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 Order Denying United States' Motion for Partial Summary Judgment on the Attributes Required to Establish an Indian Reservation's Federal Reserved Water Rights and Order Granting in Part and Denying in Part LCR Coalition's Motion for Entry of Order Regarding the Attributes Necessary for Adjudication of Federal Reserved Water Rights

CONTESTED CASE NAME: *In re Hopi Reservation HSR*

HSR INVOLVED: *Hopi Reservation*

DESCRIPTIVE SUMMARY: Determination of minimum attributes necessary define water rights reserved by the United States for the Hopi Reservation.

NUMBER OF PAGES: 28

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One of the purposes of this case is to decree federal reserved water rights for the Hopi Reservation ("Reservation") that can be used to resolve disputes among competing water users and be enforced. *See In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 313, ¶16, 35 P.3d 68, 74 (2001) ("*Gila V*"); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source,* 195 Ariz. 411, 422-23, 989 P.2d 739, 750-51 (1999) *cert. denied sub. Nom. Phelps Dodge Corp. v. United States,* 530 U.S. 1250 (2000) ("*Gila III*"). The decreed water rights should provide the Hopi Tribe with certainty regarding their legal rights to water and should also give needed certainty to the surrounding water users in the Little Colorado River watershed. The LCR Coalition and the United States filed motions that put at issue the attributes or characteristics that must be determined to decree federal reserved water rights for the Reservation. LCR Coalition's Motion for Entry of Order Regarding the Attributes Necessary for Adjudication of Federal Reserved Water Rights, filed January 29, 2020 ("LCR Motion"); United States' Motion for Partial Summary Judgment on the Attributes Required to Establish an Indian Reservation's Federal Reserved Water Rights, filed January 29, 2020 ("U.S. Motion").

The LCR Coalition contends that the federal reserved water rights must be defined by the attributes listed in §15.03 Rules for Proceedings Before the Special Master:

1. Owner
2. Priority date
3. Type of use
4. Source of water
5. Flow rate in cubic feet per second or gallons per minute

6. Volume in acre feet per annum (AFA)
7. Location of the place of diversion or withdrawal
8. Location of the place of use
9. Number of acres irrigated (in the case of irrigation rights)
10. Period of use

In the case of future uses, the LCR Coalition proposes that a good faith estimate should be provided as to the source of water, location of the place of diversion or withdrawal, and location of the place of use for a proposed future use. If any of those characteristics change after the entry of the decree, then the United States must return for a modification of the decree. LCR Motion at 11.

The United States contends that federal reserved rights to water on an Indian reservation must be defined by no more than a "sparse level of specificity". U.S. Motion at 5. According to the United States, federal law limits a final decree for a federal reserved water rights to: priority date, the aggregate quantity necessary for each category of use, and the source of water. The Salt River Project Agricultural Improvement and Power District ("SRP") partially joined with the United States to argue that a federal right must be defined by the first four characteristics listed above with the fifth and six categories consolidated into the single characteristic of "quantity". As a caveat to its position, SRP states that additional characteristics may need to be proven when the United States or Hopi Tribe moves to enforce the rights. Salt River Project's Joinder in the United States Motion, filed February 12, 2020 at 2. Adding to the characteristics listed by SRP, the City of Flagstaff argues that that place of use and point of diversion, the seventh and eighth characteristics listed above, must

be part of a minimum definition of a federal reserved water right. The City of Flagstaff further stated that a particular use may require additional attributes.

To hone the issue presented by the parties' varying positions more precisely, the parties appear to agree that a federal reserved water right must be defined by owner, type of use, priority date, quantity, and source of water. Disagreement exists about whether a federal reserved water right must specify the location of the point of diversion or withdrawal, the location of the place of use, the number of acres irrigated (in the case of irrigation rights) and the period of use. Although the parties appear to disagree, or at least do not explicitly agree to an acceptable unit of measurement to quantify a federal reserved right, the disagreement may simply be whether a particular use, such as irrigation, requires more than one unit of measurement to quantify the right, e.g., a flow rate or return rate in addition to a total volume.

The resolution of the appropriate characteristics necessary to define an enforceable federal reserved water rights for an Indian reservation first requires an examination of the federal reserved water right doctrine and the interplay between state and federal law in a general adjudication of federal reserved water rights, before turning to decisions that have defined federal reserved water rights and the argument made by the United States that a federal reserved water right improperly impinges upon the Hopi Tribe's sovereign powers of self-government.

