

SUPERIOR COURT OF ARIZONA
APACHE COUNTY

February 7, 2023

CLERK OF THE COURT

SPECIAL WATER MASTER
SUSAN WARD HARRIS

A. Parmar
Deputy

FILED: February 28, 2023

In re: the General Adjudication
Of All Rights to Use Water in the
Little Colorado River System and Source

Case No. CV6417-300

In Re: Navajo Nation

MINUTE ENTRY

Courtroom 301 – Central Court Building

1:30 p.m. This is the time set for Oral Argument regarding the San Juan Southern Paiute Tribe's *Motion for Partial Summary Judgement Regarding Paiute Water Rights in 1934 ACT Lands* filed November 21, 2022 before Special Water Master Susan Ward Harris.

The following attorneys appear virtually through Court Connect:

- Julia Kolsrud, Irania Fimbres-Ruiz and Kate Shaffer on behalf of the San Juan Southern Paiute Tribe
- Judith M. Dworkin, Jeffrey S. Leonard, Evan Hiller Candance French and Kathryn Hoover on behalf of the Navajo Nation
- Assistant Attorney General, Michelle Brown-Yazzie observing on behalf of the Navajo Nation Department of Justice
- Gus Guarino, Emmi Blades, Cody McBride and Kathryn Carey on behalf of the United States Department of Justice
- Brian J. Heiserman and David Brown on behalf of the LCR Coalition

- Payslie Bowman and Phillip Londen on behalf of the Hopi Tribe
- Alexandra Arboleda and Lee Storey on behalf of the City of Flagstaff
- Carrie Brennan and Kevin Crestin on behalf of Arizona State Land Department (“ASLD”)
- Mark McGinnis and Katrina Wilkinson on behalf of Salt River Project (“SRP”)
- Kimberly Parks observing on behalf of the Arizona Department of Water Resources (“ADWR”)

A record of the proceedings is made digitally in lieu of a court reporter.

Ms. Kolsrud addresses the Court.

Mr. Guarino addresses the Court.

Ms. Dworkin addresses the Court.

Mr. Guarino further addresses the Court.

Mr. Heiserman addresses the Court.

Ms. Kolsrud further addresses the Court.

Based on the matters presented,

IT IS ORDERED taking the San Juan Southern Paiute Tribe’s Motion under advisement.

2:29 p.m. Matter concludes.

LATER:

The San Juan Southern Paiute Tribe (“Paiute Tribe”) moves for partial summary judgment that federal reserved water rights for lands in which it claims a property interest will not be decreed solely for the benefit of the Navajo Nation. The San Juan Southern Paiute Tribe’s Motion for Partial Summary Judgment Regarding Paiute Water Rights in 1934 Act Lands (November 21, 2022) (“Paiute Tribe Motion”). It further seeks an order that no decree will be issued in this contested case to any party for federal reserved water rights on that same land unless and until a joint decree can be issued on behalf of the Paiute Tribe and the Navajo Nation. Finally, it seeks a determination that no order will issue that the Navajo Nation will hold water rights for the Paiute Tribe in trust. Summary judgment may not properly be granted unless there remains no genuine issue as to any material fact and one of the parties is entitled to judgment as a matter of law. *Grain Dealers Mut. Ins. Co. v. James*, 118 Ariz. 116, 118, 575 P.2d 315, 317 (1978); Rule 56(c), 16 A.R.S. Rules of Civil Procedure.

