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RESOLVING WATER RIGHTS FOR INDIAN RESERVATIONS: A LOOK AT THE GENERAL STREAM ADJUDICATION OF THE LITTLE COLORADO RIVER BASIN IN ARIZONA AND SETTLEMENT AS AN ALTERNATIVE

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§ 10.01 Introduction*

Tó éí íińá—Water Is Life

Securing a sustainable water source is necessary for any permanent human occupancy by a population and water for an Indian reservation is no exception. With the ever-escalating impacts of climate change, population growth, need for tribal economic development, and strain on natural resources, the security of reliable water supplies remains vital to the future of tribal communities. Over the years, tribes seeking to quantify their water rights have been successful through water rights settlements that provide "wet water," water infrastructure funding, and other arrangements that cannot be achieved in litigation.[1] However, for the few tribes that have elected to quantify their respective water rights through litigation, challenges loom in the uncharted waters of state and federal courtrooms. For over a century, only a scant number of cases concerning federal reserved water rights form the body of law concerning these rights, prompting more questions than answers thus leading tribes into decades-long battles for the precious resource of water. From April to August 2023, the Navajo Nation conducted its Phase I trial for domestic, commercial, municipal, and light industrial (DCMI) and livestock and wildlife water claims in the Arizona

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The views expressed in this chapter are those of the authors and do not reflect the views, opinions, or beliefs of the Navajo Nation or any other party referenced herein.

[1] *See* Ramsey Kropf & Oliver Skelly, "Indian Water Rights Settlements: How Settlements Are Including Climate Change Responses and Adaptations," *Water L. Inst.* 11-1 (Found. for Nat. Resources & Energy L. 2023).

General Stream Adjudication for the Little Colorado River System and Source.

This chapter, while reviewing certain seminal cases and discussing the Hopi Tribe's water rights trials, principally centers on the circumstances and issues encountered while litigating the Nation's federal reserved water rights and subsequent efforts toward a comprehensive settlement for all water rights within the state of Arizona. Section 10.02 reviews the general legal framework developed in the foundational federal reserved water rights cases of *United States v. Winans* and *Winters v. United States*, subsequent developments after the *Winans* and *Winters* decisions, and significant decisions rendered in the Arizona General Stream Adjudication of the Gila River. Section 10.03 discusses the history, claims, and most recent decisions and activity in the Arizona General Stream Adjudication of the Little Colorado River System and Source. Section 10.04 provides an overview of Indian water rights settlements and commentary on the May 2024 Northeastern Arizona Indian Water Rights Settlement. Finally, § 10.05 presents select key issues encountered in the historic Hopi and Navajo water rights trials and offers brief closing thoughts on the future of securing water rights for Indian reservations.

§ 10.02 Legal Framework for Federal Reserved Water Rights for Indian Reservations

[1] Foundational Cases

The basis for federal reserved water rights rests on two seminal cases decided in the early twentieth century. These cases spawned various state and federal decisions to create the legal framework for litigating federal reserved water rights for Indian reservations.

[a] *United States v. Winans*

The Yakama Tribe (now the Yakama Nation) was a signatory to a series of treaties entered into in the 1850s, known as the Stevens Treaties, between the United States and several Indian tribes of the Pacific Northwest. The 1855 Yakama Treaty, ratified in 1859, contained a provision that reserved for the Yakama Indians "the right of taking fish at all usual and accustomed places in common with the citizens of the territory."[2] Lineas and Audubon Winans, doing business as Winans Brothers, operated four state-licensed fishing wheels on the Columbia River in Washington State. Through the space used to operate the fishing wheels, the Winans had excluded the Yakama from accessing their traditional fishing locations. The federal government brought suit on behalf of the Yakama against the Winans. The

[2]United States v. Winans, 198 U.S. 371, 379 (1905) (emphasis omitted).

district court ruled that the Indians had acquired "no rights but what any inhabitant of the territory or state would have" and that the Winans were entitled to exclude the Yakama like any other non-Indian.[3]

The case was appealed to the U.S. Supreme Court resulting in a favorable opinion for the Yakama. In articulating the spirit of treaty-making, Justice McKenna declared that "the treaty was not a grant of rights to the Indians, but a grant of right from them,—a reservation of those not granted."[4] Furthermore, these reserved rights impose a servitude upon such lands against the United States, the state, and their respective grantees.[5] *Winans* thus stands for the proposition that water uses practiced prior to the establishment of the federal reservation retain a priority date of "time immemorial."

[b] *Winters v. United States*

Just three years after *Winans*, the Supreme Court decided *Winters v. United States*.[6] The case involved the Gros Ventre and Assiniboine Indians of the Fort Belknap Reservation in Montana. Established through an 1888 agreement, the reservation was to serve as a "permanent home and abiding place" for the Tribes and was noted as being suited for various agricultural uses.[7] After 1888, the Tribes and federal government diverted and used considerable amounts of water from the Milk River for those purposes stated in the agreement. The suit was brought by the United States to restrain upstream non-Indians from damming or preventing water flow of the Milk River and its tributaries to the Ft. Belknap Reservation.[8]

Ruling against the argument that Montana statehood repealed any previous reservation of waters made by the United States for the reservation, the Court reasoned that through the 1888 agreement, both the federal government and the Tribes themselves sought to change the habits of the Indians by transforming them into "pastoral and civilized" people.[9] The Tribes would not have given up water which would be necessary to achieve those goals, especially in such arid lands. Without the requisite water, the lands would be valueless.[10] Using the canons of treaty interpretation, the Court further reasoned that ambiguities in the 1888 agreement were to

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[3] *Id.* at 380.

[4] *Id.* at 381.

[5] *Id.* at 381–82.

[6] 207 U.S. 564 (1908).

[7] *Id.* at 565.

[8] *Id.*

[9] *Id.* at 576.

[10] *Id.*

be resolved from the standpoint of the Indians.[11] Relying on the *Winans* decision, the Court held that the federal government retained the power to reserve waters and exempt them from appropriation under state law.[12] *Winters* and its progeny have established that Indian reservations retain a priority date based on the date of the creation of the federal reservation rather than a later date of first use and retain priority despite nonuse.[13]

[c] Beyond *Winans* and *Winters*

Neither *Winans* nor *Winters* quantified the amount of water that was reserved for the tribes that would, in turn, determine how much was left for non-Indian appropriators. It was not until *Arizona v. California*[14] that the Supreme Court established a method for quantifying federal reserved water rights. Disputes over the distribution of the Colorado River caused the State of Arizona to bring suit against the State of California and some of its agencies. In addition to addressing the division of the waters for the Colorado River between the seven basin states, the Court addressed the quantification of reserved water rights of several Indian tribes along the Colorado River. It found that the "only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."[15] Using the practicably irrigable acreage (PIA) standard, the Court determined that the federal government implicitly reserved approximately one million acre-feet of water for roughly 135,000 irrigable acres of land for the five Indian reservations along the mainstem of the Colorado River.[16]

[2] History of Arizona's General Stream Adjudications

[a] Adjudication of Rights by the State Land Department and Arizona's New Judicial Process

In the 1970s, two general stream adjudications concerning the Gila River and the Little Colorado River were initiated under a state administrative process to determine the extent and priority of the rights of all persons to use water in those river systems and sources.[17] Following the Salt River

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[11] *Id.*

[12] *Id.* at 577.

[13] *See In re* General Adjudication of All Rights to Use Water in the Gila River System & Source (*Gila V*), 35 P.3d 68, 72 (Ariz. 2001).

[14] 373 U.S. 546 (1963).

[15] *Id.* at 601.

[16] *Id.* at 595–96.

[17] *See* Ariz. Dep't of Water Res. (ADWR), "Gila River and Little Colorado River General Stream Adjudications," https://www.azwater.gov/adjudications/gila-river-and-little-colorado-river-general-stream-adjudications.

Valley Water Users' Association's filings that commenced the Gila River Adjudication, Phelps Dodge Corporation filed its petition to the Arizona State Land Department on April 19, 1978, for the determination of water rights of the Little Colorado River system and source.[18]

After numerous petitions were filed to determine water rights in several watersheds throughout the state, the Arizona legislature amended the general adjudication statutes in April 1979.[19] Under those amendments, the general stream adjudications were to be brought and maintained in the superior court in the county in which the largest number of potential claimants resided.[20] This resulted in the assignment of the Gila River Adjudication to the Maricopa County Superior Court and the Little Colorado River Adjudication to the Apache County Superior Court.

[b] The McCarran Amendment

Approximately two-thirds of Arizona's land base is held in trust by the federal government with much of that being for the benefit of Indian tribes.[21] With so much of the land potentially having the earliest priority dates and vast amounts of water to serve the purposes of the federal reservations, the federal government and Indian tribes are essential players in any comprehensive general stream adjudication.

