

JUN 13 2016

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13 **IN APACHE COUNTY SUPERIOR COURT**
14 **OF THE STATE OF ARIZONA**

15 IN RE THE GENERAL ADJUDICATION OF
16 ALL RIGHTS TO USE WATER IN THE
LITTLE COLORADO RIVER SYSTEM

CIVIL NO. 6417

17 **UNITED STATES'**
18 **OBJECTIONS TO THE FINAL**
19 **HYDROGRAPHIC SURVEY**
20 **REPORT FOR THE HOPI**
21 **RESERVATION**

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LEGAL
DEPT OF WATER RESOURCES

1 **Contested Case Name:** None.

2 **HSR Involved:** Final HSR for the Hopi Reservation.

3 **Descriptive Summary:** The United States as trustee for the Hopi Tribe files
4 these Objections to the Final HSR for the Hopi Reservation, dated December
5 18, 2015.

5 **Number of Pages:** 12

6 **Date of Filing:** June 10, 2016, via Federal Express to the Clerk of the Court,
7 and via U.S. Mail to all parties on the court-approved mailing list.

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9 Pursuant to the Notice of Publication and Commencement of Objections Period for the
10 Final Hopi Hydrographic Survey Report (“HSR Notice”), the United States of America, as
11 trustee for the Hopi Tribe, hereby files these Objections to the Final Hydrographic Survey Report
12 for the Hopi Reservation (“Final Hopi HSR”), dated December 18, 2015. The United States’
13 Objections provide the information outlined in the Objection Booklet attached to the HSR Notice
14 as “appropriate,” however, the United States did not utilize the format of the objection form due
15 to the length and nature of its objections based on its status as a claimant of federal reserved
16 water rights in these proceedings. *See e.g., San Carlos Apache v. Superior Court of State of*
17 *Arizona*, 144 Ariz. 265, 278, 697 P.2d 658, 671 (Ariz. 1985).

18 The Objections are provided in two parts. First, Section A provides the Objections to the
19 water right attributes found in Chapter 5 of the Final Hopi HSR. *See* HSR Notice, Objection
20 Booklet (“An objection must be made on a legal or factual basis to ADWR’s proposed water
21 right attributes, which are found in Chapter 5 of the Final Hopi HSR.”). Section A demonstrates
22 that the HSR format is not particularly effective at resolving large, complicated federal reserved
23 water rights claims for an Indian Reservation because the water right attribute recommendations
24 are insufficient for a full decree for the past and present claims considered, while the future
25 claims are not subject to recommendations. Accordingly, litigation of most of the claims, rather
26

1 than just objections to recommendations, is necessary. Section B provides comments on the
2 other chapters of the Final Hopi HSR.

3 **A. OBJECTIONS TO WATER RIGHT ATTRIBUTES IN CHAPTER 5 OF**
4 **FINAL HOPI HSR**

5 Table 5-1 provides a summary of ADWR recommendations regarding the past and
6 present claims. Table 5-1 provides a basic starting point for reviewing the claims, however, it
7 does not include a description of all past and present water uses on the Hopi Reservation,
8 contains inaccuracies, and otherwise lacks sufficient detail to form the basis of a water right
9 decree. Nevertheless, many aspects of the ADWR recommendations do form the basis, in part,
10 for establishing water rights for the Hopi Reservation. The United States objections below are
11 listed under the Subsection numbers corresponding to the Final Hopi HSR Subsections.

12 **5.1.3 Types of Use – Include DCMI in present use**

13 The Hopi Tribe is legally entitled to DCMI water rights based on present and future use
14 to fulfill the homeland purpose of the Reservation. *In re the General Adjudication of All Rights*
15 *to Use Water in the Gila River System and Source*, 201 Ariz. 307, 313, 35 P.3d 68, 74 (Ariz.
16 2001) (“*Gila V*”). The United States’ Third Amended Statement of Claimant (“United States’
17 Third SOC”), p. 11, states that the “claim is based on the current Hopi populations, future Hopi
18 population projections, and estimated rates of water consumption per capita.”

19 The United States objects to the omission of the category of Domestic, Commercial,
20 Municipal, and Industrial (“DCMI”) because DCMI claims include present—as well as future—
21 uses. The United States will present evidence in litigation regarding both present and future
22 DCMI water uses.

