

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

May 5, 2023

CLERK OF THE COURT
A.Parmar
Deputy

SPECIAL WATER MASTER
SHERRI ZENDRI

FILED: May 12, 2023

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

In re: David & Fay Gard
Contested Case No. W1-11-2726

MINUTE ENTRY

Courtroom 301 – Central Court Building

11:00 a.m. This is the time set for a Status Conference to obtain an update from the parties before Special Water Master Sherri Zendri.

The following parties/attorneys appear virtually through Court Connect:

- Kimberly Parks on behalf of Arizona Department of Water Resources (“ADWR”)
- Rhett Billingsley on behalf of American Smelting and Refining Company (“ASARCO”)
- Mike Foy on behalf of Salt River Project (“SRP”)
- Joe Sparks and Laurel Herrmann on behalf of the San Carlos Apache Tribe
- Sue Montgomery on behalf of the Yavapai Apache Nation (and observing on behalf of Pascua Yaqui Tribe)

- Yosef Negose on behalf of the United States Department of Justice, Bureau of Indian Affairs
- Maggie Woodward on behalf of the United States Proprietary Agencies
- John Burnside on behalf of BHP Copper

A record of the proceedings is made digitally in lieu of a court reporter.

The Court notes that the landowners, Joel and Donna Quisenberry, have failed to appear again and inquires if the parties have received anything from the landowners since the last Status Conference.

Discussion is held regarding the progress since the last hearing. Counsel for the San Carlos Apache Tribe, Mr. Sparks, states that he received some correspondence from the parties in April but nothing since. Counsel for SRP, Mr. Foy, affirms that he received the same correspondence.

The Court notes that its previous Minute Entry did state that this case would be dismissed if the parties failed to appear but will confer with the Natural Resource Use and Management Clinic before issuing its final decision.

Counsel for ASARCO, Mr. Billingsley, notes that there is a number that is muted on the conference line and may be Mr. or Mrs. Quisenberry. The Court instructs the caller how to unmute themselves. The caller identifies himself as Joel Quisenberry and he states that he has been on the line listening but was unable to mute himself previously. He informs the Court that his wife, Donna Quisenberry, is on the line with him as well.

Mrs. Quisenberry states that they have not received a response from the Arizona State Land Department but notes that she received the certified mail return receipt indicating the letter was delivered.

The Court states that it will include better contact information for the Natural Resource Use and Management Clinic in today's Minute Entry so the parties can obtain help in navigating this process. Once the Court confers with the clinic, it will inform the parties of the next Status Conference.

Counsel for the United States, Mr. Negose, and Counsel for BHP Copper, Mr. Burnside, both note that they did not receive the correspondence the other parties received from the Quisenberrys and include their respective emails on the record: Yosef.Negose@USDOJ.gov and JBurnside@SWLaw.com.

Counsel for SRP, Mr. Foy, addresses the Court. He agrees with the Court's approach to resolving this matter but notes that there may be some conflicting information regarding what documents are required by the landowners. Page 3 of the Minute Entry dated April 6, 2023 references documentation of the sale of the property through time. He states that the previous Special Water Master issued a ruling on April 24, 2019 regarding Broad Legal Importance, in case W1-11-3311, that determined it was not necessary for

landowners to provide chain of title. The Court will review the ruling and clarify if this documentation is required in today's Minute Entry.

11:27 a.m. Matter concludes.

LATER:

Landowners Joel and Donna Quisenberry have claimed water rights in this contested case for domestic use and for irrigation of livestock pastureland. Arizona Revised Statutes (ARS) § 45-254 requires parties wishing to have a water right adjudicated must file a Statement of Claimant ("SOC") with the appropriate court. The Quisenberrys filed SOC #39-18140 in October 2020, and did not include a date of first use. Previous owners of the land, David and Fay Gard, filed Amended SOC # 39-003890 in February 1991 and included a claimed priority date of 1910, presumably based upon the original May 1980 SOC # 39-003890 which was filed by Pete and Marie Kelly. The Kellys also registered a "Statement of Claim" (#36-29052) as required by ARS 45-182, also with a claimed priority date of 1910.

A "perfected" water right means a water right proven by documentation or confirmed by the issuance of a permit, certification, or a court decree. Arizona has adopted the doctrine of prior appropriation, or "first in time, first in right" to govern the use of surface water - the person who first perfects a water right has priority over later water users. Prior to June 12, 1919, a person could perfect a surface water right simply by applying the water to a beneficial use and posting a notice of the use at the point of diversion. After June 12, 1919, water users were subject to revised water laws that required a person must apply for and obtain a permit and certificate to use surface water.

