

# **CHAPTER 1: INTRODUCTION AND SCOPE**

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## 1.1 INTRODUCTION

The Arizona Department of Water Resources (Department or ADWR) prepared this Final Hydrographic Survey Report (Final Hopi HSR) to address water rights claimed by the Hopi Tribe, and the United States on the Tribe's behalf, for use on the Hopi Reservation. The Final Hopi HSR was preceded by a Preliminary Hopi HSR that the Department issued on December 31, 2008.

The Department's publication of the Final Hopi HSR and the Preliminary Hopi HSR was requested by the court in a general stream adjudication entitled *In re the General Adjudication of All Rights to Use Water in the Little Colorado River System and Source*, No. 6417, pending in the Superior Court for Apache County (LCR adjudication). The LCR adjudication is a judicial proceeding and the Department is technical advisor to the LCR adjudication court. Judicial proceedings for the LCR adjudication are governed by Arizona Revised Statutes (A.R.S.) §§ 45-251 to 264. Copies of court decisions and orders relating to the water right claims for the Hopi Reservation are included in **Appendix A**.

**Figure 1-1** depicts the geographic area of the LCR adjudication, which includes both Indian and non-Indian lands. The non-Indian lands are divided into the Silver Creek watershed, the Upper Little Colorado River watershed, and the Lower Little Colorado River watershed. Indian lands in the LCR adjudication include the Hopi Reservation, parts of the Navajo, Zuni, and White Mountain Apache (formerly Fort Apache) Indian reservations, and lands occupied by the San Juan Southern Paiute Tribe.<sup>1</sup>

## 1.2 ESTABLISHMENT OF THE RESERVATION

The Hopi Reservation lands are located within two non-contiguous geographic areas referred to in this report as the 1882 Executive Order Reservation and the 1934 Act Reservation (collectively, the "Reservation" or "Hopi Reservation").<sup>2</sup> Lands within the 1882 Executive Order

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<sup>1</sup> The lands occupied by the San Juan Southern Paiute Tribe are not depicted on **Figure 1-1**. The nature, location and extent of these lands are in dispute, but are believed to be generally located north of Moenkopi Village within the Navajo reservation.

<sup>2</sup> The boundary of the Hopi Reservation depicted on **Figure 1-1** is based on a map from Ebert & Associates (Ebert), a consultant to the United States.



Reservation consist of areas known as District 6 and Hopi Partitioned Lands. Lands within the 1934 Act Reservation consist of Moenkopi Village (sometimes referred to as Moenkopi Island) and allotted lands. See **Figure 1-2**. The physical and cultural setting of the Hopi Reservation lands is described further in **Appendix B**.

The 1882 Executive Order Reservation consists of approximately 2.5 million acres and was established by an Executive Order dated December 16, 1882 issued by President Chester A. Arthur. The 1882 Executive Order Reservation is surrounded by the Navajo Reservation.

For decades, the Hopi and the Navajo disputed their respective rights and interests to land within the 1882 Executive Order Reservation. The Hopi claim an exclusive interest in an area known as Land Management District 6 (District 6), which was created to implement federal grazing regulations. The area outside of District 6 is known as the Joint Use Area, which was partitioned by the Arizona federal district court into Hopi Partitioned Lands and Navajo Partitioned Lands pursuant to the Navajo-Hopi Land Settlement Act (1974 Settlement Act). See Pub. L. No. 93-531, 88 Stat. 1712, 1714 § 4(a).

In addition to lands within the 1882 Executive Order Reservation, the Hopi Reservation includes a non-contiguous area that also is surrounded by the Navajo Reservation. In 1934, Congress passed an act that withdrew certain lands for the benefit of the Navajo and “such other Indians as may already be located thereon.” Act of June 14, 1934, Ch. 521, 48 Stat. 960, 961 (1934 Act). The 1974 Settlement Act authorized both the Navajo and Hopi to bring a quiet title action, if necessary, to determine their respective interests in lands withdrawn under the 1934 Act, including Moenkopi Island. Litigation followed the partitioning of the Joint Use Area and the withdrawal of lands under the 1934 Act for several years.

