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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 6417-300
ORDER DENYING NAVAJO NATION'S
MOTION FOR *DE MINIMUS*
TREATMENT OF TRIBAL RESERVED
RIGHTS CLAIMS FOR STOCKPONDS,
STOCK AND WILDLIFE WATERING

CONTESTED CASE NAME: *In re Navajo Nation*
HSR INVOLVED: None
DESCRIPTIVE SUMMARY: Proceedings recommended for *de minimis* claims in the Silver
Creek watershed, but never implemented, will not be modified and adopted to adjudicate claims for
the Navajo Nation's claims brought under federal law for water for stock and wildlife on the
Navajo Reservation.
NUMBER OF PAGES: 13
DATE OF FILING: May 6, 2019

1 On June 1, 2018, the Navajo Nation filed its First Amended Statement of Claimant that
2 included claims for federal reserved water rights based on stockpond and stock and wildlife
3 watering uses. It identified 2,608 impoundments, 1,823 wells, and 585 springs that provide water
4 for livestock and wildlife watering. It attached an inventory to its amended Statement of Claimant
5 consisting of hundreds of pages of specific information about the individual impoundments, wells,
6 and springs in support of its claims for 12,685 acre-feet of storage capacity and 4,864 acre-feet of
7 water annually for livestock and wildlife use.¹

9 The Navajo Nation has moved for the adoption of summary procedures based on those
10 recommended for, but not implemented in, the adjudication of water rights in the Silver Creek
11 watershed to adjudicate its federal reserved water rights for stockponds and stock and wildlife
12 watering uses that currently exist. It specifically excluded future use from its request that summary
13 procedures be used to determine water rights stating that the rights for current uses that it proposes
14 to be summarily adjudicated “would serve as the baseline for the quantification of the Nation’s
15 future use claims.” Response Brief of the Navajo Nation Addressing Sub-Issues Identified by the
16 Court to Resolve the Question of *De Minimis* Treatment of Tribal Reserved Rights Claims for
17 Stockponds, Stock and Wildlife Watering, filed March 13, 2019 (“Navajo Response”) at 2.
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21 **A. The Silver Creek Summary Proceedings**

22 In 1994 the Special Master for the Little Colorado River Adjudication recommended the
23 implementation of a set of simplified procedures to be used in the Silver Creek watershed to
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25 ¹ The amount of work that the preparation of this inventory must have necessitated was clearly anticipated by
26 the parties as evidenced by representations made at the initiation of this adjudication. Counsel for the United States
27 and the Navajo Nation represented that it would require funding from multiple budget cycles of the two governments
28 to fully update the Statements of Claimant for all claims for water rights. Proposed Schedule for the Submission of the
Navajo Nation’s and the United States’ (as Trustee for the Navajo Nation) Statements of Claimant, filed November 8,
2016, at 3-5.

1 establish the attributes for water rights to stockponds with a capacity of four acre-feet or less and
2 stock and wildlife watering uses. *Memorandum Decision, Findings of Fact, and Conclusions of*
3 *Law for Group 1 Cases Involving Stockponds, Stock watering, and Wildlife Uses*, filed April 20,
4 1994 (“Silver Creek Decision”). The Navajo Nation supports the proposition that water right
5 characteristics must specifically define its federal reserved water rights to meet the current needs
6 of its stock and wildlife. It explained that “[w]ater right characteristics or attributes are necessary
7 and effective tools for administering water rights, whether decreed for an Indian reservation, the
8 federal government, a state, or other claimant.” Initial Brief of the Navajo Nation Addressing Sub-
9 Issues Identified by the Court to Resolve the Question of *De Minimis* Treatment of Tribal Reserved
10 Right Claims for Stockponds, Stock and Wildlife Watering,” filed January 22, 2019 (“Navajo
11 Brief”) at 5. The appropriate water right characteristics that should be determined as part of this
12 process, according to the Navajo Nation, are the characteristics required by Arizona law and the
13 law of the Navajo Nation.
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16 It states that “as a general proposition” the appropriate characteristics necessary for a
17 summary adjudication of claims for stockponds, and stock and wildlife watering are those
18 characteristics identified in the Silver Creek Decision, which were: 1) Proposed water right
19 number; 2) Statement of Claimant; 3) Basis of water right; 4) Owner of the water right; 5)
20 Beneficial use (type of use); 6) Priority date; 7) Source of water; 8) Place of use; and 9) Quantity.
21 The Silver Creek Decision provided for simplified procedures to determine these water right
22 characteristics. Notwithstanding the detailed inventories provided by the United States relating to
23 water needs for stock and wildlife on the reservation, the United States contests this proposed list
24 because it believes that federal reserved water rights for an Indian reservation are determined in the
25 aggregate without specificity as to place of use and point of diversion. Thus, its objection to the
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1 list of characteristics is not because they would be used in a summary adjudication but because
2 they are unnecessary to a complete adjudication of water rights.

