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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

W-1, W-2, W-3, W-4

(Consolidated)

Contested Case No. W1-11-3394

**ORDER GRANTING GILA RIVER INDIAN
COMMUNITY MOTION FOR PARTIAL
SUMMARY JUDGMENT**

**ORDER GRANTING IN PART AND DENYING
IN PART THE SAN CARLOS APACHE TRIBE
MOTION FOR SUMMARY JUDGMENT**

**ORDER DENYING
LARSON EDUCATION TRUST
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

CONTESTED CASE NAME: *In re W. H. Claridge*
HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report
DESCRIPTIVE SUMMARY: Motion for Partial Summary Judgment filed by the Gila River Indian Community granted. Motion for Partial Summary Judgment filed by Larson Education Trust denied. Motion for summary judgment filed by the San Carlos Apache Tribe granted in part and denied in part. Pretrial conference set for **April 6, 2023 at 2:30 p.m.**
NUMBER OF PAGES: 16
DATE OF FILING: March 17, 2023

1 The Larson Education Trust (“Claimant”) claims rights to water for irrigation, mining,
2 domestic, and stockwatering uses that predate the enactment of Arizona’s Water Code in June
3 1919. The Gila River Indian Community, the San Carlos Apache Tribe, and Claimant each filed
4 either a motion for partial summary judgment or summary judgment. The motions present the issue
5 of whether rights to water with a claimed pre-1919 date can be forfeited due to nonuse. If the
6 rights are subject to statutory forfeiture, then the issues presented are whether forfeiture has
7 occurred, whether the forfeiture can be excused pursuant to A.R.S. §45-189(E), and whether the
8 use was timely resumed to prevent a forfeiture for past nonuse.
9

10 **A. Background**

11 The Claimant owns tax parcel 110-47-003G that is located in the southwest quarter of
12 Section 6, Township 7 South, Range 20 East of Graham County, Arizona (“the Property”).
13 Separate Statement of Facts in Support of Claimant’s Motion for Summary Judgment at ¶¶ 2-3
14 (filed December 2, 2022) (“LET SOF”). The Property is within the boundaries of the land
15 investigated by Arizona Department of Water Resources (“ADWR”) in the Zone 2 Well Report
16 115-05-ADC-001 filed in 1991 (“Original WR”). LET SOF ¶2. The WR stated that no irrigation
17 had occurred on the Property in the preceding five years. Attachment A to Order to Initiate
18 Contested Case (filed July 3, 2019) (“Original WFR”). It also listed three wells on the Property,
19 W1, W2, and W4. It reported that W2 and W4 were not in use. *Id.*

22 In 2020, the Claimant filed Statements of Claim Nos. 36-105960, 36-105961, 36-105962
23 for 480 acre-feet of water per year for mining purposes, 38 acre-feet per year for irrigation uses,
24 23,725 gallons year for stock and wildlife watering, and three acre-feet per year for domestic use
25 to serve five dwellings. LET SOF ¶¶11-14. It asserts that a priority date of 1897 attaches to the
26 rights for the claimed water uses. During that same year, Claimant also filed amended Statements
27 of Claimant 39-3993, 39-3995, and 39-3996. Arizona Department of Water Resources
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1 investigated the amended Statements of Claimant for water rights filed by the Claimant and
2 prepared Amended Watershed File Report 115-05-ADC-001 filed November 2, 2020 (“Amended
3 WFR”). It found no uses of water on the Property for domestic, mining, irrigation or
4 stockwatering. Appendix A at 1 (filed November 2, 2020). Claimant objected to the Amended
5 WFR primarily on the grounds that ADWR did not recognize pre-1919 uses of water on the
6 Property. Notice of Filing Objection to WFR 115-05-ADC-001 at 5 (May 19, 2022).

