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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTIES OF APACHE AND MARICOPA

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	DATE: September 28, 2007 W-1 (Salt) W-2 (Verde) W-3 (Upper Gila) W-4 (San Pedro) (Consolidated) Contested Case No. W1-104
IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE	CV 6417-100 REPORT OF THE SPECIAL MASTER; MOTION FOR ADOPTION OF REPORT; AND NOTICE OF DEADLINE FOR FILING OBJECTIONS TO THE REPORT

CONTESTED CASE NAME: *In re State Trust Lands*.

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master files his report concerning whether federal reserved water rights exist for the State Trust Lands. The report includes findings of fact, conclusions of law, and recommendations for the issues referred to the Special Master. Objections and comments to this report must be filed with the Clerks of the Superior Court of Apache County and Maricopa County on or before **December 3, 2007**. Responses to objections shall be filed by **January 22, 2008**, and replies by **February 26, 2008**. A hearing on any objections will be held at a time and place to be set by the Court.

NUMBER OF PAGES: 78.

DATE OF FILING: September 28, 2007.

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All papers and orders filed in this proceeding are available for review at the Clerk of the Maricopa County Superior Court, 601 West Jackson Street, Phoenix, Arizona 85003, under Civil No. W1-104 (contact Deputy Clerk Giannina Franco-Perez at 602-506-7400) and at the Clerk of the Apache County Superior Court, P. O. Box 365, St. Johns, Arizona 85936, under Civil No. 6417-100 (contact Deputy Clerk Mattie R. Morales at 1-928-337-7671). Ms. Rochelle Dobbins was the court reporter for the oral argument.

Electronic copies of the orders are available online at http://www.supreme.state.az.us/wm/ on the page titled *Gila River Adjudication (In re State Trust Lands).*

I. INTRODUCTION

This report addresses the four issues the Court referred to the Special Master arising from the State of Arizona's motion for partial summary judgment establishing the existence of federal reserved water rights for the State Trust Lands. The report includes a chronology of this contested case, findings of fact, conclusions of law, recommendations, and deadlines for filing objections and comments to the report.

The Special Master concludes that careful analysis of Congressional legislation, court decisions, historical documents, and all evidence submitted by the parties, considered within the law relating to implied reserved water rights, does not show that implied reserved water rights exist for the State Trust Lands.

II. CHRONOLOGY OF PROCEEDINGS

A. State of Arizona's Motion for Partial Summary Judgment

On November 22, 2002, the State of Arizona ("State") filed in the Little Colorado River Adjudication a Motion for Partial Summary Judgment Establishing the Existence of Federal Reserved Water Rights for State Trust Lands and requested the Court to set a briefing schedule.

Abitibi Consolidated Sales Corporation ("Abitibi"), Arizona Public Service ("APS"), Phelps Dodge Corporation ("Phelps Dodge"), Aztec Land and Cattle Company, Hopi Tribe, Navajo Nation, and the United States opposed the State's motion for partial summary judgment and request to set a briefing schedule. The Salt River Project ("SRP") supported the State's request for briefing. On March 6, 2003, the Court deferred consideration of the State's motion until the first general hearing held in the Little Colorado River Adjudication in 2004. That hearing was held on April 6, 2004, following which the Court directed the State to file its motion in the Gila River Adjudication so that claimants in both adjudications would have the same opportunity to be heard on an important matter.

The State filed its motion in the Gila River Adjudication on June 21, 2004. APS and Phelps Dodge moved the Court to defer ruling on the State's motion until a process for disclosure statements and discovery was completed and requested a pretrial conference. The Cities of Chandler, Cottonwood, Glendale, Mesa, Phoenix, Scottsdale, and Sedona, Gila River Indian Community ("GRIC"), SRP, Towns of Clarkdale and Jerome, Gila Valley Irrigation District, and the Franklin Irrigation District joined this request. The United States expressed a similar position. ASARCO LLC ("ASARCO") and BHP Copper Inc. ("BHP") requested that the Court defer ruling on the State's motion until other matters were determined. Although the State filed its motion for partial summary judgment in both adjudications, for simplicity, this report will refer to the motions in the singular.

The Court set a joint hearing for claimants in both adjudications on October 1, 2004, to consider the State's request for a briefing schedule on its motion.

B. Order of Reference to the Special Master

On January 20, 2005, the Court directed the Special Master to organize a contested case to hear the State of Arizona's motion and submit findings of fact, conclusions of law, and recommendations. The Court referred the following four issues to the Special Master:

1. Whether, and to what extent, does the evidence establish that the United States withdrew land from the public domain and reserved this property as state trust land?

2. If land was withdrawn and reserved, what was the purpose to be served by each reservation?

3. If lands were withdrawn and held in trust, did the United States intend to reserve unappropriated waters to accomplish the purpose of each reservation?, and

4. Any other issues required to be resolved in connection with addressing the matters listed

above.[1]

The order of reference states that "[i]n the event the Special Master determines that the State possesses federal reserved water rights, he shall not consider the priority date for any such right, the quantity, if any, of appurtenant unappropriated water or the minimum amount of water necessary to fulfill the federal purpose for each reserved right."[2] These attributes would be framed for determination after the preparation of a hydrographic survey report.

C. Organization of Contested Case

On February 9, 2005, the Special Master organized a contested case designated *In re State Trust Lands* with docket numbers in both adjudications and requested comments concerning the procedures for the case. Several parties submitted procedural suggestions.

The following parties participated in all or part of this case: Abitibi, ASARCO, APS, Arizona State Land Department ("ASLD"), Arizona Water Company, Bella Vista Water Company, Inc. ("Bella Vista"), BHP, Central Arizona Irrigation and Drainage District, Cities of Chandler, Cottonwood, Flagstaff, Glendale, Goodyear, Mesa, Phoenix, Prescott, Safford, Scottsdale, Sedona, Show Low, and Sierra Vista, Franklin Irrigation District, GRIC, Hopi Tribe, Maricopa-Stanfield Irrigation and Drainage District, Navajo Nation, Phelps Dodge, Pueblo Del Sol Water Company ("Pueblo Del Sol"), Rio Rico Properties, Inc. ("Rio Rico"), Rio Rico Utilities, Inc., Roosevelt Water Conservation District ("RWCD"), SRP, San Carlos Apache Tribe, Yavapai-Apache Nation, Tonto Apache Tribe, Pascua-Yaqui Tribe, Town of Clarkdale, Tucson Electric Power Company, and the United States. The Arizona Department of Water Resources ("ADWR") provided litigation support.

On May 19, 2005, a Scheduling Order ("Scheduling Order") was issued setting forth administrative procedures and schedules for disclosure statements, discovery, and motion briefing.

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[1] Minute Entry 4 (Jan. 20, 2005) ("Order of Reference").
[2] *Id*.

D. Disclosure Statements and Discovery

Disclosure statements and discovery were important parts of the Scheduling Order.

1. Disclosure Statements

The Scheduling Order limited disclosure statements to matters concerning the four issues and set a schedule for filing disclosure statements. All parties had a continuing duty to disclose as required by Arizona Rule of Civil Procedure 26.1(b)(2).

The State, Abitibi, ASARCO, and APS, Arizona Water Company, BHP, Cities of Chandler, Glendale, Mesa, Phoenix, Prescott, Scottsdale, and Sierra Vista, Bella Vista, GRIC, Navajo Nation, Phelps Dodge, Pueblo Del Sol, RWCD, San Carlos Apache Tribe, Yavapai-Apache Nation, Tonto Apache Tribe, and Pascua Yaqui Tribe, SRP, Tucson Electric Power Company, and the United States filed disclosure statements. The City of Goodyear filed a notice of non-filing of disclosure statement.

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

2. Discovery

The Scheduling Order limited discovery to matters concerning the issues designated for briefing. Formal discovery began after January 9, 2006, but prior to that date parties could engage in informal discovery. Discovery was conducted in accordance with Arizona Rules of Civil Procedure 26 through 37, and as applicable, pretrial orders issued in both adjudications and the Rules for Proceedings Before the Special Master. Discovery was made by requests for admissions, interrogatories, production of documents, and depositions.

On April 15, 2005, a group of parties who designated themselves the “Opposing Claimants”

(later most became the "Joint Movants") requested to serve upon the State sixteen requests for production of documents and nine non-uniform interrogatories in order to start discovery as quickly as possible. The Special Master granted the requests and allowed the State the same opportunity for initial discovery.

On July 15, 2005, the State filed objections to the Scheduling Order and requested a protective order against the Opposing Claimants' first request for discovery. The Opposing Claimants, GRIC, Navajo Nation, and the United States filed responses objecting to unreasonable restrictions on discovery. The State replied. On August 11, 2005, the Special Master denied the State's objections to the Scheduling Order and the request for a protective order but limited the scope of the discovery sought by the Opposing Claimants and set new deadlines for disclosure statements and discovery. No other discovery disputes were brought before the Special Master for resolution.

E. State of Arizona's Request for Leave to Amend Its Motion

The Scheduling Order provided that the State could amend its summary judgment motion by seeking leave of court, but a motion for leave to amend would be denied if the proposed amendments expanded the scope of this case beyond that set by the Order of Reference.

On May 19, 2006, the State timely filed a motion for leave to amend its motion for partial summary judgment. Abitibi, ASARCO, a group of parties who designated themselves the Joint Movants,[3] the San Carlos Apache Tribe, Tonto Apache Tribe, Yavapai-Apache Nation, and the Pascua-Yaqui Tribe (collectively "the Tribes") opposed the request.

The State gave the following reasons for leave to amend:

> First, the motion is amended to clarify the fact that the State is not seeking a determination that a federal reserved water right should be implied for each and every

[3] The Joint Movants include APS, BHP, Central Arizona Irrigation and Drainage District, Cities of Chandler, Cottonwood, Glendale, Mesa, Phoenix, Scottsdale, and Show Low, Franklin Irrigation District, Gila Valley Irrigation District, Maricopa-Stanfield Irrigation and Drainage District, Phelps Dodge, RWCD, SRP, and the Towns of Clarkdale and Jerome.

> parcel of state trust land. Rather, the State seeks a determination that the federal reserved water rights doctrine is applicable to at least some state trust lands. Second, the motion is amended to identify as a test case specific state trust lands (lands within the Prescott Active Management Area) for which there is presently no water supply available to support development under the state law scheme, which allocates water based on prior appropriation.[4]

On August 8, 2006, the Special Master denied the State's request for leave to amend. The Special Master found that the State's position that it was not seeking a determination that a federal reserved water right should be implied for all parcels of State Trust Lands is evident in its motion for partial summary judgment making this proposed amendment futile, and second, the proposed amendment concerning the Prescott Active Management Area lands could inject disputed issues of material facts which would defeat the State's summary judgment request.

F. Briefing and Oral Argument of Motions

The Scheduling Order set deadlines for other parties to file motions for summary judgment concerning any of the issues referred to the Special Master. A briefing schedule was set for all summary judgment motions, and oral argument was scheduled for one full day. Extensions of the original schedule were granted as the case proceeded, but time periods were not shortened. Requests to exceed page limitations were granted.

In addition to the State, the following parties filed motions for summary judgment:

1. Joint Movants' Motion for Summary Judgment
2. ASARCO's and Abitibi's Revised Motion for Partial Summary Judgment Regarding the Existence of Federal Reserved Water Rights for State Trust Lands
3. GRIC's Motion for Partial Summary Judgment
4. Navajo Nation's Motion for Summary Judgment That Water Rights for the Arizona State Trust Lands Must Be Obtained Pursuant to State Law
5. Tribes' Motion for Partial Summary Judgment, and the
6. United States' Motion for Summary Judgment.

[4] State's Motion for Leave to Amend Motion for Partial Summary Judgment 3.

The State, Abitibi, ASARCO, Cities of Flagstaff and Safford, GRIC, Joint Movants, Navajo Nation, Phelps Dodge, Rio Rico, and the United States filed responses. Phelps Dodge joined in ASARCO's and Abitibi's motion for partial summary judgment to show Phelps Dodge's entitlement to rely on the claim and issue preclusion arguments raised in the motion, a position the State opposed. The State, Abitibi, ASARCO, GRIC, Joint Movants, Navajo Nation, and the United States filed replies.

On December 7, 2006, the Special Master heard oral argument on all motions for a full court day. The following parties presented argument on their motion and/or rebuttal argument: the State, Abitibi, ASARCO, Cities of Flagstaff and Safford, GRIC, Joint Movants, Navajo Nation, Rio Rico, the Tribes, and the United States.

G. Request for Leave to File Amicus Curiae Brief

On December 4, 2006, the New Mexico Commissioner for Public Lands ("New Mexico Commissioner") filed a motion requesting leave to file an amicus curiae brief concerning the State of Arizona's claim that the State Trust Lands should be awarded federally reserved water rights. The request was received three working days prior to the oral argument.

The Joint Movants and GRIC opposed the New Mexico Commissioner's motion on grounds of untimeliness, improper amicus filing, duplication of positions, adequate representation by the State, and prejudice to other parties.

On December 7, 2006, at oral argument, counsel for the New Mexico Commissioner presented argument on behalf of the Commissioner's motion for leave to file but was not permitted to participate in oral argument. Following the conclusion of oral argument, the Special Master denied the Commissioner's request to file an amicus curiae brief for the reasons set forth in the objections.

H. Standard for Summary Judgment

Arizona Rule of Civil Procedure 56(c)(1) provides that summary judgment "shall be" granted if the papers filed "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense."[5] The fact this proceeding involves the State Trust Lands does not change the standard for summary judgment.[6] The briefing was limited to four specific issues, and all the parties requesting summary judgment engaged in and completed discovery on the issues.

Conclusion of Law No. 1. The arguments made by the prevailing parties in this proceeding do not "encompass material factual disputes" that preclude summary judgment.[7] Summary judgment can be granted if the probative value of the facts produced to support a claim, given the amount of evidence required, is such that reasonable people could not agree with the conclusion advanced by the claim's proponent.

III. WHETHER, AND TO WHAT EXTENT, DOES THE EVIDENCE ESTABLISH THAT THE UNITED STATES WITHDREW LAND FROM THE PUBLIC DOMAIN AND RESERVED THIS PROPERTY AS STATE TRUST LAND

A. Implied Reservation of Water Rights Doctrine

The State "seeks only a determination that the federal implied-reservation-of-water doctrine is applicable to State Trust Lands, and that Arizona's State Trust Lands meet the legal requirements

[5] *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).
[6] *Jeffries v. Hassell*, 197 Ariz. 151, 154, 3 P.3d 1071, 1074 (App. 1999) (in an appeal involving terms of the Enabling Act the Arizona Court of Appeals held that the Arizona Supreme Court had "not adopt[ed] a unique summary judgment standard for trust land cases."). The Congress enacted the Arizona Enabling Act ("Enabling Act"), ch. 310, 36 Stat. 557, on June 20, 1910.
[7] 197 Ariz. at 155, 3 P.3d at 1075.

of such doctrine."[8] Its arguments cite to *Winters*, *Arizona I*, *Cappaert*, *New Mexico*, and *Gila V*.[9] This United States Supreme Court case law is essential to the determinations made in this report.

The "doctrine of implied-reservation-of-water is judicially created," having been first recognized in the United States Supreme Court's decision in *Winters* which involved Indian reserved water rights.[10] *Arizona I* held that "the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands'."[11] *Arizona I* extended the doctrine by holding that it "was equally applicable to other federal establishments such as National Recreation Areas and National Forests" and national wildlife refuges.[12] The "federally reserved lands include any federal enclave."[13] "Among these reservations are national forests, national parks, national monuments, public springs and waterholes, and public mineral hot springs" as well as military installations.[14]

In *Cappaert* the Court reiterated its holdings concerning implied reserved water rights:

> This Court has long held that 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. 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. Reservation of water rights is

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[8] State's Motion for Partial Summary Judgment 3.

[9] *Winters v. United States*, 207 U.S. 564 (1908), *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"), *Cappaert v. United States*, 426 U.S. 128 (1976), *United States v. New Mexico*, 438 U.S. 696 (1978), and *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001) ("*Gila V*").

[10] *Sierra Club v. Block*, 622 F. Supp. 842, 851 (D. C. Colo. 1985), vacated on other grounds *sub. nom. Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990) (The district court opined that the doctrine "had its beginnings in dictum in *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899))." Although *Block* was subsequently vacated, it was on grounds not related to any of the points for which it is cited in this report. A respected water law treatise posits that the United States Supreme Court's opinion in *United States v. Winans*, 198 U.S. 371 (1905), was "a harbinger of the *Winters* doctrine." 4 WATERS AND WATER RIGHTS § 37.01(b)(1) 37-9 (Robert E. Beck ed., 1991).

[11] *United States v. Dist. Court for Eagle County*, 401 U.S. 520, 522-523 (1971).

[12] 373 U.S. at 601. The Supreme Court agreed with the Master's conclusion on this issue.

[13] 401 U.S. at 523.

[14] *United States v. City and County of Denver*, 656 P.2d 1, 5 (Colo. 1982) (quoted in *Sierra Club v. Block*, 622 F. Supp. at 854).

empowered by the Commerce Clause, Art. I, 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, 3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

. . . .