The McCarran Amendment, enacted by Congress in 1952, waives the sovereign immunity of the United States and permits the federal government to be joined as a party for "the adjudication of rights to use water in a river system or other source" or "for the administration of such rights where the United States appears to be the owner or is in the process of acquiring rights by appropriations under state law, purchase, exchange, or otherwise and the United States is a necessary party to such suit."[22] In *Colorado River Water Conservation District v. United States*,[23] the U.S. Supreme Court held that state courts had jurisdiction to adjudicate Indian water rights under the McCarran Amendment.[24] The Court also held that the federal policies of wise judicial administration and avoidance of piecemeal and duplicative adjudication were factors supporting the dismissal

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[18] *Id.*

[19] *Id.*

[20] *See* Ariz. Rev. Stat. Ann. § 45-252(C).

[21] *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (*Gila III*), 989 P.2d 739, 744 (Ariz. 1999).

[22] 43 U.S.C. § 666(a).

[23] 424 U.S. 800 (1975).

[24] *Id.* at 809.

of federal water rights proceedings where concurrent state proceedings were extensive and adequate to resolve the federal claims brought by the United States on behalf of the tribe.[25] In 1983, the Supreme Court further articulated the reach of the McCarran Amendment by holding that the decision reached in *Colorado River Water Conservation* applies to all states regardless of limitations posed by their respective Enabling Acts or federal policies that limited state jurisdiction over Indian affairs as those limitations were deemed to have been removed by the McCarran Amendment.[26] The Court further held that state courts have jurisdiction to hear federal claims brought by Indian tribes for Indian rights assuming state adjudications are adequate to quantify those claims.[27] Nonetheless, given the federal nature of reserved rights, courts have recognized that state courts must apply federal substantive law to measure federal reserved rights in state adjudications.[28]

[c] *Gila III* and *Gila V*

In 1988, the trial court in the Gila River Adjudication issued rulings concerning the relationship of surface water and groundwater, which prompted several petitions for interlocutory review. The Arizona Supreme Court accepted six issues for review and delivered five interlocutory opinions answering those questions. The *Gila III* and *Gila V* opinions directly address the reserved water rights of Indian reservations.

In re General Adjudication of All Rights to Use Water in the Gila River System & Source (*Gila III*)[29] addressed two questions: Do federal reserved water rights extend to groundwater that is not subject to Arizona's prior appropriation regime? Do federal reserved water rights holders enjoy greater protection from groundwater pumping than those who only hold state rights?[30] The trial court had previously ruled that "federal law establishes a reserved right to groundwater, if and to the extent that groundwater may be necessary to accomplish the purpose of the federal reservation."[31] On appeal, the Arizona Supreme Court was urged to follow the decision of *In re Rights to Use Water in Big Horn River System*,[32] where the Wyoming

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[25] *Id.* at 820.

[26] Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 570 (1983).

[27] *Id.* at 564, 570.

[28] *Id.* at 571; *see also Gila III*, 989 P.2d at 745.

[29] 989 P.2d 739 (Ariz. 1999).

[30] *Id.* at 740.

[31] *Id.* at 745.

[32] 753 P.2d 76 (Wyo. 1988).

Supreme Court declined to find a reserved right to groundwater for the Wind River Indian Reservation despite acknowledging the interconnectedness of surface water and groundwater and that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the Indian reservation also supports reservation of groundwater."[33] Relying on *Winters*[34] and *Cappaert*[35] as guideposts, the *Gila III* court held that the trial court did not err in its ruling.[36] First, in *Winters* and subsequent cases, the courts stressed the arid nature of many Indian reservations, some of which "lack perennial streams and depend for present and future survival substantially or entirely upon pumping of underground water."[37] Therefore, it would be unthinkable that the federal government would not have reserved the water necessary for habitation of the reservations. Second, the *Cappaert* Court recognized the hydrological connection between surface water and groundwater and that federal reserved rights law would decline to differentiate the two when protecting waters from subsequent diversion.[38]

The *Gila III* court also rejected the state law parties' argument that even if federal reserved water rights extend to groundwater, the court should decline the doctrine out of deference to state law.[39] Based on *Winters*, *United States v. New Mexico*,[40] *United States v. Rio Grande Dam & Irrigation Co.*,[41] and *Cappaert*, the court held that it could not "defer to state law where to do so would defeat federal water rights."[42] To defer to state law, which provides overlying landowners an equal right to pump groundwater for reasonable use, overlooks the forward-looking nature of federal reserved water rights, which reserve sufficient waters to satisfy the present and future needs of the reservation.[43] A tribe would not be able to protect its necessary waters from future depletion by off-reservation pumpers in an equal rights regime.[44] The court concluded its groundwater analysis by stating "[a] reserved right to groundwater may only be found where other

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[33] *Gila III*, 989 P.2d at 745 (alteration in original) (quoting *Big Horn*, 753 P.2d at 99).

[34] 207 U.S. 564 (1908).

[35] 426 U.S. 128 (1976).

[36] *Gila III*, 989 P.2d at 748.

[37] *Id.* at 746.

[38] *Id.* at 746–47.

[39] *Id.* at 747.

[40] 438 U.S. 696 (1978).

[41] 174 U.S. 690 (1899).

[42] *Gila III*, 989 P.2d at 747.

[43] *Id.* at 748.

[44] *Id.*

waters are inadequate to accomplish the purpose of the reservation," yet declined to declare a standard for specifically determining such purpose.[45]

Only two years after *Gila III*, the Arizona Supreme Court in *In re General Adjudication of All Rights to Use Water in the Gila River System & Source* (*Gila V*)[46] addressed the remaining question: What is the appropriate standard to apply in determining the amount of water reserved for federal lands. The 1988 trial court had previously ruled that the appropriate standard for quantification was the PIA standard established in *Arizona v. California*.[47]

Generally, the amount of water reserved for a federal reservation depends on the purpose for which it was created.[48] When applying the *Winters* doctrine, however, the court must distinguish between Indian and non-Indian federal reservations. Non-Indian reservations, such as those established for conservation, recreation, and military purposes, were quite often established through explicit language that defined a very narrow purpose. Instruments that established federal Indian reservations were not so precise and sometimes only withdrew or reserved land without an express purpose, were piece-meal, or were unilaterally executed by the federal government. Further, the United States in its role as trustee is charged with the duty to act for the benefit of Indian tribes. Therefore, the purposes of Indian reserved rights should be viewed as fulfilling those duties and given broader interpretation in order to achieve the twin goals of Indian self-determination and economic self-sufficiency.[49]

Applying a one-size-fits-all approach, such as the application of PIA to quantifying Indian water rights, essentially limits every reservation to just one ubiquitous purpose without conducting the fact-intensive inquiry recommended in *Gila III* or considering the resulting evidence that would acknowledge multiple purposes. The PIA standard freezes Indian reservations in time by assuming tribes will not enjoy the same progress and lifestyles as their non-Indian counterparts. Recognizing this limitation, the Court ultimately held that the purpose[50] of an Indian reservation is to

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[45] *Id.* at 748, 750.

[46] 35 P.3d 68, 72 (Ariz. 2001).

[47] 373 U.S. 546 (1963); *see Gila V*, 35 P.3d at 71.

[48] United States v. Adair, 723 F.2d 1394, 1419 (9th Cir. 1983).

[49] *Gila V*, 35 P.3d at 74.

[50] The *Gila V* court also analyzed whether the primary-secondary test established in *United States v. New Mexico*, 438 U.S. 696 (1978), applied to Indian reservations. The court concluded that the test did not apply as establishment of a permanent homeland for an Indian tribe is a primary purpose, not a secondary purpose. *Gila V*, 35 P.3d at 76–77.

"provide Native American people with a 'permanent home and abiding place,' that is, a 'livable' environment."[51]

While the concept of "minimal need" was first raised in *Arizona v. California*, the *Gila V* court limited the extent of *Winters* rights to an amount tailored to the minimal need by interpreting it as "only that amount of water necessary to fulfill the purpose of the reservation, no more."[52] The court did not dispose of the PIA standard completely but declined to approve PIA as the exclusive standard.[53] Although the PIA standard's agriculture and economic-based formula appears to be an objective standard, it inherently disadvantages Indian reservations that lack irrigable lands and disregards the unique cultural, historical, societal, and geographical differences of tribes, even among those residing in the same state. In light of those shortcomings, the Arizona Supreme Court developed an alternative standard based on a fact-intensive inquiry made on a reservation-by-reservation basis through the consideration of various factors, including:

- Tribe's History and Culture: A tribe's history and culture is significant and deference should be given to practices that are embedded in the tribe's traditions. Because these practices date back centuries and have deep cultural significance, water rights must encompass their continuation because to act without such consideration would not truly reflect a permanent homeland.
- Geography, Topography, and Natural Resources: In responding to the shortcomings of the PIA approach, the trial court should consider a tribe's geography, topography, and natural resources, including groundwater availability. Tribes should be able to develop their reservations based on the surroundings they inhabit.
- Tribe's Economic Base and Employment Opportunities: Tribal development plans or other evidence should address the optimal manner of creating jobs and income for the tribes and the most efficient use of water. Economic development and its associated water use must be tied, in some manner, to a tribe's current economic station. In considering a tribe's economic infrastructure the court should regard the tribe's physical infrastructure, human resources, present and potential employment base, technology, raw materials, financial resources, and capital.

