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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

CV 6417-203

ORDERS RE:
LCR COALITION MOTION FOR
PARTIAL SUMMARY JUDGMENT
REGARDING THE HOPI TRIBE'S
CONTENTION THAT THE 1994 ACT
CREATED AN EASEMENT FOR THE
MOVEMENT OF WATER OFF OF THE
HOPI'S NEWLY ACQUIRED RANCHES
AND
LCR COALITION MOTION FOR
PARTIAL SUMMARY JUDGMENT
THAT THE UNITED STATES HAS AN
ENFORCEABLE OBLIGATION TO
CONSTRUCT OR FUND WATER FOR
ECONOMIC DEVELOPMENT
PROJECTS FOR THE HOPI
RESERVATION

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2 CONTESTED CASE NAME: *In re Hopi Reservation HSR*

3 HSR INVOLVED: *Hopi Reservation*

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5 DESCRIPTIVE SUMMARY: The LCR Coalition's Motion for Partial Summary Judgment
6 Regarding the Hopi Tribe's Contention that the 1994 Act Created an Easement for the Movement
7 of Water off of the Hopi's Newly Acquired Ranches is denied. The LCR Coalition's Motion for
8 Partial Summary Judgment that the United States has an Enforceable Obligation to Construct or
Fund Water for Economic Development projects for the Hopi Reservation is recharacterized as a
motion *in limine* and is granted.

9 NUMBER OF PAGES: 8

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11 DATE OF FILING: June 18, 2020

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13 The LCR Coalition filed motions for partial summary judgment seeking legal
14 determinations regarding the existence of an easement in favor of the Hopi Tribe across privately
15 owned land, state trust land, federal land, and the Navajo Nation and the legal obligation of the
16 United States to fund infrastructure for the use and transport of water for the benefit of the Hopi
17 Reservation.

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20 **Motion I. Motion for Partial Summary Judgment Regarding the Hopi Tribe's Contention**
21 **that the 1996 Act Created an Easement for the Movement of Water Off of the**
Hopi Newly Acquired Ranches

22 The LCR Coalition, joined by the City of Flagstaff, moved for a partial summary judgment
23 finding that the Navajo-Hopi Land Dispute Settlement Act, Pub. L. No. 104-301, 110 Stat. 3649
24 (Oct. 11, 1996) ("1996 Act") did not grant the Hopi Tribe an implied easement for purposes of

1 moving water from land acquired pursuant to that legislation to the Hopi Reservation. The Navajo
2 Nation filed a partial joinder to the motion but took no position regarding whether the Hopi Tribe
3 is foreclosed from asserting an easement across the Navajo Reservation. The land in question is
4 known as the Hart Ranch. According to the Hopi Tribe, Hart Ranch, one of the newly-acquired
5 trust lands was acquired in 1997 and consists of 39,350 acres of privately owned land, 30,813.21
6 acres of leased state trust land, and 40,000 acres for which the Hopi Tribe holds a grazing permit
7 from the Forest Service. Hopi Tribe's Response at 5. The Navajo Nation filed a partial joinder to
8 the motion but took no position regarding whether the Hopi Tribe is foreclosed from asserting an
9 easement across the Navajo Reservation.
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11 This motion arises from a statement made by counsel for the Hopi Tribe during an oral
12 argument on March 21, 2019. Counsel for the Hopi Tribe asserted that the 1996 Act "creates and
13 implies [an] easement to bring groundwater" to the Hopi Reservation from the newly acquired trust
14 lands. Transcript of Proceedings at 18 (March 21, 2019) attached as Exhibit 4 to the LCR Coalition
15 Statement of Facts ¶13. Under Arizona law, an implied easement requires a showing of:
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17 '(1) The existence of a single tract of land so arranged that one portion of it derives
18 a benefit from the other, the division thereof by a single owner into two or more
19 parcels, and the separation of title; (2) before separation occurs, the use must have
20 been long, continued, obvious or manifest, to a degree which shows permanency;
and (3) the use of the claimed easement must be essential to the beneficial
enjoyment of the parcel to be benefitted.' [citation omitted].

21 *Koestel v. Buena Vista Pub. Serv. Corp.*, 138 Ariz. 578, 580, 676 P.2d 6, 8 (App. 1984).

22 Under federal law, even a right of access over government land may not rise to the level of
23 an implied easement. *See, e.g., Fitzgerald Living Tr. v. United States*, 460 F.3d 1259, 1265 (9th
24 Cir. 2006) ("Given the custom of unfettered use of public lands in 1862 when Congress passed the
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1 Homestead Act and the Supreme Court's refusal to characterize a settler's use of public lands as a
2 vested property right, we conclude that Congress did not imply an easement over public lands into
3 the 1862 Homestead Act.”)

