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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

REPORT OF THE SPECIAL MASTER
REGARDING LCR COALITION'S
MOTIONS TO DISMISS HOPI TRIBE'S
CLAIMS FOR OFF-RESERVATION
WATER FOR USE ON THE HOPI
RESERVATION

CONTESTED CASE NAME: *In re Hopi Reservation HSR*

HSR INVOLVED: *Hopi Reservation*

DESCRIPTIVE SUMMARY: Special Master recommends granting LCR Coalition's Motion to Dismiss Hopi Tribe's Claims to water from the Colorado River, Blue Springs Complex, Little Colorado River and Coconino Aquifer from locations not on Hopi land.

NUMBER OF PAGES: 12

DATE OF FILING: August 24, 2017

1 **1. Motions Presented**

2 The motions filed in this case concern the Hopi Tribe’s claims for water to be used on
3 the Hopi Reservation from sources that are not located on the Hopi Reservation. The LCR
4 Coalition, joined by the City of Flagstaff and the Salt River Project Water Agricultural
5 Improvement and Power District, moved to dismiss the Hopi Tribe’s claims to water for use
6 on the Hopi Reservation from the Colorado River upstream of Hoover Dam, the Blue Spring
7 Complex, the Little Colorado River, and the Coconino Aquifer from wells located outside the
8 boundaries of the Hopi Reservation. The Navajo Nation supports dismissal of the Hopi
9 Tribe’s claims on more limited grounds than those argued by the LCR Coalition.
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11 **2. Background**

12 The court has jurisdiction to adjudicate water rights of all persons in a designated
13 river system and source pursuant to the terms of the general adjudication statutes, A.R.S.
14 §§45-251 *et seq.* See *United States v. Superior Court In & For Maricopa Cty.*, 144 Ariz.
15 265, 270, 697 P.2d 658, 663 (1985). The purpose of this specific contested case is to
16 adjudicate the Hopi Tribe’s water rights for the Hopi Reservation in the Little Colorado River
17 system and source.
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19 In 2008, Judge Ballinger determined that “there are a number of issues pending in this
20 adjudication that may be amenable to resolution prior to obtaining reports concerning
21 technical issues being addressed by the Arizona Department of Water Resources.” *Minute*
22 *Entry* (March 19, 2008 in CV-6417) at 1. Included in the list of issues were the Hopi Tribe’s
23 claims for rights to water sources not located on its land. In 2009, Judge Ballinger decided
24 that “the Hopi Tribe is precluded from asserting water right claims in this adjudication to the
25 extent such claims seek the right to water sources located within the Little Colorado River
26 Basin that neither abut nor traverse Hopi lands.” *Minute Entry* (March 2, 2009 in CV-6417)
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1 at 2; reconsideration denied, Minute Entry (August 26, 2009 in CV-6417); petition for
2 interlocutory review denied, No. WC-09-0001-IR (Ariz. Oct. 26, 2011) (“2009 Minute
3 Entry”).

4 Six years later the Hopi Tribe filed a third amendment to its Statement of Claimant
5 which included the following:

6 D. The Hopi Tribe further asserts a right to water from other sources
7 as needed to supply the Tribe's needs to make its land a permanent
8 homeland, including water from the main stem of the Little Colorado
9 River, the Colorado River including Lake Powell, and the Coconino
10 aquifer. *See United States v. Winans*, 198 U.S. 371 (1905), *see also*,
11 *Lyon v. Gila River Indian Community*, 626 F. 3d 1059 (9th Cir. 2010) (an
implied easement existed across the Indian reservation to serve lands
that were granted by the federal government for use by the state as a
school).³

12 E. As the owner of subsurface minerals underlying the Hopi
13 Reservation pursuant to the Navajo-Hopi Land Dispute Settlement
14 Act of 1974, 25 U.S.C. §640d-6, the Hopi Tribe claims a
15 proportionate right to water discharging from the Blue Springs
Complex into the lower Little Colorado River.

16 The Hopi Tribe makes these claims on behalf of and for the benefit of
17 the Tribe, its villages, clans and people.

18 ³ If the present adjudication is not the appropriate venue for asserting the Hopi Tribe's right to
19 these waters, then the Hopi Tribe wishes to preserve its claim and right to pursue these claims at
20 a later date in a different adjudication.

