

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

Aug. 15,
1988

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

NO. 6417
Pre-Trial Order No. 2
Re: Content of HSRs

Having studied the written and oral comments of the various claimants, the statutory requirements regarding the Department of Water Resources and the preparation of hydrographic survey reports, the resources of the DWR, the length of time required to prepare the HSRs and the Court's finding that HSRs constitute no determination or resolution of factual issues but are rather for the use of the finder of fact - and may be expanded at the adjudication stage at the direction of the Court - the Court at this time ORDERS as follows, as to the content of the HSRs:

1. DWR shall prepare an HSR for Indian Lands. Contents of this HSR will include:

a. Background information on the boundaries and origins of Indian lands;

b. General information as to water resources, geology, soils, minerals, timber, range land, recreation, topography, climate, and population;

c. Legal documents applying to Indian lands;

d. Current ownerships, leases, water contracts, federal water projects, state filings;

e. Information describing surface water and groundwater available to Indian lands;

f. Past and current water uses on Indian lands.

DWR will not include descriptions or opinions of the feasibility, profitability or practicability of future uses of water for irrigation or other uses. What DWR includes in a through f above, however, will serve as a basis for evaluating claims of future uses. Further, DWR may be directed during the adjudication process to examine the data, assumptions or methods forming the basis of claims or objections to claims regarding future uses of water on Indian lands.

2A.

a. HSRs need not identify a use incidental to another primary water use for which a PWR has been created;

b. HSRs will include stockwatering or wildlife watering from springs;

c. HSRs need not include stockwatering from a well;

d. HSRs will include domestic uses of water within a municipal or water company service area boundary;

e. HSRs need not include instream stockwatering uses where no claim exists;

f. HSRs will include reservoirs impounding water;

2B.

DWR shall make a best effort to describe apparent priority dates for all reported PWRs.

2C.

DWR will describe impoundments of water of less than 15 acre feet.

2D.

DWR will make no conclusion that water uses have been relinquished.

2E.

DWR will not distinguish PWRs for irrigation uses from other uses.

3.

DWR will not utilize the alternative process for investigating and reporting domestic uses.

4.

DWR need not interpret or restate claims apart from the watershed file report.

5A. ' Assignments

a. IT IS HEREBY ORDERED that the form for Assignment of Statement of Claimant attached hereto as Exhibit A is approved and is adopted as the official assignment form for use in the Little Colorado River Adjudication.

b. IT IS FURTHER ORDERED that the filing of a completed Assignment of Statement of Claimant form with the Arizona Department of Water Resources will effect substitution of parties with respect to the water right being transferred. The assignor shall no longer be a party to this adjudication with respect to that water right. The assignee shall thereafter be a party to this adjudication with respect to that water right.

5B. Amendments

a. IT IS HEREBY ORDERED that the four Amendment to Statement of Claimant forms attached hereto as Exhibits B-E are approved and adopted as the official Amendment forms for use in the Little Colorado River Adjudication.

b. IT IS ORDERED that all amendments to Statements of Claimant filed prior to the date of this order are accepted. No motions to amend shall be required as to these amendments.

c. IT IS ORDERED that any claimant who:

- 1) Filed a Statement of Claimant which does not contain all the information requested on the court-approved form or which contains information the claimant believes to be incorrect; and
- 2) Wishes to amend the filed Statement of Claimant to adopt wholly or partially the findings contained in a Preliminary Hydrographic Survey Report or Final Hydrographic Survey Report, as the case may be,

may file a statement to that effect which will constitute an amendment to the Statement of Claimant.

d. IT IS ORDERED that verified amendments to Statements of Claimant which are filed with the Arizona Department of Water Resources not less than ninety days before the issuance of the final Hydrographic Survey Report are hereby allowed. A claimant may file such an amendment to a Statement of Claimant with the Arizona

Department of Water Resources. The Department shall accept filing of these amendments without further order of the Court.

e. IT IS FURTHER ORDERED that amendments to Statements of Claimant shall not be filed with the Arizona Department of Water Resources less than ninety days before the issuance of a final Hydrographic Survey Report unless and until the claimant secures specific court approval. A claimant who has obtained specific court approval shall submit a verified amendment to the Department.

Additionally, the Court makes the following three procedural orders to better facilitate this adjudication:

1. IT IS ORDERED that Pre-Trial Order No. 1, Paragraph 5.B(1)(e), is amended to provide that an endorsement upon or attached to a document stating that copies were mailed to all parties on the Court's approved mailing list shall be sufficient proof of service by mail. Parties shall not be required to file or serve the list of persons served by mail.

2. IT IS ORDERED that all Statements of Claimants submitted to the Department in the General Adjudication of the Little Colorado River System and Source before 5:00 p.m. on December 23, 1985, are accepted and deemed appropriately filed.

IT IS ORDERED that a person who filed a Statement of Claimant after December 23, 1985, but on or before December 23, 1986, and who has not previously intervened by motion and court order, need not file a motion to intervene, except as provided in this Order.

IT IS ORDERED that if the Department concludes from the face of a Statement of Claimant filed within one year after the filing deadline that the Statement of Claimant is inappropriate or extremely faulty, then the Department shall bring the Statement of Claimant to the Court's attention, and the Court shall determine whether the Statement of Claimant is appropriately filed.

3. IT IS ORDERED that in conjunction with the duty of the Arizona Department of Water Resources to review the Statements of Claimant and the amount of fees paid as to each as specified in A.R.S. 45-254(F), if the Department ascertains that a claimant is entitled to a refund of a filing fee, the Department shall make the refund without further direction by the Court. If the Department cannot determine whether a refund is due, the claimant shall submit the issue to the Court for decision.

There being no pending substantive motions before the Court, it is ORDERED that the hearing scheduled for October, 1988 is vacated.

ASSIGNMENT OF STATEMENT OF CLAIMANT
Superior Court of Apache County

This form is to be used to notify the Superior Court of Apache County of any change in ownership of land upon which a claim for a water right was made on a statement of claimant form filed in the General Adjudication of the Little Colorado System and Source. This form may also be used to notify the Court of any change in ownership of a water right which is not attached or appurtenant to land or which has been transferred from one parcel of land to another.

Both sides of this form are to be completed in accordance with the instructions below. All signatures are to be verified by a notary public. Mail the original completed form to: Arizona Department of Water Resources, Adjudications Division, 15 South 15th Avenue, Phoenix, Arizona 85007.

General Instructions

Please attach to this form a copy of a duly recorded deed, a copy of the County Assessor's tax parcel notice or other documentation which evidences change of ownership of the land or of a water right to which Statement(s) of Claimant applies.

Two or more Statements of Claimant may be assigned on this form only if the assignor(s)/seller(s) are identical on all Statements of Claimant and the assignee(s)/buyer(s) are identical on all Statements of Claimant. If a Statement of Claimant is subdivided to two or more separate assignees/buyers, an assignment form must be completed for each of the assignees/buyers. If more space is needed, attach a separate sheet.

This assignment form must be signed by all assignee(s)/buyer(s) and all assignor(s)/seller(s), and the current address and telephone number of each party must be furnished. If there are more than two assignees or assignors, the name, address, telephone number and signature of each additional assignee or assignor should be attached on a separate sheet.

The undersigned parties hereby notify the Superior Court of Apache County of the assignment of the following Statement(s) of Claimant:

39- _____
39- _____
39- _____
39- _____
39- _____
39- _____
39- _____
39- _____

39- _____
39- _____
39- _____
39- _____
39- _____
39- _____
39- _____
39- _____

COMPLETE OTHER SIDE OF FORM

SELLER(S) ASSIGNEE(S)

BUYER(S)/ASSIGNEE(S)

NAME(S) _____
(print or type)

NAME(S) _____
(print or type)

ADDRESS _____

ADDRESS _____

TELEPHONE () _____

TELEPHONE () _____

Signature _____

Signature _____

Signature _____

Signature _____

STATE OF ARIZONA)
County of _____) SS.

STATE OF ARIZONA)
County of _____) SS.

The foregoing instrument was
acknowledged and signed before me
this _____ day of _____,
19____, by _____.

The foregoing instrument was
acknowledged and signed before me
this _____ day of _____,
19____, by _____.

Notary Public

Notary Public

My Commission Expires:

My Commission Expires

STATEMENT OF CLAIMANT FORM
FOR
DOMESTIC USE
AMENDMENT

CLAIM BEING AMENDED
NO. 39- _____

SUPERIOR COURT OF APACHE COUNTY

1. Claimant Name: _____
Claimant Address: _____ City _____
State: _____ Zip Code _____ Telephone _____
2. Basis of Claim:
 - A. Appropriation Right acquired prior to June 12, 1919. 1974 Water Rights Registration Act Registry No. _____
 - B. Appropriation Right acquired after June 12, 1919. Application No. _____, Permit No. _____, or Certificate of Water Right No. _____
 - C. Decreed water right. Principal litigants, court, date and case no.: _____
 - D. Right to withdraw groundwater. _____
 - E. Other, describe: _____
3. Claimed Priority Date: _____ (month/day/year)
4. Source of Water:
 - A. Stream: name _____, tributary to _____
 - B. Spring: name _____, tributary to _____
 - C. Lake or Reservoir: name _____, tributary to _____
 - D. Groundwater
5. A. Legal description of the Point of Diversion:
County _____, Section _____, Township _____ N/S, Range _____ E/W
Legal Subdivision:
_____ ¼, _____ ¼, _____ ¼ of the Section
B. Legal Description of Place of Use: (one of the following)
County _____, Section _____, Township _____ N/S, Range _____ E/W
_____ ¼, _____ ¼, _____ ¼ of the Section, or
Parcel I.D. _____, or
Subdivision Name _____ Block No. _____ Lot No. _____
6. If there are Irrigation, Stockpond or Other Uses supplied from the point of diversion, describe: _____
7. Means of Diversion:
 - A. Instream pump.
 - B. Gravity flow into ditch, canal or pipeline.
 - C. Well: Arizona Department of Water Resources Well Registration No. 55- _____
 - D. Other, describe _____

8. Number of persons _____ or dwellings _____ served by this use.

9. Annual Volume Claimed: _____ acre-feet

10. It may be necessary for a representative from the Department of Water Resources to inspect the place, use and diversion. Your signature following will grant permission to enter your property for the purpose of inspection: Signature of Claimant _____

11. Should it be necessary for a representative of the Department to contact you as the claimant or your representative, are there any special instructions regarding time of day or address to aid in locating the specified person? _____

12. Additional comments: _____

(attach additional sheet if required)

13. Mail form(s) to: Department of Water Resources, Adjudications Division, 15 South 15th Avenue, Phoenix, Arizona 85007.

14. Notarized Statement:
I (We), _____
the claimant(s) named in this claim, do hereby certify under penalty of perjury, that the information contained and statements made herein are to the best of my(our) knowledge and belief true, correct & complete.

(seal)

My Commission Expires:

Notary Public

or, _____
Authorized Personnel of the Department of Water Resources

STATEMENT OF CLAIMANT FORM
FOR
STOCKPOND USE
AMENDMENT

CLAIM BEING AMENDED
NO. 39- _____

SUPERIOR COURT OF APACHE COUNTY

1. Claimant Name: _____
Claimant Address: _____ City _____
State: _____ Zip Code _____ Telephone _____
2. Basis of Claim:
 - A. Appropriation Right acquired prior to June 12, 1919. 1974 Water Rights Registration Act Registry No. _____
 - B. Appropriation Right acquired after June 12, 1919. Application No. _____
Permit No. _____, or Certificate of Water Right No. _____
 - C. Right acquired through the 1977 Stockponds Registration Act. Claim No. _____
 - D. Decreed water right. Principal litigants, court, date and case no.: _____
 - E. Other, describe: _____
3. Claimed Priority Date: _____ (month/day/year)
4. Source of Water:
 - A. Stream, wash or arroyo: name _____, tributary to _____
 - B. Is water supplied from a source other than natural channel flow into the stockpond?
 Yes, No If yes, describe: _____
5. Legal description of the location of the stockpond: (attach additional sheet if required)
_____, _____, _____, Section _____, Township _____ N/S, Range _____ E/W
6. If there are other uses supplied by the stockpond or its water source, describe: _____
7. Description of the Stockpond:
 - A. Name or other designation: _____
 - B. Dam specifications:
 - 1) Date construction began, _____, and ended _____
 - 2) Height, _____ ft.
 - 3) Does dam have an outlet structure other than spillway? Yes No
 - C. Reservoir behind dam:
 - 1) Date water first stored: _____ (month/day/year)
 - 2) Maximum length: _____ ft.
 - 3) Maximum width: _____ ft.
 - 4) Maximum depth of water at spillway crest: _____ ft.
 - 5) Maximum storage volume at spillway crest: _____ Acre-Feet

8. Number and kind of livestock or wildlife watered by this stockpond:
_____, for _____ months per year.

9. Attach photographs, maps or sketches necessary to show the location of the stockpond(s) and a conveyance system and other point(s) of diversion.

10. It may be necessary for a representative from the Department of Water Resources to inspect the stockpond and diversion. Your signature following will grant permission to enter your property for the purpose of inspection: Signature of Claimant _____

11. Should it be necessary for a representative of the Department to contact you as the claimant or your representative, are there any special instructions regarding time of day or address to aid in locating the specified person? _____

12. Additional comments: _____

(attach additional sheet if required)

13. Mail form(s) to: Department of Water Resources, Adjudications Division, 15 South 15th Avenue Phoenix, Arizona 85007.

14. Notarized Statement:
I (We), _____
the claimant(s) named in this claim, do hereby certify under penalty of perjury, that the information contained and statements made herein are to the best of my(our) knowledge and belief true, correct and complete.

(seal)

My Commission Expires:

Notary Public

or, _____
Authorized Personnel of the Department of Water Resources

STATEMENT OF CLAIMANT FORM
FOR

IRRIGATION USE
AMENDMENT

SUPERIOR COURT OF APACHE COUNTY

CLAIM BEING AMENDED

NO. 39- _____

1. Claimant Name: _____
Claimant Address: _____ City _____
State: _____ Zip Code _____ Telephone _____

2. Basis of Claim:

- A. Appropriation Right acquired prior to June 12, 1919. 1974 Water Rights Registration Act Registry No. _____
- B. Appropriation Right acquired after June 12, 1919. Application No. _____, Permit No. _____, or Certificate of Water Right No. _____
- C. Decreed water right. Principal litigants, court, date and case no.: _____
- D. Right to withdraw groundwater. _____
- E. Other, describe: _____

3. Source of Water:

- A. Stream: name _____, tributary to _____
- B. Spring: name _____, tributary to _____
- C. Lake or Reservoir: name _____, tributary to _____
- D. Groundwater.

4. Legal description of the Point of Diversion: (attach additional sheet if required)

_____ 1/4, _____ 1/4, _____ 1/4, Section _____, Township _____ N/S, Range _____ E/W

5. If there are Stockpond, Domestic or Other Uses also supplied from the point of diversion, describe:

6. Means of Diversion:

- A. Instream pump.
- B. Gravity flow into a ditch, canal or pipeline.
- C. Well: Arizona Department of Water Resources Well Registration No. 55- _____
- D. Other, describe: _____

7. Means of Conveyance:

- A. Ditch, canal or pipeline. If the means of conveyance is owned and/or operated by some other entity, please give name and address: _____
- B. Other, describe: _____

8. Place(s) of Use, Annual Water Use and Claimed Priority Date(s): (attach additional sheet if required)

County: _____

Legal Subdivision	Section	Township	Range	Acres	Annual Water Use (acre-feet)	Claimed Priority Date (month/day/year)
_____	_____	N/S	E/W	_____	_____	_____
_____	_____	N/S	E/W	_____	_____	_____
_____	_____	N/S	E/W	_____	_____	_____

9. Claimed Right:

- A. Maximum Flow Rate: _____
- cubic-feet per second
 gallons per minute
 Arizona miner's inches
- B. Annual Volume of Water Use: _____ acre-feet
- C. Storage Right: _____ acre-feet

10. Attach photographs, maps or sketches necessary to show the point(s) of diversion, storage reservoir(s), means of conveyance and place(s) of use.

11. It may be necessary for a representative from the Department of Water Resources to inspect the diversion, conveyance and place of use. Your signature following will grant permission to enter your property for the purpose of inspection: Signature of Claimant _____

12. Should it be necessary for a representative of the Department to contact you as the claimant or your representative, are there any special instructions regarding time of day or address to aid in locating the specified person? _____

13. Additional comments: _____

(attach additional sheet if required)

14. Mail form(s) to: Department of Water Resources, Adjudications Division, 15 South 15th Avenue Phoenix, Arizona 85007.

15. Notarized Statement:

I (We), _____
the claimant(s) named in this claim, do hereby certify under penalty of perjury, that the information contained and statements made herein are to the best of my(our) knowledge and belief true, correct and complete.

(seal)

My Commission Expires: _____

Notary Public

or, _____
Authorized Personnel of the Department of Water Resources

STATEMENT OF CLAIMANT FORM
FOR
OTHER USES¹

CLAIM BEING AMENDED

NO. 39- _____

AMENDMENT

SUPERIOR COURT OF APACHE COUNTY

1. Claimant Name: _____
Claimant Address: _____ City _____
State: _____ Zip Code _____ Telephone _____
2. Basis of Claim:
 - A. Appropriation Right acquired prior to June 12, 1919. 1974 Water Rights Registration Act Registry No. _____
 - B. Appropriation Right acquired after June 12, 1919. Application No. _____, Permit No. _____, or Certificate of Water Right No. _____
 - C. Decreed water right. Principal litigants, court, date and case no.: _____
 - D. Right to withdraw groundwater. _____
 - E. Other, describe: _____
3. Claimed Priority Date: _____ (month/day/year)
4. Use:
 - A. Municipal
 - B. Commercial or Industrial
 - C. Mining
 - D. Stockwatering other than from a stockpond
 - E. Recreation, Fish & Wildlife
 - F. Other, describe: _____
5. Source of Water:
 - A. Stream: name _____, tributary to _____
 - B. Spring: name _____, tributary to _____
 - C. Lake or Reservoir: name _____, tributary to _____
 - D. Groundwater
6. Legal description of the Point of Diversion: (attach additional sheet if required)
_____, _____, _____, Section _____, Township _____ N/S, Range _____ E/W
7. If there are Irrigation, Domestic or Stockpond uses also supplied from the Point of Diversion, describe:

8. Means of Diversion:
 - A. Instream pump
 - B. Gravity flow into ditch, canal or pipeline.
 - C. Well: Arizona Department of Water Resources Well Registration No. 55- _____
 - D. Other, describe _____

¹ See Instructions for explanation of uses in this category

9. Means of Conveyance:

A. Ditch, canal or pipeline. If the means of conveyance is owned and/or operated by some other entity, please give name and address: _____

B. Other, describe: _____

10. Place of Use, if other than point of diversion: (attach additional sheet if required)

County _____

Legal Subdivision	Section	Township	Range
_____	_____	_____ N/S	_____ E/W
_____	_____	_____ N/S	_____ E/W

11. Claimed Right:

A. Maximum Flow Rate: _____

cubic-feet per second
 gallons per minute
 Arizona miner's inches

B. Annual Volume of Water Use: _____ acre-feet

C. Storage Right: _____ acre-feet

12. Attach photographs, maps or sketches necessary to show the point of diversion, storage reservoir(s), place(s) of use and means of conveyance.

13. It may be necessary for a representative from the Department of Water Resources to inspect the diversion, conveyance and place of use. Your signature following will grant permission to enter your property for the purpose of inspection: Signature of Claimant _____

14. Should it be necessary for a representative of the Department to contact you as the claimant or your representative, are there any special instructions regarding time of day or address to aid in locating the specified person? _____

15. Mail form(s) to: Department of Water Resources, Adjudications Division, 15 South 15th Avenue Phoenix, Arizona 85007.

16. Additional comments: _____

(attach additional sheet if required)

17. Notarized Statement:

I (We), _____
the claimant(s) named in this claim, do hereby certify under penalty of perjury, that the information contained and statements made herein are to the best of my(our) knowledge and belief true, correct and complete.

(seal)

My Commission Expires: _____

Notary Public

or, _____
Authorized Personnel of the Department of Water Resources

Page 2

Creek has slowed progress and caused a great expenditure of everyone's resources. The Court believes that the same will happen following issuance of the St. Johns and Winslow reports unless a step is taken at this time to prepare, examine and hear the claims of the Navajo Nation, Hopi Tribe and San Juan Southern Paiute [sic, Paiute] Tribe. The Court believes the uncertainty in the nature and quantity of Indian claims is leading all parties at this time to litigate every possible issue to the fullest, for fear of what the future may reveal in the way of reserved rights. This Court believes that examination of claims of reserved rights is of foremost importance to all claimants. Therefore, the Court believes the process will best be served by turning attention to the claims of the Indian lands now. The Department of Water Resources projects a completion date for this HSR of September, 1994.

January 27, 1994
DATE

/s/ Allen G. Minker
Judge of the Superior Court

[replica of original order]

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

THE HONORABLE MICHAEL C. NELSON, PRESIDING JUDGE

IN CHAMBERS

()

IN OPEN COURT

(X)

THE HONORABLE EDWARD L. DAWSON
Visiting Judge

SUE HALL, Clerk

By: C. Morrow, Deputy

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

DATE: April 27, 2000

TIME: 1:05 p.m.

STATUS CONFERENCE

CIVIL NO. 6417

DESCRIPTIVE SUMMARY:	Status Conference held in the Apache County Superior Courtroom, St. Johns, Arizona.
NUMBER OF PAGES:	4
DATE OF FILING:	May 5, 2000

MINUTE ENTRY

This is the date and time set for a Status Conference in Civil No. 6417.

Courtroom Reporter: Susan Humphrey.

The Court welcomes those in attendance for the Status Conference.

APPEARANCES

The Court calls for appearances and they include the following: Mr. David A. Brown, representing various claimants; Mr. Scott McElroy and Mr. Stanley Pollack, representing the Navajo Nation; Mr. John B. Weldon Jr., Ms. Brenda Burman, and Mr. David C. Roberts, representing Salt River Project; Mr. Reid Chambers and Mr. Scott Canty, representing the Hopi Tribe; Mr. Charles Jakosa, U. S. Department of Justice; Mr. John Cawley, Department of the Interior/Bureau of Indian Affairs; Mr. Andrew F. Walch, representing the National Park Service, Forest Service and Bureau of Land Management; Mr. Verl Heap, representing St. Johns Irrigation Company; Mr. Eldon Pulsipher, representing Lyman Water Company; Mr. Pete Shumway, representing LCR counties; Mr. Johnnie Francis, representing the Navajo Nation; Mr. Dwight Reynolds, representing St. Johns Ditch Company; Mr. Edward L. Sullivan, representing Peabody Western Coal Company; Mr. Robert Hoffman, representing Southern California Edison; Mr. Eugene Kay and Ms. Esther Talayumptewa, representing the Hopi Tribe; Ms. Jane Marx and Ms. Susan Williams, representing the Pueblo of Zuni; Mr. Marc Jerden, representing Tucson Electric Power Company; Mr. David M. Call, representing the Stone Container Corporation, Abitibi Consolidated Sales

Corporation, the Arizona Water Company, Santa Fe Pacific Railroad Company and the Burlington Northern Santa Fe Railroad Company; Mr. Jim Odenkirk, representing Arizona Game and Fish; Ms. Mary Grier, representing the Arizona Attorney General's Office; Mr. R. W. Barris, representing the City of Winslow; Mr. Ed Peacock, hydrologist with the Arizona General's office; Mr. Adrian Hansen, representing the City of Flagstaff; Mr. William Darling, Attorney representing Cameron Trading Post and Atkinson Trading Company; Mr. Joe Papa and Mr. Brad Richards, representing the Town of Snowflake; Mr. William Staudenmaier, representing Arizona Public Service, Phelps Dodge and Aztec Land and Cattle Company; Mr. Richard Bertholf, representing Southern California Edison; Ms. Alexandra Arboleda, representing the Arizona Department of Water Resources; Mr. Tom Anderson, representing Lyman Water Company; and Mr. Gordon Farr, representing the Slade Family Trust.

Also in attendance: Special Master John E. Thorson; Ms. Kathy Dolge, assistant to the Special Master; Judge Michael C. Nelson, Presiding Judge of Apache County Superior Court and Settlement Judge in the Little Colorado Stream Adjudication.

REPORTS

The Court calls for special reports on the different pieces of the ongoing settlement negotiations.

Mr. Reid Chambers reports on Hopi-Navajo "North Side" Discussions, reviewing briefly events and various meetings since the last Status Conference. Mr. Chambers states that there is agreement in principle between the parties, although Edison is in final negotiation stages of selling the Mohave plant, and the parties are waiting for this matter to conclude. Mr. Chambers further reports on meetings with United States Senator Jon Kyl, Mr. Jakosa and other parties. Mr. Chambers remarks on the recent visit of President Clinton to the Navajo Nation, adding that in addition to the fifty percent of the homes on the reservation not having telephones, fifty percent of the homes on the reservation also do not have complete plumbing or kitchen facilities.

Following a brief discussion regarding the costs involved, Mr. Pollack, representing the Navajo Nation, reports on the Hopi-Navajo "South Side" discussions. Mr. Pollack states that he has had no meetings with Senator Kyl since the last Status Conference, but a meeting is scheduled in two weeks. Mr. Pollack further states that the Navajo Nation is willing to live by the commitments that have been made, and would like to hear from the other parties to determine if they are ready to move forward with negotiations. Mr. Pollack remarks that there has been no closure or final agreement since commitment has not been made toward moving together as a group.

The Court agrees that there is the need now for the parties to come together instead of meeting one on one.

Ms. Susan Williams, representing the Zuni Tribe, reports on Zuni Pueblo issues and references a recent meeting with Senator Kyl. Ms. Williams states that they are close to final settlement, and summarizes a proposed "Zuni only" settlement. Ms. Williams further comments regarding several remaining issues to be worked out, including concerns of the United States.

Mr. Andrew Walch, representing the National Park Service as well as other public lands owned by the United States, reports that Mr. Peter Fahmy has been circulating a draft proposal, but that one paragraph

in the draft was inadvertently omitted. Mr. Walch states that a final version of the draft will be completed soon.

Mr. Reid Chambers states for the record that the Hopi Tribe would oppose a "Zuni-only" settlement.

Mr. Stanley Pollack reports that he is in agreement with Mr. Chambers and the Hopi Tribe in this matter, and requests that the other parties support a comprehensive settlement.

Mr. John B. Weldon, Jr., representing Salt River Project, references current litigation and reports that Salt River Project will not be on board in this matter unless coal leases are validated.

Mr. Robert Hoffman, representing Southern California Edison, briefly reports on other ongoing settlements including the Central Arizona Project.

Mr. William Staudenmaier, representing Arizona Public Service, Phelps Dodge and Aztec Land and Cattle Company, confirms that each client remains committed to settlement. Mr. Staudenmaier states that Phelps Dodge has had a long-standing offer on the table regarding Blue Ridge Reservoir. Mr. Staudenmaier advises that he has not seen the proposed Zuni agreement, and has no comment in the "Zuni only" proposed settlement. Mr. Staudenmaier comments that it would make sense to have a comprehensive agreement rather than one standing alone, but reserves judgment until the proposal is final.

Mr. Charles Jakosa, representing the United States Department of Justice, advises that those representing the Department of the Interior and Department of Justice who have spoken earlier have adequately stated the United States' position. Mr. Jakosa further states his belief that everything should be resolved at the same time and supports a comprehensive settlement.

Special Master John Thorson asks Mr. Walch if he would submit his settlement for approval as soon as the Arizona Supreme Court completes its administrative order for considering such settlements. Mr. Walch responds that he would be happy to "pave the way."

Ms. Alexandra Arboleda, representing the Arizona Department of Water Resources, reports that they are supportive of continued settlement discussions and have been working toward a resolution of outstanding issues.

Mr. Walch responds that the United States will be prepared to move forward with settlement regardless of any outstanding issues with the Arizona Department of Water Resources.

Mr. Adrian Hansen, representing the City of Flagstaff, reports on support of the Three Canyon Project.

The Court urges all parties to work together in the belief that agreement on the outstanding issues may be close.

The Court addresses the problems concerning the mailing list, and the Report filed by the Special Master on March 31, 2000.

On September 23, 1994, the Arizona Department of Water Resources released the preliminary hydrographic survey report (HSR) for Indian lands. Later that year, Judge Allen G. Minker ordered a stay of the comment period on the preliminary HSR.

IT IS ORDERED lifting the stay and reopening the comment period until **June 30, 2000**. Comments are to be filed with ADWR, and a notice of filing the comments filed with the Clerk and served on the Court-approved mailing list. Comments will be available for public inspection at ADWR after July 10, 2000. Questions about the preliminary HSR and comment procedures should be addressed to ADWR.

The Court states that a proposed pretrial order concerning notice of preliminary and final hydrographic survey reports will be attached to this minute entry.

IT IS FURTHER ORDERED comments to the proposed pretrial order shall be filed on or before **Friday, May 26, 2000**.

There is discussion regarding a date for the next hearing which will be set as a Pretrial Conference.

IT IS FURTHER ORDERED that a Pretrial Conference concerning tribal water right claims be set for **Thursday, August 3, 2000 at 9:30 a.m.** in the Apache County Superior Court.

The Court advises that it does not appear necessary to deal with other pending motions at this time. Upon the Court's inquiry, there are no responses regarding items to be included on the agenda.

1:55 p.m. Status Conference is adjourned.

ADDENDUM

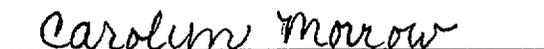
IT IS FURTHER ORDERED approving the APPLICATION FOR EX PARTE ORDER APPROVING SUBSTITUTION OF COUNSEL AND AMENDING MAILING LIST filed on December 10, 1999, by attorneys for Phelps Dodge and substituting Ryley, Carlock & Applewhite and Phelps Dodge corporate counsel for Jerry Haggard. Jerry Haggard will be removed from the Little Colorado Court-approved mailing list.



The original of the foregoing filed with the Superior Court Clerk of Apache County.

EDWARD L. DAWSON
JUDGE OF THE SUPERIOR COURT

On this 5th day of May, 2000 a copy of the foregoing is mailed to those parties who appear on the Court-approved mailing list for Civil No. 6417 dated November 16, 1999.


Carolyn Morrow, Deputy

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D R A F T

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

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

CIVIL NO. 6417
PRETRIAL ORDER NO. ____
RE: NOTICE OF HYDROGRAPHIC
SURVEY REPORTS

Pursuant to the authority vested in this Court by Section 45-259, ARIZ. REV. STAT., and Rule 16 of the ARIZONA RULES OF CIVIL PROCEDURE, the Court hereby enters the following order concerning the notice to be given by the Arizona Department of Water Resources ("Department") of the issuance or filing of hydrographic survey reports ("HSRs"):

1. Definitions

A. "Claimant" means a person who has filed a statement of claimant in the Little Colorado River adjudication under the provisions of ARIZ. REV. STAT. § 45-254, or a person to whom a previously filed statement of claimant has been assigned.

B. "Nonclaimant water user" means a person who has been identified by the Department as currently using water within the geographic area covered by the HSR.

1 **2. Notice of Preliminary HSR**

2 After the Department has completed a preliminary HSR for a watershed or
3 for an Indian or federal reservation, or any portion of such watershed or reservation
4 as specified by the Court, the Department shall provide notice thereof in the
5 following manner:

6 A. The Department shall file a notice with the clerk of the court.
7 The notice will specify where the preliminary HSR is available for inspection or
8 purchase, the deadline and procedure for submitting comments on the preliminary
9 HSR, and procedures for obtaining additional information.

10 B. The Department shall issue a press release containing the
11 information stated in the court notice. The Department shall publish the press
12 release on the Department's internet web site and in newspapers of general
13 circulation throughout the Little Colorado River adjudication area.

14 C. The Department shall send a copy of the court notice by first-
15 class mail to those persons included on the court-approved mailing list and to each
16 claimant and non-claimant water user in the geographic area covered by the
17 preliminary HSR.

18 D. If the preliminary HSR was prepared for a watershed, the
19 Department shall send by first-class mail to each claimant and nonclaimant water
20 user that portion of the preliminary HSR describing each specific water use or claim
21 by that person.

22 E. If the preliminary HSR was prepared for an Indian reservation,
23 the Department shall provide a copy of the entire preliminary HSR to the tribal
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1 representative for the Indian reservation and to the United States in its capacity as
2 trustee for the Indian tribe. If the preliminary HSR was prepared for another federal
3 reservation, the Department shall provide a copy of the entire preliminary HSR to
4 the United States.

5 F. Within a tribal or federal reservation, the Department shall
6 identify claims or water uses associated with allotted or fee land owned by persons
7 other than the tribe or the United States. For each specific water use or claim on
8 such allotted or fee land, the Department shall send by first-class mail to each
9 claimant and non-claimant water user that portion of the preliminary HSR
10 describing each specific water use or claim by that person. In the event that the
11 ownership of allotted or fee land within a reservation cannot be reasonably
12 ascertained, the Department shall publish a copy of the court notice in the manner
13 specified by Rule 4.2(f), ARIZONA RULES OF CIVIL PROCEDURE. The Department shall
14 also publish the notice in the county in which the land is located.

15 **3. Inspection of Preliminary Report**

16 After the Department has completed a preliminary HSR for a watershed or
17 reservation, or any portion of such watershed or reservation as specified by the
18 Court, the Department shall make copies of the preliminary HSR available for
19 inspection and purchase in the following manner:

20 A. The Department shall file a copy of the preliminary HSR with
21 the clerk of the court.

1 B. The Department shall provide copies of the preliminary HSR to
2 county court clerks and public libraries located throughout the Little Colorado River
3 adjudication area.

4 C. The Department shall make copies of the preliminary HSR
5 available for purchase at the Department's main office. The Department shall also
6 make copies of the preliminary HSR available for inspection at each of the
7 Department's active management area offices.

8 D. The Department shall undertake reasonable efforts to make the
9 preliminary HSR available in an electronic format.

10 4. Comments on Preliminary HSR

11 A. The Department shall establish a deadline for submitting
12 comments to the Department on a preliminary HSR. The deadline shall be
13 included in the notice of the preliminary HSR filed with the clerk of the court
14 pursuant to paragraph 2 of this order and shall be no less than 90 days after filing the
15 notice.

16 B. With the Court's approval, the Department may extend the
17 deadline for submitting comments on the preliminary HSR. The Department shall
18 provide notice of any approved extension of the comment period in the same
19 manner as the original notice under paragraph 2 of this order.

20 C. With the Court's approval, the Department may revise the
21 preliminary HSR and issue another preliminary HSR. The notice of additional
22 preliminary HSRs will comply with this order.

1 **5. Final Hydrographic Survey Report (HSR)**

2 After the Department has completed the procedures required under
3 paragraphs 2 through 4 of this order, the Department shall prepare a final HSR and
4 provide notice thereof in the following manner:

5 A. At least 120 days before the final HSR is published, the
6 Department shall file a notice with the clerk of the court. This 120-day notice shall
7 state the date on which the final HSR is to be filed and the deadlines for filing a new
8 statement of claimant or amendment to an existing statement of claimant as
9 provided by ARIZ. REV. STAT. § 45-254. The Department shall send a copy of this 120-
10 day notice by first-class mail to all persons listed on the court-approved mailing list,
11 all claimants in the geographic area covered by the final HSR, and all non-claimant
12 water users in the geographic area covered by the final HSR.

13 B. Upon filing the final HSR with the clerk of the court, the
14 Department shall also file a notice of commencement of the objection period with
15 the clerk of the court. This objection notice shall specify where the final HSR will be
16 available for inspection or purchase, the deadline and procedure for submitting
17 objections to the final HSR, and the procedures for obtaining additional
18 information. If a special master has been appointed, the notice may be combined
19 with any additional information required by the master.

20 C. The Department shall issue a press release containing the
21 information stated in the objection notice. The Department shall publish the press
22 release on its internet web site and in newspapers of general circulation throughout
23 the Little Colorado River adjudication area.

1 D. The Department shall send a copy of the objection notice by first-
2 class mail to those persons included on the court-approved mailing list, to each
3 claimant and nonclaimant water user in the geographic area covered by the final
4 HSR, and to every other claimant in the Little Colorado River adjudication.

5 E. If the final HSR was prepared for a watershed, the Department
6 shall send with the objection notice to each claimant and nonclaimant water user
7 that portion of the final HSR describing each specific water use or claim by that
8 person.

9 F. If the final HSR was prepared for an Indian reservation, the
10 Department shall provide a copy of the objection notice and the entire final HSR to
11 the tribal representative for the Indian reservation and to the United States in its
12 capacity as trustee for the Indian tribe. If the final HSR was prepared for another
13 federal reservation, the Department shall provide a copy of the objection notice and
14 the entire final HSR to the United States.

15 G. If the Department has identified claims or water uses associated
16 with allotted or fee land, as discussed in paragraph 2(F) of this Order, the
17 Department shall send by first-class mail to each claimant and non-claimant water
18 user a copy of the objection notice and that portion of the final HSR describing each
19 specific water use or claim by that person. In the event that the ownership of
20 allotted or fee land within a reservation cannot be reasonably ascertained, the
21 Department shall publish a copy of the objection notice in the manner specified by
22 Rule 4.2(f), ARIZONA RULES OF CIVIL PROCEDURE. The Department shall also publish
23 the objection notice in the county in which the land is located.
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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

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

CIVIL NO. 6417

PRETRIAL ORDER NO. 6
RE: NOTICE OF HYDROGRAPHIC
SURVEY REPORTS

Pursuant to the authority vested in this Court by Section 45-259, ARIZ. REV. STAT., and Rule 16 of the ARIZONA RULES OF CIVIL PROCEDURE, the Court hereby enters the following order concerning the notice to be given by the Arizona Department of Water Resources (“Department”) of the issuance or filing of hydrographic survey reports (“HSRs”):

1. Definitions

A. “Claimant” means a person who has filed a statement of claimant in the Little Colorado River adjudication under the provisions of ARIZ. REV. STAT. § 45-254, or a person to whom a previously filed statement of claimant has been assigned.

B. “Nonclaimant water user” means a person who has been identified by the Department as currently using water within the geographic area covered by the HSR.

1 **2. Notice of Preliminary HSR**

2 After the Department has completed a preliminary HSR for a watershed or
3 for an Indian or federal reservation, or any portion of such watershed or reservation
4 as specified by the Court, the Department shall provide notice thereof in the
5 following manner:

6 A. The Department shall file a notice with the clerk of the court.
7 The notice will specify where the preliminary HSR is available for inspection or
8 purchase, the deadline and procedure for submitting comments on the preliminary
9 HSR, and procedures for obtaining additional information.

10 B. The Department shall issue a press release containing the
11 information stated in the court notice. The Department shall publish the press
12 release on the Department's internet web site and in newspapers of general
13 circulation throughout the Little Colorado River adjudication area.

14 C. The Department shall send a copy of the court notice by first-
15 class mail to those persons included on the court-approved mailing list and to each
16 claimant and non-claimant water user in the geographic area covered by the
17 preliminary HSR.

18 D. If the preliminary HSR was prepared for a watershed, the
19 Department shall send by first-class mail to each claimant and nonclaimant water
20 user that portion of the preliminary HSR describing each specific water use or claim
21 by that person.

22 E. If the preliminary HSR was prepared for an Indian reservation,
23 the Department shall provide a copy of the entire preliminary HSR to the counsel of
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1 record for the tribe or, if none, an appropriate tribal representative for the Indian
2 reservation and to the United States in its capacity as trustee for the Indian tribe. If
3 the preliminary HSR was prepared for another federal reservation, the Department
4 shall provide a copy of the entire preliminary HSR to the United States.

5 F. Within a tribal or federal reservation, the Department shall
6 identify claims or water uses associated with allotted or fee land owned by persons
7 other than the tribe or the United States. For each specific water use or claim on
8 such allotted or fee land, the Department shall send by first-class mail to each
9 claimant and non-claimant water user that portion of the preliminary HSR
10 describing each specific water use or claim by that person. In the event that the
11 ownership of allotted or fee land within a reservation cannot be reasonably
12 ascertained, the Department shall publish a copy of the court notice in the manner
13 specified by Rule 4.2(f), ARIZONA RULES OF CIVIL PROCEDURE. The Department shall
14 also publish the notice in the county in which the land is located.

15 **3. Inspection of Preliminary Report**

16 After the Department has completed a preliminary HSR for a watershed or
17 reservation, or any portion of such watershed or reservation as specified by the
18 Court, the Department shall make copies of the preliminary HSR available for
19 inspection and purchase in the following manner:

20 A. The Department shall file a copy of the preliminary HSR with
21 the clerk of the court.

1 B. The Department shall provide copies of the preliminary HSR to
2 county court clerks and public libraries located throughout the Little Colorado River
3 adjudication area.

4 C. The Department shall make copies of the preliminary HSR
5 available for purchase at the Department's main office. The Department shall also
6 make copies of the preliminary HSR available for inspection at each of the
7 Department's active management area offices.

8 D. The Department shall undertake reasonable efforts to make the
9 preliminary HSR available in an electronic format.

10 **4. Comments on Preliminary HSR**

11 A. The Department shall establish a deadline for submitting
12 comments to the Department on a preliminary HSR. The deadline shall be
13 included in the notice of the preliminary HSR filed with the clerk of the court
14 pursuant to paragraph 2 of this order and shall be no less than 90 days after filing the
15 notice.

16 B. With the Court's approval, the Department may extend the
17 deadline for submitting comments on the preliminary HSR. The Department shall
18 provide notice of any approved extension of the comment period in the same
19 manner as the original notice under paragraph 2 of this order.

20 C. With the Court's approval, the Department may revise the
21 preliminary HSR and issue another preliminary HSR. The notice of additional
22 preliminary HSRs will comply with this order.