3 The Navajo Nation proposed a number of modifications to the procedures recommended by
4 the Silver Creek Decision. With regard to the priority date, the Silver Creek Decision relied upon
5 the date of first apparent use determined by the Arizona Department of Water Resources
6 (“ADWR”). The Navajo Nation would modify this procedure and set the priority date as the date
7 of the reservation applicable to the land on which the use occurred. With regard to the source of
8 water and place of use, the Silver Creek Decision intended that ADWR’s assessment from a final
9 hydrographic survey report (“HSR”) would provide that information absent agreement from the
10 litigants. The Navajo Nation proposes that the information for those characteristics would be taken
11 from the Statement of Claimant, presumably the Statement of Claimant filed by the Navajo Nation
12 if there were an inconsistency between the Statements of Claimant filed by the Navajo Nation and
13 the United States. The Silver Creek Decision made a distinction between incidental and intentional
14 watering use. The Navajo Nation would define all wildlife watering as an intentional use. Finally,
15 the Navajo Nation would expand the definition of stock watering to encompass all surface water
16 sources and groundwater pumped from “small wells”. Navajo Brief at 5-6. It later clarified that
17 the current briefing is limited to surface water claims although it continues to urge summary
18 adjudication procedures that encompass groundwater pumped for livestock and wildlife uses.
19 Navajo Response at 3.

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22 The unqualified acceptance of information provided by the claimant to define a water right
23 characteristic that has not been subjected to a review by a neutral third party, i.e., ADWR, and
24 incorporated into a final report, distributed to the claimants in a watershed and subjected to
25 objections is a material change to the approach detailed in the Silver Creek Decision. The
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1 proposed change to the determination of the priority date and the desired inclusion of groundwater
2 with surface water sources highlight the fact that the Silver Creek procedures were developed for
3 water rights under state law and would need to be revised to define water rights in accordance with
4 federal reserved water rights for Indian reservations. The Arizona Supreme Court requires that a
5 federal reserved water right “to groundwater may only be found where other waters are inadequate
6 to accomplish the purpose of a reservation. To determine the purpose of a reservation and to
7 determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries
8 that must be made on a reservation-by-reservation basis.” *In re General Adjudication of All*
9 *Rights to Use Water in the Gila System and Source*, 195 Ariz. 411, 989 P. 2d 739, (1999) (“*Gila*
10 *III*”).
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12 The Navajo Nation’s proposed modifications to the Silver Creek procedures to
13 accommodate federal law also demonstrate that not all claimants are similarly situated in this
14 general adjudication of the Little Colorado watershed. Different rules apply to the adjudication of
15 federal reserved water rights for an Indian reservation that do not apply to claimants seeking a
16 water right under state law. The determination of whether to adopt and the type of summary
17 procedures that should be adopted must take into consideration not only the physical attributes of
18 the watershed at issue but also the nature of the claims and the legal findings required to adjudicate
19 those claims.
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22 23 **B. Cost-Benefit Analysis**

