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G. Bernal De Villa, Deputy

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
GILA RIVER SYSTEM AND SOURCE

W1-00-001234 (Consolidated)

Contested Case No. W1-11-001675

(contested case W1-11-002093 consolidated
with W1-11-001675)

**AMENDED ORDER ADOPTING FINAL
REPORT AS MODIFIED¹**

CASE NAME: *In re St. David Irrigation District*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report

DESCRIPTIVE SUMMARY: Special Water Master Harris's final report dated November 18, 2021, and issued under Ariz. R. Civ. P 53 is adopted as modified herein. Specifically, the Court replaces the Special Water Master's legal conclusions with the ruling below.

NUMBER OF PAGES: 13

DATE OF FILING: May 5, 2026

The issue before the Court is whether a limited class of potential appropriative rights to water initiated before June 12, 1919 ("pre-1919 rights") are subject to statutory forfeiture due to non-use for five successive years as mandated under Arizona law beginning June 12, 1919.

Based upon the analysis below, the answer is "no."

¹ The Court issues this "Amended" Order to replace the original March 3, 2026 *Order Adopting Final Report As Modified*. This Amended Order incorporates two edits made on page 12 of the original Order in response to the parties' motions for reconsideration. See April 10, 2026 *Order on Motion for Reconsideration* at pp. 1-2. This Amended Order is the final order for purposes of certification to the Arizona Supreme Court.

1
2 **FACTUAL AND PROCEDURAL BACKGROUND**

3 A detailed explanation of the factual and procedural background to this action can be found
4 in the Special Master's November 18, 2023, Report. The following is merely a summary.

- 5 1) On January 23, 1995, Special Master Thorson initiated contested case no. W1-11-1675
6 to adjudicate objections and claims for water rights filed by the St. David Irrigation
7 District ("SDID") on behalf of its shareholders.²
- 8 2) The SDID filed Statement of Claimant 39-06593 claiming 5,500 acre-feet of water for
9 irrigation use with a claimed date of initiation of July 1881 and a date of first use for
10 beneficial purposes of July 1883. It also filed Statement of Claimant 39-06594 for 8,550
11 acre-feet of water for irrigation use with an 1881 date of initiation of right and date of
12 first beneficial use.
- 13 3) The Arizona Department of Water Resources ("ADWR") investigated SDID's claims
14 and provided an extended narrative about the SDID in Vol. 1 *Hydrographic Survey*
15 *Report for the San Pedro Watershed*, 333-351 (filed Nov. 20, 1991) ("San Pedro
16 HSR").
- 17 4) Among the consolidated cases are a group of cases that include potential water rights
18 for irrigation use that ADWR investigated and "determined that no irrigation has taken
19 place on this property (or parcel) in the last five years."³ Vol. 4 San Pedro HSR at 36.
- 20 5) Multiple parties objected to any potential water rights where ADWR had determined
21 that the water use had been idle for more than five years (the "Forfeiture Objection").
- 22 6) On January 31, 2020, the Salt River Project, joined by the SDID and others, filed a
23 motion for partial summary judgment challenging the Forfeiture Objection ("2020
24

25 ² A Statement of Claimant may be filed by any public or private legal entity on behalf of its
26 members or users. A.R.S. §§ 45-251(1), 45-254(A).

27 ³ The five-year time period has legal significance under Arizona law because under current
28 Arizona law, "when the owner of a right to the use of water ceases or fails to use the water
appropriated for five successive years, the right to the use shall cease, and the water shall revert
to the public and shall again be subject to appropriation." A.R.S. 45-141(C).

- 1 Motion") for potential water rights claiming a priority date prior to June 12, 1919.
- 2 7) Based on the Arizona Supreme Court's decision in *San Carlos Apache Tribe v. Superior*
3 *Court*, 193 Ariz. 195, 972 P.2d 179 (1999) ("*San Carlos*"), the 2020 Motion was denied
4 by the Special Master and a decision entered that pre-1919 water rights are subject to
5 statutory forfeiture. Minute Entry filed September 10, 2020.
- 6 8) On August 16, 2021, St. David Irrigation District, joined by ASARCO LLC and
7 Freeport Minerals Corporation, filed a motion for partial summary judgment ("2021
8 Motion") focused on a single contested case, W1-11-2093. This case was also included
9 in the 2020 Motion, but the question presented by the 2021 Motion is specific to the
10 facts of W1-11-2093 to "facilitate review of appeal," of the Special Master's September
11 10, 2020, decision. 2021 Motion at 2.
- 12 9) The 2021 Motion requested the Special Master submit a Rule 53 Report to the General
13 Stream Adjudication Judge with a 30-day objection period. 2021 Motion at 4.
- 14 10) On November 18, 2021, the Special Master filed her report.
- 15 11) All objections to the Report were timely received.