21 The Hopi Tribe's Third Amended Statement of Claimant, dated June 2, 2015, pp. 19-20.

22 **3. Claims for Water Sources located outside the Little Colorado River Basin**

23 This contested case is part of the general adjudication “to determine all rights to the
24 use of water obtained from the Little Colorado River System and Source in the State of
25 Arizona.” *Pre-Trial Order No. 1 re: Conduct of Adjudication* (April 24, 1987) at 2, No.
26 6417, *In re General Adjudication of All Rights to Use Water in Little Colorado River System*
27 *& Source*, Superior Court of Arizona, Apache County.

1 Conclusion of Law No. 1 In this contested case, the court has jurisdiction pursuant to
2 A.R.S. §§45-251 *et seq.* to determine the extent and relative priority of water rights within the
3 boundaries of the Little Colorado River system and source.

4 The Hopi Tribe asserts a claim in its Third Amended Statement of Claimant to the
5 Colorado River including Lake Powell, which is a reservoir located on the border between
6 Arizona and Utah. These broad claims for water assert rights to sources located outside the
7 boundaries of the Little Colorado Basin. In its Response, the Hopi Tribe has, however,
8 explicitly recognized that the court's jurisdiction in this general stream adjudication is limited
9 to the Little Colorado River Basin.¹ *Hopi Tribe's Response to LCR Coalition's Motion to*
10 *Dismiss the Hopi Tribe Claim to Water Upstream of the Hoover Dam*, p. 2. It explains that
11 the assertion in its Third Amended Statement of Claimant to "surface water from the
12 mainstem of the Colorado River is not intended as a claim to be adjudicated in this matter."
13 *Id.* Instead, the Hopi Tribe characterized the quoted language in its Third Amended Statement
14 of Claimant as "statements simply [made] to provide other parties notice of its rights and
15 intention, at the appropriate time and forum, to assert a claim to water from the mainstem
16 Colorado River." *Id.* The Hopi Tribe's shift from the conditional language expressed in
17 footnote 3 cited above in its Third Amended Statement of Claimant to its current position
18 where it "acknowledges and agrees that the jurisdiction of this general stream adjudication is
19 limited to the Little Colorado Basin" brings the Hopi Tribe into agreement with other parties
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25 ¹ The LCR Coalition, the Navajo Nation, and the United States also identify the same limitation on the
26 court's jurisdiction. See *LCR Coalition's Motion to Dismiss the Hopi Tribe's Claim to Water from the*
27 *Colorado River Upstream of Hoover Dam*, p. 12; *Navajo Nation's Combined Response to LCR Coalition's*
28 *Motions to Dismiss*, p. 5.; *United States Response in Opposition to LCR Coalition's Motion to Dismiss Hopi*
Tribe's Claims to Off-Reservation Water, p. 2.

1 on the issue of whether this court has jurisdiction to determine the Hopi Tribe's claims to the
2 Colorado River and Lake Powell. *Id.*

3 The Hopi Tribe also generally claims a right to water from the Coconino Aquifer in
4 its Third Amended Statement of Claimant. The LCR Coalition moved to dismiss the Hopi
5 Tribe's claims to groundwater to the extent that the Hopi Tribe claims a right to access the
6 Coconino Aquifer at geographical locations outside the Hopi Reservation. The Coconino
7 Aquifer extends "from the Mogollon Rim in the south to an area west of the LCR River and
8 northeast into New Mexico." Final Hydrographic Survey Report for the Hopi Indian
9 Reservation, December 2015, p. 2-10 ("Final Hopi HSR"). The Hopi Tribe contends that it
10 is entitled to assert a claim for a right to access groundwater from the aquifer at presumably
11 any surface location above the Coconino Aquifer because a portion of that aquifer exist under
12 the Hopi Reservation. This position is not consistent with its stated agreement that court's
13 jurisdiction in this case is limited to the Little Colorado Basin. The water rights to be
14 determined in this case initiated as part of the Little Colorado River General Adjudication
15 must be circumscribed by the boundaries of the Little Colorado River Basin.

18 Conclusion of Law No. 2 The court does not have jurisdiction to adjudicate in this
19 case the nature, extent and relative priority of water rights that the Hopi Tribe may claim to
20 sources or locations outside the Little Colorado River Basin.