I. Federal Reserved Water Right Doctrine

The United States has the power to reserve water for the benefit of its appurtenant land and when it exercises that power, explicitly or implicitly, it creates a water right enforceable against other

appropriators. *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015) ("This reserved water right gives the United States the power to exclude others from subsequently diverting waters that feed the reservation.") The ability of the United States to legally restrain competing water users from adversely impacting the use of water on its land appurtenant to that water source is a critical component of a federal reserved water right. *See In re the General Adjudication Of All Rights To Use Water In The Gila River System And Source* 195 Ariz. 411, 420, ¶29, 989 P.2d 739, 748 (2005) ("A theoretically equal right to pump groundwater, in contrast to a reserved right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers.") For more than a century, the doctrine of federal reserved water rights has provided the legal basis for the federal government to obtain a remedy at law, e.g., an injunction, to protect the use of water appurtenant to its land or land it holds in trust. *U.S. v. Rio Grande Dam & Irrigation Co*., 174 U.S. 690, 703 (1899); *Winters v. U. S.,* 207 U.S. 564 (1908); *U.S. v. Cappaert,* 426 U.S. 128 (1976) (permanent injunction restricted the pumping of irrigation wells on a ranch three miles from a pool in a national park).

The federal reserved water right doctrine first served as the basis for a legal remedy in *Rio Grande Dam* where the Court enjoined the construction of a dam intended to divert the entire unappropriated flow of the river finding "in the absence of specific authority from congress, a state cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial uses of the government property." *Rio Grande Dam & Irrigation Co.,* 174 U.S. at 703. The Court first applied the doctrine to an Indian reservation in *Winters* where the Court enjoined the

construction and maintenance of dams that prevented the Fort Belknap Indian Reservation from diverting water from the Milk River running through northern boundary of the Reservation. The Court held that "[t]he power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. [citation omitted]. That the government did reserve them we have decided, and for a use which would be necessarily continued through years." *Winters,* 207 U.S. at 577. During the ensuing decades, the federal courts repeatedly relied upon the doctrine to enjoin the actions of non-Indian appropriators and to quiet title to water rights to divert water for the benefit of land included in an Indian reservation. *See, e.g., Colville Confederated Tribes v. Walton,* 647 F.2d 42 (1980); *United States v. Ahtanum Irrigation District,* 236 F.2d 321 (9th Cir. 1956)*, cert. denied,* 352 U. S. 988 (1957)*; United States* v. *Walker River Irrigation District,* 104 F.2d 334 (9th Cir. 1939); *Conrad Investing Co.* v. *United States,* 161 Fed. 829 (9th Cir. 1908).

Here, the United States asserts federal reserved water rights not in an individual case to enjoin the actions of other water users but as part of a general adjudication of all water rights in the Little Colorado River Watershed. The Arizona Supreme Court summarized the factual basis motivating and procedural considerations relevant to a general adjudication:

> The problem, therefore, is clear. Since there is not enough water to meet everyone's demands, a determination of priorities and a quantification of the water rights accompanying those priorities must be made. Obviously, such a task can be accomplished only in a single proceeding in which all substantial claimants are before the court so that all claims may be examined, priorities determined, and allocations made.

United States v. Superior Court In & For Maricopa Cty., 144 Ariz. 265, 270, 697 P. 2d 685, 670 (1985).

The general stream adjudication will determine "the nature, extent and relative priority of the water rights" of all who use the water of in that river system and source and generate a definitive catalog of adjudicated rights. A.R.S. § 45–251(4). Decreed federal water rights will be included in the catalog along with state water rights. Congress gave the State courts the express authority to adjudicate federal reserved water rights claimed on behalf of Indian tribes under the McCarren Amendment, 43 U.S.C. §666(a) (1964). *Colorado River Water Conservation Dist. v. United States,* 423 U.S. 800, 810-811 (1951). The McCarran Amendment which provides in relevant part that: "Consent is given to join the United States in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights. 43 U.S.C. §666(a). In the context of this statute, administration of a decreed right by the court entails the construction and interpretation of the meaning of the decree, resolution of conflicts, and enforcement. *S. Delta Water Agency v. Bureau of Reclamation,* 762 F.2d 531, 541 (9th Cir. 1985). Thus, State courts will eventually use those cataloged rights to resolve disputes among state and federal litigants that will inevitably arise over the limited supply of water in this semi-arid state with a history of periodic droughts. *See Navajo Dev. Co. v. Sanderson,* 655 P.2d 1374, 1379 (Colo. 1982). Administration may also be necessary to in the future to consider changes in use or other characteristic of the final decree. *See United States v. Orr Ditch Co.,* 309 F. Supp. 2d 1245 (D. Nev. 2004)

The United States does not contend that a decreed right resulting from these proceedings cannot be enforced, which would make the right illusory. Instead it contends that future enforcement of the federal reserved water rights should not be a consideration in the determination of the water right attributes that should be included in the decreed right because the right will not be enforced. It argues that it is "unclear under what circumstances state law water users could be injured by Hopi's use of water. . . . State law water users with a later priority date simply cannot be injured by or interfere with Hopi's ability to use the full amount of its future rights – however, wherever, and whenever they become necessary on the Reservation." U.S. Motion at 16. Implicit in the United States' statement are two assumptions: the rights of the Hopi Tribe have been properly defined so the nature and scope of its "future rights" are known, and the Hopi Tribe used water consistently with those rights. As explained by the court In *United States v. Orr Ditch Co.,* 309 F. Supp. 2d 1245, 1254 (D. Nev. 2004), decreed rights "established as a matter of law that the Tribe would not injure other person's water rights when it began using its entire water duty in the place and manner described". Injury to other users can result if the Hopi Tribe were to use water inconsistently with its decreed rights and adversely impacted a state law water user. *Id.* This scenario highlights the importance of sufficiently defining federal reserved water rights. Clearly defined rights may avoid disputes because all parties will have a better understanding of the scope and nature of the rights of the Hopi Tribe. If disputes nevertheless arise, the court will be able to resolve the conflict because properly defined rights will serve as the standard against which the claimed injury can be measured. *Id.* ("The Orr Ditch Decree establishes, as a matter of law, the 'existing conditions' against which any potential impairment of other persons water rights are to be measured.").