24 The Silver Creek Decision developed the summary procedures to be used as a case
25 management tool for certain *de minimis* claims based on a decision that the benefits of summarily
26 resolving certain claims outweighed the costs of delaying a complete adjudication of the water
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1 rights. Silver Creek Decision at 9. Or as stated in the reverse by the LCR Coalition, the decision
2 to adopt summary procedures entailed a cost-benefit analysis to determine whether the burden on
3 judicial, administrative and litigant resources justified the benefit of a comprehensive adjudication
4 of those claims. LCR Coalition's Initial Brief on *De Minimis* Issues and Partial Joinder in Salt
5 River Project's Initial Brief on *De Minimis* Issues, filed January 22, 2019, at 6.
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8 **1. Costs**

9 In the Silver Creek Decision, the Special Master considered the time and expense that the
10 parties would have to incur to prove, and the court to resolve, each separate characteristic of a
11 water right, which included: owner of the water right, the legal basis for the water right, priority
12 date, beneficial use, source of water, location of the place of use, and annual volume.
13 Determinations of characteristics such as owner of the water right, the basis of the right and the
14 priority date could have required, in addition to factual findings, lengthy proceedings on legal
15 issues unique to the individual claims that could have imposed significant costs in time and
16 resources. Even characteristics that should not have been in dispute such as the actual location of
17 the water use could cause the parties to incur expense. In the early years of the adjudication, a
18 description of the physical location of a stockpond necessitated a survey with its attendant costs in
19 time and money. The Silver Creek procedures were designed to reduce this cost by permitting the
20 physical locations of the diversion and use of water for stockponds to be identified as located
21 within an area of 40 square acres or, in some cases, within an area of 10 square acres.
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24 The hundreds of claims requiring adjudication in the Silver Creek watershed were filed by a
25 large number of individual claimants. The Special Master, in addition to the time and resources
26 necessary to try and decide the individual cases, would have had to invest administrative time and
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1 resources to manage hundreds of cases over extended time periods. The summary procedures
2 designed to streamline the determination of water rights provided the additional benefit that by
3 simplifying the process the cases would proceed more quickly thereby alleviating a substantial
4 management burden.

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6 Not all of the costs considered in the Silver Creek Decision are present in this case. Here,
7 there is only one case, not hundreds, which must be managed. Costs in time and resources to
8 determine certain characteristics such as the owner of the right and the legal basis for the claims
9 will not to be individually determined for each claim made by and on behalf of the Navajo Nation.
10 Those characteristics should be decided by a single decision for all claims, if there is in fact, any
11 dispute with respect to these two water right characteristics. The applicable priority date under
12 federal law is not a function of the date on which water was put to beneficial use and, therefore, is
13 not unique to each claim. Modern mapping capabilities have reduced the need for the simplifying
14 procedures adopted in 1994 because of the accuracy and availability of satellite and aerial mapping
15 of stockponds. The Navajo Nation and the United States, as described above, have submitted
16 detailed statements of claimant that identified the location of the claimed uses. In its preliminary
17 HSR, ADWR has been able to investigate those claims and reported that it used GIS-based
18 topographic maps and imagery to conduct an analysis of the 2,609 impoundments that were
19 identified in common by the Navajo Nation and the United States.
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22 The adoption of summary proceeding will impose additional costs occasioned by the delay
23 of the scheduled trial of the claimed rights and the cost to the State for ADWR to conduct the
24 necessary analysis. Although ADWR did prepare a technical study for Silver Creek, the study in
25 this case would undoubtedly be more complicated than that performed for the Silver Creek
26 watershed. The Silver Creek proceedings concerned a single watershed whereas the Navajo
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1 Reservation encompasses multiple physical watersheds. As the complexity of the report ratchets
2 upwards, it is not unreasonable to expect that the grounds for objections would increase. As a
3 result, time and resources that could have been spent directly adjudicating water rights and
4 grappling with the time-intensive issues such as priority dates would instead be spent developing
5 procedures that would subsequently be used to determine water rights.
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8 **2. Benefits**