22 **4. Claims for Water Sources within the Little Colorado River Basin**

23 The geographical limitations on the sources of water within the Little Colorado Basin
24 to which the Hopi Tribe can claim rights to water for use on their reservation have been at
25 issue, argued and decided in the course of this adjudication. Judge Ballinger barred the Hopi
26 Tribe from claiming rights to water sources that neither "abut nor traverse" its land. 2009
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1 *Minute Entry* at 2. Since the issuance of Judge Ballinger’s decision, the adjudication has
2 been assigned to Judge Brain.

3 The Hopi Tribe’s assertion in its Third Amended Statement of Claimant for water
4 rights to sources located within the Little Colorado River Basin but outside the boundaries of
5 the Hopi Reservation after the appointment of Judge Brain effectively constitutes a horizontal
6 or lateral appeal of Judge Ballinger’s decision. “It is a well-established general rule that the
7 trial court should not reconsider a motion decided by another judge in the absence of new
8 circumstances justifying a fresh examination.” *Union Rock & Materials Corp. v. Scottsdale*
9 *Conference Ctr.*, 139 Ariz. 268, 272, 678 P.2d 453, 457 (Ct. App. 1983). Horizontal appeals
10 waste judicial resources as well of the resources of the parties who had previously briefed and
11 argued the issues and should not be undertaken unless essential facts or applicable law have
12 substantially changed or the decision is manifestly erroneous or unjust. *Cypress on Sunland*
13 *Homeowners Ass'n v. Orlandini*, 227 Ariz. 288, 296, 257 P.3d 1168, 1176 (Ct. App. 2011).
14 The Hopi Tribe and the United States contend that Judge Ballinger’s ruling was “manifestly
15 erroneous”. *Hopi Tribe’s Response to the LCR Coalition’s Motion to Dismiss the Hopi Tribe*
16 *Claim’s to Water from the Coconino Aquifer, Little Colorado River and Blue Spring Complex*
17 *p. 2-3; United States Response in Opposition to LCR Coalition’s Motion to Dismiss Hopi*
18 *Tribe’s Claims to Off-Reservation Water*, p. 2.

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22 **A. Claims to the Little Colorado River and the Coconino Aquifer**

23 The United States, joined by the Hopi Tribe, argues that federal reserved water rights
24 can extend to sources of water that are not located on the Hopi Reservation if necessary to
25 fulfill the homeland purpose of the reservation. Judge Ballinger did not address this issue
26 due to a finding that “the Hopi Tribe’s claims in this adjudication arise under unusual, if not
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1 unique circumstances.” *2009 Minute Entry* at 1. The circumstances to which Judge
2 Ballinger referred include the fact that the entire Hopi Reservation shares a common border
3 with the Navajo Reservation and the legislation enacted by Congress and decisions issued by
4 the federal courts define the respective property rights of the Hopi Tribe and the Navajo
5 Nation.

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7 Congress passed the Navajo-Hopi Land Dispute Settlement Act of 1974, Pub. L
8 No. 93-531, 88 Stat. 1712, 1715 (“Settlement Act”) to enable the Navajo and Hopi tribes
9 to resolve “their continuing dispute over which tribe was entitled to which lands in the 1934
10 reservation. Each tribe was authorized to sue the other in district court ‘for the purpose of
11 determining the rights and interests of the tribes in and to such lands and quieting title thereto
12 in the tribes.’ 25 U.S.C. § 640d-7(a).” *Masayesva v. Zah*, 65 F.3d 1445, 1450 (9th Cir. 1995),
13 *as amended on denial of reh'g and reh'g en banc* (Dec. 5, 1995). The Hopi Tribe initiated an
14 action against the Navajo Nation in federal court resulting in a series of federal court
15 decisions that applied the governing statute and determined the parties’ respective rights and
16 interests in the 1934 Reservation. In 1992, the federal district court issued a decision that
17 partitioned the Hopi Tribe’s rights and interests within the 1934 Reservation based on a
18 number of factors “including: 1) avoiding the relocation of individuals, (2) avoiding the
19 disruption of grazing areas as much as possible, (3) providing 50% of the joint use area
20 acreage to the Hopi Tribe, to the extent possible, (4) fairly and equitably distributing water
21 sources, and (5) ensuring the feasibility of future administration of the partitioned areas,
22 including fencing.” *Masayesva for & on Behalf of Hopi Indian Tribe v. Zah*, 816 F. Supp.
23 1387, 1418 (D. Ariz. 1992), *aff'd in part, rev'd in part sub nom. Masayesva v. Zah*, 65 F.3d
24 1445 (9th Cir. 1995), *as amended on denial of reh'g and reh'g en banc* (Dec. 5, 1995). The
25 federal court affirmed the configuration of the boundaries of the Hopi Reservation within the
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1 1934 Reservation recognizing that it created “‘pockets’ of land” for the Hopi Tribe within the
2 1934 Reservation. *Masayesva*, 65 F. 3d at 1456.

