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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

DETERMINATION OF PURPOSE AND  
OTHERWISE DENYING FACTUAL  
FINDINGS

Contested Case Name: *In re Hopi Reservation HSR*

HSR Involved: *Hopi Reservation*

Descriptive Summary: Order determines purpose of homeland and otherwise denies request for factual findings.

Number of Pages: 8

Date of Filing: August 20, 2018

The United States moved for a determination that the purpose of the Hopi Reservation is to provide a permanent homeland. It also seeks a factual determination as to quantities of water for domestic, commercial, mining and industrial uses (DCMI), livestock consumption,

1 impoundments, and riparian and wetland habitat in Pasture Canyon. The following parties  
2 opposed the motion in whole or in part: Arizona State Land Department, City of Flagstaff, the  
3 LCR Coalition, the Navajo Nation, and the Salt River Project Agricultural Improvement and  
4 Power District.

5  
6 **Purpose of the Hopi Reservation**  
7

8 The purpose of a federal reservation land defines the scope and nature of impliedly  
9 reserved water rights. *United States v. Adair*, 723 F. 2d 1394, 1419 (9<sup>th</sup> Cir. 1983). The  
10 Arizona Supreme Court has specifically addressed the purpose for which federal land is  
11 reserved for an Indian tribe in the context of determining the amount of water the United States  
12 has reserved for its land that it holds on behalf of an Indian tribe. The Court ruled that “the  
13 essential purpose of Indian reservations is to provide Native American people with a ‘permanent  
14 home and abiding place,’ (citation omitted) that is, a ‘livable’ environment.” *In re the General*  
15 *Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307,  
16 313, ¶16, 35 P.3d 68, 74 (2001) (“*Gila V*”).

17 The Navajo Nation argues that a determination of the purpose cannot be used to allocate  
18 water between the Hopi Tribe and the Navajo Nation. *Navajo Nation’s Response to United*  
19 *States’ Motion for Summary Judgment on Certain Past and Present Water Claims*, filed June 6,  
20 2018 at 3. The identification of the purpose of a federal reservation is a critical prerequisite to  
21 the factual determination of federal water rights for a reservation:

22  
23 The court’s function is to determine the amount of water necessary  
24 to effectuate this purpose, tailored to the reservation’s minimal  
25 need. We believe that such a minimalist approach demonstrates  
26 appropriate sensitivity and consideration of existing users’ water

1 rights, and at the same time provides a realistic basis for measuring  
2 tribal entitlements.

3 *Gila V*, 201 Ariz. at 320, ¶48, 35 P.3d at 81.

4 The Navajo Nation also interprets *Gila V* as a case designed to establish water rights  
5 based on future need rather than actual uses. *Navajo Response* at 3-4. Consequently, it argues  
6 that *Gila V* is not relevant in this subproceeding designed to determine past and present uses.  
7 *Gila V* mandates that federal reserved water rights for future need as well as present need must  
8 be quantified using a comprehensive approach that includes consideration of a tribe's history,  
9 past use and current use. As strongly argued by counsel for the United States at oral argument,  
10 the bifurcation of the fact finding process in *In re Hopi Reservation* does not alter the fact that  
11 *In re Hopi Reservation* is a single contested case initiated to establish the water rights held by  
12 and on behalf of the Hopi Tribe for the Hopi Reservation. The determination and quantification  
13 of those water rights will be based on the intensive factual findings required by *Gila V*. Thus,  
14 the determination of the purpose of the reservation is both necessary and relevant to this  
15 subproceeding.  
16

17 The purpose of the Hopi Reservation is to provide a permanent homeland for the Hopi  
18 Tribe that is a livable environment.  
19

## 20 21 **Quantification of Discrete Uses**

22 *Gila V* defines the methodology that will be used in this case to determine water rights  
23 reserved under federal law. The methodology requires a multi-faceted, fact-intensive  
24 assessment of the Hopi Tribe's water requirements to fulfill the purpose of the creation of the  
25

1 reservation. It does not countenance a simplistic approach; rather the Court envisioned that the  
2 valid factual findings would entail “a difficult, time-consuming process”. *Id* at ¶50. Based on  
3 the language of *Gila V*, important factual determinations must be conducted in such a manner to  
4 assure the reliability of the evidence and allow the trier of fact a full opportunity to evaluate the  
5 evidence presented.