4 In response to the Motion, the Hopi Tribe states that it does not concede arguments regarding
5 implied easements, ways of necessity or any other similar rights, but argues that it does not need to
6 establish in this proceeding the scope of rights the 1996 Act may have provided to establish that it
7 can obtain any necessary legal rights of access to transport water from Hart Ranch to the Hopi
8 Reservation. Hopi Tribe’s Response at 7. The United States partially joined the Hopi’s Response
9 to the extent it argued that the Hopi Tribe does not need to establish that an easement currently
10 exists as part of a demonstration of reasonably feasible economic development projects. In its
11 Reply, the LCR Coalition responded to the many arguments made by the Hopi Tribe to focus on a
12 single issue of whether the Hopi Tribe currently had an implied easement under the 1996 Act over
13 state, private, and federal land, including land within the Navajo Reservation.
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16 Given the current posture of the issue raised by the LCR Coalition, the resolution of whether
17 the Hopi Tribe received an implied easement pursuant to the 1996 Act would result in an advisory
18 opinion or the resolution of an unnecessary issue as the Hopi Tribe argues that it does not have to
19 rely on the 1996 Act to obtain the necessary easements because it will be able to obtain easements
20 using other lawful methods. *Freeport McMoRan Corp. v. Langley Eden Farms, LLC*, 228 Ariz.
21 474, 478, 268 P.3d 1131, 1135 (2011). Even if the question were properly at issue, it would not be
22 appropriate for summary judgment because there are genuine issues of material fact. *Comerica v.*
23 *Mahmoodi*, 224 Ariz. 289, 229 P.3d 1031 (App. 2010) (Plaintiff cannot prevail on summary judgment
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1 simply by saying the Defendant has not produced any evidence to generate a dispute of material fact. It
2 must present sufficient evidence from which a jury could only find in its favor on each element of its
3 claims.) Based upon the maps attached as Exhibit 3 to the LCR Coalition's Statement of Facts in
4 Support of its Motion, the newly acquired trust land is bounded by numerous parcels of land held
5 in state, private and federal ownership. At a minimum a determination of the property rights held
6 by the Hopi Tribe, if any, conveyed by the 1996 Act would require the resolution of a significant
7 number of material facts such as a determination of the route of the proposed pipeline, the properties
8 impacted by the route, the rights of the property owners which may differ depending upon the
9 landowner, and the use of the water conveyed by the pipeline.
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15 **Motion II. Motion for Partial Summary Judgment that the United States has an**
16 **Enforceable Obligation to Construct or Fund Water for Economic**
17 **Development Projects**

18 The LCR Coalition, joined by the City of Flagstaff, moves for a determination that the
19 United States has no enforceable obligation to construct or fund water projects for the Hopi
20 Reservation. In a recent case, the Hopi Tribe, relying on the federal reserved water rights doctrine
21 and federal statutes authorizing various agencies to promote safe drinking water on Indian
22 reservations, sued the United States for damages claiming that the United States had breached its
23 fiduciary obligation to ensure that the water on the reservation met certain quality standards. *Hopi*
24 *Tribe v. United States*, 782 F.3d 662, 668 (Fed. Cir. 2015). The United States argued in that case
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1 that a “water right does not bring with it a right to the capital investment necessary to put water to
2 use for particular purposes.” Answering Brief of the United States of America, 26-27, attached as
3 Exhibit 10 to the LCR Coalition’s Statement of Facts. The court rejected the Hopi Tribe’s argument
4 finding that the provisions did not establish a fiduciary duty to ensure adequate drinking water and
5 concluded:

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7 At most, by holding reserved water rights in trust, Congress accepted a fiduciary
8 duty to exercise those rights and exclude others from diverting or contaminating
9 water that feeds the reservation. We cannot infer from this duty that Congress further
intended the United States to be responsible for providing water infrastructure and
treatment needed to eliminate naturally occurring contaminants such as arsenic

10 *Id.* at 669.

11 Neither the Hopi Tribe nor the United States contend that the United States has an
12 enforceable obligation to construct or fund water projects for future water use on the Hopi
13 Reservation. At oral argument, the Hopi Tribe did not argue that a legal obligation existed and the
14 United States characterized the issue as “red herring”. In its papers, the United States claims that
15 the issue raised by the LCR Coalition confuses the applicable standards to be applied in this case
16 by implying that the absence of a legal obligation equates to an absence of funding. The United
17 States asserts that that it routinely provides funds for infrastructure projects through established
18 programs in place in the responsible agencies. In the absence of any actual controversy among the
19 parties, there is no justiciable issue.¹
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23 ¹ The Navajo Nation did not take a position whether the United States had an enforceable
24 obligation. It limited its response to two issues. In addition to the response addressed below, it
25 argued the issue of whether a duty must be expressly stated in a treaty, statute, executive order or
regulation when an action is not brought under the Indian Tucker Act, 28 U.S.C. §1505, but for
equitable relief relying on other statutory authority.

1 The impetus for Motion II appears to stem not from legal positions taken by the parties, but
2 from statements made by witnesses retained by the Hopi Tribe: Eric. C. Henson, Michael
3 Hanemann, and Dale Whittington. As the Navajo Nation argues in its Response, a threshold
4 question is whether the claim of an enforceable legal obligation, assuming that either the United
5 States or the Hopi Tribe intended to pursue it, is whether the evidence is admissible. In deciding
6 that issue, the LCR Coalition's motion is treated as a motion *in limine* directed to the three witnesses
7 to be called by the Hopi Tribe. Mr. Henson opined that the federal government had a "fundamental
8 obligation to tribes that arises from the federal government's trust responsibilities to Indian
9 nations." Expert Report of Eric C. Henson, 26, attached as Exhibit 1 to the LCR Coalition's
10 Statement of Facts. Messrs. Hanemann and Dale Whittington opined that the federal government's
11 position as trustee of the land imposed an obligation to provide a water supply and related
12 infrastructure for the reservation. Little Colorado River Adjudication Hopi Future Use Claim
13 Surrebuttal Report, Michael Hanemann and Dale Whittington, August 9, 2018 at 19, attached as
14 Exhibit 4 to the LCR Coalition's Statement of Facts. Expert testimony on legal issues such as the
15 existence of a duty or legal obligation is not permitted. *Keams v. Tempe Tech. Inst., Inc.*, 993 F.
16 Supp. 714, 721 (D. Ariz. 1997) ("The legal conclusions of an expert are inadmissible."); *Hafner v.*
17 *Beck*, 185 Ariz. 389, 393, 916 P.2d 1105, 1109 (App. 1995) ("Although standards for experts'
18 qualifications and admissibility of their opinions have been stretched considerably, we have not yet
19 reached the point when experts can dictate the law.")
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