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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

ORDER GRANTING IN PART AND
DENYING IN PART LCR COALITION'S
MOTIONS FOR PARTIAL SUMMARY
JUDGMENT

CONTESTED CASE NAME: *In re Hopi Reservation HSR*

HSR INVOLVED: *Hopi Reservation*

DESCRIPTIVE SUMMARY: LCR Coalition's Motion for Partial Summary Judgment on Hopi Claim to Immemorial Priority granted in part and denied in part. LCR Coalition's Motion for Partial Summary Judgment regarding the Hopi Tribe's and the United States' Claims to Water for Generation of Electrical Power on the Hopi Reservation for Use Outside the Hopi Reservation is denied.

NUMBER OF PAGES: 14

DATE OF FILING: April 13, 2020

1 The LCR Coalition filed a motion for partial summary judgment seeking a ruling that the
2 Hopi Tribe has no water rights with a time immemorial priority date outside Land Management
3 District 6 and no water rights with a time immemorial priority date within Land Management
4 District 6 for water uses that are not aboriginal uses defined as those uses that predate the issuance
5 of the Executive Order of December 16, 1882 (“1882 Executive Order”) for a “long time”
6 corresponding to the establishment of aboriginal title. *LCR Coalition’s Motion for Partial*
7 *Summary Judgment on the Hopi Tribe’s Claim to Immemorial Priority*, filed December 20, 2019
8 (“Motion I”). It filed a second motion for partial summary judgment that the Hopi Tribe and the
9 United States are not entitled to federal reserved rights for water to support a power plant on the
10 Hopi Tribe scaled to generate power to be sold outside the Hopi Reservation. *LCR Coalition’s*
11 *Motion for Partial Summary Judgment Regarding the Hopi Tribe’s and United States’ Claims to*
12 *Water for Generation of Electrical Power on the Hopi Reservation for Use Outside the Hopi*
13 *Reservation*, filed December 20, 2020. (“Motion II”). Arizona State Land Department and the
14 City of Flagstaff joined Motion I and Motion II and Salt River Project Agricultural Improvement
15 and Power District and Salt River Valley Water Users’ Association joined in Motion I.
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19 **I. Motion I - Immemorial Priority**

20 The Hopi Tribe has no aboriginal water rights to the use of water outside Land
21 Management District 6. Special Master’s Priority Report, Conclusions of Law No. 3 at 19, No. 6
22 at 24, Nos. 7 and 8 at 26-27, *accepted* (with Conclusion of Law no. 6 *accepted as modified*), Jan.
23 25, 2016 Minute Entry at 2, *reconsideration denied*, Order Denying Reconsideration at 5
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1 (“Priority Report”). The Hopi Tribe recognizes that this decision is the law of the case and only
2 subject to review by an appellate court. Hopi Motion for Clarification at 2 (December 31, 2019);
3 Hopi Response at 6. Similarly, the United States does not contest that the Hopi Tribe’s aboriginal
4 water rights are limited to water uses within Land Management District 6. A time immemorial
5 priority date attaches to aboriginal water rights. *U.S. v. Adair*, 723 F.2d 1394, 1413 (9th Cir.
6 1983) cert denied, 467 U.S. 1252 (1984). Accordingly, a time immemorial priority date does not
7 attach to any right to water held by or on behalf of the Hopi Tribe outside Land Management
8 District 6 because the Hopi Tribe has no aboriginal water rights outside of Land Management
9 District 6.
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11 The issue actually in dispute concerns the uses within Land Management District 6 that
12 are entitled to a priority date of time immemorial. The impetus for Motion I appears to be the
13 Hopi Tribe’s Sixth Amended Statement of Claimant in which the Hopi Tribe claims a time
14 immemorial priority date for water used for future domestic, commercial, municipal, and
15 industrial purposes (“DCMI”), future irrigation, expanded future ceremonial and subsistence
16 irrigation, mining and a future power plan, a future solar/thermal power plan, future coal
17 liquefaction/gasification plan, future expansion of cattle operations, future tourism and future
18 recreation. LCR Coalition Statement of Facts in Support of its Motion for Partial Summary
19 Judgment on the Hopi Tribe’s Claim to Immemorial Priority, filed December 20, 2019 at 1. The
20 LCR Coalition seeks a ruling that a time immemorial priority date only attaches to a right for
21 water that was in use prior to the 1882 Executive Order for a period sufficiently long to establish
22 aboriginal title. It does not seek a ruling as to a specific current or future use of water claimed
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1 by the Hopi Tribe or on behalf of the United States on Land Management District 6. Accordingly,
2 this decision that not reach any conclusion about whether any specific use of water on Land
3 Management District Six is an aboriginal water use entitled to a priority date of time immemorial.¹
4 The LCR Coalition argues that the issue presented is purely a question of law. Summary
5 judgement is appropriate on an issue of law. *Orme School v. Reeves*, 166 Ariz. 301, 310 802
6 P.2d 1000, 1009 (1990)