… [In *Winters*] the Court held that when the Federal Government reserves land, by implication it reserves water rights sufficient to accomplish the purposes of the reservation (footnote omitted).

In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is 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 (citations omitted).

. . . .

The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.[15]

In *New Mexico,* the Court dealt with the purpose of an implied reserved right and held that:

Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated (footnote omitted).

This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law (footnote and citation omitted). 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.[16]

[15] 426 U.S. at 138, 139, and 141.

[16] 438 U.S. at 700-702. "A principal motivating factor behind Congress' decision to defer to state law was thus legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." *California v. United States,* 438 U.S. 645, 668-69 (1978).

In *Gila V*, the Arizona Supreme Court held that "the primary purpose for which the federal government reserves non-Indian land is strictly construed after careful examination."[17] The "test for determining" if an implied reserved water right exists "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.[18]

This case law frames the current contours of the implied reservation of water rights doctrine.

B. Withdrawal and Reservation

"In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the threshold question necessarily is whether the government has in fact withdrawn the land from the public domain and reserved it for a federal purpose."[19] The State argued that the Congressional acts that established the Territory and the State of Arizona "withdrew the state trust lands from the public domain, [and] reserved the lands for a federal purpose."[20] The Congress "withdrew land from the public domain for school purposes in two ways," namely, by the withdrawal and granting of sections 16 and 36 in every township for the support of common schools, and secondly, by doubling "the amount of land withdrawn and reserved" for the common schools by granting to the State of Arizona in the Enabling Act sections 2 and 32 in every township.

The Congress "also reserved additional lands for other public institutions" known as "quantity grant selections." For both school lands and quantity grants, if the sections "granted to the State were unavailable because they had previously been reserved for some other purpose, other lands (known as indemnity [in lieu selections]) could be selected to compensate for the loss."

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[17] 201 Ariz. at 313, 35 P.3d at 74.
[18] *Id.* (quoted in the Order of Reference 2).
[19] 622 F. Supp. at 853.

Once "quantity grants and indemnity selections were selected, the land was conveyed to the State in trust." The argument followed that "the State as trustee is the holder of title for the benefit of the federal purposes identified in the Enabling Act," although "Congress retained the power to enforce the trust." "This amounts to a withdrawal and reservation in fact and law."

As *Gila V* directed, "the trier of fact must examine the documents … and the underlying legislation." The following Findings of Fact Nos. 1 through 24 are made concerning the relevant historical background, extent, and operative structure of the lands Arizona obtained from the United States.

Finding of Fact No. 1. The federal policy of making land grants to new states for the support of common schools originated in *An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio*, referred to as the Northwest Ordinance of July 13, 1787.[21]

Finding of Fact No. 2. In the 1848 Treaty of Guadalupe Hidalgo, which ended the Mexican War (1846-1848), Mexico relinquished to the United States the area north of the Gila River.[22]

Finding of Fact No. 3. In the Act of September 9, 1850, the Congress established the boundaries of the Territory of New Mexico and provided for a territorial government. The Territory of New Mexico was comprised of lands relinquished to the United States by Mexico in the Treaty of Guadalupe Hidalgo.[23] The lands are located within the present day boundaries of the States of New Mexico and Arizona.

Finding of Fact No. 4. Section 15 of the Act of September 9, 1850, provided that:

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[20] State's Response 9-11 including all the subsequent quotations stating the State's position.

[21] 1 Stat. 51 n.(a). A copy of the Northwest Ordinance is found in the Joint Movants' exhibits to their Statement of Facts in Support of Their Motion for Summary Judgment, Vol. 1, Exh. 3 (hereinafter "Joint Movants' Exhibits No.").

[22] Treaty with the Republic of Mexico, 9 Stat. 922 (Feb. 2, 1848).

[23] Act of Sept. 9, 1850, ch. XLIX, 9 Stat. 446. A copy is found in ASARCO's and Abitibi's Appendices to its Revised Motion for Partial Summary Judgment, Vol. 1, Tab 3 (hereinafter "Appendices"); Joint Movants' Exhibits No. 11.

> *And be it further enacted*, That when the lands in said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same.[24]

Finding of Fact No. 5. In 1853, the United States purchased from the Republic of Mexico the area between the Gila River and the present day southern boundary of Arizona.[25]

Finding of Fact No. 6. In 1854, the Congress authorized the appointment of a Surveyor General for the Territory of New Mexico. Sections 5 and 6 of the Act provided that:

> SEC. 5. *And be it further enacted*, That when the lands in the said Territory shall be surveyed, under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township, in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be created out of the same.
>
> SEC. 6. *And be it further enacted*, That, when the lands in said Territory shall be surveyed as aforesaid, a quantity of land equal to two townships shall be, and the same is hereby, reserved for the establishment of a University in said Territory, and in the State hereafter to be created out of the same, to be selected, under the direction of the legislature, in legal subdivisions of not less than one half-section.[26]

Finding of Fact No. 7. In 1859, the Congress enacted legislation concerning preemption by settlers who had settled in sections 16 and 36 before section surveys had been completed, and secondly, provided for the selection of other lands when sections 16 and 36 were wanting. The legislation provided in pertinent part:

> That where settlements, with a view to preemption, have been made before the survey of the lands in the field which shall be found to have been made on sections sixteen or thirty-six, said sections shall be subject to the preemption claim of such settler; and if they, or either of them, shall have been or shall be **reserved or pledged** for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by preemptors';

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[24] *Id*. at 452.

[25] Treaty with the Republic of Mexico, 10 Stat. 1031 (Dec. 30, 1853). The purchase was negotiated by James Gadsden, the United States Minister to Mexico, and Mexican President Antonio López de Santa Ana.

[26] Act of July 22, 1854, ch. CIII, §§ 5 and 6, 10 Stat. 308, 309. A copy is found in Appendices, Vol. 1, Tab 4.

> and other lands are also hereby appropriated to compensate deficiencies for school purposes, where said sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever …[27]

Finding of Fact No. 8. In 1863, the Congress established the boundaries of the Territory of Arizona and provided for a territorial government.[28] Section 2 of the Act provided in pertinent part that "all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act, are hereby extended to and continued in force in the said Territory of Arizona, until repealed or amended by future legislation."

Finding of Fact No. 9. In 1881, Congress "granted" to the Territory of Arizona "seventy-two entire sections of the unappropriated public lands within [the Territory], to be immediately selected and withdrawn from sale and located under the direction of the Secretary of the Interior, and with the approval of the President of the United States, for the use and support of a university …"[29]

Finding of Fact No. 10. In 1891, the Congress enacted legislation that allowed the states to select other lands when sections 16 and 36 were no longer available because they had been settled or preempted, or were mineral lands or part of a military, Indian, or other reservation. The Act of February 28, 1891, provided in pertinent part as follows:

> SEC. 2275. Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be **granted, reserved, or pledged** for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where

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[27] Act of Feb. 26, 1859, ch. LVIII, 11 Stat. 385 (emphasis added). A copy is found in Joint Movants' Exhibits No. 48.

[28] Act of Feb. 24, 1863, ch. LVI, 12 Stat. 664. A copy is found in Appendices, Vol. 1, Tab 7, and in Joint Movants' Exhibits No. 12.

[29] Act of Feb. 18, 1881, ch. 61, 21 Stat. 326. A copy is found in Appendices, Vol. 1, Tab 13, and in Joint Movants' Exhibits No. 13.

> sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States …
>
> SEC. 2276. That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur …[30]

The ASLD calls the lands selected under these conditions "indemnity in lieu selections."

Finding of Fact No. 11. On June 20, 1910, the Congress enacted the Arizona-New Mexico Enabling Act.[31] Sections 19 through 35 refer exclusively to the State of Arizona.

Conclusion of Law No. 2. The Enabling Act of June 20, 1910, confirmed prior land grants of the United States to the Territory of Arizona and granted additional lands to the State of Arizona.

Finding of Fact No. 12. On February 9, 1911, the Territory of Arizona's electorate accepted the land grants by ratifying Article 10, § 1 of the Arizona Constitution.[32]

Conclusion of Law No. 3. The provisions of the Enabling Act of June 20, 1910, became part of the organic law of Arizona. Article 20, ¶ 12 of the Arizona Constitution provides that:

> "The state of Arizona and its people hereby consent to all and singular the provisions of the enabling act approved June 20, 1910, concerning the lands thereby granted or confirmed to the state, the terms and conditions upon which said grants and confirmations are made, and the means and manner of enforcing such terms and conditions, all in every respect and particular as in the aforesaid enabling act provided."[33]

Finding of Fact No. 13. On August 21, 1911, by a joint resolution of the Congress New Mexico and Arizona were admitted into the Union upon an equal footing with the original states.[34] On February 14, 1912, President William Howard Taft issued a proclamation admitting Arizona into

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[30] Act of February 28, 1891, chap. 384, 26 Stat. 796-97 (emphasis added). A copy is found in Joint Movants' Exhibits No. 49.
[31] Act of June 20, 1910, chap. 310, 36 Stat. 557. A copy is found in Appendices, Vol. 1, Tab 15.
[32] A copy of the certification transmitting to the Congress a copy of the ratified Constitution and ascertainment of the vote is found in Appendices, Vol. 1, Tab 25.
[33] Ariz. Const. art 20, ¶ 12.
[34] 37 Stat. 39 (Part I). A copy of the joint resolution is found in Appendices, Vol. 1, Tab 17.

the Union on an equal footing with the other states.[35]

Finding of Fact No. 14. Section 24 of the Enabling Act confirmed the grants of sections 16 and 36 in each township provided in the Act of September 9, 1850, and "granted" to Arizona "sections two and thirty-two in every township in said proposed State not otherwise appropriated at the date of the passage of this Act … for the support of common schools."[36] The ASLD calls these grants "school sections in place."

Finding of Fact No. 15. The Enabling Act provides a mechanism for selecting indemnity in lieu lands. Section 24 states that "where sections two, sixteen, thirty-two, and thirty-six, or any part thereof, are mineral, or have been sold, reserved, or otherwise appropriated or reserved by or under the authority of any Act of Congress, or are wanting or fractional in quantity, or where settlement thereon with a view to preemption or homestead, or improvement thereof with a view to desert-land entry has been made heretofore or hereafter, and before the survey thereof in the field, the provisions of sections [2275 and 2276 quoted in Finding of Fact No. 10] are hereby made applicable … to the selection of lands in lieu thereof to the same extent as if sections two and thirty-two, as well as sections sixteen and thirty-six, were mentioned therein."[37]

Finding of Fact No. 16. Arizona's selection of indemnity in lieu lands began shortly after 1912 "and was completed in about 1990."[38]

Finding of Fact No. 17. The process for selecting indemnity in lieu lands began with the State of Arizona submitting an application to the United States Secretary of the Interior. After reviewing the application, the United States approved the lands that were available for transfer to Arizona, and

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[35] 37 Stat. 1729 (Part II). A copy of the proclamation is found in Appendices, Vol. 1, Tab 18.
[36] 36 Stat. at 572.
[37] *Id*.
[38] Transcript of Deposition of Mr. Richard B. Oxford 54 line 3 (May 3, 2006). *See* Joint Movants' Exhibits No. 14.

cleared the lands for state ownership by placing them in what was called the "clear list." Title to the selected lands was transferred on the date of the clear list.[39]

Finding of Fact No. 18. Section 25 of the Enabling Act provides that "the following grants are hereby made" for university purposes; legislative, executive, and judicial public buildings and for the payment of the bonds issued for their construction; penitentiaries; insane asylums; school and asylums for the deaf, dumb, and the blind; miners' hospitals for disabled miners; normal schools; state charitable, penal, and reformatory institutions; agricultural and mechanical colleges; school of mines; military institutes; and for the payment of the bonds and accrued interest issued by Maricopa, Pima, Yavapai, and Coconino Counties.[40] These are referred to as the other trust beneficiaries. A specified number of acres of land, ranging from 50,000 to one million, were granted for the support of each beneficiary. The ASLD calls these grants "quantity grant selections."

Finding of Fact No. 19. Section 29 of the Enabling Act provides in pertinent part:

> That all lands granted in quantity, or as indemnity, by this Act, shall be selected, under the direction and subject to the approval of the Secretary of the Interior, from the surveyed, unreserved, unappropriated, and nonmineral public lands of the United States within the limits of said State, by a commission composed of the governor, surveyor-general or other officer exercising the functions of a surveyor-general, and the attorney-general of the said State …[41]

The four common school sections, indemnity in lieu selections, and quantity grant selections available to Arizona were to come from surveyed, unreserved, unappropriated, and nonmineral lands.

Finding of Fact No. 20. In 1929, the Congress "granted" to the State of Arizona an additional 50,000 acres of land "for miners' hospitals for disabled miners."[42] Section 2 of the Act provided that the lands were "to be selected from the surveyed, unreserved, unappropriated, and non-mineral lands

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[39] *Id*. at 54-55.
[40] 36 Stat. at 573.
[41] 36 Stat. at 575.
[42] Act of Feb. 20, 1929, ch. 280, § 2, 45 Stat. 1252. A copy is found in Appendices, Vol. 1, Tab 20 and in Joint Movants' Exhibits No. 16.

of the United States within" the State of Arizona "in the manner provided by" the Enabling Act.

Finding of Fact No. 21. According to information posted on the Internet site of the ASLD, "Arizona has acquired lands in four types of transactions:"

> 1. **School Sections in Place**: As land surveys were completed by the Federal government, title to four school sections in each township - Sections 2, 16, 32, and 36 - automatically passed to the State.
>
> 2. **Indemnity in Lieu Selections**: When school section lands were not available to the State because they had been previously claimed by homesteaders or miners or because they fell within a Federal reservation or a national forest, park, or Indian reservation, the State was given the right to select an equal acreage of Federal public domain land as indemnity in lieu of the school sections the State should have received.
>
> 3. **Quantity Grant Selections**: The State selected the specified acreage of Federal lands for the County Bonds and each of the individual institutional Trusts.
>
> 4. **Land Exchanges**: After acquiring title to the Trust lands, the State traded many of the lands for other Federal or private lands of equal value in order to relocate and block up Trust land holdings.
>
> The State acquired its School Sections in Place wherever the land surveys placed them. The State chose the lands acquired in the Indemnity in Lieu Selections, Quantity Grant Selections, and Land Exchange processes.
>
> These choices were made by the State Selection Board, which consists of the Governor, State Attorney General, and State Land Commissioner. The Land Commissioner in recent years has been replaced on the Board by the State Treasurer. Most of the selections were made in the 1915-1960 era, with the selection program being finally completed in 1982.[43] Since the State was precluded by Federal laws from acquiring mineral lands, and since the homesteaders had already acquired most of the potential agricultural lands, the State focused on choosing the best grazing lands.
>
> Most of the acreage chosen during the 1915-1960 era was in central and southeastern Arizona, and in the checkerboard land area along the railroad across north-central Arizona. As agriculture developed in Arizona, later selections were made in irrigated areas in the Harquahala Valley and the Gila River Valley. The final selections concentrated on commercial and agricultural lands along the Colorado River.[44]

Finding of Fact No. 22. The total amount of lands obtained by Arizona from the United States

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[43] Mr. Oxford explained the distinction between 1982 and "about 1990" for the completion of the selection of indemnity in lieu lands. Transcript of Deposition of Mr. Richard B. Oxford 53 line 19 (May 3, 2006) ("They were completed twice."). *See* Joint Movants' Exhibits No. 14.

[44] Joint Movants' Exhibits No. 15 (verified by the Special Master on Sept. 11, 2007).

"was about 10, 900,000" acres.[45] State Trust Lands are found in both the Gila River (approximately 5.1 million acres of land) and the Little Colorado River (approx. 1.4 million acres of land) Systems.[46]

Finding of Fact No. 23. The Enabling Act established the trust structure for the State Trust Lands. Section 28 provides in pertinent part:

> That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the said State, shall be by the said State held in trust, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.[47]

Finding of Fact No. 24. Arizona accepted to hold in trust all the lands granted and to dispose of them in accordance with the terms of the Enabling Act. Article X, § 1 of the Arizona Constitution states that:

> All lands expressly transferred and confirmed to the state by the provisions of the Enabling Act approved June 20, 1910, including all lands granted to the state and all lands heretofore granted to the Territory of Arizona, and all lands otherwise acquired by the state, shall be by the state accepted and held in trust to be disposed of in whole or in part, only in manner as in the said Enabling Act and in this Constitution provided, and for the several objects specified in the respective granting and confirmatory provisions. The natural products and money proceeds of any of said lands shall be subject to the same trusts as the lands producing the same.[48]

The next step is to apply the legal concepts of withdrawal and reservation of public lands as they relate to reserved water rights to these findings of fact. *Cappaert* and *Gila V* hold that for a federal reserved water right to be implied there must be a withdrawal of federal public land and its reservation for a federal purpose. The State's partial summary judgment motion enumerated these

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[45] Arizona State Land Dept. Internet, http://www.land.state.az.us/history.htm, Joint Movants' Exhibits No. 15 (verified by the Special Master on Sept. 11, 2007). *Lassen*, *infra*, states that 10,790,000 acres were granted. 385 U.S. at 460 n.2.