16

17 CERTIFICATION

18 The filings in this matter predate the undersigned Judge's tenure on this case, although the
19 undersigned Judge ultimately presided over the oral argument. The undersigned Judge has
20 reviewed the record in this case and has familiarized himself with the facts, issues, and
21 evidence contained therein.

22

23 LEGAL ISSUES

24 The question of law presented by the 2020 Motion and the 2021 Motion is whether a
25 water right with an asserted priority date prior to June 12, 1919, is subject to statutory forfeiture
26 when the owner of the right to use water ceases or fails to use the water for a five-year period
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1 beginning after June 12, 1919.⁴ The 2020 Motion sought to resolve that pure issue of law. The
2 2021 Motion sought to resolve a specific claim to irrigate 17.5 acres of land where the
3 landowner claims a pre-1919 water right and does not dispute that the 17.5 acres of her land
4 were not irrigated for a period of at least five years beginning after 1919. Report at 5.

5 Specifically, the 2020 and 2021 Motions presented the following issues to the Special
6 Master:

- 7 1. Did the Supreme Court of Arizona in *San Carlos* hold that statutory forfeiture,
8 embodied in A.R.S. § 45–141(C), applies to water rights that were initiated prior to
9 June 12, 1919?
- 10 2. If the Supreme Court of Arizona did not so hold, do either Article XVII of the
11 Arizona Constitution or the savings clauses in the Arizona Water Code prohibit
12 application of statutory forfeiture to pre-1919 water rights?
- 13 3. Have rights to use water on the 17.5 acres of land owned by Terisha Driggs, to the
14 extent that they historically existed, been forfeited under section 45–141(C)?

15 The Court has, in its discretion, slightly modified these issues in the analysis below to
16 fit the realities of the case.

17 18 STANDARD OF REVIEW

19 Where there is a dispute regarding the Special Master's conclusion of law, the trial
20 judge must review them *de novo*. Ariz. R. Civ. Pro. 53(f)(4). The court must decide all
21 objections to findings of fact made or recommended by a master under the clearly erroneous
22 standard. Ariz. R. Civ. Pro. 53(f)(3).

23 24 FINDINGS OF FACT

25 The Special Master's denial of the 2020 Motion rejected a defense to the Forfeiture
26

27 ⁴ No party argues that the owner of water right with a pre-June 12, 1919, priority date forfeited
28 that right if the landowner failed to use the water for a five-year period ending before June 12,
1919. Report at 9.

1 Objection as a matter of law and did not require a factual determination that any particular
2 claimant had forfeited a water right and it did not deny water rights to any claimant or
3 landowner. No pertinent findings of fact were made explicitly or implicitly regarding any of
4 the contested cases in the 2020 Order.

5 As noted in the Special Master's Report, and in all associated filings for the 2021
6 Motion, the 2021 Motion did not present any dispute of material fact regarding the historical
7 absence of irrigation on the relevant 17.5-acre pasture. All parties agreed that:

- 8 1) Terisha Driggs purchased the Property in January 2016 and is the successor-in-interest
9 to George Whitehead et al., as to the rights claimed under the WFR.
- 10 2) Since January 2016, Ms. Driggs has irrigated an orchard of approximately 2.5 acres on
11 the east side of the Property and a field of approximately 17.5 acres on the west side of
12 the Property.
- 13 3) No evidence exists in the record that the 17.5-acre field on the west side of the Property
14 was irrigated for the 30 years from 1986 to the beginning of 2016.

15 **THE COURT THEREFORE FINDS** that no irrigation occurred on the relevant 17.5-
16 acre field between 1986 and early 2016.

