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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 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  
  
DATE OF FILING: June 29, 2020

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

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

3 To hone the issue presented by the parties' varying positions more precisely, the parties  
4 appear to agree that a federal reserved water right must be defined by owner, type of use, priority  
5 date, quantity, and source of water. Disagreement exists about whether a federal reserved water right  
6 must specify the location of the point of diversion or withdrawal, the location of the place of use, the  
7 number of acres irrigated (in the case of irrigation rights) and the period of use. Although the parties  
8 appear to disagree, or at least do not explicitly agree to an acceptable unit of measurement to quantify  
9 a federal reserved right, the disagreement may simply be whether a particular use, such as irrigation,  
10 requires more than one unit of measurement to quantify the right, e.g., a flow rate or return rate in  
11 addition to a total volume.  
12

13 The resolution of the appropriate characteristics necessary to define an enforceable federal  
14 reserved water rights for an Indian reservation first requires an examination of the federal reserved  
15 water right doctrine and the interplay between state and federal law in a general adjudication of  
16 federal reserved water rights, before turning to decisions that have defined federal reserved water  
17 rights and the argument made by the United States that a federal reserved water right improperly  
18 impinges upon the Hopi Tribe's sovereign powers of self-government.  
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## 21 **I. Federal Reserved Water Right Doctrine**

22

23 The United States has the power to reserve water for the benefit of its appurtenant land and  
24 when it exercises that power, explicitly or implicitly, it creates a water right enforceable against other  
25

1 appropriators. *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed. Cir. 2015) (“This reserved water  
2 right gives the United States the power to exclude others from subsequently diverting waters that  
3 feed the reservation.”) The ability of the United States to legally restrain competing water users  
4 from adversely impacting the use of water on its land appurtenant to that water source is a critical  
5 component of a federal reserved water right. *See In re the General Adjudication Of All Rights To*  
6 *Use Water In The Gila River System And Source* 195 Ariz. 411, 420, ¶29, 989 P.2d 739, 748 (2005)  
7 (“A theoretically equal right to pump groundwater, in contrast to a reserved right, would not protect  
8 a federal reservation from a total future depletion of its underlying aquifer by off-reservation  
9 pumpers.”) For more than a century, the doctrine of federal reserved water rights has provided the  
10 legal basis for the federal government to obtain a remedy at law, e.g., an injunction, to protect the  
11 use of water appurtenant to its land or land it holds in trust. *U.S. v. Rio Grande Dam & Irrigation*  
12 *Co.*, 174 U.S. 690, 703 (1899); *Winters v. U. S.*, 207 U.S. 564 (1908); *U.S. v. Cappaert*, 426 U.S.  
13 128 (1976) (permanent injunction restricted the pumping of irrigation wells on a ranch three miles  
14 from a pool in a national park).

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17 The federal reserved water right doctrine first served as the basis for a legal remedy in *Rio*  
18 *Grande Dam* where the Court enjoined the construction of a dam intended to divert the entire  
19 unappropriated flow of the river finding “in the absence of specific authority from congress, a state  
20 cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on  
21 a stream, to the continued flow of its waters, so far, at least, as may be necessary for the beneficial  
22 uses of the government property.” *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 703. The Court  
23 first applied the doctrine to an Indian reservation in *Winters* where the Court enjoined the  
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1 construction and maintenance of dams that prevented the Fort Belknap Indian Reservation from  
2 diverting water from the Milk River running through northern boundary of the Reservation. The  
3 Court held that “[t]he power of the government to reserve the waters and exempt them from  
4 appropriation under the state laws is not denied, and could not be. [citation omitted]. That the  
5 government did reserve them we have decided, and for a use which would be necessarily continued  
6 through years.” *Winters*, 207 U.S. at 577. During the ensuing decades, the federal courts repeatedly  
7 relied upon the doctrine to enjoin the actions of non-Indian appropriators and to quiet title to water  
8 rights to divert water for the benefit of land included in an Indian reservation. *See, e.g., Colville*  
9 *Confederated Tribes v. Walton*, 647 F.2d 42 (1980); *United States v. Ahtanum Irrigation District*,  
10 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U. S. 988 (1957); *United States v. Walker River*  
11 *Irrigation District*, 104 F.2d 334 (9th Cir. 1939); *Conrad Investing Co. v. United States*, 161 Fed.  
12 829 (9th Cir. 1908).

13  
14 Here, the United States asserts federal reserved water rights not in an individual case to enjoin  
15 the actions of other water users but as part of a general adjudication of all water rights in the Little  
16 Colorado River Watershed. The Arizona Supreme Court summarized the factual basis motivating  
17 and procedural considerations relevant to a general adjudication:  
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20 The problem, therefore, is clear. Since there is not enough water to meet everyone’s  
21 demands, a determination of priorities and a quantification of the water rights  
22 accompanying those priorities must be made. Obviously, such a task can be  
23 accomplished only in a single proceeding in which all substantial claimants are before  
24 the court so that all claims may be examined, priorities determined, and allocations  
25 made.

