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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN THE
GILA RIVER SYSTEM AND SOURCE

No. W-1 (Salt)
No. W-2 (Verde)
No. W-3 (Upper Gila)
No. W-4 (San Pedro)

Contested Case No. W1-11-605
ORDER GRANTING IN PART
AND DENYING IN PART
MOTIONS FOR SUMMARY
JUDGMENT AND FOR
PARTIAL SUMMARY JUDGMENT

CONTESTED CASE NAME: *In re Fort Huachuca.*

HSR INVOLVED: San Pedro River Watershed Hydrographic Survey Report.

DESCRIPTIVE SUMMARY: Order granting in part and denying in part motions for summary judgment and motions for partial summary judgment.

NUMBER OF PAGES: 12

DATE OF FILING: September 1, 2016

1 On June 1, 2016, the United States, Freeport Minerals Corporation, Liberty Utilities (Bella
2 Vista Water) Corp. and the State of Arizona filed motions for summary judgment and partial
3 summary judgment. The Court has reviewed those motions as well as the joinders, responses and
4 replies filed by the above-named parties as well as by Pueblo Del Sol Water Company, City of
5 Sierra Vista, Salt River Project Agricultural Improvement and Power District and Salt River Valley
6 Water User's Association ("Salt River") and the Yavapai-Apache Nation and the Pascua Yaqui
7 Tribe. On August 11, 2016, oral arguments were heard on the issues raised by the motions.
8

9 Fort Huachuca is an important federal military installation that provides essential military
10 protection and helps to ensure our national security. No dispute exists that Fort Huachuca requires
11 federal reserved water rights to assure a supply of water to fulfill its mission. Similarly, no dispute
12 exists that Fort Huachuca can access multiple sources of water: streams, springs, ponds, runoff,
13 effluent, and groundwater. State law and federal law dictate the United States' rights to these
14 sources of water. This case focuses solely on the United States' federal reserved water rights to
15 access the minimal amount of water necessary to meet its military purposes and, more specifically,
16 in this phase of the case, on three issues:
17

- 18 1) What is the quantity of the United States' federal reserved water rights?
- 19 2) What is the scope of water uses encompassed by the term "military purposes"?
- 20 3) Are sources of water other than groundwater adequate to accomplish the military
21 purposes, and if not, what is the quantity of groundwater required to accomplish these purposes?
22

23 **1. Quantification of Water Rights**

24 The United States moves for summary judgment on the issue of the quantification of
25 federal reserved water rights available to a federal military installation. It argues that the
26 appropriate quantity of federal reserved water rights is "whatever amounts it requires for military
27 purposes." *Memorandum in Support of Motion for Summary Judgment Based on Exclusive*
28

1 *Jurisdiction*, dated June 1, 2016, p. 12, line 16. According to the United States, the State of
2 Arizona does not have jurisdiction over Fort Huachuca's water resources under Article 1, Section
3 8, clause 17 of the Constitution of the United States ("Exclusive Jurisdiction Clause") and,
4 therefore, cannot determine the quantity of water to which the United States can exercise federal
5 reserved water rights. Using this reasoning, the federal government claims sole authority to
6 determine the amount of surface and groundwater that will be used to accomplish the military
7 purposes of Fort Huachuca.
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9 The basic problem with the United States' argument is this: Of course, the United States
10 has the sole authority to control what happens on its military installation pursuant to the Exclusive
11 Jurisdiction Clause.¹ But the whole point of a reserved groundwater right is to allow the United
12 States to limit what people can do on their own property, outside the military installation. The
13 Exclusive Jurisdiction Clause does not extend that far.
14

15 The Ninth Circuit Court of Appeals has clearly distinguished between the legal authority to
16 dictate the type of use of surface water flowing through a federal military installation and a water
17 right vested in the federal government:

18 [T]he right to use water is a property right and is appurtenant to
19 particular parcels of land. We must not fall into the fallacy of believing
20 that, because the United States, by its sovereignty, made use of the corpus
21 of water which entered the enclave as it chose, it thereby acquired
22 property rights in the flow against upper riparians or appropriators under
23 municipal law. . . .

