

An aerial photograph of a deep, rugged canyon. A river flows through the center of the canyon, its water a deep blue-green color. The canyon walls are composed of layered, reddish-brown rock formations. The sky above is a clear, pale blue with a few wispy clouds. The overall scene is one of natural beauty and geological grandeur.

Little Colorado River General Stream Adjudication

Prepared for the ASU College of Law Navajo CLE

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October 15, 2021

What is a general stream adjudication?

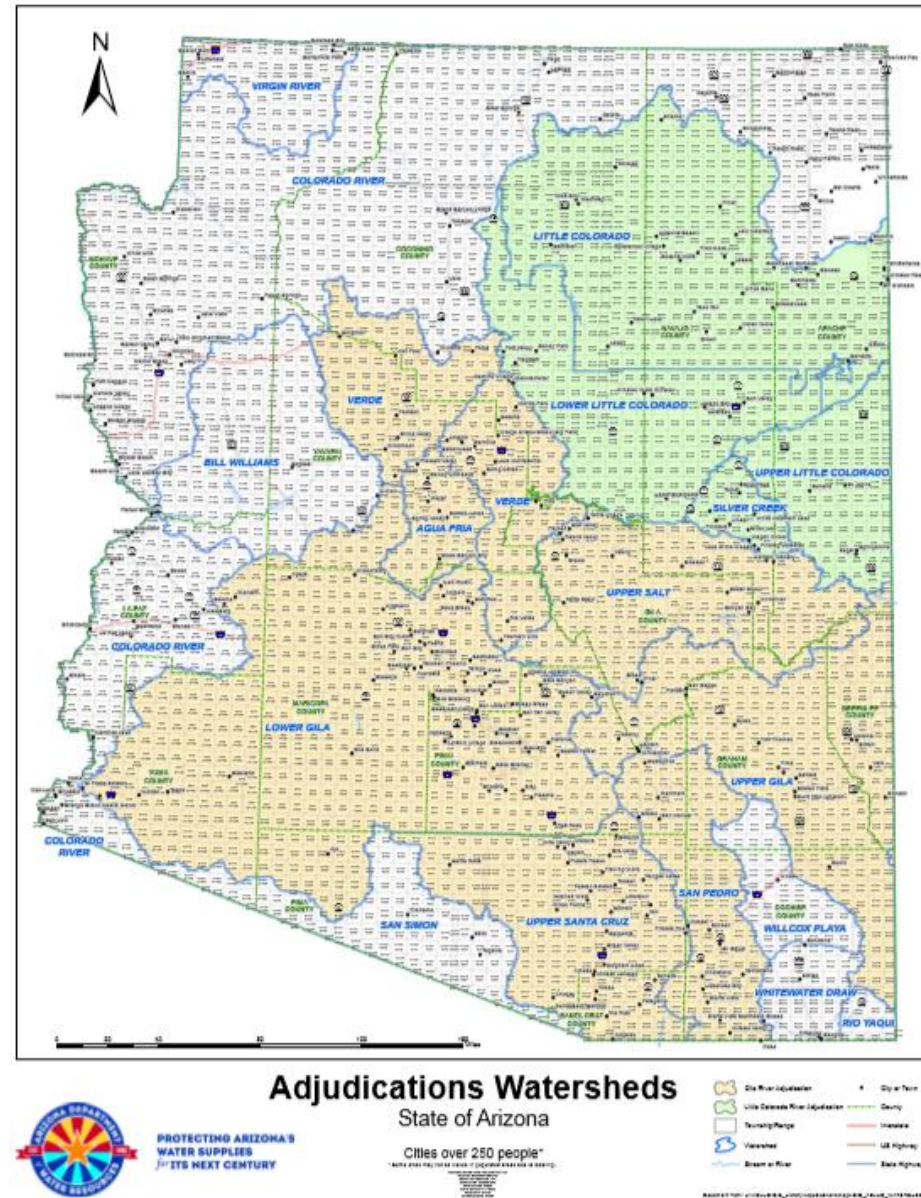
The general stream adjudication is a judicial proceeding to determine the nature, extent and relative priority of water rights in Arizona. Arizona Revised Statutes (A.R.S.) §§ 45-251 to 45-264.