1 **5. Final Hydrographic Survey Report (HSR)**

2 After the Department has completed the procedures required under
3 paragraphs 2 through 4 of this order, the Department shall prepare a final HSR and
4 provide notice thereof in the following manner:

5 A. At least 120 days before the final HSR is published, the
6 Department shall file a notice with the clerk of the court. This 120-day notice shall
7 state the date on which the final HSR is to be filed and the deadlines for filing a new
8 statement of claimant or amendment to an existing statement of claimant as
9 provided by ARIZ. REV. STAT. § 45-254. The Department shall send a copy of this 120-
10 day notice by first-class mail to all persons listed on the court-approved mailing list,
11 all claimants in the geographic area covered by the final HSR, and all non-claimant
12 water users in the geographic area covered by the final HSR.

13 B. Upon filing the final HSR with the clerk of the court, the
14 Department shall also file a notice of commencement of the objection period with
15 the clerk of the court. This objection notice shall specify where the final HSR will be
16 available for inspection or purchase, the deadline and procedure for submitting
17 objections to the final HSR, and the procedures for obtaining additional
18 information. If a special master has been appointed, the notice may be combined
19 with any additional information required by the master.

20 C. The Department shall issue a press release containing the
21 information stated in the objection notice. The Department shall publish the press
22 release on its internet web site and in newspapers of general circulation throughout
23 the Little Colorado River adjudication area.

1 D. The Department shall send a copy of the objection notice by first-
2 class mail to those persons included on the court-approved mailing list, to each
3 claimant and nonclaimant water user in the geographic area covered by the final
4 HSR, and to every other claimant in the Little Colorado River adjudication.

5 E. If the final HSR was prepared for a watershed, the Department
6 shall send with the objection notice to each claimant and nonclaimant water user
7 that portion of the final HSR describing each specific water use or claim by that
8 person.

9 F. If the final HSR was prepared for an Indian reservation, the
10 Department shall provide a copy of the objection notice and the entire final HSR to
11 the counsel of record for the tribe or, if none, to an appropriate tribal representative
12 for the Indian reservation and to the United States in its capacity as trustee for the
13 Indian tribe. If the final HSR was prepared for another federal reservation, the
14 Department shall provide a copy of the objection notice and the entire final HSR to
15 the United States.

16 G. If the Department has identified claims or water uses associated
17 with allotted or fee land, as discussed in paragraph 2(F) of this Order, the
18 Department shall send by first-class mail to each claimant and non-claimant water
19 user a copy of the objection notice and that portion of the final HSR describing each
20 specific water use or claim by that person. In the event that the ownership of
21 allotted or fee land within a reservation cannot be reasonably ascertained, the
22 Department shall publish a copy of the objection notice in the manner specified by
23
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1 Rule 4.2(f), ARIZONA RULES OF CIVIL PROCEDURE. The Department shall also publish
2 the objection notice in the county in which the land is located.

3 **6. Inspection of Final Hydrographic Survey Report (HSR)**

4 After the Department has completed a final HSR, the Department shall make
5 copies of the final HSR available for inspection and purchase in the same manner as
6 specified for preliminary HSRs by paragraph 3 of this order.

7 **7. Objections to Final Hydrographic Survey Report (HSR)**

8 A. Claimants may file objections in the manner specified by statute,
9 the pretrial orders of this Court, and the RULES FOR PROCEEDINGS BEFORE THE
10 SPECIAL MASTER § 6.00 *et seq.* (Nov. 1, 1991).

11 B. The Department shall assist the Court and special master in
12 determining the procedures and preparing the objection forms, instructions, and
13 other documents necessary for filing objections to the final HSR.

14 C. The Department shall provide copies of objection forms and
15 instructions upon request.

16
17 Dated this 26th day of July 2000.

18 /s/ Edward L. Dawson

19 _____
20 EDWARD L. DAWSON
21 Judge of the Superior Court
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**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE**

THE HONORABLE MICHAEL C. NELSON, PRESIDING JUDGE

IN CHAMBERS

()

IN OPEN COURT

(X)

THE HONORABLE EDWARD L. DAWSON
Visiting Judge

SUE HALL, Clerk

By: C. Morrow, Deputy

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

DATE: August 10, 2000

TIME: 9:55 a.m.

STATUS CONFERENCE

CIVIL NO. 6417

DESCRIPTIVE SUMMARY:	Status Conference held in the Apache County Superior Courtroom, St. Johns, Arizona.
NUMBER OF PAGES:	Minute Entry -5; Report -3; Resolution - 6 Total: 14 pages
DATE OF FILING:	August 25, 2000

MINUTE ENTRY

This is the date and time set for a Status Conference in Civil No. 6417.

Courtroom Reporter: Susan Humphrey.

The Court welcomes those in attendance for the Status Conference.

APPEARANCES

The Court calls for appearances and they include the following: Mr. David A. Brown, representing various claimants; Mr. Johnnie D. Francis, representing the Navajo Nation Department of Water Resources; Mr. Scott McElroy and Mr. Stanley Pollack, representing the Navajo Nation; Mr. Robert C. Brauchli, representing the White Mountain Apache Tribe; Mr. John B. Weldon Jr., Ms. Brenda Burman, Mr. Frederic Beeson, and Mr. David C. Roberts, representing Salt River Project; Mr. John Cawley, Department of the Interior/Bureau of Indian Affairs; Mr. Harry R. Sachse, Mr. Jim Glaze, and Mr. James Meggesto representing the Hopi Tribe; Mr. Lauren J. Caster, representing Abitibi Consolidated, the Arizona Water Company, Santa Fe Pacific Railroad Company and the Burlington Northern Santa Fe Railroad Company; Mr. Skip Hellerud and Mr. David M. Call, representing Abitibi Consolidated Sales Corporation; Mr. Pete Shumway, representing LCR counties; Mr. Ted Smith, representing San Juan Southern Paiute Tribe; Mr.

Mitchel D. Platt, representing various claimants; Ms. Alexandra Arboleda and Mr. Rich Burtell, representing the Arizona Department of Water Resources; Ms. Lee Storey, representing the City of Flagstaff; Mr. William Staudenmaier, representing Arizona Public Service, Phelps Dodge and Aztec Land and Cattle Company; Mr. Eugene Kaye, Mr. Lyman W. Polacca, Mr. Danny Honanu, Mr. Todd Honyaoma, Mr. Owen Numkewa, Jr., and Ms. Esther Talayumptewa, representing the Hopi Tribe; Ms. Mary Grier and Mr. Graham Clark, representing the Arizona Attorney General's Office; Mr. Tom Shedden, representing Arizona State Agencies; Mr. William Darling, representing Cameron Trading Post and Atkinson Trading Company; Mr. Richard Bertholf and Mr. Robert Hoffman, representing Southern California Edison; Mr. Jim Boles and Mr. Bill Barris, representing the City of Winslow; Mr. Andrew F. Walch, representing the National Park Service, Forest Service and Bureau of Land Management; Mr. Charles Jakosa, U. S. Department of Justice; Mr. Samuel Gollis, Mr. Wilford Elurer, Sr., and Mr. Malcolm Bowskatz, representing the Pueblo of Zuni; and several other individuals who did not sign the attendance sheet and whose names were unintelligible to the clerk.

Also in attendance: Special Master John E. Thorson; Ms. Kathy Dolge, assistant to the Special Master; Judge Michael C. Nelson, Presiding Judge of Apache County Superior Court and Settlement Judge in the Little Colorado Stream Adjudication.

The Court references the letter received from Senator Jon Kyl that has previously been copied and sent to the Court-approved Mailing List. The Court is willing to honor Senator Kyl's request, allowing one more legislative session to determine if additional funding is feasible.

REPORTS

The Court calls for comments from Ms. Alexandra Arboleda, Arizona Department of Water Resources.

Ms. Arboleda presents suggestions and comments regarding the continued preparation of final HSR reports, including the revision and updating of historic uses, hydrological analysis, an assessment of arable lands, and water duties. Ms. Arboleda further suggests beginning with the Hopi Tribe HSR.

Upon the Court's inquiry, Ms. Arboleda estimates that each report would require approximately two (2) years and advises that the reports could not be done simultaneously. This would amount to an estimated time of approximately six years for three preliminary HSR reports. Ms. Arboleda submits the REPORT RE: SCOPE OF INDIAN LANDS HSR to the Court which is filed this date.

Mr. Scott McElroy, representing the Navajo Nation, responds to the remarks made by Ms. Arboleda. Mr. McElroy suggests that the parties be allowed time to comment on the report (referenced above.) Mr. McElroy further suggests that the hydrology issues be addressed first, with guidance from the Court, stating that hydrology and the availability of water is an issue which affects all of the tribes.

The Court agrees that all parties will have the opportunity to comment on the report filed by the Arizona Department of Water Resources.

Mr. Harry Sachse, representing the Hopi Tribe, concurs with the Court regarding the letter from Senator Kyl. Mr. Sachse advises that the Hopi Tribe is in agreement with many of the statements made by Mr. McElroy. Mr. Sachse suggest that the hydrology reports on connecting reservations be done at one time, since it would be difficult to do one without the other. Mr. Sachse further expresses his agreement regarding the hydrologic and historic uses issues previously proposed.

Mr. Charles Jakosa, representing the U.S. Department of Justice, advises that the United States has made its decision to share some of the litigation information with the Arizona Department of Water Resources. This includes photographs dating from the 1930s and well and hydrology information may be shared as well. Mr. Jakosa agrees with Mr. McElroy and Mr. Sachse that it is in the best interest of all parties to have the hydrology reports done first. Mr. Jakosa reports that the United States will be amending the claim regarding ground water use by the White Mountain Apache Tribe. Mr. Jakosa references constraints in United States funding, states that the January 31, 2001 deadline is impossible, and requests that more time be granted. Mr. Jakosa concludes his remarks by thanking Special Master John E. Thorson and Mary Grier, from the Arizona Attorney General's office, for their services in this adjudication.

Mr. John B. Weldon, Jr., representing Salt River Project, states the need to resolve the issue regarding the White Mountain Apache Tribe. Mr. Weldon references the Gila River Adjudication and requests that the Court provide a phased structure for litigation including disclosure of documents. Mr. Weldon requests clarification on the January 31, 2001, deadline. Mr. Weldon agrees that the comment period on the DWR report is a fine idea. Mr. Weldon urges the Court to review the original HSRs, commenting that this issue could also be addressed during the comment period.

Mr. Dave Brown, on behalf of the City of Winslow, agrees with statements in the letter from Senator Kyl. Mr. Brown opposes a proposal to determine the effect of an old decree involving the City of Winslow.

Mr. Andrew Walch, representing the United States National Park Service, addresses the Court and reports on draft copies of water right abstracts prepared by the National Park Service. Copies of the draft abstracts are available to other parties, and Mr. Walch advises that he is preparing a memorandum recommending the federal government's approval of settlement. Mr. Walch states that informal comments on the abstracts may be submitted to him or to Peter Fahmy, Department of the Interior, by September 8, 2000.

Mary Grier, representing the Arizona Attorney General's office, references the status of negotiations with the United States. Ms. Grier states that substantial progress has been made, but expresses concerns about two comments made by Mr. Walch:

1. The possibility of two-party agreements being decreed without consideration by other parties.
2. Abstracts concerning federal claims which involve legal issues yet to be resolved.

Ms. Grier references a pending petition in the Arizona Supreme Court for an order specifying the approval process and requests that the state be given a chance to work out issues. Ms. Grier concludes her remarks by stating that Mr. Graham Clark will be taking over for her.

Mr. Robert C. Brauchli, representing the White Mountain Apache Tribe, addresses the Court and agrees with Mr. Weldon's comments. Mr. Brauchli requests the opportunity to amend the Tribe's motion to dismiss before the Court and to include additional data.

The Court inquires about the time frame for filing an amended motion to dismiss.

Mr. Brauchli estimates a time of sixty (60) working days, but would like to have access to well data in the Pinetop-Lakeside area and requests a Court order for obtaining this data.

The Court advises that more time would be needed if new data is included in an amended motion. The Court agrees to set up timelines for proceeding on the motion to dismiss.

Mr. William Staudenmaier, representing Arizona Public Service, Phelps Dodge and Aztec Land and Cattle Company, agrees with Mr. McElroy in his request for comment time and references the point made by Ms. Grier regarding the pending petition in the Supreme Court. Mr. Staudenmaier further references likely issues that will be raised regarding the White Mountain Apache Tribe, which must be addressed.

Ms. Lee Storey, representing the City of Flagstaff, concurs with the comments of Mr. Staudenmaier, and states she is also awaiting the adoption of procedural rule by the Supreme Court.

Mr. Lauren Caster, representing Abitibi Consolidated *et al.*, inquires about the resolution of the White Mountain Apache Tribal Council presented by Mr. Brauchli, and believes it should be made available to all parties.

The Court agrees to have a copy of the resolution attached to this minute entry for distribution.

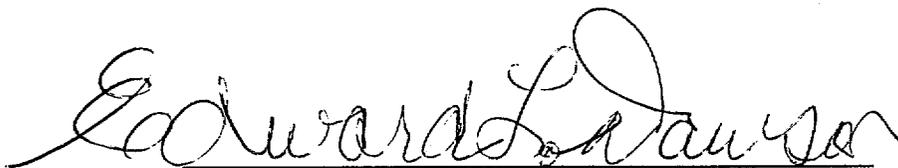
Judge Nelson requests a short meeting with the settlement committee immediately following this hearing.

10:55 a.m. Hearing is adjourned.

LATER IN CHAMBERS

1. The Department's Report Re Scope of Indian Lands HSR (August 10, 2000) is attached to this Minute Entry and thereby served upon the Court-approved mailing list. Claimants in this adjudication may file and serve comments on the Department's report on or before **Monday, September 11, 2000.**
2. The disclosure date of January 31, 2001, previously set by the Court in its Minute Entry of January 28, 2000, is **VACATED**. New disclosure dates will be announced after the Court reviews the comments on ADWR's report on preparing the HSRs for tribal lands. The United States' Motion for Reconsideration and Stay or Proceedings, filed April 24, 2000, is **DENIED** as moot.

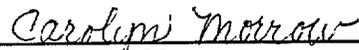
3. The White Mountain Apache Tribe's Motion to Dismiss (July 3, 1996) is referred to Special Master John E. Thorson. The Special Master will consider any requests to amend the motion to dismiss, motions concerning standing, motions for discovery, and the merits of the motion to dismiss and, thereafter, report his determinations to the Court.
4. The next status conference will be held at 1:00 p.m. on Thursday, February 22, 2001, in Apache County Superior Court.



EDWARD L. DAWSON
JUDGE OF THE SUPERIOR COURT

The original of the foregoing filed with the Superior Court Clerk of Apache County.

On this 25th day of August, 2000, a copy of the foregoing is mailed to those parties who appear on the Court-approved mailing list for Civil No. 6417 dated June 16, 2000.



Carolyn Morrow, Deputy

Copy: Senator Jon Kyl

AUG 10 2000

AT 10:30 O'Clock A. M.

C. Morrow, DEPUTY

1 Michael J. Pearce (No. 006467)
2 Alexandra M. Arboleda (No. 016673)
3 ARIZONA DEPARTMENT OF WATER RESOURCES
4 500 North Third Street
5 Phoenix, Arizona 85004
6 Telephone: (602) 417-2420
7 Facsimile: (602) 417-2415

8 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
9 **IN AND FOR THE COUNTY OF APACHE**

10 **In Re the General Adjudication of All) Civil No. 6417**
11 **Rights to Use Water in the Little Colorado)**
12 **River System and Source.) Report Re: Scope of Indian Lands HSR**
13)
14)
15)

16 DESCRIPTIVE SUMMARY: The Arizona Department of Water Resources submits its
17 report outlining the recommended scope of the Indian Lands Hydrographic Survey
18 Report(s).
19 NUMBER OF PAGES: 3 pages
20 DATE OF FILING: August 10, 2000

21 This Report is submitted in response to the Court's request¹ that the Arizona Department of
22 Water Resources ("Department") prepare a report regarding the appropriate scope of the Indian Lands
23 Hydrographic Survey Report ("HSR"). The Department has reviewed the comments received by the June
24 30, 2000 deadline in response to the Preliminary Indian Lands HSR, which was originally filed with the
25 Court on September 23, 1994. Many of the commenters recommended that a new Preliminary HSR or
several new Preliminary HSRs be prepared and that the HSR(s) cover a broader scope of information than
the original Preliminary HSR did. While the Department is prepared to continue with the preparation of a
Final Indian Lands HSR according to the schedule and content outlined in the Department's March 31,

¹ The Court's request was communicated by the Special Master telephonically on July 26, 2000.

1 2000 Report, the Department also sees the merits of preparing new Preliminary HSR(s) with a broader
2 scope.

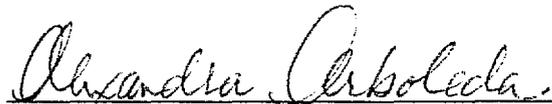
3 In its role as technical advisor to the Court, the Department is authorized by statute upon request of
4 the Court to conduct a general investigation or examination of the Little Colorado River system and source,
5 to investigate or examine the facts pertaining to the claim or claims asserted by each claimant, to identify
6 the point of diversion and place of use of water rights, to identify water quantities for diversions and
7 reservoir facilities, and to take whatever steps are necessary for a proper determination of the relative rights
8 of the parties. A.R.S. § 45-256(A). In rendering this assistance, the Department must prepare a report
9 setting forth such technical information on a claim by claim basis and must either include proposed water
10 right attributes for each individual water right claim or use investigated or indicate that there is no water
11 right proposed for a claim. A.R.S. § 45-256(B). The Department's report serves as a central document
12 outlining the relative rights in a particular geographic area, to which each claimant may object and may
13 present evidence either in support or opposition.
14

15 The Department recommends that HSRs with a broader scope than the Preliminary HSR for Indian
16 Lands be prepared as long as the Department has access to each Indian Reservation to conduct field
17 investigations and obtain data. The new HSRs would include an assessment of arable lands and water
18 duties, but not an economic feasibility analysis or engineering component. This assessment would provide
19 a factual foundation for determining "Practicably Irrigable Acreage," similar to the approach that was used
20 for the Gila River Indian Reservation HSR in the Gila River General Stream Adjudication. The new HSRs
21 would also include a revision and update of all pertinent information, investigation of historic and current
22 water uses and a more detailed hydrologic analysis. The hydrologic analysis would update the Special
23 Report to the Settlement Committee entitled *Hydrology of the Little Colorado River System*, which was
24 published by the Department in October, 1989. In addition, water right attributes would be proposed for
25

1 each water right claim or use. To the extent that the Department can provide useful information regarding
2 the history or purpose of an Indian Reservation, it may do so. However, definite conclusions about the
3 history or purpose of each reservation must be determined by the Court.

4 The Department recommends that separate HSR(s) be prepared for Hopi lands, Zuni lands and
5 Navajo/San Juan Southern Paiute lands. If necessary, a separate HSR may also be prepared for the White
6 Mountain Apache Tribe's lands. Because the Department currently has the most information regarding
7 Hopi lands, the Department recommends that the HSR for Hopi lands be prepared first. The Hopi lands
8 HSR will take approximately two years to complete. This timeframe is estimated, however, and does not
9 account for other commitments that the Department's Adjudications section may have in the Gila River
10 General Stream Adjudication or in evaluating various settlements. In addition, the estimated completion
11 time depends heavily upon the level of cooperation with the Hopi Tribe and the United States.

12
13 Respectfully submitted this 10th day of August, 2000.

14
15 

16 Michael J. Pearce
17 Alexandra M. Arboleda
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24
25

**RESOLUTION OF THE
WHITE MOUNTAIN APACHE TRIBE OF THE
FORT APACHE INDIAN RESERVATION**

- WHEREAS**, the White Mountain Apache Tribe on December 8, 1999 adopted Resolution 12-99-305, incorporated by reference herein, which requested Secretary of the Interior, Bruce Babbitt and Attorney General, Janet Reno, through their respective representatives, to meet with the White Mountain Apache Tribe to discuss the intentions of the Tribe's Trustee, the United States of America, to file an amended claim in the Little Colorado River and Gila River general stream adjudications to include the transbasin Coconino and other aquifers which are the source of the base flow of springs and rivers that arise upon, underlie, border and traverse the Fort Apache Indian Reservation, and which are present, continuous and connected both north and south of the northern boundary of the Fort Apache Indian Reservation; and
- WHEREAS**, Resolution 12-99-305 also requested that Secretary Babbitt and Attorney General Reno through their designees, be prepared to discuss the impacts and consequences of the Secretary's proposed reallocation of CAP water, the enlargement of Roosevelt Dam and subsequent additional contracting of Salt River water to competing users upon the use and future development by the White Mountain Apache Tribe of water resources within the Fort Apache Indian Reservation; and
- WHEREAS**, the White Mountain Apache Tribe further requested consultation with Secretary Babbitt and Attorney General Reno in respect to proposed settlements by selected parties to the Little Colorado River and Gila River general stream adjudications that may impact upon the Tribe's reserved water rights; and
- WHEREAS**, subsequent to the adoption of Resolution 12-99-305, representatives of the White Mountain Apache Tribe met on April 21, 2000 in Phoenix, Arizona, at the Western Regional Office of the Bureau of Indian Affairs with representatives of Secretary Babbitt and Attorney General Reno; and
- WHEREAS**, at the afore described meeting, Tribal representatives presented substantial information regarding the transbasin nature of the Coconino and Pinetop- Lakeside Aquifers that underlie the Little Colorado River and Salt River watersheds, as well as the Tribe's aboriginal and Reservation lands, and which constitute the source of the base flow and the only dependable flow as it is less subject to the vagaries of rain and snow than other water sources of the Tribe's springs and streams that

traverse the Tribe's Reservation lands; and

WHEREAS, Tribal representatives also demonstrated that the absence of the transbasin Coconino and other aquifers from the Little Colorado River and Gila River general stream adjudications would violate the jurisdictional requirements of a general stream adjudication under the McCarran amendment, as neither the Apache County nor the Maricopa County Superior Court could exercise complete personal and subject matter jurisdiction over pumping from said aquifers thereby rendering it impossible for either State Court to issue a comprehensive and enforceable decree adjudicating the rights of all claimants to the water source; and

WHEREAS, the Arizona Supreme Court has recently addressed groundwater finding that *...the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater...and...holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law rights...*; and

WHEREAS, to date, the Arizona Superior Courts have not considered the transbasin Coconino and other aquifers which constitute the base flow of the Tribe's springs and streams within the Salt River watershed and which also provide the base flow of springs and streams in the Little Colorado River basin and a source of water for numerous expanding groundwater pumpers north of the Fort Apache Indian Reservation and along its northern boundary; and

WHEREAS, in said April 21 meeting, Tribal representatives outlined and reviewed with federal officials the deficiencies in the Trustee's technical report in respect to the transbasin Coconino and other aquifers and the Trustee's conclusions respecting their contribution to the base flow of Reservation springs and streams, as well as impacts to the base flow from off Reservation groundwater pumping of the transbasin Coconino and other aquifers, and said groundwater findings and conclusions from the Trustee's technical reports, whether sound or unsound, are excluded from the United States' claim filed on behalf of the White Mountain Apache Tribe; and

WHEREAS, in the April 21 meeting, Tribal representatives explained in detail to the Departments of Interior and Justice significant differences between the practical irrigable acreage and other claims prepared by the Tribe and those prepared by the Department of Interior and filed in the State Court proceedings over the objections of the White Mountain Apache Tribe; and

WHEREAS, Tribal representatives also brought to the attention of the Departments of Interior and Justice, the response of the Bureau of Reclamation to the Tribe's comment on the Environmental Impact Statement for allocation of CAP water for Indian water

settlements, wherein the Tribe commented that assumptions used in conducting the analysis for the EIS do not, but, should account for the Trustee's (defective) claim for the White Mountain Apache Tribe's water rights in the Salt River basin; further, that the federal purpose of the EIS to reallocate CAP water to provide Indian and non-Indian water users sufficient water to overcome, at least partially, the impact of Indian reserved rights to the use of water is flawed absent proper consideration of the claim to which the Bureau of Reclamation responded in effect, that the success of the Trustee's claim for the White Mountain Apache Tribe would be so speculative that no meaningful qualification or quantification of impacts would be possible thereby denigrating the claim of the United States and underscoring the concerns of the White Mountain Apache Tribe over two decades that the United States has a defective claim and that the Bureau of Reclamation and other agencies of the United States are engaged to systematically diminish the importance of the rights to the use of water by the White Mountain Apache Tribe; and

WHEREAS, said response from the Bureau of Reclamation is contrary to and in violation of the trust obligation of the United States to protect the reserved water rights of the White Mountain Apache Tribe and demonstrates a complete disregard of the Tribe's claims to the use of water in the Salt River Basin which the Tribe has demonstrated as being 267,000 acre feet based on a practical irrigable acreage claim of 49,000 acres and municipal and industrial purposes, and for all other purposes consistent with beneficial use of water to promote the economy, health and welfare of the Tribe, as well as a disregard for the claim of the United States, albeit a defective claim; and

WHEREAS, the recent increase in the height of Roosevelt Dam, at considerable expense to the United States, has created new, dependable storage and an increase in hydropower production at Salt River Dams downstream from the Fort Apache Indian Reservation; and the Bureau of Reclamation has contracted with downstream, junior water users for the increase in dependable water supply but none of this increased capacity has been allocated with the view of offsetting the impact of future use of water by the White Mountain Apache Tribe thereby making it more difficult for the Tribe to develop its water due to the increased reliance on Salt River supplies by powerful downstream interests to which the Bureau of Reclamation is responsive, nor has any hydroelectric power or revenues derived therefrom been allocated or considered for allocation to a White Mountain Apache Tribe Water Development Fund; and

WHEREAS, the Tribal Council concludes that revenues generated by hydroelectric power derived from the Tribe's water resources and from federal investments that increase dependable water supplies in the Salt River should be deposited in an account for the White Mountain Apache Tribe to fund development of its water resources; and

WHEREAS, Tribal representatives also pointed out to the Departments of Interior and Justice that shutdowns of transbasin diversions from Blue Ridge Reservoir into the Verde River and from Show Low Lake into Forestdale Creek and the Salt River System to replace water pumped from the White Mountain Apache Tribe's Black River by Phelps Dodge, proposals now under discussion as a means of resolving conflicting claims in the Little Colorado River Basin, would further reduce water supplies available in the Salt River Basin to satisfy the prior and superior claims of the White Mountain Apache Tribe and other downstream, junior appropriators thereby increasing pressure on Arizona Courts to find against the Trustee's claim for the White Mountain Apache Tribe and increasing pressure on the White Mountain Apache Tribe not to divert or consume any water within the Salt River Basin embraced by a subsequent decree of its water rights; and

WHEREAS, the Tribal Council further concludes that its Trustee, the United States of America, has taken upon the responsibility, and therefore the liability of protecting the Tribe's priceless water resources, an irreplaceable trust asset, by the filing of its claim, amongst all other actions by the Trustee, and that the conduct of the Trustee United States relative to the protection of those rights must be in accordance with the highest fiduciary standards; further, that full title to the use of the water resources aforescribed resides in the White Mountain Apache Tribe and the Tribal Council must be advised by its Trustee, in writing and by definitive action, of the Trustee's intent to protect the Tribe's reserved water rights so that the Tribal Council may define separate, perhaps supplemental, measures of its own to protect its water resources and reserved water rights in the event that its Trustee abandons or underperforms its efforts to preserve and protect the Tribe's water resources.

BE IT RESOLVED by the Tribal Council of the White Mountain Apache Tribe that compelled by reasons of self-preservation, the recent opinion of the Arizona Supreme Court respecting groundwater and the recent acceleration of State Court proceedings in the Little Colorado River and Gila River general stream adjudications, the White Mountain Apache Tribe must be fully informed of the intentions of the Trustee United States in respect to issues discussed in this Resolution and therefore requests a response by September 30, 2000 to the following questions:

1. Will the Trustee United States file a motion to dismiss the Little Colorado River and Gila River general stream adjudications for failure to include the transbasin Coconino and other aquifers?
2. Will the Trustee United States amend claims it filed on behalf of the White Mountain Apache Tribe in the Little Colorado River and Gila River general stream adjudication to include claims to rights of the Tribe in the transbasin Coconino and other aquifers that underlie the Reservation and which supply the valuable,

dependable base flow of the Tribe's springs and streams within the Tribe's Reservation?

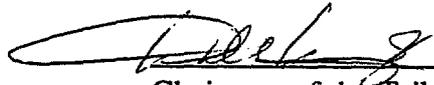
3. Will the Trustee United States oppose any Federal Court complaint for declaratory and other relief filed by the White Mountain Apache Tribe against ground water pumpers north of the Reservation in the Little Colorado River Basin, the Apache County and Maricopa County Superior Courts, and other appropriate parties, for lack of jurisdiction under the McCarran Amendment for failure to include the transbasin Coconino and Pinetop-Lakeside Aquifers in their respective adjudications?
4. Will the Trustee United States support a Federal Court action filed by the White Mountain Apache Tribe or alternatively, an action filed in the State Courts challenging the jurisdiction of the State Courts under the McCarran Amendment for failure to include the transbasin Coconino and Pinetop-Lakeside Aquifers?
5. What steps will the Trustee United States take on behalf of the White Mountain Apache Tribe to overcome adverse policy declarations of the Bureau of Reclamation in the CAP reallocation which provide neither a practical nor equitable reallocation of CAP water in conjunction with the success of the claim of the United States on behalf of the Tribe and the future use of Salt River water by the Tribe?
6. Will the Trustee United States amend the practical irrigable acreage claim filed in both State Court proceedings, purportedly on behalf of the White Mountain Apache Tribe, to the extent that the White Mountain Apache Tribe has specified where said PIA claims are inadequate and understated and where evaporative losses and secretarial power sites are overstated or otherwise erroneous?
7. Will the Trustee United States take steps, including legislation, to develop an account from which revenues from hydroelectric power made possible by the federal investment in Roosevelt Dam and other downstream dams can be deposited to fund development of the Tribe's water development plans for the Fort Apache Indian Reservation?
8. Will the Trustee United States oppose any proposed settlement in the Little Colorado River Basin that does not include assertion of the prior and paramount aboriginal rights, from time immemorial, of the White Mountain Apache Tribe to the transbasin Coconino and Pinetop-Lakeside Aquifers to the extent those sources of water constitute the base flow of the springs and streams within the Tribe's Reservation?
9. What steps will the Trustee United States take to ensure that the waters imported

to the Fort Apache Indian Reservation and to off-Reservation tributaries of the Salt River as replacement for the diversion of the Tribe's waters on the Black River by Phelps Dodge are not diminished or alternatively that Phelps Dodge will terminate its diversions of the Tribe's water?

BE IT FURTHER RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it hereby advises Secretary of Interior Bruce Babbitt and Attorney General Janet Reno and their designated representatives that it is willing to meet at any time prior to September 30, 2000 for a definitive response to the foregoing questions.

BE IT FURTHER RESOLVED by the Tribal Council of the White Mountain Apache Tribe that it hereby reaffirms its commitment to the preservation and protection of the Tribe's reserved water rights, without which it cannot survive, and petitions the Trustee United States to respond fairly and honorably to the questions presented herein.

The foregoing resolution was on July 10, 2000, duly adopted by a vote of ten (10) for and zero (0) against by the Tribal Council of the White Mountain Apache Tribe, pursuant to authority vested in it by Article IV, Section 1 (a) (c) (f) (g) (h) (i) (s) (t) and (u) of the Constitution of the Tribe, ratified by the Tribe September 30, 1993, and approved by the Secretary of Interior on November 12, 1993, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984).



Chairman of the Tribal Council



Secretary of the Tribal Council

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE
THE HONORABLE MICHAEL C. NELSON, PRESIDING JUDGE

THE HONORABLE EDWARD L. DAWSON
Visiting Judge

SUE HALL, Clerk

COURT REPORTER: Susan Humphrey

By: Carolyn Morrow, Deputy

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE	Case No. CV-6417 DATE: August 30, 2001 TIME: 10:35 a.m. STATUS CONFERENCE
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DESCRIPTIVE SUMMARY	Status Conference held in the Apache County Superior Courtroom, St. Johns, Arizona.
NUMBER OF PAGES	9
DATE OF FILING	October 16, 2001

MINUTE ENTRY

This is the date and time set for a Status Conference in Civil No. 6417.

The Court welcomes those in attendance for the Status Conference and calls for appearances.

APPEARANCES

Appearances include the following: Mr. David Brown, representing various clients; Mr. Johnnie D. Francis, representing the Navajo Nation Department of Water Resources; Mr. Stanley Pollack and Mr. Scott McElroy, representing the Navajo Nation; Mr. John B. Weldon, Jr., Mr. David C. Roberts, Mr. Frederic Beeson, and Ms. Brenda Burman, representing Salt River Project; Mr. Joe Feller, Professor of Law, Arizona State University; Mr. Robert Sejkora, representing Arizona State Parks; Mr. Robert Hoffman, Mr. Richard Bertholf and Mr. Mansour Nader, representing Southern California Edison; Mr. Lauren J. Caster, representing Abitibi Consolidated, the Arizona Water Company, Santa Fe Pacific Railroad Company and the Burlington Northern Railroad Company; Mr. Skip Hellerud, representing Abitibi Consolidated; Ms. Lee Storey, representing the City of Flagstaff; Mr. Mitchel D. Platt, representing various claimants; Ms. Cynthia Chandley and Ms. Dawn Meidinger,

representing Phelps Dodge Corporation; Mr. William Staudenmaier, representing Arizona Public Service, Phelps Dodge and Aztec Land and Cattle Company; Mr. Edward Sullivan, representing Peabody Western Coal Company; Mr. Harry R. Sachse, representing the Hopi Tribe; Ms. Jan Ronald, representing Arizona Department of Water Resources; Mr. Louis Quinn, representing the Bureau of Land Management; Mr. Graham Clark, representing the Office of the Arizona Attorney General; Mr. Jim Boles, Mayor of the City of Winslow; Mr. Bill Barris, representing the City of Winslow; Mr. Mike Foley, representing the Navajo Department of Water Resources; Mr. Stephen G. Bartell, representing the United States; Mr. Andrew F. Walch, representing the United States National Park Service, Forest Service and Bureau of Land Management; Mr. Peter Fahmy, representing the Department of the Interior; Mr. Bill Hansen, representing the National Park Service; Ms. Jane Marx and Ms. Susan Williams representing the Pueblo of Zuni; Mr. William Darling, representing Cameron Trading Post and Atkinson Trading Company; Mr. John Cawley, representing the Department of the Interior; and Mr. Charles Jakosa, representing the United States Department of Justice. There were several individuals who did not sign in and whose names were unintelligible to the clerk.

Mr. Del Molitor, representing the Bureau of Land Management in Safford, appeared in the courtroom after appearances were given.

Also in attendance: Special Master George A. Schade, Jr.; Kathy Dolge, assistant to the Special Master; and Judge Michael C. Nelson, Presiding Judge of Apache County Superior Court and Settlement Judge in the Little Colorado Stream Adjudication.

The Court concludes the appearances with the request that everyone sign in so each name can be registered correctly and included in the record of this hearing.

SETTLEMENT NEGOTIATIONS

The Court calls for reports on settlement negotiations that have been taking place, beginning with the Northern Parties.

Mr. Harry Sachse, representing the Hopi Tribe, expresses his feelings that the present time appears to be the best in many years for settlement negotiations. Mr. Sachse asks that the Court continue to stay the trial during the ongoing negotiations. Mr. Sachse further requests that during the stay, the Court will continue to provide the help of Judge Nelson during negotiations.

Mr. Robert Hoffman, representing Southern California Edison, states that the company needs to make decisions regarding the future of the Mohave

Generating Plant by December 31, 2002, and the company needs to have water issues settled prior to that date.

Mr. Stanley Pollack, representing the Navajo Nation, comments that since Southern California Edison is not a party to this adjudication, the time deadline referenced above should not be included as part of the settlement issue. Mr. Pollack favors a comprehensive settlement broader than the issues associated with the Mohave Generating Plant. He supports continued negotiations while Senator Kyl's study proceeds, and asks for Judge Nelson's help in the settlement process.

Mr. John Weldon, representing Salt River Project, is supportive of continued negotiations and states his concerns regarding the California Edison deadline as well as his concerns regarding proposed studies. Mr. Weldon also states his appreciation of Judge Nelson's help in the settlement negotiations.

Mr. Charles Jakosa, U.S. Department of Justice, supports continuing settlement negotiations, but states that the United States contribution in this matter has not yet been addressed by the Bush administration.

Mr. Edward L. Sullivan, representing Peabody Western Coal Company, hopes for a resolution but advises that they are prepared to move forward quickly and encourages the Court to continue to work with the parties toward resolution, even though Senator Kyl's study is ongoing.

The Court acknowledges the general agreement that the settlement negotiations should go on during Senator Kyl's study and expresses the hope that the United States' commitment will continue and that agreements can be made.

NATIONAL PARK SERVICE AGREEMENTS

Mr. Andrew Walch states that he has a document concerning a stipulation between the United States and various parties that can be entered into the record at the present time. Mr. Walch has the authority to sign the documents, and invites the other parties to sign so the originals can be lodged with the Court. Mr. Walch signs the agreement with Arizona Public Service, but Mr. Staudenmaier advises that he cannot sign today without management approval. The original is given to Mr. Staudenmaier. Mr. Walch signs the agreement with Abitibi Consolidated, but Mr. Lauren Caster also advises that he needs management approval before signing. The original is given to Mr. Caster. Mr. Walch signs the agreement with Salt River Project, and Mr. John Weldon, stating that he has authority to sign for Salt River Project, adds his signature to the document. The signed document is lodged with the Court. Mr. Walch signs the agreement with Tucson Electric Company, but there is no one appearing in Court on behalf of Tucson Electric

Company. Mr. Walch advises that the agreement will be forwarded for signature. Mr. Walch signs the agreement with the City of Flagstaff. Ms. Lee Storey advises that she will present the agreement to the city council meeting scheduled for September 10, 2001. The original is given to Ms. Storey.

There is discussion regarding the agreements being binding only between the parties involved, with the understanding that these agreements would be submitted to the Court at a future time. Mr. Staudenmaier views this as being only step one of the process. He believes that a formal motion is necessary for the Court to accept these agreements, and a broader settlement agreement reached later would be considered in a special proceeding. The Court agrees that lodging a motion with the Court is the next step, and preliminary basis for settlement. Mr. Walch responds that a motion could be made after all the signatures have been given. Mr. Staudenmaier references a draft motion he has previously prepared, with this intention.

BUREAU OF LAND MANAGEMENT

The Court calls for comments from the Bureau of Land Management. Mr. Stephen Bartell advises that the United States will continue to work on agreements with both federal and non-federal parties. Mr. Bartell states that on August 28, 2001, a new draft was distributed to the parties, and he encourages future meetings with Judge Nelson while remaining optimistic. Upon the Court's inquiry, Mr. Bartell advises that he hopes to prepare the final draft after the future proposed meeting with Judge Nelson. Mr. Bartell also advises that in the event the Court should set a trial date, the United States could be ready in six months.

Mr. Lauren Caster, representing Abitibi Consolidated, states that the latest draft for signature represents a significant improvement, and urges the Court to grant the time for negotiations which would fit with Judge Nelson's schedule.

The Court inquires as to whether the setting of a trial date would be useful at this time, and there are no responses.

SILVER CREEK DE MINIMIS REPORT

The Court references former Special Master John Thorson's report on the procedures for adjudicating stockpounds, stockwatering uses, and wildlife uses in the Silver Creek watershed (de minimis water uses), issued in 1994. The Court states that Judge Ballinger, Presiding Judge of the Gila River Adjudication, will hear oral argument on September 27, 2001, on the comments filed regarding Mr. Thorson's report prepared for the San Pedro

River watershed. The Court asks for comments on the Silver Creek watershed report.

Mr. Lauren Caster states that he filed comments regarding de minimis water uses and that there are differences between the San Pedro and the Silver Creek reports, for example, the Silver Creek report did not address domestic uses. Mr. Caster suggests that the Court grant time for the parties to comment on the issues raised in the Silver Creek report and not rely on decisions issued in Gila River adjudication matters.

Mr. Dave Brown states that most of the Special Master's Silver Creek report focused on ownership issues, and urges the Court not to continue with the de minimis issues at this time, but to continue to work toward settlement.

Mr. Andrew Walch offers his concerns about the report of Special Master John Thorson, stating that his objections were filed with the Court. Mr. Walch joins with Mr. Brown in urging the Court to continue with settlement negotiations as long as there is progress. Mr. Walch states that the proceedings on the San Pedro report will provide good guidance and again asks the Court not to proceed with the Silver Creek Report at this time.

HYDROGRAPHIC SURVEY REPORTS

The Court addresses the reports to be prepared by the Department of Water Resources and asks for comments.

Mr. Harry R. Sachse briefly reviews a report filed on behalf of the Hopi Tribe, and states that the hydrology of the basin should be the first consideration instead of a Hopi hydrographic survey report ("HSR").

Mr. Scott McElroy, on behalf of the Navajo Nation, also recommends that the hydrology of the basin (including both ground water and surface water) should be the first report prepared by the Department of Water Resources while settlement negotiations are ongoing. Mr. McElroy wants the Department of Water Resources to do extensive hydrological work, including the preparation of computer modeling studies for surface water and groundwater.

Mr. Lauren Caster disagrees with Mr. McElroy, asking the Court to look at the statutory requirements and authority directing the Department of Water Resources to investigate water right claims. Mr. Caster states that any modeling studies done by the Department of Water Resources would result in the department assuming an advocate's role, a position it is not authorized to have in the adjudication.

Mr. Staudenmaier agrees with Mr. Caster referencing comments filed with the Court last September. He states that the department can address the

hydrology of the Little Colorado River watershed by updating its 1989 technical report, and states that there is no need for a separate HSR for hydrology.

Mr. John Weldon, on behalf of Salt River Project, agrees that the purpose of the Little Colorado River Adjudication is not to litigate the hydrology of the river system, but to analyze water rights claims. He agrees with the positions of Mr. Caster and Mr. Staudenmaier.

