adheres to a seniority system determined by the date on which the user initially puts water to a beneficial use. According to state law, the person "first appropriating the water shall have the better right." [A.R.S.] § 45-151(A). This chronological staging becomes important in times of shortage because preference is given according to the appropriation date, allowing senior holders to take their entire allotments of water before junior appropriators receive any at all. In short, "[t]he oldest titles shall have precedence." *Id.* § 45-175.

Id.

ASARCO, unlike some other parties who had water rights claims adverse to the Community, did not join the Settlement Agreement. *See, e.g.,* Settlement Agreement ¶¶ 25.17.1, 25.17.3. Accordingly, in the Settlement Agreement, the Community retained all rights against ASARCO. *See id.* ¶¶ 25.12.1.15, 15.12.1.16. Further, Paragraph 25.12.1.3 retains the Community's right (and the United States' right on behalf of the Community) to "assert claims for injuries to, and seek enforcement of, the rights of the Community and Members under the Globe Equity Decree"

II. ASARCO is pumping subflow subject to the Community's superior downstream right.

ASARCO is pumping subflow from at least twelve irrigation wells on the San Pedro River. ASARCO has admitted these wells divert subflow; its statements of claimant identify "subflow" as a source of water for each of the wells. *See* Excerpts from Statement of Claimant Forms, attached as Exhibit 1 (admissions highlighted). The twelve ASARCO irrigation wells pumping subflow are identified in the following table. This information is taken from ADWR Well Registry Reports (attached as Exhibit 2) and ADWR's Notice of Filing Amended Watershed File Reports filed in *In re ASARCO-Irrigation*, Contested Case No. W1-11-2801 (Mar. 19, 2021) (attached as Exhibit 3).

Well Registry	ASARCO Well Name	SOC(s)	WFR	Drilled Date
55-517918	F-1A	39-2477 39-2479 39-2480 39-12969	114-01-CCD-001	6/29/1987

Well Registry	ASARCO Well Name	SOC(s)	WFR	Drilled Date
55-610306	F-2	39-2477 39-2479 39-2480 39-12969	114-01-CCD-001	1/1/1946
55-610308	F-5	39-2477 39-2479 39-2480 39-12969	114-01-CCD-001	5/3/1974
55-617375	PZ-1	39-4004	114-04-BDA-001	1948
55-617376	PZ-2	39-4004	114-04-BDA-001	1/1/1938
55-617379	PZ-9	39-4004	114-04-BDA-001	4/1/1964
55-617381	PZ-11	39-4004	114-04-BDA-001	12/17/1973
55-617384	PZ-14	39-4004	114-04-BDA-001	2/8/1978
55-617385	PZ-15	39-4004	114-04-BDA-001	3/14/1978
55-610309	F-8	39-2475 39-2476 39-2482	114-04-BDD-002	1/1/1958
55-538345	F-9	39-2475 39-2476 39-2482	114-04-BDD-002	3/18/1994
55-610314	F-10 ²	39-2475 39-2476 39-2482	114-04-BDD-002	1/1/1965

ADWR has already determined that these twelve wells are within the San Pedro Subflow Zone and are being used for irrigation. *See In re ASARCO-Irrigation*, Amended Watershed File Reports (Ex. 3).

III. Arizona law prohibits diversions in derogation of a senior right.

It is unlawful in Arizona to knowingly divert surface water out of priority, including subflow. Under A.R.S. § 45-112(A)(3), it is a class 2 misdemeanor if anyone “[w]ithout authority uses water to which another is entitled except for water taken through a registered well without knowledge that such water constitutes the subflow of a river or stream.” ASARCO has already admitted that its wells pump subflow. Further, on October 27, 2023, the Community notified ASARCO that at least eleven of its wells are pumping subflow of the San Pedro River and that it is required by law to cease its diversions of such water until the Community receives its full immemorial right. So far as the Community is aware, ASARCO has continued to operate its wells pumping subflow of the San Pedro River. A copy of the demand letter is attached as Exhibit 4.

²Although Well F-10 also supplies water for domestic uses and stock watering, it is listed by ADWR as a source of irrigation water for a potential water right for 114-04-BDD-002 and appears to be the only well near the westernmost irrigated field.

IV. ASARCO's pumping deprives the Community of water downstream.

ASARCO's diversions reduce the amount of water available to the Community downstream. Courts have repeatedly recognized that the Globe Equity Decree overallocated the Gila River, and the situation has only worsened since 1935 due to massive, unregulated pumping. For example, in a recent Globe Equity decision, the Decree Court noted that "the Gila River mainstem . . . has been over-allocated from the start, as there simply is not enough water in the river system to satisfy the allocations of all parties with water rights to the river." *Gila River Indian Cmty. v. Schoebroek*, -- F. Supp. 3d --, 2023 WL 5723400, at *5 (D. Ariz. 2023) (citing *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996) ("The river is now overdeveloped and overallocated.")).