[46] State's Statement of Fact No. 16 in Support of its Response to Opposing Claimants' Motions for Summary Judgment.

[47] 36 Stat. at 574.

[48] Ariz. Const. art 10, § 1.

requisites "(1)" and "(2)."[49]

Conclusion of Law No. 4. "In each case dealing with federal reserved water rights, it has been obvious that there has been a withdrawal and reservation of the subject lands."[50]

Conclusion of Law No. 5. "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."[51] In common terms, it means all lands owned by the United States. "The public domain includes lands open to settlement, public sale, or other disposition under the federal public land laws, and which are not exclusively dedicated to any specific governmental or public purpose."[52]

"Although often used interchangeably, the terms 'withdraw' and 'reserve' have different meanings."[53] "It is important to note at the outset that 'withdrawal' and 'reservation' are not synonymous terms. … A withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws"[54] such as the operation of federal mining, homestead, preemption, desert entry, and other federal land laws. Withdrawn lands "are tracts that the government has placed off-limits to specified forms of use and disposition," but a withdrawn parcel "may also be reserved for particular purposes, and often is."[55]

Conclusion of Law No. 6. A withdrawal of public domain land removes the land from the operation of federal public land laws and makes the land unavailable for settlement, public sale, or other disposition under the federal public land laws.

"Reserved lands … are those that have been expressly withdrawn from the public domain by

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[49] State's Motion for Partial Summary Judgment 8.
[50] 622 F. Supp. at 854.
[51] *Minnesota v. Hitchcock*, 185 U.S. 373, 391 (1902) (quoting *Newhall v. Sanger*, 92 U.S. 761, 763 (1875)).
[52] 622 F. Supp. at 854.
[53] *Id*.
[54] *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 784 (10th Cir. 2005).

statute, executive order, or treaty, and are dedicated to a specific federal purpose."[56] "A reservation … goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use … [a] reservation necessarily includes a withdrawal; but it also goes a step further, effecting a dedication of the land 'to specific public uses'."[57] Reservations or reserved lands "are the federal tracts that Congress or the Executive has dedicated to particular uses (footnote omitted). The dedication removes them from availability for contrary use or disposition."[58]

In *Southern Utah*, the 10th Circuit Court of Appeals quoted the definition of "reservation" from the first edition of Black's Law Dictionary, a reputable legal dictionary, published in 1891. The dictionary is in its eighth edition. The first edition defined "reservation" as follows: "In public land laws of the United States, a reservation is a tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc."[59] The conclusion is that at least as of the late 1880s, it was legally recognized that a reservation of public land consisted of a withdrawal of the land from disposal and its dedication to a specific public use - requisites not inconsistent with today's law of reserved water rights.

Conclusion of Law No. 7. A reservation of public land is land expressly withdrawn from the public domain by statute, executive order, or treaty, and dedicated to a specific federal purpose.

A central element of the State's position in this proceeding is that Section 15 of the Act of September 9, 1850, provided that sections 16 and 36 in each township "shall be, and the same are

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[55] 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.").

[56] 622 F. Supp. at 854.

[57] 425 F.3d 735 at 784.

[58] 1 COGGINS & GLICKSMAN § 1:11 at 1-15.

hereby, **reserved** for the purpose of being applied to schools" when a State was created (emphasis added). The State argued that the term "reserved" must be given its plain meaning from the viewpoint of 1850.

In 1859, the Congress enacted legislation concerning preemption by settlers who had settled on lands in sections 16 and 36 before a survey had been approved. The Congress used the terms "reserved or pledged**"** for the use of schools or colleges (Finding of Fact No. 7). The terms "reserved or pledged" were again used in 1891 (Finding of Fact No. 10). At a minimum, the use of "or" makes "pledged" a contemporary synonym for "reserved." The Special Master notes that in the reserved water rights case law the word "pledged" is not used to describe reserved rights.

The United States Supreme Court has considered the status of sections 16 and 36 given to states for schools. These cases are central to the resolution of the first issue addressed in this report.

In 1876, the Court considered conflicting section 16 land patents issued by the State of Nevada and by the United States. The United States patent, given prior to the survey of section 16, prevailed. The Supreme Court's holding concerning the status of public lands before they are surveyed remains valid precedent. The Court held as follows:

> The validity of the patent from the State under which the plaintiff claims title rests on the assumption that sections 16 and 36, whether surveyed or unsurveyed, and whether containing minerals or not, were granted to Nevada for the support of common schools by the seventh section of the Enabling Act …
>
> This assumption is not admitted by the United States, who, in conformity with the act of Congress of July 26, 1866 … issued to the defendant a patent to the land in controversy, bearing date March 2, 1874. Which is the better title is the point for decision.
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> . . . .
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> Congress, at the time, was desirous that the people of the Territory of Nevada should form a State government, and come into the Union. The terms of admission were proposed, and, as was customary in previous enabling acts, the particular

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[59] 425 F.3d at 784.

> sections of the public lands to be donated to the new State for the use of common schools were specified. These sections had not been surveyed, nor had Congress then made, or authorized to be made, any disposition of the national domain within that Territory.
>
> But this condition of things did not deter Congress from making the necessary provision to place, in this respect, Nevada on an equal footing with States then recently admitted. Her people were not interested in getting the identical sections 16 and 36 in every township. Indeed, it could not be known until after a survey where they would fall, and a grant of quantity put her in as good a condition as the other States which had received the benefit of this bounty. A grant, operating at once, and attaching prior to the surveys by the United States, would deprive Congress of the power of disposing of any part of the lands in Nevada, until they were segregated from those granted. In the mean time, further improvements would be arrested, and the persons, who prior to the surveys had occupied and improved the country, would lose their possessions and labor, in case it turned out that they had settled upon the specified sections. Congress was fully advised of the condition of Nevada, of the evils which such a measure would entail upon her, and of all antecedent legislation upon the subject of the public lands within her bounds. In the light of this information, and surrounded by these circumstances, Congress made the grant in question. …
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> . . . .
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> … **Until the *status* of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality**. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interests.[60]

The Supreme Court has considered two cases involving sections 16 and 36 where the Congressional acts establishing a Territory used the phrase "reserved for the purpose of being applied to schools," the same language used in the Act of September 9, 1850, that established the Territory of New Mexico (Finding of Fact No. 4). The first case involved Minnesota and the second Oregon.

The Act of March 3, 1849, establishing the Territory of Minnesota provided in pertinent part that "when the lands in the said Territory shall be surveyed … sections numbered sixteen and thirty-

[60] *Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U.S. 634, 637, 638, and 640 (1876) (bold emphasis added).

six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools …"[61]

> Turning to the legislation of Congress in respect to school lands in Minnesota, the clause in the act establishing the territorial government has only this significance. It provided that when the lands in the territory should be surveyed sections Nos. 16 and 36 "shall be and the same are hereby reserved," for the purpose of being applied to schools.
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> . . . .
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> … As in *Heydenfeldt v. Daney Gold & Silver Mining Co.*, (citation omitted), priority was given to a mining entry over the State's school right, so here, in terms, preference is given to private entries, town site entries, or reservations for public uses. In other words, **the act of admission, with its clause in respect to school lands, was not a promise by Congress that under all circumstances, either then or in the future, these specific school sections were or should become the property of the State**. The possibility of other disposition was contemplated, the right of Congress to make it was recognized, and provision made for a selection of other lands in lieu thereof."[62]

In 1916, the Supreme Court again considered conflicting titles to section 16 lands. The 1848 act establishing the Territory of Oregon stated that "when the lands in the said Territory shall be surveyed … sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same is hereby, reserved for the purpose of being applied to schools …"[63]

The Court quoted at length from *Heydenfeldt* and held as follows:

> … [C]ongress used the same phrase substantially in nearly every one of the school grants, and it was the manifest intention to place the states on the same footing in this matter. The same clause, relating to the same subject, and enacted in pursuance of the same policy, did not have one meaning in one grant and a different meaning in another; it covered other dispositions, whether prior or subsequent, if made before the land had been appropriately identified by survey and title had passed. Nor is a distinction to be observed between mineral lands and other lands, if in fact Congress disposed of them. The validity of the disposition would not be affected by the character of the lands, although this might supply the motive for the action of Congress. We regard the decision in the *Heydenfeldt Case* as establishing a definite rule of construction.

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[61] Act of Mar. 3, 1849, ch. CXXI, § 18, 9 Stat. 403, 408. A copy is found in Appendices, Vol. 1, Tab 2.
[62] *Minnesota v. Hitchcock*, 185 U.S. at 390 and 400-01 (1902) (emphasis added).
[63] Act of Aug. 14, 1848, ch. CLXXVII, § 20, 9 Stat. 323, 330. A copy is found in Appendices, Vol. 1, Tab 1.

. . . .

> The rule which the *Heydenfeldt Case* established has, we understand, been uniformly followed in the land office. After reviewing the cases, Secretary Lamar concluded (December 6, 1887; to *Stockslayer, Commissioner*, Re Colorado, 6 Land Dec. 412, 417) that the school grant "does not take effect until after survey, and if at that date the specific sections are in a condition to pass by the grant, the absolute fee to said sections immediately vests in the State, and if at that date said sections have been sold or disposed of, the State takes indemnity therefor."
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> . . . .
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> … We refer to the resolution as an express declaration by Congress that the school sections were not granted to the State absolutely, and beyond any further control by Congress, or any further action under the general land laws. …
>
> We conclude that **the state of Oregon did not take title to the land prior to the survey; and that until the sections were defined by survey and title had vested in the State, Congress was at liberty to dispose of the land**, its obligation in that event being properly to compensate the State for whatever deficiencies resulted.[64]

In 1947, the Court decided a dispute involving sections 36 lands in Wyoming. The State of Wyoming argued that the words "are hereby granted" in its Enabling Act "evince an intention to vest immediately in the State, not only legal title to section 16 and 36 when surveyed and not otherwise disposed of, but also an indefeasible proprietary interest in the unsurveyed sections of the school lands."[65]

The Court rejected the State of Wyoming's argument holding that:

> Consistent with the policy first given expression in the Ordinance of 1785, the Federal Government has included grants of designated sections of the public lands for school purposes in the Enabling Act of each of the States admitted into the Union since 1802 (footnote omitted). This Court has frequently been called upon to construe the provisions and limitations of such grants. It has consistently been held that under the terms of the grants hitherto considered by this Court, title to unsurveyed sections of the public lands which have been designated as school lands does not pass to the State upon its admission into the Union, but remains in the Federal Government until the land is surveyed. **Prior to survey, those sections are a part of the public lands**

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[64] *United States v. Morrison*, 240 U.S. 192, 205, 207, and 209-10 (1916) (emphasis added). *See Andrus v. Utah*, 446 U.S. 500, *reh'g denied*, 448 U.S. 907 (1980), *Alabama v. Schmidt*, 232 U.S. 168 (1914), and *Wisconsin v. Hitchcock*, 201 U.S. 202 (1906).

[65] *United States v. Wyoming*, 331 U.S. 440, 445(1947).

> **of the United States and may be disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes**.
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> . . . .
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> … We believe that this contention is precluded by earlier decisions of this Court. In *Heydenfeldt v. Daney Gold & Silver Mining Co.*, (citation omitted), decided some thirteen years before the passage of the Wyoming Act, this Court construed the granting clause of the Nevada Enabling Act, which contains language substantially identical to that of § 4 of the Wyoming Act (footnote omitted), as not immediately vesting in the State title to sections of the school lands unsurveyed at the date of admission (footnote omitted). In *United States v. Morrison*, (citation omitted), this Court stated: **"We regard the decision in the *Heydenfeldt Case* as establishing a definite rule of construction."**
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> . . . .
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> Defendants' view that, by virtue of the language of the Enabling Act, Congress extinguished the powers of the Federal Government subsequently to dispose of the unsurveyed school sections in the exercise of its governmental functions, admittedly would place Wyoming in a favored position among the school-grant States. Such a result does not accord with the Congressional expectation that the school grant should have "equal operation and equal benefit in all the public land States or Territories." …
>
> Furthermore, one of the important recurring problems faced by Congress during the period in which the Wyoming Enabling Act was passed was the necessity of reserving tracts of the public lands to accomplish such important purposes as preserving the national forests and mineral resources, establishing public parks, and the like (footnote omitted). Vesting in the State an immediate and irrevocable interest in the school sections before such sections had been identified by survey would be to complicate the performance of the Government's obligation with respect to the public lands. …
>
> It is significant that for a period extending over half a century, the land decisions of the Department of the Interior have consistently taken the position that title to unsurveyed school sections passes to the State only upon completion of the survey, and prior to that time the Federal Government is not inhibited from making such reservations and dispositions of the lands as required by the public interest and as authorized by applicable statutes.[66]

The holdings in *Heydenfeldt*, *Morrison*, and *Wyoming* were cited with approval in a matter involving the interpretation of Arizona's Enabling Act. The United States District Court for Arizona based its ruling, on these three opinions, that:

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[66] *Id*. at 443, 445, and 453-54 (emphasis added).

> [T]he Supreme Court has explicitly rejected that the word 'grant' in an Enabling Act transfers an interest to a State in the *specific* sections of school lands (citing *Wyoming,* 331 U.S. at 445). The Arizona Enabling Act gave the State an interest in the *quantity* of unsurveyed land designated, but no interest in specific parcels of land. Citing *Heydenfeldt,* 93 U.S. at 640, and *Morrison,* 240 U.S. at 200.[67]

WITHDRAWAL

These decisions over a period of 121 years establish that sections 16 and 36 in each township were not withdrawn from the public domain in 1850 or prior to Arizona obtaining title. Ownership of sections 16 and 36 remained in the United States, which retained the right to dispose of the lands in those sections under the public land laws, until title was conveyed to the State of Arizona. As held in *Wyoming*, "[p]rior to survey, those sections are a part of the public lands of the United States and may be disposed of by the Government in any manner and for any purpose consistent with applicable federal statutes." This "definite rule of construction" dates to 1876.

The Act of September 9, 1850, provided that "when the lands in said Territory shall be surveyed" - after their surveys - then "sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools." Neither a withdrawal nor a reservation of those lands, as those terms have been consistently interpreted with regard to the reservation of water rights doctrine, was effected in 1850.

Conclusion of Law No. 8. The Act of September 9, 1850, did not effect a withdrawal of sections 16 and 36 in each township from the public domain because the United States retained the right to dispose of those lands under the public land laws until surveys located those sections.

Conclusion of Law No. 9. The State Trust Lands, including sections 2, 16, 32, and 36 in each township, were not withdrawn from the public domain until after the Enabling Act had been passed and surveys completed and approved, and in the case of indemnity in lieu and quantity grant selections, a determination was made that the surveyed lands were available for selection. The State

[67] *Masayesva v. Zah*, 792 F. Supp. 1172, 1175-76 (D. Ariz. 1992) (italicized emphasis in opinion).

Trust Lands were not withdrawn from the public domain prior to title passing to the State of Arizona.

RESERVATION

Conclusion of Law No. 10. The term "reserved" in the Act of September 9, 1850, expressed an intention to grant to a state to be created from the Territory of New Mexico two sections of land in each township after "the lands in said Territory shall be surveyed under the direction of the government of the United States."

Conclusion of Law No. 11. The Act of September 9, 1850, did not establish a federal reservation of public lands for the support of common schools because the lands were not withdrawn from the public domain but remained available for disposal under the federal public land laws.

Conclusion of Law No. 12. The United States conveyed title to the State Trust Lands to the State of Arizona only after the surveys of sections 2, 16, 32, and 36, were completed and approved, and in the case of indemnity in lieu and quantity grant selections, a determination was made that the surveyed lands were available for selection. In all cases, title was conveyed to surveyed, unreserved, unappropriated, and nonmineral lands.

Conclusion of Law No. 13. In the Enabling Act, the United States granted sections 16 and 32 in each township, or indemnity in lieu lands if these sections were not available, for the support of common schools. These sections were additional grants of land for the support of common schools and were not federal reservations.

Conclusion of Law No. 14. All the other State Trust Lands were grants of the United States to the State of Arizona for the support of the beneficiaries and were not federal reservations.

Conclusion of Law No. 15. Implied reserved water rights do not exist for the State Trust Lands because the lands were neither withdrawn from the public domain nor reserved as required by the reservation of water rights doctrine.

The State argued that the United States Supreme Court has held that a seminary can "claim title to land reserved by the Federal Government for educational use, even though the school did not exist at the time of the reservation."[68] *Vincennes* involved the reservation of "an entire township … reserved for the use of a seminary of learning." The seminary obtained the township lands shortly after the lands were located or surveyed.