24 . . .
25 The government, as regards all claimants to water outside the
26 enclave, is not in the position of sovereign, but in the position of a lower
27 riparian which is compelled to make beneficial use within the watershed
28 and for other than proper riparian uses must show an appropriation
according to law.

26 *People of the State of California v. United States*, 235 F. 2d 647, 656 (9th Cir. 1956).

1 This Court does not accept the proposition that the authority of the United States under the
2 Exclusive Jurisdiction Clause to determine the particular use of surface water on federal property is
3 sufficient to convey unlimited federal reserved water rights that the United States can exercise to
4 curtail the use of water on property outside the boundaries of the federal property. *See Cappaert*
5 *v. United States*, 426 U.S. 128 (1976). Accordingly, the Court denies the United States' motion for
6 summary judgment for a federal reserved water right based on the Exclusive Jurisdiction Clause.
7

8 Each of the parties filing motions for partial summary judgment also sought rulings as a
9 matter of law with respect to different aspects of the quantification of the federal reserved water
10 right. The appropriate quantity of unappropriated water to which the United States should be
11 granted a federal reserved water right is the minimal amount necessary to fulfill the purpose of the
12 reservation. *United States v. New Mexico*, 438 U.S. 696, 700 (1978); *Cappaert*, 426 U.S. at 138; *In*
13 *re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 312,
14 ¶11 (2001) ("Gila V"). Thus, quantification is first and foremost a function of the primary purpose
15 of the reservation of the federal land.
16

17 Two executive orders, dated October 29, 1881, and May 14, 1883, withdrew approximately
18 44,800 acres of land for the purposes of a military reservation. Finding of Fact No. 22, Report of
19 the Special Master, filed April 4, 2008 (Report), adopted by Order dated August 23, 2011.
20 Although the 1881 Executive Order did not express the reason for the creation of a military
21 reservation, the Special Master's Report cited a number of reports and letters that indicate that the
22 military reservation was authorized to protect the American border and protect American citizens.
23 Findings of Fact Nos. 4, 5, and 9, Report. The military reservation was subsequently enlarged to
24 obtain additional resources to support the operation of the initial reservation. Findings of Fact Nos.
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28 ¹ That right is subject, of course, to any pre-existing property rights to surface waters.

1 16 and 18, Report. Judge Ballinger accepted these finding of fact and concluded that military
2 purposes included providing for local and national security. Order, dated August 23, 2011, p. 2.

3 Although the only basis for quantifying the United States' claims for federal reserved water
4 rights is the minimal amount of water required to satisfy its military purposes, the United States
5 requests two rulings that do not involve military purposes. The United States argues that, as a
6 matter of law, the Endangered Species Act and the amount of water that the U.S. Department of
7 Army reported using and anticipated using at Fort Huachuca in its consultation with U.S. Fish and
8 Wildlife Service ("Consultation Report") does not limit the quantity of its federal reserved water
9 rights. None of the parties appear to take issue with these legal conclusions. The Consultation
10 Report and the testimony of witnesses who developed the Consultation Report may constitute
11 evidence of the water needed at Fort Huachuca to meet its military purposes. That evidence,
12 however, will not necessarily provide either an upper or lower limit on the quantification of the
13 United States' federal reserved water rights. The Court must determine the volume of Fort
14 Huachuca's minimal need to accomplish its military purposes through a fact-intensive inquiry. *In*
15 *re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 195 Ariz. 420, 428,
16 ¶31 ("*Gila III*"). The Consultation Report will be considered with all other relevant facts; it will
17 not be the determining fact. The partial motions for summary judgment filed by the United States
18 with respect to the limiting effect of the Endangered Species Act and the consultation report
19 required by the Endangered Species Act on the issue of quantification are granted.
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23 The United States also seeks a ruling that the quantification of its federal reserved water
24 rights should not be reduced by the amount of water which it may be able to obtain through
25 purchase, condemnation or pumping under state law. The United States Supreme Court has
26 effectively decided this issue:
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28 [w]here water is necessary to fulfill the very purposes for which a federal
reservation was created, it is reasonable to conclude, even in the face of

1 Congress' express deference to state water law in other areas, that the
2 United States intended to reserve the necessary water. Where water is
3 only valuable for a secondary use of the reservation, however, there arises
4 the contrary inference that Congress intended ... that the United States
would acquire water in the same manner as any other public or private
appropriator.

