

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 6417-201

ORDER DENYING THE HOPI
TRIBE'S MOTION FOR
RECONSIDERATION

CONTESTED CASE NAME: *In re Hopi Tribe Priority.*

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: Judge Brain denies the Hopi Tribe's Motion for Reconsideration.

NUMBER OF PAGES: 11.

DATE OF FILING: August 18, 2017.

On February 22, 2016, the Hopi Tribe timely filed a Motion for Reconsideration pursuant to Rule 7.1(e) of the Arizona Rules of Civil Procedure of this Court's minute entry filed on January 25, 2016. The United States joined

in the motion. The Hopi Tribe's motion concerns two primary issues:

1. The priority date for federal reserved water rights for land owned by a private party at the time of the creation of the 1882 Reservation; and
2. The priority date for federal reserved water rights for Moenkopi.

The Court will deny the Motion for Reconsideration, but will take this opportunity to set forth in some detail its analysis of the first issue raised by the Hopi Tribe.

1. 1882 Reservation

A. 1866 Transfers of Ownership

In 1866, Congress granted to Atlantic and Pacific Railroad Company ("Railroad" refers to Atlantic and Pacific Railroad Company and its successors in interest) alternate odd-numbered sections of public land within the Territory of Arizona on each side of the railroad right of way subject to certain restrictions plus a right to select "in lieu" land within a designated area. Act of July 27, 1866, ch. 278, sec. 1, 14 Stat. 292, 293 ("Act"). In 1872, the Railroad filed a map designating the location of the railroad with the Secretary of the Interior. At that time, title to the land granted by Congress to the Railroad became fixed and perfected effective as of July 27, 1866. These facts are set forth in the Special Master's Report, Findings of Fact 26-28, which this Court accepted.

The Court declines to accept the Hopi Tribe's assertion that the Hopi Tribe's occupation of part or all of the land described by the Act precluded the

United States from owning a fee interest in that land that could be transferred to the Railroad. Motion for Reconsideration, p. 14, lines 17-19. The United States owned the fee interest in the land described by the Act. *Spalding v. Chandler*, 160 U.S. 394, 402-403 (1896) (“It has been settled by repeated adjudications of this court that the fee of the lands in this country in the original occupation of the Indian tribes was, from the time of the formation of this government, vested in the United States.”); *see also United States v. Santa Fe Pac RR Co*, 314 U.S. 339 (1941) (found that the grant of land to a railroad conveyed a fee interest in the land). Further, the United States had the power and authority to transfer its fee title to a railroad company pursuant to an act of Congress:

The land in controversy, and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as ‘Indian County.’ At the time the act of July 2, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of congress from operating to pass the fee of the land to the company. The fee was in the United States. The Indians had merely a right of occupancy, - a right to use the land subject to the dominion and control of the government.

Buttz v. N. Pac. R. Co., 119 U.S. 55, (1886); *Pueblo of Jemez v. United States*, 790 F.3d 1143, 1162 (10th Cir. 2015) (“This concept, that federal land grants pass fee title to the grantees subject to aboriginal title has repeatedly been upheld by the Supreme Court”). The Hopi Tribe’s aboriginal title did not eviscerate United States’ fee title in the land that it conveyed pursuant to the Act. Instead, the Hopi Tribe’s occupation encumbered the title and prevented the United States from

conveying to the Railroad a fee title free and clear of all encumbrances. *Id.* Accordingly, in 1866 the United States did hold fee title in the land subject to the Act and it conveyed fee title to that land to the Railroad effective as of July 27, 1866.

