



U.S. Department of Justice

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Washington, D.C. 20530

December 12, 1985

RECEIVED
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WATER RESOURCES

Mr. C. Laurence Linser *cll*
Deputy Director
Adjudications & Administration
99 East Virginia
Phoenix, Arizona 85004

Dear Mr. Linser:

Re: The General Adjudication of All Rights
of Water Use in the Little Colorado
River System and Source, Civil No. 6417,
Supreme Court, Apache County, Arizona.

On November 29, 1985, the United States filed its preliminary statement of claims in the Little Colorado water rights adjudication. Unfortunately there was a line transposition on pages 7 and 8 which rendered certain substantive material unintelligible. I am therefore requesting that you substitute the enclosed corrected copy for the one originally filed. Thank you for your cooperation in this matter.

Sincerely,

William A. White
Attorney, Indian Resources Section
Land and Natural Resources Division

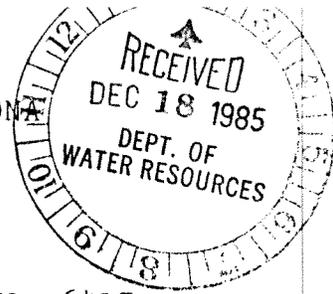
Enclosure

William Swan
Assistant Regional Solicitor
U.S. Department of the Interior
L'Aiglon Court
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505 North 2nd Street
Phoenix, Arizona 85012



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF APACHE



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IN RE: THE GENERAL ADJUDICATION OF THE)
RIGHTS TO USE WATER ON THE LITTLE)
COLORADO RIVER SYSTEM AND SOURCE)
_____)

NO. 6417

UNITED STATES STATEMENT OF CLAIMS

The United States of America in its own right and as trustee for the Navajo Nation and the Hopi Indian Tribe 1/ hereby submits its statement of claims to use water in the Little Colorado River watershed. Federal lands within the watershed for which claims are being submitted encompass the Navajo and Hopi Indian Reservations and other federal lands administered by the National Park Service, the National Forest Service, and the Bureau of Land Management. A summary of claims and supporting data for all Indian lands is set forth in the accompanying Report of Water Claims by the United States of America for the Navajo and Hopi Indian Reservations and Report of Water Claims by the United States of America for the New Lands of the Navajo Nation prepared by Stetson Engineers, Inc. The claims of the National Park Service are set forth in sixteen statement of claimant forms along with supporting data and maps. The claims of the National Forest Service are summarized in Appendix A and detailed in supporting data.

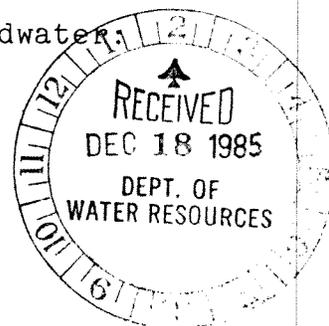
1/ It is the position of the United States that this claim does not in any way effect a waiver of the Tribes' immunity from suit. It is also our position that the Tribes' immunity from suit has not been waived by the McCarran Amendment (43 U.S.C. §666), and that a Tribe can only become a party to this proceeding if it chooses to intervene on its own behalf.

I. The Federal Reserved Water Rights Doctrine

1 The legal basis for the Indian claims and some of the
2 non-Indian federal claims is the federal reserved water rights
3 doctrine as recognized by the Supreme Court of the United
4 States. In Winters v. United States, 207 U.S. 564 (1908),
5 the treaty setting apart certain lands for an Indian reservation
6 did not contain an express reservation of a right to the use of
7 water on the Indian land. Instead the Court relied upon the
8 inferred intent of Congress in the Fort Belknap Agreement to
9 transform the Indians from a nomadic into a "pastoral and
10 civilized people," to declare the need for irrigation water to
11 make the reservation lands productive, and to find that:

12 The power of the Government to reserve
13 waters and exempt them from appropriation
14 under state laws is not denied, and could
15 not be. Id. at 577.

16 In Arizona v. California, 373 U.S. 546 (1963) the
17 Supreme Court held that the implied reservation of water on
18 Indian lands set forth in Winters was equally applicable to
19 other types of federal reservations such as national wildlife
20 refuges, national forests, national parks and national
21 recreational areas. In Colorado River Water Conservation
22 District v. United States, 424 U.S. 800, 805 (1976), the
23 Court said "[t]he reserved rights of the United States extend
24 to Indian reservations and other federal lands such as national
25 parks and forests." The Court reiterated this position in
26 Cappaert v. United States, 426 U.S. 128 (1976), the first case
to extend the reserved water rights doctrine to groundwater.