The Court's decision turned on the authority of the territorial government to approve the incorporation of an "eleemosynary corporation" to operate a seminary and the subsequent transfer of the located township lands to the seminary. The Court explained that:

> … The citizens within the township are the beneficiaries of the charity. The title to these lands has never been considered as vested in the State; and it has no inherent power to sell them, or appropriate them to any other purpose than for the benefit of schools. For the exercise of the charity under the laws, the title is in the township.[69]

But relevant to the issue being considered in this proceeding, the Court's decision does not support the State's position as much as claimed. In *Vincennes* the Court held that:

> The reservations for the seminaries of learning and for schools, are made in the same terms, and in some respects, must rest on the same principles. In all the Western States, north of the Ohio, similar reserves for schools and seminaries of learning have been made. In the case of *Wilcox v. Jackson*, (13 Peters, 498), this court held, that a reservation set apart the thing reserved for some particular use; and that "whensoever a tract of land shall once have been legally appropriated to any purpose, it becomes separated from the public lands."[70]

In *Wilcox* the dispute involved lands reserved for military purposes, but a pertinent point is that "[t]he land in question was surveyed by [the] government in 1821," prior to the dispute arising or the military reservation being established in 1824.[71] The Special Master's reading of *Vincennes* is that the lands became "legally appropriated" after they had been located or surveyed and not when

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[68] State's Reply 14.
[69] *Bd. of Trustees for the Vincennes University v. Indiana*, 55 U.S. 268, 274 (1852).
[70] *Id*. at 273-74.
[71] *Wilcox v. Jackson Ex Dem[ise] McConnel*, 38 U.S. (13 Peters) 498, 510 (1839).

they were legislatively "reserved for the use of a seminary." It was only *after* the survey had been completed, and the township lands identified, that the seminary was both incorporated and given the township lands.

In any event, any precedent *Vincennes* may have for the issue being considered has been eroded by the more relevant subsequent decisions of the United States Supreme Court that directly address the land grants given to the states. The law of school land grants evolved considerably after *Vincennes* which dealt with legislation enacted in 1804.

1. Federal Property Grants

Assuming for argument that the United States impliedly reserved a water right for the State Trust Lands granted to Arizona, the Special Master has not been provided any authority that establishes that the United States conveyed water rights to Arizona either upon its admission to the Union or the issuance of title to the State Trust Lands. The Special Master read numerous opinions in preparing this report, and he did not find any references to the federal conveyance of water rights in the cases involving state land grants.

Finding of Fact No. 25. The record does not show any evidence establishing that the United States expressly conveyed a reserved water right when it granted the State Trust Lands to Arizona or upon the issuance of title.

Concerning the interpretation of a federal property grant, the United States Supreme Court has held that:

> The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest (footnote omitted). Statutory grants of that character are to be construed strictly in favor of the public, and **whatever is not unequivocally granted is withheld; nothing passes by mere implication**.[72]

[72] *Knoxville Water Co. v. Knoxville*, 200 U.S. 22, 33-34 (1906) (quoting *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1892)) (emphasis added).

and,

> … [S]tatutes granting privileges or relinquishing rights are to be strictly construed; or, to express the rule more directly, that such grants must be construed favorably to the Government and that nothing passes but what is conveyed in clear and explicit language - inferences being resolved not against but for the Government.[73]

The Arizona Supreme Court has held that "courts have consistently construed the scope of federal land grants in favor of the [federal] government."[74] Both of the cases the Court cited to support this holding involved federal land grants; *Kadish* involved the State Trust Lands.

Conclusion of Law No. 16. "Water rights are property rights."[75]

Conclusion of Law No. 17. A reserved water right for a federal reservation is a property right of the United States. When the United States withdraws public domain lands and reserves them for a federal purpose, and an implied reserved water right is determined to exist for the reservation, "the United States acquires a reserved right …"[76]

Conclusion of Law No. 18. The record does not show that the United States conveyed to Arizona an express or implied reserved water right for the State Trust Lands, a property right of the United States, and absent an unequivocal conveyance, a reserved water right cannot be held to have passed by implication.

2. Trust Status

The State argued that the establishment of a trust, a fiduciary relationship, for Arizona's State Trust Lands effected a withdrawal and a reservation of the lands.

The United States Supreme Court explained the reasons for the trust as follows:

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[73] *Caldwell v. United States*, 250 U.S. 14, 20-21 (1919).
[74] *Kadish v. Arizona State Land Dept.*, 155 Ariz. 484, 495, 747 P.2d 1183, 1194 (1988), *aff'd sub nom. ASARCO Inc. v. Kadish*, 490 U.S. 605 (1989) (quoting *Mountain States Tel. & Tel. Co. v. Kennedy*, 147 Ariz. 514, 516, 711 P.2d 653, 655 (App. 1985)).
[75] *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992).
[76] 426 U.S. at 138.

> The central problem which confronted the Act's draftsmen was therefore to devise constraints which would assure that the trust received in full fair compensation for trust lands. **The method of transfer and the transferee were material only so far as necessary to assure that the trust sought and obtained appropriate compensation**. This is confirmed by the legislative history of the Enabling Act. All the restrictions on the use and disposition of the trust lands, including those on the powers of sale and lease, were first inserted by the Senate Committee on the Territories (footnote omitted). Senator Beveridge, the committee's chairman, made clear on the floor of the Senate that the committee's determination to require the **restrictions sprang from its fear that the trust would be exploited** for private advantage. He emphasized that the committee was influenced chiefly by the repeated violations of a similar grant made to New Mexico in 1898 (footnote omitted). The violations had there allegedly consisted of private sales at unreasonably low prices, and the committee evidently hoped to prevent such depredations here by requiring public notice and sale (footnote omitted). **The restrictions were thus intended to guarantee, by preventing particular abuses through the prohibition of specific practices, that the trust received appropriate compensation for trust lands**.[77]

The Arizona Supreme Court likewise recounted the background of Congressional intent arising from scandalous mismanagement:

> The dissipation of the funds by one device or another, sanctioned or permitted by the legislatures of the several states, left a scandal in virtually every state, and these granted lands and the monies derived from a disposition thereof were so poorly administered, so unwisely invested and dissipated, that Congress concluded to make sure, in light of the experiences of the past, that such would not occur in the new states of New Mexico and Arizona.[78]

These holdings show that the trust structure was intended to address the management of the State Trust Lands once the State obtained title. It is settled that "[t]he state is not holding this land as an instrumentality of the United States, but in its own right, in trust, however, for the schools of the state …"[79] Its obligation is to manage the State Trust Lands as a trustee in conformance with the terms of the Enabling Act. The trust addressed Congressional "fear" about the dissipation of trust assets, but the establishment of the trust did not effect a withdrawal or reservation of lands. The fact a trust was established does not overcome the hurdle of showing a withdrawal and reservation to

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[77] *Lassen v. Arizona ex rel. Arizona Highway Dept.*, 385 U.S. 458, 463-64 (1967) (emphasis added).
[78] *Murphy v. State*, 65 Ariz. 338, 351, 181 P.2d 336, 344 (1947); s*ee also* 155 Ariz. at 487, 747 P.2d at 1186.
[79] *Kelly v. Allen*, 49 F.2d 876, 878 (1931).

establish an implied reserved water right.

Conclusion of Law No. 19. The establishment of a trust for the management of the State Trust Lands did not effect either a withdrawal or a reservation of the lands.

3. Report of the 1912-1914 State Land Commission of Arizona

The Joint Movants submitted a copy of a report which provides not only a contemporaneous view of how the new State of Arizona saw the State Trust Lands but also shows how many of the mechanisms involving state land grants described in judicial opinions played out in Arizona.

Finding of Fact No. 26. In 1912, the Arizona Territorial Legislature created the State Land Commission of Arizona ("Commission") comprised of the Governor, the Attorney General, the State Engineer, and three members appointed by the Governor.[80]

Finding of Fact No. 27. The Commission, which served as a temporary Land Department of the State, was assigned to:

> 1. Ascertain "the character and value" of the public lands within Arizona "and to recommend to the Governor such as might be deemed desirable for selection in satisfaction of the federal grants to the State."
>
> 2. "[P]ersonally examine, and classify, the school and other lands of the State, with a view to aiding the Legislature in the determination of a State land policy."
>
> 3. Determine "the character and value of improvements on school and university lands," to gather information to resolve the rights of lessees on those lands, and
>
> 4. Grant "permits for the continued occupancy of school and university lands held under lease prior to Statehood."[81]

Finding of Fact No. 28. The Commission submitted a 167-page report detailing its efforts and recommending methods for managing the State Trust Lands in the future.

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[80] Act of First Territorial Legislature, Laws 1912, ch. 79, codified at ch. 1, tit. 43, Rev. Stat. 1913. A copy is found in Joint Movants' Exhibits No. 17. *See also* Joint Movants' Exhibits No. 15.

[81] Report of the State Land Commission of Arizona to the Governor of the State: June 6, 1912, to Dec. 1, 1914 7-8. A copy is found in Joint Movants' Exhibits No. 19.

Finding of Fact No. 29. The report states that Arizona received 2,350,000 acres of land for the quantity grant beneficiaries (called in the report the "institutional lands") and 8,103,680 acres of land "for the support of common schools," or a total of 10,453,680 acres. The 8,103,680 acres were the "total area of sections 2, 16, 32 and 36, in every township in the State … granted 'for the support of common schools'."[82]

Finding of Fact No. 30. Of the 8,103,680 acres for common schools (1) 3,134,555.20 were "unsurveyed, and the title of the State has therefore not accrued," (2) 1,397,357.59 were inside national forests, (3) 1,823,024.12 were inside "Indian and other reservations authorized by Act of Congress," and (4) 168,707.62 were "otherwise appropriated at the date of passage of the Enabling Act" or were settled "with a view to homestead or desert-land entry … before the survey" had been completed. In fact, the State had then only 1,580,035.47 acres of "school land" being administered by the Commission.[83]

Finding of Fact No. 31. The completion of surveys was a "pressing need" because title to the State Trust Lands was secured following the completion and approval of surveys and, when required, the selection of available lands. Although the "choicest areas" had been surveyed and titles for "several hundred thousand acres" had been secured or were pending, "more than sixty-eight per cent [of Arizona's land surface] remained, on June 30, 1914, unsurveyed."[84]

Finding of Fact No. 32. The report described the "tedious process … which State selections must undergo prior to title vesting in the State." Following the completion of surveys, their approval by the United States "at the best require[d] from eight months to a year."[85]

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[82] *Id*. at 11 and 38.
[83] *Id*. at 38-39 and 67 (Table V).
[84] *Id*. at 19-20.
[85] *Id*. at 14 and 13.

Finding of Fact No. 33. The Commission believed that the State Trust Lands would have to obtain water by either groundwater pumping or surface water appropriations. Its report stated that:

> It may be accepted as generally true, however, that the greater portion of these lands which will finally be selected are semi-arid in character and **susceptible of reclamation either by pumping or by means of storage reservoirs**, and an outstanding fact will be found to be the very considerable amount of land that will come under the reservoir class (emphasis added). … Thus it may be seen that when title to this land, in addition to that of like class already selected, shall have finally passed to the State, it will represent, in the most direct, concrete, tangible form, a reclamation and development opportunity of great proportions which it will be the State's sacred duty, as well as privilege, to improve.[86]

The report contains a discussion of the "Salt River Valley School Lands," the "most valuable body of school lands in the State."[87] The report gives a history of water rights and uses in the Valley and discusses the potential use on the State Trust Lands of waters stored behind Roosevelt Dam, made possible by the well-known Valley reclamation project.

Finding of Fact No. 34. Under the heading "Proposal to Bar School Land from Stored Water," the Commission discussed the "status of the school lands under the Salt River Valley project, with respect to the stored waters of Roosevelt dam."[88] The Commission reviewed the 1902 Reclamation Act and the recommendations of an appointed Board of Survey as they related to the potential use on the State Trust Lands of waters stored behind Roosevelt Dam. The Commission reported that "it is evident that the inclusion of these lands in the Salt River Valley reclamation project, and their admission to contractual rights in the stored waters of Roosevelt dam, while they remain in State ownership, is viewed with disfavor by the United States government."[89]

Federal disfavor negates, and at a minimum, contradicts an inference or implication that the United States reserved water rights for the State Trust Lands. Had such water rights existed, it is

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[86] *Id*. at 26.
[87] *Id*. at 89.
[88] *Id*. at 105.
[89] *Id*. at 110.

reasonable to conclude that the United States would have been favorable to the State obtaining contracts to Roosevelt Dam water for use on State Trust Lands.

Finding of Fact No. 35. The report does not contain any statements that show the Commission believed that the grants of the State Trust Lands included associated water rights conveyed by the United States or otherwise deriving from the grants, or that the grants of the State Trust Lands included express or implied federal reserved water rights.

C. Desert Land Act of 1877

The Navajo Nation, GRIC, Abitibi, and ASARCO discussed the Desert Land Act of 1877. The Navajo Nation argued that "the the rule of the Desert Lands Act controls the acquisition of water rights for the state trust lands and requires that such water rights be obtained pursuant to state law."[90] The State, quoting *Cappaert*, argued that "the Desert Land Act does not apply to water rights on federally reserved land."[91]

Finding of Fact No. 36. On March 3, 1877, Congress enacted the Desert Land Act of 1877 which provided for the sale of desert lands in certain Western states and territories including the Territory of Arizona. The Act provided in pertinent part:

> That it shall be lawful for any citizen of the United States … upon payment of twenty five cents per acre - to file a declaration … that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated … and all surplus water over and above such actual appropriation and use … shall remain and be held free for the appropriation and use of the public … subject to existing rights.

[90] Navajo Nation's Motion for Summary Judgment 10.
[91] State's Response 36 (quoting *Cappaert*, 426 U.S. at 144).

> SECTION 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act …[92]

The prior appropriation system of acquiring a surface water right evolved from the customs and practices of the people who came to the West beginning with Hispanic settlers and continuing with the farmers, miners, ranchers, and many others who followed.[93] Those who first appropriated the waters of rivers, streams, lakes, and springs and applied the water to a beneficial use established a water right and had priority over subsequent appropriators to use that water. Prior appropriation was part of "the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition."[94] Since territorial days, Arizona has adopted prior appropriation for surface water rights.[95]

The United States Supreme Court has held that in the Desert Land Act the "Congress took its first step toward encouraging the reclamation and settlement of the public desert lands in the West and made it clear that such reclamation would generally follow state water law."[96] The Court's most significant holding has been that the Desert Land Act:

> … [e]ffected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself. From that premise, it follows that a patent issued

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[92] Act of March 3, 1877, ch. 107, 19 Stat. 377, codified at 43 U.S.C. §§ 321-339 (1985). A copy is found in Appendices, Vol. 1, Tab 10.

[93] The Territory of Arizona retained the "regulations of acequias [irrigation canals], which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona." Rev. Stat. Ariz. 1887, tit. LXIII, ch. two, § 3223. *See* DOUGLAS E. KUPEL, FUEL FOR GROWTH: WATER AND ARIZONA'S URBAN ENVIRONMENT 16-21 (2003).

[94] 438 U.S. at 656 (quoting *Basey v. Gallagher*, 87 U.S. (20 Wall) 670, 684 (1875) ("[t]he doctrine of prior appropriation, linked to beneficial use of the water, arose through local customs, laws, and judicial decisions.")). *See also* 438 U.S. at 653-54.

[95] Howell Code, art. 22 (1864); Rev. Stat. Ariz. 1887, tit. LXIII, ch. two, §§ 3199-3226; Laws of 1893, no. 86, 135-36; *see Hill v. Lenormand*, 2 Ariz. 354, 356-57, 16 P. 266, 268 (1888).

[96] 438 U.S. at 657. Two Congressional acts preceded this step. The Act of July 26, 1866, ch. CCLXII, § 9, 14 Stat. 251, 253 (Appendices, Vol. 1, Tab 8) and the Act of July 9, 1870, ch. CCXXXV, §17, 16 Stat. 217, 218 (Appendices, Vol. 1, Tab 9) "reach[ed] into the future as well, and approve[d] and confirm[ed] the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid-land states, as the test and measure of private rights in and to the non-navigable waters on the public domain." 438 U.S. at 656 n.11 (quoting *California Oregon Power Co.*, 295 U.S. at 155).

> thereafter for lands in a desert-land state or territory, under any of the land laws of the United States, carried with it, of its own force, no common law right to the water flowing through or bordering upon the lands conveyed.
>
> . . . .
>
> … What we hold is that following the act of 1877, **if not before**, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.[97]

Two years later, citing *California Oregon Power*, the Supreme Court held that:

> The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states."[98]

"The Desert Land Act severed, for purposes of private acquisition, soil and water rights *on public lands*, and provided that such water rights were to be acquired in the manner provided by the law of the State of location."[99] More recently, *Cappaert* held that "[n]one of the patents [of public lands issued by the United States] conveyed water rights because the Desert Land Act of 1877, (citation omitted), provided that such patents pass title only to land, not water. Patentees acquire water rights by 'bona fide prior appropriation,' as determined by state law."[100]

Conclusion of Law No. 20. Following the enactment of the Desert Land Act in 1877, a person who received the government title to federal public lands did not acquire a water right by virtue of the land title. A water right had to be obtained in accordance with state law.

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[97] *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158 and 163-64 (1935) (emphasis added).
[98] *Ickes v. Fox*, 300 U.S. 82, 95 (1937).
[99] *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 448 (1955) (citing *California Oregon Power)* (italicized emphasis in *Federal Power Comm'n* opinion).
[100] 426 U.S. at 139, n.5.