Although the United States focuses on potential actions brought by state law users to argue that enforcement of the rights should not determine the attributes of a water right, an action could be brought by the United States or the Hopi Tribe to enforce the decreed rights. As the Supreme Court recognized, when dealing with a scarce natural resource such as water subject to multiple demands, "federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *U.S. v. New Mexico,* 438 U.S. 696, 704 (1978); *see also Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 558, ¶ 12, 423 P.3d 348, 353 (2018). The Arizona Supreme Court anticipated more than 30 years ago that the adjudication court would be called upon by the tribes to enforce their decreed rights against state law users. *See United States v. Superior Court In & For Maricopa Cty.,* 144 Ariz. at 275, 697 P. 2d at 668.

In summary, the federal reserved water right doctrine was created by the Court specifically to enable the federal government to prevent others from interfering with water uses necessary to put land reserved by the federal government to its intended use. Over the past century, the federal government has repeatedly invoked this doctrine in individual actions to enjoin other appropriators from diverting that water. More recently, the forum for the adjudication of federal reserved water rights has moved to the States' general adjudications pursuant to the Congressional grant of authority in the McCarren Amendment. While the United States' projection may prove to be accurate that no actions will be brought by any party in the future with respect to the federal reserved water rights decreed for the Hopi Reservation, the court cannot proceed forward with that expectation. The McCarren Amendment clearly contemplated the logical progression that the State courts would adjudicate and decree enforceable rights and then the court would be prepared to administer those

rights. Accordingly, the federal reserved water right decreed in this proceeding must enable the court to perform its duty if and when it is called upon to resolve disputes with respect to the right or to enforce that right.

II. Role of State Law in Defining a Federal Reserved Water Rights

The general adjudication court will apply state law to adjudicate federal reserved water rights except where it conflicts with federal law in which case federal law will apply. *United States v. Superior Court In & For Maricopa Cty.,* 144 at 277, 697 P. 2d at 670. ("Indian rights are conferred by federal law, and it is the federal substantive law which our courts must apply to measure those rights in the state adjudication. San Carlos, 463 U.S. at ——, 103 S.Ct. at 3216. Where state law conflicts, it must give way.") The Arizona court lacks the power to overthrow the *Winters* doctrine or any other federal rule which defines a federal reserved water right for an Indian reservation. *Id.*

The United States argues that the position advocated by the LCR Coalition violates the Arizona Supreme Court's mandate by improperly imposing "state law specificity" on to a federal reserved water right. The United States defines "state law specificity" by reference to the provisions of A.R.S. §45-254. This statute does not impermissibly graft state law requirements for a decreed state right on to a federal reserved water right for two reasons. First, A.R.S. §45-254 does not define the attributes of a decreed water right under state law. It lists permissible categories of information that may be included on the form to claim a right to appropriable water. Second, even assuming *arguendo,* that the statute mandates the attributes that must be included in a final decree granted under state law, the Arizona Supreme Court has already considered and rejected the argument that

A.R.S. §45-254 violates federal law. *Id.* at 276, 697 P. 2d. at 669. The Court directed that any statutory construction of the statute with respect to a claim for a federal reserved water right must generate a result consistent with federal law. *Id.* at 278, 697 P. 2d. at 671. Thus, for example, §45-254(C)(8), which lists information to prove the priority date, must be interpreted in a case where federal reserved water rights are claimed as requiring the information dictated by federal law.[1]

To continue with the assumption that A.R.S. §45-254(C) is a proxy for state law requirements for a decreed water right, there are eight categories of information in A.R.S. §45-254(C) in addition to the category devoted to establishing a priority date. Five categories require information either readily available to the United States or subsumed in the categories of information the United States' acknowledges that it must prove: the name and address of the claimant, the source of the water, the quantity of water, the purpose of the use, and the legal basis for the right. §45-254(C)(1), (2), (3), (7), (9). Categories of information about diversion infrastructure, soil types, and kinds of crops included in §45-254(C)(4) and (5) are not characteristics listed by the LCR Coalition as necessary for a federal reserved water right and, thus are not at issue here. The only provisions remaining in the statute that are also characteristics included in the LCR Coalition's list are the requirements to provide information about: the period of time during the year for which the water is claimed (§45-254(C)(3)); the amount of land irrigated (§45-254(C)(5)); and, the points of diversion and places of use (§45-254(C)(6)). As directed by the Court, state law will give way when it conflicts with federal

[1] In this case, the appropriate priority date for the federal reserved water rights for the Hopi Reservation has been the subject of extensive proceedings under federal law and no party appears to be suggesting that the United States must satisfy a state standard to define the priority date for the federal reserved water rights for the Hopi Reservation.

law. Thus, the definitive issue is not whether the LCR Coalition improperly seeks to impose state law on a federal water right but whether a federal reserved water right for an Indian reservation may be defined by period of time, amount of land irrigated, points of diversion, and place of use.