5 *United States v. New Mexico*, 438 U.S. at 702.

6 The quantity of water that the United States may acquire to meet the primary purpose of
7 Fort Huachuca is not affected by the amount of water that it could obtain for secondary purposes as
8 "any other public or private appropriator." Based on the holding in *United State v. New Mexico*,
9 *supra*, the federal government is expected to acquire water for secondary purposes of the
10 reservation using the means including those listed by the United States, i.e., purchase,
11 condemnation or pumping under state law. The motion for partial summary judgment on this issue
12 is granted.
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14 Liberty Utilities (Bella Vista Water) Corp. and Freeport Minerals Corporation moved for
15 partial summary judgment on the issue of quantification arguing that the amount of water used
16 outside the boundaries of Fort Huachuca cannot be included in the federal reserved water right for
17 Fort Huachuca. The United States, in its response, represented that it is not claiming any federal
18 reserved water right to off-reservation water use (although the offsite uses do reflect on the amount
19 of water the United States would need if, for example, it housed all of its personnel on the base).
20 Accordingly, the motions for partial summary judgment filed by Liberty Utilities (Bella Vista
21 Water) Corp. and Freeport Minerals Corporation on this issue are denied on the grounds that the
22 issue is now moot.
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25 The final issue presented by the parties regarding quantification of the federal reserved
26 water rights concerns future water use by Fort Huachuca. Freeport Minerals Corporation, the
27 State of Arizona and Liberty Utilities (Bella Vista Water) Corp. each filed motions for partial
28 summary judgment arguing that a federal reserved water right for a military installation cannot

1 include an amount of water based on future use. This Court is urged to enter a partial summary
2 judgment finding as a matter of law that federal reserved water rights for future use cannot exceed
3 current use. In support of this position, the parties cite, among other cases, the Arizona Supreme
4 Court's decision in *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*,
5 201 Ariz. 307 (2001) ("Gila V"):

6
7 Unlike those [reserved rights] attached to Indian lands, which have
8 reserved water rights for 'future need and changes in use,' [citation], non-
9 Indian reserved rights are narrowly quantified to meet the original,
primary purpose of the reservation; water for secondary purposes must
be acquired under state law.

10 201 Ariz. at 312, ¶14.

11 The language in *Gila V*, read in the context of the decision and in light of the decision in
12 *Arizona v. California*, 373 U.S. 546 (1963), simply emphasizes that the test for quantifying federal
13 reserved water rights is the "original, primary purpose of the reservation" as distinguished from
14 secondary purposes. The Court did not make a temporal distinction; rather, it made a distinction
15 among the types of purposes that may be considered. There are only two alternatives: either the
16 implied reservation was static, or it wasn't. If it was static, the United States' reserved water right
17 (if any) should be measured by the conditions as they existed at the time of the reservation. Judge
18 Ballinger has already rejected that position and determined that the reserved right may include
19 contemporary uses. There is every reason to think that Congress so intended; otherwise, the
20 reserved water right implied by the law would be for an installation that was doomed to become
21 obsolete. And, once one realizes that the reservation is not static, there is no good reason to limit it
22 to current usage. Thus, the federal reserved water rights to which Fort Huachuca is entitled will
23 include the minimum amount of water necessary to meet future uses that the United States can
24 establish are part of the reservation's primary purpose. The motions for partial summary judgment
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1 seeking a ruling as a matter of law that the federal reserved water rights cannot include the amount
2 of water needed in the future to fulfill the primary purpose of the reservation are denied.