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

3       The general stream adjudication will determine “the nature, extent and relative priority of the  
4 water rights” of all who use the water of in that river system and source and generate a definitive  
5 catalog of adjudicated rights. A.R.S. § 45–251(4). Decreed federal water rights will be included in  
6 the catalog along with state water rights. Congress gave the State courts the express authority to  
7 adjudicate federal reserved water rights claimed on behalf of Indian tribes under the McCarren  
8 Amendment, 43 U.S.C. §666(a) (1964). *Colorado River Water Conservation Dist. v. United States*,  
9 423 U.S. 800, 810-811 (1951). The McCarran Amendment which provides in relevant part that:  
10 “Consent is given to join the United States in any suit (1) for the adjudication of rights to the use of  
11 water of a river system or other source, or (2) for the administration of such rights. 43 U.S.C.  
12 §666(a). In the context of this statute, administration of a decreed right by the court entails the  
13 construction and interpretation of the meaning of the decree, resolution of conflicts, and  
14 enforcement. *S. Delta Water Agency v. Bureau of Reclamation*, 762 F.2d 531, 541 (9<sup>th</sup> Cir. 1985).  
15 Thus, State courts will eventually use those cataloged rights to resolve disputes among state and  
16 federal litigants that will inevitably arise over the limited supply of water in this semi-arid state with  
17 a history of periodic droughts. *See Navajo Dev. Co. v. Sanderson*, 655 P.2d 1374, 1379 (Colo.  
18 1982). Administration may also be necessary to in the future to consider changes in use or other  
19 characteristic of the final decree. *See United States v. Orr Ditch Co.*, 309 F. Supp. 2d 1245 (D. Nev.  
20 2004)  
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1           The United States does not contend that a decreed right resulting from these proceedings  
2 cannot be enforced, which would make the right illusory. Instead it contends that future enforcement  
3 of the federal reserved water rights should not be a consideration in the determination of the water  
4 right attributes that should be included in the decreed right because the right will not be enforced. It  
5 argues that it is “unclear under what circumstances state law water users could be injured by Hopi’s  
6 use of water. . . . State law water users with a later priority date simply cannot be injured by or  
7 interfere with Hopi’s ability to use the full amount of its future rights – however, wherever, and  
8 whenever they become necessary on the Reservation.” U.S. Motion at 16. Implicit in the United  
9 States’ statement are two assumptions: the rights of the Hopi Tribe have been properly defined so  
10 the nature and scope of its “future rights” are known, and the Hopi Tribe used water consistently  
11 with those rights. As explained by the court In *United States v. Orr Ditch Co.*, 309 F. Supp. 2d  
12 1245, 1254 (D. Nev. 2004), decreed rights “established as a matter of law that the Tribe would not  
13 injure other person’s water rights when it began using its entire water duty in the place and manner  
14 described”. Injury to other users can result if the Hopi Tribe were to use water inconsistently with  
15 its decreed rights and adversely impacted a state law water user. *Id.* This scenario highlights the  
16 importance of sufficiently defining federal reserved water rights. Clearly defined rights may avoid  
17 disputes because all parties will have a better understanding of the scope and nature of the rights of  
18 the Hopi Tribe. If disputes nevertheless arise, the court will be able to resolve the conflict because  
19 properly defined rights will serve as the standard against which the claimed injury can be measured.  
20 *Id.* (“The Orr Ditch Decree establishes, as a matter of law, the ‘existing conditions’ against which  
21 any potential impairment of other persons water rights are to be measured.”).



1 Although the United States focuses on potential actions brought by state law users to argue  
2 that enforcement of the rights should not determine the attributes of a water right, an action could be  
3 brought by the United States or the Hopi Tribe to enforce the decreed rights. As the Supreme Court  
4 recognized, when dealing with a scarce natural resource such as water subject to multiple demands,  
5 “federal reserved water rights will frequently require a gallon-for-gallon reduction in the amount of  
6 water available for water-needy state and private appropriators.” *U.S. v. New Mexico*, 438 U.S. 696,  
7 704 (1978); *see also Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, 558, ¶ 12, 423 P.3d 348, 353  
8 (2018). The Arizona Supreme Court anticipated more than 30 years ago that the adjudication court  
9 would be called upon by the tribes to enforce their decreed rights against state law users. *See United*  
10 *States v. Superior Court In & For Maricopa Cty.*, 144 Ariz. at 275, 697 P. 2d at 668.