The Hopi and the United States claim water rights for use within District 6, the Hopi Partitioned Land and Moenkopi Island, including allotted lands. Within the 1934 Act Reservation, in the vicinity of Moenkopi, there are several allotments that were established in the early 1900s pursuant to the Indian General Allotment Act of 1887, also known as Dawes Severalty Act. Under this Act, the President was authorized to allot reservation lands to individual Indians when advantageous for “agricultural and grazing purposes.” Act of February 8, 1887, Ch. 119, § 1, 24 Stat. 388. As part of the Indian Reorganization Act of 1934, the allotment program ended. The allotments within the 1934 Act Reservation are depicted on **Figure 1-2** and are included within



the claims filed by the Hopi and United States, which are described in **Chapter 3**. Water uses for these lands are also described in **Chapter 4**.

### 1.3 HISTORY OF PROCEEDINGS

In 1985, the Hopi and the United States each filed a statement of claimant (SOC) that claimed water rights for use on the Hopi Reservation. Each of these SOCs were amended several times through 2015. The Hopi and United States SOCs are summarized below and further described in **Chapter 3**, and **Tables 3-1, 3-2 and 3-3**. Also summarized are several orders entered by the LCR adjudication concerning the claims filed for the Hopi Reservation. For several years, negotiations were underway to settle the claims filed by the Hopi and the Navajo. In 2012, the settlement negotiations ended.

The original claims were filed on November 29, 1985 by the Hopi Tribe (SOC No. 39-91443) and by the United States, on behalf of both the Hopi Tribe and the Navajo Nation (SOC No. 39-91441).<sup>3</sup> Pursuant to orders entered in 1988 and 1994 by the LCR adjudication court, on September 23, 1994, the Department filed a preliminary HSR for all tribal lands within the LCR adjudication, including the Hopi Reservation.<sup>4</sup> This report was titled “Hydrographic Survey Report for Indian Lands in the Little Colorado River System” (Preliminary Indian Lands HSR), and the deadline for submitting comments on the report was December 22, 1994. On November 22, 1994, shortly before the end of the comment period, the United States filed a “Statement of Amended Claims” on behalf of the Hopi Tribe, the Navajo Nation, the White Mountain Apache Tribe and the Zuni Pueblo.<sup>5</sup> Due to ongoing settlement negotiations, the deadline for submitting comments on the report was stayed by Judge Minker, then presiding over the LCR adjudication.

Judge Minker’s stay was not lifted until six years later when Judge Dawson, the next presiding judge, reopened the comment period with a deadline of June 30, 2000.<sup>6</sup> The Department reviewed the comments and submitted a report to the LCR adjudication court on August 10, 2000, in which the Department recommended that separate HSRs rather than a joint HSR be prepared

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<sup>3</sup> On December 18, 1985, the Department received another copy of the United States claim that was revised to correct a typographical error.

<sup>4</sup> See Pre-Trial Order No. 2 dated August 15, 1988 at 1-2, as modified by Order dated January 27, 1994.

<sup>5</sup> The statement was filed in accordance with an April 18, 1994 Minute Entry of the Court, and the September 23, 1994 “Memorandum from Special Master to Water Rights Claimants in the Little Colorado River General Stream Adjudication.” Statement of Amended Claims at 2.

<sup>6</sup> See Minute Entry dated May 5, 2000 at 4.



for tribal lands within the LCR adjudication, starting with an HSR for the Hopi Reservation.<sup>7</sup> Subsequently, Judge Dawson directed the Department to commence the preparation of an HSR for Hopi tribal lands, and indicated that the Department would not be expected to update the Preliminary Indian Lands HSR.<sup>8</sup>

On January 4, 2002, Judge Dawson retired from the Superior Court.<sup>9</sup> By Order dated January 17, 2002, the Arizona Supreme Court assigned Judge Ballinger to the LCR adjudication. In July 2002, Judge Ballinger ordered the Hopi Tribe and the United States, as trustee for the Hopi Tribe, to amend their SOC's for all reservation and non-reservation lands by December 20, 2002, and to submit information to the Department regarding allotted lands.<sup>10</sup> On August 16, 2002, the United States submitted information concerning allotted lands as ordered by the Court, and stated that it was asserting "water right claims regarding the Hopi Allotted lands on behalf of the Hopi Tribe, its members and Hopi allottees." The Hopi Tribe assisted the United States in gathering information about the Hopi allotments and water uses, and joined in the United States' submittal.

