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

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

Case No. CV 6417-203

**ORDER GRANTING CITY OF
FLAGSTAFF'S MOTION IN PART
AND DENYING IT IN PART;
ORDER DENYING MOTION TO
STRIKE**

CONTESTED CASE NAME: *In re Hopi Reservation HSR*

HSR INVOLVED: Hopi Reservation Hydrographic Survey Report

DESCRIPTIVE SUMMARY: Determination made that water rights with respect to land held in trust by the United States on behalf of the Hopi Tribe pursuant to the Navajo-Hopi Land Dispute Settlement Act of 1966 are not federal reserved water rights.

NUMBER OF PAGES: 7

DATE OF FILING: April 26, 2019

The City of Flagstaff, joined by Salt River Project and Arizona State Land Department, filed a Motion to Dismiss Hopi Claim to Withdraw Groundwater from Off-Reservation Lands

1 Acquired Pursuant to the Navajo-Hopi Land Dispute Settlement Act (“Motion”). The Motion, at
2 least initially, concerns the character of the water rights to groundwater underlying the trust lands
3 held by the United States on behalf of the Hopi Tribe acquired pursuant to the Navajo-Hopi Land
4 Dispute Settlement Act of 1966 (“1966 Act”). More specifically, it concerns the groundwater
5 underlying that portion of land known as Hart Ranch, which constitutes “newly acquired trust
6 lands” under the 1966 Act. P.L. 104-301, 110 Stat. 3649, section 3(8).

7 According to the Hopi Tribe, the Hart Ranch consists of 110,163.21 acres of land located
8 outside the boundaries of the Hopi Reservation. Relying on the description of land ownership
9 provided by the Hopi Tribe, no more than 40% of the land is held in fee for the benefit of the
10 Hopi Tribe with the remainder owned by the State of Arizona or the United States subject to a
11 leasehold estate for the benefit of the Hopi Tribe.

12 The City of Flagstaff interprets the Hopi Tribe’s Fifth Amended Statement of Claimant as
13 asserting a federal reserved water right to groundwater underlying the Hart Ranch and seeks to
14 dismiss the Hopi Tribe’s claim that it has a federal reserved water right to that groundwater.¹ It
15 states:

16 the City asks the Court only to confirm that the 1996 Act explicitly
17 prevents the Hopi Tribe from directly asserting *Winters* rights to any
18 parcels acquired pursuant to the Act or indirectly asserting such rights by
19 asking the Court to adopt a priority date applicable to the Hopi
20 Reservation for groundwater withdrawn and transferred from Hart Ranch
to satisfy its future use, on-reservation claims.

21 *City of Flagstaff’s Consolidated Reply in Support of Its Motion to Dismiss Hopi Tribe’s Claim to*
22 *Withdraw Groundwater from Off-Reservation Lands Acquired Pursuant to the Navajo-Hopi Land*
Dispute Settlement Act, dated March 14, 2019, at 6.

26 ¹ No party argued that the issue raised by the City of Flagstaff should be delayed until the adjudication of the
27 water rights for the newly acquired trust land.

1 Although framing the issue as requesting a determination that the United States on behalf of the
2 Hopi Tribe does not hold federal reserved water rights to the groundwater below Hart Ranch, the
3 City of Flagstaff also argues that the “Court should therefore decline to consider the availability
4 of groundwater at Hart Ranch in determining Hopi’s federal reserved rights on the Hopi
5 Reservation.” *Id.* at 11. While the City of Flagstaff may regard the additional claim for relief as a
6 logical extension of the first issue, it has in fact presented two separate issues for consideration.
7 The first issue is whether federal reserved water rights attach to groundwater underlying Hart
8 Ranch. The second issue is an evidentiary issue applicable to the quantification of the federal
9 reserved water right on the Hopi Reservation. The two issues will be dealt with separately.