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8 The parties' positions range the full gamut of possibilities on this issue. At one end of the
9 continuum, the Hopi Tribe contends that a time immemorial priority date attaches to all water
10 uses on Land Management District 6 regardless of whether the uses are new uses to be
11 implemented in the future, were in existence at the time of the 1882 Executive Order, or came
12 into existence long before the formation of the Hopi Reservation. The United States makes the
13 nuanced argument that a time immemorial priority date applies to all water uses in Land
14 Management District 6 because all claimed water uses on that land predate the 1882 Executive
15 Order and are thus either aboriginal uses or "modern expressions" of aboriginal uses. The Navajo
16 Nation explicitly acknowledges that a time immemorial priority date does not apply to non-
17 aboriginal uses, but defines aboriginal uses as those in existence at the time of the 1882 Executive
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22 ¹ The Draft Report of the Special Master on Past and Present Uses on the Hopi Reservation (June
23 1, 2019) characterizes uses presented in the first phase of these proceeding as aboriginal or as not aboriginal
24 water uses. The parties have filed objections to the Draft Report that include objections to those
25 characterizations. The question of whether specific historical uses must be in existence at the time of the
26 1882 Executive Order or for a long time before that Order to qualify as an aboriginal use will be resolved
27 in the Final Report submitted pursuant to Ariz. R. Civ. P. 53 and will not be addressed in this decision
28 which is part of the future uses phase of the proceedings.

1 Order. The LCR Coalition argues that a time immemorial priority attaches only to aboriginal uses
2 defined as uses of water in place long before the creation of the Hopi Reservation.

3 Under federal law, the date associated with the creation of a reservation serves as the
4 priority date for water necessary to fulfill the purposes of the reservation. *Cappaert v. United*
5 *States*, 426 U.S. 128, 138 (1976); *Winters v. United States*, 207 U.S. 564 (1908); *Colville*
6 *Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981). In 1983, the federal court created
7 an exception to this rule. It addressed an issue that it characterized as one of first impression and
8 defined that issue by the parties' positions as follows:
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10 The State and individual appellants argue that an implied reservation
11 of water cannot have a priority date earlier than establishment of the
12 reservation. The Government and the Tribe argue that a pre-
13 reservation priority date is appropriate for tribal water uses that pre-
14 date the establishment of the reservation. We have been unable to
15 find any decisions that squarely address this issue.

16 *U.S. v. Adair*, 723 F.2d at 1413.

17 The court rejected the State's position finding that it "ignore[d] one of the fundamental
18 principles of prior appropriations law—that priority for a particular water right dates from the
19 time of first use." *Id.* at 1414. The court concluded that aboriginal water uses "necessarily carry
20 a priority date of time immemorial." *Id.* In a later case, the court again found the existence of an
21 aboriginal use to be the requisite basis for a time immemorial priority date. *Joint Bd. of Control*
22 *of Flathead, Mission & Jocko Irr. Districts v. United States*, 832 F.2d 1127, 1131 (9th Cir. 1987)
23 (finding aboriginal rights to "fish on the lands and waters in question before the reservation was
24 created, the priority date of the reserved water right for fishery purposes is time immemorial.").

1 The Hopi Tribe contends that a time immemorial priority date can be decoupled from an
2 aboriginal use and that any use on Land Management District 6 has a time immemorial priority
3 date. In support of its position, the Hopi Tribe relies exclusively on the Priority Report. The
4 Priority Report did not address any particular water use. Instead, it addressed the general issue:
5 “Does the Hopi Tribe hold water rights with a priority of time immemorial?” Priority Report at
6 6. This issue was decided within the context of a determination of the Hopi Tribe’s aboriginal
7 title to the land. The relevant findings in the Priority Report are as follows:
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9 Conclusion of Law No. 2. The lands within the boundaries of
10 Land Management District 6, as approved on April 24, 1943, and legally
11 enlarged thereafter, are aboriginal lands of the Hopi Indians.