Ms. Jan Ronald, on behalf of the Department of Water Resources, advises that the department can update the 1989 technical report at the same time it prepares the Hopi HSR. Ms. Ronald states that the department has limited resources and is working on the Gila River Indian Community HSR so timing is uncertain for beginning a Little Colorado HSR. The department plans to prepare Indian HSRs in the same manner that it is preparing the Gila River Indian Community HSR. Ms. Ronald states her belief that work on the Hopi HSR could begin sometime after the end of this calendar year.

There is discussion, and Mr. McElroy and Mr. Sachse make additional comments. Mr. Sachse states that there is no real disagreement with the Hopi Tribe being the first Indian HSR, but a hydrology report should be prepared prior to an HSR for the Tribe's claims.

Mr. Andrew Walch asks for a point of clarification on the HSR regarding the Department of Water Resources accepting data from other sources. Mr. Walch wants to know if it is a closed process within the Department of Water Resources, or if it is open to receive data from other sources outside the department. Ms. Ronald advises that any data is welcome regarding the hydrology of the area. Ms. Ronald states that the data would be evaluated, and parties will be allowed to comment before a report is finalized.

Special Master Schade inquires if the department plans to update its 1989 technical report or add a hydrology section to the HSR. Ms. Ronald responds that a new report is not anticipated, but a section on hydrology as it relates to the claims being investigated would be included in the HSR.

The Court asks for additional comments and there being none, requests to hear from Special Master Schade.

REPORT FROM SPECIAL MASTER SCHADE

Special Master Schade briefly comments on his role as Special Master and his commitment to litigation. The Special Master reviews the activities of the office during the past six months, including the publication of the *Arizona General Stream Adjudication Bulletin* on the newly expanded Web site. The Web site will also feature a new page for a calendar and a section for current

events and will provide more information. The Special Master also advises that he has been working with the Department of Water Resources to update mailing lists and urges the updating of statements of claimant to show current information.

The Court expresses appreciation to Special Master Schade and proceeds to discussion of the NAVAJO NATION'S MOTION FOR PROTECTIVE ORDER dated June 19, 2001, and filed with the Court on June 20, 2001.

MOTION FOR PROTECTIVE ORDER

Mr. McElroy states that a proposed form of order, addressing the objections filed to the motion for a protective order, was lodged with the Court on August 21, 2001. Mr. Staudenmaier states that the Court should be cautious in granting a protective order as it applies to discoverable data. Mr. Sachse states he has not seen the most recently lodged order.

The Court advises that the parties will have the opportunity to review and respond to the NOTICE OF LODGING REVISED FORM OR PROPOSED PROTECTIVE ORDER AND REQUEST FOR ENTRY OF PROTECTIVE ORDER, which was dated August 21, 2001, and filed with the Court on August 22, 2001.

ZUNI NEGOTIATIONS

The Court hears comments from Ms. Jane Marx regarding the ongoing negotiations with the Zuni Tribe. Ms. Marx states that there are still a few significant issues that need to be resolved, but resolution is very close, and if a settlement is not possible, she will ask the Court to set a litigation schedule. A time frame is discussed, and Ms. Marx suggests a matter of weeks, but by the end of the year for certain.

Mr. Jakosa states that the new Administration may have other views regarding the Zuni negotiations and urges the Court to wait on setting a litigation schedule. He states that the prior Administration did not agree with all the provisions of the proposed settlement.

NEXT STATUS CONFERENCE

A date for the next hearing is discussed. The Court proposes a time in mid-February of next year. Mr. Brown states his preference for a date after April 1, 2002, due to his participation in another water case that will be tried in March 2002.

The Court takes the matter under advisement and will set the date at the end of this Minute Entry.

12:10 p.m. Hearing is adjourned.

ORDERS

After considering the pleadings and the comments of counsel, the Court issues the following orders:

1. IT IS ORDERED that if and after the involved parties sign the agreements relating to the National Park Service, the parties shall file a motion requesting the Court's approval of the agreements. The parties shall advise the Court if a special proceeding, conducted pursuant to the Administrative Order of the Arizona Supreme Court issued on September 27, 2000, is anticipated.

2. IT IS FURTHER ORDERED that if similar agreements relating to the Bureau of Land Management and the U.S. Forest Service are reached, the parties shall file a motion requesting the Court's approval of the agreements. The parties shall advise the Court if a special proceeding, conducted pursuant to the Administrative Order of the Arizona Supreme Court issued on September 27, 2000, is anticipated.

3. IT IS FURTHER ORDERED that the Court shall not take up at this time former Special Master Thorson's report on the procedures for adjudicating stockponds, stockwatering uses, and wildlife uses in the Silver Creek watershed, issued in 1994. The Court will address this report at a more appropriate time in the adjudication.

4. The Arizona Department of Water Resources ("ADWR") is directed to commence the preparation of an HSR for the Hopi Tribal lands by May 1, 2002.

5. IT IS FURTHER ORDERED that ADWR shall prepare the Hopi Tribe HSR in the same manner and with the same scope as the department has prepared the HSR for the Gila River Indian Community in the Gila River Adjudication.

6. IT IS FURTHER ORDERED that the HSR for the Hopi Tribe shall contain scientific and technical information relative to the hydrology associated with the water rights claims investigated and reported in the Hopi Tribe HSR. The Court does not see appreciable merit in either preparing a separate hydrology HSR or report for the Little Colorado River watershed or in preparing such a report in advance of an HSR specific to the Hopi Tribe. The resources of the parties, as they continue settlement negotiations on several fronts, and of ADWR will be more productively utilized in preparing an HSR for the Hopi Tribe.

7. IT IS FURTHER ORDERED that ADWR shall not be required to undertake or complete computer modeling studies of surface water or groundwater as part of the Hopi Tribe HSR. The preparation of computer modeling studies by ADWR creates an unreasonable risk of placing the department in an advocacy role when the litigation of this HSR begins, a risk that the first Tribal lands-specific HSR in this adjudication should not have to face. Further, it is not clear that the benefits of ADWR preparing computer modeling studies would outweigh the delays due to the complexity of modeling work.

8. IT IS FURTHER ORDERED that at this time, ADWR shall not be expected to update the Preliminary HSR for Indian Lands in the Little Colorado River System dated September 1994. The department's administrative and technical resources should be fully committed to completing the Hopi Tribe HSR. Pursuant to this Court's minute entry dated May 5, 2000, parties submitted comments to ADWR regarding the 1994 HSR. ADWR should use those comments to the extent they can assist ADWR in preparing the Hopi Tribe HSR.

9. IT IS FURTHER ORDERED that unless the Court is advised to the contrary, those parties who previously filed notices of intent to participate in litigation relating to the Indian Lands HSR, will be deemed to have filed an intent to participate in the litigation relating to the Hopi Tribe HSR. The Court makes this determination in the interest of case management efficiency.

On September 12, 2000, the Hopi Tribe filed for leave to submit its notice of intent to participate, beyond the Court-ordered deadline. The Court grants the request, and the Hopi Tribe's notice of intent to participate is accepted.

10. IT IS FURTHER ORDERED that a schedule for disclosure will be set at a later time.

11. IT IS FURTHER ORDERED that any party who wishes the Court to address issues that should be considered in conjunction with the preparation of the Hopi Tribe HSR, may file a motion, on or before December 31, 2001, identifying the specific issues. The Court may refer to the Special Master, for hearing and report, all or part of the issues, which would be heard in a contested case before the Master.

12. IT IS FURTHER ORDERED that the parties shall have until Thursday, November 1, 2001, to file comments on the proposed form of protective order lodged by the Navajo Nation on August 22, 2001. No responses or replies will be allowed.

13. IT IS FURTHER ORDERED approving the substitution of Stephen G. Bartell, Esq. for Andrew F. Walch, Esq., as counsel for the United States on behalf of the National Park Service, U.S. Forest Service, and Bureau of Land Management.

14. IT IS FURTHER ORDERED that the Court-approved mailing list shall be amended by removing Mr. Walch and adding Mr. Bartell, whose address is:

Stephen G. Bartell, Esq.
General Litigation Section
Environmental & Natural Resources Division
U.S. Department of Justice
P.O. Box 663
Washington, D.C. 20044-0663

15. IT IS FURTHER ORDERED that the next Status Conference shall be held on Thursday, April 18, 2002, at 10:00 a.m., in the Apache County Superior Court.

DATED this 12th day of October, 2001.

/s/ Edward L. Dawson

EDWARD L. DAWSON
Judge of the Superior Court

The original of the foregoing filed with the Superior Court Clerk of Apache County.

On this 16th day of October, 2001, a copy of the foregoing is mailed to those parties who appear on the Court-approved mailing list for CV-6417 dated July 13, 2001.

/s/ Carolyn Morrow

Carolyn Morrow, Deputy

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

THE HONORABLE MICHAEL C. NELSON, PRESIDING JUDGE

IN CHAMBERS (X)

IN OPEN COURT ()

THE HONORABLE EDWARD L. DAWSON, Visiting Judge

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

Case No. CV-6417

DATE: November 6, 2001

MINUTE ENTRY

DESCRIPTIVE SUMMARY: Judge Dawson announces his retirement from the bench.

NUMBER OF PAGES: 1.

DATE OF FILING: Original mailed to Apache County Superior Court Clerk's Office on November 9, 2001.

I have advised Chief Justice Zlaket and Governor Hull that I will retire from the Superior Court. The effective date of my retirement will be January 4, 2002. The selection of a new judge to preside over the Little Colorado River Adjudication should begin shortly. I expect that the transition will be smooth.

My tenure as the Water Judge in this adjudication has been very rewarding. I thank the parties and their counsel for their efforts in this adjudication, and I encourage their continued commitment to the resolution of all water claims.

/s/ Edward L. Dawson
EDWARD L. DAWSON
Judge of the Superior Court

The original of the foregoing filed with the Superior Court Clerk of Apache County.

On this 9th day of November, 2001, a copy of the foregoing is mailed to those parties who appear on the Court-approved mailing list for CV-6417 dated October 30, 2001.

/s/ K Dolge
Kathy Dolge

In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source

Supreme Court of Arizona

November 26, 2001, Filed

Supreme Court Nos. WC-90-0001-IR (Includes WC-90-0001-IR, WC-90-0002-IR, WC-90-0003-IR, WC-90-0004-IR, WC-90-0005-IR, WC-90-0006-IR, WC-90-0007-IR WC-79-0001, WC-79-0002, WC-79-0003, WC-79-0004)
(Consolidated)

Reporter

201 Ariz. 307; 35 P.3d 68; 2001 Ariz. LEXIS 205; 361 Ariz. Adv. Rep. 3

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

Prior History: [***1] Maricopa County Nos. W-1, W-2, W-3, W-4 (Consolidated). Interlocutory Review of September 9, 1988 Order. Superior Court of Maricopa County. The Honorable Stanley Z. Goodfarb, Judge (retired). [*In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 171 Ariz. 230, 830 P.2d 442, 1992 Ariz. LEXIS 25 \(Ariz., 1992\)](#)

Disposition: Vacated in part; affirmed in part.

Core Terms

reservation, tribes, water rights, irrigable, homeland, purposes, River, tribal, practicably, quantifying, permanent, appropriation, reserved right, amount of water, agricultural, non-Indian, federally, feasibility, fulfill, water use, resources, federal government, right to use, trial court, settlement, utilized, courts, rights, irrigation project, economically

Case Summary

Procedural Posture

The Superior Court of Maricopa County, Arizona, entered an order dated September 9, 1988, which found that the practically irrigable acreage standard should have been applied when quantifying Indian tribes' water rights. Interlocutory review was granted of what was the appropriate standard to be applied in determining the amount of water reserved for federal Indian reservation lands.

Overview

The parties disputed the purposes of the several Indian reservations involved in this case. The United States and the tribal litigants argued that federal case law had preemptively determined that every Indian reservation was established as a permanent tribal homeland. The state litigants disagreed, contending instead that the trial court must analyze each tribe's treaty or enabling documentation to determine that reservation's individual purpose. The Arizona Supreme Court found that: (1) the purpose of a federal Indian reservation was to serve as a permanent home and abiding place to the Native American people living there; (2) the general purpose, to provide a home for the Indians, was a broad one and had to be liberally construed; (3) the primary-secondary purpose test did not apply to Indian reservations; (4) a permanent homeland requires water for multiple uses, which may or may not include agriculture; and (5) it declined to approve the use of practically irrigable acreage standard as the exclusive quantification measure for determining water rights on Indian lands.

Outcome

That portion of the superior court's order which applied the practically irrigable acreage standard as the exclusive quantification measure for determining water rights on Indian lands was vacated. In all other respects the order was affirmed.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Governments > Federal Government > Property

Governments > Native Americans > Water Rights

Real Property Law > Water Rights > Appropriation Rights

Real Property Law > Water Rights > Beneficial Use

HN1 The Arizona Supreme Court review's a trial court's determination of the appropriate standard to be applied in determining the amount of water reserved for federal lands, utilizing a de novo standard.

Governments > Native Americans > Water Rights

HN2 When the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation.

Governments > Native Americans > Water Rights

Governments > State & Territorial Governments > Property > Water Rights

Real Property Law > Water Rights > Appropriation Rights

Real Property Law > Water Rights > Beneficial Use

HN3 A federal right vests on the date a reservation is created, not when water is put to a beneficial use. Although this entitlement remains subordinate to rights acquired under state law prior to creation of the reservation, it is senior to the claims of all future state appropriators, even those who use the water before the federal holders. In this sense, a federally reserved water right is preemptive. Its creation is not dependent on beneficial use, and it retains priority despite non-use.

Governments > Native Americans > Water Rights

HN4 Congress, by creating an Indian reservation, impliedly reserves all of the waters of the river necessary for the purposes for which the reservation is created. This reservation of water is not only for the present needs of the tribes, but for a use which would be necessarily continued through years.

Governments > Native Americans > Water Rights

Governments > State & Territorial Governments > Property > Water Rights

HN5 The government, in establishing Indian or other federal reservations, impliedly reserves enough water to fulfill the purpose of each such reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Governments > Native Americans > General Overview

Governments > Native Americans > Fishing & Hunting Rights

Governments > Native Americans > Water Rights

Real Property Law > Water Rights > General Overview

Real Property Law > Water Rights > Administrative Allocations

HN6 When reservations are established, the federal government is aware that most of the lands are of the desert kind, hot, scorching sands, and that water from the river is essential to the life of the Indian people and to the animals they hunt and the crops they raise. The United States reserves water rights to make the reservations livable. This allocation is intended to satisfy the future as well as the present needs of the Indian reservations.

Governments > Native Americans > Water Rights

International Trade Law > Trade Agreements > Environmental Provisions > Fish & Fishing Rights

Real Property Law > Water Rights > Nonconsumptive Uses > Fishing

HN7 When the central issue is whether the Government intends to reserve unappropriated and thus available water, intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which a reservation is created. This right reserves only that amount of water necessary to fulfill the purpose of the reservation, no more. Thus, the allocation must be tailored to the minimal need of the reservation.

Governments > Native Americans > Water Rights

HN8 Both the asserted water right and the specific purpose for which the land is reserved must be examined to ascertain that without the water, the purposes of the reservation would be entirely defeated. Because federally reserved water rights are implied, where water is necessary to fulfill the very purposes for which a federal reservation is created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intends to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intends that the United States will acquire water in the same manner as any other public or private appropriator. This is now known as the primary-secondary purposes test.

Governments > Native Americans > Water Rights

HN9 Generally, the purpose of a federal reservation of land defines the scope and nature of impliedly reserved water rights.

Governments > Native Americans > Water Rights

HN10 When applying the Winters doctrine, it is necessary to distinguish between Indian and non-Indian reservations.

Contracts Law > Types of Contracts > Lease Agreements > General Overview

Governments > Federal Government > Property

Governments > Native Americans > Property Rights

Governments > Native Americans > Water Rights

Real Property Law > Deeds > Types of Deeds > Quit Claim Deeds

Real Property Law > Water Rights > General Overview

HN11 The government may exercise total dominion over water rights on federal non-Indian lands. The United States can lease, sell, quitclaim, release, encumber or convey its own federal reserved water rights.

Governments > Federal Government > Property

Governments > Native Americans > Property Rights

Governments > Native Americans > Water Rights

Real Property Law > Water Rights > General Overview

HN12 Unlike the water rights attached to Indian lands, which reserve water rights for future needs and changes in use, non-Indian reserved rights are narrowly quantified to meet the original, primary purpose of the reservation; water for secondary purposes must be acquired under state law. Thus, the primary purpose for which the federal government reserves non-Indian land is strictly construed after careful examination. The test for determining such a right is clear. For each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water, the minimal need required for such purposes.

Governments > Fiduciaries

Governments > Native Americans > Property Rights

Governments > Native Americans > Water Rights

HN13 In its role as trustee of Indian reservation lands, the government must act for the Indians' benefit. This fiduciary relationship is referred to as one of the primary cornerstones of Indian law. Thus, treaties, statutes, and executive orders are construed liberally in the Indians' favor. Such an approach is equally applicable to the federal government's

actions with regard to water for Indian reservations. The purposes of Indian reserved rights are given broader interpretation in order to further the federal goal of Indian self-sufficiency.

Environmental Law > Federal Versus State Law > Federal Preemption

Governments > Native Americans > Water Rights

HN14 The essential purpose of Indian reservations is to provide Native American people with a permanent home and abiding place, that is, a livable environment.

Governments > Legislation > Interpretation

HN15 Courts construe Indian treaties according to the way in which the Indians themselves would understand them.

Governments > Legislation > Interpretation

Governments > Native Americans > Water Rights

Real Property Law > Water Rights > Water Dispute Procedures

HN16 The general purpose of establishing an Indian reservation, providing a home for the Indians, is a broad one and must be liberally construed. Such a construction is necessary for tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency.

Governments > Native Americans > Water Rights

HN17 Limiting an Indian reservation's purpose to agriculture, as the practically irrigable acreage standard implicitly does, assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization. The homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian society develops.

Governments > Native Americans > Water Rights

HN18 Even where reservations are created so that tribes can engage in agricultural pursuits, Congress only envisions this as a first step in the civilizing process.

Governments > Native Americans > Water Rights

HN19 The purpose of a federal Indian reservation is to serve as a permanent home and abiding place to the Native American people living there.

Governments > Federal Government > Property

Governments > Native Americans > Water Rights

HN20 The significant differences between Indian and non-Indian reservations preclude application of the primary-secondary purpose test to the former.

Governments > Legislation > Interpretation

Governments > Native Americans > Property Rights

Governments > Native Americans > Water Rights

HN21 While the purpose for which the federal government reserves other types of lands may be strictly construed, the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained.

Governments > Native Americans > Water Rights

HN22 The Winters doctrine retains the concept of minimal need by reserving only that amount of water necessary to fulfill the purpose of the reservation, no more. The method utilized in arriving at such an amount, however, must satisfy both present and future needs of the reservation as a livable homeland.

Governments > Native Americans > Water Rights

HN23 Practically irrigable acreage constitutes those acres susceptible to sustained irrigation at reasonable costs. This implies a two-step process. First, it must be shown that crops can be grown on the land, considering arability and the engineering practicality of irrigation. Second, the economic feasibility of irrigation must be demonstrated. This is accomplished by subjecting proposed irrigation projects to a cost-benefit analysis, comparing the likely costs of the project to the likely financial returns. If the latter outweighs the former, the project can be found economically feasible, and the underlying land practicably irrigable.

Governments > Native Americans > Water Rights

HN24 Tribes who fail to show either the engineering or economic feasibility of proposed irrigation projects run the risk of not receiving any reserved water under the practically irrigable acreage standard.

Governments > Native Americans > Water Rights

HN25 A permanent homeland requires water for multiple uses, which may or may not include agriculture. The practically irrigable acreage standard, however, forces tribes to prove economic feasibility for a kind of enterprise that, judging from the evidence of both federal and private

willingness to invest money, is simply no longer economically feasible in the West.

Governments > Native Americans > Property Rights

Governments > Native Americans > Water Rights

Real Property Law > Water Rights > General Overview

HN26 The Arizona Supreme Court declines to approve the use of the practically irrigable acreage standard as the exclusive quantification measure for determining water rights on Indian lands.

Governments > Native Americans > Water Rights

HN27 Determining the amount of water necessary to accomplish a reservation's purpose is a fact-intensive inquiry that must be made on a reservation-by-reservation basis. This is the only way federally reserved rights can be tailored to meet each reservation's minimal need.

Governments > Native Americans > Property Rights

Governments > Native Americans > Water Rights

Real Property Law > Water Rights > Administrative Allocations

HN28 Considering the objective that tribal reservations should be allocated the water necessary to achieve their purpose as permanent homelands, there should be a balancing of a myriad of factors in quantifying reserved water rights, and a multi-faceted approach appears best-suited to produce a proper outcome.

Governments > Native Americans > Indian Child Welfare Act

Governments > Native Americans > Property Rights

Governments > Native Americans > Water Rights

Public Health & Welfare Law > Social Services > Native Americans

Real Property Law > Financing > Construction Loans

Real Property Law > Water Rights > General Overview

Real Property Law > Water Rights > Groundwater

HN29 The important thing in quantifying reserved water rights is that the lower court should have before it actual and proposed uses, along with the parties' views regarding feasibility, and the amount of water necessary to accomplish the homeland purpose. In viewing this evidence, the lower court should consider the following factors, which are not intended to be exclusive: (1) a tribe's history; (2) deference should be given to practices requiring water use that are embedded in Native American traditions; (3) water uses that

have particular cultural significance should be respected; (4) the tribal land's geography, topography, and natural resources, including groundwater availability; (5) tribes should be free to develop their reservations based on the surroundings they inhabit; (6) a tribe's economic base in determining its water rights; (7) development plans or other evidence should address the optimal manner of creating jobs and income for the tribes, and the most efficient use of the water; (8) economic development and its attendant water use must be tied, in some manner, to a tribe's current economic station; and (9) physical infrastructure, human resources, including the present and potential employment base, technology, raw materials, financial resources, and capital are all relevant in viewing a reservation's economic infrastructure.

Governments > Native Americans > General Overview

Governments > Native Americans > Water Rights

Real Property Law > Water Rights > Administrative Allocations

HN30 Past water use on a reservation should be considered when quantifying a tribe's water rights. This does not mean that Indians may not use their water allocations for new purposes on a reservation. However, any proposed projects should be scrutinized to insure that they are practical and economical. Such projects should also be examined to determine that they are, in fact, appropriate to a particular homeland.

Governments > Native Americans > General Overview

Governments > Native Americans > Water Rights

Real Property Law > Water Rights > General Overview

HN31 While it should never be the only factor, a tribe's present and projected future population may be considered in determining water rights. If a federally reserved water right is to be tailored to a reservation's minimal need, then population necessarily must be part of the equation. Therefore, the number of humans is a necessary element in quantifying water rights. It is therefore proper to use population evidence in conjunction with other factors in quantifying a tribe's Winters rights.

Evidence > ... > Exceptions > Public Records > General Overview

HN32 Population forecasts are common in today's society and are recognized and relied upon by the legal system.

Governments > Native Americans > Water Rights

Governments > State & Territorial Governments > Property > Water Rights

Real Property Law > Water Rights > General Overview

HN33 When an Indian reservation is created, the government impliedly reserves water to carry out its purpose as a permanent homeland. The court's function is to determine the amount of water necessary to effectuate this purpose, tailored to the reservation's minimal need. Such a minimalist approach demonstrates appropriate sensitivity and consideration of existing users' water rights, and at the same time provides a realistic basis for measuring tribal entitlements.

Governments > Native Americans > General Overview

Governments > Native Americans > Water Rights

HN34 The lower court must be given the latitude to consider other information it deems relevant to determining tribal water rights. The Arizona Supreme Court requires only that proposed water uses be reasonably feasible. This entails a two-part analysis. First, development projects need to be achievable from a practical standpoint, they must not be pie-in-the-sky ideas that will likely never reach fruition. Second, projects must be economically sound.

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Gila River Indian Community, Chandler, By: Rodney B. Lewis, Attorney for the Gila River Indian Community.

Navajo Nation Department of Justice, Window Rock, By: Stanley M. Pollack, Greene, Meyer & McElroy, P.C., Boulder, CO, By: Scott B. McElroy, Alice E. Walker, Attorneys for the Navajo Nation.

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Snell & Wilmer, L.L.P., Phoenix, By: Robert B. Hoffman, Attorneys for BHP Copper Co.

Ryley, Carlock & Applewhite, [***3] Phoenix, By: Michael J. Brophy, L. William Staudenmaier, III, Attorneys for Roosevelt Water Conservation Dist., Phelps Dodge Corp., and Arizona Pub. Serv. Co.

Martinez & Curtis, P.C., Phoenix, By: William P. Sullivan, Attorneys for Town of Wickenburg, Town of Gilbert, Cortaro-Marana Irrigation Dist., Bella Vista Water Company, Inc., Bella Vista Ranches LLP, Valencia Water Company, Inc., Cortaro Water Users' Ass'n.

Ellis & Baker, Phoenix, By: William D. Baker, Attorneys for New Magma Irrigation Dist.

Fines & Oden, P.L.C., By: L. Anthony Fines, Tucson, Attorneys for Gila Valley Irrigation Dist.

Brown & Brown Law Offices, P.C., Pinetop, By: David A. Brown, Michael J. Brown, Attorneys for Franklin Irrigation Dist.

John S. Schaper, Phoenix, Attorney for Buckeye Irrigation Co. and Buckeye Water Conservation and Drainage Dist.

Whiteing & Smith, Boulder, CO, By: Jeanne S. Whiteing, Tod Smith, Attorneys for Amicus Curiae San Juan Southern Paiute Tribe.

Williams, Janov & Cooney P.C., Albuquerque, NM, By: Susan M. Williams, Jane Marx, Attorneys for Amicus Curiae Pueblo of Zuni.

Sonosky, Chambers, Sachse, Endreson & Perry, Washington D.C., By: Harry R. Sachse, [***4] Arthur Lazarus, Jr., Reid Peyton Chambers, Attorneys for Amicus Curiae Hopi Tribe.

Judges: THOMAS A. ZLAKET, Chief Justice. CONCURRING: STANLEY G. FELDMAN, Justice, NOEL A. FIDEL, Judge, WILLIAM E. DRUKE, Judge, JOHN PELANDER, Judge. Vice Chief Justice Charles E. Jones and Justices Frederick J. Martone and Ruth V. McGregor recused themselves; pursuant to Ariz. Const. art. VI, § 3, Judge Noel A. Fidel of Division One, Arizona Court of Appeals, Judge William E. Druke, and Judge John Pelander of Division Two, Arizona Court of Appeals, were designated to sit in their stead.

Opinion by: THOMAS A. ZLAKET

Opinion

[*309] [**70] EN BANC
ZLAKET, Chief Justice.

P1 We are presented with another issue in the Gila River general stream adjudication. The facts and procedural history of this matter [*310] [**71] are well documented. See [Arizona v. San Carlos Apache Tribe of Arizona](#), 463 U.S. 545, 557-59, 103 S. Ct. 3201, 3209-10, 77 L. Ed. 2d 837 (1983) (subsection entitled "The Arizona Cases"); [In re Rights to the Use of the Gila River](#), 171 Ariz. 230, 232-33, 830 P.2d 442, 444-45 (1992); [United States v. Superior Court](#), 144 Ariz. 265, 270-71, 697 P.2d 658, 663-64 (1985) (subsection [***5] entitled "The Controversy"). On December 11, 1990, we granted interlocutory review of six issues decided by the trial court. Four of these have been resolved. See [In re the General Adjudication of all Rights to Use Water in the Gila River System and Source](#), 198 Ariz. 330, 9 P.3d 1069 (2000) [Gila IV] (deciding issue 2 following remand); [In re the General Adjudication of all Rights to Use Water in the Gila River System and Source](#), 195 Ariz. 411, 989 P.2d 739 (1999) [Gila III] (issues 4 & 5);

In re the General Adjudication of all Rights to Use Water in the Gila River System and Source, 175 Ariz. 382, 857 P.2d 1236 (1993) [Gila II] (issue 2); *In re Rights to the Use of the Gila River*, 171 Ariz. 230, 830 P.2d 442 (1992) [Gila I] (issue 1). Today the court addresses issue 3: "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?"

PROCEDURAL HISTORY

P2 In its September 1988 decision, the trial court stated that each Indian reservation was entitled to

such water as is necessary to effectuate the purpose of that reservation. While [***6] as to other types of federal lands courts have allowed controversy about what the purpose of the land is and how much water will satisfy that purpose, as to Indian reservations the courts have drawn a clear and distinct line. It is that the amount is measured by the amount of water necessary to irrigate all of the *practicably irrigable acreage* (PIA) on that reservation.

Order, Sept. 9, 1988, at 17 (emphasis in original). **HN1** We review this determination utilizing a de novo standard. See *Hall v. Lalli*, 194 Ariz. 54, 57, P5, 977 P.2d 776, 779, P5 (1999).

DISCUSSION

A. Prior Appropriation and the Winters Doctrine

P3 In Arizona, surface water is subject to the doctrine of prior appropriation. *Ariz. Rev. Stat. § 45-141(A)* (Supp. 2000). An appropriator acquires a legal right to water by putting it to a beneficial use, which is "the basis, measure and limit" of any such entitlement. *Id. § 45-141(B)*. So long as utilization continues, the right remains secure. However, when an owner "ceases or fails to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the [***7] public and shall again be subject to appropriation." *Id. § 45-141(C)*.

P4 Prior appropriation adheres to a seniority system determined by the date on which the user initially puts water to a beneficial use. According to state law, the person "first appropriating the water shall have the better right." *Id. § 45-151(A)*. This chronological staging becomes important in times of shortage because preference is given according to the appropriation date, allowing senior holders to take their entire allotments of water before junior appropriators receive any at all. In short, "the oldest titles shall have precedence." *Id. § 45-175*.

P5 Federal water rights are different from those acquired under state law. Beginning with *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908), the Supreme Court has consistently held that "HN2 when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138, 96 S. Ct. 2062, 2069, 48 L. Ed. 2d 523 (1976). [***8]

P6 According to *Winters* and its progeny, **HN3** a federal right vests on the date a reservation is created, not when water is put to a beneficial use. *Arizona v. California*, 373 U.S. 546, 600, 83 S. Ct. 1468, 1498, 10 L. Ed. 2d 542 (1963) [*Arizona I*]. Although this entitlement remains subordinate to rights acquired under state law prior to creation [***11] [**72] of the reservation, it is senior to the claims of all future state appropriators, even those who use the water before the federal holders. *Cappaert*, 426 U.S. at 138, 96 S. Ct. at 2069. In this sense, a federally reserved water right is preemptive. Its creation is not dependent on beneficial use, and it retains priority despite non-use.

P7 Our task is to determine the manner in which water rights on Indian lands are to be quantified. Consideration of this subject necessarily begins with the *Winters* case. The Fort Belknap Indian reservation in Montana was created by Congress on May 1, 1888 as a "permanent home and abiding place" for the Gros Ventre and Assiniboine tribes. *Winters*, 207 U.S. at 565, 28 S. Ct. at 208. According to treaty, the government reserved 600,000 acres [***9] of land for Indian use, which was a small fraction of the tribes' original holdings. The agreement, however, was silent as to tribal water rights. Within a short period of time, white settlers began to dam or otherwise divert water from the Milk River, which bordered the reservation. In 1905, a federal reservation superintendent wrote to the Commissioner of Indian Affairs protesting these diversions and imploring the government to take "radical action" on the tribes' behalf. Monique C. Shay, *Promises of a Viable Homeland, Reality of Selective Reclamation: A Study of the Relationship Between the Winters Doctrine and Federal Water Development in the Western United States*, 19 Ecology L.Q. 547, 566 (1992) (citation omitted). Relief came in a lawsuit filed by the government to enjoin *Winters* and other homesteaders, who claimed senior rights under the doctrine of prior appropriation, from "interfering in any manner with the use by the reservation of 5,000 inches of the water of the river." *Winters*, 207 U.S. at 565, 28 S. Ct. at 208.

P8 The Supreme Court, recognizing the “lands were arid, and, without irrigation, were practically valueless,” *id. at 576, 28 S. Ct. at 211*, [***10] held that **HN4** Congress, by creating the Indian reservation, impliedly reserved “all of the waters of the river . . . necessary for . . . the purposes for which the reservation was created.” *Id. at 567, 28 S. Ct. at 208*. As noted by the Court, the purpose for creating the Fort Belknap reservation was to establish a permanent homeland for the Gros Ventre and Assiniboine Indians. The Court further declared that this reservation of water was not only for the present needs of the tribes, but “for a use which would be necessarily continued through years.” *Id. at 577, 28 S. Ct. at 212*.

P9 Granted, *Winters* was not a general stream adjudication. Moreover, congressional intent to reserve water was not expressed in the Fort Belknap treaty; it was found by the Court to be implied. The principle outlined in *Winters*, however, is now well-established in our nation’s jurisprudence: **HN5** the government, in establishing Indian or other federal reservations, impliedly reserves enough water to fulfill the purpose of each such reservation. See *United States v. New Mexico, 438 U.S. 696, 700, 98 S. Ct. 3012, 3014, 57 L. Ed. 2d 1052 (1978)*; *Cappaert, 426 U.S. at 138, 96 S. Ct. at 2069*; [***11] *Arizona I, 373 U.S. at 599-601, 83 S. Ct. at 1497-98*. “In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.” *Cappaert, 426 U.S. at 138, 96 S. Ct. at 2069*.

P10 Since *Winters*, the Supreme Court has strengthened the reserved rights doctrine. In *Arizona I*, the government asserted rights to Colorado River water on behalf of five Indian reservations in Arizona, California, and Nevada. Arizona claimed that because each of the reservations was created or expanded by Executive Order, rather than by treaty, water rights were not retained. This argument was expressly rejected by the Court. *Arizona I, 373 U.S. at 598, 83 S. Ct. at 1496-97*. It noted that **HN6** when these reservations were established, the federal government was aware “that most of the lands were of the desert kind--hot, scorching sands--and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.” *Id. at 599, 83 S. Ct. at 1497*. As such, the Court found that [***12] the United States reserved water rights “to make the reservation[s] livable.” *Id.* This allocation was intended to “satisfy the future as well as the [*312] [***73] present needs of the Indian Reservations.” *Id. at 600, 83 S. Ct. at 1498*.

P11 The Supreme Court has further clarified the reserved rights doctrine in two non-Indian cases. In *Cappaert*, the government brought a lawsuit to declare its rights to an underground pool of water appurtenant to Devil’s Hole in the Death Valley National Monument. 426 U.S. at 131, 96 S. Ct. at 2066. The Cappaerts, by pumping groundwater, were threatening the amount of water available to an endangered species of desert fish. Nevada argued that the *Winters* doctrine was an equitable one which called for a “balancing of competing interests.” *Id. at 138, 96 S. Ct. at 2069*. The Court disagreed, stating that **HN7** the central issue was “whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.” *Id. at 139, 96 S. Ct. at 2070* (citations [***13] omitted). Because the Devil’s Hole Monument had been established in part to conserve natural and historical objects and the wildlife therein, the Court found a reserved water right to fulfill this purpose. In an important caveat, however, the Court stated that this right “reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.” *Id. at 141, 96 S. Ct. at 2071*. Thus, the allocation must be tailored to the “minimal need” of the reservation. ¹ *Id.*

P12 In *United States v. New Mexico, 438 U.S. at 697, 98 S. Ct. at 3012-13*, the issue before the Court was whether the New Mexico Supreme Court, in an adjudication concerning the Rio Mimbres, properly quantified the federally reserved water right associated with the Gila National [***14] Forest. After reiterating *Cappaert’s* limiting principle, that the “implied-reservation-of-water doctrine” applies only to that amount of water necessary to fulfill a reservation’s purpose, the Court emphasized that “**HN8** both the asserted water right and the specific purposes for which the land was reserved” must be examined to ascertain “that without the water the purposes of the reservation would be entirely defeated.” *New Mexico, 438 U.S. at 700, 98 S. Ct. at 3014*. Because federally reserved water rights are implied, the Court also determined that

where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress’ express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended . . . that the United States would

¹ This limitation makes good sense because federally reserved water rights are implied, *see supra* P9, *infra* P19, uncircumscribed by the beneficial use doctrine, and preemptive in nature. See *supra* P6.

acquire water in the same manner as any other public or private appropriator.

Id. at 702, 98 S. Ct. at 3015. This is now known as the “primary-secondary [***15] purposes test,” and its application to federal Indian reservations is one of the issues before us today.

B. Purpose

P13 HN9 Generally, the “purpose of a federal reservation of land defines the scope and nature of impliedly reserved water rights.” *United States v. Adair*, 723 F.2d 1394, 1419 (9th Cir. 1983). However, **HN10** when applying the *Winters* doctrine, it is necessary to distinguish between Indian and non-Indian reservations.

P14 HN11 The government may exercise total dominion over water rights on federal non-Indian lands. *State of Montana ex rel. Greely v. Confederated Salish & Kootenai Tribes*, 219 Mont. 76, 712 P.2d 754, 767 (Mont. 1985) (“The United States can lease, sell, quitclaim, release, encumber or convey its own federal reserved water rights.”). But **HN12** unlike those attached to Indian lands, which have reserved water rights for “future needs and changes in use,” *id.*, non-Indian reserved rights are narrowly quantified to meet the original, primary purpose of the reservation; water for secondary purposes must be acquired under state law. See *New Mexico*, [*313] [**74] 438 U.S. at 702, 98 S. Ct. at 3015. Thus, the primary purpose [***16] for which the federal government reserves non-Indian land is strictly construed after careful examination. The test for determining such a right is clear.

For each federal claim of a reserved water right, the trier of fact must examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation; determine the precise federal purposes to be served by such legislation; determine whether water is essential for the primary purposes of the reservation; and finally determine the precise quantity of water--the minimal need as set forth in *Cappaert* and *New Mexico*--required for such purposes.

Greely, 712 P.2d at 767 (quoting *United States v. City & County of Denver*, 656 P.2d 1, 20 (Colo. 1983)).

P15 Indian reservations, however, are different. **HN13** In its role as trustee of such lands, the government must act for the Indians’ benefit. See *United States v. Mitchell*, 463 U.S. 206, 225-26, 103 S. Ct. 2961, 2972-73, 77 L. Ed. 2d 580 (1983). This fiduciary relationship is referred to as “one of the primary cornerstones of Indian law.” Felix S. Cohen, *Handbook of Federal [***17] Indian Law* 221 (1982). Thus, treaties, statutes, and executive orders are construed liberally in the Indians’ favor. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269, 112 S. Ct. 683, 693, 116 L. Ed. 2d 687 (1992) (citations omitted). Such an approach is equally applicable to the federal government’s actions with regard to water for Indian reservations. “The purposes of Indian reserved rights . . . are given broader interpretation in order to further the federal goal of Indian self sufficiency.” *Greely*, 712 P.2d at 768 (citations omitted).

P16 The parties dispute the purposes of the several Indian reservations involved in this case. The United States and the tribal litigants argue that federal case law has preemptively determined that every Indian reservation was established as a permanent tribal homeland. The state litigants disagree, contending instead that the trial court must analyze each tribe’s treaty or enabling documentation to determine that reservation’s individual purpose. We need not decide whether federal case law has preemptively determined the issue. We agree with the Supreme Court [***18] that **HN14** the essential purpose of Indian reservations is to provide Native American people with a “permanent home and abiding place,” *Winters*, 207 U.S. at 565, 28 S. Ct. at 208, that is, a “livable” environment. *Arizona I*, 373 U.S. at 599, 83 S. Ct. at 1497.

P17 While courts may choose to examine historical documents in determining the purpose and reason for creating a federal reservation on non-Indian lands, the utility of such an exercise with respect to Indian reservations is highly questionable.² This is so for a variety of reasons.

[***19] **P18** First, as pointed out by the state litigants, many Indian reservations were pieced together over time. For example, the boundaries of the Gila River Indian Community changed ten times from its creation in 1859 until 1915, resulting in overall growth from 64,000 to 371,422 acres. But some of the changes along the way actually decreased the size of the reservation or limited the

² One commentator, in fact, suggests that “the effort to inform the quantification of federal [Indian] reserved rights with historical considerations is futile and should be abandoned.” Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification of Reserved Water Rights*, 31 Nat. Resources J. 549, 563 (1991). While we generally agree with this observation, see *infra* PP18-22, we believe that tribal history may play an important role in quantifying the amount of water necessary to fulfill an Indian reservation’s purpose as a permanent homeland. See *infra* P42.

scope of previous additions. If these alterations had different purposes, as the state litigants suggest, it might be argued that water reserved to a specific parcel could not be utilized elsewhere on the same reservation, or that water once available could no longer be accessed. Such an arbitrary patchwork of water rights would be unworkable and inconsistent with the concept of a permanent, unified homeland.

[*314] [**75] P19 A second problem lies in the fact that congressional intent to reserve water for tribal land is not express, but implied. As Franks points out, "because the intent is merely imputed--that is, its historical reality is irrelevant for purposes of establishing reserved rights--it seems strained to impute an historical definition to that imputed intent for the purpose of quantifying an [***20] extremely valuable right to a scarce resource." Franks, *supra* note 2, at 563.

P20 *HN15* Courts construe Indian treaties according to the way in which the Indians themselves would have understood them. [Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 196, 119 S. Ct. 1187, 1201, 143 L. Ed. 2d 270 \(1999\)](#) (citations omitted); [Greely, 712 P.2d at 763](#) (citations omitted). But the historical search for a reservation's purpose tends to focus only on the motives of Congress--tribal intent is easily and often left out of the equation. It is doubtful that any tribe would have agreed to surrender its freedom and be confined on a reservation without some assurance that sufficient water would be provided for its well-being.

