

1 Kimberly R. Parks (Bar No. 032828)
2 Janet L. Miller (Bar No. 011963)
3 Arizona Department of Water Resources
4 Legal Division
5 P.O. Box 36020
6 Phoenix, Arizona 85067
7 Telephone: 602-771-8472
8 Fax: 602-771-8687
9 krparks@azwater.gov
10 jlmiller@azwater.gov

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12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
13 **IN AND FOR THE COUNTY OF APACHE**

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

Contested Case No. CV6417-300

**ARIZONA DEPARTMENT OF WATER
RESOURCES' RESPONSE TO NAVAJO
NATION'S MOTION**

(Special Master Susan Ward-Harris)

CONTESTED CASE NAME: *In re Navajo Nation*

DESCRIPTIVE SUMMARY: The Arizona Department of Water Resources ("ADWR") hereby files its Response to the Navajo Nation's Motion for an Order Requesting ADWR to Include Uses from Wells in its *De Minimis* Investigation ("Navajo Motion").

NUMBER OF PAGES: Five

DATE OF FILING: October 3, 2018

INTRODUCTION AND PROCEDURAL HISTORY

In the Order filed December 28, 2016, the Court ordered the Navajo Nation and the United States to file amended statements of claimant ("SOCs") and supporting data for historic,

1 present, and future stock ponds, stock and wildlife watering, and domestic, commercial,
2 municipal, and industrial (collectively “DCMI”) water uses on the Navajo Reservation by June 1,
3 2018. During the April 12, 2018 Status Conference in this matter, counsel for the Navajo Nation
4 requested the Court to allow stock and domestic wells with the capacity to pump 35 gallons per
5 minute or less to be considered as *de minimis* uses within the Navajo Nation Hydrographic
6 Survey Report (“HSR”). *See* Minute Entry, April 24, 2018, p. 2. The Special Master ordered
7 ADWR to file a status report addressing the feasibility of a *de minimis* calculation for domestic
8 wells on the Navajo Reservation based on the data provided by the Navajo Nation and the United
9 States within 90 days of receipt of the data. *Id.* The Special Master also ordered ADWR to
10 “include a chapter that assesses whether stock ponds and stock and wildlife watering on the
11 Navajo Reservation or specific portions of the Navajo Reservation constitute *de minimis* uses.”
12 *Id.* at 3.

13 On August 31, 2018, ADWR filed its Status Report addressing the feasibility of a *de*
14 *minimis* calculation for domestic wells on the Navajo Reservation, stating that ADWR has no
15 current methodology for conducting a *de minimis* calculation for such wells due to the lack of
16 available information pertaining to individual domestic uses on the Reservation. ADWR Status
17 Report, at 4.

18 In its Motion mailed to the Clerk of Court on September 24, 2018, the Navajo Nation
19 renewed its request that the Court order ADWR to “evaluate the *de minimis* impact from wells
20 pumping less than 35 gallons per minute (“gpm”) for stock watering, wildlife watering and
21 domestic water hauling in the preparation of the HSR for the Navajo Reservation, in addition to
22 its investigation of *de minimis* uses from washes, springs, and impoundments.” Navajo Motion at
23 1.

24 ADWR has considered the Navajo Nation’s renewed request and evaluated again whether
25 this type of *de minimis* analysis would be possible. Upon further evaluation, it appears that a *de*
26

1 *minimis* analysis for individual uses is not applicable to the determination of federal reserved
2 water rights on the Navajo Reservation.

4 **NATURE OF FEDERAL RESERVED WATER RIGHTS**

5 Federal water rights are different from those determined under state law. Under *Gila V*¹,
6 the water rights for the Navajo Reservation are to be quantified by determining the minimal need
7 to serve the purpose of the reservation, *i.e.* as a permanent home and abiding place, also referred
8 to as homeland purposes. *Gila V*, 35 P.3d at 76-77. When quantifying federal reserved rights for
9 Indian tribes, the quantity is represented as a reservation-wide demand for each type of use.
10 Federal reserved rights for Indian tribes are not claimed on an individual-use basis.

11 For example, in its amended statement of claimant, the Navajo Nation have claimed 4,662
12 AFY for past and present DCMI. See Navajo Nation’s First Amended Statement of Claimant,
13 filed June 1, 2018 at 13. The Navajo Nation asserts a claim for 4,864 AFY for livestock
14 watering. *Id.* at 12. These claims are for reservation-wide use, not individual uses.