9 The Silver Creek Decision effectively concluded that a complete adjudication of each claim
10 for a water right provided little benefit to the claimants. The Special Master found that the 110
11 stock watering uses claimed in the Silver Creek watershed could not be called, meaning that no
12 enforcement action could be taken against the users. With respect to a class of smaller stockponds,
13 he found that only users within the watershed could make a call on the stockponds, but he
14 anticipated that such calls would occur infrequently. He included a specific factual finding that no
15 other stockpond user was known to have filed an objection to another stockpond user's claim for a
16 water right. *Silver Creek Decision* at 15, 24-27. The enforceability of a water right was apparently
17 not perceived as a significant benefit to the owner of the water right due to the absence of a
18 practical method to administer or enforce the water rights and because of the finding that other
19 water users would rarely bring an enforcement action.
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22 The assumption made in the Silver Creek Decision that there would be few, if any,
23 enforcement actions brought in the future cannot be made in this case. There are no fewer than 26
24 parties currently participating in this preliminary stage of the proceeding prepared to examine the
25 ADWR's final HSR and file appropriate objections to water rights proposed for the Navajo
26 Reservation. Although the United States dismisses the possibility that an enforcement action could
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1 occur between the Navajo Nation and the Hopi Tribe, it does acknowledge that enforcement
2 actions could be brought by or on behalf of the Navajo Nation to protect its federal reserved water
3 rights against other water users neighboring the Navajo Reservation claiming water rights under
4 state law. United States' Initial Brief on the Potential Use of a *De Minimis* Proceeding to
5 Determine Water Rights Based on Stock and Wildlife Watering and Stockpond Uses, filed
6 February 25, 2019, at 11. Further, the parties have a history of disagreements about claims for
7 water rights on the Navajo Reservation according to the City of Flagstaff's report that the parties
8 "in this adjudication have long engaged in settlement discussions that unfortunately ended in 2012
9 without an agreement." City of Flagstaff's Joinder in LCR Coalition's Initial Brief on *De Minimis*
10 Issues and Partial Joinder in Salt River Project's Initial Brief on *De Minimis* Issues, filed January
11 22, 2019, at 2. In this case where water uses may affect neighboring users or be affected by
12 neighboring users and neighboring users may be prepared to bring enforcement actions, the
13 enforceability of a water right cannot be disregarded in a determination of whether summary
14 proceedings should be implemented.

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17 Salt River Project ("SRP") argues that the rights summarily adjudicated under the Silver
18 Creek Decision would have given the owner the benefit of only an acknowledgment that a water
19 right existed and should be allowed to exist, but would have lacked the "legal implications as other
20 rights that are fully adjudicated." Salt River Project's Initial Brief on *De Minimis* Issues, filed
21 January 22, 2019, ("SRP Brief") at 13. In support of its position that summarily adjudicated water
22 rights for *de minimis* water uses are not enforceable, SRP makes three arguments paraphrased as
23 follows. First, it contends that *de minimis* uses involve so little water that the law does not
24 recognize the existence of a water right. Second, the expense to fully consider the water right is so
25 prohibitive that the court should not adjudicate the existence of the right. Third, summary
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1 adjudication proceedings do not allow for the necessary evidentiary findings so the court cannot
2 adjudicate a water right. SRP Brief at 16. According to SRP's analysis, a summarily adjudicated
3 right is essentially a protective right in the sense that it protects a claimant's ability in a later
4 enforcement proceeding to fully adjudicate the right and make it an enforceable water right.
5 Counsel for the Navajo Nation took essentially the same position at the oral argument on March
6 20, 2019, but stated it differently. If there were an enforcement proceeding concerning a
7 summarily adjudicated water right, that proceeding would be used to fully adjudicate the water
8 right characteristics that had only been summarily determined.
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10 The United States argued that it is premature to deal with the issue of the enforceability of a
11 summarily adjudicated water right. While it is unnecessary at this stage to engage in a full
12 determination of the mechanics and procedures that may be used to enforce an adjudicated federal
13 reserved water right, the consideration that rights resulting from the Navajo Nation's proposed
14 summary adjudication may require extensive post-decree proceedings to fully establish water right
15 characteristics such as a priority date and quantity, must be factored into the cost-benefit analysis
16 used in the Silver Creek Decision.
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18 19 20 **3. Balancing the Costs and Benefits**