A. Background

In 1934, Congress withdrew land “for the benefit of the Navajo and such other Indians as may already be located thereon.” Act of June 14, 1934, ch. 521, 48 Stat. 960, 961 (“1934 Act”). This land is known as the 1934 Act Lands. In 1974, Congress passed the Navajo-Hopi Settlement Act of 1974 (“1974 Settlement Act”) to authorize the Navajo Nation or the Hopi Tribe to bring a lawsuit “for the purpose of determining the rights and interests of the tribes in and to [the 1934 Act Lands] and quieting title thereto in the tribes.” Pub. L. No. 93-531, 88 Stat. 1712, 1715. The Hopi Tribe brought the authorized quiet title action against the Navajo Nation that resulted in the decision issued by the district court in *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183 (1978). The Court explained that the title to be quieted arises under the doctrine of “recognized title.” This type of property interest requires a finding that Congress had a definite intent to convey legal rights to a tribe as opposed to mere permissive occupancy. *Id.* at 1191. When such a finding is made, recognized title conveys a vested, equitable right to the tribe to permanently occupy land. *Id.* at 1188, 1192; *see also Masayesva v. Zah*, 793 F. Supp. 1495, 1500 (Ariz. 1992). The *Sekaquaptewa* Court found that the resolution of the case only required it to decide the Hopi Tribe’s and the Navajo Nation’s competing property interests in the 1934 Act Lands and it explicitly declined to decide whether other Indian Tribes obtained any property interests under the 1934 Act. *Id.* at 1193. On appeal, the Ninth Circuit Court of Appeals ruled that the Hopi Tribe would obtain a recognized title that would convey exclusive rights to property that the Hopi Tribe exclusively possessed, occupied, or used in 1934. The Court also concluded that it may be proper to declare that the Navajo Nation and the Hopi Tribe have joint or an undivided title, subject to partition, to land used by both tribes in 1934. *Sekaquaptewa v. MacDonald*, 619 F. Supp. 801 (1980). It remanded the case for a determination of the land that the Hopi “possessed, occupied or used” *Id.* at 811 (1980).

Eight years after the quiet title litigation was initiated, the Paiute Tribe moved to intervene because it had a property claim to the 1934 Act Lands. San Juan Southern Paiute Tribe's Statement of Fact in Support of Its Motion for Partial Summary Judgment Regarding Paiute Water Rights in 1934 Act Lands (November 21, 2022) (“SJ SOF”) ¶¶7, 11. The district court found that the Paiute Tribe was an existing Indian tribe in 1934 and that the court had jurisdiction to adjudicate the rights of the Paiute Tribe in the 1934 Act Lands. *Masayesva v. Zah*, 792 F. Supp. 1165, 1168 (D. Ariz. 1992). It rejected the Navajo Nation’s and the Hopi Tribe’s arguments that the Paiute Tribe did not have an interest in the 1934 Act Lands on the following basis:

Further, neither the Navajo nor Hopi Tribe cites any evidence that Congress would have excluded the Paiute Tribe from this Court’s jurisdiction to determine rights under section 7(a) if Congress had been aware of the existence of the Paiutes *as a tribe* at the time of the Settlement Act. At the time of the Act, Congress believed that there were only a few Paiute Indians living on the 1934 Reservation. *See H.R.Rep. No. 909, 93rd Cong. 2d Sess 10 (1974)* (“Sections 8 and 9 make allotments to a few Paiute Indians who were settled in the 1934 Reservation on the date of that Act and their descendants

and confirms the remainder of the 1934 area in the Navajo”). It is not likely that Congress would have excluded the Paiute Tribe given that the legislation was intended to achieve “final settlement of all title claims.” *Sekaquaptewa v. MacDonald*, 619 F.2d 801, 809 (9th Cir.), *cert. denied*, 449 U.S. 1010, 101 S.Ct. 565, 66 L.Ed.2d 468 (1980).

Id.