8 Claimant filed a motion for partial summary judgment that water rights subject to a pre-
9 1919 priority date cannot be forfeited or, in the alternative, the claims for water rights should not
10 be forfeited due to a consecutive five-year period of nonuse pursuant to A.R.S. §45-189(E). The
11 Gila River Indian Community moved for partial summary judgment that the irrigation and mining
12 uses have been forfeited and the mining claim is actually a claim for future use. The San Carlos
13 Apache Tribe moved for summary judgment arguing that all uses had either been forfeited or not
14 perfected. The Salt River Project joined with Claimant and filed a response to the Gila River
15 Indian Community’s and the San Carlos Apache Tribe’s motions. Salt River Project, joined by
16 BHP Copper and ASARCO LLC, made the additional argument that the Gila River Indian
17 Community and San Carlos Apache Tribe did not meet their burden of proof that Claimant did not
18 use the water claimed for a five-year consecutive period. It further contends that the mining use
19 cannot be forfeited because the mining use resumed before the forfeiture occurred.

22 **B. Forfeiture of Pre-1919 Water Rights**

23 The first issue presented by all of the motions for summary judgment is an issue of law.
24 Claimant, joined by Salt River Project, argues that its water rights have a priority date prior to June
25 12, 1919, and, therefore, cannot be forfeited because water was not used on the Property during a
26 consecutive five-year period beginning after June 12, 1919. Arizona law generally provides that
27 when the owner of a right to the use of water ceases or fails to use the water appropriated for five
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1 successive years, the right ceases, the water reverts to the public and is subject to appropriation.
2 A.R.S. §45-141(C). In 1995, the Arizona legislature amended A.R.S. §45-141(C) to specifically
3 exempt pre-1919 water rights from forfeiture due to nonuse. The Arizona Supreme Court found
4 that the amended statute violated the due process requirements under Article II, section 4 of the
5 Arizona Constitution. *San Carlos Apache Tribe v. Superior Court ex. rel Cty. Of Maricopa*, 193
6 Ariz. 195, 972 P.2d 179 (1999).

8 The Court reasoned that the change made to the statute to protect pre-1919 holders of water
9 rights from forfeiture impermissibly altered the vested substantive water rights of junior users. *Id.*
10 at 205, 972 P.2d at 189. The amendment changed the legal consequences that would otherwise
11 apply to pre-1919 rights and to the priority of rights junior to pre-1919 rights subject to forfeiture
12 for nonuse. *Id.* at 206, 972 P.2d at 190. Accordingly, based on the *San Carlos* decision, when the
13 owner of a right to the use of water with a pre-June 12, 1919 priority date ceases using the
14 appropriated water for five successive years beginning after June 12, 1919, the right to the use is
15 subject to forfeiture.

17 **Conclusion of Law No. 1.** A priority date prior to June 12, 1919, if established, does not
18 exempt the water rights claimed by the Claimant from statutory forfeiture. A.R.S. §45-141(C).

20 C. Water Use on the Property

21 The remaining issues presented by the motions involve questions of fact as well as legal
22 issues. Cross motions for summary judgment neither alter the basic summary judgment standard,
23 nor warrant a grant of summary judgment *per se* when each party is asserting that there are no
24 material issues of fact in dispute. *See Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 118,
25 575 P.2d 315, 317 (1978); *Guardian News & Media LLC v. Ryan*, 225 F. Supp. 3d 859 (D. Ariz.
26 2016). Pursuant to Arizona Rule of Civil Procedure 56, summary judgment will be entered in
27 favor of the moving party if the “moving party shows that there is no genuine dispute as to any
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1 material fact and the moving party is entitled to judgment as a matter of law.” Ariz. R. Civ. P.
2 56(a).