III. Attributes of Federal Reserved Water Right for an Indian Reservation

An analysis of the relevant case law to determine whether federal law restricts the definition of a federal reserved water right to a sparse level of specificity must be undertaken subject to the strictures that "cases are not precedential for propositions not considered," *United States v. Pepe,* 895 F.3d 679, 688 (9th Cir. 2018). Similarly, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *United States v. Shabani*, 513 U.S. 10, 16 (1994); *Webster v. Fall,* 266 U.S. 507, 511, (1925). An issue not "raised in briefs or argument nor discussed in the opinion of the Court .... is not a binding precedent on [that] point." *U.S. v. L.A. Tucker Truck Lines, Inc.,* 344 U.S. 33, 38, (1952). In short, the decisions issued by the federal courts that defined and enforced federal reserved water rights must be evaluated with an understanding of their factual and procedural context.

To start at the beginning, the *Winters* decision does not support the proposition that a federal reserved water right must be defined as aggregate amount for a use from a stated source and cannot be defined by other attributes such as a point of diversion, number of acres irrigated, places of use, or flow rates. None of those questions were ruled upon in the decision. In *Winters,* the Court decided whether the United States had reserved rights to water from the Milk River that supported an injunction of the upstream users' actions and whether the reserved rights were repealed by the

admission of Montana into the United States. It also effectively decided that the priority date for a federal right, unlike a state right, is not the date the water was first put to beneficial use.[2] The Court neither recited the language of the injunction issued nor addressed terms required to define the scope of the rights when it upheld an injunction granted by the district court to enforce a rights to water from a defined source (Milk River), at a given flow rate (5,000 miner's inches), for a particular use (irrigation) at a set place of use (the land on the reservation watered by ditches that transported water from the Milk River).

The federal courts that subsequently determined federal reserved water rights relied on the *Winters* decision to find that the federal government reserved federal water rights when it created a reservation and to set a priority date. The decisions do not cite the *Winters* opinion as a constraint on the courts' ability to define the right by attributes deemed necessary by the courts. In *Conrad Inv. Co. v. United States*, 161 F. 829, 834 (9th Cir. 1908), the United States moved to establish federal reserved water rights to Birch Creek to irrigate a 10,000-acre tract of land on the Blackfeet Reservation in order to obtain an injunction against a neighboring landowner from damming Birch Creek upstream of the points of diversion. The Ninth Circuit affirmed the district court's decree enjoining the landowner from "impeding, preventing, or obstructing the waters of said creek to the amount and extent of 1,666 $\frac{2}{3}$ inches, or the equivalent of 33 $\frac{1}{3}$ second feet[3], from flowing down the

[2] The case also decided a procedural matter affecting the defendant and appellants not relevant to here.

[3] "Second feet" is a unit of measurement of water flow equal to cubic feet per second which is the LCR Coalition's proposed characteristic number 5.

natural channel of said creek and the points of diversion and places of use established by the complainant for the benefit of the Indians on the reservation." The court's description of a federal reserved water right includes type of use (irrigation), source of water (Birch Creek), flow rate (1,666 $\frac{2}{3}$ inches, or the equivalent of 33 $\frac{1}{3}$ second feet), location of place of use (referenced the complaint) and points of diversion (referenced the complaint).

In *U.S. ex rel. Ray v. Hibner,* 27 F.2d 909, 912 (D. Idaho 1928) the United States sought an adjudication of federal reserved water rights for allotted land. The federal court found that a reserved right existed to a "continuous use of a sufficient amount of water for the irrigation of their lands, and domestic purposes" and awarded a "continuous right through the entire year to the use of one miner's inch of water per acre for the irrigation of that portion of their lands which the evidence discloses is susceptible to irrigation, and with a priority of February 16, 1869." *Id.* at 911. This description includes the attributes of period of time, flow rate, type of use, and place of use (land the evidence shows to be irrigable), and priority date. The decision concludes with the direction that counsel will "prepare appropriate decrees, with the usual provisions found in such decrees, and with definite declarations of the amount of water, right of each claimant, the date of priority, the point of diversion, and place of use.") *Id.* at 912.