1 In so doing the United States acquires
2 a reserved right in appropriated water which
3 vests on the date of the reservation and is
4 superior to the rights of future appropriators.
5 Reservation of water rights is empowered by the
6 Commerce Clause, Art. I, §8, which permits
7 federal regulation of federal lands. The
8 doctrine applies to Indian reservations and
9 other federal enclaves, encompassing water
10 rights in navigable and non-navigable streams.
11 Id. at 138. (citations omitted.)

12 When lands are withdrawn or reserved for authorized public
13 purposes requiring the use of water, the right to use a sufficient
14 amount of the unappropriated waters to accomplish those purposes
15 is also reserved and is appropriated under federal law.

16 The basic elements of the reserved rights doctrine are
17 well established in common law. At the date a reservation is
18 established whether by treaty, statute or executive order,
19 sufficient water is impliedly reserved from appurtenant surface
20 and underground sources to fulfill the purposes of the reser-
21 vation. 2/ The federal reserved right, although unquantified
22 or unused, is a perfected, vested property right, which is
23 controlled by federal law and is not dependent upon state law
24 or procedure for its existence, nature and extent, whether or
25 not an adjudication action is in state court. United States

26 2/ The federal reserved right grants priority in the use of
water over subsequent appropriators even if there is an
adverse economic effect on those non-federal users. Winters,
207 U.S. at 570. Moreover, the United States has the power to
reserve waters for the use and benefit of federally reserved
lands whether the withdrawal is accomplished before or after
the state within which the lands are located was admitted to
the Union. United States of America v. District Court in and
for Eagle County, Colorado, 401 U.S. 520, 522-523 (1971).

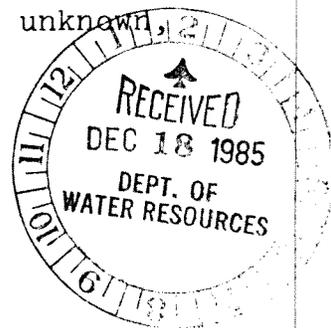


1 v. Superior Court, Nos. 17623-SA, 17681-SA (consolidated)
2 (S.Ct. Ariz. January 30, 1985), slip op. at 18 citing Arizona v.
3 San Carlos Apache Tribe, 463 U.S. 545 (1983). Thus, a reserved
4 right exists if two elements are established. First, there
5 must be a federal reservation of land, and second, the purpose
6 for which the land is reserved must require water. When these
7 two items are shown, the United States holds a reserved right
8 and is then entitled to enough water to fulfill the purposes
9 of the reservation.

10 II. Indian Reservations

11 The reserved water rights doctrine as set out in the
12 proceeding section is the basis for the United States' claim
13 for reserved water rights on behalf of the Navajo Indian Nation
14 and the Hopi Indian Tribe. 3/ When Congress and the President
15 created permanent homelands for the Navajo and Hopi Tribes it
16 was necessarily intended that sufficient water was reserved to
17 satisfy the present, as well as the future, needs of the Indians.
18 Enough water was thus reserved to irrigate all of the practicably
19 irrigable acreage on the reservation, as well as to meet other
20 future needs. Arizona v. California, 373 U.S. at 600-601.
21 Indians' needs have been defined to include establishing a
22 _____

23 3/ The United States intends to file claims for water on behalf
24 of the Zuni Indian Tribe for lands recently reserved and
25 acquired, through exchange or purchase, as a result of P.L. 98-
26 408, 98 Stat. 1533 (1984). Because the lands are just now
being acquired, the nature of any claims is currently unknown,
and there are no data available to support them.

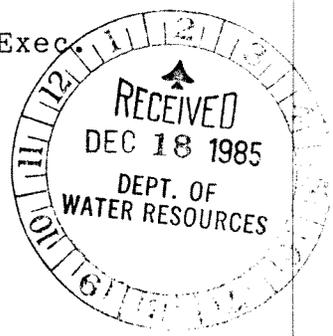


1 permanent homeland, making the reservation livable and maintenance
2 of the Indian way of life in the present and the future. Id.
3 at 599; Winters, 207 U.S. at 577; Menominee Tribe v. United
4 States, 391 U.S. 404, 406 (1968). These purposes are fulfilled
5 through the uses of water for agriculture, livestock, fisheries
6 and wildlife, mineral development, municipal, industrial and
7 recreational uses, and aesthetics. See, e.g., United States v.
8 Shoshone Tribe, 304 U.S. 111 (1938) (timber and minerals);
9 United States v. Adair, 723 F.2d. 1394 (9th Cir.), cert. denied,
10 104 S.Ct. 3536 (1984) (fisheries and wildlife).