23 **5.1.6 Places of Use – Specific Locations for existing uses required for decree**

24 The United States objects to the lack of specificity for places of use in the Final Hopi
25 HSR with respect to past and present water uses, specifically existing wells, springs and
26 impoundments. The Final Hopi HSR’s broad statements of the place of use being on the Hopi

1 Reservation are insufficient for an ultimate water right decree. For example, the United States'
2 Third SOC, Appendices 4-6, identifies specific locations for wells, springs and impoundments.
3 ADWR verified the precise location of many of those claims as explained in Chapter 4 of the
4 Final Hopi HSR. *See e.g.*, Final Hopi HSR at 2-13 (ADWR verified 316 springs but unable to
5 verify the remaining 63 springs claimed by the United States). Those verified claim locations
6 should be accepted by the Court and decreed with precise locations even though they were not
7 the subject of water right attribute recommendations in Chapter 5. For any claims unverified by
8 ADWR, the United States will provide evidence of the locations of those claims in litigation.

9 Based on federal law, the Hopi Tribe will exercise sovereign authority to administer water
10 rights pursuant to a tribal water code within the boundaries of the Hopi Reservation in the future.
11 Accordingly, present and future uses will be subject to tribal authority for changes in places of
12 use. Despite such tribal authority for future changes, however, a water rights decree as an initial
13 document confirming existing water rights requires specificity regarding locations of those
14 exiting uses.

15 **5.1.7.1 Quantity of Use – Agricultural (Irrigation) – Incorrect Quantity**

16 The United States objects to the proposed water right attribute for agricultural use of
17 10,325 AFA as an incorrect water quantity based on an incorrect recommendation of 9,553 acres
18 irrigated in a single year. Final Hopi HSR at 5-5. From a factual perspective, the Final Hopi
19 HSR reached a number of incorrect conclusions. First, the recommended 9,553 acres of
20 irrigation improperly relies on the Second Amended SOC and an incorrect assumption that the
21 United States SOC is a “composite of the lands that are believed to have been irrigated at any
22 time during approximately the last 80 years.” *Id.* at 5-4. The assumption that the United States’
23 claim is a composite, e.g., acres of irrigated lands from multiple years added together, is not
24 correct. On the contrary, the United States’ claim to 13,032 acres for irrigation is comprised of
25 six classes of irrigation which include some composite acreage for certain classes, e.g., irrigation
26 projects, but are based on a single, short time-period of acreage for the majority of acres claimed,

1 e.g., native irrigation. The United States will present evidence in litigation regarding its analysis
2 of historically irrigated acreage by categories of irrigation. Moreover, for the irrigation
3 categories that include some composite of acreage, the Hopi Tribe is legally entitled to water
4 rights based on all irrigation that has occurred over time; federal reserved water rights on Indian
5 reservation are not lost through non-use. *Gila V*, 35 P.3d 68, 72. (“In this sense, a federally
6 reserved water right is preemptive. Its creation is not dependent on beneficial use, and it retains
7 priority despite non-use.”). Finally, the Final Hopi HSR utilized a crop duty approach to
8 calculate total water use. Final Hopi HSR at 5-5. The United States will present evidence in
9 litigation in support of its claim for 28, 417 AFA which is based on a water supply model that is
10 more accurate based on the circumstances.

11 **5.1.7.3 Quantity of Use – Livestock and Water Storage for Stock – Incorrect Quantity**

12 The United States objects to two conclusions reached by the Final Hopi HSR regarding
13 Livestock and Water Storage for Stock. First, the Final Hopi HSR rejects seven of the
14 impoundments claimed by the United States based on an observation that the seven sites lacked
15 visible evidence of water storage. *Id.* at 5-6. Upon further review of evidence, the United States
16 objects regarding one or more of these claimed impoundments. The United States will present
17 evidence in litigation in support of these claimed impoundments to the extent that it has such
18 evidence.

19 Second, the United States objects to the removal of Pasture Canyon Reservoir from the list
20 of impoundments claimed by the United States. *Id.* The United States claimed impoundments for
21 all usage purposes, not just for stock water. Pasture Canyon Reservoir was included as a multi-
22 purpose reservoir—irrigation and stock water—and its inclusion in the list of impoundments is
23 consistent with other multi-purpose impoundments therein. If Pasture Canyon Reservoir is
24 removed from the United States’ list of impoundments, the United States must be granted leave to
25 add the Reservoir as an irrigation water storage reservoir and include the evaporative losses as a
26 depletion.