In *United States v. Walker River Irr. Dist*., 104 F.2d 334 (9th Cir. 1939), the United States brought an action to restrain upstream users of the Walker River from diverting the natural flow of Walker River to the extent of 150 cubic feet per second and to adjudicate the relative rights of those upstream users and the Pahute Tribe to water from the Walker River that bordered the Walker River Indian Reservation. Although the court began its analysis with a determination that the government

had reserved water to "the extent reasonably necessary to supply the needs of the Indians," it did not limit its definition of the federal reserved water right to this general statement. *Id.* at 339–40. It also specifically rejected the United States' suggested decree for a broad water right to "the quantity of water for reservation purposes of the amount, not exceeding 150 second feet, which the Government may demand from year to year at the commencement of the season." *Id.* at 340. Instead, the court defined the federal reserved water and enjoined the upstream users from preventing or interfering with:

> the continuous flow of 26.25 cubic feet of water per second, to be diverted from Walker River upon or above Walker River Indian Reservation during the irrigation season of one hundred and eighty days for the irrigation of two thousand one hundred acres of land on the reservation, and the flow of water reasonably necessary for domestic and stock watering purposes and for power purposes to the extent now used by the Government, during the non-irrigating season, with a priority of November 29, 1859.

Id.

The federal reserved water right for the Walker River Indian Reservation included: a flow rate, the source of water, general point of diversion, time period, place of use, type of use, number of acres irrigated, and a priority date.

Approximately two decades later the court considered a quiet title action brought by the United States to claim federal reserved water rights for the Yakim Indian reservation from the Ahtanum Creek that forms the northern boundary of the reservation. *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956). Although the court ultimately declined to adjudicate water rights or enter an injunction, it did address the evidence needed, and in that case not needed, to establish a federal reserved water right. The Ninth Circuit found that the United States was required to show

ownership, points of diversion, place of use, number of irrigable acres, type of use, source of water, and quantity:

> By maps and Indian Office records the United States showed the location, point of diversion and capacity of each ditch constructed by Indians, or by the Indian Service, and the description, irrigable area, and location of all reservation lands served by those ditches with water from Ahtanum Creek. Also shown are the rate of progress through the years since the creation of the treaty in getting this water upon these lands. Just which lands are Indian owned, whether under trust or fee patent, and which are owned by successors of Indian allottees, also was proven. The quantities of water required by these lands was both stipulated and proven. No more was required, for the United States has the right to make distribution of its water under such rules as it may adopt, as provided by 25 U.S.C.A. § 381 (note 16, supra). It is no concern of ours which particular parcels or allotments are served by the Indian Service ditches, so long as adequate proof was made of their aggregate needs.

United States v. Ahtanum Irr. Dist., 236 F.2d 321, 340 (9th Cir. 1956).

In reversing the district court's dismissal of the United States' claims, the Ninth Circuit found that the United States did not have to prove that the actions of the upstream users had harmed the ability to irrigate any particular allotment before it could obtain an enforceable water decree. In that situation the United States had the statutory authority to distribute irrigation water among the allotted lands. Here, the United States focuses on the final two sentences of the quotation cited above to contend that a federal reserved water right only requires "proof of aggregate need". Such a broad reading of the language would render the court's catalog of elements that the United States had to prove to obtain an enforceable right found in the preceding sentences absolutely meaningless. Read in the context of the case, the Ninth Circuit did not eviscerate its prior list of requirements. It stated the reason that it reversed the lower's court's decision that the United States could not claim federal reserved water rights for a group of allottments.

The Supreme Court again entered the arena of federal reserved water rights for Indian reservations with its decision in *Arizona v. California*, 373 U.S. 546 (1963). In evaluating whether the Supreme Court limited the acceptable attributes of a federal reserved right, it is important, as in, for example, the *Ahtanum Irr. Dist* decision, to examine the context in which the rights were adjudicated and the issues presented. The United States intervened in *Arizona v. California*, a case brought to determine states' rights to water in the Colorado River, to adjudicate federal water rights for, *inter alia,* 25 Indian reservations that included three Indian reservations in the Little Colorado River basin: the Hopi, Navajo and Zuni Reservations. Report from Simon H. Rifkind, Special master to the Supreme Court 6 (December 5, 1960) ("Report"). The Special Master ultimately declined to adjudicate federal water rights for the Little Colorado River reservations.

The Special Master chose to adjudicate rights for five "mainstream Indian Reservations[4]" to water from the Colorado River because a justiciable controversy existed between the United States, Arizona, and California about the claimed rights. He also determined that the adjudication of rights for those reservations was warranted so that the Secretary of the Interior, who had legal and physical control of the river, would know the quantity of water to release from the Colorado River. Report at 255-256, 324. Thus, the source of water (Colorado River) and the point of diversion (determined by the Secretary of Interior) were not at issue in the case. Accordingly, *Arizona v. California* does not stand for the proposition that federal reserved water rights cannot be defined by source of water or point of diversion. *See United States v. Pepe, supra.* Nor does it stand for the proposition that a federal reserved right does not require a beneficial use of water (type of use) or that water can be

[4] The five reservations are the: Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave Reservations.

put to any use. The question of use was not at issue in *Arizona v. California* because the United States only sought water for "future agricultural and related uses". *Id.* at 265. Further, the Special Master explicitly stated that the "question of change in character of use is not before me." *Id.* It was not until the parties reached an agreement more than a decade later, as opposed to any court decision on the merits of the issue, that the use of the water changed to any beneficial use. *Arizona v. California*, 439 U.S. 419, 421 (1979), amended, 466 U.S. 144 (1984).