On January 30, 2004, both the Hopi Tribe and the United States filed their amended claims upon court order extending the prior deadline.<sup>11</sup> By Minute Entry Order dated November 4, 2004, Judge Ballinger limited the Hopi HSR to the "main reservation lands," which do not include the Hopi Industrial Park or other lands known as the Hopi Ranches or "Hopi newly acquired lands" that were included in the 2004 amended claims. The "main reservation lands" are those lands that are depicted as the 1882 Executive Order Reservation and the 1934 Act Reservation in **Figure 1-1**.

After the 2004 amendments were filed, the Department began its investigation of the amended claims and the Hopi Tribe and the United States provided additional information in support of their 2004 amended claims. The Department issued the Preliminary Hopi HSR on December 31, 2008.

By Minute Entry Order dated March 2, 2009, with respect to surface streams within the Little Colorado River Basin, Judge Ballinger ruled that "the Hopi is precluded from asserting water right claims in this adjudication to the extent such claims seek the right to water sources located

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<sup>7</sup> See Minute Entry filed August 25, 2000, Attachment at 3.

<sup>8</sup> See Minute Entry filed October 16, 2001 at 8-9.

<sup>9</sup> See Minute Entry filed November 9, 2001.

<sup>10</sup> See Minute Entry filed July 16, 2002 (2002 Order) at 5.

<sup>11</sup> See Minute Entry filed May 9, 2003.



within the Little Colorado River Basin that neither abut nor traverse Hopi lands.” By order dated October 25, 2011, the Arizona Supreme Court declined to take interlocutory review of Judge Ballinger’s March 2, 2009 order.

On or about March 30 and June 30, 2009, comments were filed to the Preliminary Hopi HSR by several parties. Also, on June 30, 2009, the United States amended SOC No. 39-91441, and on November 12, 2009, the Hopi Tribe amended SOC No. 39-91443, followed by the submission of additional information as requested by the Department.

On April 24, 2013, the Special Master for the LCR adjudication issued a report in contested case no. CV 6417-201, *In re Hopi Tribe Priority* (Special Master’s Priority Date Report). In this report, the Special Master entered findings of fact and conclusions of law regarding priority dates for the water right claims for District 6, the Hopi Partitioned Lands, and Moenkopi Island. On October 17, 2012, Judge Brain was appointed to replace Judge Ballinger, who had resigned. On January 17, 2014, oral argument was held before Judge Brain on objections to the Special Master’s Priority Date Report. The matter is under consideration.

On May 4, 2015, ADWR issued a 120-day notice, pursuant to Pre-Trial Order No. 6, of its intention to file the Final Hopi HSR on September 1, 2015. On June 2, 2015 both the Hopi and the United States amended their SOC’s, and ADWR requested that they provide additional information to support the amendments. Some, but not all, of the requested information was forthcoming. By ADWR notice dated August 19, 2015, the publication date for the Final Hopi HSR was extended to December 18, 2015, and on September 17, 2015, the Hopi filed a supplement to its amended claim.

## 1.4 SCOPE

The scope of the Final Hopi HSR is based on a 2001 decision of the Arizona Supreme Court in a case known as *Gila V*,<sup>12</sup> a July 2002 order issued by Judge Ballinger, and July 2013 and November 2015 orders issued by Judge Brain. Under *Gila V*, the water rights for the Hopi Reservation are to be quantified by determining the minimal need to serve the purpose of the reservation, *i.e.* as a permanent home and abiding place, also referred to as homeland purposes. *Gila V*, 35 P.3d at 76-77.