In this contested case, there have been no records provided to document the perfection date of the Quisenberrys claim to water. Claimants have not demonstrated the accuracy of a 1910 date of first use with documentation of property, inhabitants, and water usage. Previous Minute Entries from this Court have requested a "title history" for the property. Salt River Project (SRP) Counsel has noted that this terminology may conflict with an April, 24, 2019, ruling from this Court stating it was not necessary for landowners to provide chain of title. Even though the *In re Luebbermann* Order ruling was noted as regarding an issue of "broad legal importance" and thus implying application across a broader landscape than the single contested case where it was decided, the language in the order restricts the determination to "a claimant with good title to the property for which there are *historically perfected*, appurtenant water rights..." (emphasis added). Minute Entry at 8 (April 4, 2019). This limits the *Luebbermann* decision to a very specific set of facts where there is no dispute of ownership nor of the actual priority date. Here it is precisely the priority date that is in dispute.

While the Court appreciates that documentation over a century old may be hard to find, it is nonetheless the required evidence for a defensible claim of historical water use. If the Claimants want to take advantage of a pre-1919 priority date, they must demonstrate it is justifiable.

IT IS ORDERED that Landowners Joel and Donna Quisenberry must provide documentation of historical water use to all parties by **September 1, 2023**. The Quisenberrys should carefully review their Statement of Claimant for accuracy with respect to all information, including a reasonable estimation of water withdrawn. For questions to the Natural Resource Use and Management Clinic at the University of Arizona, please contact through email at Law-AZAdjudicationsProject@arizona.edu or by phone at 520-621-6722.

IT IS FURTHER ORDERED setting a Status Conference on **Thursday, September 28, 2023, at 10:00 am**. All parties must be prepared to decide whether this contested case will be settled, dismissed, or go to trial. The Status Conference will be held using the Court Connect program. Instructions for Court Connect are attached. If you receive this Order by email, click on the red box “Join Court Connect Hearing” on the attached instructions to make an appearance. If you do not receive this Order by email, log into the Court Connect program on the internet by typing <https://tinyurl.com/specialwatermaster>. If you do not have access to the internet, you may attend telephonically using the telephone number and access code included in the instructions for Court Connect.

IT IS FURTHER ORDERED that ALL parties, including the Quisenberrys must file any communication to the Court regarding a contested case, with the exception of communication for scheduling or clerical purposes, with the Clerk of the Maricopa County Superior Court and ALL parties listed on the Court-approved mailing list. Electronic filing with Clerk is not available for this case therefore a party must file its communications with the Maricopa County Clerk of Court either by mail or by physically delivering the communication to a filing counter location.

The current Court-approved mailing list for this case may be found at <http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/maillingLists.asp>. If an email address is not available for a party on this list, then a hard copy must be delivered.

Communications that do not follow these rules may be dismissed and may not be considered by the Special Water Master.

A copy of this order is mailed to all persons listed on the Court-approved mailing list.



Court Connect Hearing Notice for In David & Fay Gard

This hearing will be conducted through the new Court Connect program offered by the Superior Court of Arizona in Maricopa County. This new and innovative program allows Court participants to appear online, rather than in a physical courtroom. Hearings are preferably conducted by videoconference but can also be conducted by phone. Lawyers (and self-representing litigants) are responsible for distributing this notice to anyone who will be appearing on their behalf.

All participants must use the JOIN COURT CONNECT HEARING button or the dial in information below to participate.

Participants: Please follow the steps below to participate in the remote proceeding.

1. Click the JOIN COURT CONNECT HEARING button below.
2. Enter your full name and role in name field.
3. Wait for the facilitator to admit you to the proceeding.

Remember to keep this email handy so you can use it to participate in the following proceeding.

Case Name: In re David & Fay Gard, Contested Case No. W1-11-2726

Start Date/Time: September 28, 2023 at 10:00 a.m.

JOIN COURT CONNECT HEARING

Dial-in Information: +1 917-781-4590

Private Dial-in Information: for privacy purposes, you can block your phone number by dialing *67 +1 917-781-4590

Dial-in Access Code: 688 970 203#

Tiny URL: <https://tinyurl.com/specialwatermaster>

To ensure an optimal experience, please review the brief Court Connect training prior to the hearing: [Here](#)