10
11 **A. Federal Reserved Water Rights**

12 Federal reserved water rights can arise from an express reservation of water by the
13 federal government when it withdraws land from the public domain for a federal purpose or they
14 can arise from an implied reservation. *In re General Adjudication of All Rights to Use Water in*
15 *the Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739 (1999). In recent years, most of
16 the Congressional acts “have specifically addressed water rights. The trend is moving away from
17 the traditional approach of silence--that is, not expressly saying whether water was or was not
18 reserved.” John D. Leshy, *Water Rights for New Federal Land Conservation Programs: A Turn-*
19 *of-the-Century Evaluation*, 4 U. Denv. Water L. Rev. 271, 276 (2001). Congress explicitly
20 reserves federal water rights in some legislation, expressly disclaims it in other legislation, and, in
21 some acts does neither. *Id.*

22 The 1996 Act specifically addressed water rights and expressly disclaimed federal
23 reserved water rights for the groundwater under the land to be acquired for the benefit of the Hopi
24 Tribe. The relevant portion of the Act provides as follows:

1 Sec. 12 Water Rights

2 (a) IN GENERAL. –

3 (1) WATER RIGHTS. – Subject to the other provisions of this section,
4 newly acquired trust lands shall have only the following rights:

5 (A) The right to reasonable use of groundwater pumped from such
6 lands.

7 (B) All rights to the use of surface water on such lands existing under
8 State law on the date of acquisition, with the priority date of such
9 right under State law.

10 (C) The right to make any further beneficial use on such lands which
11 is unappropriated on the date each parcel of newly acquired trust
12 lands is taken into trust. The priority date for the right shall be
13 date the lands are taken into trust.

14 ...

15 (b) RECOGNITION AS VALID USES. –

16 (1) GROUNDWATER. – With respect to water rights associated with newly
17 acquired trust lands, the Tribe, and the United States on the Tribe's behalf,
18 shall recognize as valid all uses of groundwater which may be made from
19 wells (or their subsequent replacements) in existence on the date each
20 parcel of newly acquired trust land is acquired and shall not object to such
21 groundwater uses on the basis of water rights associated with the newly
22 acquired trust lands. The Tribe, and United States on the Tribe's behalf,
23 may object only to the impact of groundwater uses on newly acquired trust
24 lands which are initiated after the date the land affected are taken into trust
25 and only on grounds allowed by the State law as it exists when the
26 objection is made.

27 ...

28 (h) STATUTORY CONSTRUCTION. – Nothing in this section shall be construed
to determine the law applicable to the water use on lands owned by the
United States, other than on the newly acquired trust lands. The granting
of the right to make beneficial use of unappropriated surface water on the
newly acquired trust land with a priority date such lands are taken into
trust shall not be construed to imply such other right is a Federal reserved
water right. Nothing in this section or any other provision of this Act shall
be construed to establish any Federal reserved right to groundwater.
Authority for the Secretary to take land into trust for the Tribe pursuant to
the Settlement Act and this Act shall be construed as having been provided
solely by the provisions of this Act.

P.L. 104-301, 110 Stat. 3649, section 12(a)(1)(A)-(C), (b)(1), (h).

1 Based on the unequivocal language of the 1966 Act, the Hopi Tribe and the United States on its
2 behalf do not have federal reserved water rights to groundwater at Hart Ranch.

3 In its Response, the Hopi Tribe acknowledged that the water rights included in the 1966
4 Act are not “implied federal reserved water rights” to the groundwater on the newly acquired trust
5 land. *Hopi Tribe’s Response to Flagstaff’s Motion to Dismiss Hopi Tribe’s Claim to Withdraw*
6 *Groundwater from Off-Reservation Lands Acquired Pursuant to the Navajo-Hopi Land Dispute*
7 *Settlement Act*, dated January 4, 2019 at 5 (“Response”). It characterizes its rights to the
8 groundwater under the 1966 Act as “federal statutory rights”. The determination of the
9 characteristics of the water rights conveyed by the “federal statutory rights” will not be
10 determined by the law applicable to federal reserved water rights because the rights to
11 groundwater on Hart Ranch are neither express nor implied federal reserved water rights.
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14 Due to the Hopi Tribe’s contention that, notwithstanding the language of the 1966 Act, a
15 priority date for groundwater withdrawal would be set and that date would depend upon a
16 decision as to whether the governing law was the law applicable to the newly-reserved trust land
17 or the law applicable to the Hopi Reservation, the City of Flagstaff raises a concern that the Hopi
18 Tribe intends to claim the characteristics and protections attendant to federal reserved water for
19 the Hart Ranch groundwater if water from Hart Ranch were used on the Hopi Reservation. The
20 courts have “adopted a rule of narrow construction of federal reserved water rights, recognizing
21 the doctrine’s disruptive effect in prior appropriation jurisdictions.” *In re the Gen. Adjudication*
22 *of All Rights to Use Water in the Gila River Sys. & Source*, 231 Ariz. 8, 13 ¶ 16, 289 P.3d 936,
23 941 (2012). In this case there is no need to engage in any legislative construction to determine
24 Congressional intent with respect to whether it intended federal reserved water rights to attach to
25 water from the newly-acquired trust lands. The 1966 Act is explicit on this point: federal
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1 reserved water rights do not attach to the water. Consequently, regardless of the place of use, the
2 Hopi Tribe are entitled to the rights granted by the 1966 Act to water from the newly-acquired
3 trust lands and are not entitled to federal reserved water rights.