P21 The most recognizable difficulty with the historical approach is that many documents do not accurately represent the true reasons for which Indian reservations were created. It is well known that in the nineteenth century, the federal government made conflicting promises. On one hand, it offered white settlers free land, an abundance of resources, and safety if they would travel to and inhabit the West. The government [***21] also assured Indians that they would be able to live on their lands in peace. The promises to the tribes were not kept. As recognized in 1863 by the Superintendent of Indian Affairs, M. Steck, the invasion of white settlement caused the Apache Indian people to be

divested . . . of all their peculiar and former means of subsistence, in contending with a race who, under the

circumstances, can feel no sympathy with them, [such that] the Indian must soon be swept from the face of the earth. If every red man were a Spartan, they would find it impossible to withstand this overpowering influx of immigration. Humanity and religion, therefore, demand of us that we interpose a barrier for their safety. . . .

S. Rep. 102-133, at 2 (1991). Even after this humanitarian "barrier" was imposed, however, General William T. Sherman made clear that "if [the Indians] wander outside they at once become objects of suspicion, liable to be attacked by the troops as hostile." *Id. at 3*. In a November 9, 1871 letter to the Secretary of War, Sherman closed by stating that General Crook³, head of the Army in Arizona, "may feel assured that whatever measures of severity he may adopt to [***22] reduce these Apaches to a peaceful and subordinate condition will be approved by the War Department and the President." *Id.*

P22 Despite what may be set forth in official documents, the fact is that Indians were forced onto reservations so that white settlement of the West could occur unimpeded. See Walter Rusinek, Note, *A Preview of Coming Attractions? Wyoming v. United States and the Reserved Rights Doctrine*, 17 Ecology L.Q. 355, 406 (1990) [***23] ("Cynical motives aside, the goals of the reservation system were to move Indian tribes out of the path of white settlement, provide them a homeland, and 'civilize' individual tribal members, often by attempting to transform them into yeoman farmers."). As recognized by former Arizona Congressman Morris K. Udall, the federal government "can be kindly described as having been less than diligent in its efforts to secure sufficient water supplies for the [Indian] community to develop its arable lands and achieve meaningful economic self-sufficiency and self-determination." 134 Cong. Rec. E562-02 (Mar. 8, 1988) (statement of Rep. Udall).

[*315] [**76] P23 The trial court here failed to recognize any particular purpose for these Indian reservations, only finding that the PIA standard should be applied when quantifying tribes' water rights. It is apparent that the judge was leery of being "drawn into a potential racial controversy" based on historical documentation. Order, *supra*, at 17. But it seems clear to us that each of the Indian reservations in question was created as a "permanent home and abiding place" for the Indian people, as explained in [Winters, 207 U.S. at 565, 28 S. Ct. at 208](#). [***24] This conclusion

³ General George Crook served as the commanding officer for the Department of Arizona from 1871-1875 and again from 1882-1886. A large part of Crook's job was to force Indians onto reservation lands and hunt down those who dared step off, in order to transform the Indians into "docile inhabitants of the reservation." *General George Crook: His Autobiography* 214 (Martin F. Schmitt ed., 1960). Even Crook recognized that "the greed of the white man for reservation land and the remarkably short-term views of the Indian Bureau observed no promises made in the past." *Id. at 241*.

comports with the belief that “**HN16** the general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.” *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). Such a construction is necessary for tribes to achieve the twin goals of Indian self-determination and economic self-sufficiency. See Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. 103-434, § 102(a)(1), 108 Stat. 4526, 4526; Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. 101-628, § 402(a)(1), 104 Stat. 4469, 4480; *Greely*, 712 P.2d at 768.

P24 HN17 Limiting an Indian reservation’s purpose to agriculture, as the PIA standard implicitly does,

assumes that the Indian peoples will not enjoy the same style of evolution as other people, nor are they to have the benefits of modern civilization. I would understand that the homeland concept assumes that the homeland will not be a static place frozen in an instant of time but that the homeland will evolve and will be used in different ways as the Indian society develops.

In re General Adjudication of All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 119 (Wyo. 1988)

[***25] (Thomas, J., dissenting) [*Big Horn I*]; see also *Walton*, 647 F.2d at 47 (stating that courts consider Indians’ “need to maintain themselves under changed circumstances” when determining a reservation’s purpose).⁴

P25 Other right holders are not constrained in this, the twenty-first century, to use water in the same manner as their ancestors in the 1800s. Although over 40% of the nation’s population lived and worked on farms in 1880, less than 5% do today. U.S. Census Bureau, *Historical Statistics of the United States, Colonial Times to 1970*, 240, 457 (1975). Likewise, agriculture has steadily decreased as a percentage of our gross domestic product. [***26] See U.S. Census Bureau, *Statistical Abstract of the United States*, 881, 886 (1999) (demonstrating that agricultural output as a

percentage of GDP has declined from 10.7% in 1930 to 2.84% in 1997). Just as the nation’s economy has evolved, nothing should prevent tribes from diversifying their economies if they so choose and are reasonably able to do so. The permanent homeland concept allows for this flexibility and practicality. We therefore hold that **HN19** the purpose of a federal Indian reservation is to serve as a “permanent home and abiding place” to the Native American people living there.⁵

[***27] *C. Primary-Secondary Purpose Test*

P26 Next arises the question of whether the primary-secondary purpose test applies to Indian reservations. In *New Mexico*, a case dealing with a national forest, the Supreme Court reaffirmed that “where water is necessary to fulfill the very purposes for which a federal reservation was created,” it is implied that the United States reserved water for it. *438 U.S. at 702, 98 S. Ct. at 3015*. However, where the “water is only valuable for a secondary use of the reservation,” any right must be acquired according [***316] [***77] to state law. *Id.* All parties agree that this distinction applies to non-Indian federal reservations. The trial court here rejected the primary-secondary test, finding that the “rule is a little different for entrusted lands, Indian reservations.” Order, *supra*, at 16-17. We agree.

P27 It is true that some courts have utilized the primary-secondary purpose test or looked to it for guidance when dealing with Indian lands. See *Adair*, 723 F.2d at 1408 (stating that *New Mexico* is not directly applicable, but establishes “several useful guidelines”); *Walton*, 647 F.2d at 47 [***28] (applying the test); *In re the General Adjudication of all Rights to Use Water in the Big Horn River System*, 835 P.2d 273, 278-79 (Wyo. 1992) [*Big Horn II*] (following the test). Nevertheless, we believe **HN20** the significant differences between Indian and non-Indian reservations preclude application of the test to the former.⁶ As Judge Canby has noted, “**HN21** while the purpose for which the federal government reserves other types of lands may be

⁴ **HN18** Even where reservations were created so that tribes could engage in agricultural pursuits, Congress only envisioned this as “a first step in the ‘civilizing’ process.” *Walton*, 647 F.2d at 47 n.9 (citing 11 Cong. Rec. 905 (1881)).

⁵ We are aware that in *Gila III*, we stated: “To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.” 195 Ariz. at 420, P31, 989 P.2d at 748, P31. In that case, however, a determination of purpose was not squarely before the court. Having now received oral and written argument dealing specifically with the issue, and upon further consideration, we find that Indian reservations were created as permanent homelands. The need for individualized, fact-based quantifications of their water rights, however, remains unchanged. See *infra* P39.

⁶ By our rejection of the primary-secondary test in matters dealing with Indian reservations, we do not suggest that other principles articulated in the non-Indian federally reserved water rights cases are similarly inapplicable. See *supra* P11; *infra* PP29, 37, 49; see also *Gila III*, 195 Ariz. at 422, 989 P.2d at 750, P38.

strictly construed, the purposes of Indian reservations are necessarily entitled to broader interpretation if the goal of Indian self-sufficiency is to be attained." W. Canby, *American Indian Law* 245-46 (1981) (citation omitted); *see also* Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. 103-434, § 102(a)(1), 108 Stat. 4526 (declaring United States' policy "to promote Indian self-determination and economic self-sufficiency"); *Greely, 712 P.2d at 767-68* (distinguishing Indian and non-Indian federally reserved rights, stating that Indian rights "are given broader interpretation in order to further the federal goal of Indian self-sufficiency"). Parenthetically, even if the *New Mexico* [***29] test were to apply, tribes would be entitled to the full measure of their reserved rights because water use necessary to the establishment of a permanent homeland is a primary, not secondary, purpose.

D. Quantifying Winters Rights

P28 HN22 The *Winters* doctrine retains the concept of "minimal need" by reserving "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert, 426 U.S. at 141, 96 S. Ct. at 2071*. The method utilized in arriving at such an amount, however, must satisfy both present and future needs of the reservation as a livable homeland. *See Arizona I, 373 U.S. at 599-600, 83 S. Ct. at 1497-98*; [***30] *Winters, 207 U.S. at 577, 28 S. Ct. at 212*.

E. The PIA Standard

P29 The trial court in this matter held that each Indian reservation was entitled to "the amount of water necessary to irrigate all of the *practicably irrigable acreage* (P.I.A.) on that reservation." Order, *supra*, at 17 (emphasis in original). The PIA standard was developed by Special Master Rifking in *Arizona I, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963)*. That case dealt with the water rights of similarly-situated tribes in Arizona, California, and Nevada. Without much amplification, the Supreme Court declared:

We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the *practicably irrigable acreage* on the reservations.

Id. at 600, 83 S. Ct. at 1498. Other courts have since adopted the PIA standard in quantifying reserved water rights for Indian tribes. *See Walton, 647 F.2d at 47-48* (applying PIA "to [***31] provide a homeland for the Indians to maintain their agrarian society"); *Greely, 712*

P.2d at 764 (utilizing PIA to fulfill a reservation's agricultural purpose).

P30 HN23 PIA constitutes "those acres susceptible to sustained irrigation at reasonable costs." *Big Horn I, 753 P.2d at 101*. This implies a two-step process. First, it must be shown that crops can be grown on the land, considering arability and the engineering practicality of irrigation. *See id.* Second, [***317] [***78] the economic feasibility of irrigation must be demonstrated. *See generally Arizona v. California, 460 U.S. 605, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983)* [*Arizona II*] (adopting the Special Master's PIA analysis requiring this methodology); Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in Wyoming v. United States, 68 U. Colo. L. Rev. 683, 696 (1997)* (acknowledging that, since *Arizona II*, the economic feasibility requirement in PIA analysis has "become the norm"); Rusinek, *supra*, at 371 (detailing the PIA process utilized by the *Arizona II* Special Master). This is accomplished by subjecting proposed irrigation [***32] projects to a cost-benefit analysis, "comparing the likely costs of the project to the likely financial returns. If the latter outweighs the former, the project can be found economically feasible, and the underlying land 'practicably irrigable' . . ." Franks, *supra*, at 553.

P31 The United States and tribal litigants argue that federal case law has preemptively established PIA as the standard by which to quantify reserved water rights on Indian reservations. We disagree. As observed by Special Master Tuttle in his *Arizona II* report, "the Court did not necessarily adopt this standard as the universal measure of Indian reserved water rights. . . ." *Id. at 556 n.40* (quoting Special Master's Report at 90 (Feb. 22, 1981)). Indeed, nothing in *Arizona I* or *II* suggests otherwise.

P32 On its face, PIA appears to be an objective method of determining water rights. But while there may be some "value of the certainty inherent in the *practicably irrigable acreage* standard," *Big Horn I, 753 P.2d at 101*, its flaws become apparent on closer examination.

P33 The first objection to an across-the-board application of PIA lies in its potential [***33] for inequitable treatment of tribes based solely on geographical location. Arizona's topography is such that some tribes inhabit flat alluvial plains while others dwell in steep, mountainous areas. This diversity creates a dilemma that PIA cannot solve. As stated by two commentators:

There can be little doubt that the PIA standard works to the advantage of tribes inhabiting alluvial plains or

other relatively flat lands adjacent to stream courses. In contrast, tribes inhabiting mountainous or other agriculturally marginal terrains are at a severe disadvantage when it comes to demonstrating that their lands are practicably irrigable.

Mergen & Liu, *supra*, at 695. **HN24** Tribes who fail to show either the engineering or economic feasibility of proposed irrigation projects run the risk of not receiving any reserved water under PIA. See, e.g., [State ex rel. Martinez v. Lewis, 116 N.M. 194, 861 P.2d 235, 246-51 \(N.M. Ct. App. 1993\)](#) (denying water rights to the Mescalero Apache Tribe, situated in a mountainous region of southern New Mexico, for failure to prove irrigation projects were economically feasible). This inequity is unacceptable and inconsistent with [***34] the idea of a permanent homeland.

P34 Another concern with PIA is that it forces tribes to pretend to be farmers in an era when "large agricultural projects . . . are risky, marginal enterprises. This is demonstrated by the fact that no federal project planned in accordance with the Principles and Guidelines [adopted by the Water Resources Council of the Federal Government] has been able to show a positive benefit/cost ratio in the last decade [1981 to 1991]." Franks, *supra* note 2, at 578. **HN25** A permanent homeland requires water for multiple uses, which may or may not include agriculture. The PIA standard, however, forces "tribes to prove economic feasibility for a kind of enterprise that, judging from the evidence of both federal and private willingness to invest money, is simply no longer economically feasible in the West." *Id.*

P35 Limiting the applicable inquiry to a PIA analysis not only creates a temptation for tribes to concoct inflated, unrealistic irrigation projects, but deters consideration of actual water needs based on realistic economic choices. We again agree with the analysis of Justice Richard V. Thomas in *Big Horn I*:

I would be appalled [***35] . . . if the Congress . . . began expending money to develop water projects for irrigating these Wyoming lands when far more fertile lands in the midwestern states now are being removed [***318] [**79] from production due to poor market conditions. I am convinced that . . . those lands which were included as practicably irrigable acreage, based upon the assumption of the construction of a future irrigation project, should not be included for the purpose of quantification of the Indian peoples' water rights. They may be irrigable academically, but not as a matter of practicality. . . .

[753 P.2d at 119](#) (Thomas, J., dissenting).

P36 The PIA standard also potentially frustrates the requirement that federally reserved water rights be tailored to minimal need. Rather than focusing on what is necessary to fulfill a reservation's overall design, PIA awards what may be an overabundance of water by including every irrigable acre of land in the equation.

P37 For the foregoing reasons, we **HN26** decline to approve the use of PIA as the exclusive quantification measure for determining water rights on Indian lands.

F. Proper Factors for Consideration

P38 Recognizing that [***36] the most likely reason for PIA's endurance is that "no satisfactory substitute has emerged," Dan A. Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 Land & Water L. Rev. 631, 659 (1987), we now enter essentially uncharted territory. In *Gila III*, this court stated that **HN27** determining the amount of water necessary to accomplish a reservation's purpose is a "fact-intensive inquiry that must be made on a reservation-by-reservation basis." [195 Ariz. at 420, 989 P.2d at 748, P31](#). We still adhere to the belief that this is the only way federally reserved rights can be tailored to meet each reservation's minimal need.

P39 When *Big Horn I* went before the Supreme Court, one of the present state litigants, in an amicus brief, argued that there should be a "balancing of a myriad of factors" in quantifying reserved water rights. Rusinek, *supra*, at 397 (quoting Brief of Amicus Curiae Salt River Project Agric. Improvement & Power Dist. at 19, [Wyoming v. United States, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342 \(1989\)](#)). During oral argument in the present case, counsel for the Apache tribes made a similar [***37] argument. **HN28** Considering the objective that tribal reservations be allocated water necessary to achieve their purpose as permanent homelands, such a multi-faceted approach appears best-suited to produce a proper outcome.

P40 Tribes have already used this methodology in settling water rights claims with the federal government. One feature of such settlements has been the development of master land use plans specifying the quantity of water necessary for different purposes on the reservation. See, e.g., S. Rep. 101-479 (1990) (Fort McDowell Indian Community utilized a land use plan in conjunction with its water rights settlement based on agricultural production, commercial development, industrial use, residential use, recreational use, and wilderness).

P41 While we commend the creation of master land use plans as an effective means of demonstrating water

requirements, tribes may choose to present evidence to the trial court in a different manner. **HN29** The important thing is that the lower court should have before it actual and proposed uses, accompanied by the parties' recommendations regarding feasibility and the amount of water necessary to accomplish the homeland purpose.

[**38] In viewing this evidence, the lower court should consider the following factors, which are not intended to be exclusive.

P42 A tribe's history will likely be significant. Deference should be given to practices requiring water use that are embedded in Native American traditions. Some rituals may date back hundreds of years, and tribes should be granted water rights necessary to continue such practices into the future. An Indian reservation could not be a true homeland otherwise.

P43 In addition to history, the court should consider tribal culture when quantifying federally reserved rights. Preservation of culture benefits both Indians and non-Indians; for this reason, Congress has recognized the "unique values of Indian culture" in our society. 25 U.S.C. § 1902 (1994) (recognizing the importance of culture when placing Indian children in foster care); *see also* 20 U.S.C. § 7801 (1994) (finding that education [**319] [**80] should "build on Indian culture"). Water uses that have particular cultural significance should be respected, where possible. The length of time a practice has been engaged in, its nature (e.g., religious or otherwise), [**39] and its importance in a tribe's daily affairs may all be relevant.

P44 The court should also consider the tribal land's geography, topography, and natural resources, including groundwater availability. As mentioned earlier, one of the biggest problems with PIA is that it does not allow for flexibility in this regard. It has also been observed that "irrigation is one of the most inefficient and ecologically damaging ways to use water. . . . Increasing the use of water for irrigation runs counter to a historic trend in western water use--the transition from agricultural to less consumptive and higher-valued municipal and industrial uses." Rusinek, *supra*, at 410. This does not mean that tribes are prohibited from including agriculture/irrigation as part of their development plans. However, future irrigation projects are subject to a PIA-type analysis: irrigation must be both practically and economically feasible. Tribes should be free to develop their reservations based on the surroundings they inhabit. We anticipate that any development plan will carefully consider natural resources (including potential water uses), so that the water actually granted will be put to its best [**40] use on the reservation.

P45 In conjunction with natural resources, the court should look to a tribe's economic base in determining its water rights. Tribal development plans or other evidence should address, and the court should consider, "the optimal manner of creating jobs and income for the tribes [and] the most efficient use of the water. . . ." *Id. at 397* (citing Brief of Amicus Curiae Salt River Project Agric. Improvement & Power Dist. at 19, Wyoming v. United States, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342 (1989)). Economic development and its attendant water use must be tied, in some manner, to a tribe's current economic station. Physical infrastructure, human resources, including the present and potential employment base, technology, raw materials, financial resources, and capital are all relevant in viewing a reservation's economic infrastructure.

P46 HN30 Past water use on a reservation should also be considered when quantifying a tribe's rights. The historic use of water may indicate how a tribe has valued it. Logically, tribal prioritization of past water use will affect its future development. For example, a tribe that has never [**41] used water to irrigate is less likely to successfully and economically develop irrigation projects in the future. This does not mean that Indians may not use their water allocations for new purposes on a reservation. However, any proposed projects should be scrutinized to insure that they are practical and economical. Such projects should also be examined to determine that they are, in fact, appropriate to a particular homeland.

P47 HN31 While it should never be the only factor, a tribe's present and projected future population may be considered in determining water rights. We recognize that the Supreme Court has rejected any quantification standard based solely on the "number of Indians." Arizona II, 460 U.S. at 617, 103 S. Ct. at 1390. However, if a federally reserved water right is to be tailored to a reservation's "minimal need," as we believe it must, then population necessarily must be part of the equation. To act without regard to population would ignore the fact that water will always be used, most importantly, for human needs. Therefore, the number of humans is a necessary element in quantifying water rights. Such consideration is not at odds with the need [**42] to satisfy tribes' "future as well as . . . present needs." Arizona I, 373 U.S. at 600, 83 S. Ct. at 1498. **HN32** Population forecasts are common in today's society and are recognized and relied upon by the legal system. *See Hernandez v. Frohmler, 68 Ariz. 242, 257, 204 P.2d 854, 864 (1949)* (taking judicial notice of census population data); *State ex rel. Corbin v. Sabel, 138 Ariz. 253, 256, 674 P.2d 316, 319 (App. 1983)* (relying on a population estimate to find that a town could not file for incorporation). It is therefore proper

to use population evidence in conjunction with other factors in quantifying a tribe's *Winters* rights.

[*320] [**81] **P48** The state litigants argue that courts should act with sensitivity toward existing state water users when quantifying tribal water rights. *See New Mexico, 438 U.S. at 718, 98 S. Ct. at 3023* (Powell, J., dissenting in part) (concurring that the *Winters* doctrine "should be applied with sensitivity to its impact upon those who have obtained water rights under state law"). They claim that this is necessary because when a water source is fully appropriated, there will be a gallon-for-gallon [***43] decrease in state users' water rights due to the tribes' federally reserved rights. *See Arizona II, 460 U.S. at 621, 103 S. Ct. at 1392; New Mexico, 438 U.S. at 705, 98 S. Ct. at 3016. HN33* When an Indian reservation is created, the government impliedly reserves water to carry out its purpose as a permanent homeland. *See Winters, 207 U.S. at 566-67, 577, 28 S. Ct. at 208-09, 212.* The court's function is to determine the amount of water necessary to effectuate this purpose, tailored to the reservation's minimal need. We believe that such a minimalist approach demonstrates appropriate sensitivity and consideration of existing users' water rights, and at the same time provides a realistic basis for measuring tribal entitlements.

P49 Again, the foregoing list of factors is not exclusive. **HN34** The lower court must be given the latitude to consider other information it deems relevant to determining tribal water rights. We require only that proposed uses be reasonably feasible. As with PIA, this entails a two-part analysis. First, development projects need to be achievable from a practical standpoint--they must not be pie-in-the-sky ideas that [***44] will likely never reach fruition. Second, projects must be economically sound. When water, a scarce resource, is put to efficient uses on the reservation, tribal economies and members are the beneficiaries.

CONCLUSION

P50 We wish it were possible to dispose of this matter by establishing a bright line standard, easily applied, in order to

relieve the lower court and the parties of having to engage in the difficult, time-consuming process that certainly lies ahead. Unfortunately, we cannot.

P51 In a quote attributed to Mark Twain, it is said that "in the west, whiskey is for drinkin' and water is for fightin'." Nicholas Targ, *Water Law on the Public Lands: Facing a Fork in the River*, 12 Nat. Resources & Env't 14 (Summer 1997). While this remains true in parts of Arizona, it is our hope that interested parties will work together in a spirit of cooperation, not antagonism. "Water is far too ecologically valuable to be used as a political pawn in the effort to resolve the centuries-old conflict between Native Americans and those who followed them in settling the West." Rusinek, *supra*, at 412. This is especially so now, when the welfare and progress of [***45] our indigenous population is inextricably tied to and inseparable from the welfare and progress of the entire state.

P52 The relevant portion of the September 9, 1988 order is vacated and the trial court is directed to proceed in a manner consistent with this opinion.

THOMAS A. ZLAKET, Chief Justice.

CONCURRING:

STANLEY G. FELDMAN, Justice

NOEL A. FIDEL, Judge

WILLIAM E. DRUKE, Judge

JOHN PELANDER, Judge

Vice Chief Justice Charles E. Jones and Justices Frederick J. Martone and Ruth V. McGregor recused themselves; pursuant to *Ariz. Const. art. VI, § 3*, Judge Noel A. Fidel of Division One, Arizona Court of Appeals, Judge William E. Druke, and Judge John Pelander of Division Two, Arizona Court of Appeals, were designated to sit in their stead.

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

06/18/2002

CLERK OF THE COURT
FORM V000

HONORABLE EDDWARD BALLINGER, JR.

R. Luiszer
Deputy

CV-6417

FILED: July 16, 2002

In Re the General Adjudication
of All Rights to Use Water in
The Little Colorado River System
and Source

MINUTE ENTRY

A hearing was held on June 4, 2002 on various requests for relief filed by the Navajo Nation, Small Claimants, United States, Salt River Project, Arizona Public Service, Phelps Dodge Corporation, Aztec Land and Cattle Company, Abitibi Consolidated Sales Corporation, Tucson Electric Power Company, and the City of Flagstaff. After considering all the filed memoranda and argument of counsel,

IT IS ORDERED:

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1. The Navajo Nation's Motion to Direct the Special Master to Report on the Arizona Department of Water Resources' ("ADWR") Procedures to Provide Technical Assistance is DENIED. The court is satisfied with ADWR's avowal that it is taking all steps necessary to insure that those ADWR employees who have participated and are participating in settlement negotiations are not, directly or indirectly, supplying input concerning advice and assistance ADWR is providing this court and the special master. Further, the court, the special master, or the parties can address in future hearings the evidentiary issue raised by the motion.
2. The Navajo Nation's Motion to Set a Trial Date and Discovery Schedule for Show Low Lake, Show Low Irrigation Company, and Lakeside Irrigation Company is GRANTED, IN PART. Any stay or abeyance of litigation relating to Show Low Lake (WFR 033-56-ABC-027) is dissolved, and the parties may proceed with any needed discovery for the determination of water rights in that contested case.

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As to scheduling for hearing pretrial motions, setting a trial date and directing that a revised pretrial order be submitted, consideration of these requests must await the court's review of the report to be filed by ADWR concerning available resources and expected costs relating to preparation of hydrographic survey reports ("HSRs") and updates for Arizona's two water adjudications. After reviewing the report, the court will issue additional direction as to how this adjudication, including the Show Low contested case, will proceed. The relief requested concerning the Show Low Irrigation Company (WFR 033-56-074) and the Lakeside Irrigation Company (WFR 033-56-073) matters, is DENIED, without prejudice, to the request being resubmitted after June 1, 2003.

3. The preparation of a comprehensive HSR for all Hopi lands and for which the Tribe or the United States on its behalf claim a federal or state law water right will most efficiently accomplish the objectives of this

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adjudication. For this reason, in preparing the Hopi HSR, ADWR is directed to investigate all statements of claimant for all reservation and non-reservation lands for which the Hopi Tribe or the United States on behalf of the Tribe claim water rights under federal or state law.

4. In accordance with the offer made in open court, the Hopi Tribe and the United States on behalf of the Tribe shall identify any allotted lands derived from the Hopi Reservation or from non-reservation lands, or that are held by tribal members, on or before Friday, August 16, 2002, or thereafter within forty-five (45) days of transfer. This disclosure shall also disclose the respective water right claims attributable to any allotted lands. The information shall be submitted to ADWR, and a notice of submission filed with the court. The parties are asked to work out as much as possible any issues that might arise relating to further disclosure of the information.

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5. The Hopi Tribe and the United States shall file new or amended statements of claimant for all reservation and non-reservation lands for which the Tribe or the United States on behalf of the Tribe claim water rights under federal or state law on or before Friday, December 20, 2002. The purpose of this deadline is to identify and update all the water right claims that ADWR should investigate so that the HSR reports current information. The Hopi Tribe and the United States are not precluded from amending their statements of claimant later in accordance with A.R.S. section 45-254(E).

6. The court will direct ADWR to complete HSRs and other tasks by separate order to be issued after reviewing ADWR's report due on July 26, 2002. In undertaking the work ordered, including the preparation of the Hopi HSR, ADWR shall take into consideration the directives of the Arizona Supreme Court contained in the interlocutory review decisions rendered in *In re the General Adjudication of All Rights to Use Water in the Gila River*

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System and Source. The court specifically incorporates the directions set forth in the order entered in the Gila River Adjudication dated April 12, 2002, concerning the contents of the Gila River Indian Reservation ("GRIR") HSR, which directed ADWR "to evaluate each of the factors listed by the Arizona Supreme Court in the *Gila V* decision, 201 Ariz. 307, 35 P.3d 68 (2001), in connection with the preparation of the GRIR HSR, to report in accordance with A.R.S. section 45-256(B) proposed water right attributes for each claim investigated, and to examine the physical factors of water use and supply and land arability."

7. In preparing the Hopi Tribal Lands Hydrographic Survey Report ("Hopi HSR"), ADWR shall give due consideration to the information and items requested to be included in an Indian lands HSR by the parties in their comments to ADWR's Preliminary Hydrographic Survey Report for Indian Lands in the Little Colorado River System (September

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1994) and Report Re: Scope of Indian Lands HSR (August 10, 2000). The court makes the following directives:

- A. The Hopi HSR shall contain hydrological and technical information about available surface water and groundwater supplies and resources to meet each claim.
- B. The Hopi HSR shall contain comprehensive and detailed information about historic, current and existing water uses.
- C. The Hopi HSR shall report all statements of claimant, including the most recent amended statements, filed by both the Hopi Tribe and by the United States on its behalf.
- D. The Hopi HSR shall report any statement of claimant filed by claimants other than the Hopi Tribe or the United States on behalf of the Tribe that are associated with the Tribe's reservation and non-reservation lands.
- E. The Hopi HSR shall identify statements of claimant associated with fee owned in-holdings, if any, but

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these claims will not be adjudicated as part of the Hopi HSR.

F. The Hopi HSR shall report water rights claimed by the Hopi Tribe or the United States on the Tribe's behalf that may claim a priority earlier than the date the reservation was created.

G. The Hopi HSR shall report ADWR's proposed water right attributes, pursuant to A.R.S. section 45-256(B), for claims based on Indian reserved rights, federal non-Indian reserved rights, and state law for historic, current and existing water uses. ADWR will not be required to report proposed water right attributes for proposed future water uses.

H. The Hopi HSR shall contain adequate descriptive and technical information about proposed future uses of water on both the Tribe's reservation lands and non-reservation lands. Pursuant to Pretrial Order No. 2 (August 15, 1988) and as modified in Pretrial Order No. 3 (January 27, 1994), ADWR shall not include

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descriptions or opinions of the feasibility, profitability or practicability of future uses of water for irrigation or other uses, but ADWR may survey the already existing literature on that issue and list what previous studies have been done. The information shall be adequate to, as stated in Pretrial Order No. 2, "serve as a basis for evaluating claims of future uses."

I. ADWR should conduct field investigations when and where ADWR deems necessary to verify claims, water uses or technical reports prepared by others. If any issues relating to ADWR's access to Hopi lands should arise, they should be brought to the court's attention, although the court does not anticipate such issues arising.

J. ADWR shall use all available relevant technical reports and try to find the most recent reports or the ones having the most recent data or information.

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K. The parties are encouraged to provide technical and other information to ADWR during the course of preparing the Hopi HSR. Voluntary production of information will not limit a party's right to amend a statement of claimant or to present evidence related to an objection, and will not require ADWR to use or not use information supplied.

L. ADWR shall not be required to prepare the Hopi HSR in accordance with the "simplifying assumptions" identified by Special Master Thorson in a memorandum dated September 23, 1994, and released with ADWR's Preliminary Hydrographic Survey Report for Indian Lands in the Little Colorado River System (September 1994). If ADWR uses any of the simplifying assumptions in preparing the Hopi HSR, ADWR shall identify the assumptions used and the reasons for their use.

M. ADWR is expected to adhere to its estimated timeline of two years to complete the Hopi HSR.

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8. Some of the factors to be considered by ADWR as a result of this order require that ADWR undertake economic analysis and consider proposed uses of water within the Hopi Tribal lands that may not be known to ADWR. The court expects that the Hopi Tribe and the United States will provide ADWR, on a cooperative and ongoing basis, with information and supporting documentation relating to the Tribe's current and future land and water use planning within the area affected by the Hopi HSR. If this process needs clarification, the matter can be considered at the October 8, 2002 hearing in this case.
9. ADWR shall file its report regarding available and needed staff and other resources and expected costs related to its technical advice to the court and the special master, both in this adjudication and in the Gila River Adjudication, on or before Friday, July 26, 2002. The court asks ADWR to include in its report ADWR's capability to provide a central repository of information

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for this adjudication. The report should describe with detail the staff allocations and all expected costs.

10. The Joint Motion for Confirmation of Binding Effect, as Between Signatory Parties, of Certain Stipulations Addressing Specified Water Rights Claims is GRANTED, and the stipulations as corrected and filed with the court are approved. The stipulations shall bind each signatory, but not any other party in this adjudication, ADWR, this court, or the special master in any respect. ADWR shall not be precluded from technically analyzing the information contained in the stipulations or reporting the information and its determinations in technical reports. The movants shall promptly submit to this court a form of order similar to the one they filed on March 27, 2002, but stating that the parties to a written agreement modifying a stipulation "shall submit the modified stipulation to this Court for review and approval."

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11. The Joint Motion for Clarification on Use of Claimants' Filing Fees for Reimbursement of Expenses Incurred by Settlement Judge is deemed moot in light of the Arizona legislature's recent amendment to A.R.S. section 45-255(B), effective on August 22, 2002, which serves as evidence that the legislature intends that the funds of claimants' filing fees be used to pay more than the compensation and expenses of the special master.
12. Some of the parties seek resolution of questions relating to the issues of whether the Hopi Tribe has a viable claim to the mainstem of the Little Colorado River, the purported effect of terms contained in the Navajo-Hopi Land Dispute Settlement Act of 1996, and the preclusive effect of prior decrees or legislation. The resolution of these issues may necessitate determinations relating to matters identified in the preliminary Hopi HSR.

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All of the parties have urged the court to consider and resolve the claims held by and for Indian Tribes prior to addressing other claims. Toward this goal, the court directs that any party who believes that prior agreements, decrees, or federal and state legislation, as well as other issues properly addressed by expedited disposition, have adjudicated, settled or otherwise significantly affected any part of the reserved water right claims held by the Hopi Tribe, Navajo Nation, San Juan Southern Paiute Tribe, and the Zuni Pueblo shall file a disclosure on or before Friday, November 22, 2002, setting forth each matter the party believes affects the relevant reserved water rights claim and a brief factual summary of the basis for each assertion.

Each disclosure filed shall list the relevant documents and the names and addresses of any witnesses, including expert witnesses, the party believes will be called to substantiate the claim. The disclosure shall contain a

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fair description of the substance of expected testimony. For any expert witnesses, the disclosure shall include a copy of the expert's curriculum vitae and a list of case names and dates of all prior testimony in water right cases. No copies of the listed documents shall be attached to the disclosure statement served on the parties or the court. The disclosure shall contain a well considered statement as to whether or not that party believes any issue can be resolved by summary judgment based on the existing documents or whether an evidentiary hearing will be needed and shall state the time required to prepare such motions or for an evidentiary hearing.

13. A hearing shall be held on Tuesday, October 8, 2002, at 9:30 a.m., in the Apache County Courthouse. The court will hear any issues that may impede the timely progress of the Hopi HSR and requests that would expedite its preparation.

* * * *

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A copy of this minute entry is mailed to all parties on the
Court-approved LCR mailing list dated February 7, 2002.

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05/08/2003

CLERK OF THE COURT
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HONORABLE EDDWARD BALLINGER, JR.

R. Luiszer
Deputy

CV-6417

FILED: May 9, 2003

In Re the General Adjudication
of All Rights to Use Water in the
Little Colorado River System and
Source

MINUTE ENTRY

The Court has received requests from the United States and the Hopi Tribe for an extension, until January 30, 2004, of the time during which each entity may file its amended statement of claimant.

IT IS ORDERED granting both requests. Each amended statement of claimant shall be filed on or before January 30, 2004. The Court notes that it is highly unlikely any additional extension requests will be granted.

* * * *

A copy of this minute entry is mailed to all parties on the Court-approved LCR mailing list dated May 6, 2003.

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

10/01/2004

CLERK OF THE COURT
FORM V000

HONORABLE EDDWARD BALLINGER, JR.

R. Luiszer
Deputy

CV-6417

FILED: November 4, 2004

In Re the General Adjudication
of All Rights to Use Water in the
Little Colorado River System and
Source

MINUTE ENTRY

3:15 p.m. Present are the following: John Weldon and Mark McGinnis representing Salt River Project, Anthony Fines representing Gila Valley Irrigation District and Verde Valley Communities, Joe P. Sparks representing San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation, Steve Wene representing City of Safford, City of Flagstaff, and Rio Rico Properties, Inc., Janet Ronald from Arizona Department of Water Resources, Peter Fahmy representing Office of the Solicitor, U.S. Department of the Interior, David Brown representing various parties, William Staudenmaier representing Arizona Public Service, Lauren Caster representing Abitibi Consolidated Sales and Arizona Water Company, Scott McElroy representing Navajo Nation, Perri Benemelis from the City of Phoenix, Shanti Rosset and Graham Clark representing the Arizona Attorney General's Office, Colin Hampson, Harry Sachse, R. Sekayaumptewa and Kim Honani, Sr. representing the Hopi Tribe, John Lacy representing BHP Copper, Inc., Tim Pierson representing Gila River Indian Community, Lin Fehlmann representing Bureau of Land

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Management, Gregg Houtz representing Arizona Department of Water Resources, Mike Pearce representing CAWCD, Vanessa Boyd Willard and Stephen Bartell representing the U.S. Department of Justice and Mary Ann Joca representing the U.S. Department of Agriculture Forest Service. Special Master, George A. Schade, Jr. and his assistant, Kathy Dolge, are present.

Court Reporter, Monica Hill, is present.

This is the time set for a meeting with the Little Colorado River Adjudication Settlement Committee.

Jan Ronald addresses the Court on the direction ADWR should take regarding the Hopi Tribe HSR. Harry Sachse and John Weldon address the Court. The Court directs that ADWR shall proceed with the main reservation lands.

Discussion is held that a settlement judge is no longer available for this case. The possibilities of others to preside over the settlement discussions are further discussed.

Harry Sachse, John Weldon, Gregg Houtz, Stephen Bartell, and David Brown address the Court.

The Court suggests that the Settlement Committee locate a settlement judge or mediator to preside over the discussions and agreed to inquire as to whether there is a judge within the state that is able to assume that role.

Discussion is held on the format of hydrographic survey reports for non-Indian federal lands.

Peter Fahmy addresses the Court on procedures to address non-Indian federal reserved water right claims.

3:46 p.m. Court stands at recess.

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APACHE COUNTY

10/01/2004

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R. Luiszer
Deputy

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* * * *

A copy of this minute entry is mailed to all parties on the Court-approved LCR mailing list dated October 21, 2004.

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

02/25/2009

CLERK OF THE COURT
FORM V000

HONORABLE EDDWARD BALLINGER, JR.

R. TOMLINSON
DEPUTY

FILED: 03/02/2009

In Re the General Adjudication of
All Rights to Use Water in the Little
Colorado River System and Source

CV-6417

In Re Motions for Summary Judgment on
Water Rights Claims By and For the Hopi
Tribe to Surface Streams That Do Not
Traverse Any Part of the Hopi Reservation

MINUTE ENTRY

The court has considered the positions of the parties with respect to the question of whether the Hopi Tribe is precluded from claiming a right to water from surface streams located within the Little Colorado River Basin, but which do not traverse any part of the Hopi Reservation. In answering this question, some parties have requested that the court hold that claimants may never assert rights to water that is not adjacent to or traverses the claimant's land unless the claimant has a legal right to physical access to the water source. After much pondering, the court concludes that this question may have to be addressed on another occasion, but it need not be considered to resolve the pending motions directed to the Hopi Tribe's claims.

In this case, the court agrees with those asserting that the Hopi Tribe's claims in this adjudication arise under unusual, if not unique, circumstances. The Hopi Tribe claims the right to water that it can only access by intruding onto lands owned by others, particularly the Navajo Nation. These two tribes have been involved in disputes and litigation regarding their respective land rights for decades.

The United States Congress and the federal courts have undertaken to define the rights of the Navajo Nation and the Hopi Tribe by virtue of the reservations created in 1882 and 1934 and their related settlement acts, as well as by numerous rulings entered by the Indian Claims, federal district, and appellate courts. These pronouncements are not subject to review by this adjudication court and do not support the Hopi Tribe's claim to water sources located outside its reservation.

The court also finds that the Hopi Tribe cannot overcome the legal impediments to its claims by asserting the right to an easement by prescription or necessity. The Tribe has not pointed to any directive by any tribunal that would justify a finding that the adjudication court can ignore sovereign rights and hold that the Navajo Nation does not have the power to exclude the Hopi Tribe, or others, from the Nation's lands.

In summary, the court agrees with those movants who assert that the rights of the Hopi Tribe and the Navajo Nation have been carefully considered and resolved by legislative acts and federal court litigation. These determinations dictate the outcome with respect to the pending motions. Therefore,

IT IS ORDERED granting the Navajo Nation's motion for summary disposition and declaring that the Hopi Tribe is precluded from asserting water right claims in this adjudication to the extent such claims seek the right to water sources located within the Little Colorado River Basin that neither abut nor traverse Hopi lands.

IT IS FURTHER ORDERED deeming the remaining pending motions requesting a declaration limiting the Hopi Tribe's claims in this adjudication moot in light of this order.

IT IS FURTHER ORDERED signing this minute entry as an order of the Court.

/s/ Eddward P. Ballinger, Jr.
JUDICIAL OFFICER OF THE SUPERIOR COURT

A copy of this minute entry is mailed to all parties on the Court-approved mailing list for Little Colorado River Adjudication Civil No. 6417 dated January 23, 2009.

1 GEORGE A. SCHADE, JR.
Special Master
2 Maricopa County Superior Court
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Phoenix, Arizona 85003-2205
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Email: schadeg099@superiorcourt.maricopa.gov
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6
7 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF APACHE

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

DATE: April 24, 2013

No. CV 6417

11 In re Hopi Tribe Priority

Contested Case No. CV 6417-201

12 REPORT OF THE SPECIAL MASTER;
13 MOTION FOR ADOPTION OF REPORT;
14 AND NOTICE FOR FILING OBJECTIONS
15 TO THE REPORT

16 CONTESTED CASE NAME: *In re Hopi Tribe Priority*.

17 HSR INVOLVED: None.

18 DESCRIPTIVE SUMMARY: The Special Master files his report concerning the determinations of
19 seven issues regarding the priority of water rights claimed by the Hopi Tribe. The report contains
findings of fact, conclusions of law, and recommendations. Objections to the report must be filed
with the Clerk of the Superior Court of Apache County on or before **Monday, July 1, 2013**.
20 Responses to objections are due on or before **Friday, August 16, 2013**. A hearing on any objections
will be held at a time and place to be set by the Court.