3 **1. Larson Education Trust**

4 Claimant moved for partial summary judgment that its nonuse of water on the Property
5 should not result in forfeiture due to the operation of legal proceedings or for any other reason that
6 a court of competent jurisdiction deems would warrant nonuse. A.R.S. §§ 45-189(E)(4) and 45-
7 189(E)(9). For purposes of Claimant’s motion, it is necessarily implicit that all claimed water
8 uses have not been put to a beneficial use for a five-year consecutive period.
9

10 The Athletic Mining Company processed ore on the Property between 1942 and 1957. LET
11 FOF ¶6. The San Carlos Apache Tribe provided documentation showing that active mining on the
12 Property stopped by 1971 due to insufficient funds to keep the Klondyke Mill operational. Exhibit
13 H of San Carlos Apache Tribe Separate Statement of Fact at 2-5 to 2-7 (filed December 2, 2022).
14 In 1990, Arizona Department of Water Resources found that the Property had been irrigated in the
15 preceding ten years, but no irrigation had occurred in the previous five years. Original WR. It
16 reported no uses of water for mining purposes. *Id.* Water was used on the Property for mining-
17 related uses from 2008 to 2018 to stabilize and cap the mining tailings left by earlier mining
18 operations as required by Arizona Department of Environmental Quality. LET FOF ¶6. In 2019,
19 Arizona Department of Environmental Quality issued a Declaration of Environmental Use
20 Restriction (“DEUR”) and recorded an easement on the Property. LET FOF ¶18. The DUER
21 applies to nearly 32 acres of the Property, all situated in the same locations of historic and current
22 water use. LET Controverting SOF at 7, ¶10.
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25 In 2020 ADWR stated that no irrigation had occurred on the Property within the past ten
26 years. Amended WFR at 4. It also found no current uses of water on the Property.
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1 **Finding of Fact No. 1.** The Athletic Mining Company processed ore on the Property
2 between 1942 and 1957.

3 **Finding of Fact No. 2.** Mining activity on the Property ceased by the early 1970s.

4 **Finding of Fact No. 3.** By 1990, the Property had not been irrigated during the preceding
5 five years.

6 **Finding of Fact No. 4.** In 2020, ADWR found no irrigation use had occurred within the
7 past ten years.

8 **Finding of Fact No. 5.** The Klondyke Tailings Project Water Quality Assurance
9 Revolving Fund Site is located on the Property.

10 **Finding of Fact No. 6.** Water was used on the Property for mining-related uses from
11 2008-2018.

12 **Finding of Fact No. 7.** In 2019, Arizona Department of Environmental Quality issued a
13 Declaration of Environmental Use Restriction and recorded an easement on the Property.

14 **Finding of Fact No. 8.** Claimant acquired title to the Property on or about February 13,
15 2019.

16 Claimant contends that historic uses of water on the Property should not be forfeited
17 because it was not possible to use the water as it has been used historically. A water right ceases
18 under A.R.S. §45-141(C) when the owner of a right to the use of water does not use the water
19 appropriated for five successive years. Claimant relies on the remediation efforts and the
20 limitations on the use of the Property imposed by Arizona Department of Environmental Quality
21 under a DEUR as grounds to excuse the nonuse under A.R.S. §45-189(E). The statute provides
22 in relevant part:
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1 Sufficient causes for nonuse include:

2 ...
3 (4) The operation of legal proceedings.

4 ...
5 (9) Any other reason that a court of competent jurisdiction deems would warrant nonuse.

6 A.R.S. §45-189 (E)(4), (E)(9).

7 Claimant has the burden to show that the legal proceedings or “any other reason”
8 exceptions excused nonuse of water on the Property for a five-year consecutive period. A plaintiff
9 who seeks summary judgment must submit undisputed admissible evidence that would compel
10 factual findings in its favor on every element of its claim. *Wells Fargo Bank, N.A. v. Allen*, 231
11 Ariz. 209, 213, ¶ 18, 292 P.3d 195, 199 (App. 2012). Claimant provides no evidence that legal
12 proceedings or any other reason prevented all beneficial uses of the water rights for a consecutive
13 five-year period for which Claimant seeks a determination of sufficient cause for nonuse.¹ It does
14 not show how legal proceedings, or any other reason prevented any beneficial use of the claimed
15 water rights for mining use for the period after the cessation of the mining operation and prior to
16 2008. Similarly, it does not demonstrate how legal proceedings or any other reason prevent
17 irrigation for a five-year period prior to 1990. Claimant certainly does not provide evidence that
18 there was any legal proceeding that enjoined or otherwise restrained using the claimed water right
19 for any purpose on the Property for any period prior to 2008.