12 In summary, the federal reserved water right doctrine was created by the Court specifically  
13 to enable the federal government to prevent others from interfering with water uses necessary to put  
14 land reserved by the federal government to its intended use. Over the past century, the federal  
15 government has repeatedly invoked this doctrine in individual actions to enjoin other appropriators  
16 from diverting that water. More recently, the forum for the adjudication of federal reserved water  
17 rights has moved to the States’ general adjudications pursuant to the Congressional grant of authority  
18 in the McCarren Amendment. While the United States’ projection may prove to be accurate that no  
19 actions will be brought by any party in the future with respect to the federal reserved water rights  
20 decreed for the Hopi Reservation, the court cannot proceed forward with that expectation. The  
21 McCarren Amendment clearly contemplated the logical progression that the State courts would  
22 adjudicate and decree enforceable rights and then the court would be prepared to administer those  
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1 rights. Accordingly, the federal reserved water right decreed in this proceeding must enable the court  
2 to perform its duty if and when it is called upon to resolve disputes with respect to the right or to  
3 enforce that right.

## 4 5 **II. Role of State Law in Defining a Federal Reserved Water Rights**

6 The general adjudication court will apply state law to adjudicate federal reserved water rights  
7 except where it conflicts with federal law in which case federal law will apply. *United States v.*  
8 *Superior Court In & For Maricopa Cty.*, 144 at 277, 697 P. 2d at 670. (“Indian rights are conferred  
9 by federal law, and it is the federal substantive law which our courts must apply to measure those  
10 rights in the state adjudication. *San Carlos*, 463 U.S. at —, 103 S.Ct. at 3216. Where state law  
11 conflicts, it must give way.”) The Arizona court lacks the power to overthrow the *Winters* doctrine  
12 or any other federal rule which defines a federal reserved water right for an Indian reservation. *Id.*  
13

14 The United States argues that the position advocated by the LCR Coalition violates the  
15 Arizona Supreme Court’s mandate by improperly imposing “state law specificity” on to a federal  
16 reserved water right. The United States defines “state law specificity” by reference to the provisions  
17 of A.R.S. §45-254. This statute does not impermissibly graft state law requirements for a decreed  
18 state right on to a federal reserved water right for two reasons. First, A.R.S. §45-254 does not define  
19 the attributes of a decreed water right under state law. It lists permissible categories of information  
20 that may be included on the form to claim a right to appropriable water. Second, even assuming  
21 *arguendo*, that the statute mandates the attributes that must be included in a final decree granted  
22 under state law, the Arizona Supreme Court has already considered and rejected the argument that  
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1 A.R.S. §45-254 violates federal law. *Id.* at 276, 697 P. 2d. at 669. The Court directed that any  
2 statutory construction of the statute with respect to a claim for a federal reserved water right must  
3 generate a result consistent with federal law. *Id.* at 278, 697 P. 2d. at 671. Thus, for example, §45-  
4 254(C)(8), which lists information to prove the priority date, must be interpreted in a case where  
5 federal reserved water rights are claimed as requiring the information dictated by federal law.<sup>1</sup>

6 To continue with the assumption that A.R.S. §45-254(C) is a proxy for state law requirements  
7 for a decreed water right, there are eight categories of information in A.R.S. §45-254(C) in addition  
8 to the category devoted to establishing a priority date. Five categories require information either  
9 readily available to the United States or subsumed in the categories of information the United States'  
10 acknowledges that it must prove: the name and address of the claimant, the source of the water, the  
11 quantity of water, the purpose of the use, and the legal basis for the right. §45-254(C)(1), (2), (3),  
12 (7), (9). Categories of information about diversion infrastructure, soil types, and kinds of crops  
13 included in §45-254(C)(4) and (5) are not characteristics listed by the LCR Coalition as necessary  
14 for a federal reserved water right and, thus are not at issue here. The only provisions remaining in  
15 the statute that are also characteristics included in the LCR Coalition's list are the requirements to  
16 provide information about: the period of time during the year for which the water is claimed (§45-  
17 254(C)(3)); the amount of land irrigated (§45-254(C)(5)); and, the points of diversion and places of  
18 use (§45-254(C)(6)). As directed by the Court, state law will give way when it conflicts with federal  
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23 <sup>1</sup> In this case, the appropriate priority date for the federal reserved water rights for the Hopi  
24 Reservation has been the subject of extensive proceedings under federal law and no party appears to be  
25 suggesting that the United States must satisfy a state standard to define the priority date for the federal reserved  
26 water rights for the Hopi Reservation.