17 18 CONCLUSIONS OF LAW

19 The operative portion of the 1919 Arizona Water Code, Chapter 164, Section 1,
20 declares:

21 The water of all sources of supply, flowing in natural streams, canyons, ravines
22 or other natural channels, or in definite underground channels, whether
23 perennial, intermittent or flood waters, waste or surplus water, and of lakes,
24 ponds and springs, on the surface, belongs to the public and is subject to
25 beneficial use as herein provided. Beneficial use shall be the basis and the
26 measure and the limit to the use of water in the State, *and whenever hereafter
27 the owner of a perfected and developed right shall cease or fail to use the
28 water appropriated for a period of five (5) successive years the right to use
shall thereupon cease and revert to the public and become again subject to
appropriation in the manner herein provided.* But nothing herein contained
shall be so construed as to take away or impair the vested rights which any
person, firm, corporation or association may have to any water at the time of
passage of this act.

(Emphasis added).

1 As stated above, the Court must determine whether this forfeiture provision from the
2 1919 law -- statutory forfeiture of water rights after five years of non-use -- applies to water
3 rights that had been acquired prior to the law's enactment. The Court's analysis requires three
4 specific inquiries:

- 5
6 1. Whether the Arizona Supreme Court in *San Carlos Apache Tribe v. Superior Court*,
7 193 Ariz. 195 (1999) has already resolved this issue. If the answer is "yes," the Court
8 need look no further. If the answer is "no," then,
- 9 2. Whether the forfeiture provision of the 1919 Water Code, by its terms, applied to
10 preexisting water rights. If the answer is "yes," that determination ends the analysis. If
11 the answer is "no," then,
- 12 3. Whether common law prior to the enactment of the 1919 Water Code required
13 forfeiture based solely upon non-use.

14 If the answer to all three questions is "no," then water rights acquired prior to enactment
15 of the 1919 Water Code are not subject to statutory forfeiture based upon five years of non-use,
16 regardless of whether that non-use occurred after the enactment of the 1919 Water Code.

17 **I. Application of *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195 (1999)**

18 The Arizona Supreme Court issued the *San Carlos* ruling in 1999, which affirmed in
19 part the rulings of a previous General Stream Adjudication Judge: the Honorable Susan R.
20 Bolton. The case arose from the Legislature's attempt to enact certain statutes that the
21 Legislature intended to have retroactive effect on water rights in the state. Specifically, in 1995
22 the Legislature amended the water statutes and added, *inter alia*, a provision stating that
23 statutory forfeiture by non-use shall not apply to a water right initiated before June 12, 1919.
24 The Legislature also added additional language that made "abandonment" (as opposed to
25 forfeiture) the sole basis for relinquishment of a water right initiated before June 12, 1919.

26 Our Supreme Court struck down these sections, among others, as unconstitutional. The
27 court reasoned that the amendments improperly applied retroactively to actions taken prior to
28 the 1995 amendments. The Court further reasoned that the amendments were impermissibly

1 intended to alter existing water rights retroactively, because other junior appropriators may
2 have already moved up in priority due to the forfeiture of water rights by more senior
3 appropriators. Those already forfeited, more senior rights could not be revived by subsequent
4 legislation to the detriment of the junior appropriators who had moved up in priority. Such
5 action would be a violation of due process under the Arizona Constitution. Specifically, the
6 court stated in relevant part:

7 The consequences of failure to make use of appropriated water on all of the
8 appropriator's land must be determined on the basis of the law existing at the
9 time of the event, not on the basis of subsequently enacted legislation that
10 may change the order of priority. *** Section 45-141(C) eliminates any
11 possibility of forfeiture for rights initiated before June 12, 1919. If applied
12 retrospectively, this too creates a new and unconstitutional protection for pre-
1919 water rights that may have been forfeited and vested in others under the
law existing prior to 1995. Forfeiture and resultant changes in priority must
be determined under the law as it existed at the time of the event alleged to
have caused the forfeiture.

13 *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 206, ¶ 17 (1999) (emphasis added).