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[51] *Id.* at 74 (citations omitted) (quoting *Winters*, 207 U.S. at 565; *Arizona v. California*, 373 U.S. at 599).

[52] *Id.* at 77 (quoting *Cappaert*, 426 U.S. at 141).

[53] *Id.* at 79.

- Past Water Uses: The historical use of water by a tribe may indicate its value and prioritization for future development. Any proposed projects should be scrutinized to ensure they are practical, economical, and appropriate for a particular homeland.
- Present and Future Projected Population: While it should never be the only factor, it is proper to consider a tribe's present and projected future population along with other evidence when quantifying a tribe's *Winters* rights. Including population in any water rights equation is crucial, as overlooking it would fail to recognize that the water will always serve human needs.[54]

Although *Gila III* extended federal reserved rights to groundwater and *Gila V* broadened the approach for tribes to present evidence compared to the formulaic calculations of the PIA standard, both these decisions were interlocutory and the court decided the issues in the abstract.[55] The challenges and difficulties of the court's approach would become apparent when actual contested cases applied the homeland standard and the *Gila V* factors. What was intended to provide guidance instead produced more questions than answers.

§ 10.03 Litigating the Quantification of Federal Reserved Water Rights: Applying the Permanent Homeland Standard in the Arizona General Stream Adjudication of the Little Colorado River

[1] Hopi Contested Case

The involvement of the Navajo Nation and the Hopi Tribe in *In re General Adjudication of All Rights to Use Water in the Little Colorado River System & Source*, Contested Case No. CV 6417 (LCR Adjudication) is longstanding and convoluted. Both Tribes intervened in the 1980s to assert their own claims, separate and apart from the federal trustee. For decades, both Tribes and other non-Indian parties submitted disclosure statements

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[54] *Id.* at 79–80.

[55] *Gila III*, 989 P.2d at 748–49 ("We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis. Likewise, we do not now attempt to impose a standard upon the trial court for determining the purpose of any reservation. That standard, in our judgment, is not well-suited to abstract declaration and should instead emerge from testing in the solid context of the facts." (citation omitted)).

and comments, and proposed issues. However, it was not until September 8, 2008, that *In re Hopi Tribe Priority*, Contested Case No. CV 6417-201 ("Priority Case" or "201 Case") was initiated by the Special Master to determine the priority[56] of the various claims asserted by, or on behalf of, the Hopi Tribe.[57] The history of the Hopi Tribe set the stage for a myriad of possible priority dates for the Hopi Reservation. As a result, the Special Master designated seven issues for briefing.[58]

The progress of the Hopi Priority Case was delayed as settlement negotiations took place from 2010 to 2012. With the lack of support for a final settlement, years of briefing the issues, and disclosure of 6,616 documents, the Special Master released a 2013 report (Priority Report) resolving six priority issues on summary judgment.[59] The Priority Report was amended and approved by the Apache Superior Court on January 25, 2016, and was incorporated into the Final Report issued by the Special Master on May 25, 2022 (Hopi Final Report).

On December 31, 2008, the Arizona Department of Water Resources (ADWR) issued a Preliminary Hydrographic Survey Report (HSR) for the Hopi Reservation analyzing the water rights claims[60] of the Hopi Tribe and the United States on behalf of the Hopi Tribe and allottees. After seven years, ADWR released the Final HSR in December 2015. After the statutory comment period, the court held a status conference to determine procedures to adjudicate the claims for the Hopi Reservation. On August 25, 2016, the Special Master initiated *In re Hopi Reservation HSR*, Contested Case No. CV 6417-203 ("Hopi HSR Case" or "203 Case") and ordered bifurcated trials to address the past and present claims and then the future claims.[61] The trial to address the past and present claims was held from September 11 to December 18, 2018, and included the testimony of 33 witnesses

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[56]The Court's decision to hear the Hopi Tribe's priority claims first was, in part, to allow the Arizona Department of Water Resources, which serves as technical advisor to the court, to complete a Preliminary Hydrographic Survey Report for the Hopi Reservation.

[57]Final Report at 10, *In re* Hopi Reservation HSR, Contested Case No. CV 6417-203 (Ariz. Super. Ct. Apache Cnty. May 25, 2022) (Hopi Final Report).

[58]Report of the Special Master; Motion for Adoption of Report; and Notice for Filing Objections to the Report at 6, *In re* Hopi Tribe Priority, Contested Case No. CV 6417-201 (Ariz. Super. Ct. Apache Cnty. Apr. 24, 2013).

[59]Hopi Final Report, *supra* note 57, at 5–7.

[60]The initial claims for the Hopi Reservation were filed in 1985 by the United States through Statement of Claimant 39-91441 and by the Hopi Tribe through Statement of Claimant 39-91443. *Id.* at 9–10.

[61]*Id.* at 11.

and the admission of 1,617 exhibits.[62] The trial to address future claims was originally set to commence on June 1, 2020. However, the COVID-19 pandemic caused considerable delay as the United States and Hopi Tribe were tasked, over the Hopi Tribe's objection, with conducting what would be a 60-day virtual trial.[63] With the identification of various Hopi tribal members serving as witnesses in the trial to address future claims, the Hopi Tribe required additional time to make suitable arrangements for the safety and convenience of its witnesses. The trial was held from September 14, 2020, to February 22, 2021, and included the testimony of 66 witnesses and the admission of 961 exhibits.[64]

On May 25, 2022, the Special Master released the Hopi Final Report that contained a recommended decree for the overall Hopi Contested Case. Both the report and the decree identified the specific attributes[65] required for an enforceable federal reserved right for the Hopi Reservation.[66] With regard to priority, the Special Master recommended a time immemorial priority for aboriginal water uses within Land Management District 6.[67] All water uses (aboriginal or new) within the remainder of the Hopi Reservation located within the 1882 Reservation were assigned a December 16, 1882, priority date.[68] All water uses (aboriginal or new) within Moenkopi Island and those of allottees received a June 14, 1934, priority date.[69]

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[62] *Id.* at 13.

[63] *Id.* at 15.

[64] *Id.*

[65] The United States as trustee in both the Hopi and Navajo contested cases argued that federal law does not require federal reserved water rights to be characterized by any other attribute other than source, aggregate quantity, type of use, and priority date. The Special Master in the Hopi Contested Case concluded the required attributes to be (1) type of use, (2) source, (3) quantity, (4) priority date, (5) place of use, and (6) point of diversion. *Id.* at 46.

[66] *Id.*

[67] *Id.* at 19. Land Management District 6 is situated entirely within the 1882 Reservation.

[68] *Id.*

[69] *Id.*

Table 1. Comparison of Hopi Tribe Claims and the Recommended Decree

Type of Use	Hopi or United States Claim	Recommended Hopi Decree
DCMI	9,322 AFA70	3,069.3 AFA
Stockponds	3,576 AFA	3,572 AFA
Stock and Wildlife	1,123 AFA	824 AFA
Agriculture (Irrigation)	26,687 AFA	18,898 AFA
Cultural and Subsistence Gardens	9,471 AFA	0
Livestock Value Chain Operations/Alfalfa Fields	12,215 AFA	0
Coal Liquefaction	20,600 AFA	0
Hybrid Coal-fired and Solar Electrical Power Generating Plant	6,500 AFA	2,300 AFA
Keams Canyon Recreational Area	8.3 (Storage) 17.7 (Evaporation)	26 AFA
Pasture Canyon (Riparian)	317 AFA	286.8 AFA
White Ruins Canyon (Riparian)	12.39 AFA	12.39 AFA

Table 1 provides a comparison of select claims asserted by either the Hopi Tribe or claims of the United States as trustee for the Hopi Tribe on the Hopi Reservation, and the quantities recommended by the Special Master.