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<sup>12</sup> *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001).



By order filed July 16, 2002, Judge Ballinger directed the Department to prepare the Hopi HSR in compliance with *Gila V*. Judge Ballinger specifically directed the Department to include the following in the Hopi HSR:

- a. Hydrological and technical information about available surface water and groundwater resources to meet each claim;
- b. Comprehensive information about historic, current and existing water uses;
- c. A description of all statements of claimant, including amendments, filed by both the Hopi Tribe and the United States on behalf of the Hopi Tribe;
- d. A description of any statement of claimant filed by claimants other than the Hopi Tribe or the United States on behalf of the Hopi Tribe that are associated with the Tribe's reservation lands;
- e. A description of statements of claimant associated with fee owned in-holdings, if any;
- f. Any water rights claimed by the Hopi Tribe or the United States on behalf of the Hopi Tribe that may claim a priority date earlier than the date the reservation was created;
- g. Proposed water right attributes, excluding proposed future water uses; and
- h. Descriptive and technical information to serve as a basis for evaluating claims of future uses, excluding descriptions or opinions of the feasibility, profitability or practicability of future uses of water for irrigation or other uses.

2002 Order at 7-9.

By Minute Entry filed July 2, 2013, Judge Brain expressed agreement with several parties that "Hydrographic Survey Reports (HSRs) should be cut back to the minimum requirements of existing statutes." Regarding the scope of the Final Hopi HSR in particular, Judge Brain entered a Minute Entry Order dated November 10, 2015, in response to requests for clarification made by ADWR, the Hopi Tribe, and the United States. Judge Brain directed ADWR to comply with Judge Ballinger's July 16, 2002 Order, except as follows:

Future use shall be excluded from the Hopi HSR and ADWR shall have no further obligation to obtain information from the United States or the Hopi Tribe that the parties have declined to provide based on assertions that the requested information relates to future use or presents confidentiality concerns.



The court further stated that the “Hopi HSR shall clearly identify those portions of the HSR that do not contain the director’s recommendations for the water rights claims and uses investigated.”

## 1.5 PUBLICATION AND COMMENT

As required by Pretrial Order No. 6 in the LCR adjudication (dated July 26, 2000), the Department is taking the following steps regarding the publication of the Final Hopi HSR:

- a. A notice of publication of the Final Hopi HSR is being filed with the clerk of the Superior Court for Apache County that specifies where the Final Hopi HSR is available for inspection or purchase, the notice of commencement of the objection period, the deadline for objections, and procedures for obtaining additional information (Notice of Publication and Commencement of Objection Period).
- b. A press release is being issued that contains the information in the Notice of Publication and Commencement of Objection Period. The press release will be posted on the Department’s web site and will be published in newspapers of general circulation within the geographic boundaries of the LCR adjudication.
- c. Copies of the Notice of Publication and Commencement of Objection Period are being sent by first-class mail to those persons included on the court-approved mailing list for the LCR adjudication, the Hopi Tribe and the United States, the fee landowner and lessee located within the Reservation, and all claimants within the LCR adjudication boundaries.<sup>13</sup>
- d. A copy of the Final Hopi HSR is being provided to counsel for the Hopi Tribe and counsel for the United States in its capacity as trustee for the Hopi Tribe.<sup>14</sup>

Pursuant to A.R.S. § 45-256, the deadline for filing objections is 180 days from the filing date. Objections to the Final Hopi HSR must be filed and received by the court on or before

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<sup>13</sup> On September 13, 1925 patent number 966986 was issued to the General Conference of Mennonites of North America for a forty-acre site in the Village of Kytotsmovi. According to the patent when the “lands are no longer used for mission or school purposes said lands shall revert to the Indian owners.”

<sup>14</sup> Both the Hopi and the United States have indicated that they filed their claims on behalf of the allottees.



Wednesday, June 15, 2016 and must comply with the requirements described in the Objection Booklet that is enclosed with the Notice of Publication and Commencement of Objection Period.