14 THE COURT FINDS that the Arizona Supreme Court did not hold in *San Carlos* that
15 the forfeiture provisions of the 1919 Water Code applied to pre-existing water rights. Indeed,
16 the *San Carlos* decision provided no specific analysis of the applicability of statutory forfeiture
17 to pre-1919 water rights. It merely concluded that the 1995 amendments that were before the
18 court improperly applied a retroactive, substantive, new layer of protection not previously
19 afforded by Arizona statutes.

20 The court's reference in the decision to "water rights that may have been forfeited and
21 vested in others under the law existing prior to 1995" simply means: *to the extent a party is*
22 *arguing that forfeiture may or may not have occurred*, the issue must be determined according
23 to the law existing at the time of the events allegedly resulting in forfeiture. The court in *San*
24 *Carlos* was focused entirely on whether the 1995 amendments were constitutional. The court
25 did not decide – or even analyze – whether statutory forfeiture applied to pre-1919 vested
26 rights. Because the Legislature intended the 1995 amendments to be applied retroactively, and
27 because retroactive application would be applied to the detriment of junior appropriators, the
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1 amendments violated the due process protections of Article 2, Section 4 of the Arizona
2 Constitution.

3 Certain parties in the present case cited a case from the Ninth Circuit Court of Appeals,
4 arguing that the case analyzed this issue and held that the *San Carlos* decision found pre-1919
5 water rights to be subject to the forfeiture provisions of the 1919 Water Code. *See United*
6 *States v. Gila Valley Irrigation District*, 859 F.3d 789 (9th Cir. 2017). As an initial matter,
7 federal court decisions, with limited exceptions, are not binding on Arizona's state courts.
8 More importantly, however, the cited Ninth Circuit opinion did not provide any substantive
9 analysis of the issue; it merely assumed - erroneously - that the Arizona Supreme Court found
10 in *San Carlos* that forfeiture applies to pre-1919 vested water rights. *Id.* at 807. The Court has
11 already addressed that issue above.

12 Although not determinative, it is notable that the federal district court judge that the
13 Ninth Circuit reversed in *Gila Valley* was none other than the Honorable Susan R. Bolton; the
14 former Arizona General Stream Adjudication Judge who's ruling the Arizona Supreme Court
15 affirmed in the *San Carlos* decision. Further notable is the fact that Judge Bolton - now
16 serving on the federal district court - analyzed in her new role whether the Arizona Supreme
17 Court in *San Carlos* actually determined the applicability of the 1919 Water Code to pre-
18 enactment rights. Judge Bolton found: "[T]he Arizona Supreme Court did not consider in *San*
19 *Carlos Apache Tribe*, or in any other case, ... whether the terms of the 1919 Water Code
20 actually permitted the five-year provision to be applied to pre-1919 water rights[.]" *Order*
21 *dated August 3, 2010 at p.38, United States v. Gila Valley Irr. Dist.*, D. Ariz., Case No. CV30-
22 0061-TUC-SRB (Bolton, J.) ("Bolton Order"). But the Ninth Circuit reversed Judge Bolton on
23 this issue in the *Gila Valley* case, despite her intricate, first-hand knowledge of the *San Carlos*
24 case, based upon the Ninth Circuit's misinterpretation of the *San Carlos* decision and its belief
25 that the Arizona Supreme Court had already determined that forfeiture applies.

26 The *San Carlos* decision did not specifically determine whether the forfeiture
27 provisions of the 1919 Water Code apply to pre-1919 vested water rights. The Court must
28 therefore analyze whether the 1919 Water Code by its terms was intended to apply to pre-

1 existing rights.

2 3 **II. Application of the 1919 Water Code to Pre-Existing Water Rights**

4 Sections 1 and 56 of the 1919 Water Code included an explicit statutory forfeiture
5 provision and two savings clauses:

6 [W]henever hereafter the owner of a perfected and developed right shall cease or fail
7 to use the appropriated water for a period of five (5) successive years the right shall
8 thereupon cease and revert to the public and become again subject to appropriation
9 in the manner herein provided. *But nothing herein contained shall be so construed
as to take away or impair the vested rights which any person, firm, corporation, or
association may have to any water right at the time of the passage of this Act.*

10 *Nothing in this act contained, shall impair the vested rights of any person,
11 association or corporation to the use of water.*

12 1919 Ariz. Sess. Laws, ch. 164, §§ 1, 56 (Reg. Sess.) (1919) (emphasis added).