21 NUMBER OF PAGES: 77.

22 DATE OF FILING: April 24, 2013 (sent to the Clerk of the Apache County Superior Court by
23 FedEx).

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1 **I. INTRODUCTION AND SUMMARY**

2 This report addresses the seven issues the Special Master designated for briefing arising from the
3 claims of the Hopi Tribe and the United States to water rights for the Hopi Indian Reservation located in
4 Northern Arizona. The Hopi Tribe of Arizona is a federally recognized Indian tribe.¹ The report
5 contains a chronology of the proceedings, findings of fact, conclusions of law, recommendations, a
6 motion for adoption of the report, and time lines for filing objections to the report and responses.

7 The Special Master’s determinations are summarized as follows:

8 1. The Hopi Tribe holds water rights with a priority of time immemorial only in the area
9 within Land Management District 6. The Hopi Tribe does not hold time immemorial water rights on
10 other tribal lands within the 1882 Executive Order Reservation or Moenkopi Island. Its aboriginal
11 water rights were incidents of aboriginal title, and the extinguishment of the Hopi Tribe’s aboriginal
12 title, as determined by the Commission, terminated aboriginal water rights to those lands.

13 2. The Hopi Tribe does not hold water rights with a priority date of 1848 as a result of the
14 Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1848). The treaty did not create or establish water
15 rights but protected existing property rights within the lands acquired by the United States.

16 3. The Hopi Tribe holds an implied reserved water right with a priority of December 16,
17 1882, to the Hopi Partitioned Lands within the 1882 Executive Order Reservation. President Chester
18 A. Arthur’s Executive Order of December 16, 1882, impliedly reserved water for the Hopi Tribe.

19 4. The Hopi Tribe holds an implied reserved water right to Moenkopi Island with a
20 priority of June 14, 1934, pursuant to the Act of June 14, 1934, 48 Stat. 960.

21 The Special Master does not make any findings of fact, conclusions of law, and
22 recommendations regarding the priority of water rights for the Hopi Industrial Park and the Aja, Clear

23 _____
24 ¹ See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian
Affairs, 74 Fed. Reg. 40,218 and 40,220 (Aug. 11, 2009), latest version available at www.federalregister.gov.

1 Creek, Drye, and Hart Ranches. The Special Master recommends that the Court direct the Arizona
2 Department of Water Resources (“ADWR”) to complete the investigations of the claimed water rights
3 for the four ranches.

4 The priorities of the Hopi Tribe’s water rights in the lands within the boundaries of the 1882
5 Executive Order Reservation and Land Management District 6 are not affected by the reported
6 conveyances and reacquisitions of lands by the United States beginning in the 1860s.

7 5. The Hopi Tribe is precluded from asserting claims of aboriginal title that were litigated
8 and determined by the Indian Claims Commission, but is not precluded from asserting a reserved
9 water right. Non-parties to the prior litigation before the Indian Claims Commission and partition
10 cases may assert claim and issue preclusion.

11 6. The settlement of the Hopi Tribe’s action before the Indian Claims Commission was an
12 accord and satisfaction of claims to aboriginal title to land but not water rights.

13 7. This issue cannot be resolved by summary judgment due to genuine disputes over
14 material facts and the lack of an adequate record to support summary relief.

15 **II. CHRONOLOGY OF PROCEEDINGS**

16 This contested case was initiated on September 8, 2008. Its progress has been affected by
17 settlement negotiations, the Hopi Tribe’s substitution of legal counsel and replacement of an expert
18 witness, and briefing of the issue concerning the Treaty of Guadalupe Hidalgo separate from the
19 others.

20 **A. Case Initiation Order and Designation of Issues for Briefing**

21 On March 19, 2008, after considering groupings of issues and comments submitted by parties,
22 the Court undertook to address the Hopi Tribe’s water rights claims. As part of that undertaking, the
23 Court directed “the Special Master to commence proceedings in accordance with the practices and
24

1 procedures of the Special Master to resolve the question of whether the claims to water rights asserted
2 by, or on behalf of the Hopi Tribe in this adjudication have a priority of ‘time immemorial’ or are
3 otherwise senior to the claims of all other claimants.”²

4 After reviewing the proposals of parties, on September 8, 2008, the Special Master issued a
5 Case Initiation Order and Designation of Issues for Briefing (“Case Initiation Order”) organizing this
6 case, designating seven issues for briefing, and setting time lines for disclosure statements, expert
7 reports, discovery, and dispositive motions.

8 The following issues were designated for briefing:

- 9 A. Does the Hopi Tribe hold water rights with a priority of time immemorial?
10 B. Does the Hopi Tribe hold water rights with a priority date of 1848 as a result of
the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1848)?
11 C. Does the Hopi Tribe possess water rights with a priority date of 1882 as a result
12 of the establishment of the Hopi Reservation under the Executive Order of December
16, 1882?
13 D. Does the Hopi Tribe possess water rights with another date of priority as a result
of Congressional acts and court decisions adding property to the Hopi Reservation?
14 E. Does claim or issue preclusion or both preclude any claims by or on behalf of
15 the Hopi Tribe to water rights more senior to those held by any other claimant?
16 F. Does accord and satisfaction preclude any claims by or on behalf of the Hopi
Tribe to water rights more senior to those held by any other claimant? And,
17 G. May the Hopi Tribe assert a priority that is senior to the Navajo Nation for
18 water resources that are shared by both tribes in light of the process for the allocation of
resources established by the Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403, and
the Act of December 22, 1974, Pub. L. No. 93-531, 88 Stat. 1712, as amended?³

19 As a result of requests as the matter proceeded, the order’s schedules were modified seven times.

20 **B. Disclosure Statements**

21 The Case Initiation Order limited disclosure statements to matters concerning the issues
22 designated for briefing. Parties had a continuing duty to disclose as required by Arizona Rule of Civil
23

24 ² Order at 2 (Mar. 19, 2008). The text is available at <http://tinyurl.com/9uaahst>.

1 Procedure 26.1(b)(2).

2 Arizona Public Service Company (“APS”), Catalyst Paper (Snowflake) Inc., City of Flagstaff,
3 Freeport-McMoRan Corporation (“Freeport-McMoRan”), Hopi Tribe, Navajo Nation, Salt River
4 Project (“SRP”), and the United States filed disclosure statements. A group of claimants who
5 designated themselves the “LCR Claimants” joined in the disclosure statement of Catalyst Paper
6 (Snowflake) Inc. Catalyst Paper (Snowflake) Inc., Hopi Tribe, Navajo Nation, and the United States
7 submitted supplemental disclosures. Historical documents, books, reports, journals, judicial records,
8 executive documents, and congressional acts were disclosed. Some 6,616 documents were disclosed.

9 ADWR developed and maintained on its internet site an electronic data base and index of all
10 disclosed documents. All disclosing parties were directed to submit to ADWR an electronic copy,
11 paper copy, and index of disclosed documents. ADWR made available to any claimant, upon payment
12 of the standard fee, a copy of a disclosed document.

13 **1. Navajo Nation’s Motion to Strike Supplemental Disclosure**

14 On April 13, 2012, the Navajo Nation moved to strike the Hopi Tribe’s third supplemental
15 disclosure. The Special Master denied the motion.⁴

16 **C. Discovery and Exchange of Expert Reports**

17 The Case Initiation Order limited discovery to matters concerning the issues designated for
18 briefing. Discovery was allowed according to Arizona Rules of Civil Procedure 26 through 37, and as
19 applicable, pretrial orders issued in the Little Colorado River Adjudication and the Rules for
20 Proceedings Before the Special Master.

21 The Hopi Tribe and the Navajo Nation deposed expert witnesses. These parties and the United
22 States filed and exchanged reports prepared by expert witnesses. This process was extended as the

23 ³ Special Master’s Order at 3-4 (Sept. 8, 2008). The text is available at <http://tinyurl.com/9vsotcw>.

24 ⁴ Special Master’s Order (June 18, 2012). The text is available at <http://tinyurl.com/acjnbb1>.

1 Hopi Tribe had to replace an expert witness for reasons unrelated to this case.

2 **1. Hopi Tribe’s Motion in Limine**

3 On August 10, 2012, the Hopi Tribe filed a Motion in Limine and Request for Oral Argument
4 to exclude evidence of the following matters:

- 5 1. Navajo presence in the Little Colorado River Basin;
- 6 2. Navajo water use in the Little Colorado River Basin;
- 7 3. The creation of the Navajo Reservation;
- 8 4. The homeland intent of the Navajo Reservation;
- 9 5. The federal government’s efforts to manage the Navajo Nation’s lands;
- 10 6. The federal government’s efforts to catalogue and develop water resources on
the Navajo Reservation and for the benefit of the Navajo inhabitants in the Little
Colorado River Basin;
- 11 7. The trust obligation of the United States to the Navajo Nation; and
- 12 8. The location of Navajo members within the boundaries of the 1882 Reservation.

13 The Special Master denied the motion.⁵

14 **D. Motions for Summary Judgment**

15 Catalyst Paper (Snowflake) Inc., Hopi Tribe, Navajo Nation, and the United States filed
16 motions for full or partial summary judgment on one or more of the issues designated for briefing.
17 These parties filed various responses and replies. No other parties submitted dispositive motions.

18 APS, City of Flagstaff, Freeport-McMoRan, LCR Claimants, and SRP joined in the motions,
19 responses, and replies filed by Catalyst Paper (Snowflake) Inc. APS and Freeport-McMoRan partially
20 joined in the City of Flagstaff’s statement of facts in support of its joinder in Catalyst Paper
21 (Snowflake) Inc.’s response to the Hopi Tribe’s motion for summary judgment.

22 **E. Briefing and Oral Argument of Motions for Summary Judgment**

23 Telephonic conferences were held on June 2, 2008, May 5, 2010, October 14, 2010, April 19,
24

1 2011, September 7, 2011, and March 6, 2012. The status of settlement negotiations, compliance with
2 time lines, and procedural matters were discussed at the conferences.

3 On October 24, 2012, the Special Master heard oral argument on all summary judgment
4 motions for a full court day. Catalyst Paper (Snowflake) Inc., Hopi Tribe, Navajo Nation, and the
5 United States presented opening, rebuttal, and closing arguments. The City of Flagstaff gave rebuttal
6 argument. The Special Master adopted the participants' proposed schedule of presentation.

7 **1. Hopi Tribe's Motion to Strike Supplemental Citation**

8 On October 17, 2012, a week prior to oral argument, the Special Master received from Catalyst
9 Paper (Snowflake) Inc. three supplemental citations to federal decisions (copies of the opinions were
10 not included). In preparation for the oral argument, the Special Master read the decisions.

11 On Friday, November 30, 2012, the Special Master received a letter from the Hopi Tribe's
12 attorney requesting the Special Master to "disregard" the supplemental citations. The letter contained
13 responses to the three decisions. On Monday, December 3, 2012, the Special Master directed counsel
14 to file a motion and deliver a copy to all persons listed on the Court approved mailing list for this case.

15 On January 14, 2013, the Special Master received a copy of the Hopi Tribe's motion to strike
16 the supplemental citation of legal authority. Catalyst Paper (Snowflake) Inc. responded. The Hopi
17 Tribe replied.

18 The Hopi Tribe requested leave to respond to the citations if the Special Master decided to
19 accept the supplemental citations, and "[i]n anticipation of the court granting the Hopi Tribe leave to
20 respond, it has taken the liberty of including its response to the Supplemental Citations."⁶

21 The Arizona Supreme Court's opinion in *Stone v. Arizona Highway Commission*, 93 Ariz. 384,
22 395, 381 P.2d 107, 114 (1963) is instructive for this motion. No finding is made whether Rule 12(f)
23

24 ⁵ Special Master's Order (Sept. 24, 2012). The text is available at <http://tinyurl.com/an8v7gc>.

1 applies, but the Supreme Court crafted two criteria that resolve this motion, namely, (1) “it is clear that
2 [the material being struck] can have no possible relation to the subject matter of the litigation,” and (2)
3 “the movant can show he is prejudiced by the [material].”

4 The cited decisions are related to the issues being briefed, and the citations have not prejudiced
5 the Hopi Tribe. The Hopi Tribe’s Motion to Strike Catalyst Paper (Snowflake) Inc.’s Supplemental
6 Citation of Legal Authority is denied; its request to respond is granted and is considered complete.

7 **2. Hopi Tribe’s Request for a Draft Report**

8 In a post-oral argument brief, the Hopi Tribe requested the Special Master to submit a draft
9 report. Rule 53(f) states: “Before filing a report, a master may submit a draft of the report to the parties
10 for the purpose of receiving comments.” In 2005, when the Arizona Supreme Court considered
11 proposed amendments to Rule 53, the Special Master successfully argued to retain this provision and,
12 in fact, he suggested the current language of Rule 53(f).⁷

13 Although a reasonable request, a draft report will unnecessarily delay this case without
14 providing a benefit to effective judicial management. The request is denied.

15 **III. STANDARD FOR SUMMARY JUDGMENT**

16 Arizona Rule of Civil Procedure 56(a) (effective January 1, 2013) states that the “court shall
17 grant summary judgment if the moving party shows that there is no genuine dispute as to any material
18 fact and the moving party is entitled to judgment as a matter of law.” The Arizona Supreme Court has
19 held that summary judgment “should be granted if the facts produced in support of the claim or
20 defense have so little probative value, given the quantum of evidence required, that reasonable people
21 could not agree with the conclusion advanced by the proponent of the claim or defense.”⁸

22
23 ⁶ Hopi Tribe Memo. in Support of its Motion to Strike Catalyst Paper (Snowflake) Inc.’s Supp. Citation of
Legal Authority at 5 (Jan. 11, 2013).

24 ⁷ Ariz. Sup. Ct. No. R-05-0001 (Sept. 27, 2005). The amendment became effective on January 1, 2006.

⁸ *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

1 The United States Supreme Court has held that:

2 By its very terms, [the standard now found in Rule 56(a)] provides that the mere
3 existence of *some* alleged factual dispute between the parties will not defeat an
4 otherwise properly supported motion for summary judgment; the requirement is that
5 there be no *genuine* issue of *material* fact (emphasis in original).

6 As to materiality, the substantive law will identify which facts are material. Only
7 disputes over facts that might affect the outcome of the suit under the governing law
8 will properly preclude the entry of summary judgment. Factual disputes that are
9 irrelevant or unnecessary will not be counted....

10 [S]ummary judgment will not lie if the dispute about a material fact is “genuine,” that
11 is, if the evidence is such that a reasonable jury could return a verdict for the
12 nonmoving party.⁹

13 Conclusion of Law No. 1. The arguments made by the prevailing parties do not encompass
14 genuine disputes about material facts that preclude summary judgment, and the prevailing party is
15 entitled to judgment as a matter of law.

16 In complex litigation, the Special Master “needs to be concerned with whether the record is
17 adequately developed to support summary judgment.”¹⁰ This is an important check when considering a
18 motion for summary disposition.

19 The briefing covered the following areas associated with the Hopi Tribe:

- 20 1. Land Management District 6
- 21 2. Hopi Partitioned Lands within the 1882 Executive Order Reservation
- 22 3. Moenkopi Island
- 23 4. Hopi Industrial Park, and the
- 24 5. Aja, Clear Creek, Drye, and Hart Ranches

25 The priority of water rights concerning Land Management District 6 will be considered in
26 Section IV, Hopi Partitioned Lands in Section VI, and Moenkopi Island, Hopi Industrial Park, and the

27 ⁹ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); see *Celotex Corp. v. Catrett*, 477 U.S. 317,
28 322-23 (1986).

1 four ranches in Section VII.

2 **IV. DOES THE HOPI TRIBE HOLD WATER RIGHTS WITH A PRIORITY OF TIME**
3 **IMMEMORIAL?**

4 **A. Land Management District 6**

5 Land Management District 6 is wholly located inside the boundaries of the lands described in
6 President Chester A. Arthur's Executive Order of December 16, 1882, generally referred in this
7 proceeding and in this report as the 1882 Executive Order Reservation.

8 The litigation known as *Healing v. Jones* "was instituted in the United States District Court for
9 the District of Arizona on August 1, 1958, to obtain a determination of the rights and interests of the
10 Navajo Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive Order of
11 December 16, 1882. The instituting of such an action was authorized by Congress by the Act of July
12 22, 1958, Pub. L. 85-547, 85th Cong., 1st Sess., 72 Stat. 402."¹¹ The Hopi Tribe was plaintiff. The first
13 decision, designated *Healing I*, addressed jurisdictional issues. *Healing II* addressed substantive
14 matters.

15 *Healing II* described the creation of Land Management District 6:

16 On June 18, 1934, Congress enacted the Indian Reorganization Act, 48 Stat. 984. Under
17 § 6 of that act, the Secretary of the Interior was directed to make rules and regulations
18 for the administration of Indian reservations with respect to forestry, livestock, soil
erosion and other matters. Pursuant to the authority thus conferred, the Commissioner,
with the approval of the Secretary, on November 6, 1935, issued regulations affecting
the carrying capacity and management of the Navajo range. ...

19 These regulations provided a method of establishing land management districts ...

20 Early in 1936, boundaries for these land management districts were defined. ... Several
21 such districts (Nos. 1, 2, 3, 4, 5 and 7) included parts of the Navajo reservation and part
of the 1882 reservation.

22 ¹⁰ ANNOT. MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.34 (Summary Judgment) (2001 and 1995).

23 ¹¹ *Healing v. Jones*, 174 F. Supp. 211, 213 (D. Ariz. 1959) ("*Healing I*"). The United States argued that the
24 district court lacked jurisdiction because the action presented a political and not a judicial question. The
argument was rejected. The district court also ruled on preliminary motions.

1 **District 6, which laid entirely within the 1882 reservation, was specifically**
2 **designed to encompass the area occupied exclusively by Hopis.** (Emphasis added.)¹²

3 From 1936 through April 24, 1943, there were several meetings, conferences, and reports
4 concerning the boundaries of Land Management District 6. “On April 24, 1943, the Office of Indian
5 Affairs approved the boundaries ... [of Land Management District 6] ... as recommended by the two
6 [“Hopi and Navajo”] superintendents on November 20, 1942.”¹³ The boundaries approved on April
7 24, 1943, encompassed 631,194 acres of land.

8 Under the judgment entered in *Healing II*, dated September 28, 1962, “about one quarter of the
9 1882 reservation, consisting of district 6 as defined in 1943, will be completely removed from
10 controversy, having been awarded exclusively to the Hopi Indian Tribe.”¹⁴ The Ninth Circuit Court of
11 Appeals would later hold that in “an exhaustive opinion, the three-judge district court concluded that
12 the Hopi were exclusively entitled to about one-quarter of the 1882 Reservation, consisting of District
13 6 as defined in 1943, and the court quieted the Hopi title to that land.”¹⁵

14 The judgment entered in *Healing II* described a survey that showed total acreage of 650,013
15 acres of land. The survey was done from November 6, 1963, to March 30, 1964.¹⁶

16 Exhibit A is a map contained in *Healing II* that shows the boundaries of the 1882 Executive
17 Order Reservation and Land Management District 6. “The 1882 Reservation is rectangular, about
18

19
20 ¹² *Healing v. Jones*, 210 F. Supp. 125, 158 (D. Ariz. 1962), *aff’d per curiam sub nom. Jones v. Healing*, 373
U.S. 758 (1963) (“*Healing II*”).

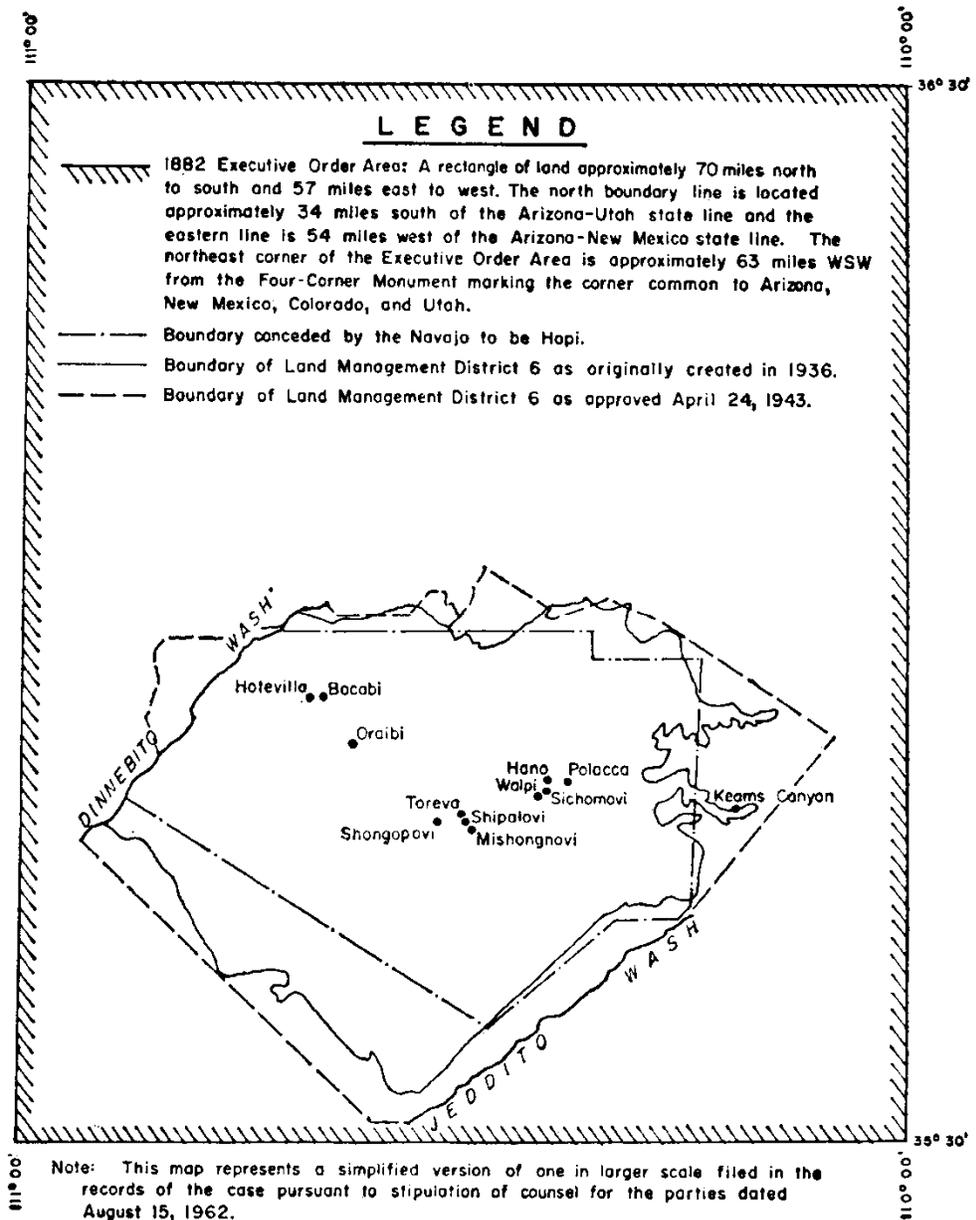
21 ¹³ 210 F. Supp. at 166; the reference to the “Hopi and Navajo” superintendents is on page 165.

22 ¹⁴ 210 F. Supp. at 192.

23 ¹⁵ *Sekaquaptewa v. MacDonald*, 575 F.2d 239, 246 (9th Cir. 1978). Later, the Indian Claims Commission found
24 that pursuant “to the provisions of ‘Sec. 2’ of the Act of July 23, 1958, ... the Court in *Healing v. Jones* entered
a judgment wherein the Hopi Tribe was decreed to be the exclusive owner of the land in ‘land management
district 6’ and said tribe was awarded reservation title thereto.” *Hopi Tribe and Navajo Tribe v. United States*,
23 Ind. Cl. Comm. 290, at 310 (1970).

¹⁶ A copy of the survey is available in Catalyst Paper (Snowflake) Inc. Second Supp. Disc. No. 32, FCHP00790-
805.

1 seventy miles long and fifty-five miles wide."¹⁷ The map is used here solely for illustration.



20 Exhibit A: Source: *Healing v. Jones*, 210 F. Supp. 125, 133 (D. Ariz. 1962).¹⁸

21
22 ¹⁷ *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 114 (9th Cir. 1980). The area "contains approximately 2,500,000 acres, or 3,900 square miles." Finding of Fact No. 5, *Healing II*. A copy of *Healing II's* Findings of Fact is available in the Navajo Nation Initial Disc. Index No. 4464, NN027610-24.

23 ¹⁸ The map was later described as "a simplified version of a larger scale map of the 1882 Reservation, which was filed by the parties pursuant to stipulation." 575 F.2d at 246. A copy of the map is also found in 575 F.2d at 249 and *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, following page 311.

1 In *Healing II*, the federal district court made the following findings:

2 No Indians in this country have a longer authenticated history than the Hopis. As far
3 back as the Middle Ages the ancestors of the Hopis occupied the area between Navajo
4 Mountain and the Little Colorado River, and between the San Francisco Mountains and
5 the Luckachukas. In 1541, a detachment of the Spanish conqueror, Coronado, visited
6 this region and found the Hopis living in villages on mesa tops, cultivating adjacent
7 fields, and tending their flocks and herds. [Footnote 4 accompanying this sentence
8 stated: "In 1692 another Spanish officer, Don Diego De Vargas, visited the area where
9 he met the Hopis and saw their villages. American trappers first encountered the Hopis
10 in 1834. In 1848, by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, this area came under
11 the jurisdiction of the United States."]

12 The level summits of these mesas are about six hundred feet above the surrounding
13 sandy valleys and semi-arid range lands. The village houses, grouped in characteristic
14 pueblo fashion, were made of stone and mud two, three, and sometimes four stories
15 high. Water had to be brought by hand from springs at the foot of each mesa.¹⁹

16 The Indian Claims Commission, in litigation subsequent to *Healing II* described later in this
17 section, made the following findings of fact:

18 Before 1300 A.D. the ancestors of the Hopi were identified in the area between Navajo
19 Mountain in the northwest corner of the overlap area and the Little Colorado River to
20 the south, and between the San Francisco Mountains well south of the overlap area and
21 the Luckachuais Mountains in the northeast portion of the subject tract.

22 Archaeological evidence indicates that the Hopi village of Oraibi has existed in its
23 present form since the 12th century. Oraibi is located near the center of the subject area
24 and within the confines of the Hopi Reservation that was established by the Executive
Order of December 16, 1882 (I Kappler 805).

It was in the summer of 1541 that the Hopi Indians first became known to white men.
At that time, General Francisco Coronado sent Don Pedro de Tovar and a small
detachment westward from the Zuni country to investigate the seven Pueblos in the
province of Tusayan, as the Hopi country was then referred to, for the purpose of
gaining information relative to the area and its people. There Tovar found the Hopis in
villages on the mesa tops. The level summits of these mesas rise about six hundred feet
above the surrounding valleys and range lands... De Tovar found that Hopis of this
period wore cotton garments and that they possessed such things as dressed hides, flour,
salt, pinon nuts, fowl and jewelry. They also cultivated fields of maize, beans, peas,
melons, and pumpkins. The areas away from their village sites provided the Hopi
Indians with a hunting ground for bears, mountain lions, wild cats, and other wild life.²⁰

¹⁹ 210 F. Supp. at 134 n.4.

²⁰ *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, at 292-93, *motions to amend findings denied*, 31 Ind. Cl. Comm. 16, 37 (1973) and 33 Ind. Cl. Comm. 72 (1974), *aff'd mem.*, *Hopi Tribe v. United States*,

1 In its opinion denying the Hopi Tribe's motion to amend the Commission's findings
2 concerning extinguishment of Hopi aboriginal title, the Commission stated that the "record clearly
3 shows that for a long time prior to the establishment of the 1882 Executive order reservation, and also
4 for a long time prior to the 1848 date of American sovereignty, the Hopi Indians pursued a static,
5 nonnomadic, nonexpansionist, agricultural mode of life," and from "their ancient pueblos high atop
6 three mesas in east central Arizona," they "descended to the valleys below to cultivate neighboring
7 fields for grain and fruit and to pasture small flocks of sheep."²¹

8 The Special Master adopts, as modified, the following three findings of fact submitted by the
9 Hopi Tribe:²²

10 Finding of Fact No. 1. The Hopi used their aboriginal lands for villages, farming for food,
11 farming cotton, making textiles for use and trade, making pottery for use and trade, herding, and coal
12 mining, with an economy that changed as new activities and crops were introduced. 210 F. Supp. at
13 134; E. Charles Adams, Ph.D., *Hopi Use and Development of Water Resources in the Little Colorado*
14 *River Drainage Basin of Arizona: An Archeological Perspective to 1700*, 90-105 (March 2009); J. O.
15 Brew, *Hopi Prehistory and History to 1850* ("Coal Mining"), 9 Handbook of North American Indians
16 517-19 (William C. Sturtevant and Alfonso Ortiz, eds., Smithsonian Inst. 1979); Peter M. Whiteley,
17 Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 8, 10, 14-15,
18 18-21 (March 2009); Charles R. Cutter, Ph.D, *Documentary Evidence for Hopi Agriculture and Water*

21 *sub nom. Burket v. United States*, 529 F.2d 533 (Table) (Ct. Cl. 1976), *cert. dismissed*, 429 U.S. 1030 (1976). The
22 decisions of the Indian Claims Commission are available at <http://digital.library.okstate.edu/icc/index.html>. The case
23 name citation is due to the fact that the Hopi Tribe's action was consolidated with a petition filed by the Navajo
24 Nation also alleging the uncompensated taking of Navajo aboriginal land. The name of the mountains has been
reported as Luckachukas, Luckachuais, and currently Lukachukai. Oraibi is located within Land Management
District 6.

²¹ *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 21. The Commission denied a second
motion to amend the findings on January 23, 1974, 33 Ind. Cl. Comm. 72.

1 *Use in the Spanish and Mexican Periods, 9-10 (March 30, 2009).*

2 Finding of Fact No. 2. Hopi extensive use of its water and land was noted by the earliest
3 Spanish explorers and later visitors from Coronado's expedition in 1540 forward. Peter M. Whiteley,
4 Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 11-12, 14
5 (March 2009).

6 Finding of Fact No. 3. "In the sixteenth century, Hopi seems to have been the principal supplier
7 of cotton for the indigenous Southwest and perhaps beyond: 'From all accounts Hopiland was
8 supplying Zuni and the Rio Grande towns with woven cloth and also some cotton fiber, a practice
9 which has continued until the present time.'" Peter M. Whiteley, Ph.D., *Historic Hopi Use and*
10 *Occupancy of the Little Colorado Watershed, 1540-1900*, 13 (March 2009).

11 The Special Master adopts, as modified, the following three findings of fact submitted by the
12 United States:

13 Finding of Fact No. 4. The Puebloan people that comprise the Hopi Tribe have lived in the
14 Little Colorado River Basin for centuries and were well-established in the Basin at the time of
15 European contact. Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado*
16 *Watershed, 1540-1900*, 1-4 (March 2009); Hana Samek Norton, Ph.D., *The Establishment of the Hopi*
17 *Reservation and Hopi Agricultural Developments, 1848-1935*, 3 (March 30, 2009).

18 Finding of Fact No. 5. The Hopi are credited with farming techniques that were specialized to
19 growing crops in an arid climate like the Little Colorado River Watershed. T. J. Ferguson, Ph.D., *Hopi*
20 *Agriculture and Water Use*, 18 (March 2009); Hana Samek Norton, Ph.D., *The Establishment of the*
21 *Hopi Reservation and Hopi Agricultural Developments, 1848-1935*, 4-9 (March 30, 2009).

22 Finding of Fact No. 6. In addition to farming, the Hopi utilized springs and other water sources
23

24 ²² The findings of fact adopted in this report attributed to a party are taken from the proposed statements of fact electronically submitted following oral argument. The Special Master verified each citation and admits the

1 to support livestock. T. J. Ferguson, Ph.D., *Hopi Agriculture and Water Use*, 195-97 (March 2009);
2 Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-*
3 *1900*, 42-43 (March 2009).

4 The foregoing findings made in *Healing II*, by the Indian Claims Commissions, and Findings
5 of Fact Nos. 1-6 establish that Hopi Indians lived and subsisted within Land Management District 6 as
6 far back as, at least, the Middle Ages as we use that historical classification. At a minimum, a specific
7 year marker is 1541.

8 The United States Supreme Court has held that:

9 By the time of the Revolutionary War, several well-defined principles had been
10 established governing the nature of a tribe's interest in its property and how those
11 interests could be conveyed. It was accepted that Indian nations held "aboriginal title"
12 to lands they had inhabited from time immemorial. See Cohen, *Original Indian Title*, 32
13 *Minn. L. Rev.* 28 (1947). The "doctrine of discovery" provided, however, that
14 discovering nations held fee title to these lands, subject to the Indians' right of
15 occupancy and use.²³

16 Aboriginal title - or the right of occupancy and use - also called "Indian title,"²⁴ depends upon
17 a factual determination. Aboriginal title "must rest on actual, exclusive, and continuous use and
18 occupancy 'for a long time' prior to the loss of the property."²⁵

19 In the partition case *Sekaquaptewa v. MacDonald*, "[t]he Navajo conceded that the Hopi had
20 exclusive interest" in Land Management District 6.²⁶

21 Finding of Fact No. 7. The Hopi Tribe has enjoyed actual, exclusive, and continuous use and
22 occupancy of the lands within the boundaries of Land Management District 6. Although *Healing II*
23 noted that a federal survey submitted in December, 1940, "reported that 2,618 Hopis and 160 Navajos

24 exhibits cited in the adopted findings of fact.

²³ *Oneida County, N.Y. v. Oneida Indian Nation of N. Y. State*, 470 U.S. 226, 233-34 (1985).

²⁴ *Oneida Indian Nation of N.Y. State v. Oneida County, N.Y.*, 414 U.S. 661, 667 (1974) ("That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act.").

²⁵ *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183, 1187-88 (D. Ariz., 1978), *aff'd in part and rev' in part*, 619 F.2d 801 (9th Cir. 1978), *cert. denied*, 449 U.S. 1010 (1980).

1 were living within the boundaries of district 6 as it then existed,”²⁷ the Hopi Tribe has been recognized
2 in prior judicial proceedings and treated as having had actual, exclusive, and continuous use and
3 occupancy of Land Management District 6.

4 Conclusion of Law No. 2. The lands within the boundaries of Land Management District 6, as
5 approved on April 24, 1943, and legally enlarged thereafter, are aboriginal lands of the Hopi Indians.

6 Aboriginal title includes “an aboriginal right to the water used by the Tribe as it flow[s]
7 through its homeland.”²⁸

8 Conclusion of Law No. 3. The aboriginal land title of the Hopi Tribe includes an aboriginal
9 right to use the water that flows on those lands.

10 Conclusion of Law No. 4. Aboriginal “water rights necessarily carry a priority date of time
11 immemorial;” where “a tribe shows its aboriginal use of water ... the water right thereby established
12 retains a priority date of first or immemorial use.”²⁹ Aboriginal rights “arise[ing] from occupancy and
13 use of land by the Indians from time immemorial.”³⁰ Aboriginal water rights predate the establishment
14 of an Indian reservation.

15 Conclusion of Law No. 5. The water rights that the Hopi Tribe uses on the lands within the
16 boundaries of Land Management District 6 have a priority of time immemorial.

17 The lands outside Land Management District 6 are not aboriginal lands of the Hopi Tribe
18 because the tribe’s aboriginal title was extinguished.

19 **B. Extinguishment of Aboriginal Title**

20 The Indian Claims Commission Act, 60 Stat. 1049, was enacted on August 13, 1946.

22 ²⁶ 575 F.2d at 246.

23 ²⁷ 210 F. Supp. at 160 n.44.

24 ²⁸ *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983), *cert. denied sub nom. Oregon v. United States*,
467 U.S. 1252 (1984).

²⁹ 723 F.2d at 1414.

1 According to the United States Supreme Court the Act “had two purposes,” namely:

2 The “chief purpose of the [Act was] to dispose of the Indian claims problem with
3 finality.” H.R. Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945). This purpose was
4 effected by the language of § 22(a): “When the report of the Commission determining
5 any claimant to be entitled to recover has been filed with Congress, such report shall
6 have the effect of a final judgment of the Court of Claims....” (footnote omitted).
7 Section 22 (a) also states that the “payment of any claim ... shall be a full discharge of
8 the United States of all claims and demands touching any of the matters involved in the
9 controversy.”...

10 The second purpose of the Indian Claims Commission Act was to transfer from
11 Congress to the Indian Claims Commission the responsibility for determining the
12 merits of native American claims.³¹

13 The Act established the Indian Claims Commission. The District Court for the District of
14 Arizona held that “claims before the Indian Claims Commission are not based in law, but on
15 Congress’ policy decision to provide limited compensation to Indian Tribes for the extinguishment of
16 nonrecognized Indian title.”³²

17 In 1951, the Hopi Tribe filed Petition No. 196 with the Indian Claims Commission.

18 Finding of Fact No. 8. In paragraph 1 of its Petition dated August 3, 1951, the Hopi Tribe
19 asserted that “[p]rior to their being placed on the reservation they now occupy, its members, by
20 permission of the tribe, used and occupied from time immemorial the lands described in paragraph 7
21 hereof.” Paragraph 7 alleged that:

22 On July 4, 1848 and prior thereto from time immemorial, petitioner owned or
23 continually held, occupied and possessed a large tract of land described generally as
24 follows, to wit: Beginning at the juncture of the Colorado and Little Colorado Rivers;
thence in a southeasterly direction along the said Little Colorado River to its juncture
with the Zuni River; thence in a northeasterly direction along the said Zuni River to a
point where the same now intersects the state line between the States of Arizona and
New Mexico; thence in a northerly direction along said state line until said state line
intersects the San Juan River; thence along the San Juan River in a general westerly
direction to its juncture with the Colorado River; and thence in a southwesterly
direction along the said Colorado River to the point of beginning.

30 *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), *cert. denied*, 526 U.S. 1966 (1999).

31 *United States v. Dann*, 470 U.S. 39, 45 (1985).

32 *Masayeva v. Zah*, 793 F. Supp. 1495, 1500 (D. Ariz. 1992), *aff’d in part and rev’d in part*, 65 F.3d 1445 (9th Cir. 1995), *cert. denied sub nom. Secakuku v. Hale*, 517 U.S. 1168 (1996).

1 Finding of Fact No. 9. The first sentence of paragraph 8 of the petition alleged that:

2 On July 4, 1848, when the defendant obtained sovereignty over the area owned or
3 occupied by the petitioner, the members of petitioner tribe were an agricultural and
4 pastoral people who from time immemorial had lived in permanent dwellings and
5 raised their crops and pastured their flocks on the surrounding land.

6 Finding of Fact No. 10. The Hopi Tribe alleged that the United States converted the tribe's
7 aboriginal lands to its own use without just compensation. In paragraph 36, the Hopi Tribe prayed in
8 the alternative for judgment against the United States:

9 Wherefore, petitioner prays that it be awarded judgment against the defendant after
10 the allowance of all just credits and offsets for (1) an amount which will provide just
11 compensation for the lands taken from the petitioner by the defendant; or (2) an
12 amount which will provide just compensation to the petitioner for the damages caused
13 by the defendant's failure to deal fairly and honorably with petitioner in the taking of
14 the petitioner's lands; or (3) an amount which will provide just compensation for the
15 lands taken from the petitioner by the defendant in violation of the terms and
16 obligations of the Treaty of Guadalupe Hidalgo; or (4) an amount which will provide
17 just compensation to the petitioner for the damages caused by the defendant's failure
18 to deal fairly and honorably with the petitioner in the taking of the petitioner's lands in
19 violation of the terms and obligations of the Treaty of Guadalupe Hidalgo; or (5) an
20 amount which will provide just compensation for the use of said lands to the date
21 hereof; or (6) an amount which will provide just compensation to the petitioner for the
22 damages caused by defendant's failure to deal fairly and honorably with the petitioner
23 in depriving petitioner of the use of said lands to the date hereof; or (7) an amount
24 which will provide just compensation to the petitioner for damages caused by
25 defendant's seizing and depriving the petitioner of the use of said lands in violation of
26 the terms and obligations of the Treaty of Guadalupe Hidalgo; or (8) an amount which
27 will provide just compensation to the petitioner for the damages caused by the
28 defendant's failure to deal fairly and honorably with the petitioner in the seizing and
29 depriving of the use of said lands in violation of the terms and obligations of the
30 Treaty of Guadalupe Hidalgo; and (9) that defendant be required to make a full, just
31 and complete accounting for all property or funds received or receivable and expended
32 for and on behalf of petitioner, and for all interest paid or due to be paid on any and all
33 funds of petitioner, and that judgment be entered for petitioner in the amount shown to
34 be due under such an accounting; and (10) for such other relief as to the Commission
35 may seem fair and equitable.³³

36 The Indian Claims Commission made findings that involved the aboriginal title claims of the
37 Hopi Tribe to lands outside the boundaries of the 1882 Executive Order Reservation, and second, to
38 lands inside the reservation but outside Land Management District 6. First, the Commission found:

39 Based upon the preceding findings of fact and all the evidence of record, the

40 ³³ A copy of the petition is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 21, FCHP00164-171.

1 Commission finds that the issuance of the Presidential order on December 16, 1882,
2 establishing the Hopi Executive Order Reservation effectively terminated and
3 extinguished, without the payment of any compensation to the Hopi Tribe, its
4 aboriginal title claims to all lands situated outside of said reservation.³⁴

5 Second, the Commission found that:

6 Commencing on February 7, 1931, when the Secretary of Interior approved a
7 recommendation calling for a Navajo-Hopi division of the 1882 Executive Order
8 Reservation, administration officials followed a policy designed primarily to exclude
9 Hopi Indians from that part of the 1882 Reservation upon which Navajo Indians were
10 being settled with implied Secretarial consent. This policy of segregating the two tribes
11 was pursued further with the issuance of grazing regulations designed to control the
12 grazing capacity of the lands within the newly formed “land management district 6”,
13 which district insofar as the grazing regulations were concerned was designated as a
14 “Hopi Reservation”. The Commission finds that administration action on June 2, 1937,
15 effectively terminated all Hopi aboriginal title to the lands within the 1882 Executive
16 Order Reservation outside the boundaries of “land management district 6” as
17 established and approved by the Office of Indian Affairs on April 24, 1943.³⁵

18 Finding of Fact No. 11. The “administrative action on June 2, 1937” involved the adoption of
19 grazing regulations that provided a method of establishing land management districts.³⁶

20 The Commission’s interlocutory order dated June 29, 1970, stated in pertinent part as follows:

21 On December 16, 1882, the United States without the payment of any compensation,
22 extinguished the Hopi Indian title to all lands ... lying outside the boundaries of the
23 1882 Executive Order Reservation.