1 **B. COMMENTS ON OTHER CHAPTERS OF THE FINAL HOPI HSR BY**
2 **CLAIM CATEGORY**

3 The United States provides the following comments by chapter on Chapters 1 – 4.

4 **Chapter 1**

5 The allotments depicted on Figure 1-2 include lands that were surveyed but not
6 ultimately allotted, therefore, the allotment locations presented in the Final Hopi HSR are not
7 accurate. Additionally, the United States disagrees that the tract depicted as an inholding in
8 Figure 1-2 is actually an inholding. The United States will present evidence in litigation
9 regarding accurate allotment locations and the proposed inholding tract.

10 Chapter 1 provides an incomplete and potentially misleading summary of the *Gila V*
11 decision. While the Court in *Gila V* found that the “minimal need” standard applies in the
12 context of Indian reservations, it was careful to note that “[t]he method utilized in arriving at
13 such an amount, however, must satisfy both present and future needs of the reservation as a
14 livable homeland.” *Gila V*, 35 P.3d 68, 77 (Ariz. 2001).

15 **Chapter 2**

16 Chapter 2 provides a general overview of groundwater hydrology on the Hopi
17 Reservation lands which appears generally correct with some exceptions noted below. The
18 United States’ comments on the hydrology summary are not meant to be exhaustive and it
19 expressly reserves the opportunity as claimant to provide additional and/or clarifying hydrologic
20 information in support of its claims in future litigation.

21 Section 2.1.1, Overview, outlines regions of the Hopi Reservation with pumping rate
22 limitations. The United States notes that these rates may not be accurate and reserves the right to
23 provide evidence on this issue in litigation. Final Hopi HSR at 2-2. In another example, Section
24 2.1.5, D Aquifer, states that “[t]he Dakota Sandstone is the most important water-bearing unit.”
25 The United States does not agree with this assertion as a general matter on the Hopi Reservation,
26

1 | however, it notes that the comment may be accurate if simply intended to explain the feature
2 | within the D Aquifer that bears the most water.

3 | ADWR states that it was able to verify 316 springs but unable to verify the remaining 63
4 | springs claimed by the United States. *Id.* at 2-13. The United States will present evidence in
5 | litigation of the 63 springs outlined in Table 2-2.

6 | Chapter 3

7 | Chapter 3 provides a general history of the Statements of Claimants (“SOCs”) filed by
8 | the United States and Tribe between 1985 and 2015. The summary appears correct, however, the
9 | United States notes that the SOC’s speak for themselves and if there are any inconsistencies, the
10 | SOC’s control.

11 | In Section 3.5.6, Quantities of Use, the Livestock claim lists 997 AFA as “future [use]
12 | from existing and future wells.” The 997 AFA includes present—as well as future—uses for
13 | livestock water consumption. The United States’ Third SOC, p. 15, explains that the 997 AFA
14 | for livestock is based on the maximum carrying capacity of the Hopi rangeland based on the total
15 | number of animal units (44,486 animals) that can utilize the available acreage (1,622,455 acres).
16 | The Tribe has existing livestock resources that utilize the rangeland at this time and, thus,
17 | comprise a portion of the total animal units claimed which represents present—rather than
18 | future—water use.

19 | Section 3.6.2, Agricultural (Irrigation), asserts that the United States’ agriculture claim is
20 | “based on a composite of 13,032 acres of land that have been irrigated any time historically to
21 | present.” Final Hopi HSR at 3-18. This assertion is inaccurate because the 13,032 acres claimed
22 | by the United States is comprised of six categories of irrigation classes—some of which are a
23 | composite of acres over several years, e.g., irrigation projects, but other classes are not
24 | composites and are based on a single, short time-period review, e.g., native irrigation fields. The
25 |
26 |

1 United States will present evidence of this analysis in litigation. *See also* Section A, Objection to
2 5.1.7.1 Quantity of Use – Agricultural (Irrigation) – Incorrect Quantity.

3 Chapter 4

4 Since Chapter 4 is arranged by claim category, the United States’ comments on Chapter 4
5 are also arranged by claim category below.

6 Agriculture (Irrigation)

7
8 Section 4.2.2, Claimed Use and Basis, states that the United States’ Third SOC “for past
9 and present irrigation represent[s] a composite of all lands the Hopi and United States
10 determined, through analysis of historic aerial photographs and field surveys, to have been
11 farmed on at least one occasion. The acreage claimed represents the total acreage of all the fields
12 that show visible evidence of cultivation.” Final Hopi HSR at 4-8. ADWR repeats its
13 conclusion regarding composite lands in other parts of Chapter 4 and ultimately concludes that
14 only approximately 9,500 acres has been irrigated in any one year. *Id.* at 4-10 and 4-13. As
15 explained above, the assertion that the United States claim is a composite is incorrect as to
16 certain categories of irrigation which are based on a single, short time-period review rather than a
17 composite. *See also* Section A, Objection to 5.1.7.1 Quantity of Use – Agricultural (Irrigation) –
18 Incorrect Quantity. Moreover, reliance on the acreage claimed in the 2009 SOC is not
19 appropriate here where the United States has provided updated irrigation analysis in its Third
20 SOC. The United States will provide evidence in litigation for its agricultural claims.