12 Aboriginal title includes “an aboriginal right to the water used
13 by the Tribe as it flow[s] through its homeland.”²

14 Conclusion of Law No. 3. The aboriginal land title of the Hopi
15 Tribe includes an aboriginal right to use the water that flows on those
16 lands.

17 Conclusion of Law No. 4. Aboriginal “water rights necessarily
18 carry a priority date of time immemorial;” where “a tribe shows its
19 aboriginal use of water ... the water right thereby established retains a
20 priority date of first or immemorial use.”³ Aboriginal rights “arise[ing]
21 from occupancy and use of land by the Indians from time immemorial.”⁴
22 Aboriginal water rights predate the establishment of an Indian
23 reservation.

24 ² 575 F.2d at 246

25 ³ 723 F.2d at 1414.

26 ⁴ *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), *cert.*
27 *denied*, 526 U.S. 1966 (1999).

1 Conclusion of Law No. 5. The water rights that the Hopi Tribe
2 uses on the lands within the boundaries of Land Management District 6
3 have a priority of time immemorial.

4 Priority Report at 19.

5 In reaching its Conclusions of Law, the Priority Report explicitly referenced and relied
6 on the *Adair* holding that a time immemorial priority date applies only where there is a showing
7 of aboriginal uses. Given the context of the relevant portion of the Priority Report and the fact
8 that the Priority Report cites the *Adair* decision as the basis for the conclusions of law, the Priority
9 Report cannot reasonably be interpreted as concluding in direct contradiction of the *Adair*
10 decision that a time immemorial priority date applies to non-aboriginal or new uses. Nor can the
11 Priority Report be read as reaching a conclusion that violates the fundamental principle cited by
12 the *Adair* Court that the date of first use controls the priority date.
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14 The adoption of the Hopi Tribe's interpretation is also barred by directive that if there
15 were a conflict between state and federal law, state courts must apply federal substantive law to
16 the determination of Indian rights in state water adjudications. *In re Gen. Adjudication of All*
17 *Rights to Use Water in Gila River Sys. & Source*, 195 Ariz. 411, 416–17, ¶ 13, 989 P.2d 739, 744–
18 45 (1999); *see also Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983).
19 The Hopi Tribe's proposed interpretation of the Priority Report would create a conflict with
20 established federal rule: "If the use for which the water was reserved is a use that did not exist
21 prior to creation of the Indian reservation, the priority date is the date the reservation was created."
22 *State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 219 Mont.
23 76, 92, 712 P.2d 754, 764 (1985); *State of Ariz. v. State of Cal.*, 373 U.S. 546, 600 (1963). Thus,
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1 a time immemorial priority date only applies to aboriginal water uses, as opposed to non-
2 aboriginal water uses, on Land Management District 6.

3 The United States claims that all water uses in Land Management District 6, whether
4 currently operational or expected to become operational in the future, are either aboriginal uses
5 or “modern expressions” of aboriginal uses and therefore are entitled to a priority date of time
6 immemorial. For example, the United States equates the water use associated with the Hopi
7 Tribe’s pre-1882 coal mining practices with water needed for unspecified heavy industrial and
8 economic development activities.
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10 The United States bases its argument on the assertion that a water use can retain its
11 aboriginal character under federal law even though the amount of water needed for the aboriginal
12 practice changes or the methods or technology involved with the aboriginal practice necessitating
13 the water use changes. It first cites to the *Adair* decision which dealt with the appropriate test to
14 be applied to the amount of water that retains an aboriginal character.⁵ Quantity of water is not
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18 ⁵ The court limited the quantity of water to which the Tribe could claim aboriginal rights to that
19 amount:

necessary to support its hunting and fishing rights as currently exercised to
20 maintain the livelihood of Tribe members, not as these rights once were
21 exercised by the Tribe in 1864. . . . Implicit in this “moderate living”
22 standard is the conclusion that Indian tribes are not generally entitled to the
23 same level of exclusive use and exploitation of a natural resource that they
enjoyed at the time they entered into the treaty reserving their interest in the
resource, unless, of course, no lesser level will supply them with a moderate
living.