13 The forfeiture provision in section 1 of the 1919 Water Code has continuously appeared
14 in Arizona statutes since 1919 and is currently codified at A.R.S. § 45-141(C). The savings
15 clause in section 1 of the 1919 Water Code was repealed in 1928, but the savings clause in
16 section 56 remains codified at A.R.S. § 45-171.

17 The Court's primary goal when interpreting the 1919 Water Code, or any statute, is to
18 give effect to the legislature's intent. *J.D. v. Hegyi*, 236 Ariz. 39, 40, ¶ 6 (2014); *see also*
19 *Hampton v. Glendale Union High School District*, 172 Ariz. 431, 434 (App. 1992) (cardinal
20 rule of statutory construction is that courts must primarily attempt to ascertain and give effect
21 to the intent of the legislature). The Court's task in statutory construction is to effectuate the
22 text if it is clear and unambiguous. *BSI Holdings, LLC v. Arizona Department of*
23 *Transportation*, 244 Ariz. 17, 19 ¶ 9 (2018).

24 **THE COURT FINDS** that the forfeiture provisions of the 1919 Water Code were *not*
25 intended to apply to pre-enactment vested water rights. The Code does not expressly state that
26 its forfeiture provisions apply to pre-enactment rights. To the contrary, the Code contains two
27 unambiguous savings clauses. Section 1 declares that "nothing herein contained shall be so
28 construed as to take way or impair the vested rights which any person, firm, corporation or
association may have to any water at the time of passage of this act." And Section 56 contains

1 similar yet more expansive language, which again precludes any interpretation that impairs or
2 negatively affects vested rights or rights in the process of vesting.

3 Applying a subsequently enacted forfeiture provision to a pre-existing right – a right that
4 was not previously subject to forfeiture – would, at a minimum, certainly “impair” the vested
5 right in violation of these provisions. Such a provision is a new Damocles Sword hanging over
6 the preexisting water right.

7 Moreover, the concept of forfeiture is strongly disfavored in Arizona, a fact that weighs
8 heavily against any interpretation that applies newly enacted forfeiture provisions to pre-
9 enactment rights in the absence of express language. It is well established in Arizona that
10 “forfeitures are not favored by the law, and every reasonable presumption is against a
11 forfeiture.” *De Almada v. Sovereign Camp, W.O.W.*, 49 Ariz. 433, 436 (1937); *see also Mason*
12 *v. Hasso*, 90 Ariz. 126, 130 (1961) (“It is axiomatic that the law abhors a forfeiture.”); *Public*
13 *Service Company of Oklahoma v. Bleak*, 134 Ariz. 311, 318 (1982) (“We recognize that the
14 law abhors a forfeiture[.]”). Thus, in the absence of clear statutory language expressly
15 applying a new forfeiture statute to existing property rights, the Court will not assume that the
16 new forfeiture provisions apply to pre-enactment rights.

17 The Court is further persuaded by the recognition that in Arizona, “[w]ater rights are
18 property rights.” *Matter of Rights to Use of Gila River*, 171 Ariz. 230, 235 (1992). Property
19 rights, once vested, are jealously guarded in this state because “[t]he framers of our
20 Constitution understood that one of the basic responsibilities of government is to protect
21 private property interests.” *Bailey v. Meyers*, 206 Ariz. 224, 227, ¶ 11 (App. 2003). Indeed,
22 Article 17, section 2 of the Arizona Constitution declared upon adoption in 1912 that “[a]ll
23 existing rights to the use of any of the waters in the state for all useful or beneficial purposes
24 are hereby recognized and affirmed.” Given Arizona’s strong support for the protection of
25 property rights, the Court will not assume that a new forfeiture provision applies to pre-existing
26 water rights in the absence of express language in the new statute.

27 Because the forfeiture provisions of the 1919 Water Code were not intended to apply to
28 pre-enactment water rights, such rights can only be lost in accordance with the law that was in

1 place in Arizona before enactment in 1919.