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21
22 The conclusion that the record does not establish sufficient cause under A.R.S. §45-189 for
23 nonuse is consistent with the Court’s general interpretation of statutes governing water rights to
24 protect junior appropriators who have advanced in priority after a senior water right has been lost
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27 ¹ In its Reply, Claimant stated that it is seeking to exempt all water uses from statutory
28 forfeiture. Claimant’s Reply to Gila River Indian Community Response to Claimant’s Motion
for Summary Judgment at 2 (filed January 18, 2023).

1 or terminated. *San Carlos Apache Tribe v. Superior Court ex. rel Cty. Of Maricopa, supra.* A
2 narrow reading of the exceptions provided in A.R.S. §45-189 also advances the legislative intent
3 underlying §45-141(C) to manage a scarce natural resource by maximizing its use by people or
4 entities in the State who can use the available appropriable water. Arizona Revised Statute §45-
5 141(C) makes appropriable water available for appropriation when an owner does not put water
6 to beneficial use for five years.

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8 **Conclusion of Law No. 2.** Claimant's nonuse of water for beneficial use for a five-year
9 consecutive period is not excused under A.R.S. §45-189.

10 **2. Gila River Indian Community and San Carlos Apache Tribe Motions**

11 The Gila River Indian Community and the San Carlos Apache Tribe also moved for
12 summary judgment. Even though Claimant filed a cross motions for summary judgment, summary
13 judgment cannot be granted on these motions unless there remains no genuine issue as to any
14 material fact and one of the parties is entitled to judgment as a matter of law. *Arizona Land Title*
15 *& Trust Co. v. Safeway Stores, Inc.*, 6 Ariz. App. 52, 429 P.2d 686 (1967). The evidence presented
16 must be examined in a light most favorable to the Claimant, and if disputes of material facts exist,
17 summary judgment cannot be entered. *Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. at 118,
18 575 P.2d at 317 (1978).

19
20 The Gila River Indian Community seeks a partial summary judgment that water uses for
21 irrigation and mining uses have been forfeited because water has not been used for irrigation or
22 mining uses for more than five years. The original Statements of Claimant filed in 1980 for water
23 use on the Property stated that corn, grain, and grass crops were cultivated. San Carlos Apache
24 Tribe Separate Statement of Facts in Support of Motion for Summary Judgment at 6, ¶23; LET
25 Controverting SOF at 3, ¶23. The Original WR found no irrigation use for a five-year period by
26 1990. The Statements of Claimant filed in 2020 by Claimant do not offer any proof of current or
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1 continuous irrigation. San Carlos Apache Tribe Separate Statement of Facts in Support of Motion
2 for Summary Judgment at 6, ¶23; LET Controverting SOF at 3, ¶23. The Amended WFR reported
3 no irrigation use on the Property in 2020. When only one inference can be drawn from undisputed
4 material facts, the moving party is entitled to judgment as a matter of law. *McWain v. Tucson Gen.*
5 *Hosp.*, 137 Ariz. 356, 358, 670 P.2d 1180, 1182 (App. 1983).
6

7 **Conclusion of Law No. 3.** Any water rights that may have existed for irrigation use on
8 the Property have been forfeited.