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

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

5 An analysis of the relevant case law to determine whether federal law restricts the definition  
6 of a federal reserved water right to a sparse level of specificity must be undertaken subject to the  
7 strictures that “cases are not precedential for propositions not considered,” *United States v. Pepe*,  
8 895 F.3d 679, 688 (9th Cir. 2018). Similarly, “[q]uestions which merely lurk in the record, neither  
9 brought to the attention of the court nor ruled upon, are not to be considered as having been so  
10 decided as to constitute precedents.” *United States v. Shabani*, 513 U.S. 10, 16 (1994); *Webster v.*  
11 *Fall*, 266 U.S. 507, 511, (1925). An issue not “raised in briefs or argument nor discussed in the  
12 opinion of the Court .... is not a binding precedent on [that] point.” *U.S. v. L.A. Tucker Truck Lines,*  
13 *Inc.*, 344 U.S. 33, 38, (1952). In short, the decisions issued by the federal courts that defined and  
14 enforced federal reserved water rights must be evaluated with an understanding of their factual and  
15 procedural context.  
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18 To start at the beginning, the *Winters* decision does not support the proposition that a federal  
19 reserved water right must be defined as aggregate amount for a use from a stated source and cannot  
20 be defined by other attributes such as a point of diversion, number of acres irrigated, places of use,  
21 or flow rates. None of those questions were ruled upon in the decision. In *Winters*, the Court decided  
22 whether the United States had reserved rights to water from the Milk River that supported an  
23 injunction of the upstream users’ actions and whether the reserved rights were repealed by the  
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1 admission of Montana into the United States. It also effectively decided that the priority date for a  
2 federal right, unlike a state right, is not the date the water was first put to beneficial use.<sup>2</sup> The Court  
3 neither recited the language of the injunction issued nor addressed terms required to define the scope  
4 of the rights when it upheld an injunction granted by the district court to enforce a rights to water  
5 from a defined source (Milk River), at a given flow rate (5,000 miner's inches), for a particular use  
6 (irrigation) at a set place of use (the land on the reservation watered by ditches that transported water  
7 from the Milk River).  
8

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

24 <sup>3</sup> "Second feet" is a unit of measurement of water flow equal to cubic feet per second which is the LCR  
25 Coalition's proposed characteristic number 5.

1 natural channel of said creek and the points of diversion and places of use established by the  
2 complainant for the benefit of the Indians on the reservation.” The court’s description of a federal  
3 reserved water right includes type of use (irrigation), source of water (Birch Creek), flow rate (1,666  
4  $\frac{2}{3}$  inches, or the equivalent of 33  $\frac{1}{3}$  second feet), location of place of use (referenced the complaint)  
5 and points of diversion (referenced the complaint).  
6

7 In *U.S. ex rel. Ray v. Hibner*, 27 F.2d 909, 912 (D. Idaho 1928) the United States sought an  
8 adjudication of federal reserved water rights for allotted land. The federal court found that a reserved  
9 right existed to a “continuous use of a sufficient amount of water for the irrigation of their lands, and  
10 domestic purposes” and awarded a “continuous right through the entire year to the use of one miner’s  
11 inch of water per acre for the irrigation of that portion of their lands which the evidence discloses is  
12 susceptible to irrigation, and with a priority of February 16, 1869.” *Id.* at 911. This description  
13 includes the attributes of period of time, flow rate, type of use, and place of use (land the evidence  
14 shows to be irrigable), and priority date. The decision concludes with the direction that counsel will  
15 “prepare appropriate decrees, with the usual provisions found in such decrees, and with definite  
16 declarations of the amount of water, right of each claimant, the date of priority, the point of diversion,  
17 and place of use.”) *Id.* at 912.  
18

19 In *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939), the United States  
20 brought an action to restrain upstream users of the Walker River from diverting the natural flow of  
21 Walker River to the extent of 150 cubic feet per second and to adjudicate the relative rights of those  
22 upstream users and the Pahute Tribe to water from the Walker River that bordered the Walker River  
23 Indian Reservation. Although the court began its analysis with a determination that the government  
24

1 had reserved water to “the extent reasonably necessary to supply the needs of the Indians,” it did not  
2 limit its definition of the federal reserved water right to this general statement. *Id.* at 339–40. It also  
3 specifically rejected the United States’ suggested decree for a broad water right to “the quantity of  
4 water for reservation purposes of the amount, not exceeding 150 second feet, which the Government  
5 may demand from year to year at the commencement of the season.” *Id.* at 340. Instead, the court  
6 defined the federal reserved water and enjoined the upstream users from preventing or interfering  
7 with:  
8

9           the continuous flow of 26.25 cubic feet of water per second, to be diverted  
10          from Walker River upon or above Walker River Indian Reservation during  
11          the irrigation season of one hundred and eighty days for the irrigation of  
12          two thousand one hundred acres of land on the reservation, and the flow of  
13          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.