The district court concluded that it “will thus exercise jurisdiction to determine the rights of the Paiute Tribe in the 1394 Act Reservation, and to quiet title thereto.” *Id.* at 1169. Shortly after it issued this decision, the district court issued a second decision in which it found that it had jurisdiction to determine the areas in which Paiutes “farmed, grazed livestock, and engaged in other traditional activities” and it made a series of factual findings with respect to that land use. *Masayesva v. Zah* 794 F. Supp. 899, 903 (D. Ariz. 1992). It also reached the legal conclusion that the Paiute Tribe is not entitled to an exclusive interest in the surface and subsurface land that the court found to be exclusively used by the Paiute Tribe. *Id.* at 929. It reasoned:

A holding that the Paiute Tribe is entitled to the surface and subsurface estate in land which were exclusively used, occupied, or possessed by Paiutes in 1934 and to quiet title in the Paiute Tribe would be tantamount to a partition of that land to the Paiute Tribe. Thus, while the Court will make findings as to the lands held exclusively by Paiutes in 1934, the Paiute Tribe will not be entitled to an exclusive interest in the surface and subsurface estate.

Id. at 929.

In its final judgment, the court quieted title to portions of the 1934 Act Lands in the Hopi Tribe subject only to the trust title of the United States and quieted title to portions of the 1934 Act Lands in the Navajo Nation subject only to the trust title of the United States. *Masayesva for & on Behalf of Hopi Indian Tribe v. Zah*, 816 F. Supp. 1387, 1435-1436 (D. Ariz. 1992), *aff'd in part, rev'd in part sub nom. Masayesva v. Zah*, 65 F.3d 1445 (9th Cir. 1995), as amended on denial of reh'g and reh'g en banc (Dec. 5, 1995). It did not quiet title in any part of the 1934 Act Lands to the Paiute Tribe. *See id.* at 1435. Instead, it found that that the Paiute Tribe had a property interest in lands shown on an attached map subject to an interest held by the Navajo Nation in a portion of the mapped land. *Id.* at 1435, 1438. It also concluded that the Paiute Tribe did not have jurisdiction over the land in which it found that the Paiute Tribe had an interest on the ground that “the exercise of jurisdiction is not available to the Paiute Tribe, because the Paiute Tribe does not have a reservation.” *Id.* at 1429.

B. The Paiute Tribe’s Claims for Water Rights

The Paiute Tribe does not request a determination in this adjudication of its property interests in the 1934 Act Lands. Paiute Tribe Motion at 1. It asserts that the district court

created a beneficial interest in favor of the Paiute Tribe in 26,000 acres of land within the boundaries of the Navajo Reservation, which it refers to as “Paiute Land,” and water for that land. Paiute Tribe Motion at 5, 7, 12. The *Masayesva* cases did not make any determination about water rights for the Paiute Tribe. With respect to property interests, the *Masayesva* cases determined that the Paiute Tribe has a property interest in the Paiute Land that does not constitute recognized title, could not be quieted in the name of the Paiute Tribe, does not entitle the Paiute Tribe to an exclusive right to the surface or subsurface of the land, and does not convey any jurisdiction to Paiute Tribe over the land or the use of the land. *Masayesva*, 816 F. Supp. at 1435. The precise nature of the Paiute Tribe’s property interests in the Paiute Land will not be determined in this contested case to adjudicate federal reserved water rights to be held by the United States on behalf of the Navajo Nation. This decision is consistent with the Paiute Tribe statement that it “does not ask this Court to determine the Paiute’s land interests.” Paiute Tribe Motion at 1.¹

The Paiute Tribe phrases its motion in the negative by arguing that the Navajo Nation is not entitled to a sole beneficial interest in federal reserved water rights for the Paiute Land and that the Navajo Nation is not entitled to a beneficial interest in federal reserved water rights for the Paiute Land unless the beneficial interest is jointly held with the Paiute Tribe. The Paiute Tribe argues that its property interests preclude a decree to or on behalf of the Navajo Nation of water rights for use on Paiute Land.