24 On June 2, 1937, the United States extinguished the Hopi Indian title to some 1,868,364
acres of land within the 1882 Executive Order Reservation, said acreage being the
balance of the land in the 1882 Reservation lying outside of that part of the reservation
known as “land management district 6.”³⁷

The Commission granted the Hopi Tribe a rehearing but denied the tribe’s “motion to amend the
Commission’s findings previously entered herein with respect to the extent of [the tribe’s] aboriginal or

³⁴ *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, at 305.

³⁵ *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, at 309-10; *see also* 31 Ind. Cl. Comm. 16, at 17.

³⁶ The “Commission chose June 21 [sic 2], 1937, as the climactic date, since on that date the restrictive grazing regulations as approved by the Secretary of Interior were put into effect, thus substantially confining future Hopi activity within the boundaries of land management district 6...” *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 34-35; *see also* 30-31 for further explanation about the creation of the district.

1 Indian title to the claimed area, and the dates said Indian title was extinguished by the United States.”³⁸

2 The interlocutory decision was appealed to the Court of Claims which on January 30, 1976,
3 affirmed the decisions and orders of the Indian Claims Commission.³⁹

4 In 1976, the Hopi Tribe and the United States settled the Hopi Tribe’s claim for payment of \$5
5 million, and the Commission entered judgment. The Hopi Tribe agreed in the settlement that:

6 Entry of final judgment in said amount shall finally dispose of all rights, claims or
7 demands which the plaintiff presented or could have presented to the Indian Claims
8 Commission pursuant to the Act of August 13, 1946, ch. 949 [sic 959], 60 Stat. 1049,
25 U.S.C. § 70 et seq., and the plaintiff shall be barred thereby from asserting any such
rights, claims or demands against the United States in any future actions.⁴⁰

9 The District Court for the District of Arizona on two occasions noted the Hopi Tribe’s
10 litigation before the Indian Claims Commission. In 1978, the District Court stated as follows:

11 In 1951 the Hopi tribe brought an action against the United States before the Indian
12 Claims Commission alleging the government occupied and possessed without
compensation the tribe’s aboriginal land. ...

13 The Indian Claims Commission denied the Hopi tribe’s aboriginal title claim to all of
14 the territory alleged. Rather, the Commission held the Hopi tribe possessed aboriginal
15 title to a smaller area which included the 1882 Reservation. This title was extinguished
16 without compensation as to all lands outside the 1882 Reservation when the Executive
Order of December 16, 1882 issued. The Hopis’ aboriginal title to land within the 1882
Reservation was extinguished partially in 1937 when the Navajo tribe was
administratively settled within the area.”⁴¹

17 In 1992, the District Court held that “the Hopi Tribe’s aboriginal claims ... were previously
18 adjudicated by the Indian Claims Commission; the Commission held that Hopi aboriginal claims were
19 extinguished by the passage of the 1882 Executive Order withdrawing lands for the Hopi. *Hopi Tribe*
20 *v. United States*, 31 Ind. Cl. Comm. 16 (1973); *Hopi Tribe v. United States*, 23 Ind. Cl. Comm. 277

21
22 ³⁷ *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 312 (nos. 3 and 4) (1970).

23 ³⁸ *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 36; Order Denying Hopi Mot. to Amend
Findings, 31 Ind. Cl. Comm. 37 (1973). A second motion to amend the findings was denied on January 23, 1974.

24 ³⁹ *Hopi Tribe v. United States*, 39 Ind. Cl. Comm. 204, at 207 (1976). On March 26, 1976, the Court of Claims
denied the Hopi Tribe’s motion for a rehearing en banc.

⁴⁰ *Id.* at 211 (no. 2); *see also* 207-08.

1 (1970).”⁴²

2 The Little Colorado River Adjudication Court is bound by the decisions of the Indian Claims
3 Commission concerning the Hopi Tribe’s aboriginal title and cannot review or fade those decisions.

4 Conclusion of Law No. 6. The Hopi Tribe’s aboriginal land title claims were extinguished to
5 the extent found by the Indian Claims Commission.

6 The question becomes whether the Hopi Tribe’s aboriginal water rights were extinguished
7 when Indian title to land was terminated.

8 **C. Extinguishment of Aboriginal Water Rights**

9 Much case law has been presented on this issue. The cases have a common element, namely,
10 the interpretation of treaties between the United States and Indian tribes, and on occasion, executive
11 orders and congressional acts. The cases have involved treaties of peace, land cessions, and
12 reservations of usufructuary rights such as hunting, fishing, and gathering. The right to use water, a
13 usufruct of land, is usufructuary.

14 The United States puts great weight on the following holding of the United States Supreme
15 Court for the proposition that usufructuary rights, such as water rights, are separate incidents from title
16 to land: “the Chippewa’s usufructuary rights under the 1837 Treaty existed independently of land
17 ownership; they were neither tied to a reservation nor exclusive. ... [t]here is no background
18 understanding of the rights to suggest that they are extinguished when title to the land is
19 extinguished.”⁴³ Although posited as stating black letter law, such it is not. The statement simply
20 accords with the Court’s holding that the Chippewa had not relinquished rights to hunt, fish, and
21 gather on ceded lands because the Chippewa had been guaranteed those rights in the land cession
22 treaty. As the Court explained: “The Chippewa agreed to sell the land to the United States, but they

23 ⁴¹ 448 F. Supp. at 1187-88.

24 ⁴² 793 F. Supp. at 1501.

1 insisted on preserving their right to hunt, fish, and gather in the ceded territory,” and the United States
2 “guaranteed to the Chippewa the right to hunt, fish, and gather on the ceded lands.”⁴⁴ The Chippewa’s
3 guaranteed rights to hunt, fish, and gather were indeed separate from their ownership of the ceded
4 lands, not by legal effect but by treaty negotiation.

5 On the other side, Catalyst Paper (Snowflake) Inc. points to the following holding involving
6 two Indian land cessions (also made by the Chippewa in Minnesota):

7 If the cessions extinguished Indian title to the ceded areas, they also would have the
8 effect of abrogating any aboriginal hunting, fishing, trapping, or wild ricing rights.
9 These rights are mere incidents of Indian title, not rights separate from Indian title, and
consequently if Indian title is extinguished so also would these aboriginal rights be
extinguished.⁴⁵

10 The Special Master has not been pointed to any treaties or reservations of water rights in
11 agreements involving the Hopi Tribe that are similar to those considered in the cited cases. There are
12 no treaties involving Hopi water rights that must be addressed in this report.⁴⁶ The Special Master has
13 not been presented evidence showing that the Hopi Tribe qualified its settlement agreement during the
14 course of the proceedings before the Indian Claims Commission to reserve aboriginal water rights.⁴⁷

15 The cases cited by the parties have been studied. The Special Master finds that the prevailing
16 law is that usufructuary water rights are incidents of aboriginal or Indian land title, and the
17 extinguishment of aboriginal title terminates aboriginal water rights existing on those lands.

18 ⁴³ *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 201-202 (1999) (“*Mille Lacs*”).

19 ⁴⁴ 526 U.S. at 175.

20 ⁴⁵ *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979), *aff’d sub nom. Red Lake Band of*
Chippewa Indians v. Minnesota, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980). The Court
noted, unlike *Mille Lacs*, that “[n]one of the documents mention the retention of hunting, fishing, trapping, or
21 wild ricing rights.”

22 ⁴⁶ Catalyst Paper (Snowflake) Inc., whose papers show much research, states, “[t]here was no treaty between the
[Hopi] Tribe and the United States.” Resp. to Hopi Tribe’s Mot. for Summ. J. Excluding Spanish Law Rights at
23 23 (Dec. 20, 2011); *see also* its Reply to Hopi Tribe’s Resp. in Opp. to Catalyst’s Mot. for Partial Summ. J. at
20 (Feb. 15, 2012).

24 ⁴⁷ The Commission’s record presented to the Special Master shows that the Commission was presented
evidence that the Hopi Tribe used water for agricultural and stockwatering purposes. It cannot be said that the
Commission was not aware of the Hopi Tribe’s uses of water. Nothing more on this point can be derived from

1 This determination is supported by the decisions in *United States v. Minnesota, supra*, and
2 *Western Shoshone Nat. Council v. Molini*. In *Molini*, the Court held that:

3 “the [Indian Claims] Commission award establishes conclusively that Shoshone title
4 has been extinguished. We further hold that absent some express reservation, hunting
and fishing rights are subsumed within an unconditional transfer of title.”⁴⁸

5 Conclusion of Law No. 7. Aboriginal water rights are incidents of aboriginal title.

6 The Supreme Court of California surveyed the case law on “the nature and scope of Indian title
7 and the effect of extinguishment of such title” in a matter involving the right to hunt. That matter
8 involved extinguishment of aboriginal title as a result of an action brought before the Indian Claims
9 Commission and a settlement agreement. The Court held that, “[w]hen the tribe’s Indian title was
10 extinguished, so too, under the law, were the tribe’s aboriginal hunting rights.”⁴⁹ The right to hunt was
11 held to be an incident of aboriginal title.

12 The Indian Claims Commission held the view that extinguishment of aboriginal title
13 terminated aboriginal water rights. In a matter involving another Arizona Indian community, the
14 Commission held as follows:

15 Plaintiff’s aboriginal title entitled it to use the land in its traditional Indian fashion,
16 including the irrigation of its agricultural lands with Gila River water. Thus the plaintiff
had as part of its aboriginal title the right to divert water from the Gila River for the
17 purpose of irrigating its land. ... This water right terminated with the extinguishment of
plaintiff’s aboriginal title.⁵⁰

18 Conclusion of Law No. 8. The Hopi Tribe’s aboriginal water rights were incidents of its
19 aboriginal or Indian title. The extinguishment of the Hopi Tribe’s aboriginal title terminated its
20

21 the record of this briefing.

22 ⁴⁸ *Western Shoshone Nat. Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991), *cert. denied*, 506 U.S. 822
23 (1992) (“We therefore hold that Shoshone aboriginal hunting and fishing rights were taken when ‘full title
24 extinguishment’ occurred.”). *Accord, Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d at 462
 (“[t]he creation and acceptance of an Indian reservation by treaty constitutes a relinquishment of aboriginal
rights to lands outside the reservation. (citations omitted). The Tribe signed the 1854 Treaty which created the
Wolf River reservation and extinguished any aboriginal rights the Menominee possessed, including aboriginal
rights in land or water not specifically mentioned in any treaty.”).

1 aboriginal water rights existing on those lands.

2 **V. DOES THE HOPI TRIBE HOLD WATER RIGHTS WITH A PRIORITY DATE OF**
3 **1848 AS A RESULT OF THE TREATY OF GUADALUPE HIDALGO, 9 STAT. 922 (FEB. 2,**
4 **1848)?**

4 This issue was briefed separately from the others due to the Hopi Tribe’s substitution of an
5 expert witness and scheduling of depositions.

6 Finding of Fact No. 12. The United States acquired sovereignty over that portion of what is now
7 Arizona north of the Gila River through the Treaty of Peace, Friendship, Limits, and Settlement between
8 the United States of America and the Mexican Republic. The treaty, known as the Treaty of Guadalupe
9 Hidalgo, was signed by diplomatic representatives on February 2, 1848.⁵¹

10 Finding of Fact No. 13. Article VIII of the Treaty of Guadalupe Hidalgo declared that
11 “property of every kind, now belonging to” Mexican citizens living in the lands acquired by the United
12 States “shall be inviolably respected,” and the then present owners of the property, their heirs, and all
13 Mexicans who may thereafter acquire the “property by contract, shall enjoy with respect to it
14 guaranties equally ample as if the same belonged to citizens of the United States.”⁵² Article IX
15 declared that Mexicans living in the ceded territories who wished to become citizens of the United
16 States “shall be maintained and protected in the free enjoyment of their liberty and property.”⁵³

17 Conclusion of Law No. 9. “Water rights are property rights.”⁵⁴

18 In 1888, the United States Supreme Court held in a partition action, involving land granted by
19 the Mexican government prior to the Treaty of Guadalupe Hidalgo, that:

21 ⁴⁹ *In Re Wilson*, 30 Cal. 3d 21, 35, 177 Cal. Rptr. 336, 345, 634 P.2d 363, 372 (1981).

22 ⁵⁰ *Gila River Pima-Maricopa Indian Comm. v. United States*, 29 Ind. Cl. Comm. 144, at 151 (1972).

23 ⁵¹ 9 Stat. 922. A copy of the treaty is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 1,
24 FCHP00001-23. The treaty, ending the Mexican-American War (1846-1848), was signed at the Basilica of
Guadalupe at Villa Hidalgo within the present city limits of Mexico City.

⁵² 9 Stat. 922, 929-30.

⁵³ 9 Stat. 922, 930.

⁵⁴ *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992).

1 Article 8 of the treaty protected all existing property rights within the limits of the
2 ceded territory, but it neither created the rights nor defined them. Their existence was
3 not made to depend on the Constitution, laws, or treaties of the United States. There
4 was nothing done but to provide that if they did in fact exist under Mexican law, or by
5 reason of the action of Mexican authorities, they should be protected.⁵⁵

6 In a case involving an 1833 land grant, the Territorial Supreme Court of Arizona held that:

7 The contention ... that, under the Treaty of Guadalupe Hidalgo, the owner of a
8 Mexican grant, title to which had vested at the date of the treaty, retained all vested
9 rights of property to which he was entitled under the laws of Mexico, is undoubtedly
10 sound. The Legislature of Arizona has no power or authority to deprive any such owner
11 of any such rights, at least without due compensation.⁵⁶

12 The Hopi Tribe concedes that the “Treaty of Guadalupe Hidalgo is not an independent source
13 of water rights, nor does it serve as an independent priority date for water rights that pre-date the
14 creation of the reservation.”⁵⁷ The United States “does not claim water rights on behalf of the Hopi
15 Tribe based on the Treaty itself, but asserts instead that the Treaty simply protected the aboriginal
16 water rights that were in existence at that time.”⁵⁸

17 Conclusion of Law No. 10. The Treaty of Guadalupe Hidalgo neither created nor established new
18 water rights by virtue of its provisions.

19 Conclusion of Law No. 11. The Treaty of Guadalupe Hidalgo protected property rights,
20 including water rights, held by Mexican citizens who lived in the lands acquired by the United States
21 as a result of the treaty.

22 The Hopi Tribe does not hold water rights with a priority of 1848 as a result of the Treaty of
23 Guadalupe Hidalgo. The Special Master recommends that the Court deny the Hopi Tribe’s Motion for
24

21 ⁵⁵ *Phillips v. Mound City Land & Water Ass’n*, 124 U.S. 605, 610 (1888). *Accord*, *Townsend v. Greeley*, 72 U.S.
22 326, 334 (1866) (“The treaty of Guadalupe Hidalgo does not purport to divest the pueblo, existing at the site of
23 the city of San Francisco, of any rights of property, or to alter the character of the interests it may have held in
24 any lands under the former government.”).

⁵⁶ *Boquillas Land & Cattle Co. v. St. David Coop. Com. & Dev. Ass’n.*, 11 Ariz. 128, 138, 89 P. 504, 507 (Terr.
1907), *aff’d*, 213 U.S. 339 (1909).

⁵⁷ Hopi Tribe Resp. in Opp’n. to Catalyst Paper’s Mot. for Partial Summ. J. at 32.

1 Summary Judgment on Hopi Water Rights under the Treaty of Guadalupe Hidalgo to the extent the
2 motion requests the adjudication of discrete water rights with a priority date of 1848.

3 **VI. DOES THE HOPI TRIBE POSSESS WATER RIGHTS WITH A PRIORITY DATE OF**
4 **1882 AS A RESULT OF THE ESTABLISHMENT OF THE HOPI RESERVATION UNDER**
5 **THE EXECUTIVE ORDER OF DECEMBER 16, 1882?**

6 **A. Hopi Partitioned Lands Within the 1882 Executive Order Reservation**

7 The analysis of the priorities of the Hopi Tribe’s water rights in the Hopi Partitioned Lands and
8 Moenkopi Island revolves around the congressional Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat.
9 403 (“1958 Act”), the Act of December 22, 1974, Pub. L. No. 93-531, 88 Stat. 1712, (“1974 Act”),
10 and the federal district court litigation brought by the Hopi Tribe pursuant to both Acts.⁵⁹

11 The lands within the boundaries of the 1882 Executive Order Reservation which were
12 partitioned and distributed to the Hopi Tribe pursuant to the 1958 Act and 1974 Act are referred to as
13 the “Hopi Partitioned Lands.” The Hopi Partitioned Lands are located within the boundaries of the
14 tract of land President Chester A. Arthur withdrew and set apart for the use and occupancy of the Hopi
15 Tribe by his Executive Order dated December 16, 1882 (the “1882 Executive Order Reservation”).
16 However, the Hopi Partitioned Lands are located outside Land Management District 6.

17 The Special Master has determined that the Hopi Tribe does not have aboriginal water rights to
18 the lands outside Land Management District 6. It is argued in the alternative that the Hopi Tribe holds
19 a reserved water right to the Hopi Partitioned Lands. The Hopi Tribe and the United States assert that
20 the priority of a reserved right is December 16, 1882. Catalyst Paper (Snowflake) Inc. counters that the
21 priority of a reserved water right for the Hopi Partitioned Lands cannot be prior to February 10, 1977,
22 or when the federal district court entered a judgment of partition.

23 ⁵⁸ U.S. Resp. to Hopi Tribe’s Mot. for Summ. J. on Hopi Water Rights Under Treaty of Guadalupe Hidalgo at 3-
24 4 (June 20, 2012).

1 **1. Executive Order of December 16, 1882**

2 Finding of Fact No. 14. After the transfer of sovereignty under the Treaty of Guadalupe
3 Hidalgo, the “Hopis persistently expressed interest in the protections afforded by their inclusion”
4 within the United States.⁶⁰

5 Finding of Fact No. 15. Between November 14, 1876, and December 13, 1882, federal agency
6 staff recommended that a reservation be established for the Hopi Indians. This history is described in
7 *Healing II*.⁶¹

8 Finding of Fact No. 16. On December 16, 1882, President Chester A. Arthur issued an
9 Executive Order which stated in pertinent part as follows:

10 It is hereby ordered that the tract of country in the Territory of Arizona lying and being
11 within the following-described boundaries ... be, and the same is hereby, withdrawn
12 from settlement and sale, and set apart for the use and occupancy of the Moqui and
such other Indians as the Secretary of the Interior may see fit to settle thereon.⁶²

13 The term “other Indians” is noteworthy. “Reservations were commonly created with similar
14 language;” for example, the Executive Order of July 2, 1872, creating the Colville Indian Reservation
in the State of Washington stated as follows:

15 It is hereby ordered that the country bounded on the east and south by the Columbia
16 River, on the west by the Okanogan River, and on the north by the British possessions,
17 be, and the same is hereby, set apart as a reservation for said Indians, and for such other
Indians as the Department of the Interior may see fit to locate thereon.⁶³

18 ⁵⁹ The 1974 Act was codified as the Navajo-Hopi Land Settlement Act of 1974. *See* 25 U.S.C. §§ 640d1-10
19 (2001). Copies of the 1958 and 1974 Acts are available in Catalyst Paper (Snowflake) Inc. Initial Disc. Nos. 25
and 48, FCHP00180-81 and FCHP00393-405, respectively.

20 ⁶⁰ Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900* at
106 (no. 7).

21 ⁶¹ 210 F. Supp. at 135-37.

22 ⁶² I CHARLES J. KAPPLER (ed.), INDIAN AFFAIRS: LAWS AND TREATIES 805 (GPO, Washington, D.C., 2d ed.
1904). A digital edition of Kappler’s compilation is available at <http://digital.library.okstate.edu/Kappler/>. A
23 copy of the handwritten executive order is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 2,
FCHP00824-27, and in the Navajo Nation Initial Disc. Index No. 4483, 027722. In historical documents, Hopi
Indians are often referred to as Moqui Indians. “The ‘Hopi’ and the ‘Moqui’ are one and the same Indian
people.” 210 F. Supp. at 129 n.1.

24 ⁶³ *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 n.8 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092
(1981) (“*Walton*”).

1 The federal district court made the following finding in *Healing II*:

2 The executive order reservation of December 16, 1882, was established for the
3 following purposes: (1) to reserve for the Hopis sufficient living space as against
4 advancing Mormon settlers and Navajos, (2) to minimize Navajo depredations against
5 Hopis, (3) to provide a legal basis for curbing white intermeddlers who were disturbing
6 the Hopis, and (4) to make available a reservation area in which Indians other than
7 Hopis could, in the future, in the discretion of any Secretary of the Interior, be given
8 rights of use and occupancy.⁶⁴

9 Its decision stated as follows:

10 “The circumstances which led to the issuance of [the 1882] executive order ...
11 demonstrate that the primary purpose was to provide a means of protecting the Hopis
12 from white intermeddlers, Mormon settlers, and encroaching Navajos. It was thus
13 intended that the Hopis would be provided such means of protection immediately upon
14 the issuance of the executive order, no further proceedings by way of Secretarial
15 settlement or otherwise being required. Hence ... based on the language of the order ...
16 the Hopis acquired immediate rights in the 1882 reservation upon issuance of the
17 December 16, 1882 order.”⁶⁵

18 The Indian Claims Commission’s findings of fact nos. 16 and 17 in 1970 indicate that federal
19 agents wanted and recommended that a “reservation” be established for the Hopi Indians:

20 16. In an effort to cope with the rapidly increasing Indian population and the steady
21 pressure from nearby Mormon settlements, the Indian Agent at Fort Defiance, Arizona,
22 recommended in 1876 that a reservation fifty miles square be set aside for the benefit of
23 the Hopi Tribe. A second recommendation for a Hopi reservation was forwarded to
24 Washington in 1878. Nothing came of either of these proposals. ...

17. [O]n March 22 [sic 27], 1882, the Hopi Indian Agent, J. H. Fleming, addressed a
letter to the Secretary of Interior recommending that a Hopi reservation be established
that would include within its boundaries all of the Hopi Pueblos, the agency buildings
at Kearns Canyon, and sufficient lands for agricultural and grazing purposes. Agent
Fleming cited the need of protecting the Hopis from the intrusions of other Indians,
Mormon settlers, and white intermeddlers. Other responsible government officials
voiced their support for such a reservation.⁶⁶

Healing II found that it “was the official intention, in creating this reservation, that the Hopi

⁶⁴ Finding of Fact No. 16, *Healing II*, *supra*.

⁶⁵ 210 F. Supp. at 137-38.

⁶⁶ *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, at 302-303. A copy of Mr. Fleming’s letter is available in the Navajo Nation Initial Disc. Index No. 3640, NN021034-39. In a subsequent letter dated

1 Indians would immediately have, subject to the limitation [that the Secretary of the Interior could
2 settle other Indians on the reservation] the usual Indian title in and to all parts of the described area,
3 whether or not then actually used and occupied by them and without the need of any action on the part
4 of the Secretary, express or implied, settling them on the reservation or otherwise confirming their
5 rights therein.⁶⁷

6 **2. Partition of the Joint Use Area**

7 The Hopi Tribe and Navajo Nation disagreed regarding tribal authority over certain lands
8 within the 1882 Executive Order Reservation outside Land Management District 6.⁶⁸ The
9 disagreements were prompted in part by the fact that both Hopis and Navajos were living inside the
10 1882 Executive Order Reservation as *Healing II* found:

11 Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, as
12 their continuing and permanent area of residence, from long prior to the creation of the
13 reservation in 1882 to July 22, 1958. The Navajo population in the reservation has
14 steadily increased all of these years, growing from about three hundred in 1882 to about
15 eighty-eight hundred in 1958. During the same period the Hopi population in the
16 reservation increased from about eighteen hundred to something over thirty-two
17 hundred.⁶⁹

18 Attempts to resolve mutually the dispute were unsuccessful. Congressional efforts to address the
19 conflict led to enactment of the 1958 and 1974 Acts and the partition actions filed under both Acts.

20 The litigation resulted in the following principal cases, pertinent to this briefing, collectively
21 referred in this report as the “partition cases” *Healing I and II*, *Sekaquaptewa v. MacDonald* 448 F.
22 Supp. 1183, (D. Ariz. 1978, *aff’d in part, rev’d in part*, 619 F.2d 801 (9th Cir. 1980), *cert. denied*, 449
23 U.S. 1010 (1980); *Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978), *Sekaquaptewa v.*

24 December 4, 1882, Mr. Fleming specified the “boundaries of the proposed reservation, the lines which were
later described in the Executive Order of December 16, 1882.” 210 F. Supp. at 137.

⁶⁷ Finding of Fact No. 17, *Healing II*, *supra*.

⁶⁸ “For centuries, the Hopi and Navajo peoples have disagreed on their tribes’ respective rights to lands in
northeastern Arizona. The dispute has been the subject of extensive litigation and legislation. ... The Hopi 1882
reservation has been the subject of much litigation between the Navajo and Hopi tribes.” 65 F.3d at 1450.

1 *MacDonald*, 626 F.2d 113 (9th Cir. 1980); *Masayesva v. Zah*, 792 F. Supp. 1155 (D. Ariz. 1992), *aff'd*
2 *in part, rev'd in part*, 65 F.3d 1445 (9th Cir. 1995), *cert. denied sub nom. Secakuku v. Hale*, 517 U.S.
3 1168 (1996); *Masayesva v. Zah*, 793 F. Supp. 1495 (D. Ariz. 1992), *aff'd in part, rev'd in part*, 65
4 F.3d 1445 (1995), *cert. denied sub nom. Secakuku v. Hale*, 517 U.S. 1168 (1996); *Masayesva v. Zah*,
5 816 F. Supp. 1387 (D. Ariz. 1992), *aff'd in part, rev'd in part*, 65 F.3d 1445 (9th Cir. 1995), *cert.*
6 *denied sub nom. Secakuku v. Hale*, 517 U.S. 1168 (1996). There are other cases, but those are not
7 pertinent to the issues of this briefing or are in the nature of enforcement actions.

8 The 1958 Act authorized the Hopi Tribe and Navajo Nation acting through the chairmen of
9 their tribal councils, and the Attorney General of the United States, to commence or defend an action
10 in federal district court “for the purpose of determining the rights and interests of said parties in and to
11 said lands [“described in the” December 16, 1882, Executive Order] and quieting title thereto in the
12 tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in
13 law and equity,” and directed the federal district court to determine whether either tribe had “exclusive
14 interest” in any part of the 1882 Executive Order Reservation.⁷⁰

15 Section 2 of the 1958 Act states in pertinent part as follows:

16 Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are
17 determined by the court to have the exclusive interest shall thereafter be a part of the
18 Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including
19 any Hopi village or clan thereof, or individual Hopi Indians are determined by the court
20 to have the exclusive interest shall thereafter be a reservation for the Hopi Indian
21 Tribe.⁷¹

22 Section 2 of the 1958 Act is similar to section 8(b) of the 1974 Act, which provided that lands
23 in which the Navajo Nation was determined to have exclusive interest “shall continue to be a part of
24 the Navajo Reservation; lands in which the Hopi Tribe was determined to have the exclusive interest

⁶⁹ Finding of Fact No. 20, *Healing II, supra*.

⁷⁰ 72 Stat. 403.

1 “shall thereafter be a reservation for the Hopi Tribe;” and lands in which the district court found that
2 both tribes had a joint or undivided interest were to be partitioned “on the basis of fairness and equity,”
3 and any “area so partitioned shall be retained in the Navajo Reservation or added to the Hopi
4 Reservation, respectively.”⁷²

5 Finding of Fact No. 17. On January 6, 1959, Assistant Secretary of the Interior Roger Ernst
6 signed Public Land Order 1773 revoking the December 16, 1882, Executive Order pursuant to the
7 delegation of authority in § 1 of Executive Order No. 10355 (May 26, 1952).⁷³ Public Land Order
8 1773 states that the “lands were declared by the [1958 Act] to be held by the United States in trust for
9 the Hopi Indians and such other Indians, if any, as theretofore had been settled thereon by the
10 Secretary of the Interior pursuant to the Executive Order of December 16, 1882,” and this “order,
11 therefore, has no effect upon the lands involved in the withdrawal of December 16, 1882, other than as
12 an administrative measure to clear the records of such withdrawal.”

13 *Healing I* and *II* were the result of the Hopi Tribe’s action filed pursuant to the 1958 Act.
14 *Healing II* found that the Hopi Tribe had exclusive interest in Land Management District 6 as defined
15 on April 24, 1943, and second, as “to the remainder of the reservation, the Hopi and Navajo Indian
16 Tribes have joint, undivided and equal interests as to the surface and sub-surface including all
17 resources appertaining thereto, subject to the trust title of the United States.”⁷⁴ The area of joint
18 interest is referred to as the “Joint Use Area” of the 1882 Executive Order Reservation.

19 The district court in *Healing II* did not distribute the Joint Use Area because the court
20 determined it lacked jurisdiction under the 1958 Act to partition and distribute “jointly-held lands,” a
21

22 ⁷¹ *Id.*

⁷² 88 Stat. 1712, 1715-16.

⁷³ 24 Fed. Reg. 282 (Jan. 13, 1959). A copy of the order is available in Catalyst Paper (Snowflake) Inc. Second
23 Supp. Disc. No. 24, FCHP00754-59. The order’s heading is “Revoking Executive Order of December 16, 1882,
Which Reserved Lands for Moqui (or Hopi) Reservation.”

⁷⁴ 210 F. Supp. at 191-92.

1 factor that “preclude[d] a complete resolution of the Hopi-Navajo controversy.”⁷⁵ The distribution of
2 the Joint Use Area was later accomplished under the 1974 Act.

3 Differences arose between the Hopi Tribe and Navajo Nation regarding the Joint Use Area. To
4 resolve the dispute, Congress enacted the 1974 Act which authorized “supplemental proceedings in”
5 the *Healing* litigation to partition the Joint Use Area.⁷⁶ The legislation called for the “partition of the
6 relative rights and interests, as determined by the decision in” *Healing II*, of the Hopi Tribe and
7 Navajo Nation “to and in lands within the reservation established by the Executive order of December
8 16, 1882, except land management district no. 6.”⁷⁷ The legislation provided for the use of a mediator
9 to assist in settlement negotiations and the partition process. A mediator was used.

10 The 1974 Act also allowed the filing of an action in federal district court by a tribe “claiming
11 any interest in or to the area described in the Act of June 14, 1934, 48 Stat. 960, except the reservation
12 established by the Executive Order of December 16, 1882, for the purpose of determining the rights
13 and interests of the tribes in and to such lands and quieting title thereto in the tribes.”⁷⁸ This provision
14 led to the partition of Moenkopi Island that is addressed in the next section of this report.

15 Pursuant to the 1974 Act, the Hopi Tribe filed an action. In accordance with the 1974 Act and
16 the mediator’s report, the federal district court partitioned and distributed the Joint Use Area between
17 the Hopi Tribe and Navajo Nation.⁷⁹

18 Finding of Fact No. 18. On February 10, 1977, the district court entered a judgment of
19 partition. In pertinent part, the judgment states that “all of the property partitioned to the Hopi Tribe ...
20 shall be held in trust by the United States exclusively for the Hopi Tribe and as a part of the Hopi
21

22 ⁷⁵ 210 F. Supp. at 192.

23 ⁷⁶ See 575 F.2d at 241 and 25 U.S.C. § 640d-3(a) (“supplemental proceedings in the Healing case.”).

24 ⁷⁷ 88 Stat. 1712.

⁷⁸ 88 Stat. 1712, 1715.

⁷⁹ See 575 F.2d at 241-43.

1 Reservation.”⁸⁰

2 The Ninth Circuit Court of Appeals affirmed the district court’s decision to partition the Joint
3 Use Area, but vacated and remanded the partition decree to permit resolution of a dispute over the
4 boundary of the 1882 Executive Order Reservation.⁸¹

5 Conclusion of Law No. 12. The Ninth Circuit Court of Appeals held that by declaring “that the
6 administration of their respective halves of the Joint Use Area is to be the responsibility of the
7 respective tribes and by requiring the surveying and fencing of the lands partitioned,” the partition
8 order had “practically severed” the Hopi and Navajo interests.⁸²

9 Finding of Fact No. 19. On April 18, 1979, the district court entered its Summary Judgment on
10 the Boundary Issue and Judgment of Partition, *Sekaquaptewa v. MacDonald*, Civil No. 579 PCT (D.
11 Ariz.). The court held that “all of the property partitioned to the Hopi Tribe ... shall be held in trust by
12 the United States exclusively for the Hopi Tribe and as a part of the Hopi Reservation,” and
13 “readopted and confirmed, except as expressly modified herein, or by intervening orders of the court,”
14 the “Judgment of Partition dated February 10, 1977.”⁸³ The judgment of partition was final on April
15 18, 1979.

16 It is noted that the 1977 and 1979 judgments, entered in proceedings supplemental to the
17 *Healing* litigation derived from the 1958 Act, stated that the lands partitioned and distributed to the
18 Hopi Tribe were to be held in trust for the Hopi Tribe “as a part of the Hopi Reservation.” Section 2 of
19 the 1958 Act provided that such lands “shall thereafter be a reservation for the Hopi Indian Tribe.”

21 ⁸⁰ See page 3 of the judgment. A copy of the Judgment of Partition is available in the Navajo Nation Initial Disc.
Index No. 4481, NN027714-18.

22 ⁸¹ The Court of Appeals revisited the boundary issue in *Sekaquaptewa*, 626 F.2d 113, *supra*. The Court affirmed
the district court’s reliance on a 1965 survey that accurately reflected the legal description contained in the 1882
Executive Order. 626 F.2d at 116-19.

23 ⁸² 575 F.2d at 243.

24 ⁸³ See page 3 of the judgment. A copy of the Summary Judgment on the Boundary Issue and Judgment of
Partition is available in the Navajo Nation Initial Disc. Index No. 4402, NN024658-60.

1 Finding of Fact No. 20. Since December 16, 1882, the United States has held ownership of the
2 lands within the 1882 Executive Order Reservation in trust for Indians.

3 **3. Analysis**

4 Catalyst Paper (Snowflake) Inc. argues that President Arthur’s December 16, 1882, Executive
5 Order did not create a vested right in the Hopi Tribe to the reservation. It points to the following
6 determinations made in *Healing II*:

7 The right of use and occupancy gained by the Hopi Indian Tribe on December 16,
8 1882, was not then a vested right. As stated in our earlier opinion, an unconfirmed
9 executive order creating an Indian reservation conveys no right of use or occupancy to
10 the beneficiaries beyond the pleasure of Congress or the President. Such use and
11 occupancy may be terminated by the unilateral action of the United States without
12 legal liability for compensation. The Hopis were therefore no more than tenants at the
13 will of the Government at that time. (citation omitted). No vesting of rights in the
14 1882 reservation occurred until enactment of the Act of July 22, 1958.⁸⁴

15 It is argued that the Hopi Tribe did not obtain a vested right in the 1882 Executive Order
16 Reservation until passage of the 1958 Act. The Hopi Tribe did not obtain a beneficial interest in the
17 Hopi Partitioned Lands, and those lands did not become a reservation, until at least February 10, 1977,
18 when the judgment of partition was entered. Hence, the priority of a reserved water right in the Hopi
19 Partitioned Lands cannot be prior to February 10, 1977.

20 Catalyst Paper (Snowflake) Inc. presents a well-structured and argued position. However, the
21 Special Master finds that the Hopi Tribe has an implied reserved water right in the Hopi Partitioned
22 Lands with a priority of December 16, 1882. The other attributes of this right must be addressed in
23 future proceedings. This determination deals only with the priority of a reserved water right.

24 The Special Master bases his determination on principles arising from litigation, and
25 harmonized by courts, on all judicial levels, in numerous decisions over the past 100 years, concerning
26 Indian reservations. The Ninth Circuit Court of Appeals declared some of these longstanding concepts

⁸⁴ 210 F. Supp. at 138, *see also* 170; 448 F. Supp. at 1192 (“The *Healing* Court held that equitable interests in

1 regarding Indian reservations as follows:

2 The rule of construction applicable to executive orders creating Indian reservations is
3 the same as that governing the interpretation of Indian treaties. Executive orders, no
4 less than treaties, must be interpreted as the Indians would have understood them ‘and
5 any doubtful expressions in them should be resolved in the Indians’ favor.’ *Choctaw*
6 *Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. State of Washington*,
7 969 F.2d 752, 755 (9th Cir.1992), *cert. denied*, 507 U.S. 1051 (1993). In interpreting
8 statutes that terminate or alter Indian reservations, we construe ambiguities in favor of
9 the Indians. *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425,
10 444 (1975); *Confederated Salish and Kootenai Tribes of Flathead Reservation, Mont.*
11 *v. Namen*, 665 F.2d 951, 955 (9th Cir.1982), *cert. denied*, 459 U.S. 977 (1982). Rights
12 arising from these statutes must be interpreted liberally, in favor of the Indians. *Pacific*
13 *Coast*, 494 F.Supp. at 633 n.6 (citing *Choate v. Trapp*, 224 U.S. 665, 675 (1912)).⁸⁵

14 The Arizona Supreme Court agrees that “[c]ourts construe Indian treaties according to the way
15 in which the Indians themselves would have understood them.”⁸⁶ Although it spoke of treaties, the
16 Court must be deemed to have approved the long established rule for interpreting executive orders
17 creating Indian reservations.

18 In that opinion, the Arizona Supreme Court defined longstanding principles of Indian water
19 rights and law that apply in this matter:

20 Federal water rights are different from those acquired under state law. Beginning with
21 *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court has consistently held
22 that “when the Federal Government withdraws its land from the public domain and
23 reserves it for a federal purpose, the Government, by implication, reserves appurtenant
24 water then unappropriated to the extent needed to accomplish the purpose of the
25 reservation.” (citation omitted).

26 According to *Winters* and its progeny, a federal right vests on the date a reservation is
27 created, not when water is put to a beneficial use. *Arizona v. California*, 373 U.S. 546,
28 600 (1963). ...

29 The Supreme Court, recognizing the “lands were arid, and, without irrigation, were
30 practically valueless,” (citation omitted), held that Congress, by creating the Indian
31 reservation, impliedly reserved “all of the waters of the river ... necessary for ... the

32 the 1882 executive order reservation were not vested until congressional recognition in 1958.”).

33 ⁸⁵ *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th. Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996); *see Walton*, 647
34 F.2d at 47.

⁸⁶ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz.
307, 314, 35 P.3d 68, 75 (2001).

1 purposes for which the reservation was created.” (citation omitted). As noted by the
2 Court, the purpose for creating the Fort Belknap reservation was to establish a
3 permanent homeland for the Gros Ventre and Assiniboine Indians....

4 Granted, *Winters* was not a general stream adjudication. Moreover, congressional intent
5 to reserve water was not expressed in the Fort Belknap treaty; it was found by the Court
6 to be implied. The principle outlined in *Winters*, however, is now well-established in
7 our nation’s jurisprudence: the government, in establishing Indian or other federal
8 reservations, impliedly reserves enough water to fulfill the purpose of each such
9 reservation. (citations omitted)....

10 Since *Winters*, the Supreme Court has strengthened the reserved rights doctrine. In
11 *Arizona I*, the government asserted rights to Colorado River water on behalf of five
12 Indian reservations in Arizona, California, and Nevada. Arizona claimed that because
13 each of the reservations was created or expanded by Executive Order, rather than by
14 treaty, water rights were not retained. This argument was expressly rejected by the
15 Court. *Arizona I*, 373 U.S. at 598. It noted that when these reservations were
16 established, the federal government was aware “that most of the lands were of the
17 desert kind - hot, scorching sands - and that water from the river would be essential to
18 the life of the Indian people and to the animals they hunted and the crops they raised.”
19 (citation omitted). As such, the Court found that the United States reserved water rights
20 “to make the reservation[s] livable.” *Id.* (citation omitted)....

21 Indian reservations, however, are different. In its role as trustee of such lands, the
22 government must act for the Indians’ benefit. (citation omitted). This fiduciary
23 relationship is referred to as “one of the primary cornerstones of Indian law.” Felix S.
24 Cohen, *Handbook of Federal Indian Law* 221 (1982). Thus, treaties, statutes, and
executive orders are construed liberally in the Indians’ favor. (citation omitted). Such
an approach is equally applicable to the federal government’s actions with regard to
water for Indian reservations. “The purposes of Indian reserved rights ... are given
broader interpretation in order to further the federal goal of Indian self sufficiency.
(citation omitted).⁸⁷

Usually, congressional intent to reserve water for tribal reservations is not express but implied.

Such is the case here. As the Arizona Supreme Court held, it “is doubtful that any tribe would have
agreed to surrender its freedom and be confined on a reservation without some assurance that
sufficient water would be provided for its well-being.⁸⁸

The Court held “that the purpose of a federal Indian reservation is to serve as a ‘permanent

⁸⁷ 201 Ariz. at 310-313, 35 P.3d at 71-74.

⁸⁸ 201 Ariz. at 314, 35 P.3d at 75.