[2] Navajo Contested Case

[a] Procedural History

Although the LCR Adjudication commenced in 1978, and the Navajo Nation submitted its own claims through Statement of Claimant 39-91442 in 1985, it was not until August 11, 2016, that *In re Navajo Nation*, Contested Case No. CV 6417-300 ("Navajo Contested Case" or "300 Case") was initiated to quantify the Navajo Nation's water rights for the portion of the Navajo Reservation situated in the Arizona Little Colorado River Basin (sometimes referred herein as "Study Area").[71] The structure of the

[70] Acre-feet per annum.

[71] Case Initiation Order for the Navajo Nation at 2, *In re* Navajo Nation, Contested Case No. CV 6417-300 (Ariz. Super. Ct. Apache Cnty. Aug. 11, 2016). In addition to claims for on-reservation federal reserved rights, the Apache County Court also established *In re Lower Little Colorado River (LCR) Subwatershed*, Contested Case No. 6417-400 ("400 Case") in March 2018. This contested case was established to primarily address subwatersheds outside the Navajo Nation: the Lower LCR, Silver Creek, and Upper LCR Subwatersheds. While addressing the predominantly non-Indian claims in that subwatershed, it also

Navajo Contested Case did not mirror that of the Hopi Contested Cases. The court, upon the proposal of the Navajo Nation and United States, established three phases to hear the past, present, and future claims for specific uses.[72] Initially, the first phase was to address water sources, priority, DCMI (domestic, commercial, municipal, and light industrial) and stock/wildlife watering (Phase I).[73] The second phase was to address claims for heavy industrial/mining, riparian, fish, recreational, and unique tribal/cultural uses of water.[74] The third phase was to address irrigated agriculture claims.[75]

The COVID-19 pandemic caused the reorganization of the Navajo Contested Case due to the extended closure of the Navajo Nation government, restricted access to the Navajo Reservation, and the closure of various federal institutions that held historical texts vital to the Navajo priority claim. The Navajo Contested Case was eventually condensed into two phases with the priority and irrigation claims shifted to the second phase (Phase II). In December 2019, ADWR issued its Final Navajo Reservation Hydrographic Survey Report for the first phase claims of DCMI, stock and wildlife watering, and stockponds.[76]

[b] The Navajo People and the Navajo Nation

Navajo origin stories recount that during the creation of the world the *Diné*[77] were provided sacred mountains and rivers that would serve as natural boundaries for the Navajo homeland. Of the sacred rivers, the Little Colorado River serves as the southern boundary. Over the years the Navajo grew in population where new clans were created due to groups branching-off from the four original clans and the adoption of other tribes into Navajo society.

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addressed the Hopi Tribe's off-reservation claims for the Hopi Ranches and Hopi Industrial Park and the Navajo Nation's off-Reservation fee land claims (e.g., the Winslow Tract and tribal ranches). To date, the 400 Case has been focused on special procedures for small uses of water for stockponds, stock and wildlife watering, known as de minimis uses.

[72] Order to File Amended Statements of Claimant and Order Requesting Technical Assistance from the Arizona Department of Water Resources at 6, *In re* Navajo Nation, Contested Case No. CV 6417-300 (Ariz. Super. Ct. Apache Cnty. Dec. 28, 2016).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] ADWR, Final Navajo Reservation Hydrographic Survey Report within the LCR Watershed DCMI, Stock and Wildlife Watering & Stockponds, https://infoshare.azwater.gov/docushare/dsweb/View/Collection-19709.

[77] The Navajo people call themselves *Diné*, meaning "The People" in the Navajo language.

Oral and recorded history reveals the varying relationships the Navajo had with neighboring tribes and the Spanish, Mexican, and American governments. In 1848, the United States and Mexico signed the Treaty of Guadalupe Hidalgo, which resulted in Mexico ceding much of what became present-day California, Nevada, Utah, New Mexico, most of Arizona and Colorado, and parts of Oklahoma, Kansas, and Wyoming.[78] Acting within its new territory, the United States entered into a peace treaty with the Navajo on September 9, 1849.[79] Under its various provisions, the 1849 Treaty memorialized the United States' promises to place the Navajo "forever" under its "exclusive jurisdiction and protection," to "designate, settle, and adjust" the boundaries of a reservation for the Navajos, and to "legislate and act as to secure the permanent prosperity and happiness" of the Navajo.[80] The 1849 Treaty states that its terms "shall be binding upon the contracting parties;" subject to later "modifications and amendments" adopted by the United States, and was to "receive a liberal construction, at all times and in all places."[81]

Only weeks after Congress's ratification of the 1849 Treaty, the respected Navajo leader Narbona was killed and scalped during additional peace negotiations. The leader's death ignited years of hostilities between the Navajo and the new Americans. Commencing in the spring of 1864, the Navajo were ordered to surrender at Ft. Defiance, Arizona, and were subsequently marched to Bosque Redondo in southeastern New Mexico. The "Long Walk" as it is now known is a dark period in Navajo history replete with tales of starvation, substandard living conditions, cruelty, and death. With the signing of *Naaltsoos Sání*[82] (Treaty of Bosque Redondo) in 1868, the Navajo negotiated their release from imprisonment and return to their homeland, avoiding relocation to Indian Territory in present-day Oklahoma.[83] The 1868 Treaty delineated the initial boundaries of the Navajo Reservation.[84] The Navajo Reservation was expanded through subsequent executive orders and congressional acts. Like so many other tribes, the Navajo were subjected to disastrous and assimilative federal policies. Perhaps the most detrimental policies included the slaughter of Navajo

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[78] Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922.

[79] Treaty with the Navaho, Sept. 9, 1849, 9 Stat. 974.

[80] *Id.* at art. 9.

[81] *Id.* at art. 11.

[82] The Navajo people refer to the Treaty of Bosque Redondo as *Naaltsoos Sání*, meaning "old paper" in the Navajo language.

[83] Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 668.

[84] *Id.* at art. 2.

livestock as a means to reduce overgrazing, the forced removal and education of Navajo children at boarding schools in order to "kill the Indian" and "save the man,"[85] and federal relocation programs that encouraged Navajos to depart the reservation and resettle in metropolitan areas.

The 43-year development ban known as the Bennett Freeze was a federal policy known nowhere else in the United States. Due to years of land disputes between the Hopi Tribe and the Navajo Nation, former Commissioner of Indian Affairs Robert Bennett "froze" approximately 1.5 million acres of federal land west of the 1882 Executive Order Reservation in an effort to promote settlement between the two tribes. During the ban, both tribes were restricted from developing or repairing any new or existing infrastructure without the other tribe's permission. As a result, homes became dilapidated, unrepairable livestock corrals lead to a decrease in traditional animal husbandry, economic development was stymied, gas and water lines were not built, and roads deteriorated. As electric lines traversed the Bennett Freeze Area to reach metropolitan consumers, Navajo homes could not tap into the much-needed resource to power refrigerators, provide indoor lighting, or to enjoy simple pleasures such as watching television. Navajo families were forced to endure these deplorable conditions or move away from the Bennett Freeze Area which disrupted Navajo societal customs. In 2005, Congress passed amendments to the Navajo-Hopi Land Settlement Act and in 2009, President Barack Obama lifted the development ban.

Today, the Navajo Nation is a federally recognized Indian tribe with a reservation that spans across the states of Arizona, New Mexico, and Utah. It is the largest Indian tribe in both land base and population. The Navajo Reservation is approximately 27,413 square miles, which is roughly the size of the state of West Virginia. The central Navajo Nation government is comprised of three branches: executive, legislative, and judicial. The Navajo Nation and the executive branch are led by a president elected at large by all eligible Navajo voters. The legislative branch consists of legislative departments and the Navajo Nation Council (Council), which is comprised of 24 elected Council Delegates representing 110 local Navajo government units called Chapters. The Council elects a speaker to serve as leader of the legislative branch. The judicial branch is led by the Chief Justice who is appointed by the president and confirmed by the Council. Local governance authority is delegated to the 110 Chapters.