14 *Id.*

15  
16 The federal reserved water right for the Walker River Indian Reservation included: a flow rate, the  
17 source of water, general point of diversion, time period, place of use, type of use, number of acres  
18 irrigated, and a priority date.

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

3 By maps and Indian Office records the United States showed the location,  
4 point of diversion and capacity of each ditch constructed by Indians, or by  
5 the Indian Service, and the description, irrigable area, and location of all  
6 reservation lands served by those ditches with water from Ahtanum Creek.  
7 Also shown are the rate of progress through the years since the creation of  
8 the treaty in getting this water upon these lands. Just which lands are Indian  
9 owned, whether under trust or fee patent, and which are owned by  
10 successors of Indian allottees, also was proven. The quantities of water  
11 required by these lands was both stipulated and proven. No more was  
12 required, for the United States has the right to make distribution of its water  
13 under such rules as it may adopt, as provided by 25 U.S.C.A. § 381 (note  
14 16, supra). It is no concern of ours which particular parcels or allotments  
15 are served by the Indian Service ditches, so long as adequate proof was  
16 made of their aggregate needs.

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

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



1       The Supreme Court again entered the arena of federal reserved water rights for Indian  
2 reservations with its decision in *Arizona v. California*, 373 U.S. 546 (1963). In evaluating whether  
3 the Supreme Court limited the acceptable attributes of a federal reserved right, it is important, as in,  
4 for example, the *Ahtanum Irr. Dist* decision, to examine the context in which the rights were  
5 adjudicated and the issues presented. The United States intervened in *Arizona v. California*, a case  
6 brought to determine states' rights to water in the Colorado River, to adjudicate federal water rights  
7 for, *inter alia*, 25 Indian reservations that included three Indian reservations in the Little Colorado  
8 River basin: the Hopi, Navajo and Zuni Reservations. Report from Simon H. Rifkind, Special master  
9 to the Supreme Court 6 (December 5, 1960) ("Report"). The Special Master ultimately declined to  
10 adjudicate federal water rights for the Little Colorado River reservations.  
11

12       The Special Master chose to adjudicate rights for five "mainstream Indian Reservations"<sup>4</sup> to  
13 water from the Colorado River because a justiciable controversy existed between the United States,  
14 Arizona, and California about the claimed rights. He also determined that the adjudication of rights  
15 for those reservations was warranted so that the Secretary of the Interior, who had legal and physical  
16 control of the river, would know the quantity of water to release from the Colorado River. Report at  
17 255-256, 324. Thus, the source of water (Colorado River) and the point of diversion (determined  
18 by the Secretary of Interior) were not at issue in the case. Accordingly, *Arizona v. California* does  
19 not stand for the proposition that federal reserved water rights cannot be defined by source of water  
20 or point of diversion. *See United States v. Pepe, supra*. Nor does it stand for the proposition that  
21 a federal reserved right does not require a beneficial use of water (type of use) or that water can be  
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25       <sup>4</sup> The five reservations are the: Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave Reservations.

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

7  
8 The justiciable controversy that necessitated the adjudication of the mainstream reservations’  
9 rights was whether the United States intended to reserve water for the reservations’ future needs as  
10 opposed to needs at a particular time. In deciding this issue, the Special Master squarely addressed  
11 the question that the federal courts had considered in the past.<sup>5</sup> The Special Master rejected the  
12 issuance of an “open end decree, simply stating that each Reservation may divert at any particular  
13 time all the water reasonably necessary for its agricultural and related uses as against those who  
14 appropriated water subsequent to its establishment.” *Id.* at 263-264. Finding that a federal reserved  
15 right must provide for future as well as current needs, the Special Master determined “the United  
16 States intended to reserve enough water to irrigate all of the practicably irrigable lands on a  
17 Reservation and that the water rights thereby created would run to defined lands, as is generally true  
18 of water rights.” *Id.* at 263. The Supreme Court approved this approach: “We also agree with the  
19 Master’s conclusion as to the quantity of water intended to be reserved. He found that the water was  
20 intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that  
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24 <sup>5</sup> In *Conrad Inv. Co. v. United States*, the court left the decree open whereas in *Walker River*, the  
25 court examined past and present use to reach a decision about future use.