9 The Gila River Indian Community and the San Carlos Apache Tribe move for summary
10 judgment that water uses claimed by the Claimant for mining uses have terminated because water
11 has not been used for mining purposes for five years or more. Salt River Project argues that the
12 San Carlos Apache Tribe and the Gila River Indian Community failed to establish a particular five-
13 year period during which mining use ceased. The San Carlos Apache Tribe presented evidence
14 that mining operations ceased in 1971. Remediation of the mining site began in 2008. Claimant
15 asserted that “the property has continuously consumed water for mining use” and the explanation
16 that remediation is a mining activity. Claimant’s Responsive and Controverting Statements of
17 Fact Re: San Carlos Apache Tribe MSJ at 5 (December 28, 2022). To the extent that Claimant is
18 literally stating that water was continuously used between 1971 and the initiation of the mining
19 remediation process in 2008, as well as before and after those dates, it did not provide any evidence
20 to support its claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (holding that a
21 party defending against a motion for summary judgment “may not rest upon the mere allegations
22 or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine
23 issue for trial”). Moreover, the statement is at odds with the conclusion submitted by Claimant
24 that “[o]ver time, the operations of the mine ceased and the usage of the property has changed.”
25 Claimant’s Motion for Summary Judgment at 6 (filed December 2, 2022).
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1 **Finding of Fact No. 9.** Water was not used on the Property for mining purposes for at
2 least five years between the cessation of mining activities in the 1970s and the initiation of
3 remediation activities in 2008.

4 Salt River Project also argues in support of Claimant's position that if formal forfeiture or
5 abandonment proceedings under A.R.S. §45-189 or proceedings to sever and transfer under A.R.S.
6 §45-172 have not occurred, a claimant will not forfeit a water right if the water use was resumed
7 before "[t]he filing by a third party of a statement of claimant in a general adjudication . . .
8 assert[ing] the right to use water from the stream in which the subject nonuse has occurred."
9 §A.R.S. 45-188(B)(2). By the terms of this statute, a nonuser may be protected from forfeiture if
10 no one filed a Statement of Claimant asserting a right to water from the stream in which the subject
11 nonuse occurred prior to resumption of the nonuse. Salt River Project interprets the statute more
12 narrowly as preventing forfeiture in this case so long as no other party claimed a right in this
13 general adjudication to Aravaipa Creek with a priority date after 1977 but before 2008. Salt River
14 Project's Consolidated Response to Summary Judgment Motions Filed by Gila River Indian
15 Community, San Carlos Apache Tribe, and the Larson Education Trust at 9 (filed January 9,
16 2023)("SRP Response"). Without addressing the merits of SRP's interpretation of the statute,
17 judicial notice will be taken of the proposed abstract approved in *In re BLM-Nature Conservancy*
18 *Leased Land*, Contested Case No. W1-11-3329. *Reidy v. O'Malley Lumber Co.*, 92 Ariz. 130,
19 132, 374 P.2d 882, 884 (1962) (court may take judicial notice of the record in another action tried
20 in the same court.); *see also Pierpont v. Hydro Mfg. Co.*, 22 Ariz. App. 252, 254, 526 P.2d 776,
21 778 (1974). The approved abstract identifies Statement of Claimant 39-13624, filed April 3, 1989,
22 and approves a May 18, 1982 priority date. Arizona Revised Statute §45-188(B)(2) does not
23 prevent forfeiture in this case because the claimed resumption of water use began in 2008, which
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1 was after “[t]he filing by a third party of a statement of claimant in a general adjudication.” A.R.S.
2 § 45-188(B)(2).

3 **Conclusion of Law No. 4.** Any water rights that may have existed for mining use on the
4 Property have been forfeited.

5 Claimant also asserted claims for water rights for domestic use and stock and wildlife
6 watering. San Carlos Apache Tribe argues that those claims have been forfeited under A.R.S. §45-
7 141(C). San Carlos Apache Tribe Motion for Summary Judgment at 5. There is no genuine dispute
8 as to current inhabitation of the Property. Claimant has acknowledged that the only dwellings on
9 the Property are the remains of historical structures which are not currently inhabited. LET SOF
10 ¶25. ADWR also found no domestic use on the Property during its visit in October 2020. Amended
11 WFR at 4.