3 As a consequence of the federal action, the Hopi Tribe’s access to any water source
4 that does not abut or traverse the Hopi Reservation necessarily requires the Hopi Tribe to
5 have a legal right to ingress and egress over the Navajo Reservation for the purpose of
6 accessing and transporting water outside the boundaries of its reservation. Clearly
7 recognizing the jurisdiction of the federal court and the extent of the litigation in the federal
8 courts undertaken to resolve the respective property interests of the Hopi Tribe and the
9 Navajo Nation in the 1934 Reservation, Judge Ballinger ruled:
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11 [T]he federal courts have undertaken to define the rights of the Navajo Nation
12 and the Hopi Tribe by virtue of the reservations created in 1882 and 1934 and
13 their related settlement act, as well as by numerous rulings entered by the Indian
14 Claims, federal district and appellate courts. These pronouncements are not
subject to review by this adjudication court and do not support the Hopi Tribe’s
claim to water sources located outside its reservation.

15 *2009 Minute Entry* at 2.

16 The United States contends that Judge Ballinger should have considered the
17 possibility that the lack of access through the Navajo Nation could have been remedied by
18 either the actions of Congress or the United States in its capacity as trustee for both parties.
19 In the 22 years since the issuance of the *Masayesva* decision and the eight years since Judge
20 Ballinger issued his decision, no party claims that any such action has occurred. Thus, the
21 occurrence and efficacy of any future action on the part of either the United States or
22 Congress with respect to this issue is, at this point, purely speculative.
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24 Conclusion of Law No. 3 A decision is not rendered manifestly unjust due to lack of
25 consideration of entirely speculative future changes in law or fact.
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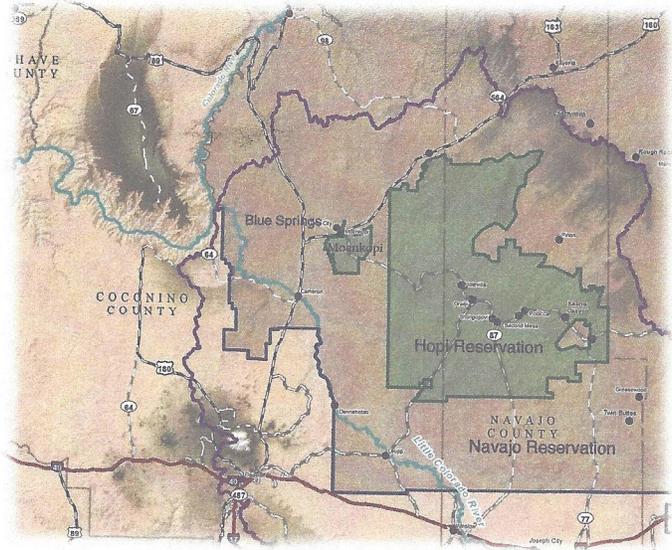
1 The United States also argues that that basis of Judge Ballinger’s Order is manifestly
2 erroneous because the court’s jurisdiction is limited to defining water rights and it cannot
3 consider “how the Hopi Tribe will access its reserved water rights”. *United States Response*
4 *in Opposition to LCR Coalition’s Motions to Dismiss Hopi Tribes Claims to Off-Reservation*
5 *Water*, p. 15. The Arizona Supreme Court has expressly rejected such a narrowly
6 circumscribed role for the adjudication court in the context of Indian water rights: “The lower
7 court must be given the latitude to consider other information it deems relevant to
8 determining tribal water rights.” *In re Gen. Adjudication of All Rights to Use Water in Gila*
9 *River Sys. & Source*, 201 Ariz. 307, 320, 35 P.3d 68, 81 (2001). Among the factors to be
10 considered in the adjudication of federal Indian reserved water rights, the trial court must
11 determine whether proposed water uses are “achievable from a practical standpoint”. *Id.*
12 The lack of legal access to a source of water significantly affects the viability of its proposed
13 use.
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16 Conclusion of Law No. 4 The Hopi Tribe’s lack of legal access across the Navajo
17 Reservation to transport water from a source outside the boundaries of the Hopi Reservation
18 on to the Hopi Reservation could properly be considered to determine the Hopi Tribe’s water
19 rights.
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21 Conclusion of Law No. 5 Judge Ballinger’s decision to limit the Hopi Tribe’s claims
22 for water to be used on the Hopi Reservation to water sources that abut or traverse the Hopi
23 Reservation was not manifestly unjust.
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2 **B. Blue Springs Complex**