24 *United States v. Adair*, 723 F.2d 1394, 1414–15 (9th Cir. 1983).

1 relevant to the Motion I because the LCR Coalition put at issue the types of water uses, not the
2 amounts of water use, to which a time immemorial priority date attaches.

3 The United States also cites to *N.M. ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993 (D.N.M.
4 1985), but this decision does not address the issue of whether a time immemorial priority date
5 attaches to a particular current or future water use. In *Aamodt*, the court adjudicated the rights of
6 the Pueblos de Nambe, Pojoaque, San Ildefonso and Tesuque (Pueblos) to water from Rio
7 Tesuque and the Rio Nambe or Pojoaquea (the stream system) for domestic and irrigation uses.
8 The court found that the prior to the first European entry in 1540, the Pueblos were diverting water
9 from the stream system for domestic and irrigation uses and they continued to do so during the
10 Spanish period from 1598 to 1921, under the control of the Mexican government, and through the
11 time that the United States occupied the territory beginning in 1846. Based on this historical use,
12 the court concluded that the Pueblos had prior rights to use water for domestic and irrigation
13 purposes based on aboriginal water rights as modified by Spanish and Mexican law and protected
14 under federal law except with respect to those lands for which ownership was terminated by the
15 1924 Pueblos Lands Act. This decision affirmed water rights for uses that the court found
16 predated European contact and it did not address new types of water use.

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19 The remaining three cases cited by the United States focus on the scope of fishing rights
20 reserved by tribes in treaties at customary places and the acceptable limitations that could be
21 imposed on those rights. In each case there was no issue that the claimed right, a right to fish,
22 involved a new or future use of water to support the rights reserved in the treaty. Each decision
23 specifically referenced the importance and established historical reliance of the tribes on fishing.
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1 *Grand Traverse Band of Ottawa & Chippewa Indians v. Dir., Michigan Dept. of Nat. Res.*, 141
2 F.3d 635, 639 (6th Cir. 1998) (court noted that “dependence on fish for both subsistence and
3 commercial resources stretched back as far as 10,000 B.C.”); *United States v. State of Mich.*, 471
4 F. Supp. 192, 214 (W.D. Mich. 1979) (“By the time of first European contact around 1650 A. D.
5 fishing had come to be of enormous importance to the Upper Great Lakes Indians. All traditional
6 fishing methods were still in use, but the most productive was gill netting from canoes.”); *United*
7 *States v. State of Wash.*, 384 F. Supp. 312, 350 (W.D. Wash. 1974), *aff’d and remanded*, 520 F.2d
8 676 (9th Cir. 1975)(“In pretreaty times . . .one common cultural characteristic among all of these
9 Indians was the almost universal and generally paramount dependence upon the products of an
10 aquatic economy, especially anadromous fish, to sustain the Indian way of life.”).⁶ In each of
11 these decision, no dispute exists that the ultimate right involved is the right to fish in customary
12 locations, which is the right granted in the treaties. These cases do not address the issue raised by
13 the United States’ that the definition of an aboriginal use is sufficiently elastic to encompass any
14 use of water that the Hopi Tribe may claim or the United States may claim on behalf of the Hopi
15 Tribe in Land Management District 6.

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18 In a treaty interpretation case cited by the LCR Coalition, *Lac Courte Oreilles Band of*
19 *Lake Superior Chippewa Indians v. State of Wis.*, 758 F. Supp. 1262, 1270 (W.D. Wis. 1991), the
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22 ⁶ The court also stated that the reserved right to fish “exists in part to provide a volume of fish which
23 is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who
24 may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor
25 the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.” *United States*
26 *v. State of Wash.*, 384 F. Supp. at 401.

1 court had to determine the nature and scope of the usufructuary rights reserved in two treaties to
2 an Indian tribe to exploit timber. As demonstrated by the reasoning in that case, the determination
3 of the nature and scope of a right based on historical use required a factual determination based
4 on a complete evidentiary record. Thus, the issue of the scope of the aboriginal rights claimed by
5 the Hopi Tribe and on behalf of the Hopi Tribe cannot be determined as a pure question of law
6 and in the absence of evidence about the claimed future uses.
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8 The classes of future uses may not, however, be as numerous as indicated by either the
9 Hopi Tribe's Sixth Amended Statement of Claimant or the United States' Response. In its
10 Response, the Hopi Tribe identified six broad categories of use on Land Management District 6:
11 DCMI, agricultural, subsistence and ceremonial, water storage, livestock, and recreation. The
12 Hopi Tribe's Response to the LCR Coalition's Statement of Fact filed February 10, 2020 at 7.
13 The Hopi Tribe does not identify any water use for mining/power plants or economic development
14 in Land Management District 6. *Id.*
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17 **II. Motion II – Generation of Electrical Power on Hopi Reservation for Use Outside the** 18 **Hopi Reservation**