21 The Silver Creek Decision addressed an adjudication involving hundreds of claimants who
22 filed a number of claims for water rights related to the water uses for their cattle. Each of those
23 claims potentially raised a host of unique legal and factual issues at a time when even the
24 determination of physical locations imposed an expense. In the analysis, the Special Master
25 determined that the costs of a full adjudication to be incurred by the court and the parties could not
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1 be justified because any resulting fully adjudicated claim would not change the claimant's position
2 and the right would or could not be used to protect the claimed water use.

3 Here there are water right characteristics that can be defined for the entire class of claims
4 and other characteristics such as a priority date that can be defined for groups or classes of claims
5 so a summary proceeding is not necessary to eliminate the costs associated with separate
6 determinations for thousands of claims. Moreover, if any costs were saved by adopting a summary
7 procedures to determine the priority date, those costs will likely have to be incurred at a later date
8 when other water uses are at issue because the priority date for federal reserved water rights are not
9 tied to a particular water uses. The United States and the Navajo Nation have already submitted
10 detailed information about the location of their proposed stock and wildlife watering and
11 stockpond uses that ADWR has been able to investigate, so summary proceedings are not
12 necessary to simplify any physical location requirements. No assumptions can be made that a
13 water right is not necessary to protect a water use from neighboring uses so the costs imposed by
14 this process are not being weighed against a negligible benefit. Finally, the adoption of a summary
15 proceeding would require an investigation to be conducted by ADWR, delay the scheduled trial,
16 and add an additional proceeding. The actual process of constructing appropriate summary
17 proceedings imposes costs on all of the parties. Based on the foregoing, a cost-benefit analysis
18 does not support the creation and adoption of summary proceeding as a reasonable case
19 management tool.
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23 24 **C. Federal Reserved Water Rights**

25 The Arizona Legislature and the Arizona Supreme Court have specified the purposes of the
26 adjudication of federal reserved water rights for an Indian reservation. This case was initiated and
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1 is proceeding ahead of thousands of other claims filed in the Little Colorado River Adjudication
2 because of the legislative determination that an “early quantification and prioritization of Indian
3 and non-Indian federal claims are prudent objectives in order to plan for the impact that the federal
4 water rights may have on the welfare of this state.” 1995 Ariz. Sess. Laws, Ch. 9 Sec. 25(c)
5 (March 17, 1995). A final decree that has a tail of summarily adjudicated rights to be quantified
6 and prioritized over years of future enforcement proceedings would not be consistent with
7 legislative intent.
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9 The LCR Coalition argues that federal reserved water rights cannot be summarily
10 adjudicated for an Indian reservation because those rights are based on the minimal need of the
11 reservation which is an “inevitably fact-intensive inquir[y].” *In re Gen. Adjudication of All Rights*
12 *to Use Water in Gila River Sys. & Source* 201 Ariz. 307, 316 ¶28, 35 P. 3d 68, 77 (2001) (“*Gila*
13 *V*”). The Arizona State Land Department, citing to *In re Gen. Adjudication of All Rights to Use*
14 *Water in the Gila River Sys. & Source*, 231 Ariz. 8, 289 P.3d 936 (2012), emphasized that federal
15 reserved water right must quantify the amount of water necessary to fulfill the purpose of the
16 reservation. These decisions necessarily require a holistic approach that results in a final,
17 enforceable decree defining federal reserved water rights for the entire Navajo Reservation. Here,
18 the two parties favoring the adoption of summary proceedings anticipate that the water rights
19 determined under those proceedings would require further evidentiary findings in enforcement
20 actions initiated after the entry of a final decree to determine key water right characteristics. A
21 final decree that contains summarily adjudicated water rights requiring seriatim adjudication to
22 make findings of fact and conclusions of law necessary for the enforcement or protection of those
23 rights is not consistent with the decisions of the Arizona Supreme Court.
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