The Special Master agrees with the Navajo Nation that Arizona's Enabling Act must be read consistently with the Desert Land Act. The "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[101] The Enabling Act does not express a Congressional intention that contradicts the Desert Land Act. Further, the statutory construction rule of in pari materia requires that when two or more statutes address the same subject matter, the statutes must be construed consistently with one another. The rule is "a logical extension of the principle that individual sections of a single statute should be construed together, (footnote omitted) for it necessarily assumes that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject (citation omitted)."[102] The Desert Land Act and the Enabling Act dealt with public domain lands and were enacted at a time in our history when the West was rapidly being settled and homesteaded, then matters of great importance to the Congress.

Conclusion of Law No. 21. Arizona's Enabling Act must be construed consistent with the Desert Land Act, and each Act must be regarded as effective. When the State of Arizona received in the Enabling Act the grants of the State Trust Lands from the United States, Arizona did not receive a water right for those lands.

No basis has been presented to conclude that "any of the land laws of the United States" are overridden by an enabling act. The Special Master has not found, and was not cited, any authority for the proposition that a state that receives a grant of public lands through its enabling act must be treated in a different manner than an entryman who patents federal land upon proper declaration.

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[101] *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *see J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001). Other supporting cases are cited in the Navajo Nation's Motion for Summary Judgment 21-23.

[102] *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972).

In fact, the Ninth Circuit Court of Appeals' decision in *Cappaert* is authority to the contrary. The Court of Appeals held as follows:

> **In 1890 and 1892, the State of Nevada by selection acquired fee simple title from the United States Government** to the land now owned by the Cappaerts. The Desert Land Act of 1877, 43 U.S.C. § 321 (1964), as construed in [*California Oregon Power*] provides that a transfer of federal land out of the public domain after the date of the Act would not pass title to any unappropriated appurtenant water; water rights would be determined under the law of the state in which the land was located. **Because water rights were severed from title in 1877, Nevada got no water rights in 1890 and 1892 when it acquired title** to the Cappaerts' land. Therefore, the Cappaerts, as successors in interest, possess no water rights unless they or a predecessor acquired such rights under Nevada law.[103]

Nevada's Enabling Act, in which the United States granted to Nevada sections 16 and 36 of every township for "the support of common schools," and indemnity in lieu lands, was enacted in 1864 (13 Stat. 30, 32, § 7), thirteen years before the Desert Land Act, yet Nevada did not receive any water rights when it acquired the title to the land. Devil's Hole, the subject of the *Cappaert* litigation, is located in the SW¼ SE¼ of Section 36, T. 17 S., R. 50 E., a school section granted to Nevada.[104]

Conclusion of Law No. 22. The State must obtain water rights for the State Trust Lands in accordance with state law.

The United States Supreme Court has carved two exceptions to the rule of the Desert Land Act that water rights must be acquired pursuant to state law, namely, when the United States grants the bed and banks of a navigable stream to a state upon its admission to the Union, the United States retains a navigable servitude in the stream that cannot be defeated by state law, and secondly, when the United States remains "the owner of lands" it retains the right to water flows on its lands "for the

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[103] *United States v. Cappaert*, 508 F.2d 313, 318 (9th. Cir. 1974), *aff'd*, 426 U.S. 128 (1976) (emphasis added). The United States Supreme Court held that the District Court and the Ninth Circuit Court of Appeals had "correctly held" on this issue. 426 U.S. at 139 n.5. *See* the Navajo Nation's Response 5-9 for an analysis of those cases.

[104] Proclamation, U.S. Code Cong. & Adm. News, 82d Cong., 2d Sess., vol. 1, 964 (Jan. 23, 1952).

beneficial use of the government property."[105] There has been no showing that nonnavigable waters are involved in this proceeding, and the United States does not own the State Trust Lands.

Conclusion of Law No. 23. Neither of the judicially created exceptions to the Desert Land Act that a water right must be acquired pursuant to state law applies to the State Trust Lands.

D. Claim Preclusion

Abitibi and ASARCO argued that the ASLD is precluded by claim preclusion from litigating a claim to reserved water rights. ASARCO is the corporate successor in interest to Pima Mining Company. Pima Mining Company, the State Land Commissioner ("Commissioner"), and the ASLD were parties to the appeals that culminated in two decisions of the Arizona Supreme Court. The State argued that there is no claim preclusion bar.

Claim preclusion is based on two grounds, first, that the ASLD in *Farmers Inv. Co. v. Bettwy*, 113 Ariz. 520, 558 P.2d 14 (1976) ("*Bettwy*"),[106] had argued "that trust lands were immune from state water law," and second, that the ASLD had advocated that its "position … is perhaps more easily referenced as extending what is referred to as the 'reservation doctrine' to trust lands."[107]

Phelps Dodge joined in ASARCO's and Abitibi's preclusive effect positions because it is the corporate successor in interest to Duval Corporation, who was a party to one of the consolidated appeals in *Bettwy*.

The Arizona doctrine of claim preclusion or res judicata "will preclude a claim when a former judgment on the merits was rendered by a court of competent jurisdiction and the matter now in issue

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[105] 295 U.S. at 159; *Cappaert*, 426 U.S. at 144 ("This Court held in *FPC v. Oregon*, (citation omitted), that the Desert Land Act does not apply to water rights on federally reserved land.").

[106] Vice Chief Justice Fred C. Struckmeyer, Jr., who wrote the opinion for the 4-1 majority, had a special interest in Arizona water law, having authored likely the first review of the subject. Fred C. Struckmeyer, Jr. and Jeremy E. Butler, Water, A Review of Rights in Arizona (*Arizona Weekly Gazette*, April 1960). Dissenting, Chief Justice James Duke Cameron wrote that *Bettwy* "is at best, a hard and difficult case involving a body of law already burdened with many inconsistencies and uncertainties." 113 Ariz. at 530, 558 P.2d at 24.

between the same parties or their privities was, or might have been, determined in the former action."[108] The "longstanding rule" is "that when the court has jurisdiction over the subject matter, a judgment is not only *res judicata* as to every issue decided, but it is also *res judicata* as to any issue raised by the record."[109]

Finding of Fact No. 37. ASARCO is the corporate successor in interest to Pima Mining Company.

Finding of Fact No. 38. Pima Mining Company, the Commissioner, and the ASLD were parties to the appeals culminating in the decisions in *Farmers Inv. Co. v. Pima Mining Co.*, 111 Ariz. 56, 523 P.2d 487 (1974) (Struckmeyer, J.) and *Farmers Inv. Co. v. Bettwy*, 113 Ariz. 520, 558 P.2d 14 (1976) ("*Bettwy*"). Both decisions considered the same lease that Pima Mining Company held with the ASLD designated Commercial Lease No. 906.

Finding of Fact No. 39. The decision in *Bettwy* resolved appeals in three cases involving rulings of the Pima County Superior Court. The Arizona Supreme Court consolidated the appeals for decision.

Finding of Fact No. 40. Duval Corporation was a party in one of the appeals which the Arizona Supreme Court consolidated for the decision that culminated in *Bettwy*.

Finding of Fact No. 41. Phelps Dodge is the corporate successor in interest to Duval Corporation.

Finding of Fact No. 42. In *Bettwy*, the dispute involved Pima Mining Company's pumping of groundwater from four wells it had drilled on State Trust Land that Pima Mining Company leased from the ASLD and the transportation and use of that groundwater in connection with Pima Mining

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[107] ASARCO's and Abitibi's Revised Motion for Partial Summary Judgment 6.
[108] *Hall v. Lalli*, 194 Ariz. 54, 57, 977 P.2d 776, 779 (1999).

Company's mining and milling plant located approximately four miles west of the leased lands. The lease was Commercial Lease No. 906.

Finding of Fact No. 43. The State of Arizona acquired the land that it leased to Pima Mining Company by grant from the United States pursuant to the Enabling Act.

Finding of Fact No. 44. Farmers Investment Company, Inc. ("FICO"), the plaintiff/appellant in *Bettwy*, alleged in Count Four of its amended complaint that:

> The continued pumping of groundwater from the critical groundwater area and the area adjacent to the farm lands of plaintiff constitutes a trespass upon plaintiff's property rights and a violation of the water law of the State of Arizona. The withdrawal of groundwater from the state land the subject of said Commercial Lease and the transportation of it away from said land constitutes waste and a breach of the provisions and requirements of the Enabling Act, particularly Section 28 thereof and hence a breach of trust on the part of the State of Arizona.[110]

Finding of Fact No. 45. *Farmers Inv. Co. v. Pima Mining Co*. also dealt with Commercial Lease No. 906. In *Bettwy*, the Court explained its holding in *Farmers Inv. Co. v. Pima Mining Co.*:

> … We accepted jurisdiction for the limited purpose of determining the constitutional validity of State Lease No. 906. Our decision … determined that the State Land Department violated the Arizona Constitution and Enabling Act and the lease was determined to be null and void."
>
> The instant appeal from the summary judgment granted Pima Mining Company challenges only the sufficiency of the allegations of Count 4 of FICO's complaint to state a cause of action. FICO's allegation in Count 4 is that the continued pumping of water from the lands conveyed by the State Land Department's Lease No. 906 "constitutes a trespass upon plaintiff's property rights and a violation of the water law of the State of Arizona."[111]

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[109] *Fraternal Order of Police Lodge 2 v. Superior Court*, 122 Ariz. 563, 565, 596 P.2d 701, 703 (1979). *See State ex rel. Lassen v. Self-Realization Fellowship Church*, 21 Ariz. App. 233, 235, 517 P.2d 1280, 1282, *review denied*, 111 Ariz. 84, 523 P.2d 781 (1974) (mem.).

[110] Appendices, Vol. 2, Tab 5 at VIII (FCTL000041). FICO filed its original complaint in November 1969, and its amended complaint which added Count Four in January 1972. The 319 acres leased to Pima Mining Company were located within the then designated (since 1954) Sahuarita-Continental Critical Groundwater Area. For the Arizona Supreme Court's description of a "critical groundwater area," see *Farmers Inv. Co. v. Pima Mining Co*., 111 Ariz. at 57, 523 P.2d at 488.

[111] 113 Ariz. at 528, 558 P.2d at 22.

Finding of Fact No. 46. In *Farmers Inv. Co. v. Pima Mining Co.*, the Supreme Court held "that the question pertaining to whether the State Land Department or the State Land Commissioner could lease lands within a critical groundwater area upon which to sink wells and pump water **for use outside the area** cannot be resolved at this time in the light of Pima Mining Company's affirmative defenses"[112] The Court vacated and set aside the Superior Court's ruling which had granted Pima Mining Company's motion for summary judgment. The matter returned to the Pima County Superior Court.

Finding of Fact No. 47. The Commissioner and the ASLD denied the allegations of Count Four of FICO's amended complaint.

Finding of Fact No. 48. Following the Supreme Court's decision in *Farmers Inv. Co. v. Pima Mining Co.*, the Superior Court heard FICO's and Pima Mining Company's motions for summary judgment and entered judgment against FICO on Count Four of FICO's amended complaint.

Finding of Fact No. 49. FICO appealed the ruling of the Superior Court. Its appeal was resolved in *Bettwy* in which Pima Mining Company, the Commissioner, and the ASLD were appellees.

Finding of Fact No. 50. In their Appellees' Answering Brief, the Commissioner and the ASLD reviewed the holdings of the United States Supreme Court in *Lassen*, two decisions of the Arizona Supreme Court including *Farmers Inv. Co. v. Pima Mining Co.*, and one decision of the Ninth Circuit Court of Appeals concerning the State's obligations under the Enabling Act for the disposition of products found on State Trust Lands. They argued that:

> Within the framework of the foregoing cases we arrive at the question of whether the disposition of the state trust natural product, water, is subject to the beneficial use theory **as asserted by appellant**. The State Land Department submits that it does not apply (underlined emphasis in original).[113]

[112] 111 Ariz. at 58, 523 P.2d at 489 (emphasis added).
[113] Appendices, Vol. 3, Tab 2 at 11-12 (FCTL001857-58) (emphasis added).

Their position was that "[t]he State Land Department is entitled to dispose of the natural product 'water' from state lands so long as it complies with the provisions of the Enabling Act relating to disposition of natural products."[114]

Finding of Fact No. 51. Appellant FICO stated as follows its position that Pima Mining Company's groundwater use was as a matter of law illegal:

> QUESTIONS PRESENTED FOR REVIEW
>
> 1. Whether pumping and transportation of groundwater from state trust lands within a critical groundwater area under a state commercial lease for use outside of said critical area and away from these leased lands, which use is unrelated to the beneficial use and enjoyment of the land from which the water is withdrawn, thereby causing the water wells of a groundwater user in the same area as said leased lands and within the critical area to be damaged, is unlawful or lawful?
>
> . . . .
>
> 1 … There is no serious contention made by Pima that the water pumped from the state lands leased to it by Commercial Lease No. 906 is used upon the land from which it is produced, beneficially or otherwise. The use is some four miles distant, outside of the critical area, and for mining and milling purposes.
>
> Under Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173, this use is plainly illegal if, thereby, FICO as a water user within the area influenced by the pumping of Pima's wells, is injured in FICO's water supply. Under Jarvis v. State Land Department, 104 Ariz. 527, 456 P.2d 385; Jarvis v. State Land Department, 106 Ariz. 506, 479 P.2d 169, any withdrawal of groundwater from within a critical area for use outside that area unrelated to the beneficial use of the critical area land begun after the area was designated as a critical area as a matter of law injures all lawful users of groundwater within the area.[115]

Finding of Fact No. 52. In opposing FICO's motion for summary judgment before the Superior Court, Duval Corporation argued that:

> "FICO's entire motion is based on a single, simple, but erroneous, assertion: that any transportation whatever of water from a Critical Groundwater Area is an unreasonable use per se. However, such is not and never has been the law of Arizona."[116]

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[114] *Id*. at 13 (FCTL001859).

[115] Appendices, Vol. 3, Tab 1 at 13-14 and 15 (FCTL001557-58 and 1559). Justice Struckmeyer wrote both *Jarvis* opinions.

[116] Appendices, Vol. 2, Tab 4 at 12 (FCTL002134).

Finding of Fact No. 53. The Arizona Supreme Court rejected the arguments of the Commissioner and the ASLD and remanded the matter with directions to the Superior Court. The Court held that:

> The question … presented is whether the pumping and transportation of groundwater from State lands lying within the upper Santa Cruz basin away from the lands on which the water is pumped is unlawful where the supply of other groundwater users who overlie the common source of supply is being lowered and depleted. It is immediately apparent from what we said in FICO's appeal against Anamax that it is.[117]

In "FICO's appeal against Anamax," the first appeal of *Bettwy's* trilogy, the Court held that "[w]ater may not be pumped from one parcel and transported to another just because both overlie the common source of supply if the plaintiff's lands or wells upon his lands thereby suffer injury or damage."[118]

Finding of Fact No. 54. On September 10, 1976,[119] the Commissioner and the ASLD moved for rehearing. The motion for rehearing stated in part as follows:

> The position advocated by the Land Commissioner and Land Department in the brief and here is **perhaps** more easily referenced as extending what is referred to as the "reservation doctrine" to trust lands. Winters v. United States, 207 U.S. 564. It cannot [be (missing word)] inferred that the United States created the School Land Trust without the intention to reserve sufficient waters to the trust as are proportionately available to other lands, adjacent or otherwise, which may rely on a common supply and that such waters are reserved for the use and disposition which will be to the best interest and enhancement of the trust. The decision in this case not only deprives the trust of the right to use or dispose of the natural product but also allows for depletion of the resource without compensation. The trust is thereby substantially restricted

[117] 113 Ariz. at 528, 558 P.2d at 22. The issue is essentially the same FICO presented in its Appellant's Opening Brief found in Appendices, Vol. 3, Tab 1 at 13-14 (FCTL001557-58).
[118] 113 Ariz. at 527, 558 P.2d at 21.
[119] *Cappaert* was decided three months earlier on June 7, 1976. The Arizona Attorney General had filed an amicus curiae brief in *Cappaert* urging reversal of the Ninth Circuit Court of Appeals' "thorough" decision "holding that the implied-reservation-of-water doctrine applied to groundwater as well as to surface water." 426 U.S. at 137. *Cappaert* affirmed the Ninth Circuit's decision found at 508 F.2d 313 (1974).

from using the product for the trust's best interest and enhancement but also is restricted in future use and development of the trust lands.[120]

Finding of Fact No. 55. On December 7, 1976, the Arizona Supreme Court denied the motion for rehearing.

Finding of Fact No. 56. In their Appellees' Answering Brief filed prior to the motion for rehearing, the Commissioner and the ASLD did not mention the reserved water rights doctrine or cite any opinion, including *Winters v. United States*, that involved the reserved water rights doctrine.

Finding of Fact No. 57. Besides the Commissioner's and the ASLD's motion for rehearing, no other document has been presented that shows that the ASLD argued for the existence of federal reserved water rights on the State Trust Lands.[121]

Finding of Fact No. 58. The Arizona Supreme Court did not discuss the reserved water rights doctrine in *Bettwy* or cite any opinion, including *Winters v. United States*, which involved the reserved water rights doctrine.

Conclusion of Law No. 24. The issue in *Bettwy* was whether the pumping **and transportation of groundwater from State Trust Lands away from the lands on which the water is pumped** is unlawful where the supply of other groundwater users who overlie the common source of supply is being lowered and depleted (emphasis added). The Supreme Court had already found the State's Commercial Lease No. 906 null and void. The litigation turned to situations involving the transportation of groundwater away from the place of withdrawal.