The justiciable controversy that necessitated the adjudication of the mainstream reservations' rights was whether the United States intended to reserve water for the reservations' future needs as opposed to needs at a particular time. In deciding this issue, the Special Master squarely addressed the question that the federal courts had considered in the past.[5] The Special Master rejected the issuance of an "open end decree, simply stating that each Reservation may divert at any particular time all the water reasonably necessary for its agricultural and related uses as against those who appropriated water subsequent to its establishment." *Id.* at 263-264. Finding that a federal reserved right must provide for future as well as current needs, the Special Master determined "the United States intended to reserve enough water to irrigate all of the practicably irrigable lands on a Reservation and that the water rights thereby created would run to defined lands, as is generally true of water rights." *Id.* at 263. The Supreme Court approved this approach: "We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that

[5] In *Conrad Inv. Co. v. United States*, the court left the decree open whereas in *Walker River*, the court examined past and present use to reach a decision about future use.

enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." *Arizona v. California,* 373 U.S. at 600.

Due to the facts and circumstances in *Arizona v. California,* the federal reserved water rights for the five Indian reservations for which rights were adjudicated and approved by the Court were effectively defined by: priority date (date the reservation was established); type of use (irrigation and related uses); source of water (Colorado River); quantity (lesser of acre feet per year or consumptive use for irrigation and related use); point of diversion (determined by the Secretary of the Interior); place of use (the land shown to be practicably irrigable); and number of acres irrigated (the land shown to be practicably irrigable).

After the issuance of the decision in *Arizona v. California,* the Ninth Circuit adjudicated water rights for allottments involving the Coville Confederated Tribe that required the adjudication of water rights for seven allotments from the No-Name system that included the No-Name Creek and Omak Lake. The court followed the traditional analysis used to determined federal reserved water rights. It first focused on the purpose of the reservation and then approved sufficient water (with directions to the district court to calculate the amounts) to meet those purposes. The court found the purpose of the Colville Reservation was to maintain an agrarian society and held that the Tribe was entitled to that quantity of water required to irrigate all practicably irrigable acreage on the reservation. The court also found that the Colvilles traditionally fished and that another purpose for the creation of the reservation was the preservation of the tribe's access to fishing grounds. Based on that purpose and the fact that the tribe could no longer could access traditional fishing grounds it found that the tribe had a reserved right to water necessary to maintain the Omak Lake Fishery which

included sufficient water to permit natural spawning of trout. *Colville Confederated Tribes v. Walton*, 752 F.2d 397 (9th Cir. 1985). The decision based on dual purposes approved a quantity of water, the types of uses, place of uses (land shown to be irrigable and a lake), and points of diversion (No Name Creek Basin).

The United States also cites to the decisions issued by the Arizona Supreme Court in support of its position that a federal reserved water rights should contain little information beyond a priority date, the aggregate quantity necessary for each category of use, and the source of water. The Arizona Supreme Court, like the federal courts, has not banned or otherwise limited the use of the attributes proposed by the LCR Coalition, SRP, or the City of Flagstaff to define federal reserved water rights.

In its seminal decision on federal water reserved water rights for an Indian Reservation, the Court considered the proper method to quantify a federal reserved water right for an Indian reservation. *Gila V* at 313, ¶16, 35 P.3d 68, 74. The Court began its analysis of the scope of a federal right to water for Indian reservations with the recognition that the purpose for the reservation of land defines the scope and nature of reserved water rights. *United States v. Adair*, 723 F. 2d 1394, 1419 (9th Cir. 1983). It considered and declined to follow the federal cases that engaged in a judicial examination of historical documents maintained by the Congress or the executive branch to glean a specific purpose for the creation of the reservation. The *Gila V* decision provides numerous reasons for the Court's holding, one of which was a possibility that a reservation formed over many decades could have different historical purposes attached to different parcels of land resulting in an "arbitrary patchwork of water rights" inconsistent with a unified homeland. *Gila V* at 313, ¶18, 35 P.3d at 74. The Court's identification of a possible problem that could arise by continuing to follow past

practices to define the purpose of a reservation is not tantamount to a decision, as argued by the United States, that a federal reserved water right defined by a place of use and type of use would not satisfy the needs of the reservation. It is simply one reason given by the Court to reject a methodology that tethered federal reserved water rights to judicial interpretations of implied historical intent.

The Court ultimately held that "the essential purpose of Indian reservations is to provide Native American people with a 'permanent home and abiding place,' (citation omitted) that is, a 'livable' environment." *Gila V* at 313, ¶16, 35 P.3d at 74. With this determination of purpose, no longer did the court limit the purpose of a reservation to agricultural use or agricultural and fishing uses as had the many federal courts that found federal reserved water rights in the past, but instead transferred to the tribes and the United States the obligation to develop plans and present evidence of "actual and proposed uses, accompanied by the parties' recommendations regarding feasibility and the amount of water necessary to accomplish the homeland purpose." *Id.* at 318, ¶41, 35 P.3d at 79. The actual and proposed uses are not intended to be mere suggestions or theoretical concepts, but uses that can be shown to be practical and economically sound.