1 home and abiding place' to the Native American people living there.”⁸⁹ This “conclusion comports
2 with the belief that ‘[t]he general purpose, to provide a home for the Indians, is a broad one and must
3 be liberally construed.’”⁹⁰

4 Regarding the priority of an implied Indian water right when interpreting an executive order,
5 the following holding of the New Mexico Court of Appeals is instructive:

6 [F]or purposes of setting a priority date for water rights, the priority date should be the
7 date the United States promised to create a reservation and promised to give that
8 promise a liberal construction, while at the same time exacting promises from the
9 Indians, which subjected them to the authority of the United States. Any contrary
10 holding would be a crabbed interpretation of the dealings between the Indians and the
11 United States, an interpretation that the weight of authority teaches us to avoid. ... [A]
12 contrary holding would be inconsistent with the very *Winters* doctrine upon which the
13 Indians’ water rights are based.⁹¹

14 The New Mexico Court of Appeals cautioned, as other appellate courts have, that “treaties and
15 like documents are not to be construed in such a manner as to rewrite them, and they are not to be
16 expanded beyond their clear terms, even to remedy injustice.”⁹² Courts cannot change the meaning of
17 a document under the guise of a liberal interpretation and cannot remake history.

18 *Healing II* found “that neither before nor after the Secretarial settlement of Navajos, did the
19 Hopis abandon their previously-existing right to use and occupy that part of the 1882 reservation in
20 which Navajos were settled,” and “Hopi rights of use and occupancy in that part of the reservation
21 were not terminated by Congressional enactment, administrative action, or abandonment.”⁹³

22 Hopi Indians have lived and subsisted on the Hopi Partitioned Lands since before 1882. As the
23 Indian Claims Commission found, the “record clearly shows that for a long time prior to the
24

⁸⁹ 201 Ariz. at 315, 35 P.3d at 76.

⁹⁰ *Id.* The Court cited *Walton, supra*.

⁹¹ *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 203, 861 P.2d 235, 244 (N.M. App., 1993).

⁹² 116 N.M. at 200, 861 P.2d at 241. *See e.g. United States v. Minn.*, 466 F. Supp. at 1385 (“The Supreme Court has cautioned that the courts cannot remake history or expand treaties and legislation beyond their clear terms to remedy a perceived injustice suffered by the Indians.”).

⁹³ 210 F. Supp. at 189.

1 establishment of the 1882 Executive order reservation, and also for a long time prior to the 1848 date
2 of American sovereignty, the Hopi Indians pursued a static, nonnomadic, nonexpansionist, agricultural
3 mode of life,” and from “their ancient pueblos high atop three mesas in east central Arizona,” they
4 “descended to the valleys below to cultivate neighboring fields for grain and fruit and to pasture small
5 flocks of sheep.”⁹⁴

6 The Indian Claims Commission made the following determinations that are striking in light of
7 the foregoing principles courts apply to Indian reservations:

8 It is clear that the Government expected that the 1882 Executive order would enable it
9 to protect the Hopis from the Navajos and from white settlers and also provide the
10 Hopis with enough land to sustain them. ... **It was intended that the Hopi reservation**
11 **would be a permanent home for the Hopis.** Responsible government officials
12 believed that sufficient land had been set aside to accommodate present and future Hopi
13 tribal needs and therefore the Hopis would confine their activities within the boundaries
14 of the reservation. The record does not disclose any Hopi protest or objection at the
15 time as to the size of the new reservation. (Emphasis added.)⁹⁵

16 The Commission found that the “implied Hopi acceptance coupled with the Government’s manifest
17 intent to confine future Hopi tribal activity within the boundaries of the 1882 reservation, terminated
18 the Hopi’s aboriginal title to lands outside of the reservation.”⁹⁶

19 The Hopi Indians may have had a right of use and occupancy and lacked an exclusive interest
20 in the Hopi Partitioned Lands prior to partition and distribution, but these lands were withdrawn from
21 settlement and sale and set apart for them after six years of federal agents recommending the
22 establishment of a reservation for Hopis. The Indian Claims Commission, who considered much
23 evidence of Hopi history, found that it “was intended that the Hopi reservation would be a permanent
24 home for the Hopis.” The Hopis acquiesced in the reservation that became to those living there their
permanent home and abiding place. Hopis have lived in the area of the 1882 Executive Order

23 ⁹⁴ See n.21, *supra*.

24 ⁹⁵ *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 26.

⁹⁶ *Id.* at 28.

1 Reservation, at least, since prior to 1541. In the words of the Arizona Supreme Court, it is doubtful
2 that the Hopis would have agreed to surrender their freedom and be confined on a reservation without
3 some assurance that sufficient water would be provided for their well-being.

4 Catalyst Paper (Snowflake) Inc. points to the distinction made in section 2 of the 1958 Act,
5 namely, lands in which the Navajo Indians were found to have an exclusive interest “shall thereafter be
6 a part of the Navaho Indian Reservation,” but Hopi partitioned lands “shall thereafter be a reservation *for*
7 the Hopi Indian Tribe.” (Emphasis added.)⁹⁷ Several counter arguments were presented, but none were
8 conclusively persuasive. Hardly anything was said about the 1958 Act’s legislative history so likely that
9 avenue is not helpful.⁹⁸

10 It is again noted that the 1977 and 1979 partition judgments stated that the lands partitioned
11 and distributed to the Hopi Tribe were to be held in trust for the Hopi Tribe “as a part of the Hopi
12 Reservation.”

13 In 1958, the Navajo Nation had a larger reservation created by treaty and congressional
14 legislation. The Hopi Tribe had an executive order reservation. Perhaps the drafters of the 1958 Act read
15 something into this distinction that cannot be fathomed.⁹⁹ It is incongruous that the drafters envisioned a
16 reservation to be established in the 1960s or 1970s for people whose authenticated history in the area
17 then went back over 400 years. The Special Master cannot find that this distinction overrides the long
18 held principles courts have consistently adhered to when considering the status of Indians and
19 reservations. Viewed within the background of these principles, the distinction is not dispositive.

21 ⁹⁷ 72 Stat. 403.

22 ⁹⁸ Apparently, the lack of useful legislative history is common to both the 1934 and 1974 Acts. 448 F. Supp. at
23 1193 (“The congressional record on the 1934 Act is sparse.”); 793 F. Supp. at 1500 (“The legislative history of
24 the 1934 Act is sparse...” and “The language and legislative history of the Navajo-Hopi [Land] Settlement Act
[of 1974] is similarly unhelpful.”).

⁹⁹ See Finding of Fact No. 28, *Healing II, supra* (“On May 25, 1918, 40 Stat. 570, 25 U.S.C. § 211, was
enacted, prohibiting the creation of any Indian reservation or the making of any additions to existing

1 Conclusion of Law No. 13. President Chester A. Arthur’s Executive Order of December 16,
2 1882, was intended to establish a reservation for Hopi Indians.

3 Conclusion of Law No. 14. The December 16, 1882, Executive Order impliedly reserved water
4 for the use of the Hopi Indians.

5 Conclusion of Law No. 15. The date of priority of the Hopi Tribe’s reserved water right in the
6 Hopi Partitioned Lands within the 1882 Executive Order Reservation is December 16, 1882.

7 No findings are made concerning the other parameters of an implied reserved water right.
8 Those will be determined in future proceedings.

9 **VII. DOES THE HOPI TRIBE POSSESS WATER RIGHTS WITH ANOTHER DATE OF**
10 **PRIORITY AS A RESULT OF CONGRESSIONAL ACTS AND COURT DECISIONS**
11 **ADDING PROPERTY TO THE HOPI RESERVATION?**

12 This section covers several areas associated with the Hopi Indian Tribe. The first is Moenkopi
13 Island.

14 **A. Moenkopi Island**

15 Moenkopi Island is located west of the 1882 Executive Order Reservation. According to the
16 United States, the area “is referred to as an island because it is a portion of land within the overall
17 Navajo Nation Reservation.”¹⁰⁰ The “Hopis use the spelling ‘Moenkopi’; some government documents
18 and previous court decisions utilized the spelling ‘Moencopi.’”¹⁰¹

19 The Hopi Tribe and the United States argue that the Hopi Tribe has aboriginal water rights to
20 Moenkopi Island. The Special Master has determined that the Hopi Tribe does not have aboriginal
21 water rights to lands outside the 1882 Executive Order Reservation.

22 In the alternative, the Hopi Tribe and the United States assert that the Hopi Tribe holds an

23 reservations in the States of New Mexico and Arizona, except by Act of Congress.”); *see also* Act of March 3,
1927, 44 Stat. 1347.

24 ¹⁰⁰ U.S. Stmt. Undisp. Facts in Support of U.S. Mot. for Summ. J. at 5 (no. 7 but should be 8) (Mar. 26, 2010).

¹⁰¹ 793 F. Supp. at 1502 n.8.

1 implied reserved water right to Moenkopi Island. The United States posits alternative reserved right
2 priorities based on a January 8, 1900, Executive Order of President William McKinley or the Act of
3 June 14, 1934, which was the genesis of a partition action commenced by the Hopi Tribe under the
4 1974 Act.

5 Catalyst Paper (Snowflake) Inc. counters that the priority of a reserved water right for
6 Moenkopi Island cannot be prior to December 21, 1992 (final judgment in *Masayesva v. Zah*, CIV 842
7 PCT EHC (D. Ariz.) (later *Honyoama v. Shirley*)), or December 4, 2006 (incorporation of the
8 December 21, 1992, final judgment in *Honyoama v. Shirley*, No. CIV 74-842-PHX-EHC (D. Ariz.)).
9 Both dates reflect the entry of a final judgment in the partition action involving Moenkopi Island.

10 **1. Executive Order of January 8, 1900**

11 The United States argues that a reserved water right priority for Hopi rights on the Moenkopi
12 Island is January 8, 1900, the date President William McKinley issued the following Executive Order:

13 It is hereby ordered that the tract of country lying west of the Navajo and Moqui
14 reservations in the Territory of Arizona, embraced within the following described
15 boundaries, viz, beginning at the southeast corner of the Moqui Reservation and
16 running due west to the Little Colorado River; thence down that stream to the Grand
17 Canyon Forest Reserve; thence north on the line of that reserve to the northeast corner
18 thereof; thence west to the Colorado River; thence up that stream to the Navajo Indian
19 Reservation, be, and the same is hereby, withdrawn from sale and settlement until
20 further ordered.¹⁰²

21 Finding of Fact No. 21. The Moenkopi Island is situated within the “tract of country”
22 withdrawn from sale and settlement described in the January 8, 1900, Executive Order.¹⁰³

23 The express wording states that the lands were withdrawn from sale and settlement, but were
24 not reserved for an Indian reservation or a federal purpose. Both a withdrawal of land and a
reservation for a federal purpose are requirements of a reserved water right as the Arizona Supreme

23 ¹⁰² I KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 877, *supra*. A copy of the executive order is available in
Catalyst Paper (Snowflake) Inc. Third Supp. Disc. No. 1, FCHP00816-820.

24 ¹⁰³ 448 F. Supp. at 1191 (“The Hopi village of Moenkopi is within the 1900 executive order reservation.”).

1 Court recently held.

2 Conclusion of Law No. 16. “In each case dealing with federal reserved water rights, it has been
3 obvious that there has been a withdrawal and reservation of the subject lands.”¹⁰⁴

4 Conclusion of Law No. 17. “Although often used interchangeably, the terms ‘withdraw’ and
5 ‘reserve’ have different meanings.”¹⁰⁵ “It is important to note at the outset that ‘withdrawal’ and
6 ‘reservation’ are not synonymous terms. ... A withdrawal makes land unavailable for certain kinds of
7 private appropriation under the public land laws”¹⁰⁶ such as the operation of federal mining,
8 homestead, preemption, desert entry, and other federal land laws. Withdrawn lands “are tracts that the
9 government has placed off-limits to specified forms of use and disposition,” but a withdrawn parcel
10 “may also be reserved for particular purposes, and often is.”¹⁰⁷ A withdrawal of public domain land
11 removes the land from the operation of federal public land laws and makes the land unavailable for
12 settlement, public sale, or other disposition under the federal public land laws.

13 Conclusion of Law No. 18. “Reserved lands ... are those that have been expressly withdrawn
14 from the public domain by statute, executive order, or treaty, and are dedicated to a specific federal
15 purpose.”¹⁰⁸ “A reservation ... goes a step further: it not only withdraws the land from the operation of
16 the public land laws, but also dedicates the land to a particular public use ... [a] reservation necessarily
17 includes a withdrawal; but it also goes a step further, effecting a dedication of the land ‘to specific
18 public uses.’”¹⁰⁹ Reservations or reserved lands “are the federal tracts that Congress or the Executive
19

20 ¹⁰⁴ *Sierra Club v. Block*, 622 F. Supp. 842, 854 (D. C. Colo. 1985), *vacated on other grounds sub nom. Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990).

21 ¹⁰⁵ 622 F. Supp. at 854.

22 ¹⁰⁶ *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 784 (10th Cir. 2005) (*Southern Utah*”).

23 ¹⁰⁷ 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *Public Natural Resources Law*, § 1:12 at 1-16 (2004) (“The main distinction between withdrawn and reserved lands is that a withdrawal is negative, forbidding certain uses, while a reservation is a positive declaration of future use.”).

24 ¹⁰⁸ 622 F. Supp. at 854.

¹⁰⁹ 425 F.3d at 784.

1 has dedicated to particular uses (footnote omitted). The dedication removes them from availability for
2 contrary use or disposition.”¹¹⁰

3 In *Southern Utah*, the 10th Circuit Court of Appeals quoted the definition of “reservation”
4 from the first edition of Black’s Law Dictionary, a reputable legal dictionary, published in 1891. The
5 dictionary is in its ninth edition. The first edition defined “reservation” as follows: “In public land laws
6 of the United States, a reservation is a tract of land, more or less considerable in extent, which is by
7 public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as
8 parks, military posts, Indian lands, etc.”¹¹¹ At least as of the late 1880s, it was recognized that a
9 reservation of public domain consisted of a withdrawal of the land from disposal and its dedication to
10 a specific public use - requisites consistent with today’s law of reserved water rights.

11 The Arizona Supreme Court upheld these requirements in its decision concerning State Trust
12 Lands, holding that because “the State Trust Lands were not withdrawn and reserved for a federal
13 purpose. ... [t]hese lands cannot include federal reserved water rights.”¹¹² The Special Master has not
14 seen any authority that makes these requirements inapplicable to Indian reserved water rights.

15 Noteworthy is that the Navajo Nation in *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183,
16 1191, “suggest[ed] that land withdrawn by the Executive Order of January 8, 1900, was permanently
17 reserved by Congress.” The argument was based on a 1902 federal appropriations act. The district
18 court rejected the argument holding that:

19 [N]othing in the legislative history cited by the Navajo tribe indicates such a clear
20 purpose. Indeed, the Navajo position leads to an anomalous result. The Hopi village of
21 Moencopi is within the 1900 executive order reservation. One stumbling block to
passage of the 1934 Act was the presence of this Hopi village. The Navajo tribe would
read the status of the Moencopi village completely out of the 1934 Act.¹¹³

22 ¹¹⁰ 1 COGGINS & GLICKSMAN § 1:11 at 1-15.

23 ¹¹¹ 425 F.3d at 784.

24 ¹¹² *In re the General Adjudication of All Rights to Use Water in the Gila River and Little Colorado River System and Source (Consol.)*, 231 Ariz. 8, 16, 289 P.3d 936, 944 (2012).

¹¹³ 448 F. Supp. at 1192.

1 Relevant to this proceeding is the further evidence that Moenkopi Island was a Hopi area prior to the
2 1934 Act, and its “status” was within the scope of that legislation.

3 Conclusion of Law No. 19. The January 8, 1900, Executive Order of President William
4 McKinley withdrew public lands from sale and settlement, but did not reserve those lands for an
5 Indian reservation or a federal purpose.

6 Conclusion of Law No. 20. The January 8, 1900, Executive Order is not a basis to determine
7 that the Hopi Tribe holds a reserved water right for Moenkopi Island with a priority of that date.
8 However, the Executive Order withdrew Moenkopi Island from sale and settlement.

9 The Hopi Tribe cannot assert a reserved water right priority of January 8, 1900, for water rights
10 to Moenkopi Island.

11 **2. Act of June 14, 1934, and Partition Litigation**

12 The 1934 Act defined the exterior boundaries of the Navajo Indian Reservation by perimeter
13 legal descriptions and provided for exchanges, consolidations, purchases, relinquishments, and
14 reconveyances of lands. The Act provided that all vacant, unreserved, and unappropriated public lands
15 within those boundaries are “permanently withdrawn from all forms of entry or disposal for the benefit
16 of the Navajo and such other Indians as may already be located thereon.”¹¹⁴ Hopi Indians resided on
17 some of those lands.

18 The 1934 Act stated that “nothing herein contained shall affect the existing status of the Moqui
19 (Hopi) Indian Reservation created by Executive order of December 16, 1882.”¹¹⁵ The Act excluded
20 from its scope other specified lands not pertinent to this proceeding.

21 Finding of Fact No. 22. The Moenkopi Island was occupied by members of the Hopi Tribe on
22 June 14, 1934, when the 1934 Act was enacted. The federal district court took “judicial notice that a

23 ¹¹⁴ 48 Stat. 960, 961. A copy of the 1934 Act is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 16,
24 FCHP00148-151.

1 Hopi village existed at Moencopi on June 14, 1934,” and “Moencopi is within the 1934 Act land grant,
2 and, therefore, the Hopi are within the ‘such other Indians’ clause and are holders of equitable
3 interests.”¹¹⁶

4 Disagreements arose between the Hopi Tribe and Navajo Nation concerning Moenkopi Island,
5 and efforts to resolve them mutually failed. The Congress enacted the 1974 Act in part to resolve the
6 conflict concerning the lands of the 1934 Act.¹¹⁷

7 The 1974 Act authorized the Hopi Tribe and Navajo Nation, acting through the chairmen of
8 their tribal councils, to commence and defend an action in federal district court to determine the rights
9 and interests of the tribes in or to the area described in § 1 of the 1934 Act, “except the reservation
10 established by the Executive Order of December 16, 1882,” and “quieting title thereto in the tribes.”¹¹⁸

11 Section 8(b) of the 1974 Act provided that lands in which the Navajo Nation was determined to
12 have exclusive interest “shall continue to be a part of the Navajo Reservation;” lands in which the
13 Hopi Tribe was determined to have the exclusive interest “shall thereafter be a reservation for the Hopi
14 Tribe;” and lands in which the district court found that both tribes had a joint or undivided interest
15 were to be partitioned “on the basis of fairness and equity,” and any “area so partitioned shall be
16 retained in the Navajo Reservation or added to the Hopi Reservation, respectively.”¹¹⁹ With the
17 exception of the reference to joint interest lands, section 8(b) contains the same language as section 2
18 of the 1958 Act.¹²⁰

20 ¹¹⁵ *Id.*

21 ¹¹⁶ 448 F. Supp. at 1193.

22 ¹¹⁷ 65 F.3d at 1460 (“Congress decided that the dispute should be brought to an end by litigation, and exercised
its power to provide for the standards which should be used.”).

23 ¹¹⁸ 88 Stat. 1712, 1715.

24 ¹¹⁹ 88 Stat. 1712, 1715-16.

¹²⁰ Section 2 of the 1958 Act states in pertinent part as follows:

Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the
court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands,
if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi

1 Pursuant to the 1974 Act, the Hopi Tribe brought suit against the Navajo Nation to determine
2 the Hopi Tribe's rights to lands within the scope of the 1934 Act. The litigation was split into two
3 phases. The following is an overview of the extended litigation.

4 The first phase determined "who were 'such other Indians' entitled to assert interests in the
5 1934 [Act] Reservation, which lands in the 1934 [Act] Reservation were subject to litigation, and
6 where 'such other Indians' were 'located' in 1934."¹²¹ Phase II "more specifically delineate[d] the
7 boundaries of the area which [the court] found Hopis had exclusively used, and that area found to have
8 been jointly used by Hopis and Navajos in 1934," and the district court partitioned the lands that were
9 jointly used.¹²²

10 The Ninth Circuit Court of Appeals "affirmed the District Court's interpretation of the 1934
11 Act that Hopi interest in the 1934 lands depended on Hopi occupation, possession, or use of the lands
12 on June 14, 1934," holding that the "purposes, history, and language of the 1934 Act show an intent to
13 withdraw all reservation land for the Navajos except for pockets occupied by Hopis."¹²³ The Court of
14 Appeals agreed with the district court that this was the meaning of the "such other Indians as may
15 already be located thereon" provision.

16 The Ninth Circuit Court of Appeals noted that "[t]his dispute probably" had lasted for over
17 four centuries, and that "[i]t can never be ended in a way which satisfies both tribes."¹²⁴ The Special
18 Master is optimistic that the same will not be said of the water rights adjudication. Except for a
19 determination regarding the location of Hopi religious sites, the Court of Appeals held that the dispute
20
21

22 Indians are determined by the court to have the exclusive interest shall thereafter be a reservation for
the Hopi Indian Tribe. 72 Stat. 403.

23 ¹²¹ 793 F. Supp. at 1498.

¹²² 816 F. Supp. at 1394.

¹²³ 793 F. Supp. at 1499.

¹²⁴ 65 F.3d at 1460.

1 resolution process between the Hopi Tribe and Navajo Nation “has largely been completed.”¹²⁵

2 Finding of Fact No. 23. On December 21, 1992, the federal district court entered a final
3 judgment in *Masayesva v. Zah*, No. CIV 74-842 PCT EHC (D. Ariz.) (later *Honyoama v. Shirley*).¹²⁶

4 The lands of Moenkopi Island were recognized as held in trust by the United States for the Hopi Tribe.

5 Finding of Fact No. 24. The federal district court’s judgment was incorporated in the court’s
6 Order and Final Judgment dated December 4, 2006, entered in *Honyoama v. Shirley*, No. CIV 74-842
7 PHX EHC (D. Ariz.).¹²⁷

8 Finding of Fact No. 25. The United States has held ownership of the lands of Moenkopi Island
9 in trust for Indians.

10 Catalyst Paper (Snowflake) Inc. argues that Moenkopi Island was added to the Hopi Indian
11 Reservation upon the entry of the judgment of partition, at least December 21, 1992, and not earlier.
12 Until the judgment of partition, the Hopi Tribe held an undivided one-half interest in the land. It was
13 only then that Moenkopi Island was added to the Hopi Reservation, hence, a reserved water right for
14 Moenkopi Island cannot have an earlier priority.

15 The Special Master adopts the same principles and reasoning used to determine a priority for a
16 reserved water right for the 1882 Executive Order Reservation. Although the 1934 Act did not explicitly
17 withdraw lands from sale and settlement and reserved them for a Hopi Indian Reservation, the legislation
18 recognized the presence of Hopis in areas within the exterior boundaries of the Navajo Indian
19 Reservation and provided a judicial means to have those “pockets” reserved for Hopi Indians.

20 Catalyst Paper (Snowflake) Inc. reiterates its arguments concerning the wording of the 1974 Act

21 _____
22 ¹²⁵ *Id.*

23 ¹²⁶ A copy of the judgment is available in the Hopi Tribe Initial Disc. Index No. 709, HP015480-88 excluding
24 attachments. The judgment includes the determinations made concerning the interests of the San Juan Southern
Paiute Tribe in a portion of the 1934 Act lands, but the Hopi Tribe does not have any interest in any portion of
the Paiute lands.

¹²⁷ A copy of the judgment is available in the Hopi Tribe Initial Disc. Index No. 709, HP015474-78.

1 that the lands in which the Hopi Tribe was determined to have the exclusive interest “shall thereafter
2 be a reservation for the Hopi Tribe” as opposed to being “a part of” the Hopi Indian Reservation. It is
3 noteworthy that the district court that spent years immersed in the partition issues related to the 1934 Act
4 appears to have itself been confused by the wording. In summarizing its tasks, the court stated that:

5 Thus, this Court need only address Navajo use of lands on which the Hopi Tribe has
6 proved Hopis were “located” in 1934, in order to decide whether Hopis were
7 “exclusively” or “jointly” located on that land. **If Hopis were exclusively located on
an area of land, it will become a part of the Hopi Reservation.**” (Emphasis
added.)¹²⁸

8 And later:

9 Upon completion of a survey of the exclusive Hopi lands by a competent surveyor
10 appointed by the Court or by stipulation of the parties, and upon the Court’s approval of
11 that survey, title to the lands so identified shall be quieted in the Hopi Tribe, subject to
the trust title of the United States, and all **such lands shall be a part of the Hopi
Reservation.** (Emphasis added.)¹²⁹

12 The district court did not say shall “be a reservation for the Hopi Tribe” as the 1974 Act provided but
13 stated shall be “a part of the Hopi Reservation.”

14 Conclusion of Law No. 21. The 1934 Act defined the boundaries of the Navajo Indian
15 reservation and recognized the presence of other Indians within those lands including Hopi Indians
16 residing in Moenkopi Island.

17 Conclusion of Law No. 22. The 1934 Act impliedly reserved water for the use of Hopi Indians
18 residing in Moenkopi Island.

19 Conclusion of Law No. 23. The date of priority of the Hopi Tribe’s reserved water right in
20 Moenkopi Island is June 14, 1934.

21 No findings are made concerning the other parameters of an implied reserved water right
22 which will be determined in future proceedings.

23 _____
¹²⁸ 793 F. Supp. at 1501.

24 ¹²⁹ 793 F. Supp. at 1531.

1 **B. Hopi Industrial Park**

2 The Hopi Industrial Park consists of approximately 200 acres of land located near Winslow,
3 Arizona, south of the 1882 Executive Order Reservation. According to the United States, it approved
4 on October 17, 1966, the purchase of the Hopi Industrial Park in trust for the Hopi Tribe. The
5 industrial park is not, and has never been, part of the Hopi Indian Reservation.

6 Catalyst Paper (Snowflake) Inc. alleges that the United States assembled the industrial park in
7 1966 and 1967 through an indenture and two deeds, and the date of acquisition is a disputed issue of
8 material fact. Furthermore, it argues that because the Hopi Industrial Park has not been added to the
9 Hopi Indian Reservation, the park is not within the Court’s order of reference to the Special Master.

10 There was little briefing concerning the Hopi Industrial Park. The record is insufficient to
11 determine by summary judgment the priority of water rights for the Hopi Industrial Park. Furthermore,
12 in light of the position of Catalyst Paper (Snowflake) Inc. that this issue is not within the scope of the
13 referral to the Special Master, the alternatives are to wait until ADWR prepares the appropriate report
14 to address the priority issue or the Court clarifies the referral to the Special Master, and the record is
15 augmented and briefed as needed.

16 The Special Master does not make findings of fact, conclusions of law, and recommendations
17 concerning the priority of water rights for the Hopi Industrial Park.

18 **C. Aja, Clear Creek, Drye, and Hart Ranches**

19 According to the United States, these ranches were purchased in the 1990s by the Hopi Tribe
20 pursuant to the Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat.
21 3649, and the Secretary of the Interior has taken these four ranches into trust for the Hopi Tribe.

22 The Navajo-Hopi Land Dispute Settlement Act of 1996 “specifically limits the Ranches to”
23
24

1 surface water and groundwater rights.¹³⁰ Section 12 (a)(1) of the Act states in pertinent part as follows:

2 [N]ewly acquired trust lands shall have only the following water rights:

3 (A) The right to the reasonable use of groundwater pumped from such lands.

4 (B) All rights to the use of surface water on such lands existing under State law
on the date of acquisition, with the priority date of such right under State law.

5 (C) The right to make any further beneficial use on such lands which is
6 unappropriated on the date each parcel of newly acquired trust lands is taken
into trust. The priority date for the right shall be the date the lands are taken into
trust.¹³¹

7
8 The United States has submitted as part of the latest federal amended statement of claimant
9 abstracts of the water rights claimed for the ranches. According to Catalyst Paper (Snowflake) Inc.,
10 there are 330 abstracts, 121 of which raise issues of material fact involving priority. The abstracts
11 include state law based water rights claims.¹³²

12 Based on his experience in adjudication matters, the Special Master takes judicial notice that
13 330 abstracts likely present numerous factual and legal questions. Furthermore, Arizona state law
14 based water rights raise issues not pertinent to reserved rights claims, such as abandonment, forfeiture,
15 subflow, pre-June 12, 1919 priority, and ownership.

16 Because state law based surface water and groundwater rights, and a large number, are
17 involved, the Special Master finds that determining the priority of these rights should be deferred until
18 ADWR prepares the appropriate report to address the issue. The record is insufficient to determine by
19 summary judgment water rights priorities associated with the ranches.

20 The Special Master does not make findings of fact, conclusions of law, and recommendations
21 concerning the priority of water rights for the Aja, Clear Creek, Drye, and Hart Ranches. However, the

22 ¹³⁰ U. S. Mot. for Summ. J. at 20 (Mar. 26, 2010).

23 ¹³¹ 110 Stat. 3649, 3653. Section 12 (d) provides in part that the Hopi Tribe's "water rights on newly acquired
24 trust lands shall be adjudicated with the rights of all other competing users in the court now presiding over the
Little Colorado River Adjudication." 110 Stat. 3649, 3654. A copy of the Navajo-Hopi Land Dispute Settlement
Act of 1996 is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 54, FCHP00504-11.

1 Special Master recommends that the Court direct ADWR to complete the investigations of the claimed
2 water rights for these ranches.

3 **D. Reacquired Lands**

4 The Special Master adopts, as modified, the following nine findings of fact submitted by
5 Catalyst Paper (Snowflake) Inc. to provide the background of certain conveyances and reacquisitions
6 of lands made by the United States within and surrounding the 1882 Executive Order Reservation.

7 Finding of Fact No. 26. Congress granted lands to the Atlantic and Pacific Railroad Company
8 in aid of construction of a railroad line from Springfield, Missouri, to the Pacific Ocean. Act of July
9 27, 1866, ch. 278, § 1, 14 Stat. 292, 293 (“1866 Act”). The grantee received a right of way. *Id.* § 2, 14
10 Stat. 294. In addition, it received:

11 every alternate section of public land, not mineral, designated by odd numbers, to the
12 amount of twenty alternate sections per mile, on each side of said railroad line, as said
13 company may adopt, through the Territories of the United States and whenever,
14 prior to said time, any of said sections or parts of sections shall have been granted, sold,
15 reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of,
other lands shall be selected by said company in lieu thereof, under the direction of the
Secretary of the Interior, in alternate sections, and designated by odd numbers, not
more than ten miles beyond the limits of said alternate sections, and not including the
reserved numbers....

16 *Id.* § 3, 14 Stat. 294-95. The grantee was permitted to select “in lieu” lands to replace sections
17 disqualified from the grant due to their mineral character. *Id.* 14 Stat. 295. In summary, the 1866 Act
18 granted the Atlantic and Pacific Railroad Company alternate odd-numbered sections of land on each
19 side of the railroad right of way extending outward for forty miles, plus the right to select as “in lieu”
20 lands alternate odd-numbered sections within an additional ten miles on each side of the right of way.

21 *See Santa Fe Pacific Railroad Co. v. United States*, 294 F.3d 1336, 1338-39 (Fed. Cir. 2002);
22 *Chapman v. Santa Fe Pac. Railroad Co.* 198 F.2d 498, 499 (D.C. Cir. 1951), *cert. denied*, 343 U.S.

23
24 ¹³² Catalyst Paper (Snowflake) Inc. Resp. to U.S. Mot. for Summ. J. at 14 (Dec. 20, 2011).

1 964 (1952).

2 Finding of Fact No. 27. The grant to the Atlantic and Pacific Railroad Company was *in*
3 *praesenti*. The United States Supreme Court, quoting from its opinion in *St. Paul & Pacific Railroad*
4 *Co. v. Northern Pacific Railroad Co.*, 139 U.S. 1, 5-6 (1891), explained:

5 The language of the statute is, ‘that there be, and hereby is, granted’ to the company
6 every alternate section of the lands designated, which implies that the property itself is
7 passed, not any special or limited interest in it. The words also import a transfer of a
8 present title, not a promise to transfer one in the future. The route not being at the time
9 determined, the grant was in the nature of a float, and the title did not attach to any
10 specific sections until they were capable of identification; but when once identified the
11 title attached to them as of the date of the grant, except as to such sections as were
12 specifically reserved. It is in this sense that the grant is termed one *in praesenti*; that is
13 to say, it is of that character as to all lands within the terms of the grant, and not
14 reserved from it at the time of the definite location of the route.

15 *United States v. Southern Pac. Railroad Co.*, 146 U.S. 570, 593 (1892) (citation in *St. Paul & Pac.*
16 *Railroad Co. v. Northern Pac. Railroad Co.*, *supra*, omitted).

17 Finding of Fact No. 28. The Atlantic and Pacific Railroad Company filed a map of definite
18 location with the Secretary of the Interior on March 12, 1872, and thereafter the railroad was
19 constructed. *Chapman v. Santa Fe Pac. Railroad Co.* 198 F.2d at 499. At that point, its title to the
20 designated lands was no longer “floating” but attached as of July 27, 1866 (the date of the 1866 Act).
21 *United States v. Southern Pac. Railroad Co.*, 146 U.S. at 595.

22 Finding of Fact No. 29. The St. Louis & San Francisco Railroad Company succeeded to the
23 interest of the Atlantic and Pacific Railroad Company. The St. Louis & San Francisco Railroad
24 Company later sold one-half of that interest to the Atchison, Topeka & Santa Fe Railway Company.
Eventually the bulk of the Atlantic and Pacific Railroad Company’s interest came to be owned by the
Santa Fe Pacific Railroad Company (an affiliate of the Atchison, Topeka & Santa Railway Company),
the Aztec Land and Cattle Company, and the New Mexico and Arizona Land Company. SANFORD A.
MOSK, LAND TENURE PROBLEMS IN THE SANTA FE RAILROAD GRANT AREA at 12-13 (Univ. Cal. Press

1 1944; Arno Press Inc. reprint 1981).

2 Finding of Fact No. 30. Congress authorized the Government to reacquire granted lands after
3 1866 to accomplish various purposes. *E.g.*, Act of June 22, 1874, ch. 400, 18 Stat. 194 (authorizing the
4 relinquishment of railroad grant lands in the possession of a settler who entered the lands under the
5 preemption or homestead laws after the railroad grant attached to them, and substitution of “in lieu”
6 lands; Act of April 21, 1904, ch. 1402, 33 Stat. 189, 211 (“1904 Act”) (authorizing the exchange of
7 private land over which an Indian reservation was extended by executive order for vacant, non-
8 mineral, non-timbered, surveyed public lands).

9 Finding of Fact No. 31. Pursuant to the 1904 Act, 33 Stat. 211, Santa Fe Pacific Railroad
10 Company conveyed to the United States at least¹³³ 183,200 acres of its land situated within the
11 boundaries established by the 1882 Executive Order. Santa Fe Pacific Railroad Company received “in
12 lieu” lands in return for these conveyances.

13 Finding of Fact No. 32. The United States acquired land within the area subject to the 1934 Act
14 and in the vicinity of the area subject to the 1882 Executive Order by way of deeds from various
15 landowners. Catalyst Paper (Snowflake) Inc. See Exhibit 1 and Revised Exhibit 2.

16 Finding of Fact No. 33. On August 25, 1934, Santa Fe Pacific Railroad Company conveyed
17 land to the United States along the western and southern limits of the area subject to the 1882
18 Executive Order. *See* Deed dated Aug. 25, 1934, First Supp. Disc. No. 28, FCHP00620-27. While
19 some of the land conveyed lies within the area subject to the 1882 Executive Order, the majority does
20 not. Santa Fe Pacific Railroad Company received monetary compensation for this conveyance. *Id.*

21 Finding of Fact No. 34. Pursuant to the 1934 Act, Santa Fe Pacific Railroad Company

22 _____
23 ¹³³ Catalyst Paper (Snowflake) Inc. derived the conveyance and acreage information from deeds it obtained
24 from the federal Bureau of Land Management. Additional deeds, if any, that the Bureau could not locate or
otherwise did not provide are not reflected in this account. The maps designated Exhibits 1 and 2 are based on
these deeds.

1 conveyed land to the United States along the southern limits of the area subject to the 1882 Executive
2 Order. *See* Deed dated Oct. 20, 1934, First Supp. Disc. No. 29, FCHP00628-42. While some of the
3 land conveyed by this deed lies within the area subject to the 1882 Executive Order, the majority does
4 not. Santa Fe Pacific Railroad Company received “in lieu” lands in return for this conveyance. *See*
5 Phoenix No. 075761, Patent No. 1107275, Second Supp. Disc. No. 28, FCHP00775-83.

6 Catalyst Paper (Snowflake) Inc. submitted with its summary judgment motion two maps
7 designated Exhibit 1 and Revised Exhibit 2 (revised December 2011). Exhibit 1 identifies the United
8 States’ land reacquisitions by grantor. Revised Exhibit 2 shows the chronology of the United States’
9 reacquisitions of land, by year of acquisition from 1909 to 1963, within and in the vicinity of the 1882
10 Executive Order Reservation.

11 Catalyst Paper (Snowflake) Inc. argues that the priority of any tribal water right associated with
12 lands conveyed to private owners and reacquired cannot predate the United States’ reacquisition of the
13 lands. While the conveyances may have been subject to the Hopi Tribe’s aboriginal or Indian title
14 when the conveyances attached as of July 27, 1866, that encumbrance was removed from the grant
15 lands when the Hopi Tribe’s claimed aboriginal title was extinguished as of 1882 and 1937.

16 Neither Exhibit 1 nor Revised Exhibit 2 show land conveyances inside the Moenkopi Island.
17 The land conveyances shown are inside Land Management District 6, outside District 6 but within the
18 boundaries of the 1882 Executive Order Reservation, and on the southwestern, southern, and
19 southeastern exterior vicinity of the 1882 reservation. Exhibit 1 identifies seven grantors by names.

20 Finding of Fact No. 35. According to Exhibit 1, the Santa Fe Pacific Railroad Company was
21 the only grantor of reacquired lands within the boundaries of the 1882 Executive Order Reservation
22 including Land Management District 6.

23 As Justice William O. Douglas wrote for the United States Supreme Court:
24

1 If the right of occupancy of the [Hopis] was not extinguished prior to the date of
2 definite location of the railroad in 1872, then the respondent's predecessor took the fee
subject to the encumbrance of Indian title. (citation omitted). For on that date the title of
respondent's predecessor attached as of July 27, 1866.¹³⁴

3 The Hopi Tribe's Indian title was its right of occupancy and use. For over 200 years, it has
4 been well-defined under the doctrine of discovery "that discovering nations held fee title to these
5 lands, subject to the Indians' right of occupancy and use."¹³⁵

6 Finding of Fact No. 36. The Hopi Tribe's aboriginal title to Land Management District 6 has
7 not been extinguished.

8 Hence, the lands inside District 6 that were conveyed to others and were reacquired by the
9 United States, beginning in and continuing after 1909, remained subject to the Hopi Tribe's Indian
10 title.

11 Finding of Fact No. 37. The Hopi Tribe's aboriginal title to the lands outside Land
12 Management District 6 but within the 1882 Executive Order Reservation was terminated on June 2,
13 1937.

14 Finding of Fact No. 38. According to the map shown on Catalyst Paper (Snowflake) Inc.'s
15 Revised Exhibit 2, the United States reacquired the lands inside the boundaries of the 1882 Executive
16 Order Reservation in 1909, 1910, 1911, and 1913.

17 From the foregoing finding it follows that the reacquired lands within the boundaries of the
18 1882 Executive Order Reservation, but outside Land Management District 6, remained subject to the
19 Hopi Tribe's aboriginal title from their original conveyances in the 1860s to after they were reacquired
20 by the United States between 1909 and 1913. The Hopi Tribe's aboriginal or Indian title was
21

22 ¹³⁴ *United States v. Santa Fe Pac. Railroad Co.*, 314 U.S. 339, 347 (1941). The "encumbrance of Indian title,"
23 when a sovereign grants lands "while yet in possession of the natives," was recognized by the principal
European nations that populated the Americas. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823) ("These grants
24 have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.").

¹³⁵ 470 U.S. at 234.

1 extinguished after these lands were conveyed to others and were reacquired.

2 Catalyst Paper (Snowflake) Inc. cites the following footnote in Justice Douglas' opinion:

3 In case of any lands in the reservation which were not part of the ancestral home of the
4 Walapais and which had passed to the railroad under the 1866 Act, the railroad's title
would antedate the creation of the reservation in 1883 and hence not be subject to the
incumbrance of Indian title.¹³⁶

5 In this case, the evidence shows that the lands within the 1882 Executive Order Reservation, including
6 Land Management District 6, were "part of the ancestral home of the" Hopis when the conveyances
7 were made in the 1860s. The Indian Claims Commission answered that issue.

8 The peculiarity of this case is that the reacquired lands situated within the boundaries of the
9 1882 Executive Order Reservation remained subject to the Hopi Tribe's aboriginal title from prior to
10 July 27, 1866, to June 2, 1937. The conveyances and reacquisitions made during that period do not
11 affect the priority of the Hopi Tribe's water rights as argued.

12 The United States cites the Wyoming Supreme Court's *Big Horn River Adjudication* decision
13 as authority for the proposition that reacquired lands that return to the status of "reservation lands"
14 retain the priority of the reservation's implied reserved water right. The Court held that:

15 "Because all the reacquired lands ... of the reservation are reservation lands, ... the
16 same reserved water rights apply. Thus, reacquired lands on both portions of the
reservation are entitled to an 1868 priority date."¹³⁷

17 The Court held that because the reacquired lands had again become part of the existing
18 reservation, which was held to have a reserved water right with an 1868 priority, the reacquired lands
19 were entitled to the same priority. The Court did not find it necessary to examine the transactional
20 details of the reacquired lands. At a minimum, this holding supports the conclusion that the priorities
21 of the Hopi Tribe's water rights for lands within the boundaries of the 1882 Executive Order
22

23
24 ¹³⁶ 314 U.S. at 359 n.24.

1 Reservation are not affected by the conveyances as argued.

2 Conclusion of Law No. 24. The priorities of the Hopi Tribe’s water rights for lands within the
3 boundaries of the 1882 Executive Order Reservation, including Land Management District 6, are not
4 affected by the conveyances of lands to private parties by the United States beginning in the 1860s
5 because the lands remained subject to the Hopi Tribe’s aboriginal title.