Conclusion of Law No. 25. In *Bettwy*, the position of the Commissioner and the ASLD was that the ASLD is entitled to dispose of groundwater from State Trust Lands, by sale or lease, even if

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[120] ASARCO's and Abitibi's Revised Motion for Partial Summary Judgment 6 (emphasis added). The complete motion for rehearing is found in Appendices, Vol. 3, Tab 3. It is noted that the State's counsel did not cite either *Cappaert* or *Arizona I*, a home opinion that dealt with reserved water rights on non-Indian lands (and which FICO's lead counsel had argued to the United States Supreme Court).

[121] The Commissioner's and the ASLD's Answer and Cross-Claim are found in Appendices, Vol. 2, Tab 9.

the groundwater will be transported to another area, so long as it complies with the appraisal, notice, and auction requirements of the Enabling Act. The position posited the argument that the beneficial use theory cannot trump the Enabling Act. This position is not exactly the same as arguing that the beneficial use doctrine does not at all apply on the State Trust Lands.

Conclusion of Law No. 26. Scrutiny of the entire record of *Bettwy* submitted in this proceeding does not support a conclusion that the State raised a claim of reserved water rights in that case sufficient to constitute claim preclusion in this proceeding. The motion for rehearing is not persuasive. Two sentences, one made tenuous by the word "perhaps," in an argument presented on the penultimate page of a motion for rehearing of a decision of the Arizona Supreme Court is insufficient record to conclude that the State raised in *Bettwy* the issue of whether federal reserved water rights exist for the State Trust Lands.

Conclusion of Law No. 27. *Bettwy* did not determine expressly or implicitly whether federal reserved water rights exist for the State Trust Lands. Accordingly, the State is not barred by claim preclusion from pursuing its implied reserved water rights claim in this proceeding.

E. Issue Preclusion

Abitibi, ASARCO, and Phelps Dodge by joinder argued that issue preclusion bars the ASLD from pursuing a reserved water rights claim because the "underlying issues common to" *Bettwy* and the State's "claim are whether the Trust Lands are immune from state water law, and whether the United States conveyed a reserved right along with the Trust Lands."[122]

The Arizona Supreme Court has held that "[c]ollateral estoppel, or issue preclusion, applies when an issue was actually litigated in a previous proceeding, there was a full and fair opportunity to litigate the issue, resolution of the issue was essential to the decision, a valid and final decision on the

[122] ASARCO's and Abitibi's Revised Motion for Partial Summary Judgment 10.

merits was entered, and there is common identity of parties."[123] "Issue preclusion bars 'relitigation of issues actually litigated regardless of whether the prior action is based upon the same claim as the second suit'."[124] Under issue preclusion, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."[125]

Finding of Fact No. 59. The foregoing findings of fact made concerning claim preclusion are incorporated in the determination of issue preclusion.

Conclusion of Law No. 28. The issue of whether federal reserved water rights exist for the State Trust Lands was not actually litigated in *Bettwy*, and its resolution was not essential to that decision. Accordingly, the State is not barred by issue preclusion from pursuing its implied reserved water rights claim in this proceeding.

F. Laches, Estoppel, Abandonment, and Waiver

The Joint Movants argued that the State has relinquished any potential reserved water rights claim by laches and estoppel. GRIC added that abandonment and waiver bar the State's reserved rights claim. The State responded that these equitable defenses do not apply because a reserved water right cannot be lost by nonuse, these defenses cannot bar a claim that was not asserted because the law had not previously recognized the claim, and governmental entities are not generally subject to laches and estoppel.

1. Laches and Estoppel

The Special Master adopts the following statements of fact and citations (omitted) that the

[123] *Hullett v. Cousin*, 204 Ariz. 292, 297-98, 63 P.3d 1029, 1034-35 (2003).
[124] *Smith v. CIGNA HealthPlan*, 203 Ariz. 173, 180, 52 P.3d 205, 212 (App. 2002).
[125] *Montana v. United States*, 440 U.S. 147, 153 (1978), cited in the Report of the Special Master (John E. Thorson) 59, W1-203 (June 30, 2000).

Joint Movants submitted concerning laches and estoppel which the State did not controvert.[126]

Finding of Fact No. 60. The ASLD has made thousands of water right filings for the State Trust Lands.

Finding of Fact No. 61. Where leases are involved, the ASLD requires lessees to comply with Arizona Department of Water Resources regulations and active management area groundwater management plans. Often, the ASLD requires its lessees to make initial state law water right filings on behalf of the ASLD, but the water rights are subsequently issued in the name of the State.

Finding of Fact No. 62. Generally, the ASLD attempts to comply with Arizona water law.

The United States Supreme Court enunciated in 1908 the reserved water rights doctrine putting water users on notice of potential claims based on new legal concepts. However, because *Winters* involved the water rights of an Indian tribe it is reasonable to conclude that water users believed the doctrine to be applicable only to Indian reservations. A respected water law treatise comments that although the reserved water rights doctrine "was first announced in 1908, for nearly a half century it was thought to be confined to Indian reservations."[127] It was not until 1963 that the Supreme Court "clarified" the "full extent of the *Winters* doctrine" and applied it to federal non-Indian reservations.[128] The next case that directly addressed reserved water rights was *Cappaert* in 1976.[129]

Arizona's general stream adjudications have their origins in petitions filed with the ASLD in April, 1974, (Gila River Adjudication) and February, 1978, (Little Colorado River Adjudication). As a result of legislation which became effective on April 24, 1979, both adjudication proceedings were

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[126] Joint Movants' Separate Statement of Facts in Support of Their Motion for Summary Judgment 25 (Nos. 102-104).

[127] 4 WATERS AND WATER RIGHTS § 37.01(a) 37-5.

[128] *United States v. Superior Court*, 144 Ariz. 265, 272, 697 P.2d 658, 665 (1985).

[129] *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976), and *Eagle County* primarily addressed McCarran Amendment jurisdictional issues.

transferred from the ASLD to the Superior Court of Arizona.[130]

Finding of Fact No. 63. The Special Master takes judicial notice that claimants began filing adjudication claims prior to the earliest deadlines of June 30, 1980, for the Upper Salt River Watershed and July 11, 1980, for the San Pedro River Watershed, but the filing of statements of claimant began in earnest after July 1, 1983, following the United States Supreme Court's decision in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983), which resolved jurisdictional issues.[131]

In its motion, the State indicated that it "asserted its federal reserved water rights claims in 1974 shortly after the adjudications were commenced."[132] In its response, the State indicated it "asserted its [reserved] rights in 1979 … within the time limits fixed in the general stream adjudications."[133] The State did not provide the dates when it filed its adjudication statements of claimant asserting a federal reserved water right which would have resolved this point and further did not explain if these assertions had been made in non-adjudication filings. The latter is important to note because between 1974 and 1980, surface water users were at times concurrently engaged in three statewide filing processes, each ultimately numbering in the thousands, namely, stockpond registrations, water rights registrations, and adjudication claims.[134]

Finding of Fact No. 64. The Final Hydrographic Survey Report for the San Pedro River Watershed states that the ASLD "filed 1,546 statements of claimant in the San Pedro River

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[130] *See* Rules for Proceedings Before the Special Master § 2.01 which relates this early history of the adjudications. This history is also told in *United States v. Superior Court*, 144 Ariz. at 270-71, 697 P.2d at 663-64.

[131] Judicial notice is based on the fact that during the period of 1981 to 1986, the Special Master saw first-hand and later supervised this process. *See* Rules for Proceedings Before the Special Master § 2.01 and Vol. 1, Hydrographic Survey Report for the San Pedro River Watershed 375 (Nov. 20, 1991).

[132] State's Motion for Partial Summary Judgment 2

[133] State's Response 32.

watershed," and that **"[m]any of these filings** claim … rights established under federal law."[135] Based on this report, the Special Master takes judicial notice that the ASLD claimed a federal reserved water right to specific State Trust Lands in statements of claimant filed in or after 1980.

The Joint Movants argued that since 1915 the State has managed the State Trust Lands without recognizing a reserved water right, for decades the State's lessees were required to obtain water rights under their own names, and the "Court can take judicial notice of the fact that thousands of water users have invested millions of dollars over the last one hundred years, in reliance upon the established system of water rights, a system that did not include federal reserved rights for" the State Trust Lands.[136]

GRIC argued that in 1864 Arizona adopted prior appropriation, has since encouraged its citizens "to build their lives and economies based" on that system, "and, then 142 years later, ask[s] this Court to … reallocate all of the water" to the ASLD, and furthermore, that since 1974, when the Gila River Adjudication was petitioned, the Arizona Legislature has not taken any action that supports, or would have put water users on notice of, the State's reserved water rights claim.[137]

To apply laches, a form of estoppel, the delay or lapse of time must be unreasonable, and prejudice must have resulted to other parties. The Arizona Supreme Court has held that:

> We emphasize that laches may not be imputed to a party for mere delay in the assertion of a claim. Rather, the delay must be unreasonable under the circumstances, including the party's knowledge of his or her right, and it must be shown that any change in the circumstances caused by the delay has resulted in prejudice to the other

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[134] Registration of Stockponds Act of 1977, A.R.S. §§ 45-271-276 (the first deadline was June 30, 1978); Water Rights Registration Act of 1974, A.R.S. §§ 45-181-190 (the first deadline was June 30, 1977). The initial enacted deadlines were subsequently extended more than once.

[135] Vol. 1, Hydrographic Survey Report for the San Pedro River Watershed 375 (Watershed File Report ("WFR") No. 113-12-[3]6) (emphasis added).

[136] Joint Movants' Motion for Summary Judgment 28-29.

[137] GRIC's Motion for Partial Summary Judgment 16. The State concedes that "due to the passage of time and the intervening appropriations of water by third parties (including the Opposing Claimants (footnote omitted)) any attempt to create the functional equivalent of a reserved right through state legislation undoubtedly would be invalidated as an attempt to retroactively change the law." State's Response 26.

party sufficient to justify denial of relief.[138]

In determining this issue, the Special Master has focused on when it would be reasonable to conclude that the State first had, or should have had, notice that it would be prudent to assert a claim for reserved water rights that potentially might accrue to the State Trust Lands. Principal consideration has been given to the timeline of the evolvement of the implied reserved water rights doctrine as it pertains to non-Indian reserved rights.

That timeline begins in 1963 with *Arizona I*, but significant momentum for the doctrine ensued thirteen years later with *Cappaert*. As noted in Footnote 119 *supra*, following the Ninth Circuit Court of Appeals' *Cappaert* decision in 1974, the Arizona Attorney General filed a brief with the United States Supreme Court in *Cappaert*, leading to the conclusion that the State was by at least 1974 aware of the implied reserved water rights doctrine and presumably its implications for the State Trust Lands.

Finding of Fact No. 65. *Cappaert* and *New Mexico* exemplify the long periods of years that can pass between the date a federal reservation is established and a claim for reserved water rights is asserted in legal proceedings. In *Cappaert*, Devil's Hole was withdrawn and reserved in 1952, but its reserved water rights were asserted in or about 1971. In *New Mexico*, the Gila National Forest was established in 1897, but its reserved water rights were claimed in an adjudication begun in 1970.

Conclusion of Law No. 29. The lapse of time between 1963, when *Arizona I* was issued, and post-1980, when the State began claiming a federal reserved water right in the general stream adjudications, is not an unreasonable delay for the State to assert an implied reserved water right. It is reasonable to conclude that 1974 is the more realistic starting point. Accordingly, laches does not bar the State's claim that reserved water rights exist for the State Trust Lands.

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[138] *Flynn v. Rogers*, 172 Ariz. 62, 66, 834 P.2d 148, 152 (1992) (quoted in *Mathieu v. Mahoney*, 174 Ariz. 456, 459, 851 P.2d 81, 84 (1993)); *see Jerger v. Rubin*, 106 Ariz. 114, 117, 471 P.2d 726, 729 (1970).

The discussion of laches can stop here, but a further step will be taken. The Arizona Supreme Court has held that "it must also be established that the delay resulted in **actual** prejudice to the adverse parties."[139] Determining whether actual prejudice has resulted to other parties sufficient to justify application of laches is hard to do based on the statements of facts presented. "Fundamental fairness is the *sine qua non* of the laches doctrine."[140] Fairness must consider the ASLD as an agency subject to political pressures, funding limitations, and management agendas, the stockmen lessees who applied, paid, and at times contested over years, for their water rights as the agency awaited, and water users and others who entered into agreements and transactions believing that the ASLD would not assert reserved water rights. Based on the record in this proceeding, the Special Master cannot make findings of fact and conclusions of law concerning whether actual prejudice resulted to other parties sufficient to justify application of laches. A finding of actual prejudice requires more evidence than this summary judgment proceeding has presented.

Conclusion of Law No. 30. The record is insufficient to conclude whether actual prejudice has or has not resulted to other parties sufficient to justify application of laches against the State.

Estoppel is considered next. Estoppel is an equitable defense "greatly within the sound discretion of the trial court" whose "object and purpose" have been explained by the Arizona Court of Appeals as follows:

> The remedy of estoppel has for its purpose the promotion of the ends of justice, and the doctrine is grounded on equity and good conscience. It is based on the grounds of public policy and good faith, and is interposed to prevent injury, fraud, injustice, and inequitable consequences by denying to a person the right to repudiate his acts, admissions, or representations, when they have been relied on by persons to whom they were directed and whose conduct they were intended to and did influence.[141]

The defense of estoppel requires the elements of reliance and detriment or injury resulting

[139] *Harris v. Purcell*, 193 Ariz. 409, 412, 973 P.2d 1166, 1169 (1998) ("[A] finding of unreasonable delay is not enough.") (emphasis added).
[140] 193 Ariz. at 414, 973 P.2d at 1171.

from the other's repudiation of its prior conduct. Although the Joint Movants and the State disagree on the pertinent case law, the law each cites agrees that these two elements must be present.[142] And the Arizona Supreme Court has held that the detriment or injury to another must be "substantial."[143]

The record is insufficient to make proper findings of fact and conclusions of law concerning the existence or lack of reliance and detriment. The Special Master will not make findings of fact and conclusions of law, concerning these elements, based mainly on judicial notice. Moreover, determinations that involve the tempering influences of good conscience, public policy, and good faith - especially when considered over a period of decades - demand more of a factual record than the Special Master has before him on summary judgment.

Conclusion of Law No. 31. The extent of reliance by water users and resulting detriment or injury to them, if any, cannot be determined based on the record in this summary judgment proceeding. While Arizona's impressive growth may seem like a reasonable matter for judicial notice, if estoppel is to be correctly applied, relevant evidence of reliance and detriment must be presented and considered to determine its application.

The Special Master is not concluding that laches and estoppel cannot apply to a state agency, including the ASLD, or that these equitable defenses (including abandonment and waiver) should be narrowly construed in adjudication matters. Other contested cases may present evidence sufficient to apply laches and estoppel. They are valid affirmative defenses in adjudication matters.

2. Abandonment and Waiver

GRIC argued that abandonment and waiver bar the State's reserved rights claim.

The Arizona Supreme Court has held that:

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[141] *Bartholomew v. Superior Court*, 4 Ariz. App. 50, 52, 417 P.2d 563, 565 (1966).

[142] The Joint Movants cite *City of Tucson v. Whiteco Metrocom, Inc.*, 194 Ariz. 390, 396, 983 P.2d 759, 765 (Ariz. 1999), and the State cites *Valencia Energy Co. v. Ariz. Dep't of Revenue*, 191 Ariz. 565, 576-67, 959 P.2d 1256, 1267-68 (1998); *accord Bartholomew*.

> Abandonment involves an intention to abandon, together with an act or an omission to act by which such intention is apparently carried into effect (citation omitted). Waiver is the voluntary and intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right (citations omitted). It is to be observed that both abandonment and waiver require the concurrence of act and intent, although the intent may be manifested or inferred from the act. The difference between abandonment and waiver is consensual."[144]

"Waiver by conduct must be established by evidence of acts inconsistent with an intent to assert the right." [145]

Conclusion of Law No. 32. The record does not establish intent on the part of the State to abandon its position concerning the existence of implied reserved water rights for State Trust Lands.

Conclusion of Law No. 33. The record does not show an express, voluntary, or intentional relinquishment of a legal position or such conduct as warrants an inference of its relinquishment, on the part of the State, to constitute a waiver of the right to claim that implied reserved water rights exist for the State Trust Lands.