2
3 **III. Forfeiture Based Upon Non-Use At Common Law**

4 Having found that this issue was not resolved by the Arizona Supreme Court in *San*
5 *Carlos*, and having further found that the forfeiture provisions in the 1919 Water Code were
6 not intended to apply to pre-enactment water rights, the Court must determine whether
7 forfeiture applied at common law, prior to enactment of the 1919 Water Code, to strip an
8 appropriator of vested water rights based merely upon non-use.⁵

9 As an initial matter, forfeiture is materially different from the related concept of
10 "abandonment," which requires a showing of an intentional and voluntary relinquishment of a
11 known right. *Mason*, 90 Ariz. at 129. Unlike abandonment, forfeiture is involuntary and
12 occurs without regard to intention. *Id.* Forfeiture is therefore more draconian in application.

13 Of the various Arizona decisions cited by the parties that predate the enactment of the
14 1919 Water Code, the Court finds that the *Gould* case is the most relevant and compelling. *See*
15 *Gould v. Maricopa Canal Co.*, 8 Ariz. 429 (1904). The Supreme Court for the Territory of
16 Arizona issued the *Gould* decision in 1904, well before the enactment of the 1919 Water Code.
17 *Gould* involved an individual landowner that irrigated his land from a diversion of the
18 Maricopa Canal. Later, he stopped diverting and instead purchased water from a company that
19 delivered water from the Canal. The issue before the court, *inter alia*, was whether Mr. Gould
20 lost his vested right to water from the Maricopa Canal when he stopped diverting water from
21 the Canal for his irrigation purposes and instead used a company to divert and deliver water.
22 *Id.* at 447-48.

23 The Supreme Court held that Gould had not lost his vested water rights under those
24 facts. In so holding, the Supreme Court was clear that under the law existing at the time, Gould
25 could only lose his vested water rights through abandonment or adverse possession by another

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27 ⁵ Judge Bolton reached a similar conclusion in her aforementioned district court order,
28 stating: "Arizona's forfeiture provision does not apply to pre-1919 water rights by the terms of
the 1919 Water Code; pre-1919 water rights can only be lost in accordance with the law that
was in place in Arizona before 1919." *Bolton Order* at 40.

1 party, unambiguously declaring: “[water rights] may be lost by abandonment, or it may be lost
2 to another by adverse user on the part of the other continued for the period of the statute of
3 limitations, *and in no other way.*” *Id.* at 448 (emphasis added). The Supreme Court then
4 clarified that “[a]bandonment is a matter of intent,” *Id.*, and Gould had not demonstrated
5 sufficient intent to abandon his water rights when he stopped diverting the water himself.

6 The *Gould* case, and its proclamation that there is “no other way” an appropriator may
7 lose his water rights except through adverse possession or abandonment (with proper showing
8 of intent), leaves no room for a finding that the common law stripped an appropriator of vested
9 water rights through forfeiture based solely on non-use.

10 The other pre-1919 Arizona cases cited by the parties are not helpful to the analysis
11 because they either focus upon the *acquisition* of a water right or they involve the doctrine of
12 *adverse possession*, both of which are analyzed according to different standards. They do not
13 involve the application of strict forfeiture at common law based upon non-use.

14 **THE COURT THEREFORE FINDS** that vested water rights that predated the 1919
15 Water Code could be lost through either abandonment or through adverse possession, but *not*
16 through forfeiture.

17 **THE COURT FURTHER FINDS** that water rights acquired prior to enactment of the
18 1919 Water Code are not subject to statutory forfeiture, regardless of whether that non-use
19 occurred after the enactment of the 1919 Water Code. Such pre-enactment rights may only be
20 lost through abandonment or adverse possession unless and until the Legislature expressly
21 expands the forfeiture provisions to apply to pre-1919 vested rights.

22 **THE COURT FURTHER FINDS** that to the extent any right to water exists for the
23 purpose of irrigating 17.5 acres of land on the west side of Terisha Driggs’s Property, that right
24 has not been forfeited due to non-use.

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26 On good cause, and in the Court’s discretion,
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IT IS THEREFORE ORDERED modifying and replacing in part the November 18, 2021 *Report of the Special Master* consistent with the Findings, Conclusions, and related analysis herein.

The Honorable Scott A. Blaney
Arizona Superior Court in Maricopa County