6 **VIII. DOES CLAIM OR ISSUE PRECLUSION OR BOTH PRECLUDE ANY CLAIMS BY**
7 **OR ON BEHALF OF THE HOPI TRIBE TO WATER RIGHTS MORE SENIOR TO THOSE**
8 **HELD BY ANY OTHER CLAIMANT?**

8 The Arizona Supreme Court has held that:

9 Federal law dictates the preclusive effect of a federal judgment. *See Semtek Int’l Inc. v.*
10 *Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) (noting that state courts cannot give
11 federal judgments “merely whatever effect they would give their own judgments, but
12 must accord them the effect that [the United States Supreme] Court prescribes”); *Heck*
13 *v. Humphrey*, 512 U.S. 477, 488 n.9 (1994) (“State courts are bound to apply federal
14 rules in determining the preclusive effect of federal-court decisions on issues of federal
15 law.”).¹³⁸

13 The defense of claim preclusion - which formerly encompassed merger and bar and is often
14 referred to as res judicata - “has three elements: (1) an identity of claims in the suit in which a
15 judgment was entered and the current litigation, (2) a final judgment on the merits in the previous
16 litigation, and (3) identity or privity between parties in the two suits.”¹³⁹

17 Issue preclusion - which formerly encompassed collateral and direct estoppel - “attaches only
18 when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the
19

20 ¹³⁷ *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 114 (Wyo.
1988), *aff’d per curiam by equally div’d court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989). The
21 Wind River Indian Reservation was established by treaty in 1868.

22 ¹³⁸ *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 212 Ariz. 64,
69, 127 P.3d 882, 887 (2006), *cert. denied*, 549 U.S. 1156 (2007); *see Maricopa-Stanfield Irr. & Drainage Dist.*
23 *v. Robertson*, 211 Ariz. 485, 491, 123 P.3d 1122, 1128 (2005), *cert. denied sub nom. Carranza v. Maricopa-*
Stanfield Irr. & Drainage Dist., 547 U.S. 1163 (2006).

24 ¹³⁹ 212 Ariz. at 69-70, 127 P.3d at 887-88 (citing *Blonder-Tongue Lab, Inc. v. Univ. of Ill. Found.*, 402 U.S.
313, 323-24 (1971)). The United States Supreme Court has stated that claim and issue preclusion “are
collectively referred to as ‘res judicata.’” *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

1 determination is essential to the judgment.”¹⁴⁰ A year earlier, the Arizona Supreme Court held that a
2 “party asserting the bar must show that (1) the issue was litigated to a conclusion in a prior action, (2)
3 the issue of fact or law was necessary to the prior judgment, and (3) the party against whom preclusion
4 is raised was a party or privy to a party to the first case.”¹⁴¹

5 The United States Supreme Court has held that:

6 Under the doctrine of claim preclusion, a final judgment forecloses “successive
7 litigation of the very same claim, whether or not relitigation of the claim raises the
8 same issues as the earlier suit.” (citation omitted). Issue preclusion, in contrast, bars
9 “successive litigation of an issue of fact or law actually litigated and resolved in a valid
10 court determination essential to the prior judgment,” even if the issue recurs in the
11 context of a different claim. (citation omitted). By “preclud[ing] parties from contesting
12 matters that they have had a full and fair opportunity to litigate,” these two doctrines
13 protect against “the expense and vexation attending multiple lawsuits, conserv[e]
14 judicial resources, and foste[r] reliance on judicial action by minimizing the possibility
15 of inconsistent decisions.”¹⁴²

11 **A. Assertion of Preclusive Effect by a Non-Party to the Prior Litigation**

12 The Hopi Tribe and the United States argue that Catalyst Paper (Snowflake) Inc. cannot assert
13 either claim or issue preclusion because the company was not a party to the Indian Claims
14 Commission action, *Healing II*, or the partition cases and, second, is not in privity with a party in those
15 matters.

16 “Ordinarily the application of claim preclusion requires ‘mutuality’ - both the party asserting
17 the preclusive effect of a prior judgment and the party against whom preclusion is asserted must have
18 been parties in the prior litigation.”¹⁴³ Our highest Court has held that “mutuality has been for the most
19 part abandoned in cases involving collateral estoppel [note: issue preclusion]” but “it has remained a
20

21
22 ¹⁴⁰ 212 Ariz. at 70, 127 P.3d at 888 (citing *Blonder-Tongue Lab, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-
23 24 (1971)).

¹⁴¹ 211 Ariz. at 491-92, 123 P.3d at 1128-29 (citing *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980)).

¹⁴² 553 U.S. at 892; *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (“*Montana*”).

24 ¹⁴³ 212 Ariz. at 83, 127 P.3d at 901.

1 part of the doctrine of *res judicata* [note: claim preclusion].”¹⁴⁴ The United States concedes that under
2 *Montana* “mutuality is not required for issue preclusion,” but only when the party being precluded
3 “had a full and fair opportunity to litigate the issue in the first case.”¹⁴⁵

4 This position agrees with the requirement of issue preclusion that “an issue of fact or law is
5 actually litigated and determined by a valid and final judgment.” For this reason, consent agreements
6 and judgments ordinarily do not support issue preclusion because “none of the issues is actually
7 litigated” in the prior law suit.¹⁴⁶

8 In summary, mutuality is not required for issue preclusion if the Hopi Tribe actually litigated
9 issues concerning its water rights or priorities before the Commission or the federal district court.
10 Issue preclusion is supported if those issues were actually litigated and determined by a valid and final
11 judgment.

12 Is mutuality required for claim preclusion? After holding that mutuality has remained a part of
13 *res judicata* or claim preclusion, the United States Supreme Court carved the following exception in a
14 case involving an Indian tribe and a request for additional water rights filed sixty years after the first
15 action that resulted in the *Orr Ditch Decree*:

16 Nevertheless, exceptions to the *res judicata* mutuality requirement have been found
17 necessary, (citation omitted), and we believe that such an exception is required in this
18 case....

19 [E]veryone involved in *Orr Ditch* contemplated a comprehensive adjudication of water
20 rights intended to settle once and for all the question of how much of the Truckee River
21 each of the litigants was entitled to. ... Nonparties such as the subsequent appropriators
22 in this case have relied just as much on the *Orr Ditch* decree in participating in the
23 development of western Nevada as have the parties of that case. We agree with the
24 Court of Appeals that under “these circumstances it would be manifestly unjust ... not

22 ¹⁴⁴ *Nevada v. United States*, 463 U.S. 110, 143 (1983) (“*Nevada*”).

23 ¹⁴⁵ U. S. Resp. Brief in Support of its Mot. for Summ. J. at 30 (Dec. 20, 2011).

24 ¹⁴⁶ *Arizona v. California*, 530 U.S. 392, 414 (2000) (“In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion.”).

1 to permit subsequent appropriators” to hold the Reservation to the claims it made in
2 *Orr Ditch*; “[a]ny other conclusion would make it impossible ever finally to quantify a
reserved water right.”¹⁴⁷

3 In the Gila River Adjudication, the Arizona Supreme Court applied this exception emphasizing
4 the reliance of non-parties on the prior *Globe Equity Decree*:

5 “[E]xceptions to the *res judicata* mutuality requirement have been found necessary...”
6 (*Nevada* citation omitted). The Supreme Court established such an exception in
7 *Nevada*, holding that the Orr Ditch litigation was “a comprehensive adjudication of
8 water rights intended to settle once and for all the question of how much of the Truckee
9 River each of the litigants was entitled to.” (citation omitted). Because of the scope of
10 the litigation, “[n]onparties [including] subsequent appropriators ... have relied just as
much on the *Orr Ditch* decree in participating in the development of western Nevada as
11 have the parties to that case.” (citation omitted). Under those circumstances, the Court
12 recognized a limited exception to the requirement of mutuality for claim preclusion,
13 enabling those later appropriators to assert the preclusive effect of the decree against
parties to the decree....

14 [G]iven the long history of the [*Globe Equity*] Decree, it is clear that those not party to
15 the Decree have in fact relied upon it in the same manner as the later appropriators in
16 *Nevada*. With respect to the Gila River mainstem, the *Nevada* exception to mutuality
17 applies and those who were not party to the Decree are entitled to assert its preclusive
18 effects against parties to the Decree and their successors.¹⁴⁸

19 The United States argues that the *Nevada* exception to mutuality or privity still requires
20 adversity of interests between parties. The Special Master does not so interpret *Nevada*, but finds that
21 reliance by non-parties on a prior judgment is the dispositive element rather than adversity of interest.

22 Non-parties such as Catalyst Paper (Snowflake) Inc. have relied “just as much on” the
23 existence and effect of the prior judgments “in the development of” northern Arizona as have the Hopi
24 Tribe, Navajo Nation, and the United States. Moreover, “any other conclusion would make it
impossible ever finally to quantify” all water rights in the Little Colorado River Watershed. Those
prior judgments have influenced the nature of claims to water rights in the Little Colorado River

23 ¹⁴⁷ 463 U.S. at 143-44. The following year, the Court explained that in *Nevada* “we applied principles of *res*
24 *judicata* against the United States as to one class of claimants who had not been parties to an earlier
adjudication, (citation omitted), but we recognized that this result obtained in the unique context of ‘a

1 Watershed and will influence the adjudication of water rights in the basin.

2 Finding of Fact No. 39. Catalyst Paper (Snowflake) Inc. was not a party in the Hopi Tribe's
3 action before the Indian Claims Commission, *Healing II*, or the partition cases.

4 Conclusion of Law No. 25. Catalyst Paper (Snowflake) Inc. satisfies the *Nevada* exception of
5 mutuality or privity to the doctrine of claim preclusion.

6 Conclusion of Law No. 26. Catalyst Paper (Snowflake) Inc. is not barred from asserting either
7 claim or issue preclusion based on the Hopi Tribe's action before the Indian Claims Commission,
8 *Healing II*, and the partition cases.

9 **B. Preclusive Effect**

10 The parties argued at length about the nature of relief sought by the Hopi Tribe before the
11 Indian Claims Commission and the Commission's jurisdiction to consider claims for loss or
12 diminishment of water rights. Catalyst Paper (Snowflake) Inc. argues that the Hopi Tribe sought
13 compensation in Count 5 of its petition for the loss of "use" of tribal aboriginal lands, and that use
14 included water sources. Hence, the count for deprivation or loss of "use" included loss of water rights.

15 The same relief was also petitioned in Counts 6, 7, and 8 (see Finding of Fact No. 10).
16 However, the Commission noted that the Hopi Tribe "[i]n further explanation" of these counts had
17 stated that Counts 5 through 8 were based on claims for the reasonable rental value of lands the United
18 States had allowed Navajos to use prior to the taking of Hopi lands.¹⁴⁹ This explanation of Counts 5
19 through 8 erodes the contention that the counts for loss of use of lands clearly encompassed claims for
20 lost water rights. The Hopi Tribe's petition did not expressly mention the loss or diminution of water
21 rights.

22 comprehensive adjudication of water rights intended to settle once and for all the question of how much of the
23 Truckee River each of the litigants was entitled to." *United States v. Mendoza*, 464 U.S. 154, 163 n.8 (1984).

¹⁴⁸ 212 Ariz. at 83-84, 127 P.3d at 901-902.

¹⁴⁹ *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 35-36.

1 Catalyst Paper (Snowflake) Inc. points to the decisions of the Commission in several cases that
2 considered compensation for water rights claims. In those matters, the Indian plaintiffs expressly
3 raised the loss or minimization of water rights. Their petitions and arguments were not silent
4 concerning water. That is not the case with the Hopi Tribe's petition which was silent as to water.

5 Finding of Fact No. 40. The Hopi Tribe's petition before the Indian Claims Commission did
6 not expressly seek compensation for the loss or infringement of water rights.

7 The Special Master does not find anything in the record of the Commission's decisions
8 submitted to him showing that water rights and their priorities were actually litigated. The federal
9 district court's decisions in the litigations of *Healing v Jones*, *Sekaquaptewa v. MacDonald*, and
10 *Mayayesva v. Zah* do not show that the Hopi Tribe's water rights or their priorities were actually
11 litigated and determined by a valid and final judgment in those extended cases.

12 As an observation, we have spent years, economic resources, judicial time, and intellectual
13 capital addressing Indian water rights. The Indian Claims Commission may have considered water
14 issues in certain cases, but the Special Master wonders if the Commission could have done what we
15 are doing. The attributes of water rights must be known before the rights' economic worth can be
16 appraised and value assessed. Indian water law was in its infancy. Adjudications were barely emerging
17 as ways to resolve seminal water issues and conflicts. Perhaps water rights were purposefully left off
18 the Commission's agenda.

19 The Indian Claims Commission determined the extent of the Hopi Tribe's aboriginal title to
20 certain lands located inside and outside the 1882 Executive Order Reservation. The issue of aboriginal
21 title concerning those lands issue was actually litigated and determined by a valid and final judgment.

22 Conclusion of Law No. 27. The Hopi Tribe is precluded from litigating claims of aboriginal
23 title that were actually litigated and determined before the Indian Claims Commission.

1 Conclusion of Law No. 28. The Hopi Tribe's water rights and their priorities were not actually
2 litigated and determined by a valid and final judgment in the Indian Claims Commission, *Healing II*,
3 or the partition cases.

4 Conclusion of Law No. 29. The Hopi Tribe is not precluded from asserting a reserved water
5 right in the Little Colorado River Adjudication.

6 Conclusion of Law No. 30. The Hopi Tribe is not precluded from asserting water rights senior
7 to those held by any other claimant.

8 The Special Master has determined that the Hopi Tribe's aboriginal water rights were incidents
9 of aboriginal or Indian title, and the extinguishment of the Hopi Tribe's aboriginal title, as determined
10 by the Indian Claims Commission, terminated the Hopi Tribe's aboriginal water rights to those lands.
11 While the Hopi Tribe is not barred by claim or issue preclusion from asserting a time immemorial
12 priority, it will not prevail concerning the lands for which the Commission determined that aboriginal
13 title had been extinguished.

14 **IX. DOES ACCORD AND SATISFACTION PRECLUDE ANY CLAIMS BY OR ON**
15 **BEHALF OF THE HOPI TRIBE TO WATER RIGHTS MORE SENIOR TO THOSE HELD**
16 **BY ANY OTHER CLAIMANT?**

17 Federal District Court Judge Susan R. Bolton, who presided in this adjudication when she was
18 a state superior court judge, explained accord and satisfaction as follows:

19 Accord and satisfaction is a method for discharging a cause of action, whereby the
20 parties enter into a new agreement (accord), and the new agreement is performed
21 (satisfaction). *Green v. Huber*, 66 Ariz. 116, 119, 184 P.2d 662, 664 (1947). The
22 elements of an accord and satisfaction are as follows: (1) A proper subject matter; (2)
23 competent parties; (3) an assent or meeting of the minds of the parties; and (4) a
24 consideration. *Vance v. Hammer*, 105 Ariz. 317, 320, 464 P.2d 340, 343 (1970). The
claim that is discharged is defined by the terms of the accord.¹⁵⁰

¹⁵⁰ *Daly v. Royal Ins. Co. of America*, 2002 WL 1768887 at 2 (D. Ariz. 2002, not reported in F. Supp. 2d). See
Flagel v. Southwest Clinical Psychiatrists, P.C., 157 Ariz. 196, 200, 755 P.2d 1184, 1188 (App. 1988); *Solar-*
West, Inc. v. Falk, 141 Ariz. 414, 419-20, 687 P.2d 939, 944-45 (App. 1984); and *Rossi v. Stewart*, 90 Ariz.
207, 210, 367 P.2d 242, 244 (1961).

1 The issue arises from the settlement of the Hopi Tribe’s action before the Indian Claims
2 Commission for a payment of \$5 million. Did the settlement agreement and payment constitute a
3 contract of accord and satisfaction, and if so, what is its preclusive effect?

4 As *Daly* held, the “claim that is discharged is defined by the terms of the accord.” The terms of
5 the agreement are examined to determine if there was the requisite “meeting of the minds” for a valid
6 accord and satisfaction.

7 The following case history is set forth in the Commission’s Findings of Fact and Conclusions
8 of Law on Compromise Settlement.¹⁵¹ On August 25, 1976, the Hopi Tribe submitted an offer to the
9 United States to settle the tribal claims for \$5 million. On October 5, 1976, the United States accepted
10 the offer subject to certain conditions. On November 11, 1976, representatives of the Hopi Tribe and
11 the United States executed a Stipulation for Entry of Final Judgment. On December 2, 1976, after
12 considering all the evidence presented at a hearing, the Commission issued its Findings of Fact and
13 Conclusions of Law on Compromise Settlement and the Final Award regarding the settlement of the
14 Hopi Tribe’s action.

15 The Stipulation for Entry of Final Judgment stated in the second preamble that “the Hopi Tribe
16 claims aboriginal possession and Indian title to the lands described in its Petition before” the
17 Commission “as reduced to conform with Petitioner’s proof at the time of trial.”¹⁵² This preamble
18 expressly describes the scope of the Hopi Tribe’s petition, namely, an action for loss of aboriginal
19 possession and Indian title to lands. The preamble defines the scope of the litigation.

20 Finding of Fact No. 41. The Stipulation for Entry of Final Judgment dated November 11, 1976,
21 does not mention the settlement or resolution of any claims involving water uses or rights.

22 Finding of Fact No. 42. The Final Award entered by the Indian Claims Commission on

23 ¹⁵¹ *Hopi Tribe v. United States*, 39 Ind. Cl. Comm. 204, at 208-12. The Final Award is in 39 Ind. Cl. Comm. 223
24 (1976).

1 December 2, 1976, approving the Stipulation for Entry of Final Judgment, does not mention the
2 settlement or resolution of claims involving water rights or payment of compensation for their loss.

3 Conclusion of Law No. 31. The settlement agreement was an accord and satisfaction of the
4 Hopi Tribe's claim for loss of aboriginal title to lands as determined by the Indian Claims
5 Commission. The terms of the settlement did not expressly include or encompass water rights or their
6 priorities. Accordingly, it was not a contract of accord and satisfaction that applied to the Hopi Tribe's
7 claim for loss of aboriginal water rights.

8 Accord and satisfaction does not preclude the Hopi Tribe from claiming a reserved water right
9 or a right more senior to those held by another claimant. However, because the Special Master has
10 determined that the Hopi Tribe's aboriginal water rights were incidents of its aboriginal title, and the
11 extinguishment of the Hopi Tribe's aboriginal title as determined by the Commission terminated the
12 Tribe's aboriginal water rights existing on those lands, while the Hopi Tribe can claim an aboriginal
13 priority, it will not prevail concerning the lands for which the Commission determined that aboriginal
14 or Indian title had been extinguished.

15 **X. MAY THE HOPI TRIBE ASSERT A PRIORITY THAT IS SENIOR TO THE NAVAJO**
16 **NATION FOR WATER RESOURCES THAT ARE SHARED BY BOTH TRIBES IN LIGHT**
17 **OF THE PROCESS FOR THE ALLOCATION OF RESOURCES ESTABLISHED BY THE**
18 **ACT OF JULY 22, 1958, PUB. L. NO. 85-547, 72 STAT. 403, AND THE ACT OF DECEMBER**
19 **22, 1974, PUB. L. NO. 93-531, 88 STAT. 1712, AS AMENDED?**

20 The Navajo Nation proposed this issue for briefing.¹⁵³ The Nation makes a twofold argument,
21 first, that as a matter of federal law "with consideration" of the two tribes' "long common history in
22 the federal system and the actions of Congress, the President and the courts in providing for the
23 determination of the Tribes' rights in their reservations" the answer to this question is No, and second,
24 as "an ancillary matter," the allocation of shared water resources must be done "on the basis of

¹⁵² 39 Ind. Cl. Comm. 204, at 209.

1 equitable apportionment.”¹⁵⁴

2 The Hopi Tribe and the Navajo Nation agree that a date of priority for tribal water rights must
3 be adjudicated. This position is in harmony with both the statutes governing this adjudication, which
4 require determination of priority, and the judicial doctrine of equitable apportionment.

5 A.R.S. § 45-254(C)(8) requires that a statement of claimant “shall include” the “time of the
6 initiation of the right and the date when water was first used for beneficial purposes for the various
7 amounts and times claimed.” A.R.S. § 45-257(B)(1) mandates that the court “shall ... [d]etermine the
8 ... priority date” of a water right.

9 Concerning equitable apportionment, in an opinion that led to a decree involving the states of
10 Nebraska, Wyoming, and Colorado based on equitable considerations, the United States Supreme
11 Court held that:

12 “Apportionment calls for the exercise of an informed judgment on a consideration of
13 many factors. Priority of appropriation is the guiding principle.”¹⁵⁵

14 Conclusion of Law No. 32. The priority of the water rights claimed by the Hopi Tribe must be
15 determined in this adjudication regardless whether a standard of equitable apportionment is
16 implemented to adjudicate those rights.

17 Concerning its second argument that the allocation of shared water resources must be done
18 using the standard of equitable apportionment, the Navajo Nation concedes that the request to adopt
19 this standard is “not necessarily encompassed by the Special Master’s questions or the Court’s order of
20 reference,” but the request is “an effort to advance the litigation.”¹⁵⁶ The Special Master agrees that
21 adoption of an equitable apportionment standard exceeds the Court’s order of reference and the scope
22 of the issues being briefed, but these are only two elements of the answer to the question.

23 ¹⁵³ See Stmt. of Issues of the Navajo Nation at 8 (no. 1c) (July 7, 2008).

24 ¹⁵⁴ Memo. In Support of Mot. of the Navajo Nation for Summ. J. on Issue G at 3-4 and 2 (Mar. 26, 2010).

1 Issue G cannot be resolved by summary judgment because there are genuine disputes about
2 material facts, and the existing record is not adequately developed to support summary relief.

3 First, the Hopi Tribe points to the “number of disputed facts ... [that] ... demonstrate that
4 Navajo has failed to meet its burden to support a summary judgment motion.”¹⁵⁷ The disputed facts
5 concern the meaning and effect of the 1958 and 1974 Acts, prior congressional and executive actions,
6 and court decisions.

7 Second, this case is limited to the priority of the Hopi Tribe’s claimed water rights. In order to
8 answer this issue, there must be an adequate record concerning the priority of the Navajo Nation’s
9 water rights to the shared resources. The lack of an adequate record precludes the resolution of the
10 issue by summary judgment.

11 The Special Master needs to be concerned with whether the record is adequately developed to
12 support summary judgment. Other matters meriting further factual development and legal analysis,
13 based on pleadings filed in this briefing, are the hydrologic and geographic extent of the shared water
14 resources and the possible existence of other claimants using the shared resources.

15 Third, the Navajo Nation concedes that further fact finding and briefing are needed to resolve
16 Issue G. In its summary judgment motion, the Navajo Nation states that “the Special Master should
17 determine that the shared water supplies between the two Tribes should be equitably apportioned after
18 further legal briefing and fact-finding”, and “the Special Master should determine as part of the
19 present proceeding that the court should equitably apportion the available water shared by the two
20 tribal sovereigns after the necessary further briefing and fact-finding”.¹⁵⁸ In reply, the Navajo Nation
21 states that “[f]urther briefing on the proper implementation of [the equitable apportionment] standard
22

23 ¹⁵⁵ *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

24 ¹⁵⁶ Navajo Nation Resp. to Hopi Tribe’s Mot. for Summ. J. and U.S. Mot. for Summ. J. at 2 (Dec. 20, 2011).

¹⁵⁷ Hopi Tribe Memo. in Resp. to Navajo Nation’s Mot. for Summ. J. on Issue G at 4-8 (Dec. 20, 2011).

¹⁵⁸ Mot. of the Navajo Nation for Summ. J. on Issue G at 7 and 17.

1 in the circumstances of this case is appropriate.”¹⁵⁹

2 Four, the United States, the trustee of both tribes, states that the equitable apportionment issue
3 “presents complicated questions regarding tribal sovereignty, the role of the federal trustee, and how
4 such federal law concepts intersect with state water law under the McCarran Amendment;” an “entire
5 body of federal law exists regarding each one of these issues.”¹⁶⁰ These legal issues have not been
6 fully or even cursorily briefed in this case.

7 The United States avows that it “is not likely that the priority date system provides an effective
8 method to allocate these two exclusively tribal resources [referring to the N-Aquifer and the Washes],”
9 and if the two tribes possess equal priorities to the shared resources, “distribution of the resources must
10 proceed under another standard.”¹⁶¹ The Hopi Tribe disagrees with this view and argues that if the
11 Court forgoes the application of reserved rights law, the Court “must conduct an intensive fact-finding
12 review to determine what approach should be applied to the apportionment of the waters claimed by
13 the two tribes in light of the 1958 and 1974 Acts.”¹⁶² The need for a fuller record reiterates itself.

14 Five, it is not clear that the Court has the jurisdictional power to adopt and implement an
15 equitable apportionment standard even should it wish to do so. The jurisdiction of the Court to do so
16 was amply discussed at oral argument. The Navajo Nation and the United States offered differing
17 views. Noteworthy, Arizona’s general stream adjudication statutes do not explicitly provide for the use
18 of this standard, and counsel could not cite precedent for its adoption found in the decisions of other
19 Western adjudication courts.¹⁶³

20 Arguably, the doctrine might not apply in this proceeding. The United States Supreme Court
21

22 ¹⁵⁹ Navajo Nation Reply Memo. at 26 (Feb. 15, 2012).

23 ¹⁶⁰ U. S. Resp. Brief in Support of its Mot. for Summ. J. at 35.

24 ¹⁶¹ *Id.*

¹⁶² Hopi Tribe Memo. in Resp. to Navajo Nation’s Mot. for Summ. J. on Issue G at 4.

1 considered the issue in the 1963 *Arizona v. California* opinion. Answering Arizona’s argument that
2 equitable apportionment should be used to allocate the water between the Indian tribes and the other
3 claimants in the State of Arizona, the Supreme Court held as follows:

4 The doctrine of equitable apportionment is a method of resolving water disputes
5 between States. It was created by this Court in the exercise of its original jurisdiction
6 over controversies in which States are parties. An Indian Reservation is not a State.
7 And while Congress has sometimes left Indian Reservations considerable power to
8 manage their own affairs, we are not convinced by Arizona’s argument that each
9 reservation is so much like a State that its rights to water should be determined by the
10 doctrine of equitable apportionment. Moreover, even were we to treat an Indian
11 Reservation like a State, equitable apportionment would still not control, since, under
12 our view, the Indian claims here are governed by the statutes and Executive Orders
13 creating the reservations.¹⁶⁴

14 On the other hand, the federal district court partitioned land and allocated certain water sources
15 between the Hopi Tribe and Navajo Nation “on the basis of fairness and equity.”¹⁶⁵

16 Issue G cannot be answered by summary judgment. There are genuine disputes about material
17 facts, and the record is not adequately developed to support summary judgment. This question can be
18 briefed when the omissions are remedied. Nothing said in this report should be construed to be an
19 indication of how the Special Master views the use of equitable apportionment in this adjudication.

20 The Special Master recommends that the Court deny the Navajo Nation’s Motion for Summary
21 Judgment on Issue G. Although a dispositive determination of this issue is not made, the Special
22 Master submits this report so the Court has the opportunity to consider ways to proceed with this issue.

23 **XI. RECOMMENDATIONS**

24 The Special Master recommends that the Court:

22 ¹⁶³ The Navajo Nation cites *United States v. Washington*, 573 F.3d 701 (9th Cir. 2009), a case of an intertribal
23 dispute over a shared fishery. The Ninth Circuit Court of Appeals affirmed the district court’s dismissal of the
24 lawsuit on procedural pleading grounds. No decision implementing equitable apportionment was entered.

¹⁶⁴ *Arizona v. California*, 373 U.S. 546, 597 (1963).

¹⁶⁵ See 25 U.S.C.A. § 640d-7(b); 816 F. Supp. at 1423 (“equitably distributing water sources” and “Partition ...
is an equitable result.”).

- 1 1. Approve and adopt these findings of fact, conclusions of law, and recommendations.
- 2 2. Grant and deny to the extent consistent with this report the following five motions:
 - 3 A. Hopi Tribe's Motion for Summary Judgment on Hopi Water Priorities
 - 4 Excluding Spanish Law Rights (dated Mar. 26, 2010),
 - 5 B. Hopi Tribe's Motion for Summary Judgment on Hopi Water Rights Under the
 - 6 Treaty of Guadalupe Hidalgo (dated Apr. 27, 2012),
 - 7 C. Motion of the Navajo Nation for Summary Judgment on Issue G (dated Mar. 26,
 - 8 2010),
 - 9 D. United States' Motion for Summary Judgment that the Hopi Tribe Holds Water
 - 10 Rights with Priority Date Time Immemorial (dated Mar. 26, 2010), and
 - 11 E. Catalyst Paper (Snowflake) Inc.'s Motion for Partial Summary Judgment on
 - 12 Issues Designated for Briefing by the Case Initiation Order and Designation of Issues
 - 13 for Briefing (Sept. 8, 2008) (dated Mar. 26, 2010).
- 14 3. Direct ADWR to complete the investigations of the claimed water rights for the Aja,
- 15 Clear Creek, Drye, and Hart Ranches. And,
- 16 4. Direct ADWR to implement the determinations in this report adopted by the Court.

17 **XII. AVAILABILITY OF THE REPORT**

18 This report and a transcript of the oral argument held on October 24, 2012, will be filed with
19 the Clerk of the Superior Court of Apache County. A copy of the report will be distributed to all the
20 persons listed on the Court approved mailing lists for both the Little Colorado River Adjudication and
21 this contested case dated January 10, 2013, as updated. The lists are posted on the internet at
22 <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/maillingLists.asp>.

23 All papers and orders are available at the Clerk of the Apache County Superior Court, 70 West
24

1 3rd South, St. Johns, Arizona, under docket Civil No. 6417-201; contact Deputy Clerk Elisa Y. Craig
2 at 1-928-337-7671. Ms. Debbie Croci reported the oral argument. Electronic copies of all orders are
3 posted on the Special Master’s website on the page titled *Little Colorado River Adjudication* under the
4 heading *In re Hopi Tribe Priority, Contested Case No. 6417-201*, at
5 <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/>.

6 **XIII. TIME TO FILE OBJECTIONS TO THE REPORT**

7 At oral argument, the Special Master invited parties to submit briefs concerning the length of
8 the period for filing objections to the Special Master’s report should a report be filed with the Court.

9 A.R.S. § 45-257(A)(2), which prompted the discussion, states that the “master shall:”

10 For all determinations, recommendations, findings of fact or conclusions of law issued,
11 prepare and file with the court a report in accordance with rule 53(g) of the Arizona
12 rules of civil procedure, which shall contain those determinations, recommendations,
13 findings of fact and conclusions of law. Each claimant may file written objections with
14 the court to any rule 53(g) report within the later of sixty days after the report is filed
with the court or within sixty days after the effective date of this amendment to this
section. If the report covers an entire subwatershed or federal reservation, each claimant
may file with the court written objections to the report within one hundred eighty days
of the date on which the report was filed with the court.

15 The question is does this report require a 60-day or a 180-day objection period. The Hopi Tribe
16 and the Navajo Nation submitted helpful briefs.

17 First, the Special Master believes he has answered the question the Court referred of “whether
18 the claims to water rights asserted by, or on behalf of the Hopi Tribe in this adjudication have a
19 priority of ‘time immemorial’ or are otherwise senior to the claims of all other claimants.” The Special
20 Master agrees with the Navajo Nation that the 180-day objection period should not apply to decisions
21 that do not fully answer a referred question.

22 Second, this report addresses a specific question referred by the Court to the Special Master.
23 The report does not arise from a contested case organized to resolve objections generated by a
24 hydrographic survey report (“HSR”).

1 Third, the report answers the referred question and branch issues limited to one attribute of a
2 water right, namely, priority. All the other attributes of the Hopi Tribe's claimed water rights await
3 adjudication. The scope of this report is narrow.

4 Four, the 60-day objection period was added to A.R.S. § 45-257(A)(2), effective March 17,
5 1995, when the following language was enacted:

6 Each claimant may file written objections with the court to any rule 53(g) report within
7 the later of sixty days after the report is filed with the court or within sixty days after
8 the effective date of this amendment to this section. If the report covers an entire
9 subwatershed or federal reservation ...¹⁶⁶

10 By March, 1995, ADWR had published two final HSRs (San Pedro River Watershed and
11 Silver Creek Watershed) and one preliminary HSR (Upper Salt River Watershed) as well as several
12 technical reports covering limited specific subjects. Special Master John E. Thorson was completing
13 the fifth year of his appointment; the extent and scope of his decisions was known.

14 It is reasonable to conclude that when A.R.S. § 45-257(A)(2) was amended in 1995, the
15 Legislature knew the distinction between a large watershed-wide and a smaller scale technical report,
16 and that the Special Master would issue reports of varying scopes of determinations. It follows that the
17 Legislature intended to provide a shorter objection period than 180 days for reports that address
18 limited discrete issues, hence, the addition of a 60-day objection period.

19 For the foregoing reasons, the Special Master finds that the 60-day period specified in A.R.S. §
20 45-257(A)(2) for filing objections to a Rule 53(g) report applies to this report.

21 The Court's March 19, 2008, order of reference stated that the Special Master "may determine
22 the time periods to file objections, comments, and responsive memoranda to his report."¹⁶⁷ The Special

23 ¹⁶⁶ 1995 Ariz. Sess. Laws, ch. 9, § 20 (1st Reg. Sess.). A copy of the 1995 legislation is found in Appendix A of
24 *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 219-240, 972 P.2d 179, 203-224 (1999). The cited
language was not affected by the Supreme Court's opinion.

¹⁶⁷ Order at 2. The Special Master suggested this provision to the Court in order to allow parties more than the
ten day period to file objections provided in Rule 53(h)(1).

1 Master will provide a period of sixty-seven (67) days to file objections and a subsequent period of
2 forty-six (46) days to file responses to objections.

3 Any claimant in the Little Colorado River Adjudication may file a written objection to this
4 report on or before **Monday, July 1, 2013**. Responses to objections must be filed on or before **Friday,**
5 **August 16, 2013**. All objections and responses must be filed with the Clerk of the Apache County
6 Superior Court, P. O. Box 365, St. Johns, Arizona 85936.

7 A copy of all papers filed with objections and responses shall be served on all persons listed on
8 the Court approved mailing list for the contested case In re Hopi Tribe Priority, No. CV 6417-201,
9 dated January 10, 2013, as updated. The list is posted on the Special Master's website at
10 <http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/maillingLists.asp>.

11 **XIV. MOTION FOR ADOPTION OF THE REPORT**

12 The Special Master moves the Court under A.R.S. § 45-257 and Rule 53(h) to adopt the
13 findings of fact, conclusions of law, and recommendations contained in this report. A proposed order
14 will be lodged as the Court may direct upon consideration of the report.

15 **XV. NOTICE OF SUBSEQUENT PROCEEDINGS**

16 Rule 53(h)(5) states that the Court “may adopt or affirm, modify, wholly or partly reject or
17 reverse, or resubmit to the master with instructions.” The Special Master's motion to approve the
18 report and any objections and comments will be taken up as ordered by the Court.

19 Submitted this 24th day of April, 2013.

20
21
22 /s/ George A. Schade, Jr.
23 GEORGE A. SCHADE, JR.
24 Special Master

1 On April 24, 2013, the report was sent by FedEx
2 to the Clerk of the Apache County Superior Court
3 for filing and distributing a copy to the persons
4 who appear on the Court approved mailing lists
5 for the Little Colorado River Adjudication, No.
6 CV 6417, and In re Hopi Tribe Priority, No. CV
7 6417-201, dated January 10, 2013. On the same
8 date, the Special Master distributed an electronic
9 copy of the report.

10 /s/ Barbara K. Brown

11 _____
12 Barbara K. Brown
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SUPERIOR COURT OF ARIZONA
APACHE AND MARICOPA COUNTY

06/18/2013

CLERK OF THE COURT
FORM V000

HONORABLE MARK H. BRAIN

A. Melchert
Deputy

W-1, W-2, W-3, W-4(Consolidated)

Civil No. 6417

FILED: 07/02/2013

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 the General Adjudication
of All Rights to Use Water in
The Little Colorado River System and Source

CV 6417

MINUTE ENTRY

This matter came before the Court for a hearing on April 25, 2013 to discuss potential improvements to the adjudications. Since then, the Court has spent a fair amount of time mulling over the parties' various comments and arguments, a daunting task given the history and complexity of the litigation. The Court has also discussed the matter with Special Master Schade. Without attempting to address everything raised at the hearing, the Court offers the following thoughts and comments.

It is clear that the parties are frustrated with the pace of the adjudications. The Court shares that sentiment; the cases have gone on longer than most thought possible at their inception. This Court's perception is that law surrounding "subflow" has proven to be the root cause of the delay—whatever one might think of that concept from a philosophical perspective, it has proven to be extraordinarily difficult to apply in practice. But at this juncture, there is no going back.¹ The good news is that we appear to be

¹ *E.g. In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993), and *In re the General Adjudication of All Rights to Use Water in the Gila*

making substantial progress in finally determining the subflow zone of the San Pedro River, and that having done so, there is reason to believe that mapping the subflow zone of the remaining rivers will be easier (things always being more difficult the first time).² The Court believes that the framework provided in Pretrial Order No. 1 continues to be valid.

The parties have indicated that they want more of the Court's time. They will get it. A number of the parties have also indicated they wish to avoid the current "two-step" process, through which they incur significant fees (and the attendant delays) by litigating issues before the Special Master and then the Court. The Court is sympathetic to this concern, and believes that it would be proper for the Court to take the lead on various issues.³ In particular, it appears appropriate to transfer the Fort Huachuca, SPRNCA and Aravaipa Canyon cases to the Court in the near future. The parties are encouraged to submit a specific proposal for transferring Fort Huachuca to the Court, so that the Court can set aside time to hold hearings in that matter, including an evidentiary hearing. The Court requests a proposal by **August 15, 2013**.

There appears to be a broad consensus, and the Court agrees, that the Hydrographic Survey Reports (HSRs) should be cut back to the minimum requirements of the existing statutes. ADWR is invited to submit a proposal to the extent it believes (or is concerned that) the statutes are unclear.

The Court appreciates the parties' input, but does not believe that the following suggestions are meritorious:

- Updating the 1990 Final Silver Creek HSR. The Court does not believe this is the appropriate time to revisit Silver Creek. Indeed, the Court believes that the litigation should first focus on parties who likely have priority, including the tribal and governmental claims. In that regard, it is appropriate for ADWR to continue finalizing the Hopi HSR as a priority matter.
- Deconsolidate the Gila River Adjudication. For better or worse, the Gila River and its tributaries are one system, and the Court does not see how deconsolidating that system into components will accomplish anything valuable.

River System and Source, 198 Ariz. 330, 9 P.3d 1069 (2000), *cert. denied sub nom. Phelps Dodge Corp. v. U.S.*, 533 U.S. 941 (2001).

² In addition, the Court notes that finally identifying the subflow zone will go a long ways towards adjudicating a number of claims along the San Pedro, as it will allow the parties to turn their attention to whether the wells along that zone are pumping subflow (and exclude those claimants whose wells are not pumping subflow).

³ Some parties indicated that the Court should take the lead on issues of broad legal significance. The problem, of course, is in identifying those issues. The Court is open to suggestion.

- Have the parties submit their own expert reports regarding such things as the subflow zone. If ADWR thought it would be useful to it, the Court would be more amenable to considering such an idea, but ultimately, ADWR has to submit its own report, and as the Court now understands it, ADWR does not believe that such input would be useful.
- Holding a hearing on whether the Gila River is “overappropriated.” Perhaps it is, but there are more valuable ways to spend time (and to the extent it is, new claimants are still entitled to establish priority for excess water and/or for water rights that are later available due to abandonment or forfeiture by those with priority).

The Court does not believe it appropriate (and indeed, views it as presumptuous) to comment on suggestions that require legislative changes.

A copy of this order is mailed to all persons listed on the Court approved mailing lists for the Gila River Adjudication, W-1, W-2, W-3, and W-4 (Consolidated), and the Little Colorado River Adjudication, Civil No. 6417, both dated January 10, 2013.

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

11/10/2015

CLERK OF THE COURT
Form V000

HONORABLE MARK H. BRAIN

L. Stogsdill
Deputy

FILED: 11/10/2015

In Re the General Adjudication
of All Rights to Use Water in
The Little Colorado River System and Source

CV 6417

MINUTE ENTRY

By Minute Entry dated July 16, 2002, this Court ordered the preparation of a comprehensive Hydrographic Survey Report (HSR) for all Hopi reservation and non-reservation lands for which the Hopi Tribe or the United States on its behalf claim a federal or state law water right. Following the issuance of the minute entry, the Hopi Tribe filed an amended Statement of Claimant on January 29, 2004, a Second Amended Statement of Claimant on November 12, 2009, a Third Amended Statement of Claimant on June 2, 2015, and a supplement to the Third Amended Statement of Claimant on September 17, 2015.

Arizona Department of Water Resources (ADWR) has requested the Hopi Tribe and the United States to provide certain documentation to support the Third Amended Statement of Claimant and the supplement. By motion dated October 2, 2015, ADWR has requested an order clarifying the July 16, 2002 minute entry due to refusal on the part of the United States and the Hopi Tribe to provide information requested by ADWR. The Hopi Tribe and the United States join in the motion and request an order directing ADWR to complete the HSR based on the information provided. After considering the motions submitted,

IT IS ORDERED:

1. Based on the information currently in its possession, ADWR shall issue the Hopi HSR no later than December 18, 2015, in compliance with A.R.S. section 45-256 and this Court's minute entry dated June 16, 2002, except that 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 provided based on assertions that the requested information relates to future use or presents confidentiality concerns.

2. 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.

A copy of this order is mailed to all parties on the Court-approved mailing list for the Little Colorado River Adjudication Civil No. 6417.