3 **2. Military Purposes**

4 The United States is only entitled to a federal reserved water right to that minimum quantity
5 of water necessary fulfill the military purposes of Fort Huachuca. Freeport Minerals Corporation
6 seeks a ruling as a matter of law that certain water uses, i.e., wildlife and game management, are
7 secondary purposes. The State of Arizona takes the broader position that all water used for morale,
8 welfare and recreation programs is water used for a secondary purpose because such programs are
9 “merely desired amenities”. *State of Arizona’s Consolidated Reply to the United States and SRP’s*
10 *Response to the State of Arizona’s Motion for Partial Summary Judgement*, p. 9. The United States
11 counters that wildlife and game management are necessary to facilitate hunting and that activity
12 along with other recreation programs contribute to the soldiers’ readiness and willingness to
13 remain with the armed forces.
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16 The parties seeking partial summary judgment have the burden of showing that no genuine
17 issue of material fact exists. *Schwab v. Ames Construction*, 207 Ariz. 56, ¶15 (App. 2004).
18 Limitations exist on the exercise of the trial court's discretion in granting motions, especially if the
19 motion is one for summary judgment. *Id.* The trial court must consider the entire record before
20 deciding a summary judgment motion and must view the evidence and inferences in a light most
21 favorable to the party opposing the motion. *Chanay v. Chittenden*, 115 Ariz. 32, 563 P. 2d 287
22 (1977). The Arizona Supreme Court has clearly stated its view that the trial court’s definition of
23 the military purpose of the reservation must be “grounded in the bedrock of the facts” *Gila III*,
24 195 Ariz. at 422, ¶39. Clearly, issues of material fact exist so the motions for partial summary
25 judgment on this issue are denied.
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1 The Court has little doubt that maintaining morale is an important government interest, but
2 the reserved right is limited to the minimum amount necessary to fulfill the purpose of the
3 reservation. It follows that the United States is not entitled to unlimited federal reserved water
4 rights to provide the water necessary for whatever programs it wishes to adopt to maintain moral.
5 To the extent other effective means of maintaining moral are reasonably available, the United
6 States may not be able to claim reserved water rights for programs using water to maintain moral.
7 These are questions for trial. It is expected that at the upcoming trial, the United States will present
8 evidence that clearly ties each quantity of water for which it seeks federal reserved water rights to a
9 clearly defined use, the absence of which would defeat the military purpose of the reservation.
10 Purposes that may benefit or optimize the operation of a military installation may be considered
11 secondary purposes.
12

13 **3. Federal Reserve Rights to Groundwater**

14 The United States moves for partial summary judgment on two issues related to
15 groundwater. First, it seeks a ruling that its federal reserved water rights include a right to
16 groundwater. The Arizona Supreme Court established the guiding rule to resolve this issue: “A
17 reserved right to groundwater may only be found where other waters are inadequate to accomplish
18 the purpose of the reservation.” *Gila III*, 195 Ariz. at 420, ¶31. No dispute exists among the
19 parties that surface water exists on the land included in the military reservation for Fort Huachuca.
20 Thus, in essence, the United States is requesting a ruling as a matter of law that other waters are
21 inadequate and therefore it is entitled to a federal reserved water right to groundwater. In this case,
22 there is not only a dispute about the total quantity of water required, as discussed above, but there
23 appears to be a factual dispute regarding the quantity and availability of water other than
24 groundwater available. Under the holding in *Gila III*, the United States has the burden of
25 establishing the quantity of “other water” available to Fort Huachuca and the minimal amount of
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1 water needed to fulfill the military purpose. To the extent that proven demand for water to fulfill
2 military purposes exceeds the supply of “other water”, the United States will be entitled to federal
3 reserve water rights to groundwater to satisfy the excess demand. *Id.* At this point, however, the
4 partial motion for summary judgment is denied due to material issues of fact in dispute.

5 Assuming that it is entitled to federal reserved water rights to groundwater, the United
6 States moves for a decision, as a matter of law, that the amount of groundwater is not limited by
7 the average amount of water that flows through Huachuca Canyon. Again, there is a dispute of
8 material fact among the parties concerning the quantity of water in Huachuca Canyon that is
9 available. The partial motion for summary judgment is denied.