While *Gila V* may have transported the determination of the federal reserved water rights into "uncharted territory" in terms of purpose and uses for water on Indian reservations beyond those historically found by the federal courts, it did not take the further step of considering, much less approving, a decreed water right stripped of virtually all attributes other than quantity, an aggregate quantity necessary for each category of use, source, and a priority date. The Court, as had the Special Master in *Arizona v. California* clearly contemplated that a right to satisfy present and future needs

must be based on a type of use. The determination of a federal reserved water right to secure water for a specific type of use to meet future needs is not unchartered territory. For example, in *Arizona v. California,* the Special Master and the Court determined federal reserved rights for irrigation water to meet the future needs of the reservations. As the purpose of the reservation drove the determination of type of use in prior cases, so did the type of use drive determinations of other attributes such as place of use, point of diversion, and appropriate measurement of quantity. The attributes of the federal reserved water rights in *Arizona v. California* included the place of use on the reservation where the water could be used (the land that could be practically irrigated), the number of irrigable acres, and quantity measured by consumptive use which required calculations of volume in acre feet per annum and return flow along with priority dates, point of diversion and source of water.

As demonstrated by the cases discussed above, the federal courts and the Arizona Supreme Court have not limited a federal reserved water right to a truncated set of characteristics. Rights have been defined, implicitly and explicitly, by place of use, point of diversion, and, in the case of irrigation use, number of acres irrigated in addition to priority date, source and quantity using various types of measurements.

IV. Settlement Agreements

In support of its position regarding appropriate characteristics of a water right, the United States urges recourse to settlement agreements approved by the courts arguing that the terms of the settlement agreements must comply with federal law and therefore establish terms acceptable in a decree of federal reserved water rights. The agreements do not purport to establish federal reserved

water rights. The agreements are contractual arrangements voluntarily reached by the parties that involved a host of rights and claims based on state and federal law and other contractual obligations. Even though the agreements do not provide guidance about terms acceptable in a federal reserved water right decree, they do provide valuable information about the detail that interested parties deem necessary to define a workable water right. The agreements cited by the United States appear to be the result of long, careful, detailed negotiations by the parties knowledgeable in the area that are in essence comprehensive water management plans.

Among the cited documents is an agreement made by the Zuni Tribe. The Zuni Reservation was one of the reservations for which the United States attempted to obtain federal reserved water rights in *Arizona v. California,* along with rights for the Hopi and the Navajo Reservations. More than 15 years ago, the Zuni Indian Tribe and the United States entered into an agreement with many of the parties in this litigation to resolve claims for water rights for the Zuni Reservation. The 127-page document deals with a myriad of issues affecting continued access to surface water and groundwater. The parties determined that certain water uses were so small that their use could remain unfettered, imposed significant amounts of monitoring and measurements described in detail for other uses, and required cataloging of existing water uses. As part of the document, separate abstracts were created include abstracts for irrigation use with detailed descriptions defining water rights by source, acres, quantity, use, priority date, period of use, point of diversion, and place of use. *See* Zuni Indian Tribe Water Right Settlement in the Little CO River Basin, 65-68 (June 7, 2002). As can be seen from a comparison of the abstracts prepared as part of the Zuni agreement some of the attributes have been broadly defined while other attributes are very specific.

Other water agreements referenced impose little to no monitoring on some types of water uses while requiring consistent, accurate measurements for other uses in other locations. For example, the Amended and Restated White Mountain Apache Tribe Water Rights Quantification Agreement (2013) requires the use of stream gages, precipitation gages, and includes specific equations to calculate lake runoff. The agreements allow for internal governance of water and provide for annual reporting. For example, the Gila River Indian Community Settlement Agreement of 2005 requires the Community to enact a water code to allocate the water that is the subject of the agreement among the Community and the allottees and produce a series of annual reports of diversions of ground and surface water. The impact of pumping on the aquifers is generally recognized and addressed by all agreements implicitly or explicitly. The Soboba Band of Luiseño Indians Settlement Agreement (2006), for example, requires water to be used to recharge the aquifer to mitigate overdrafting.

The agreements are not uniform because the circumstances are not uniform and the sources of water vary from water primarily flowing through or under the reservation to water sources that primarily originate outside of the reservation. As an example of the latter situation, more than 80% of the water referenced in the Tohono O'odom Settlement Agreement comes from sources off the reservation. In no instance are the Settlement Agreements of valuable water rights reduced to one or two broad sweeping paragraphs. *See* Amended and Restated White Mountain Apache Tribe Water Rights Quantification Agreement (2013) (97-page agreement plus exhibits totaling 795 pages); Soboba Band of Luiseño Indians Settlement Agreement (2006) (24-page agreement plus exhibits totaling 109 pages); Gila River Indian Community Settlement Agreement of 2005 (295-page

agreement plus exhibits totaling 3374 pages); and Tohono O'odom Settlement Agreement (2003) (52-page agreement plus exhibits totaling 258 pages). The lesson to be learned from the agreements reached by the tribes with parties from the surrounding communities, utilities, and local, state, and federal governments is that viable water agreements are holistic, require detailed descriptions of water uses, long range planning, recognition of the impact of various types of water uses and water sources, judgments to be made about priorities, and a commitment to regular reporting and quantifying certain types of uses.