15 In previous tribal HSRs, ADWR did not create individual water rights for specific places
16 of use, but rather provided water right attributes for the reservation as a whole. ADWR assesses
17 individual places such as stockponds in order to verify the claims and stockpond capacities but
18 does not create separate rights for each stockpond. The water right attributes for stockwatering
19 are based on the carrying capacity of the range. This is the same approach that ADWR plans to
20 take in developing the HSR for the Navajo Reservation.

22 **PURPOSE OF A *DE MINIMIS* ANALYSIS**

23 “*De Minimis* water use” means a water use found to be sufficiently small so that the costs
24 of a detailed adjudication of the use outweigh the benefits that would result.” See Special Master

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26 ¹ *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).

1 John E. Thorson’s Memorandum Decision, Findings of Fact, and Conclusions of Law for Group I
2 Cases Involving Stockwatering, Stockponds, and Domestic Uses, filed November 14, 1994, as
3 modified by Order dated February 23, 1995 (collectively referred to as “Special Master’s *De*
4 *Minimis* Report”). The purpose of a *de minimis* finding is to allow summary adjudication of an
5 individual right, thereby saving the court and parties time and effort.²

6 The Navajo Nation has not submitted claims for individual water uses on the Navajo
7 Reservation and has not provided data and information about quantities for particular uses at
8 particular sites in relation to other types of uses at those same sites.³ Evaluating potential *de*
9 *minimis* rights for specific places of use in addition to evaluating the rights claimed for the
10 reservation as a whole will increase the effort required by ADWR, the Court and the parties.
11 ADWR would have to develop standards as to what constitutes *de minimis* uses on the
12 reservation, which would be subject to objections by the parties and approval by the Court, and
13 ADWR would have to create individual places of use in order to apply the criteria. ADWR
14 would then have to evaluate how the individual rights impact the amount of water claimed for the
15 reservation as a whole.

17 CONCLUSION AND ADWR’S PROPOSAL

18 While ADWR does not recommend conducting a *de minimis* analysis for individual uses
19 on the Navajo Reservation, it would be possible for ADWR to evaluate the total volume of
20 impoundments and compare that to the flow records from the Little Colorado River system
21 (“LCR”) to determine whether the impact of the total volume of impoundments is *de minimis* in
22 nature. ADWR can also evaluate whether there are any closed basins within the Navajo

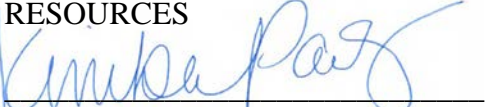
23 ² *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 175 Ariz. 382, 394, 857 P.2d 1236,
24 1248 (1993) (“A properly crafted *de minimis* exclusion will not cause piecemeal adjudication of water rights or in
25 any other way run afoul of the McCarran Amendment. Rather, it could simplify and accelerate the adjudication by
reducing the work involved in preparing the hydrographic survey reports and by reducing the number of contested
cases before the special master”).

26 ³ See Navajo Nation’s First Amended Statement of Claimant at 13. (“Wells and springs on the Navajo Reservation
within the LCR Basin claimed for livestock and wildlife use are also claimed for domestic uses”.)

1 Reservation, as the use of surface water within such basins would not impact flows on the LCR.
2 ADWR respectfully requests that the Court deny the Navajo Nation's Motion. ADWR is
3 prepared to conduct a cumulative stockpond impact analysis and identify closed basins as part of
4 the Navajo Nation HSR if so directed by the Court.

5 **DATED** this 3rd day of October 2018.

6 ARIZONA DEPARTMENT OF WATER
7 RESOURCES

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9 Kimberly R. Parks, Deputy Counsel
Janet L. Miller, Deputy Counsel


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11 **ORIGINAL** of the foregoing sent by first-class
mail on October 3, 2018, to:

12 Clerk of the Apache Superior Court
13 Attn: Water Case
14 70 West Third South
St. Johns, AZ 85936

15 **COPY** of the foregoing sent by first-class
16 mail on October 3, 2018, to:

17 Special Master Susan Ward-Harris
18 Maricopa County Central Court Building
Central Court Building
19 201 West Jefferson Street, Suite 3A
Phoenix, AZ 85003-2205

20
21 **COPIES** of the foregoing sent by first-class
22 mail on October 3, 2018 to all parties on the
court-approved mailing list for Contested
Case No. CV6417-300.

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