12 In Statement of Claimant 39-3993, water was claimed for stockwatering use, and in 1991
13 ADWR found an incidental stockwatering use on the property. Original WFR. The Statement of
14 Claimant identified Mill Well #1 as the source of the water. Arizona Department of Water
15 Resources reported that Mill Well #1 is not currently connected to any means that could convey
16 water for stock watering and concluded that there was no current stock watering use during its visit
17 October 2020. Amended WFR at 4. The DEUR encumbering the Property prohibits agricultural
18 activities, including the creation of ponds or other water holding features. Exhibit 3 to SRP
19 Response at 2.

20 **Finding of Fact No. 10.** The only dwellings on the Property are the remains of historical
21 structures which are not currently inhabited.

22 **Finding of Fact No. 11.** ADWR found no domestic use on the Property during its visit in
23 October 2020.

1 **Finding of Fact No. 12.** Mill Well #1 is not currently connected to any means that could
2 convey water for stock watering.

3 **Finding of Fact No. 13.** ADWR concluded that there was no current stock watering use
4 during its visit October 2020.

5 **Finding of Fact No. 14.** The DEUR affecting the Property prohibits agricultural activities,
6 including the creation of ponds or other water holding features.

7
8 Although there is no dispute that water is not currently used on the Property for
9 stockwatering or domestic purposes, a party asserting forfeiture must show failure “to use the water
10 appropriated for five successive years.” A.R.S. § 45-141(C). Because it has not shown more than
11 current nonuse, the San Carlos Apache Tribe has not met its burden to show that water for domestic
12 and stock watering uses ceased for a consecutive five-year period.

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14 **Conclusion of Law No. 5.** The San Carlos Apache Tribe has not met its burden to show
15 that forfeiture of water for domestic and stock watering purposes has occurred as a matter of law.

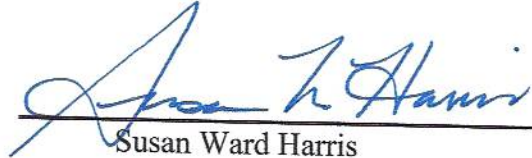
16 **IT IS ORDERED** granting the motion of the Gila River Indian Community, granting the
17 motion of the San Carlos Apache Tribe in part and denying it in part, and denying the motion of
18 the Larson Education Trust.

19
20 **IT IS FURTHER ORDERED** setting a pretrial conference set for **April 6, 2023 at 2:30**
21 **p.m.** to address, among other pretrial issues, the anticipated duration of the trial and to reset the
22 trial date.

23 The scheduling conference will be held using the Court Connect program. Instructions for
24 Court Connect are attached as Attachment A. If you receive this Order by email, click on the red
25 box “Join Court Connect Hearing” on the attached instructions to make an appearance. If you do
26 not receive this Order by email, log into the Court Connect program on the internet by typing
27 <https://tinyurl.com/specialwatermaster>. If you do not have access to the internet, you may attend
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1 telephonically using the telephone number and access code included in the instructions for Court
2 Connect. Alternatively, you may attend telephonically using the following instructions:

3 Instructions for telephonic appearance:
4 Dial: 602-506-9695 (local)
5 1-855-506-9695 (toll free long distance)
6 Dial Participant Pass Code 357264#

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9 _____
10 Susan Ward Harris
11 Special Master

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14 On March 17, 2023, the original of the
15 foregoing was mailed to the Clerk of the
16 Maricopa County Superior Court for filing
17 and distributing a copy to all persons listed on
18 the Court approved mailing list for this
19 contested case.

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22 _____
23 Emily Natale

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ATTACHMENT A



Court Connect Hearing Notice for In re W. H. Claridge

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 W. H. Claridge, Contested Case No. W1-11-3394

Start Date/Time: April 6, 2023 at 2:30 p.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](#)



Court Approved Mailing List
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W1-11-3394 (18 Names)
Prepared by the Special Master
3/17/2023

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