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

3 Due to the facts and circumstances in *Arizona v. California*, the federal reserved water rights  
4 for the five Indian reservations for which rights were adjudicated and approved by the Court were  
5 effectively defined by: priority date (date the reservation was established); type of use (irrigation and  
6 related uses); source of water (Colorado River); quantity (lesser of acre feet per year or consumptive  
7 use for irrigation and related use); point of diversion (determined by the Secretary of the Interior);  
8 place of use (the land shown to be practicably irrigable); and number of acres irrigated (the land  
9 shown to be practicably irrigable).  
10

11 After the issuance of the decision in *Arizona v. California*, the Ninth Circuit adjudicated  
12 water rights for allotments involving the Coville Confederated Tribe that required the adjudication  
13 of water rights for seven allotments from the No-Name system that included the No-Name Creek  
14 and Omak Lake. The court followed the traditional analysis used to determine federal reserved  
15 water rights. It first focused on the purpose of the reservation and then approved sufficient water  
16 (with directions to the district court to calculate the amounts) to meet those purposes. The court  
17 found the purpose of the Colville Reservation was to maintain an agrarian society and held that the  
18 Tribe was entitled to that quantity of water required to irrigate all practicably irrigable acreage on  
19 the reservation. The court also found that the Colvilles traditionally fished and that another purpose  
20 for the creation of the reservation was the preservation of the tribe’s access to fishing grounds. Based  
21 on that purpose and the fact that the tribe could no longer access traditional fishing grounds it  
22 found that the tribe had a reserved right to water necessary to maintain the Omak Lake Fishery which  
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1 included sufficient water to permit natural spawning of trout. *Colville Confederated Tribes v.*  
2 *Walton*, 752 F.2d 397 (9th Cir. 1985). The decision based on dual purposes approved a quantity of  
3 water, the types of uses, place of uses (land shown to be irrigable and a lake), and points of diversion  
4 (No Name Creek Basin).

5 The United States also cites to the decisions issued by the Arizona Supreme Court in support  
6 of its position that a federal reserved water rights should contain little information beyond a priority  
7 date, the aggregate quantity necessary for each category of use, and the source of water. The Arizona  
8 Supreme Court, like the federal courts, has not banned or otherwise limited the use of the attributes  
9 proposed by the LCR Coalition, SRP, or the City of Flagstaff to define federal reserved water rights.  
10

11 In its seminal decision on federal water reserved water rights for an Indian Reservation, the  
12 Court considered the proper method to quantify a federal reserved water right for an Indian  
13 reservation. *Gila V* at 313, ¶16, 35 P.3d 68, 74. The Court began its analysis of the scope of a  
14 federal right to water for Indian reservations with the recognition that the purpose for the reservation  
15 of land defines the scope and nature of reserved water rights. *United States v. Adair*, 723 F. 2d 1394,  
16 1419 (9<sup>th</sup> Cir. 1983). It considered and declined to follow the federal cases that engaged in a judicial  
17 examination of historical documents maintained by the Congress or the executive branch to glean a  
18 specific purpose for the creation of the reservation. The *Gila V* decision provides numerous reasons  
19 for the Court’s holding, one of which was a possibility that a reservation formed over many decades  
20 could have different historical purposes attached to different parcels of land resulting in an “arbitrary  
21 patchwork of water rights” inconsistent with a unified homeland. *Gila V* at 313, ¶18, 35 P.3d at 74.  
22 The Court’s identification of a possible problem that could arise by continuing to follow past  
23  
24

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

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

16 While *Gila V* may have transported the determination of the federal reserved water rights  
17 into “uncharted territory” in terms of purpose and uses for water on Indian reservations beyond those  
18 historically found by the federal courts, it did not take the further step of considering, much less  
19 approving, a decreed water right stripped of virtually all attributes other than quantity, an aggregate  
20 quantity necessary for each category of use, source, and a priority date. The Court, as had the Special  
21 Master in *Arizona v. California* clearly contemplated that a right to satisfy present and future needs  
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1 must be based on a type of use. The determination of a federal reserved water right to secure water  
2 for a specific type of use to meet future needs is not uncharted territory. For example, in *Arizona*  
3 *v. California*, the Special Master and the Court determined federal reserved rights for irrigation water  
4 to meet the future needs of the reservations. As the purpose of the reservation drove the  
5 determination of type of use in prior cases, so did the type of use drive determinations of other  
6 attributes such as place of use, point of diversion, and appropriate measurement of quantity. The  
7 attributes of the federal reserved water rights in *Arizona v. California* included the place of use on  
8 the reservation where the water could be used (the land that could be practically irrigated), the  
9 number of irrigable acres, and quantity measured by consumptive use which required calculations  
10 of volume in acre feet per annum and return flow along with priority dates, point of diversion and  
11 source of water.  
12

13 As demonstrated by the cases discussed above, the federal courts and the Arizona Supreme  
14 Court have not limited a federal reserved water right to a truncated set of characteristics. Rights  
15 have been defined, implicitly and explicitly, by place of use, point of diversion, and, in the case of  
16 irrigation use, number of acres irrigated in addition to priority date, source and quantity using various  
17 types of measurements.  
18