The Hopi Tribe also argues that it is legal error to conclude that the transfer of the land impaired the Hopi Tribe's aboriginal title. Motion for Reconsideration, p.12, lines 16-17. The finding that the United States held fee title in the land that it conveyed to the Railroad should not be equated with a finding that the United States conveyed fee title free and clear of the Hopi's aboriginal rights. The Court did accept and continues to agree with the Hopi Tribe's position that the transfer of the fee interest in the land did not terminate the Hopi Tribe's aboriginal title to the land ultimately described in 1882 Executive Order. The Railroad took title to the land subject to the Hopi Tribe's aboriginal rights. *United States v. Santa Fe Pac RR Co, supra; Pueblo of Jemez v. U.S., supra.* The Hopi Tribe holds water rights based on its aboriginal title with a priority of time immemorial for all land in Land Management District 6 within the reservation created by the 1882 Executive Order as set forth in the Special Master's Findings of Fact 1-7 and Conclusions of Law 2-5, which were accepted by this Court.

The Special Master also effectively decided in Finding of Fact 37 that the transfer of title to the Railroad Land in 1866 did not terminate the Hopi's aboriginal title in the remaining land in the 1882 Reservation. The Court accepted

Finding of Fact 37, which states that aboriginal title to land outside of District 6 was extinguished 71 years after the United States transferred its fee interest in the land to the Railroad. This Court confirms its decision that the Hopi Tribe's aboriginal title was extinguished in 1937 for all land within the 1882 Reservation except as to that land in the Land Management District 6. The Hopi Tribe does not have a time immemorial priority date for any water rights based on aboriginal title for any of the land that is within the 1882 Reservation but outside of Land Management District 6.

B. 1882 Ownership

In 1882, President Chester A. Arthur issued an Executive Order “withdrawing from settlement and sale” certain land described by metes and bounds in the Territory of Arizona (“1882 Reservation”) for the use and occupancy the Hopi Tribe “and such other Indians as the Secretary of the interior may see fit to settle thereon”. Executive Order, December 16, 1882. When President Arthur signed the Executive Order, the Railroad held fee title to a portion of the land described in the 1882 Executive Order and the United States held the fee title to the remainder of the land. For purposes of this Order, the term “Railroad Land” refers to that land located within the boundaries of the Executive Order to which the United States had conveyed its fee interest to the Railroad pursuant to the Act. To properly determine the appropriate priority date for the Hopi Tribe's federal reserved water rights appurtenant to the land within the 1882

Reservation, the Court cannot ignore the legal consequences of the federal government's 1866 transfer to the Railroad of its fee title to the Railroad Land.

The threshold condition that must be satisfied before a federal reserved water right can be asserted is a finding that the government has withdrawn the land from the public domain and reserved it for a public purpose. *United States v. New Mexico*, 438 U.S. 696, 698, (1978); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir. 1981) (The implied reservation of water arises from Congress' "power to reserve unappropriated water for use on appurtenant lands withdrawn from the public domain for specific federal purposes."); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 231 Ariz. 8, ¶¶ 27-36, 289 P. 3d 936 (2012) (federal government could not withdraw land not owned by the federal government and concluded that no federal reserved water rights attached to the land); *Mexico ex rel State Engineer v. Commissioner of Public Lands* 145 N.M. 433, 445, 200 P. 3d 86, 98 (N.M. App. 2008) ("[W]e are aware of no authority that supports the proposition that by retaining oversight or enforcement power over a state's disposition of its trust lands, the federal government also retains the title to the land that is necessary to create a federal reservation and impliedly reserve water rights."). In *Cappaert v. U.S.*, 426 U.S. 128 (1976) the Supreme Court described the conditions necessary for the creation of federal reserved water rights:

This Court has long held that when the Federal Government withdraws *its* land from the *public* domain and reserved it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. . . . Reservation of water rights is empowered by the Commerce Clause, Art. I, § 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, § 3, which permits federal regulation of *federal lands*. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert, 426 U.S. at 138 (emphasis added).

In accordance with these decisions, no federal reserved water rights with a priority date of 1882 can attached to the Railroad Land. The Hopi Tribe's federal reserved water rights in the Railroad Land attached on the dates on which the federal government acquired title to real property. *United States v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984) (federal reserved water right priority dates for the Spokane Indian Reservation determined by dates of acquisition of land); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, *supra* at ¶18.