There are two general stream adjudications in the state:

- Gila River System and Source (Gila Adjudication)
- Little Colorado River System and Source ("LCR" Adjudication)

The exterior boundaries of these two adjudications include more than half the state, where most of the Indian reservations and federal land are located.

Map of the Adjudicated Areas in Arizona



SacksTierney P.A.
ATTORNEYS



Navajo Nation Chapters in the Little Colorado River Basin within Arizona

1. Dilkon Chapter Government
2. Indian Wells Chapter
3. White Cone Chapter
4. Greasewood Springs Chapter
5. Teesto Chapter
6. Coppermine Chapter
7. Tonalea/Red Lake Chapter
8. Bodaway/Gap Chapter
9. K'aibii'to Chapter
10. Tachee/Blue Gap Chapter
11. Low Mountain Chapter
12. Ts'ah Bii Kin Chapter (Inscription House)
13. Shonto Community Governance
14. Chilchinbeto Chapter
15. Kayenta Chapter
16. Jeddito Chapter
17. Cornfields Chapter
18. Ganado Chapter
19. Kin Dah Lichii Chapter (Kinlichee)
20. Steamboat Chapter
21. Nazlini Chapter
22. Klagetoh Chapter
23. Wide Ruins Chapter
24. Houck Chapter
25. Tse Si Ani Chapter (Lupton)
26. Nahata Dziil Chapter (Newlands)
27. Crystal Chapter
28. Fort Defiance Chapter
29. Red Lake #18 Chapter
30. Sawmill Chapter
31. Chinle Chapter
32. To'Nanees'Dizi Chapter (Tuba City)
33. Cameron Chapter
34. Coalmine Canyon Chapter
35. Tsidi To'ii Chapter (Bird Springs)
36. Leupp Chapter
37. Tolani Lake Chapter
38. Oak Springs Chapter
39. St. Michaels Chapter
40. Hardrock Chapter
41. Forest Lake Chapter
42. Pinon Chapter
43. Black Mesa Chapter
44. Whippoorwill Chapter

The Beginning of the LCR Adjudication

- The LCR Adjudication was initiated in 1978. In 1985 the Navajo Nation (“NN”), the Hopi Tribe, and the United States (on behalf of the two tribes), filed claims in the LCR Adjudication after the United States Supreme Court determined that water rights held in trust by the United States were subject to state court jurisdiction and the Arizona Supreme Court held that the Arizona constitution did not bar such claims.
- The case is assigned to the Apache County Superior Court, because this is the County where the largest number of potential claimants reside. However, the proceedings are being conducted by Special Master Susan Ward Harris in the Maricopa County Superior Court.
- In 2001, Judge Ballinger determined that the claims of the Hopi Tribe would proceed first in the LCR Adjudication, followed by the claims of the Navajo Nation.

Parties Involved

A “claimant” is any entity - e.g. a person, a tribe, a city - that is making a claim for water rights. An entity that objects to those claims is an “objector.”

- The claimants in the Navajo and Hopi cases are the Navajo Nation, Hopi Tribe, and the United States on behalf of the tribes.
- Navajo is an objector in the Hopi case and Hopi is an objector in the Navajo case.
- Other Non-Indian Objectors to the Navajo and Hopi cases:
 - > City of Flagstaff
 - > LCR Coalition
 - > State Land Department
 - > SRP
 - > Other individuals and entities



The Hopi Case

"the 201 and 203 contested matter"



In re Hopi Tribe Priority, Contested Case No. CV 6417-201

- District 6 within the 1882 Reservation --- Time immemorial
- 1882 Reservation - Priority date of December 16, 1882
- Moenkopi Island - Priority date of July 22, 1958

In re Hopi Reservation HSR, Contested Case No. CV 6417-203

- Hopi claims for past and present uses - Trial Sept. 11- Dec. 18, 2018
- Hopi claims for future uses - Trial Sept. 14, 2020 -February, 2021

Currently, the parties are in the process of completing post-trial briefing. Once the Special Master issues her Report and recommendations, it may be submitted to the Superior Court Judge for review and determination.