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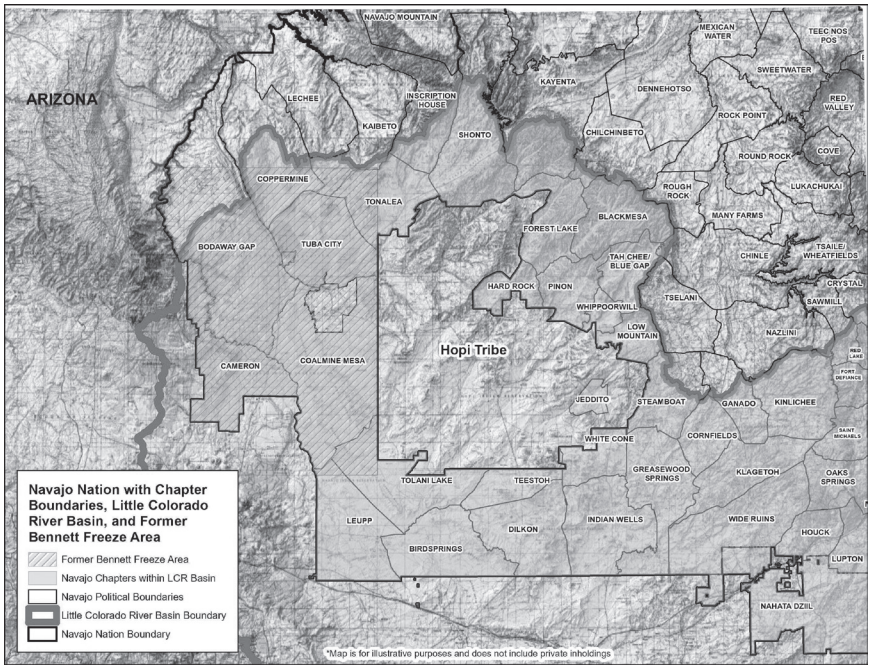
[85] Richard Henry Pratt, The Advantage of Mingling Indians with Whites at the Proceedings of the National Conference of Charities and Correction (June 23–29, 1892).

[c] A Reservation-by-Reservation Analysis for the Navajo Nation's Claims

The portion of the Navajo Reservation that lies within the Arizona Little Colorado River Basin is approximately 10,383 square miles, with 44 chapters being wholly or partially situated therein.

Figure 1. Navajo Nation with Chapter Boundaries, LCR Basin, and Former Bennett Freeze Area[86]



Coming off the Hopi trials and the release of the Hopi Final Report, it was expected that the most contentious claim in Phase I and possibly of the entire Navajo Contested Case would be for future DCMI. The Special Master in the Hopi Contested Case determined that domestic uses include water, whether provided by in-home connections or provided by municipal sources, used inside the home for drinking, cooking, cleaning, toilets, bathing, and outdoor residential uses such as home gardens and watering livestock stabled near the home.[87] Commercial uses include water

[86] Figure 1 is a map created by the Navajo Nation litigation team for use in the LCR Adjudication. The map illustrates the boundaries of the LCR Basin, chapter political boundaries, the Former Bennett Freeze Area, the Hopi Reservation including Moenkopi Island, and the lands occupied by the San Juan Southern Paiute.

[87] Hopi Final Report, *supra* note 57, at 90.

for business ventures.[88] Municipal uses include water used for government buildings, public parks, and public service facilities.[89] Light industrial uses include industries that typically produce small consumer goods that do not require a large or dedicated water supply and are typically served out of the public water supply.[90]

The obvious difficulty in presenting any future claim for all DCMI uses is the inability to account for any and every home, garden, business, school, hospital, road, or other structures that will be present within the LCR Basin at any given point in the future. Using a similar approach taken and approved in the Hopi trial to determine the amount needed for future DCMI, the Navajo Nation and United States each projected future stable populations and a future water use per person per day stated as gallons per capita per day (gpcd).[91] The products of these projections resulted in a claim by the Navajo Nation for approximately 85,000 acre-feet per annum (AFA) and a claim by the United States of approximately 45,000 AFA.[92] The Navajo Nation's impending Phase I trial required a concerted effort to present masses of supporting evidence aligned with the *Gila V* factors in its presentation of a permanent homeland that would reflect Navajo culture and traditions while using water in the same fashion as other modern communities.[93]

[i] Present and Future Projected Population

In the Hopi trial, the United States and Hopi Tribe presented a population projection based on total future tribal enrollment. However, the past and present population of the Study Area and the overall Navajo Reservation includes non-Navajos who are: of Navajo descent but not enrolled, married to a Navajo spouse, provide professional services to the Nation,

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[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] The Hopi Tribe presented a future gpcd of 160. The Navajo Nation used 160 gpcd as a base rate and adjusted it to account for climate change and peak demand resulting in a final claim for 178 gpcd.

[92] The United States DCMI claim was based on a smaller future population and smaller gpcd of 150. Objecting parties projected even smaller populations with more limited water needs.

[93] The Navajo Nation and objectors reached an agreement concerning livestock/wildlife watering. The parties stipulated to a 20 gallons per Animal Unit per day consumption rate, an Animal Unit conversion rate, and an overall quantification of 3,000 AFA for livestock and wildlife consumption. *See* Order Approving Stipulation Regarding Livestock and Wildlife Watering, *In re* Navajo Nation, Contested Case No. CV 6417-300 (Ariz. Super. Ct. Apache Cnty. Apr. 5, 2022). Therefore, this chapter provides limited discussion of the livestock and wildlife watering claim of the Navajo Nation.

or are authorized to be present on the Reservation pursuant to the Navajo treaties. Therefore, the Navajo Nation's projection was based on the entire population for the Study Area.

The Nation's projection applied the widely accepted Cohort Component Method (CCM), which allows for a flexible and dynamic approach to population projection by incorporating various data and assumptions about population change. The CCM was applied to an adjusted 2010 population and subsequent decennial projections up to 2080. From 2080 to 2120, the projection was based on the Study Area's annual growth rate. The 2010 Census was adjusted based on the assumption that it did not account for the actual population due to the manner in which the Census was conducted and the unique challenges of collecting Census information on the Navajo Reservation. The population projection also reflected considerable in-migration due to the following factors:

- The Study Area is situated within the traditional homelands of the Navajo people as described in Navajo oral history.
- The Navajo people have historically resisted various forms of removal from the Study Area and overall Navajo Reservation.
- The Navajo people have strong cultural and familial connections to family members, clans, and communities within the Study Area.
- Navajo culture integrates non-Navajos into society.
- Improved living conditions and economy are expected to occur and will attract Navajos and non-Navajos to the Study Area.

Based on the CCM, the Nation projected a Study Area population of 340,978 by 2120.

[ii] Tribe's History and Culture

The Navajo Nation opened its historic water rights case with the central theme and traditional Navajo philosophy, "*Tó éí íińá*" (water is life). It would have been impossible (and unwise) to describe the Navajo without acknowledging the very beginnings of the people told by the *Diné* themselves. The Nation took this approach by including in its arsenal of witnesses those who could know the beginnings of Navajo existence based on oral tradition. These witnesses explained the presence and importance of water as the Navajo journeyed through the First, Second, Third, and Fourth Worlds and the birth of the *Asdzą́ą́ Nádleehé* (Changing Woman) who is considered to be the mother of all Navajo people. Witnesses also attested that water has and continues to sustain all facets of the Navajo way of life including human consumption, ceremonial bathing, the raising of crops, ceremonial life, and the raising of livestock. One major philosophy

that was reiterated throughout the Nation's case centered on the ability to integrate non-Navajo/foreign concepts into Navajo society in order to improve the future of Navajo people.

The Nation also presented personal accounts of Navajo resilience and connection to the land, culture, and language. Several witnesses told stories of their ancestors' imprisonment and return from the Long Walk, the specific history of their clan or family to an area within the LCR Basin, and the symbolic connection of burying umbilical cords within the Four Sacred Mountains. A majority of the Navajo witnesses described their experiences of leaving or growing up outside of the Study Area only to return to the Reservation. Witnesses described surviving boarding schools located both on- and off-reservation, attending school away from the reservation, departing to provide military service, and growing up in metropolitan areas due to their families participating in the government's relocation programs. All-in-all the witnesses had the same thing in common—their strong connection to the land, culture, language, and people brought them back to the Navajo homeland.

Navajo witnesses also testified to their expectations of a future permanent homeland. The Navajo Reservation will be a place where Navajos are able to continue to live amongst their *K'é* (clan relatives) and speak *Diné bizaad* (the Navajo language). The homeland will foster the cultivation of Navajo crops and livestock and traditional Navajo practices. In sum, the homeland will be a place where Navajo people can achieve *hózhó* (everlasting life and balance) by taking the good of each of the traditional Navajo world and the Western world for the betterment of the Nation and the Navajo people.

[iii] Past Water Uses

Through testimony and Navajo government documents, the Nation presented impediments to water infrastructure development. Due to the enormous land base, scattered housing, geographic challenges, and insufficient funding, it is estimated that approximately 30% of Navajo Reservation homes lack a connection to a public water system.[94] Lack of access to a public water system has forced Navajo families to haul water for domestic uses from sources such as chapter houses, utility watering points, off-reservation facilities, and non-potable sources. Due to the physical labor and costs required to haul water, the Navajo people strive to conserve water by using it for essential needs and forgoing convenience and luxury experienced by off-reservation communities.

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[94]Navajo Tribal Util. Auth. (NTUA), "Navajo Nation Utility Infrastructure Needs," at 1 (Mar. 31, 2021).