4 **B. Evidence of Use of Groundwater in Future Phase of Trial**

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6 The City of Flagstaff effectively raises a second issue by its request that evidence should
7 not be admitted in the next phase of the trial regarding the availability of groundwater at Hart
8 Ranch for the purpose of quantifying the Hopi Tribe's federal reserved water rights on the Hopi
9 Reservation. The Hopi Tribe represents that it plans to produce evidence about the water
10 available from Hart Ranch because the court must consider all available water to evaluating future
11 development projects. Given the Arizona Supreme Court's directive that a fact-intensive, in-
12 depth inquiry must be applied to the quantification of tribal water rights, a significant evidentiary
13 decision will not be made at this early stage of the proceeding on the issue of future development
14 before adequate facts are developed to permit a proper consideration of the issue.
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17 **C. Motion to Strike**

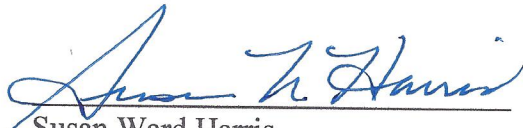
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19 Following the responses filed by the Hopi Tribe and the LCR Coalition, the City of
20 Flagstaff filed a Motion to Strike Extraneous Material in Hopi Tribe and LCR Coalition's
21 Responses to City's Motion to Dismiss, dated March 14, 2019, to strike portions of expert reports
22 and trial testimony from the first phase of the trial in this case included in or attached to those
23 responses. The City of Flagstaff contends that the attachment of those materials converts its
24 motion filed under Ariz. R. Civ. P. 12(b)(6) into a motion for summary judgment under Rule 56.
25 The decisions reached as on the two issues presented by the City of Flagstaff did not require
26 consideration of the expert reports or trial testimony. "Rule 56 treatment is not required when the
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1 court does not rely on the proffered extraneous materials.” *Strategic Dev. & Const., Inc. v. 7th &*
2 *Roosevelt Partners, LLC*, 224 Ariz. 60, 63, ¶ 8, 226 P.3d 1046, 1049 (App. 2010). The actions of
3 the Hopi Tribe and the LCR Coalition did not convert the City of Flagstaff’s motion into a motion
4 for summary judgment because the conclusion reached did not depend on the challenged expert
5 reports and testimony.
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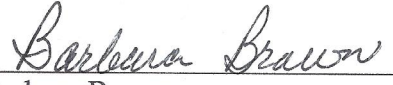
7 **IT IS ORDERED** granting City of Flagstaff’s motion finding that federal reserved water
8 rights do not attach to groundwater underlying Hart Ranch, a portion of the newly acquired trust
9 land held by the United States on behalf of the Hopi Tribe pursuant to the 1966 Act.

10 **IT IS FURTHER ORDERED** denying the City of Flagstaff’s motion to exclude
11 evidence of the availability of, the accessibility to, or the cost associated with withdrawing and
12 transporting groundwater from Hart Ranch to the Hopi Reservation on the grounds that the
13 motion is premature.
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15 **IT IS FURTHER ORDERED** denying the Motion to Strike.
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19 Susan Ward Harris
Special Master
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21 On April 26, 2019, the original of the foregoing
22 was mailed to the Clerk of the Apache County
23 Superior Court for filing and distributing a copy
24 to all persons listed on the Court approved
mailing list for the Little Colorado River
Adjudication Civil No. 6417-203.

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26 Barbara Brown
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