10 The State of Arizona, Freeport Minerals Corporation and Liberty Utilities (Bella Vista
11 Water) Corp. each move for partial summary judgment contending that federal reserved water
12 rights to groundwater cannot be granted unless the United States demonstrates that the other water
13 on the reservation is inadequate. As discussed above, this argument is a correct statement of the
14 law. *See Gila II*, 195 Ariz. at 420, ¶31. Nevertheless, the motions for partial summary judgment are
15 denied because the determination of “inadequate” is more nuanced. Water may be present on a
16 federal reservation, but inadequate because it is not reasonably accessible due to physical or
17 economic constraints. Water managers are not expected to adopt extreme technological measures
18 to access and utilize all water on the land surface before federal reserved water rights may be
19 granted to groundwater. At the least, the United States is expected to make reasonable efforts to
20 utilize unappropriated water to satisfy the primary needs of Fort Huachuca before it exercises
21 federal reserved water rights to the groundwater.

22 The State of Arizona argues that the Court should also consider the effluent and runoff in
23 its determination of the minimum amount of water for which federal reserved water rights should
24 be granted to meet the primary purpose of the reservation. The very concept of “minimum need”
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1 suggests elements of conservation and good stewardship of resources. Accordingly, the
2 availability of effluent may affect the minimum amount of water needed. Take, for example, the
3 golf course. As the Court understands the current state of affairs, the United States claims that the
4 golf course is needed to boost morale, and is therefore part of primary purpose of the reservation.
5 Even if the Court ultimately accepts this claim, the Court perceives no reason that it should not
6 take into account the amount of effluent available to water the course as it determines the minimum
7 amount of water needed. This is particularly true where, as here, effluent is currently being used
8 for precisely that purpose.
9

10 All other sources of appropriable water will also be considered and the United States will
11 have the burden of proving that the use of appropriable water is not reasonably available and
12 economically feasible. Water will not be deemed unavailable simply because it is not currently
13 being used, is not potable or no infrastructure is currently in operation.
14

15 **IT IS ORDERED:**

16 1. Denying the United States' Motion for Summary Judgment based on Exclusive
17 Jurisdiction.

18 2. Granting the United States' Motion for Partial Summary Judgment that the
19 quantification of the amount of the federal reserved water right is not limited to the estimate of
20 water usage of 1,300 acre feet per annum made by the Department of the Army in its consultation
21 with the Fish and Wildlife Service.
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23 3. Granting the United States' Motion for Partial Summary Judgment that the
24 Endangered Species Act does not substantively limit the quantification of the amount of the federal
25 reserved water right.
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1 4. Granting the United States' Motion for Partial Summary Judgment that the
2 quantification of the federal reserve water right to satisfy the military purposes of Fort Huachuca is
3 not reduced by its ability to obtain water by condemnation, purchase or under state law.

4 5. Denying the United States' Motion for Partial Summary Judgment on the remaining
5 issues concerning groundwater because material issues of fact are in dispute.

6 6. Denying Liberty Utilities (Bella Vista Water) Corp.'s and Freeport Minerals
7 Corporation's Motions for Partial Summary Judgment regarding reserved water rights for water
8 uses occurring outside of the Fort Huachuca's boundaries on the grounds that the issue became
9 moot.

10 7. Denying Freeport Minerals Corporation's and the State of Arizona's Motions for
11 Partial Summary Judgment seeking to exclude Fort Huachuca's future use in the quantification of
12 federal reserved water rights.

13 8. Granting the State of Arizona's motion to consider the availability of effluent and
14 other surface water (in appropriate circumstances) in determining the minimum need.

15 9. Denying the remainder of the partial motions for summary judgment for the reasons
16 set forth above.

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21 Hon. Mark H. Brain
22 Judge of the Superior Court

23 On September 1, 2016, the original of the foregoing
24 was delivered to the Clerk of the Maricopa County
25 Superior Court for filing and distributing a copy to all
26 persons listed on the Court approved mailing list for
27 Contested Case No. W1-11-605.

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