Much of the existing water infrastructure on the Navajo Reservation and Study Area was developed by the Indian Health Services (IHS) for the limited purpose of domestic use. IHS did not develop its water systems for expanded commercial or municipal endeavors. The lack of water infrastructure is apparent in the Former Bennett Freeze Area, which affected nine of the 44 LCR Chapters and encompasses approximately 26% of the LCR Basin. Since 2009, these communities have worked diligently toward "thawing" by creating community development plans to rebuild and improve what was once frozen in time.

Despite the past challenges, the Nation's governmental leaders and planning officials described current water infrastructure build-out and their vision for the future. The Navajo homeland will continue to experience widespread expansion of regional infrastructure to support economic and community development. This is reflected and supported by the work of the Nation's former leaders and the subsequent commitment of both Navajo Nation and federal funds for development. Former Navajo Nation President Peterson Zah testified how he spearheaded an effort to plan for the future generations of the Navajo people using the payment received as a result of the *Kerr-McGee Corp. v. Navajo Tribe of Indians*[95] case and oversaw the creation of the Permanent Trust Fund and 10 other trust funds.

Residents and employees of the Nation testified to the quality of life they want for themselves, their families, and others living on the Navajo Reservation. The Navajo homeland should and will be one where Navajo society thrives by having access to lifestyles, trends, and technology experienced outside the Reservation. Navajo communities will provide emergency services, youth facilities, parks, post offices, grocery stores, and other public services. With electric and water connections, Navajo households will have an improved quality of life and enjoy modern amenities such as washing machines, dryers, sinks, toilets, dishwashers, refrigerators, and other modern home appliances. The practice of water hauling will decrease as waterlines and home connections are built and expanded.

[iv] Tribe's Economic Base and Employment Opportunities

The Nation called upon its various national and local leaders, governmental departments, and enterprises such as past presidents, chapter officials, the Navajo Division of Economic Development, Navajo Department of Transportation, Navajo Department of Health, Diné College, Navajo Tribal Utility Authority, Navajo Nation Gaming Enterprise, and Navajo

[95] 471 U.S. 195 (1985).

Nation Hospitality Enterprise to testify regarding the past economic and infrastructure challenges and measures taken to overcome those challenges, available and developing resources, and plans for expanded economic development in the future. It is anticipated that the expansion of water, electric, and broadband infrastructure will contribute to a thriving economy that fosters economic development, entrepreneurship, strong businesses, and jobs. Tourism, hospitality, and gaming will continue to develop and be strong economic drivers in the Study Area. The Nation will have an expansive roadway and transportation system that contributes to the overall health, safety, and economy and eliminates the dependency on border towns to supply goods and services.

The Navajo people will receive high-quality medical care from cutting-edge healthcare facilities situated across the reservation. The expansion of the Nation's healthcare system will also create jobs, ranging from construction to direct care. Navajo students will no longer be forced to leave the Reservation for higher education and will be able to attend modern educational institutions that employ Navajo principles and values. The Nation's educational institutions will provide access to technology and skills that will build a workforce that reflects the developing needs and economy of the Navajo Nation.

§ 10.04 Working to Secure the Future: The Northeastern Arizona Indian Water Rights Settlement

[1] Setting the Stage for Settlement

While an Indian tribe may be litigating its water rights in a judicial proceeding, it may also pursue non-judicial negotiation and settlement with the objecting parties to the tribe's claims. The Navajo Nation has participated in water rights settlement negotiations in Arizona on several occasions over the past six decades. The failure of the settlement negotiations in 2012 led to the re-initiation of the litigation in the LCR Adjudication. While settlement discussions renewed in 2020, the Navajo Nation walked out of the negotiations in November 2021.[96]

Only days before the Phase I trial was to commence, the Navajo Nation held a leadership meeting that included the Navajo Nation President, Delegates from the 25th Navajo Nation Council, and members of the Navajo

[96] *See* Letter from Navajo Nation President Jonathan Nez to Arizona Governor Doug Ducey (Nov. 1, 2021) (on file with authors) ("I write to express my great disappointment with the disrespect the October 6, 2021, Arizona water rights settlement proposal exhibits toward the Navajo people and the sovereignty of the Navajo Nation Government. . . . Please be advised that the Nation will return to the negotiating table when the State has a realistic and good faith offer that is respectful of the Navajo people and their Government.").

Nation Water Rights Commission wherein the participants committed to reviving efforts to settle the Navajo Nation's comprehensive claims to water rights within the entire state of Arizona.[97] Many reasons may have contributed to the Nation's successful efforts to re-energize settlement talks in April 2023: a change in leadership at the state level, a change in leadership within the Navajo Nation, a newly appointed Special Master, and the broader national recognition of the plight of Navajo people to battle infectious diseases without an available clean water supply. In addition, the Nation acknowledged the uncertainty of securing a satisfactory result in the LCR Adjudication based on the experience of the Hopi Tribe under the standards of *Gila III* and *Gila V*. In the Hopi Recommended Decree, the Special Master recommended a DCMI right of 3,069 AFA, which represents only one-third of the Hopi Tribe's claim for 9,322 AFA. In addition, the Hopi Final Report established significant pumping caps on the amount of water that the Hopi Tribe could pump as a federal reserved water right, even from the aquifers underlying the Hopi Reservation. Although the Hopi Tribe shares the use of a significant aquifer and five washes with the Navajo Nation, there had been no effort by the court to signify how those resources would be shared.

In the Nation's Phase I trial, the challenges were substantial as it had the burden to demonstrate (1) what the population for the Navajo Nation would be for a permanent homeland, (2) how much water would meet the minimal need for that population, and (3) what sources of water should be used to satisfy the claims for DCMI and livestock and wildlife watering. The Nation decided to take greater control of its water rights by meeting with the other stakeholders, tribal and non-tribal, to seek an alternative mechanism for resolving its claims.

Indian water rights settlement negotiations generally focus on the delivery of water to tribal communities by providing funding to build out the water infrastructure as much as it does on the quantification of the water right. Indian water rights settlements typically require money for infrastructure which necessitates congressional action authorizing the settlement and appropriating funding. For this reason, the comparison is made between obtaining "paper water" as a result of litigation or "wet water" as a result of settlement. Settlement works best if there is a source of unallocated water that can be used to replace sources that are fully appropriated by non-Indian parties. Federal funding is an important component of a settlement, but so is the ability of a tribe to control its own destiny. The *Gila V* concept that a permanent homeland should be limited to its "minimal

[97] See Navajo Nation Council Resolution CMY-26-24, § 2(L) (May 20, 2024).

need" is inconsistent with the twin goals of self-determination and sovereignty. Indian people are not pupfish who need just enough to survive. The Navajo Nation's desire to enter into settlement talks was met with a favorable response by other stakeholders and negotiations commenced in earnest again.

[2] The Room Where It Happens—the Negotiations

"Two Virginians and an immigrant walk into a room
Diametrically opposed Foes

They emerge with a compromise
Having open doors that were previously closed"[98]

In some ways, water rights settlement negotiations are not much different than the foregoing description of the negotiations in the musical Hamilton. The parties may come into the room diametrically opposed in position, but emerge with compromises that the parties can embrace. In stark contrast to the description in Hamilton in which "No one else was in the room where it happens," there are many people in the negotiation room where a water settlement takes place. In the Northeastern Arizona Indian Water Rights Settlement of 2024 (2024 Settlement), 39 parties including the Navajo Nation, Hopi Tribe, San Juan Southern Paiute Tribe, the United States, the State of Arizona, large public utilities, several cities and towns, irrigation districts, ranchers, and private companies participated in negotiations. While several parties with similar interests formed a coalition and were jointly represented, there were often a dozen or more attorneys in the negotiation room and many more attending through online platforms. Constant in-person and online meetings helped facilitate better communication amongst the parties and addressed issues in real time which contributed to the eventual settlement agreement.

Many individuals have written about water rights settlements, including those who have participated in one or more settlement negotiations,[99] law professors who study from a distance various water settlements and compare and contrast the outcomes,[100] and law students writing for

[98] Leslie Odom, Jr. & Lin Manuel Miranda, "The Room Where It Happens," *YouTube* (Apr. 20, 2017), https://www.youtube.com/watch?v=WySzEXKUSZw.

[99] *See, e.g.*, Stanley M. Pollack, "The Navajo Nation New Mexico Water Rights Settlement Agreement—How It Fits into Interstate Compact Obligations and Affect on Other Water Users in the San Juan River and Colorado River Basins," *Natural Resources Development on Indian Lands* 12-1 (Rocky Mt. Min. L. Fdn. 2011).

[100] *See, e.g.*, Heather Tanana & Elizabeth Paxton Parker, "The Unfulfilled Promise of Indian Water Rights Settlements," *Utah Law Digit. Commons* (2022).

law reviews.[101] While each water settlement is unique, there are some generalities that can and were applied as the parties worked toward the 2024 Settlement.