The San Pedro River empties into the Gila River mainstem just upstream from where the Community diverts water at the Ashurst-Hayden Dam. Subflow not diverted on the San Pedro finds its way downstream to the mainstem and is available for diversion by the Community. *See* Analysis of Peter Mock (attached as Exhibit 5). By pumping subflow upstream of the Community, ASARCO is depleting water that would otherwise be available to satisfy the Community's superior rights under the Globe Equity Decree. *See id.*

Diversions on the San Pedro by ASARCO deplete Gila River flows downstream especially during times of shortage when summer crops are being irrigated and rainfall is minimal, such as in May and June. These are times when the Community does not receive its full immemorial right under the Globe Equity Decree because the water simply is not available. For example, from May 1, 2022 to May 19, 2022, the San Carlos Indian Irrigation Project diverted the entire remaining natural flow of the Gila River under the Community's time-immemorial priority every day, and because there was not enough water to satisfy the Community's full right, SCIIP had to use stored water and pumped water to supplement its diversions of natural flow. Available natural flow varied from 25 to 90 cfs, yet the Community's immemorial right is for 437.50 cfs. *See* Excerpts from Gila Water Commissioner's 2022 Annual Report at Plate 29-5 (attached as Exhibit 6). As another example, that same situation recurred from June 9, 2023 to October 27, 2023: the Gila River had insufficient water to satisfy the Community's right to 437.50 cfs of natural flow, while ASARCO was pumping subflow upstream. *See* Excerpts from Gila Water Commissioner monthly reports (attached as Exhibit 6). ASARCO's diversions are depleting Gila River flows at times when the Community is not receiving its full entitlement.

V. ADWR has the duty and the authority to shut down wells pumping water to which another has a superior right.

Arizona law not only imposes a duty for the ADWR Director to act to stop unlawful diversions, it also provides authority to protect those with adjudicated, senior water rights from being deprived of water by unauthorized or junior diverters upstream. "The director has general control and supervision of surface water, its appropriation and distribution . . . except distribution of water reserved to special officers appointed by courts under existing judgments or decrees." A.R.S. § 45-103(B). The director "shall . . . [i]nvestigate and take appropriate action on any complaints alleging withdrawals, diversions, impoundments or uses of surface water . . . that may violate" Arizona law. A.R.S. § 45-105(B)(8). ADWR "has been given broad powers to administer water legislation in Arizona." *Cortaro Water Users' Ass'n v. Steiner*, 714 P. 2d 836, 838 (Ariz. Ct.

App. 1985), *rev'd in part on other grounds*, 714 P. 2d 807 (Ariz. 1986).

This power must be exercised, especially in times of shortage, to ensure the priority system functions. “Since the amount of surface water available is insufficient to satisfy all needs, and since Arizona follows the doctrine of prior appropriation, it is unavoidable that the priority claims of large users will reduce, if not eliminate, the amount of water available to some of those with lower priority.” *United States v. Superior Ct. In & For Maricopa Cnty.*, 697 P.2d 658, 663 (Ariz. 1985) (internal citation omitted). Without enforcement action by you and your department, the law of prior appropriation is essentially a nullity in areas of Arizona where there is no federal control of diversions, such as on the San Pedro River.

The Gila Adjudication court’s judicial authority over pending claims to water rights does not supplant or curtail the Director’s duties to carry out the Department’s executive law enforcement functions. The ongoing Adjudication, with no end in sight, is not a license for ASARCO to violate vested rights and provides no excuse for the Department to suspend enforcement of those rights or shift responsibility to the Adjudication court. As Director, you have a statutory duty to protect those who, like the Community, have fully adjudicated water rights. You have no authority to delegate that executive function to the judicial branch of government or to seek advance consultation from that separate branch of government.