6  
7 The United States filed a motion for summary judgment to obtain a factual determination  
8 that the past and present water rights to meet the purpose for the reservation include: the  
9 maximum amount reported from specified sources for unspecified DCMI uses; the total capacity  
10 of storage facilities; the amounts required to maintain the largest number of cattle reported in a  
11 year; the amounts claimed for riparian and wetland habitats in Pasture Canyon; and presumably  
12 all water pumped from or diverted from 253 wells and 378 springs that the United States claims  
13 in Exhibit 14 to *United States’ Consolidated Reply to Responses to United States’ Motion for*  
14 *Summary Judgment on Certain Hopi Past and Present Water Claims* (“Exhibit 14”) are used for  
15 domestic, municipal, livestock and irrigation uses.  
16

17 A party filing for summary judgment must carry its burden of establishing that there is  
18 no genuine dispute as to any material fact. *Wells Fargo Bank, N.A. v. Allen*, 231 Ariz. 209,  
19 213, ¶17, 292 P. 3d 195, 199 (App. 2012) (“The moving party's burden is a ‘heavy’ one: all  
20 reasonable inferences from the evidence are made in the non-moving party's favor”). Any  
21 evidence or reasonable inference contrary to the material facts will preclude summary judgment.  
22 *United Bank of Arizona v. Allyn*, 167 Ariz. 191, 195, 805 P.2d 1012, 1016 (App. 1990). A party  
23 must also meet the procedural requirements of Ariz. R. Civ. P. 56, which are designed to assure  
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1 the reliability of evidence presented to the court. Specifically relevant here is the requirement  
2 that documents used to support a motion for summary judgment must constitute admissible  
3 evidence. *Wells Fargo Bank*, 231 Ariz. 209, 215, ¶18, 292 P. 3d 195, 200; *Briskman v. De*  
4 *Monte Mortg. Co.*, 10 Ariz. App. 263, 266, 458 P. 2d 130, 133 (1969) The United States relied  
5 upon reports prepared by Paul Hamai, Michael Hanemann, Shem Liechty and Thomas Ley in  
6 support of its motion. Unsworn witness reports do not constitute admissible evidence for  
7 purposes of summary judgment. *GM Dev. Corp., v. Cmty. Am. Morg. Corp.*, 165 Ariz. 1, 5, 795  
8 P. 2d 827, 831 (App. 1990) (“As a general rule, an unsworn and unproved assertion is not a fact  
9 that a trial court can consider in ruling on a motion for summary judgment”). The United  
10 States subsequently submitted a series of affidavits that it attached to its Reply. The affidavits  
11 were untimely and thus prejudicial to the other parties because of their inability to raise  
12 additional evidentiary objections. The affidavits did not comply with Rule 56(c)(5). Also, the  
13 United States did not submit a set of additional or supplemental facts despite attaching  
14 numerous exhibits to its Reply. A party moving for factual determinations under Rule 56 must  
15 comply with the rule to insure the effectiveness of its procedural and evidentiary safeguards.  
16 Failure to comply with Rule 56 precludes the entry of factual findings required by *Gila V* to  
17 support claims for federal reserved water rights.