[a] Uncertainty

"Uncertainty is necessary because it is the unknown that gives parties the political will to settle."[102] For each of the active parties there was some degree of uncertainty, including—at the least—the length of time that would pass before there would be closure in the litigation process. The Nation's Phase II trial is not scheduled to begin until 2027. Beyond the trial, there would be briefing, a report and recommended decree from the Special Master with accompanying objections, briefing and argument before the superior court judge, and eventually an appeal to the Arizona Supreme Court. These lengthy proceedings also involve costs associated with legal representation, experts, and other litigation costs. For non-Indian parties, it has been important that the Navajo Nation and the United States on its behalf withdraw from their objections to the state-based claims in the adjudication proceedings. For the Nation, the uncertainty of what the Special Master would conclude regarding the population of a permanent homeland and what water is required as minimal need for such a homeland caused great concern.

[b] Trust

"[N]egotiations are highly personal. It is the rapport people at the table build that determines a successful outcome."[103] By example, in the negotiations that led to the Southern Arizona Water Rights Settlement Amendments, the seven to eight active parties alternated hosting each meeting at their respective offices. After several months, the lawyers representing the parties learned enough about the other parties, their experiences, and their priorities that it began to break down barriers. Settlement negotiations are rarely a zero-sum game. Through the 2024 Settlement negotiations, the Navajo Nation and the Hopi Tribe were able to reach provisions regarding management of the N-aquifer and the five northern washes that the two tribes use, as well as rights-of-way for infrastructure to be developed. This result would not have been achieved through litigation.

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[101] *See, e.g.*, Gina McGovern, "Settlement or Adjudication: Resolving Indian Reserved Rights," 36 *Ariz. L. Rev.* 195 (1994).

[102] Barbara Cosens, "2005 Indian Water Rights Settlement Conference Keynote Address," 9 *U. Denv. Water L. Rev.* 285, 288 (2006).

[103] *Id.* at 290.

[c] Voluntary Settlement Versus Third-Party Imposed Litigation Outcome

"If the only politically acceptable solution to your client is retribution, to win it all, or to maintain the status quo—go to court."[104] Settlement allows the parties to seek out alternative outcomes beyond those that judicial rules allow. However, the proposals that the parties make must be ones that, with good leadership, can be accepted by the people. A proposed solution that will result in the recall or removal of a political player is no solution at all. Parties should focus only on those solutions that are achievable. The Navajo Nation worked through details regarding the Colorado River contracts that satisfied both the Nation and the State of Arizona.

[d] Giving Up a Degree of Control Is an Exercise of Tribal Sovereignty

As part of the 2024 Settlement negotiations, the State of Arizona requested that the Navajo Nation provide certain water use reports to the State. Rather than reject the State's request contending that federal law does not require a tribe to provide such information to the State, the Nation agreed to the State's request. The Nation did so as an exercise of its sovereignty.

The settlement of the claims of the Navajo Nation, the Hopi Tribe, and the San Juan Southern Paiute Tribe would not have been possible if the sources of water available to the negotiations were limited to just the Little Colorado River Basin. Only through the inclusion of other water, specifically water from the Colorado River, could settlement be reached. It allowed the tribes to resolve their comprehensive water rights and eliminated the risks associated with litigating under the untested standards of *Gila III* and *Gila V*.

[3] The Federal Role in Indian Water Rights Settlement

The claimed water sources for which a tribe makes a claim are typically trust assets of the United States.[105] The Department of Interior's policy, since the 1990s has been that Indian water rights should be resolved through negotiated settlement rather than litigation.[106] Negotiated

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[104] *Id.* at 291.

[105] See the discussion above regarding *Winters* and *Winans* water rights.

[106] Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9223 (Mar. 12, 1990) (policy statement).

settlements are preferred because they provide water supply certainty for tribal and surrounding non-tribal communities, build cooperative solutions that benefit all stakeholders, and include funding for important water infrastructure that allows a tribe to access the water to which they have a legal entitlement.[107] The federal government has entered into 35 Indian water rights settlements since 1978 through enacted federal legislation, and an additional four settlements have been approved administratively by the Secretary of the Interior or the U.S. Attorney General.[108]

The Secretary's Indian Water Rights Office (SIWRO) of the U.S. Department of the Interior is charged with managing, negotiating, and overseeing implementation of settlements of Indian water rights claims. Its mission is to work with the tribes and all water stakeholders to "deliver long promised water resources to the tribes, certainty to all the non-Indian neighbors, and a solid foundation for future economic development for entire communities dependent on common water resources."[109] The Department of the Interior's Working Group, comprised of all Assistant Secretaries and the Solicitor (and typically chaired by a counselor to the Secretary or Deputy Secretary), is responsible for making recommendations to the Secretary of the Interior regarding water rights settlements.

Once the negotiation is complete and the parties have agreed on specific terms that are embodied in a settlement agreement, the settlement is introduced in Congress for approval, authorization for the Secretary of Interior to execute the settlement agreement, and for appropriations to fund the proposed infrastructure.

[4] Funding a Settlement

Indian water rights settlements typically provide federal funding for the infrastructure development which allows water to be delivered to tribal homes and businesses. Congress can choose to provide discretionary funding, mandatory funding, or a hybrid. Discretionary spending (spending that is subject to appropriations) has historically been the common source of funding for congressionally approved Indian water rights settlement. Congress has authorized the appropriations of specific sums, including funding of specific accounts that are created in the federal legislation approving the settlement. The accounts are authorized to receive future discretionary funding up to a stated maximum. On occasion, Congress

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[107] H.R. Rep. No. 116-440, at 2 (2020).

[108] Cong. Research Serv., "Indian Water Rights Settlements," at 6–8 tbl.1 (2023).

[109] U.S. Dep't of the Interior, "Secretary's Indian Water Rights Office," https://www.doi.gov/siwro.

has authorized discretionary appropriations of "such sums as may be necessary."[110]

Congress has also authorized mandatory funding for Indian water rights settlements. Mandatory funding has been authorized through one of a number of mechanisms: (1) funding from the Reclamation Water Settlements Fund, a dedicated fund created in 2010 for certain priority Indian water rights settlements; (2) funding from the Indian Water Settlements Completion Fund, a fund created in 2021 for all settlements authorized prior to that bill's enactment; (3) funding for specific individual settlements; and (4) funding through redirecting existing receipt accounts. Currently there is no available funding in either the Reclamation Water Settlements Fund or the Indian Water Settlements Completion Fund. In the Arizona Water Settlements Act,[111] which authorized the Gila River Indian Community water rights settlement and an amendment to the Tohono O'odham water rights settlement, Central Arizona Project repayments by Arizona parties were made available as mandatory funding to support the infrastructure and OM&R costs for those tribal settlements.

The proposed 2024 Settlement seeks mandatory funding for the construction of a pipeline from Lake Powell that will transport and deliver Colorado River water to both Upper Basin and Lower Basin communities on the Navajo Nation, and the Lower Basin communities on the Hopi Reservation and the San Juan Southern Paiute Southern Area. The 2024 Settlement also establishes trust funds for each of the tribes to further develop water infrastructure, to revitalize livestock wells and stockponds, and to provide for OM&R.

[5] Approval of an Indian Water Rights Settlement by the Adjudication Court

Once Congress has approved the settlement and authorized funding, the parties must conform the settlement agreement to the legislation and obtain approval by all of the parties. In Arizona, an Indian tribe's water rights settlement must be approved in the general stream adjudication in which the Indian tribe is located. The Arizona Supreme Court has promulgated a Special Procedural Order in the Gila River Adjudication Court[112]

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[110] *See, e.g.*, Pub. L. No. 106-554, § 303, 114 Stat. 2763.

[111] Pub. L. No. 108-451, 118 Stat. 3479 (2004).

[112] *In re* General Adjudication of the Rights to Use Water in the Gila River System & Source, Case Nos. WC-79-0001 to WC-79-0004 (consolidated) (Ariz. Super. Ct. Maricopa Cnty. May 16, 1991) (special procedural order providing for the approval of federal water rights settlements, including those of Indian tribes).

and the Little Colorado River Adjudication Court[113] providing for the approval of a settlement agreement involving an Indian tribe.