21 In Section 4.2.3, ADWR Review and Findings (Agricultural Use), ADWR explains that it
22 conducted “an office GIS aerial photo interpretation evaluation” and concluded that
23 “[a]pproximately 13,022 acres or 99.9% of lands claimed by the United States” have evidence of
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1 agricultural activity. Final Hopi HSR at 4-12. The United States will present evidence of the
2 additional 10 acres of irrigation during litigation.

3 Livestock

4 Section 4.4.2.2, United States Third Amended SOC (Livestock and Stockponds), states
5 that the 997 AFA claimed by the United States for livestock purposes “appears to be for future
6 use.” Hopi Final HSR at 4-23. This assumption is incorrect as this claim is for present—as well
7 as future—uses for livestock as it takes into account existing livestock on the Hopi Reservation.
8 ADWR acknowledges the use of stockponds by current livestock. *Id.* at 4-24. Section 4.4.3.1,
9 Review of Hopi Third Amended SOC (Livestock and Stockponds), provides an extensive
10 discussion regarding rangeland available and corresponding estimates of animal units that could
11 utilize rangeland to determine whether the carrying capacity claimed by the United States is
12 reasonable. *Id.* at 4-24 through 4-26. The United States will provide evidence in litigation of
13 existing livestock use and in support of its claim to 997 AFA based on carrying capacity of the
14 Reservation.

15 Ceremonial and Subsistence Irrigation Use

16 Section 4.5.3, ADWR Review and Findings (Ceremonial and Subsistence Irrigation),
17 asserts that there may be overlap between the DCMI claims and ceremonial and subsistence
18 irrigation claims. Final Hopi HSR at 4-30. There is not overlap between the two claims and the
19 United States and Tribe will present evidence in litigation demonstrating the difference.
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22 Respectfully submitted this 10th day of June, 2016

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24 John Cruden
25 Assistant Attorney General
26 Vanessa Boyd Willard
Andrew “Guss” Guarino
Trial Attorneys, Indian Resources Section

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By: 

Counsel for the United States

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2 **VERIFICATION OF UNITED STATES DEPARTMENT OF INTERIOR**

3 I verify under penalty of perjury under the laws of the United States of America that to
4 the best of my knowledge and belief, the statements made in these Objections are true and
5 correct. By making this verification, neither I, the United States, nor any of its agencies or
6 personnel, waive any immunities, rights, privileges, or presumptions, whether based on federal,
7 state or other statutory and/or common law, except as clearly and unambiguously required by
8 Congress.
9

10 *Christopher Banet*

11 Christopher Banet
12 Trust Resources and Protection Manager
13 Branch of Water Resources
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16 1001 Indian School Road, NW
17 Albuquerque, NM 87104

18 State of New Mexico

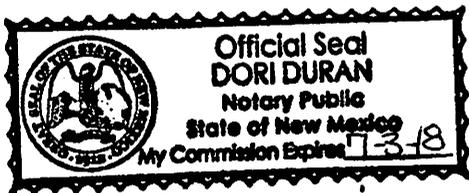
19 County of Bernalillo

20 Subscribed and sworn before me this 9th day of June 2016 by

21 Christopher Banet

22 *Dori Duran*

23 Dori Duran
24 Notary Public



26 My Commission expires: July 3, 2018

CERTIFICATE OF SERVICE

The original and one copy of the foregoing sent via Federal Express this 10th day of June 2016 to:

Clerk of the Superior Court
Apache County
P.O. Box 365
St. Johns, AZ 85936

A copy of the foregoing sent via Federal Express this 10th day of June 2016 to:

Hon. Mark H. Brain
Judge of the Superior Court
Central Court Building, Suite 12A
201 West Jefferson
Phoenix, AZ 85003

Susan Ward Harris
Special Master
Central Court Building, Ste 3A
201 West Jefferson
Phoenix, AZ 85003-2205

Copies of the foregoing were sent this 10th day of June 2016 to all persons on the court-approved mailing list for Little Colorado River Adjudication, No. CV 6417 dated May 5, 2016.


Vanessa Boyd Willard