#### 19 **IV. Settlement Agreements**

20  
21 In support of its position regarding appropriate characteristics of a water right, the United  
22 States urges recourse to settlement agreements approved by the courts arguing that the terms of the  
23 settlement agreements must comply with federal law and therefore establish terms acceptable in a  
24 decree of federal reserved water rights. The agreements do not purport to establish federal reserved  
25

1 water rights. The agreements are contractual arrangements voluntarily reached by the parties that  
2 involved a host of rights and claims based on state and federal law and other contractual obligations.  
3 Even though the agreements do not provide guidance about terms acceptable in a federal reserved  
4 water right decree, they do provide valuable information about the detail that interested parties deem  
5 necessary to define a workable water right. The agreements cited by the United States appear to be  
6 the result of long, careful, detailed negotiations by the parties knowledgeable in the area that are in  
7 essence comprehensive water management plans.  
8

9       Among the cited documents is an agreement made by the Zuni Tribe. The Zuni Reservation  
10 was one of the reservations for which the United States attempted to obtain federal reserved water  
11 rights in *Arizona v. California*, along with rights for the Hopi and the Navajo Reservations. More  
12 than 15 years ago, the Zuni Indian Tribe and the United States entered into an agreement with many  
13 of the parties in this litigation to resolve claims for water rights for the Zuni Reservation. The 127-  
14 page document deals with a myriad of issues affecting continued access to surface water and  
15 groundwater. The parties determined that certain water uses were so small that their use could  
16 remain unfettered, imposed significant amounts of monitoring and measurements described in detail  
17 for other uses, and required cataloging of existing water uses. As part of the document, separate  
18 abstracts were created include abstracts for irrigation use with detailed descriptions defining water  
19 rights by source, acres, quantity, use, priority date, period of use, point of diversion, and place of  
20 use. *See Zuni Indian Tribe Water Right Settlement in the Little CO River Basin*, 65-68 (June 7,  
21 2002). As can be seen from a comparison of the abstracts prepared as part of the Zuni agreement  
22 some of the attributes have been broadly defined while other attributes are very specific.  
23  
24

1        Other water agreements referenced impose little to no monitoring on some types of water  
2 uses while requiring consistent, accurate measurements for other uses in other locations. For  
3 example, the Amended and Restated White Mountain Apache Tribe Water Rights Quantification  
4 Agreement (2013) requires the use of stream gages, precipitation gages, and includes specific  
5 equations to calculate lake runoff. The agreements allow for internal governance of water and  
6 provide for annual reporting. For example, the Gila River Indian Community Settlement Agreement  
7 of 2005 requires the Community to enact a water code to allocate the water that is the subject of the  
8 agreement among the Community and the allottees and produce a series of annual reports of  
9 diversions of ground and surface water. The impact of pumping on the aquifers is generally  
10 recognized and addressed by all agreements implicitly or explicitly. The Soboba Band of Luiseño  
11 Indians Settlement Agreement (2006), for example, requires water to be used to recharge the aquifer  
12 to mitigate overdrafting.  
13

14        The agreements are not uniform because the circumstances are not uniform and the sources  
15 of water vary from water primarily flowing through or under the reservation to water sources that  
16 primarily originate outside of the reservation. As an example of the latter situation, more than 80%  
17 of the water referenced in the Tohono O'odam Settlement Agreement comes from sources off the  
18 reservation. In no instance are the Settlement Agreements of valuable water rights reduced to one  
19 or two broad sweeping paragraphs. *See* Amended and Restated White Mountain Apache Tribe Water  
20 Rights Quantification Agreement (2013) (97-page agreement plus exhibits totaling 795 pages);  
21 Soboba Band of Luiseño Indians Settlement Agreement (2006) (24-page agreement plus exhibits  
22 totaling 109 pages); Gila River Indian Community Settlement Agreement of 2005 (295-page  
23  
24  
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1 agreement plus exhibits totaling 3374 pages); and Tohono O’odom Settlement Agreement (2003)  
2 (52-page agreement plus exhibits totaling 258 pages). The lesson to be learned from the agreements  
3 reached by the tribes with parties from the surrounding communities, utilities, and local, state, and  
4 federal governments is that viable water agreements are holistic, require detailed descriptions of  
5 water uses, long range planning, recognition of the impact of various types of water uses and water  
6 sources, judgments to be made about priorities, and a commitment to regular reporting and  
7 quantifying certain types of uses.  
8

## 9 10 **V. Federal Reserved Water Rights and Tribal Self-Determination**

11  
12 The United States makes the further argument that the inclusion of attributes of place of use,  
13 point of diversion, number of acres irrigated, and period of time in a decreed federal reserved water  
14 right would infringe on tribal sovereign powers of self-government. It argues at length that the Hopi  
15 Tribe has the “inherent sovereign power to regulate how, where, and by whom its reserved water  
16 rights are used once quantified” and, any descriptive characteristic of the reserved water right that  
17 limits that power constitutes impermissible state regulation. U.S. Motion at 8. It bases its argument  
18 on decisions that consider the relative authority of Indian tribes and the States within reservation  
19 boundaries. U.S. Motion at 8-12.  
20