Conditions warranting special proceedings are as follows:

(1) The Indian water rights are subject to a claim in the adjudication;

(2) The Indian water rights have been determined in a settlement agreement among the Indian tribe, the United States, and a group of claimants whose claims are adverse to the tribe;

(3) The settlement agreement has been confirmed by an act of Congress;

(4) The terms of the settlement require approval by the adjudication court; and

(5) There are special circumstances preventing consideration in the normal course.[114]

The order approving the special proceeding requires a statement that if the court enters a final judgment adjudicating the Indian water rights, the judgment will be binding upon all parties to the general adjudication. The court shall approve the stipulation and adjudicate the Indian water rights if, after hearing the evidence, it determines that the parties to the settlement have established by a preponderance of the evidence that:

> the settlement is fair, adequate, reasonable, and consistent with applicable law, considering all of the circumstances surrounding the settlement and all of the consideration provided under the settlement. In making this determination, the court may consider in addition to other evidence offered, the statement of claimant filed by the Indian tribe(s) or federal agency and all supporting documentation.[115]

The respective legislative bodies of each of the Navajo Nation, the Hopi Tribe, and the San Juan Southern Paiute Tribe, whose water rights within the State of Arizona are being resolved in the Northeastern Arizona Indian Water Rights Settlement Agreement, have unanimously approved the settlement agreement. At the time of this writing, the non-Indian parties are in the process of approving the settlement agreement. The attention of the parties has shifted to Congress and its enactment of federal legislation to approve and ratify the settlement and finance development of the infrastructure.

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[113] *In re* General Adjudication of all Rights to Use Water in the Little Colorado River System & Source, Case No. WC-79-0006 (Ariz. Sept. 27, 2000) (administrative order).

[114] *Id.* at 1–2.

[115] *Id.* at 8.

§ 10.05 Key Issues and Concluding Thoughts

[1] Working Relationship Between Tribes and the Trustee

The United States serves as the trustee for the three tribes involved in the LCR Adjudication and has submitted its own claims on behalf of each. The tribes have found it necessary to object to each other's water rights claims and in some instances, to join in certain arguments that have the potential to impact their own claims. With its fiduciary duty to each tribe, it can be difficult, frustrating, and confusing for a tribal objector in another tribe's water rights case to be pitted against the United States, its co-claimant in its own case. It becomes important for tribes to establish, nurture, and maintain a good working relationship with opposing tribal attorneys, attorneys from the Department of Justice and Office of the Solicitor should it find itself in water rights litigation. However, regardless of how strong the working relationship may be, it is certain disagreements will take place. Whether it is a claimed use or amount, litigation strategy, or legal argument, it is important co-claimants work to resolve issues or minimize any dissention.

In contrast to litigation, settlement negotiations encourage cooperation between the tribal parties and the United States. The tribal parties in the 2024 Settlement were able to reach certain agreements regarding shared resources and the consent of rights-of-way for construction of water infrastructure to the satisfaction of all the tribes and the United States.

[2] Priority

Although *Winters* rights have a priority as of the date of the establishment of the reservation and *Winans* rights carries a time immemorial priority, for a reservation that has been established piecemeal over time and through various legal instruments, the result could mean unworkable water rights. For example, the initial land base of the Navajo Reservation was reserved in the 1868 Treaty although a reservation was promised in 1849. Realizing the inability to settle all Navajo people on such ill-calculated acreage, the federal government expanded or adjusted the Arizona portion of the Navajo Reservation over 25 times. A strict application of *Winters* and *Winans*, as applied in the Hopi Priority Case would subject the Navajo LCR Basin Chapters to 25+ priority dates ranging from 1868 to as late as the mid-2010s. The piecemeal priority is compounded by the fact that roughly half of the 44 Navajo LCR Basin Chapters have lands that were reserved through at least two federal actions.

However, adherence to the findings in the Hopi Contested Case may not be appropriate. First, unlike the Navajo, the Hopi Tribe did not execute any

treaties with the United States. Second, the Navajo Nation would rely on *State ex rel. Martinez v. Lewis*,[116] in which the New Mexico appellate court determined a single priority date for the Mescalero Apache Tribe despite its reservation being created by five separate executive orders issued in five different years between 1853 and 1873. With the United States first promising to "designate, settle, and adjust" the territory of the Mescalero in an 1852 Peace Treaty, a liberal interpretation supported a unified 1852 priority date for the entire Mescalero Reservation. The Navajo Peace Treaty of 1849 contains identical language to that of the Mescalero Treaty. Were litigation to continue, the Navajo Nation would contend that the 1849 Peace Treaty would be the most appropriate *Winters* date for the entire Navajo Reservation in order to effectuate a permanent homeland.

In addition to the multitude of possible priority dates for *Winters* rights, the history of the Navajo Reservation is fraught with land disputes between the Navajo Nation and the Hopi and San Juan Southern Paiute Tribes. From these land disputes, there are portions of the Navajo Reservation that are landlocked by the Hopi Reservation (Jeddito Island); landlock another tribe's reservation (Moenkopi Island); and have been deemed as exclusive use areas for another tribe (San Juan Southern Paiute lands); or are replacements for lost areas that would have very early priority dates (Nahata Dzil).

Winans rights often require a considerable emphasis on determinations made by the Indian Claims Commission (ICC). However, the ICC was established to settle land claims for tribes seeking to resolve the illegal taking of their lands by the United States. The only authorized remedy through the ICC was for monetary compensation. To maximize their potential monetary award, tribes put forth their largest claims and best scientific evidence that existed at the time often causing overlapping claims. The ICC eventually compensated tribes for those lands where aboriginal title was lost. In the Hopi Contested Case, the loss of the aboriginal title to lands outside of Land Management District 6, regardless of reacquisition by the Tribe, resulted in only a fraction of the current reservation having a time immemorial priority. In essence, the tribes unknowingly traded time immemorial water rights priority for monetary awards that did not factor in those rights. These inequities suggest the ICC decisions are not appropriate for determining priority in Indian water rights cases and instead, an adjudication court should rely on new or developing scientific evidence supporting a tribe's connection to certain lands from which it asserts water rights claims.

[116] 861 P.2d 235, 238 (N.M. Ct. App. 1993).

In the context of a water settlement, as a compromise and in the best interest of the tribe, the tribe may negotiate releasing a claim for a senior water right to a water source that is currently being put to use by junior appropriators and waive the right to object to a junior appropriator's use of that water, in exchange for a replacement source of water and funding for infrastructure to bring that water to the tribal communities. By example, in the Southern Arizona Water Rights Settlement Act of 1982,[117] as amended by the Southern Arizona Water Rights Settlement Amendments Act of 2004,[118] the Tohono O'odham Nation waived senior claims to the Santa Cruz River in exchange for Colorado River Water. In similar fashion, the Navajo Nation contracts for Upper Basin Colorado River water permitted the Nation to release objections to appropriators of surface water upgradient of the Navajo Reservation.

[3] Proper Factors for Consideration

The fact-intensive inquiry on a reservation-by-reservation basis provides tribes an opportunity to present a myriad of factors for the trial court to consider. This can be both a blessing and a curse. In theory, such an approach is geared to give a tribe the latitude to build a water rights case as it sees fit with available evidence to support its case. In a perfect world, a tribe would have regularly documented and archived any of its functions, operations, governing laws and resolutions, economic and community development plans, tribal reports, and other similar items to demonstrate past and continued growth of the reservation over time. However, the reality is that tribes operate to meet the most urgent needs of the people and the tribal government, rather than design plans in anticipation of future water rights cases.

Another major disconnect from the realities of the reservation is the requirement for "actual and proposed projects" and their need to be "practically achievable and economically feasible." Long-range planning in non-Indian communities is generally limited to 30 years. The adjudication of a tribe's water rights is very likely its one shot to secure all the water it will need for the next several generations, if not forever. How can a tribe present any "actual and proposed projects" for its population needs and permanent homeland 100 years out? Furthermore, how could any community, tribal or non-tribal, demonstrate achievability or feasibility so far out? Finally, the requirement that projects be economically feasible assumes a mutual understanding and bright line threshold of what that entails. If a

[117] Pub. L. No. 97-293, tit. III, 96 Stat. 1261.

[118] Pub. L. No. 108-451, tit. III, 118 Stat. 3478.

tribe pursues a project that is needed on the homeland but lacks financial sense, should it not be provided a water right to support that project?

The permanent homeland standard appears to allow tribes to assert claims and provide supporting evidence in excess of what it could claim under a PIA analysis. But based on the limited experience of the Hopi Contested Case, the Hopi Tribe fared better in outcome as described in the Special Master's Final Report and Recommended Decree with claims that it was able to secure through stipulation or that were grounded in inflexible mathematical calculation. What benefit does the permanent homeland standard perform if courts disregard a tribe's self-articulated vision for a future homeland and rely on the comforts of formulaic approaches? In contrast to litigation, a settlement allows a tribe to consider issues more broadly, exercise its sovereignty to compromise, secure funding to deliver water to tribal homes and businesses, and to focus on those matters that are most important to providing for the permanent homeland of today and tomorrow.