19 The LCR Coalition also filed a motion seeking partial summary judgment denying any
20 water for use by or on behalf of the Hopi Tribe to generate power on the Hopi Reservation that
21 will be conveyed across transmission lines located on the Navajo Reservation for use outside the
22 Hopi Reservation. It argues that the Hopi Tribe does not have and will not have the ability to
23 convey power over the Navajo Reservation for sale off of the Hopi Reservation. LCR Coalition's
24 Reply to the United States filed March 9, 2000 at 2. It also cites to Judge Ballinger's much-
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1 appealed decision as to the sources of water to which the Hopi Tribe could assert federal reserved
2 water rights. The decision applied to a narrow issue that is separate from the current issue about
3 which there is no dispute as to the legal access to the proposed sources of water and involves
4 additional future easements to transport energy off the Hopi Reservation to generate new revenue
5 streams.

6 Unlike Motion I, Motion II does not purport to raise an issue of law. Under the general
7 rule, summary judgment is appropriate only if the moving party shows that there is no genuine
8 dispute as to any material fact. Ariz. R. Civ. P. 56(a). In determining whether there is a genuine
9 issue of material fact, the court must “view the facts and reasonable inferences therefrom in the
10 light most favorable to the party opposing the motion.” *Andrews v. Blake*, 205 Ariz. 236, 240
11 ¶13, 69 P.3d 7, 11 (2003). The application of these rules must also take into account the context
12 in which this issue is presented. This case is an adjudication of the water rights for an Indian
13 Reservation about which the Arizona Supreme Court has at least twice emphasized is a fact-
14 intensive inquiry that implicitly imposes a higher barrier to reaching a conclusion that a factual
15 issue as to proposed future water use can be resolved on summary judgment. *In re Gen.*
16 *Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 318, ¶ 38, 35
17 P.3d 68, 79 (2001); *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. &*
18 *Source*, 195 Ariz. 411, at 420, 989 P.2d 739 at 748, ¶ 31 (1992).

19 In its Reply, the LCR Coalition defined the issue as whether there is factual dispute about
20 whether an easement can be obtained over the Navajo Reservation for the purpose of generating
21 income from outside the Navajo and Hopi Reservation from the transmission of energy from
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1 facilities that the Hopi proposes to build along the border between the two reservations. As
2 demonstrated in the proceeding on past and present uses, an effective easement existed for a slurry
3 line across the Hopi and Navajo Reservations to deliver coal, in which both tribes had an interest,
4 off the reservations for the mutual economic benefit of both tribes. *See* United States' Response
5 to LCRC Statement of Facts filed February 10, 2020, at 7, ¶63. Thus, in the past an easement
6 across reservation lands was achieved where it provided mutual economic benefit. In its
7 Response, the Hopi cite to the testimony of Mr. Carroll Onsaе, the President and General Manager
8 of the Hopi Telecommunications, Inc. and the Hopi Utilities Corporation about the Navajo
9 Nation's agreements to sell easements across its reservation to facilitate current projects on the
10 Hopi Reservation. Again, an agreement that provided economic benefits to both parties resulted
11 in an easement across the Navajo Reservation for the benefit of the Hopi Tribe. Although the
12 Navajo Nation states that it agrees with the LCR Coalition that any proposal by the Hopi Tribe to
13 transmit electricity by constructing a *new* transmission line *across the Navajo Reservation* is not
14 "achievable from a practical standpoint," it provides no explanation of any physical impediment
15 to the construction of a transmission line even in the same general area where a functional
16 transmission line already exists. Navajo Response filed February 10, 2020 at 2 (emphasis in
17 original). There are clearly material issues in dispute about whether the Hopi Tribe will be able
18 to negotiate an agreement with the Navajo Nation for an additional easement or amendments to
19 existing easements to permit the transmission of power off the Hopi Reservation.
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