G. Public Trust Doctrine

GRIC argued that applying the implied reservation of water rights doctrine to State Trust Lands would violate the public trust doctrine because the "enduring and fundamental" public policy of this State has been since territorial days to encourage "the full use of scarce water resources"[146] and to prevent monopolization of the right to use public waters.[147] The State argued that the public trust doctrine applies only to navigable waterways that passed to the State of Arizona pursuant to the equal footing doctrine upon its admission to the Union, and charged GRIC's arguments with

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[143] *City of Tucson v. Koerber*, 82 Ariz. 347, 357, 313 P.2d 411, 418 (1957).
[144] 82 Ariz. at 356, 313 P.2d at 418.
[145] *American Continental Life Ins. Co. v. Ranier Const. Co., Inc.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980) (This decision added "express" to "voluntary and intentional relinquishment.").
[146] *West Maricopa Combine, Inc. v. ADWR*, 200 Ariz. 400, 406, 26 P.3d 1171, 1177 (2001).
[147] *Oury v. Goodwin*, 3 Ariz. 255, 275-76, 26 P. 376, 382-83 (1891); *Clough v. Wing*, 2 Ariz. 371, 378, 17 P. 453, 455 (1888).

expressing "hysteria and hyperbole."[148]

Although the Arizona Supreme Court "long ago acknowledged the doctrine" in 1931, as of 1991, "the doctrine [had] not yet been applied," and "[p]ublic trust jurisprudence [was] nascent in Arizona."[149] In 1995, the Legislature enacted an amendment to the general stream adjudication statutes that stated in part "[i]n adjudicating the attributes of water rights … the court shall not make a determination as to whether public trust values are associated with any or all of the river system or source."[150] The Arizona Supreme Court held this amendment invalid because "[t]he public trust doctrine is a constitutional limitation on legislative power to give away resources held by the state in trust for its people," and "[i]t is for the courts to decide whether the public trust doctrine is applicable to the facts" presented by an adjudication water rights claim.[151]

The public trust doctrine issue was not briefed to a level that the Special Master is comfortable addressing it. The doctrine presents issues about its application and interpretation that merit more robust briefing. As the Court of Appeals cautioned, "we need not weave a jurisprudence out of air."[152] Accordingly, the Special Master does not make findings of fact and conclusions of law concerning the public trust doctrine as it relates to the issues of this report.

IV. IF LAND WAS WITHDRAWN AND RESERVED, WHAT WAS THE PURPOSE TO BE SERVED BY EACH RESERVATION

A. Purposes of the State Trust Lands

Although the Special Master has concluded that the State Trust Lands were neither withdrawn nor reserved as required to establish an implied federal reserved water right, the following findings of fact and conclusions of law are submitted.

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[148] State's Response 37.
[149] *Ariz. Ctr. for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 366, 837 P.2d 158, 168 (App. 1991).
[150] *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 215, 972 P.2d 179, 199 (1999).
[151] *Id*.
[152] 172 Ariz. at 366, 837 P.2d at 168.

The State argued that the State Trust Lands "were withdrawn, reserved and granted by Congress for the specific federal purpose of providing for the support of a public school system, universities and certain other designated public institutions."[153] In its response, the State amplified that "[t]hrough the Enabling Act, Congress established a restrictive trust to insure that state trust lands could only be used to provide the most substantial support possible for public education and other beneficiaries."[154] The Enabling Act contains strict standards for the disposition of State Trust Lands and their natural products. The restrictions, according to the State, serve to assure as held in *Lassen*, "the federal purpose behind the reservation - to provide the most substantial support possible for the beneficiaries."[155]

In *Lassen*, the United States Supreme Court addressed "only two" issues related "to the conditions or consequences of the use by the State itself of the trust lands for purposes not designated in the grant."[156] The State's argument of "the most substantial support possible for the beneficiaries" flows from the Court's discussion of the second issue, which the Court framed as follows: "[t]he second issue here is the standard of compensation which Arizona must employ to recompense the trust for the land it acquires."[157]

The Court held that:

> The Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given. First, it requires that before trust lands or their products are offered for sale they must be "appraised at their true value," and that "no sale or other disposal … shall be made for a consideration less than the value so ascertained. … " (footnote omitted). The Act originally provided in addition that trust lands should not be sold for a price less than a statutory minimum (footnote omitted). Second, it imposes a series of careful restrictions upon the use of trust funds.

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[153] State's Motion for Partial Summary Judgment 10.
[154] State's Response 13. The State argued that this was the "exclusive purpose of the trust." State's Reply 20.
[155] *Id*. at 15.
[156] 385 U.S. at 461.
[157] 385 U.S. at 465.

> … The Act thus specifically forbids the use of "money or thing of value directly or indirectly derived" (footnote omitted) from trust lands for any purposes other than those for which that parcel of land was granted. It requires the creation of separate trust accounts for each of the designated beneficiaries, prohibits the transfer of funds among the accounts, and directs with great precision their administration. "Words more clearly designed … to create definite and specific trusts and to make them in all respects separate and independent of each other could hardly have been chosen" (citation omitted). All **these restrictions** in combination **indicate Congress' concern both that the grants provide the most substantial support possible to the beneficiaries and that only those beneficiaries profit from the trust**.
>
> This is confirmed by the background and legislative history of the Enabling Act. The restrictions placed upon land grants to the States became steadily more rigid and specific in the 50 years prior to this Act, as **Congress sought to require prudent management** and thereby to preserve the usefulness of the grants for their intended purposes (footnote omitted). The Senate Committee on the Territories, with the assistance of the Department of Justice, (footnote omitted) adopted for the New Mexico-Arizona Act the most satisfactory of the restrictions contained in the earlier grants. Its premise was that the grants cannot "be too carefully safeguarded for the purpose for which they are appropriated" (footnote omitted). Senator Beveridge described the restrictions as "quite the most important item" in the Enabling Act, and emphasized that his committee believed that "we were giving the lands to the States for specific purposes, and that restrictions should be thrown about it which would assure its being used for those purposes" (footnote omitted).[158]

The discussion in *Lassen*, upon which the State bases its position concerning the purpose of State Trust Lands, involved a "standard of compensation" and the "restrictions placed upon land grants" to Arizona, not the purpose of the grants. It overreaches to conclude that 57 years after Congress enacted the Enabling Act and 55 after Arizona became a state, the United States Supreme Court articulated the purpose of the State Trust Lands granted to Arizona.

In a case involving New Mexico's Enabling Act, which has the same relevant provisions as Arizona's Enabling Act, the United States Supreme Court held that New Mexico's Enabling Act contains "a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose."[159] This holding mandates going to the

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[158] 385 U.S. at 467-68 (emphasis added).

[159] *Ervien v. United States*, 251 U.S. 41, 47 (1919) (quoted in *Lassen*, 385 U.S. at 467). *Ervien* involved section 10 of New Mexico's Enabling Act which is the same as section 28 of Arizona's Enabling Act.

starting point, namely, the Enabling Act to determine the purposes of the State Trust Lands. On three occasions, the Arizona Supreme Court has held that the Enabling Act is the "fundamental and paramount law" in Arizona superior to the Constitution.[160] As stated in Findings of Fact Nos. 14 and 18, the Enabling Act provides that the grants of the State Trust Lands are for the support of common schools and the support of the other trust beneficiaries.

The records of the Arizona Constitutional Convention of 1910 show that the delegates believed that the purpose of the State Trust Lands was the support of the common schools.[161]

Finding of Fact No. 66. At the 1910 Arizona Constitutional Convention, during the debate of a proposed amendment to Article XI, § 8 of the Constitution, Section 28 of the Enabling Act was discussed. The discussion dealt with whether rental income and interest from sales of State Trust Lands were to be used "for the maintenance of the schools." Delegate Albert M. Jones (Yavapai County) stated that he believed that Section 28 "does not mean that the principal of this land shall be held and nothing but the interest used, but it means that it cannot be used for any other object than **the object for which it was granted, which is the support of the schools of the state** …[162]

In *Murphy v. State*, the Arizona Supreme Court "set forth an able and scholarly history of the Enabling Act."[163] Justice LaPrade wrote that the "four sections under the Enabling Act thus reached the state for the support of common schools."[164] Subsequent to *Lassen*, the Arizona Supreme Court has held that "[t]he land could be used *only* for the support of the common schools of the state (state

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[160] *Gladden Farms, Inc. v. State*, 129 Ariz. 516, 518, 633 P.2d 325, 327 (1981); *Kadish*, 155 Ariz. at 495, 747 P.2d at 1194; *Murphy*, 65 Ariz. at 345, 181 P.2d at 340.

[161] Fifty-two delegates met between October 10, 1910, and December 9, 1910, to draft Arizona's proposed constitution.

[162] THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 946 (Dec. 7, 1910) (John. S. Goff, ed.) (emphasis added).

[163] *State ex rel. Arizona Highway Dept. v. Lassen*, 99 Ariz. 161, 164, 407 P.2d 747, 749 (1965).

[164] 65 Ariz. at 345, 181 P.2d at 340.

trust lands) and for internal improvements to the state."[165] In 1993, the Arizona Court of Appeals likewise held.[166]

The Special Master acknowledges that legal positions can change, and hence does not rely on this evidence, but notes that the 1991 San Pedro Final Hydrographic Survey Report, in describing the State's adjudication filings that claimed "rights established under federal law," reported that the claims stated that "[t]he purpose of the [sections 2, 16, 32, and 36] grants is to support the common schools and other beneficiaries."[167]

Conclusion of Law No. 34. The purpose of the State Trust Lands granted for common schools is the support of common schools. The terms of the Enabling Act are paramount.

Conclusion of Law No. 35. The purpose of the State Trust Lands granted for the other beneficiaries is the support of those beneficiaries.

The Arizona Supreme Court has held that the "duties imposed upon the state were the duties of a trustee and not simply the duties of a good business manager."[168] The "restrictive trust" the State describes was "[t]o ensure that Arizona … would not dissipate the assets granted."[169] The grant of lands "was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the Act."[170] "[O]ne of the purposes of" the restrictive trust "was to assure that the trust lands generated the appropriate if not maximum revenue for the support of the common schools."[171]

The Arizona Court of Appeals was asked to determine if "the sole or predominant interest of

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[165] 155 Ariz. at 486, 747 P.2d at 1185 (emphasis in opinion).
[166] *Campana v. Arizona State Land Dept.*, 176 Ariz. 288, 291, 860 P.2d 1341, 1344 (1993).
[167] Vol. 1, Hydrographic Survey Report for the San Pedro River Watershed 375 (WFR No. 113-12-[3]6).
[168] 155 Ariz. at 487, 747 P.2d at 1186.
[169] *Id.*
[170] 385 U.S. at 463.
[171] 129 Ariz. at 520, 633 P.2d at 329 (1981).

the state is the maximization of lease revenue."[172] The Court held that:

> Lease revenue is not the sole factor which governs the [state land] department's decision. The Legislature chose a broader, 'best interest' standard that permits other considerations, such as the public benefits flowing from employing state land in uses of higher value than would the applicant for a lease.[173]

This holding reflects Arizona law concerning the management of the State Trust Lands. The Arizona Supreme Court has held that:

> The controlling factor in granting a lease of state land to anyone must be the best interest of the state and the general benefit to its residents. Indeed, common sense could not dictate otherwise. The statutes, the regulations of the State Land Department and the decisions of this Court are all in accord with this view.[174]

"[I]mmediate revenue is not the sole consideration in determining the best interests of the trust."[175]

Many other decisions besides those cited have directed how the State must go about managing the State Trust Lands for the benefit of the beneficiaries. As *Lassen* held, the State Trust Lands "require prudent management." Prudent management encompasses more than net maximization of revenue, as the State claimed, and requires other professional and land management decisions "best left to the expertise and discretion of the commissioner."[176]

Conclusion of Law No. 36. Providing the most substantial support possible to the beneficiaries of the trust is a standard of compensation for the management of the State Trust Lands. This standard applies to the duty of the State as trustee and not to the purposes of the State Trust Lands.

B. Are the Purposes of the State Trust Lands Federal Purposes?

The State argued that the State Trust Lands "were withdrawn, reserved and granted by

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[172] *Havasu Heights Ranch and Dev. Corp. v. Desert Valley Wood Prods., Inc.*, 167 Ariz. 383, 391, 807 P.2d 1119, 1127 (App. 1991).
[173] 167 Ariz. at 392, 807 P.2d at 1128.
[174] *Williams v. Greene*, 95 Ariz. 378, 381, 390 P.2d 907, 909 (1964). S*ee Boice v. Campbell*, 30 Ariz. 424, 248 P. 34 (1926) for an early reference to the best interest of the trust standard.
[175] 176 Ariz. at 291, 860 P.2d at 1344.
[176] 167 Ariz. at 392, 807 P.2d at 1128.

Congress for the specific federal purpose of providing for the support of a public school system, universities and certain other designated public institutions,"[177] that "public education is undeniably a federal purpose" as shown by the "longstanding federal policy and practice of supporting public education, by land grants and other means," and "[p]ublic education continues to be an important federal purpose today."[178] These arguments countered the claims that federal support for education, universities, and hospitals do not make these concerns federal purposes, and second, education is a state concern, not a federal purpose within the meaning of the reservation of water rights doctrine.

After describing each of the quantity grants given to Arizona, the Arizona Supreme Court held that "[c]onsidering the purposes for which these lands were granted it is plain to us that the state holds these lands in trust for an ultimate governmental purpose."[179] A public school system, a university, courthouses, asylums, and miners' hospitals serve governmental purposes which are intended to benefit all citizens of the State.

The Special Master does not dispute that these governmental purposes are matters of national interest. "Undoubtedly, every subject that merits congressional legislation is, by definition, a subject of national concern."[180] Educating our citizens in order to promote economic productivity, social cohesion, and good governance serves the Nation well.

Although the federal government has supported education as well as the other governmental purposes enumerated in enabling acts, the States have exclusive power over these purposes. In a case involving the sale of lands the United States had granted to the State of Michigan for the maintenance of common schools, the United States Supreme Court held that "[t]he trusts created by these compacts relate to a subject certainly of universal interest, but of municipal concern, over

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[177] State's Motion for Partial Summary Judgment 10.
[178] State's Response 17-18 and 19.
[179] 65 Ariz. at 361, 181 P.2d at 351.
[180] *Hillsborough County, Florida v. Automated Medical Labs., Inc.*, 471 U.S. 707, 719 (1985).

which the power of the State is plenary and exclusive."[181] "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[182] "Today, education is perhaps the most important function of state and local governments."[183]

The Territory of Arizona undertook most of the governmental purposes for which the State of Arizona subsequently received the State Trust Lands, for example, a public school system, funding of university operations, building a school of mines, construction of school facilities, an asylum for the mentally ill, care for the indigent sick, construction of a territorial prison and county jails, and the issuance of bonds to finance the construction of State Capitol buildings and courthouses. The Territory of Arizona saw these concerns as governmental purposes which it was expected to, and did, fulfill. The Special Master adopts the following statements of fact and citations (omitted) that ASARCO and Abitibi submitted which the State did not controvert.

Finding of Fact No. 67. The Special Master adopts Statements of Fact Nos. 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, and 29, including citations, submitted by ASARCO and Abitibi that show that the Territory of Arizona undertook many of the governmental purposes for which the State subsequently received the State Trust Lands.

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[181] *Cooper v. Roberts*, 59 U.S. (18 How.) 173, 181-82 (1855) (quoted in *Alabama v. Schmidt*, 232 U.S. at 173).

[182] *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974). The State argued that "[f]rom the very inception of this nation the importance of educating the population has been a federal focus," and quoted one sentence from a letter written by Thomas Jefferson to Colonel Charles Yancey dated January 6, 1816. Charles Yancey was "a prominent member" of the Virginia Legislature. THE WILLIAM AND MARY QUARTERLY 224, vol. 17, no. 3 (Jan. 1909). In the sentence immediately preceding the sentence the State quotes, Jefferson suggested that "[i]f the legislature would add to [the literary fund] **a perpetual tax of a cent a head on the population of the State**, it would set agoing at once, and forever maintain, a system of primary or ward schools, and an (sic) university (emphasis added) …" State's Consolidated Statement of Facts in Support of Response, exh. C, 383-384. It appears that Jefferson was speaking of the Commonwealth of Virginia's, and not the federal government's actions to advance education.

These governmental purposes reflect important national interests, but reflection does not transform them into federal purposes as that term applies to the reservation of water rights doctrine. The judicial decisions that have found an implied non-Indian reserved water right have a common factor, namely, that the United States has retained ownership and responsibility for the reservation. The Congress has exclusive administrative, regulatory, and fiscal responsibility for national forests, wildlife refuges, recreation areas, and monuments, among others, which are federal enclaves. This element is absent in the State Trust Lands. Arizona has absolute ownership of the State Trust Lands and "plenary and exclusive" power over them.

Conclusion of Law No. 37. The United States does not have exclusive responsibility for the administration and management of the State Trust Lands. The ASLD, a state agency created and authorized by state laws, administers and manages the State Trust Lands.

Reserved water rights have been found to exist only for "federal enclaves."[184] "The United States government has exclusive authority and jurisdiction over federal enclaves."[185]

Conclusion of Law No. 38. "A federal enclave is a portion of land over which the United States government exercises exclusive federal jurisdiction."[186]

Conclusion of Law No. 39. The United States does not have exclusive authority and jurisdiction over the State Trust Lands, and therefore, the State Trust Lands are not a federal enclave.

In its reply, the State argued that the "Trust is the means by which Congress fulfilled a very important federal purpose … to provide land for public schools so that new states could enter the

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[183] *Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1974); *see Edmonds School Dist. No. 15 v. City of Mountlake Terrace*, 77 Wash. 2d 609, 611, 465 P.2d 177, 178 (1970) ("Education is one of the paramount duties of the state.").