The Paiute Tribe contends that the underlying premise of its argument cannot be challenged in this case because of the doctrine of issue preclusion. Issue preclusion requires (1) that a final judgment be entered, (2) that the party against whom the doctrine is to be used had a full opportunity to litigate the issue, (3) that the party actually did litigate the issue, and (4) that the issue was essential to the final judgment. *Circle K Corp. v. Industrial Com’n of Arizona*, 179 Ariz. 422, 425, 880 P.2d, 642, 645 (App. 1993). The Paiute Tribe has not established the elements of issue preclusion. Fundamental to the application of issue preclusion from one case to a later case is the presence of the same party in both cases against whom the defense is asserted. The United States is the claimant and the party in this case who will own legal title to the federal reserved water rights adjudicated in this case and will act as trustee on behalf of the Navajo Nation with respect to those rights. The United States, against whom the Paiute Tribe is effectively asserting issue preclusion, was not a party in the *Masayesva* cases. Whether any of the other elements of issue preclusion from a case focused on property interests can be found to apply issue preclusion in a case adjudicating federal reserved water rights is not relevant because the Paiute Tribe cannot establish that the United States appeared in the *Masayesva* cases and was given an opportunity to and did litigate the issue for which the Paiute Tribe seeks to assert issue preclusion in this case.

The Paiute Tribe next argues that the property interest found by the *Masayesva* decisions include implied water rights for the benefit of the Paiute Tribe that preclude federal reserved water rights for the Navajo Nation. It cites to *Winters v. United States*, 207 U.S. 564 (1908) for the proposition that its property interests include implied water

¹ It asserts that its interests were sufficiently determined thirty years ago. *Id.*

rights. The *Winters* Court concluded that the United States implicitly reserved water rights because the United States and the Gros Ventre and Assiniboine bands or tribes entered into an agreement intended to provide the Gros Ventre and Assiniboine bands or tribes with resources to support the Gros Ventre and Assiniboine bands or tribes. As correctly argued by the Navajo Nation, federal reserved water right cases establish a requirement that a federal reserved water right be tied to the creation of a reservation by Treaty, Executive Order, or act of Congress. The Paiute Tribe presented its argument that it had federal reserved water rights in a motion for summary judgment. At a minimum, the Paiute Tribe must establish that the federal government reserved land for the benefit of the Paiute Tribe and implicitly intended to reserve water for its benefit. The *Masayesva* Court found that Congress was not aware of the existence of the Paiute Tribe living within the boundaries of the Navajo Reservation as late as the passage of the Settlement Act. *Masayesva*, 792 F. Supp. at 1168. The *Masayesva* Court further stated that the Paiute Tribe did not have a reservation. No determination can be made as a matter of law based on the current record that *Winters* rights attached to the Paiute Land for the benefit of the Paiute Tribe that exclude the interests of the Navajo Nation in whole or in part.

The Paiute Tribe next argues that the failure to enter a decision at this stage of the proceedings to bar the entry of a decreed water right for the benefit of the Navajo Nation would violate the McCarran Amendment. The purpose of the McCarran Amendment is to adjudicate all water rights in a particular river system in one comprehensive proceeding. According to the Paiute Tribe, a violation could occur because a decreed water right to the Navajo Nation could result in “needless duplicative and satellite litigation to untangle” the water rights of the two peoples. Paiute Tribe Motion at 12. It is certainly true that the status quo maintained over several decades by the Navajo Nation and the Paiute Tribe will, in all probability, result in more litigation to finally resolve water rights between the two peoples than would have been necessary if the respective property rights had been resolved, but that possibility does not constitute a violation of the McCarran Amendment. All water rights to land within the boundaries of the Navajo Reservation will be adjudicated in the General Adjudication of the Little Colorado System and Source consistently with the purpose of the McCarran Amendment.