21 State regulatory authority over a tribal reservation may be prohibited because it is pre-  
22 empted by federal law or because it impermissibly infringes on the right of tribes to self-government.  
23 *Colville Confederated Tribes v. Walton*, 647 F. 2d at 50. At work here, however, is not the exercise  
24 of the State’s regulatory authority. As explained by the LCR Coalition, “[i]t is not necessary to delve  
25

1 into the complex jurisprudence governing state authority within Indian reservations in order to  
2 determine the attributes required for adjudication of federal rights. This Court's authority over  
3 reserved water rights is derived from the McCarran Amendment and extends no further than the  
4 express terms set forth in that statute." LCR Response at 5 (March 9, 2020). State regulation by  
5 the executive branch of state government is not synonymous with the powers exercised by the State  
6 court to decree and enforce federal reserved water rights. *Colville Confederated Tribes v. Walton*,  
7 647 F. 2d at 53. The Wyoming court rejected a similar argument that failed to distinguish between  
8 the power exercised by the two separate branches of government in *In re Gen. Adjudication of All*  
9 *Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76, 115 (Wyo. 1988), *aff'd sub nom.*  
10 *Wyoming v. United States*, 492 U.S. 406, 109 S. Ct. 2994, 106 L. Ed. 2d 342 (1989), *abrogated by*  
11 *Vaughn v. State*, 962 P.2d 149 (Wyo. 1998) ("The role of the state engineer is thus not to apply state  
12 law, but to enforce the reserved rights as decreed under principles of federal law.")  
13

14  
15 The courts have also considered and rejected the argument that the adjudication of a water  
16 right claimed by the United States to have been reserved to the United States impairs tribal  
17 sovereignty or self-determination. *Colorado River*, 424 U.S. at 813; *United States v. Superior Court*  
18 *In & For Maricopa County*, 144 Ariz. 265, 276-77 ("Application of state adjudicatory procedures to  
19 water claims does not interfere with tribal self-government").  
20

## 21 **VI. Conclusion**

22  
23 Federal courts have neither defined federal reserved water rights in broad strokes nor issued  
24 decisions directing that federal reserved water right could not be defined by attributes such as place  
25

1 of use or quantity measured by flow rate rather than volume or volume in addition to flow rate. As  
2 stated by the Navajo Nation, decreed rights “for an Indian tribe must include sufficient attributes to  
3 allow enforceable administration of such water rights.” Navajo Response at 2 (March 9, 2020). The  
4 characteristics advocated by the LCR Coalition do not uniformly apply to all water rights because,  
5 as it recognized, for example, a water right for a domestic use will not properly include a description  
6 of a number of irrigated acres. Quantity may be appropriately measured by flow rate, consumptive  
7 use, or volume depending upon the type of use. Thus, the approach proposed by the City of Flagstaff  
8 to identify a minimum set of attributes will be adopted. The following minimum water right  
9 attributes shall be established by the Claimants for federal reserved water rights for the Hopi  
10 Reservation: beneficial use (type of use); source of water; location of the place of diversion or  
11 withdrawal (for consumptive uses); location of the place of use; and quantity<sup>6</sup>. Other attributes may  
12 be necessary to define the water right depending on the claimed use such as number or acres or  
13 consumptive use in the case of irrigation.  
14

15  
16 Still unanswered and which will have to be resolved based on the evidence presented at trial  
17 is the requisite level of specificity needed for each attribute of a claimed federal reserved water rights.  
18 The level of detail necessary to define the attributes of a federal reserved water right can vary  
19 significantly depending upon the facts as demonstrated by the decision in *Cappaert v. U.S.*, 426 U.S.  
20 at 145-156 compared to *Arizona v. California*. In formulating a test to evaluate the sufficiency of  
21 the description of an attribute for an actual or proposed use, consideration will be given to whether  
22 the offered description provides a basis upon which the adjudication court will be able to resolve  
23


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24  
25 <sup>6</sup> Priority dates were already considered in the first phase of this proceeding.

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

3  
4 For the reasons stated above,

5 **IT IS ORDERED** that the United States' Motion for Partial Summary Judgment on the  
6 Attributes Required to Establish an Indian Reservation's Federal Reserved Water Rights is denied.  
7 The LCR Coalition's Motion for Entry of Order Regarding the Attributes Necessary for Adjudication  
8 of Federal Reserved Water Rights is granted in part and denied in part.  
9

10  
11  
12   
13 Susan Ward Harris  
14 Special Master

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