[184] *See* 426 U. S. at 138, 401 U.S. at 523. *See In re the General Adjudication of All Rights to Use water in the Gila River System and Source,* 195 Ariz. 411, 417, 989 P.2d 739, 745 (1999), *cert. denied sub nom. Phelps Dodge Corp. v. U.S.* and *Salt River Valley Water Users' Assn. v. U.S.*, 530 U.S. 1250 (2000).

[185] BLACK'S LAW DICTIONARY 568 (8th ed. 2004) (definition of "federal enclave").

Union supporting and regulating public education" in accordance with the "original and evolved policy of equal footing."[187]

The United States Supreme Court has held that the equal footing doctrine encompasses only political rights and sovereignty:

> The "equal footing" clause has long been held to refer to political rights and to sovereignty (citation omitted). It does not, of course, include economic stature or standing. There has never been equality among the States in that sense. Some States when they entered the Union had within their boundaries tracts of land belonging to the Federal Government; others were sovereigns of their soil. Some had special agreements with the Federal Government governing property within their borders (citation omitted). Area, location, geology, and latitude have created great diversity in the economic aspects of the several States. The requirement of equal footing was designed not to wipe out those diversities but to create parity as respects political standing and sovereignty.[188]

This holding does not support the State's position that federal land grants to the States for the support of the common schools were intended to allow a State to enter the Union on an equal footing "supporting and regulating education."

Conclusion of Law No. 40. The support of common schools and the support of the beneficiaries enumerated in the Enabling Act are not federal purposes under the implied reservation of water rights doctrine. A federal purpose under the doctrine is one associated with a federal enclave. The State Trust Lands are not a federal enclave.

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[186] *Benjamin v. Brookhaven Science Associates, LLC*, 387 F. Supp. 2d 146, 157 (E.D.N.Y. 2005); 77 AM. JUR. 2D *United States* § 30 at 33 (2006).

[187] State's Reply 19-20.

[188] *United States v. Texas*, 339 U.S. 707, 716 (1950). Prof. Sally K. Fairfax, who has studied the history of state lands, has written that the equal footing doctrine, "which holds that each state joins the union on an equal footing with the original states," is not found in the Constitution, but its origins are in the Northwest Ordinance of July 13, 1787. Sally K. Fairfax, Jon A. Souder, and Gretta Goldenman, The School Trust Lands: A Fresh Look at Conventional Wisdom, 22 Envtl. L. Rev. 797, 806 n.23 (1992). A copy of the article is found in Joint Movants' Exhibits No. 4. *See Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

V. IF LANDS WERE WITHDRAWN AND HELD IN TRUST, DID THE UNITED STATES INTEND TO RESERVE UNAPPROPRIATED WATERS TO ACCOMPLISH THE PURPOSE OF EACH RESERVATION?

Although the Special Master has concluded that the State Trust Lands were not withdrawn from the public domain prior to title being conveyed to the State of Arizona, and hence were not withdrawn as that concept applies to reserved water rights, the following findings of fact and conclusions of law are submitted.

The State argued that:

> … First, it is uncontroverted [that] lands in Arizona are arid and almost every use of state trust land depends on the availability of water. As population growth continues and lands become more suitable for more intensive and profitable uses, more water is required to sustain such uses. Finally, it is uncontroverted that Arizona's state trust lands cannot produce the most substantial revenues possible for the trust beneficiaries over the long term, unless water is available to support domestic, commercial and industrial uses of the state trust lands. As growth increases and water supplies dwindle, the state trust lands will not have water available.[189]

Cappaert held that:

> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated … water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.
>
> . . . .
>
> … [T]he implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation …[190]

New Mexico clarified and limited that:

> … Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which

[189] State's Response 23. The Joint Movants denied the State's Statements of Fact Nos. 17 and 19 relied upon by the State for this position. Joint Movants' Response to State of Arizona's Separate Statements of Facts 6; *see also* Joint Movants' Response to State's Separate Consolidated Statement of Facts Filed in Support of its Response to Motions for Summary Judgment 3.

[190] 426 U.S. at 139 and 143.

> the land was reserved, and concluded that **without the water the purposes of the reservation would be entirely defeated** (footnote omitted).[191]

The State argued that "the phrase 'entirely defeated' must be regarded as dictum because this characterization was not essential to the Court's decision."[192] This position appears to be based on the following statement made by the dissent in a footnote: "[a]lthough the Court purports to hold that passage of the 1960 [Multiple-Use Sustained- Yield] Act did not have the effect of reserving any additional water in then-existing forests, see *ante*, at 713-715, this portion of its opinion appears to be dicta" because neither the United States nor the State of New Mexico had argued that point.[193]

What "appears to be dicta" to the dissenters does not refer to the "entirely defeated" statement but to another subsequent part of the majority's opinion. Furthermore, the majority's "entirely defeated" holding was footnoted. In the footnote, the Court reviewed its holdings in *Winters*, *Arizona I*, and *Cappaert* as follows:

> In *Winters* … the Court was faced with two questions. First, whether Congress, when it created the Fort Belknap Indian Reservation by treaty, impliedly guaranteed the Indians a reasonable quantity of water. … Without water to irrigate the lands, however, the Fort Belknap Reservation would be "practically valueless" and "civilized communities could not be established thereon" (citation omitted). The purpose of the Reservation would thus be "impair[ed] or defeat[ed] …
>
> In *Arizona v. California* … Arizona argued that there was "a lack of evidence showing that the United States in establishing the reservations intended to reserve water for them" (citation omitted). The Court disagreed:
>
> > "It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware … 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 (citation omitted).
>
> In *Cappaert* … As the Court concluded, the pool was reserved specifically to preserve its scientific interest, principal of which was the Devil's Hole pupfish. Without a certain quantity of water, these fish would not be able to spawn and would

[191] 438 U.S. at 700 (emphasis added).
[192] State's Reply 24.
[193] 438 U.S. at 719 n.1.

> die. This quantity of water was therefore impliedly reserved when the monument was proclaimed.[194]

The majority explained that its prior opinions on reserved water rights had held that without the water the purpose of the reservation would have been entirely defeated. Water was essential, indispensable, and vital to the survival of the Indian tribes and the unique desert pupfish. The Special Master cannot agree that "entirely defeated" was dictum.

Moreover, in *Gila V*, the Arizona Supreme Court quoted with approval this specific holding leading to the conclusion that the Court saw it and the Special Master must construe it, as not being dictum. *Gila V* was reviewing the reserved water rights doctrine as a whole when it held as follows:

> … 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 [United States Supreme] Court emphasized that "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."[195]

The issue thus becomes, assuming that the State Trust Lands meet all the requirements for a reservation, would their purposes be entirely defeated without the water. The Special Master has concluded that the purposes of the State Trust Lands are the support of the common schools and the support of the other trust beneficiaries.

That support comes from funds accumulated from the sales and leases of State Trust Lands. As *Lassen* held:

> … The grant was plainly expected to produce a fund, accumulated by sale and use of the trust lands, with which the State could support the public institutions designated by the Act. It was not supposed that Arizona would retain all the lands given it for actual use by the beneficiaries; the lands were obviously too extensive and too often inappropriate for the selected purposes. … It intended instead that Arizona would use the general powers of sale and lease given it by the Act to accumulate funds with which it could support its schools.[196]

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[194] *Id*. at 700-701 n.4.
[195] 201 Ariz. at 312, 35 P.3d at 73.
[196] 385 U.S. at 463.

This funding expectation is reflected in the Arizona Constitution ratified by the voters of the Territory of Arizona on February 9, 1911, and approved by the Congress

Finding of Fact No. 68. The first sentence of Article 11, § 10 of the Arizona Constitution, ratified by the voters of the Territory of Arizona on February 9, 1911, and approved by the Congress before Arizona was admitted to the Union, provides that "[t]he revenue for the maintenance of the respective State educational institutions shall be derived from the investment of the proceeds of the sale, and from the rental of such lands as have been set aside by the Enabling Act approved June 20, 1910, or other legislative enactment of the United States, for the use and benefit of the respective State educational institutions."[197]

But the State Trust Lands are not the sole means of support for public schools. The Arizona Supreme Court has interpreted Article 11, § 10 to mean that support for the common schools shall also come from taxation, special appropriations, and other sources of revenue.

Finding of Fact No. 69. The second sentence of Article 11, § 10 of the Arizona Constitution provides that "[i]n addition to such income the Legislature shall make such appropriations, to be met by taxation, as shall insure the proper maintenance of all State educational institutions, and shall make such special appropriations as shall provide for their development and improvement."

The Arizona Supreme Court has interpreted the second sentence of Article 11, § 10 to give the legislature and schools the right to resort to other sources of revenue:

> … The mandate of the Legislature, found in the second sentence … while it imports that the educational institutions of the state must be maintained and adequately developed and improved by taxation, does not make that resource the exclusive method. It simply means that it shall be the duty of the Legislature to make whatever provision is necessary for the proper and efficient functioning of these institutions, but does not deny the Legislature, or the institutions with the

[197] Ariz. Const. art 11, § 10. A copy of the ratified Constitution is found in Appendices, Vol. 1, Tab 25.

Legislature's consent, the right to resort to other sources of revenue than that of state taxation for that purpose."[198]

Conclusion of Law No. 41. Support of the common schools can be provided by taxation, special appropriations, and other sources of revenue.

One example of other sources of revenue is federal funds. The Congress has historically supported education in Arizona, for example, federal aid to education in Arizona exceeded $23 million for fiscal year 1961.[199]

The ASLD has derived substantial revenues from sales and leases of State Trust Lands including agreements for the withdrawal of water from those lands. The Special Master adopts the following statements of fact and citations (omitted) submitted by the Joint Movants, not controverted by the State, which describe some of the transactions and revenues accruing to the State from sales, leases, and agreements involving the State Trust Lands.[200] These findings establish that the ASLD has been able to accumulate a substantial and growing fund for the support of common schools without needing reserved water rights.

Finding of Fact No. 70. The Special Master adopts Statements of Fact Nos. 45, 49, 50, 51, 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 72, 73, 78 (first sentence only), 79 (first sentence only), and 80, including citations, submitted by the Joint Movants.

Conclusion of Law No. 42. Assuming that the State Trust Lands meet all the requisites of a federal reservation for a specific federal purpose, which is contrary to the Special Master's determinations, the support of the common schools would not be entirely defeated, or even defeated,

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[198] *Board of Regents of Univ. of Ariz. v. Sullivan*, 45 Ariz. 245, 262, 42 P.2d 619, 626 (1935) (This case involved a federal loan and a grant.).

[199] ASARCO and Abitibi's Statement of Fact No. 30 in Support of Motion for Partial Summary Judgment 12, Appendices, Vol. 3, Tab 12; *see also* Vol. 3, Tab 13. *See, e.g., Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 553 (1985) ("The States have obtained federal funding for such services as police and fire protection, education, public health and hospitals, parks and recreation, and sanitation.").

[200] Joint Movants' Separate Statement of Facts in Support of Their Motion for Summary Judgment 11-20.

without an implied reserved water right, and hence, an intent to reserve could not be inferred.

As general observations, possessing water rights in Arizona is advantageous, and sales and leases of State Trust Lands holding reserved water rights might accrue high revenues. The State made this point. But the implied reservation of water rights doctrine, as it has been molded by judicial decisions, is not an expansive or conjectural concept. It is characterized by terms such as "strictly construed," "minimal need," "to the extent needed," "carefully examined," and "limiting principle." As the Arizona Supreme Court opined, these "limitation[s] make good sense because federally reserved water rights are implied, (citation omitted), uncircumscribed by the beneficial use doctrine, and preemptive in nature."[201] The Special Master's findings of fact and conclusions of law concerning this issue adhere to the implied reservation of water rights doctrine as fashioned by courts.

VI. ANY OTHER ISSUES REQUIRED TO BE RESOLVED IN CONNECTION WITH ADDRESSING THE MATTERS LISTED ABOVE

ASARCO and Abitibi argued that the State must comply with A.R.S. § 12-1841 because a determination that federal reserved rights exist for the State Trust Lands would create a conflict with the Groundwater Management Act ("GMA")[202] and other statutes that require the ASLD to comply with state law in using water on the State Trust Lands. It was posited that the constitutionality of the GMA is at risk, and all parties who have or claim any interest which would be affected by a declaration of constitutional infirmity should be added as parties to this proceeding pursuant to A.R.S. § 12-1841, which provides for notice and participation by potential parties. If this statutory process is not followed in this case, according to ASARCO and Abitibi, a ruling in favor of the State "would always be subject to nullification at the request of the current or a future Attorney

[201] 201 Ariz. at 312, 35 P.3d at 73 n.1; *see also* 201 Ariz. at 311, 35 P.3d at 72.
[202] A.R.S. tit. 45, ch. 2 (1980).

General."[203]

In light of the Special Master's findings of fact and conclusions of law that the State cannot prevail on its motion that federal reserved water rights exist for the State Trust Lands, the Special Master does not find it necessary to determine this issue in this report.

VII. RECOMMENDATIONS

The Special Master concludes that careful analysis of the implied reserved water rights doctrine, as it has evolved through decisions of the United States Supreme Court and other courts, does not show that implied reserved water rights exist for the State Trust Lands. This conclusion is well grounded in Congressional legislation, court decisions, historical documents, legal principles, and water law.

The Special Master recommends that the Court:

1. Approve these findings of fact, conclusions of law, and recommendations.

2. Deny the State's Motion for Partial Summary Judgment Establishing the Existence of Federal Reserved Water Rights for State Trust Lands.

3. Grant to the extent consistent with this report the following motions:

   a. Joint Movants' Motion for Summary Judgment

   b. ASARCO's and Abitibi's Revised Motion for Partial Summary Judgment Regarding the Existence of Federal Reserved Water Rights for State Trust Lands

   c. GRIC's Motion for Partial Summary Judgment

   d. Navajo Nation's Motion for Summary Judgment That Water Rights for the Arizona State Trust Lands Must Be Obtained Pursuant to State Law

   e. Tribes' Motion for Partial Summary Judgment, and the

   f. United States' Motion for Summary Judgment.

[203] ASARCO's and Abitibi's Response to State's Motions for Partial Summary Judgment 5. A.R.S. § 12-1841(C) provides that "[i]f the attorney general … [is] not served in a timely manner with notice pursuant to subsection A, on motion by the attorney general … the court shall vacate any finding of unconstitutionality and shall give the attorney general … a reasonable opportunity to prepare and be heard."

4. Direct the Arizona Department of Water Resources to implement the determinations adopted by the Court in future technical reports involving the State Trust Lands.

VIII. AVAILABILITY OF THE REPORT

This report will be filed with the Clerk of the Superior Courts of Apache and Maricopa County. A copy of the report will be distributed to all the persons listed on the Court approved mailing list for this case. An electronic copy will be posted on the Special Master's Web site at http://www.supreme.state.az.us/wm/ on the *Gila River Adjudication (In re State Trust Lands)* page.

IX. TIME TO FILE OBJECTIONS TO THE REPORT

The Order of Reference states that:

> Objections and comments to the Special Master's Report may be filed within sixty (60) days after the report is filed with the court. Responses to objections and comments shall be filed within forty-five (45 days) after objections and comments are due, with any replies to be filed not later than thirty (30) days after the response due date. Filing times are exclusive of the additional period authorized by Ariz. R. Civ. P. 6(e).[204]

The dates indicated in this report for filing objections, responses, and replies account for the additional period authorized by Rule 6(e).

X. MOTION FOR ADOPTION OF THE REPORT

The Special Master moves the Court, under A.R.S. § 45-257(B) and Arizona Rule of Civil Procedure 53(h) to adopt the findings of fact, conclusions of law, and recommendations contained in this report. A proposed order will be lodged as the Court may direct upon consideration of the report.

XI. NOTICE OF SUBSEQUENT PROCEEDINGS

Any claimant in the Gila River Adjudication may file a written objection or comment to this report on or before **Monday, December 3, 2007**. Responses to objections and comments shall be filed by **Tuesday, January 22, 2008**, and replies by **Tuesday, February 26, 2008**. All papers must

[204] Order of Reference 5.

be filed with both of the following Clerks of the Court:

Clerk of Maricopa County Superior Court Attn: Water Case 601 West Jackson Street Phoenix, Arizona 85003	Clerk of Apache County Superior Court Attn: Little Colorado River Adjudication P.O. Box 365 St. Johns, Arizona 85936

Copies of all papers must be served on all persons listed on the Court approved mailing list for this contested case that is available online at http:www.supreme.state.az.us/wm on the *Court Approved Mailing Lists* page. The hearing on the Special Master's motion to approve the report and any objections and comments to the report will be taken up as ordered by the Court. Rule 53(h)(5), Ariz. R. Civ. P., provides that "[t]he court may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions."

Submitted this 28th day of September, 2007.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On September 28, 2007, an original of the foregoing was mailed to the Clerk of the Apache County Superior Court for filing, and a duplicate original was delivered to the Clerk of the Maricopa County Superior Court for filing and distributing to the persons who appear on the Court approved mailing list for this contested case dated July 26, 2007.

/s/ Regina M. Spurlock
Regina M. Spurlock