The judicial branch exercises judicial review over your decisions but has no authority to direct the exercise of your statutory duties in the first instance. Although the Department serves as an advisor to the Gila Adjudication court in matters within that court’s jurisdiction pursuant to A.R.S. § 45-256, the reverse is not true—the Gila Adjudication court has no statutory mandate or authority to advise the Department as to how to carry out its enforcement duties. Article III of the Arizona Constitution prohibits courts from exercising executive authority. “The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.” Ariz. Const. art. III. And “the executive branch’s duty is to carry out the policies and purposes declared by the Legislature.” *State ex rel. Woods v. Block*, 942 P.2d 428, 434 (Ariz. 1997). Arizona courts “do not issue advisory opinions.” *Freeport McMoRan Corp. v. Langley Eden Farms, LLC*, 268 P.3d 1131, 1135 (Ariz. Ct. App. 2011). Indeed, Arizona courts cannot issue declaratory judgments on “issues that are committed for initial decision to an administrative body.” *Tanner Companies v. Arizona State Land Dep’t*, 688 P.2d 1075, 1079–80 (Ariz. Ct. App. 1984); *see also Original Apartment Movers, Inc. v. Waddell*, 880 P.2d 639, 642 (Ariz. Ct. App. 1993) (trial court should decline to accept declaratory judgment action when an administrative agency has primary jurisdiction). As the Department has aptly stated in an analogous context, the Department must “follow the rules and statutes as they are written,” “provide predictability and consistency,” and “honor the legislators’ intent as expressed in statute and the separation of powers enshrined in the Constitution of the State of Arizona.” *In re Paul L. Sale Investment Co.*, No. W1-11-3107, ADWR Reply to Responses of SRP and City of Phoenix dated Jan. 18, 2024, at 11. Here, the legislature’s express command must be given effect: the director “shall . . . [i]nvestigate and take appropriate action on any complaints alleging withdrawals, diversions, impoundments or uses of surface water . . . that may violate” Arizona law. A.R.S. § 45-105(B)(8).

Nothing in this complaint implicates the Adjudication court's jurisdiction, even under a broad view of that jurisdiction. The issues raised in this complaint do not depend on the resolution of any case, claim, or issue pending in that court. Even if the Special Master's decision in *In re Paul L. Sale* is adopted by the court, this is not a case that requires a "determination of the attributes of a water right," an "allocation of water rights," or a "determination of water rights." See *In re Paul L. Sale Investment Co.*, No. W1-11-3107, Special Master Final Report dated Mar. 23, 2023, at 6. This case is unlike *Gabel v. Tatum*, 707 P. 2d 325, 326 (Ariz Ct. App. 1985), where the court held that the Gila Adjudication had prior jurisdiction over a claim for a "declaration of rights." Here, the Community has an adjudicated, superior right to the water ASARCO is pumping regardless of the resolution of ASARCO's claims in the Gila Adjudication. The Gila Adjudication has jurisdiction only to determine "the nature, extent and relative priority of the water rights of all persons in the river system and source." A.R.S. § 45-252(A). The Gila Adjudication court has already determined that the Community's time-immemorial right is enforceable; enforcement need not await any further determination as to the nature, extent, or relative priority of ASARCO's claimed rights, because ASARCO does not claim any superior right to pump water upstream of the Community. The earliest priority date ASARCO claims is 1869. The Community's time-immemorial right to Gila River water is senior to any right ASARCO asserts or could assert to the San Pedro River or its tributaries. ASARCO must cease diversions from the twelve wells identified herein as pumping subflow at all times when the Community seeks to divert water under its adjudicated, time-immemorial right under Article VI(1) of the Globe Equity Decree. The Community respectfully insists that you as ADWR Director promptly fulfill your statutory duty to investigate and take action to stop this flagrant abuse of the Community's judicially and congressionally recognized right to waters of the Gila River.

Conclusion

The Community requests that ADWR carry out its statutory duty to investigate ASARCO's unlawful diversions and order ASARCO to cease diverting when the Community is invoking its time-immemorial right to waters of the mainstem. Time is of the essence for the Community in this matter as we approach the critical irrigation season in May.

Please let us know if we can provide any additional information the Department may wish to consider in investigating this matter.

Respectfully,



Stephen Roe Lewis, Governor
Gila River Indian Community

cc: Nicole Klobas
Gila River Indian Community Council
Gila River Indian Community Lt. Governor Regina Antone
Javier Ramos
Don Pongrace

Jason Hauter
Merrill Godfrey

Attachments:

1. Excerpts from Statement of Claimant Forms
2. Selected ADWR Well Registry Reports
3. *In re ASARCO-Irrigation*, Contested Case No. W1-11-2801, Arizona Department of Water Resources' Notice of Filing Amended Watershed File Reports (Mar. 19, 2021)
4. Letter from Governor Stephen R. Lewis, Gila River Indian Community, to C.E.O. Oscar Gonzalez Rocha, ASARCO, dated October 27, 2023
5. Analysis by Peter Mock, Ph.D., R.P.G.
6. Excerpts from Gila Water Commissioner's 2022 Annual Report and Monthly Reports for June through October 2023