11 The Navajo Nation and Hopi Indian Tribes have occupied
12 the area of their present reservations and adjacent lands for
13 many hundreds of years. Accordingly, the water rights claim
14 for the Navajo and Hopi Reservations is made on the basis of a
15 priority date of time immemorial.

16 The United States government has entered into certain
17 agreements and treaties with the Navajo Tribe including, but not
18 limited to, the Treaty of September 9, 1868, 15 Stat. 667, in
19 which the Navajo Indian Reservation was established and set apart
20 by the federal government. The Reservation was augmented by
21 President Rutherford B. Hayes by Executive Order on October 29,
22 1878. Other executive orders and statutes which augmented the
23 reservation within the watershed include, but are not necessarily
24 limited to, the following: Exec. Order, January 6, 1880; Exec.
25 Order, December 16, 1882; Exec. Order, May 17, 1884; Exec.

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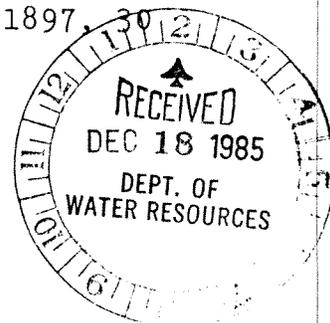
1 Order, January 8, 1900; Exec. Order, November 14, 1901; Exec.
2 Order No. 709, November 9, 1907; Exec. Order No. 1699, February 10,
3 1913; Exec. Order, January 19, 1918; 46 Stat. 378-379, May 23,
4 1930; 46 Stat. 1204, February 21, 1931; 48 Stat. 960-962, June 14,
5 1934; 25 U.S.C. § 3640d et seq. (1980). See I C. Kappler, Indian
6 Affairs Laws and Treaties, 875-876 (2nd ed. 1904); II Kappler
7 583, 1015. The Hopi Indian Reservation was established by
8 President Chester A. Arthur in the same Executive Order dated
9 December 16, 1882 listed above. See I Kappler 805; see also
10 Healing v. Jones, 210 F.Supp. 125 (D. Ariz. 1962), aff'd, 373
11 U.S. 758 (1963).

12 III. Other Federal Lands

13 A. Reserved Water Rights.

14 As previously stated, the reserved water rights doctrine
15 applies to other types of federal reservations. Included in the
16 United States' claims to water are reserved water rights claims
17 made on behalf of the following National Forest units within the
18 Little Colorado River watershed: Apache-Sitgreaves, Coconino
19 and Kaibab. In addition, reserved water rights are asserted on
20 behalf of the following National Park Service units within the
21 Little Colorado River watershed: Grand Canyon National Park,
22 Petrified Forest National Park, Walnut Canyon National Monument,
23 Sunset Crater National Monument, Wupatki National Monument. 4/

24 4/ The purposes and benefits to the national interest in the
25 establishment of national parks, monuments and forests are
26 set forth in the Act of August 25, 1916, 39 Stat. 535, as
amended, 10 U.S.C. §1 (1970); Creative Act of 1891, 20 Stat.
1103, 16 U.S.C. §471; Organic Administration Act of 1897, 30
Stat. 34, 16 U.S.C. §3475.



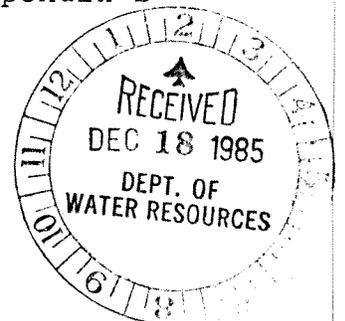
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B. State Law Appropriative Water Rights.

Many of the claims asserted on behalf of federal agencies are based on the Arizona law of prior appropriation. These claims are supported by: 1) pre-1919 water rights registered under the Water Rights Registration Act of 1974, A.R.S. §§45-180 to 45-192; 2) existing administratively certificated water rights; 3) water rights applied for under state law, but not yet acted on by the Arizona Department of Water Resources; or 4) water rights recognized in existing judicial decrees. Prior appropriation water rights have been asserted on behalf of the following federal agencies: the U.S. Forest Service, the National Park Service, and the Bureau of Land Management.