The McCarran Amendment, itself, is a legislative waiver of the United States’ sovereign immunity in the state court adjudication of water rights claimed by the United States for water appurtenant to reserved federal land. It allows the state court to exercise jurisdiction over the United States, as relevant here, as the trustee of land reserved for Indian Reservations. *United States v. Superior Court In & For Maricopa Cnty*, 144 Ariz. 265, 272, 277, 697 P.2d 658, 665, 670 (1985). As the United States pointed out during oral argument, the United States, the affected party, does not contend that this proceeding violates the McCarran Amendment.² It makes no argument that the procedural posture of the case affects the waiver of its sovereign immunity or the jurisdiction of this court over its claims for federal reserved water rights. No violation of the McCarran Amendment

² The McCarran Amendment does not waive the sovereign immunity of the Indian tribes as parties to the state comprehensive water adjudications. *Id.* at 273, 697 P.2d at 666. Tribal participation is the result of tribal decisions to intervene in the contested cases.

will result from the decision to not adjudicate the federal reserved water rights of the Paiute Tribe in this contested case.

The Paiute Tribe also seeks a determination that federal reserved water rights will not be granted to the Navajo Tribe that will be held in trust for the Paiute Tribe. The doctrine of federal reserved water rights is based on the constitutional authority granted to the federal government under Article 1 Section 8 of the Commerce Clause and Article IV, Section 3 of the Property Clause. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). In *Winters*, the Court determined that an implied power to reserve water appurtenant to federal land arose from the exercise of the power to reserve federal land. 207 U.S. 564, 577 (1908). Thus, under both *Cappaert* and *Winters*, only the United States has the power and authority to have and hold federal reserved water rights. No party argued that any basis exists under the Constitution, statute, or case law for the Navajo Nation to hold federal reserved water except in its capacity as the beneficiary of the reserved lands. While the Navajo Nation suggested that a consensual contractual arrangement may be entered into between the Navajo Nation and the Paiute Tribe to administer any beneficial interests in federal reserved water rights that may attach to a reservation for the Paiute Tribe, the Navajo Nation did not contend that it could hold federal reserved water rights for the Paiute Tribe in trust. The Paiute Tribe is correct that federal reserved water rights may not be held by the Navajo Nation in trust for the Paiute Tribe and that only the United States can serve as trustee for federal reserved water rights for the benefit of the Paiute Tribe.

The decision issued on the Paiute Tribe Motion is necessarily a narrow ruling. This decision only determines that the Paiute Tribe is not entitled to summary judgment that its rights preclude the adjudication of the claims asserted by and on behalf of the Navajo Nation as a matter of law. This decision makes no determination about any aspect of any claims or beneficial rights the Navajo Nation has to federal reserved water rights for water on the Paiute Land. Such a determination is one that must be based on law and facts that will be presented in this contested case. Given the claims of the Paiute Tribe and the anticipated future proceedings that will determine the beneficial interests of the Paiute Tribe, it is especially important in this case that the attributes of any federal reserved water rights found for the benefit of the Navajo Nation be defined with specificity by place of use as well as the other attributes of type of use, source, quantity, priority date and point of diversion.

As has been repeatedly stated in this contested case since the Paiute Tribe filed its objection, once the Paiute Tribe's interests in the Paiute Land are comprehensively resolved such that the requirements of *Winters* can be satisfied, a separate contested case will be initiated to determine federal reserved water rights for the Paiute Tribe. The quantification of reserved water rights for the Paiute Tribe will be based on a "fact-intensive inquiry" focused on the reservation established for the Paiute Tribe. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 194 Ariz. 411, 420 (1999). As directed by the Arizona Supreme Court, the adjudication and quantification of federal reserved water rights for the Paiute Tribe will be based upon, but not limited to the following factors: tribal history, traditions, and culture; the tribal land's geography, topography, and natural resources; the tribe's economic base; past water use on

the land; and a tribe's present and projected future population. *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 318–19 (2001).

IT IS ORDERED granting partial summary judgment that the Navajo Nation cannot hold federal reserved water rights in trust for the Paiute Tribe and otherwise denying the remainder of the Paiute Tribe's Motion for Partial Summary Judgment.

A copy of this minute entry is provided to all parties on the Court approved mailing list.