3 In its Third Amended
4 Statement of Claimant, the Hopi Tribe
5 relies on federal law to claim a right to
6 the Blue Springs Complex. As shown
7 on Figure 1, this water source is
8 located west of the Hopi Moenkopi
9 Area on that portion of the 1934
10 Reservation partitioned to the Navajo
11 Nation. Final Hopi HSR, p. 5-3 and
12 Figure 2-6.



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Figure 1. Location of the Blue Springs Complex Reservation within LCR Adjudication Area.
Source: Final Hopi HSR (Dec. 2015) Figure 1-1

According to the Hopi Tribe’s Third Statement of Claimant, the Navajo-Hopi Land Dispute Settlement Act of 1974, 25 U.S.C. §640d *et seq.*, 88 Stat. 1712, P.L. 93–531 (1974) conveys to the Hopi Tribe “a proportionate right to water discharging from the Blue Springs Complex into the Little Colorado River.” Section 7 of the Settlement Act, codified as 25 U.S.C. §640d-6 (omitted), provided in relevant part:

Partition of the surface of the lands of the joint use area shall not affect the joint ownership status of the coal, gas and all other minerals within or underlying such lands. All such coal, gas and other minerals within or underlying such lands shall be managed jointly by the two tribes, subject to supervision and approval by the Secretary as otherwise required by law, and the proceeds therefrom shall be divided between the tribes share and share alike.

Neither the Hopi Tribe nor the United States specifically address the Hopi Tribe’s interpretation of the cited provision. Among other arguments, the Navajo Nation and the

1 LCR Coalition contend that 25 U.S.C. §640d-6 (omitted) does not affect the Blue Spring
2 Complex area because it does not apply to the 1934 Reservation on which the Blue Springs
3 Complex is located. The federal district court that determined the partitioning of the 1934
4 Reservation specifically distinguished the partitioning of the 1934 Reservation from the
5 partition of the 1882 Reservation where 25 U.S.C. § 640d-6 did apply and had restricted the
6 partition to only the surface rights. The court stated:

7 Section 640d-6 does not apply to the areas jointly used by the
8 Navajo and Hopi on the 1934 Reservation. Section 640d(a)
9 specifies that the language “joint use area” in the statute refers to
10 “lands within the reservation established by the Executive order
of December 16, 1882, except land management district no. 6.

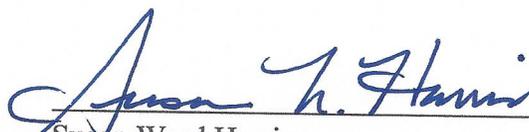
11 *Masayesva for & on Behalf of Hopi Indian Tribe v. Zah*, 816 F. Supp. 1387, 1421 (D. Ariz.
12 1992), *aff'd in part, rev'd in part sub nom. Masayesva v. Zah*, 65 F.3d 1445 (9th Cir. 1995),
13 as amended on denial of reh'g and reh'g en banc (Dec. 5, 1995).

14 Conclusion of Law No. 6 25 U.S.C. §640d-6 (omitted) does not apply to the 1934
15 Reservation. Thus, it does not provide a basis for the Hopi Tribe’s claims to water from the
16 Blue Springs Complex.

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18 **5. Recommendations.**

19 The Special Master recommends that the Court:

- 20 1. Approve and adopt these conclusions of law.
21 2. Grant the LCR Coalition’s Motions and dismiss the Hopi Tribe’s claims to water
22 for use on the Hopi Reservation from the Coconino Aquifer accessed outside the
23 Hopi Reservation, the Blue Spring Complex, the Little Colorado River, the
24 Colorado River, and Lake Powell.

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27 Susan Ward Harris
28 Special Master

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On August 24, 2017 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.

Barbara Brown

Barbara Brown