IV. Lands Recently Purchased For
The Navajo Tribe

On June 14, 1983, the Navajo Tribe selected 372,334 acres of land for acquisition in Arizona to be added to the Navajo Reservation pursuant to Public Law 93-531, as amended by Public Law 96-305 (Navajo and Hopi Indian Reservation Amendments Act of 1980). See 25 U.S.C. § 640d et seq. Lands chosen for acquisition were the Wallace, Spurlock, Roberts, Fitzgerald, and Kelsey Ranches in Arizona and certain small acreage owned by the Babbitt Brothers Trading Company within the Navajo Reservation. Also included were the Bar N and Chambers ranches presently owned in fee by the Navajo Tribe. See Appendix B for ranch locations.



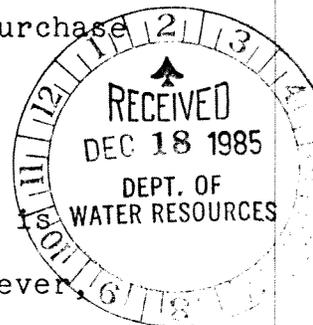
1 Because the above-described lands were only recently
2 acquired, the United States does not have sufficient data
3 available to claim, with certainty, the water rights that
4 attach to these lands. Accordingly, the water rights claims
5 for the ranch lands are necessarily incomplete, and supplements
6 will be filed at a later date in order to more fully state the
7 claims of the United States for those lands. Some data are
8 presently available in regard to a few of the properties and
9 have been included in the Report of Water Claims by the United
10 States of America, in and for the New Lands of the Navajo Nation.

11 Since the ranch lands will be taken into trust by the
12 United States on behalf of the Navajo Tribe as part of the
13 permanent homeland for that tribe, the United States claims a
14 reserved water right as to all unappropriated water that is
15 necessary to make the land habitable and useful to the Indian
16 residents. The priority date claimed is the date of purchase
17 for each parcel.

18 V. Payment Of Fees

19 In support of these claims the United States is
20 tendering the fees required by A.R.S. §45-254(F). However,
21 this suit was not instituted by the United States, which was
22 required to participate in order to protect its rights to use
23 water against the interests of other parties.

24 Jurisdiction over the United States in this case is
25 governed by the McCarran Amendment, 43 U.S.C. §666 (1952).
26 United States v. Superior Court, supra, slip op. at 8-10. The



1 McCarran Amendment provides in part that "no judgment for costs
2 shall be entered against the United States in any such suit."
3 This proviso restates and reinforces the common law rule that,
4 in absence of a statute directly authorizing it, courts could
5 not give judgment against the United States for costs and
6 expenses. 5/

7 The McCarran Amendment constitutes a waiver of the
8 sovereign immunity of the United States by permitting it to be
9 joined as a defendant in a suit quantifying water rights.
10 Colorado River Water Conservation District v. United States,
11 supra; Arizona v. San Carlos Apache Tribe, supra. In Block v.
12 North Dakota, 461 U.S. 273 (1983), the Supreme Court repeated
13 the familiar rule of construction of statutes which waive
14 federal sovereign immunity:

15 The basic rule of federal sovereign
16 immunity is that the United States
17 cannot be sued at all without the
18 consent of Congress. A necessary
19 corollary of this rule is that when
20 Congress attaches conditions to
21 legislation waiving the sovereign
immunity of the United States, those
conditions must be strictly observed
and exceptions thereto not to be lightly
implied. (Citations omitted.) Id. at 287.



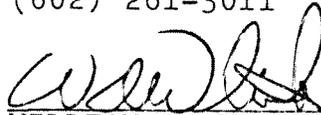
22 5/ In 1966, Congress, by enactment of Public Law 89-507, waived
23 the government's sovereign immunity from a judgment of costs
24 and expenses insofar as that immunity was based on common law
25 principles rather than on a statutory prohibition. Act of
26 July 18, 1966, 80 Stat. 308, as amended 28 U.S.C. §2412.
However, the 1966 waiver does not apply to cases, such as this
case, where the immunity from a judgment for costs is "specifically
provided for by statute." 28 U.S.C. §2412(a).

1 The Court went on to hold that there is no reason why the
2 federal sovereignty rule should not be applied to states. Id.
3 at 288-289. And in Aycrigg v. United States, 124 F.Supp. 416,
4 418 (N.D. Cal. 1954) the Court held that the rule of strict
5 construction of sovereign immunity waiver was applied to costs
6 "with especial rigor."

7 The United States intends to seek recovery of the
8 filing fees in this case as well as other legitimate costs
9 associated with this litigation after final judgment has been
10 rendered.

11 Respectfully submitted,

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