V. Federal Reserved Water Rights and Tribal Self-Determination

The United States makes the further argument that the inclusion of attributes of place of use, point of diversion, number of acres irrigated, and period of time in a decreed federal reserved water right would infringe on tribal sovereign powers of self-government. It argues at length that the Hopi Tribe has the "inherent sovereign power to regulate how, where, and by whom its reserved water rights are used once quantified" and, any descriptive characteristic of the reserved water right that limits that power constitutes impermissible state regulation. U.S. Motion at 8. It bases its argument on decisions that consider the relative authority of Indian tribes and the States within reservation boundaries. U.S. Motion at 8-12.

State regulatory authority over a tribal reservation may be prohibited because it is pre-empted by federal law or because it impermissibly infringes on the right of tribes to self-government. *Colville Confederated Tribes v. Walton,* 647 F. 2d at 50. At work here, however, is not the exercise of the State's regulatory authority. As explained by the LCR Coalition, "[i]t is not necessary to delve

into the complex jurisprudence governing state authority within Indian reservations in order to determine the attributes required for adjudication of federal rights. This Court's authority over reserved water rights is derived from the McCarran Amendment and extends no further than the express terms set forth in that statue." LCR Response at 5 (March 9, 2020). State regulation by the executive branch of state government is not synonymous with the powers exercised by the State court to decree and enforce federal reserved water rights. *Colville Confederated Tribes v. Walton,* 647 F. 2d at 53. The Wyoming court rejected a similar argument that failed to distinguish between the power exercised by the two separate branches of government in *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 115 (Wyo. 1988), *aff'd sub nom. Wyoming v. United States*, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342 (1989), *abrogated by Vaughn v. State*, 962 P.2d 149 (Wyo. 1998) ("The role of the state engineer is thus not to apply state law, but to enforce the reserved rights as decreed under principles of federal law.")

The courts have also considered and rejected the argument that the adjudication of a water right claimed by the United States to have been reserved to the United States impairs tribal sovereignty or self-determination. *Colorado River*, 424 U.S. at 813; *United States v. Superior Court In & For Maricopa County*, 144 Ariz. 265, 276-77 ("Application of state adjudicatory procedures to water claims does not interfere with trial self-government").

VI. Conclusion

Federal courts have neither defined federal reserved water rights in broad strokes nor issued decisions directing that federal reserved water right could not be defined by attributes such as place

of use or quantity measured by flow rate rather than volume or volume in addition to flow rate. As stated by the Navajo Nation, decreed rights "for an Indian tribe must include sufficient attributes to allow enforceable administration of such water rights." Navajo Response at 2 (March 9, 2020). The characteristics advocated by the LCR Coalition do not uniformly apply to all water rights because, as it recognized, for example, a water right for a domestic use will not properly include a description of a number of irrigated acres. Quantity may be appropriately measured by flow rate, consumptive use, or volume depending upon the type of use. Thus, the approach proposed by the City of Flagstaff to identify a minimum set of attributes will be adopted. The following minimum water right attributes shall be established by the Claimants for federal reserved water rights for the Hopi Reservation: beneficial use (type of use); source of water; location of the place of diversion or withdrawal (for consumptive uses); location of the place of use; and quantity[6]. Other attributes may be necessary to define the water right depending on the claimed use such as number or acres or consumptive use in the case of irrigation.

Still unanswered and which will have to be resolved based on the evidence presented at trial is the requisite level of specificity needed for each attribute of a claimed federal reserved water rights. The level of detail necessary to define the attributes of a federal reserved water right can vary significantly depending upon the facts as demonstrated by the decision in *Cappaert v. U.S.*, 426 U.S. at 145-156 compared to *Arizona v. California*. In formulating a test to evaluate the sufficiency of the description of an attribute for an actual or proposed use, consideration will be given to whether the offered description provides a basis upon which the adjudication court will be able to resolve

[6] Priority dates were already considered in the first phase of this proceeding.

disputes or enforce the right in a post-decree action with a minimum of evidence required in that subsequent action to construe or interpret the attribute.

For the reasons stated above,

IT IS ORDERED that the United States' Motion for Partial Summary Judgment on the Attributes Required to Establish an Indian Reservation's Federal Reserved Water Rights is denied. The LCR Coalition's Motion for Entry of Order Regarding the Attributes Necessary for Adjudication of Federal Reserved Water Rights is granted in part and denied in part.

Susan Ward Harris
Special Master

On June 29, 2020, the original of the foregoing was mailed to the Clerk of the Apache County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for the Little Colorado River Adjudication Civil No. 6417-203.