20 The United States’ motion, except as provided above with respect to a finding of a  
21 homeland purpose, must also be denied for substantive as well as procedural reasons. The  
22 United States asserts claims for federal reserved rights to groundwater. The Arizona Supreme  
23 Court held that a “reserved right to groundwater may only be found where other waters are  
24

1 inadequate to accomplish the purpose of a reservation.” *In re the General Adjudication of All*  
2 *Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 420, ¶31, 989 P.2d  
3 739, 748 (1999)(“*Gila III*”). The United States provides no factual information in its Statement  
4 of Facts regarding the insufficiency of surface water for the uses for which it seeks a federal  
5 reserved right to groundwater. Arizona Department of Water Resources confirmed the presence  
6 of 316 springs on the reservation and the United States claims an additional 59 springs. Final  
7 Hydrographic Survey Report for the Hopi Indian Reservation, December 2015; *Amended*  
8 *Statement of Undisputed Facts in Support of United States’ Motion for Summary Judgment on*  
9 *Certain Past and Present Hopi Water Claims*, filed May 8, 2018 at 6, ¶20. Consequently, no  
10 factual determination can be made on this motion with respect to claims to water rights based on  
11 the use of groundwater, such as the claims for DCMI from the C, D, and N aquifers and the  
12 right to pump groundwater from 253 wells.  
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14  
15 The United States also made a blanket claim to hundreds of springs, which is  
16 presumably a claim for all flow from those springs, and a claim for 3,572 acre feet to fill and  
17 refill impoundments. The Court has rejected the proposition that “Indian tribes have a reserved  
18 right to all of the waters appurtenant to their reservations.” *Gila III*, 195 Ariz. at 421, ¶32, 989  
19 P.2d at 749. No claim for a water right can be granted simply because the water is appurtenant  
20 to the reservation. Further, a water right must be based on a quantified use. *Gila V*, 201 Ariz.  
21 at 316, ¶28, 35 P.3d at 77. The claims for springs and impoundments are claims to sources.  
22 Although, the United States purports to link sources with uses in Exhibit 14, the practice of  
23 making claims for use and separate claims for sources raises the possibility identified by the  
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1 LCR Coalition of “double counting.” Such double counting could occur if the United States  
2 claims a water right to a set amount of water for a particular use, such as DCMI and stock  
3 watering, and, in addition, claims a second water right to all water from the source of water to  
4 be accessed to satisfy that use.

5 Finally, the Arizona State Land Department, the Navajo Nation, City of Flagstaff and the  
6 LCR Coalition dispute a series of factual issues asserted by the United States in support of its  
7 claim for 315.5 acre feet to preserve the riparian and wetland habitat in Pasture Canyon.  
8 Accordingly, genuine issues of material fact preclude the entry of a factual determination on  
9 this issue as well.  
10

11 **IT IS ORDERED** finding the purpose of the Hopi Reservation as set forth above and  
12 otherwise denying the remainder of the motion.

13 **IT IS FURTHER ORDERED** denying the Proposed Order Granting United States’  
14 Motion for Summary Judgment on Certain Hopi Past and Present Water Claims, attached to the  
15 *United States’ Consolidated Reply to Responses to United States’ Motion for Summary*  
16 *Judgment on Certain Hopi Past and Present Water Claims.*

17 **IT IS FURTHER ORDERED** granting the *LCR Coalition’s Motion to Strike Excerpt*  
18 *of Deposition Testimony of Dale Whittington Attached to United States’ Consolidated Rely;*  
19 *LCR Coalition’s Motion to Strike Affidavit of Christopher Banet Attached to United States’*  
20 *Consolidated Rely; LCR Coalition’s Motion to Strike Affidavit of Paul Hamai Attached to*  
21 *United States’ Consolidated Rely; LCR Coalition’s Motion to Strike Affidavit of Thomas Ley*  
22 *Attached to United States’ Consolidated Rely.*  
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Susan Ward Harris  
Special Master

On August 20, 2018, the original of the foregoing was mailed to the Clerk of the Apache County Superior Court for filing and distributing a copy to all persons listed on the Court approved mailing list for the Little Colorado River Adjudication Civil No. 6417-203.