The Hopi Tribe also asserts that it is entitled to an earlier priority date for the federal reserved water rights: “the railroad grant lands are subject to aboriginal title, including a reserved water right with a time immemorial priority date.” Motion for Reconsideration, p. 15, lines 19-20. This Court will not conflate aboriginal rights and federal reserved rights because the courts have crafted fundamentally different factors and tests to determine priority dates and

quantification conveyed by the two separate rights. *United States v. Adair*, 723 F.2d 1394 (1983) (“This hierarchy among Indian water rights arises, . . ., from the analytically separate question of what priority date for appropriation the various water rights reserved in the treaty carry.”). The Court cannot conclude that aboriginal title extends the priority date that attaches to federal reserved water to time immemorial. *Id.*; 2 *Water and Water Rights* §37.02(b) (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2015) (“federal rights cannot have a ‘time immemorial priority’ date.”) The motion for reconsideration requesting the adoption of Conclusion of Law 24 is denied.

In Finding of Fact 38 the Special Master identifies dates between 1909 and 1913 on which the United States acquired fee title to the Railroad Land. Several parties disputed Finding of Fact 38 asserting that the United States acquired additional parcels included in the Railroad Land as late as 1934. Due to the uncertainty regarding the post-1882 dates on which the United States completed its acquisition of the Railroad Land, the Court rejected Finding of Fact 38 and denies the Hopi’s Motion for Reconsideration with respect to Finding of Fact 38.

C. Trust Ownership

The Hopi Tribe contends that the United States has held “ultimate title to the Hopi 1882 Reservation lands and held those land in trust since December 16, 1882.” Motion for Reconsideration, p. 4, lines 24-25. It is well-established that the United States currently holds and has held fee title to all of the land within the

1882 Reservation for decades and that the title is held in trust. *See Healing v. Jones*, 210 F. Supp. 125 (1962). The specific question presented here, however, is whether the United States held fee title to the Railroad Land in trust in 1882 so that federal reserved water rights could attach in 1882.

The Hopi Tribe contends that requisite ownership interest can be found based on the United States' fiduciary duty to the Indians enunciated in *U.S. v. Mitchell*, 463, U. S. 206 (1983) "coupled with the split title to the Indian lands that grew out of *Johnson [v. M'Intosh]*, 21 U.S. 543 (1823)]." Motion for Reconsideration, p 4, line 23. This Court is in accord with the general concept that the United States has a fiduciary obligation to the Hopi Tribe. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 35 P.3d 68 (2001) In *Mitchell*, however, the finding of a fiduciary duty arising out of federal statutes and regulations supported a right to claim damages for breach of duty, not a conclusion that the federal government had an ownership interest in trust or otherwise to assets titled in the name of private party. As recognized by the Hopi Tribe in its assertion that the United States held a "split title" to the Railroad Land, a determination that the United States held the title to the Railroad Land in trust requires a finding that the United States actually owned an interest in that land. Given that the United State's title to the Railroad Land passed to the Railroad effective in 1866, the Court can find no remaining ownership interest in the Railroad Land reserved by the federal government that

could have been held in trust in 1882. *See Masayesva v. Zah*, 65 F. 3d 1445, 1459 (1995) (“Had the United States been able to convey the lands into trust for the Navajo without paying the Santa Fe for quitclaim deed, as it could if it owned the land, there is no reason to be doubt that this would have been done.”) Thus, the Court does not accept Finding of Fact 20, which requires the finding that United States owned the Railroad Land in trust in 1882.

Finally, the Hopi Tribe requests the opportunity to assert a claim based on the prior appropriate doctrine and assert a time immemorial priority date. As the Hopi Tribe correctly stated, the Special Master did not consider this issue and this Court made no ruling regarding either rights under prior appropriation or the appropriate priority date under state law. The proper context for asserting such a fact dependent claim is in the contested case *In re Hopi Reservation HSR*, CV6417-203.

2. Moenkopi

No further explanation is required with respect to this issue.

IT IS ORDERED denying the Hopi Tribe’s Motion for Reconsideration.

DATED: August 18, 2017.



HON. MARK H. BRAIN
Judge of the Superior Court

On August 18, 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. 6417-201.