The Navajo Case

"the 300 case"



In re Navajo Nation, Contested Case No. CV 6417-300

Amended Statements of Claimant were/are due as follows:

Phase I: Past, present, and future uses:

- Domestic, commercial, municipal, and industrial ("DCMI") purposes
 - > Domestic- home uses of water i.e., home gardens, washers, dishwashers, showers, toilets, etc.
 - > Commercial- small business water use i.e., Burger King, laundromats, car washes, tourism
 - > Municipal- government uses i.e., chapter houses, parks, libraries, hospitals, police/fire stations,
 - > Industrial- uses water from system (not from an independent well) i.e., small factories, small industrial construction, solar projects connected to NTUA source
- Stock and wildlife watering
- Sources of water
- Due/filed: June 1, 2018

Phase II: Past, present, and future uses: **Phase III:** Past, present, and future uses:

- | | |
|---|---|
| <ul style="list-style-type: none"> ▪ Cultural/unique tribal ▪ Recreational ▪ Fish, wildlife, and conservation ▪ Mining and heavy industrial/commercial uses ▪ Filed: October 7, 2020 | <ul style="list-style-type: none"> ▪ Irrigation ▪ Due: December 1, 2021 |
|---|---|

Adjudication of Phase I Uses:

**past, present and future stockponds,
stock watering, wildlife and DCMI water**

Schedule:

**JUNE 1
2018**

Claims filed and
amended
occasionally

**MARCH 8
2019**

Preliminary HSR
issued by ADWR

**JUNE 7
2019**

Navajo Nation
Comments filed

**DECEMBER 2
2019**

Final HSR

**JUNE 1
2020**

Objection
period expires

**APRIL 30
2021**

Navajo/U.S.
Disclosure Statements
and Expert Reports

**OCTOBER 12
2021**

Objectors'
Disclosure and
Expert Reports

**DECEMBER 13
2021**

Navajo/U.S. Rebuttal
Reports

**JULY 29
2022**

Discovery concludes

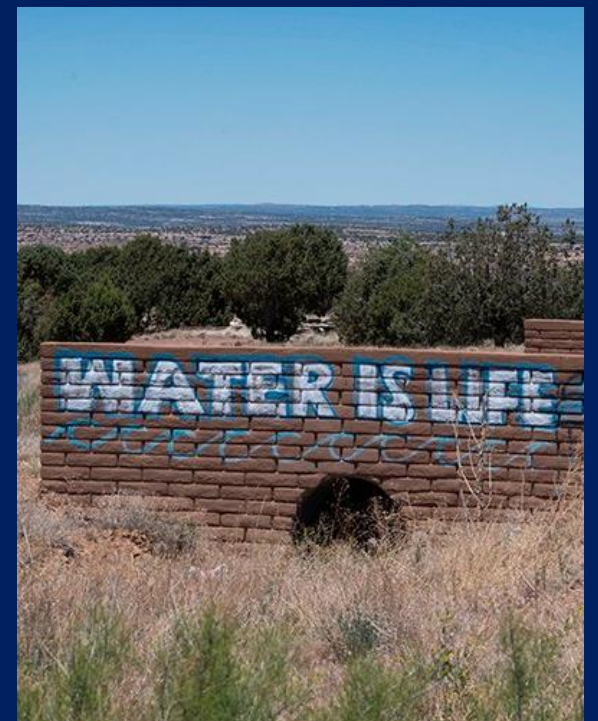
With this deadline
deposition preparation
and depositions for
witnesses will start in late
2021/early 2022.

**FEBRUARY 10
2023**

Phase I Trial begins

These dates may change
at the request of 1 or
more parties. These dates
are current as of the date
printed on the cover
page of this presentation.

Phase I: DCMI and Livestock Watering



Adjudication of Phase II and III Uses:

past, present and future cultural/unique
tribal recreational fish, wildlife, and
conservation mining heavy
industrial/commercial irrigation

Schedule:

OCTOBER 7, 2020

Phase II claims filed
and will be amended
occasionally

DECEMBER 1, 2021

Phase III claims due

Phases II and III have been consolidated into a single phase

- Preliminary HSR and Final HSR by ADWR - TBD
- Navajo/U.S. Disclosure Statements and Expert Reports - TBD
- Objectors' disclosure and Expert Reports - TBD
- Discovery concludes - TBD
- Phase II/III Trial begins - TBD

Litigation Goals

- 1. Establish the amount of water required by the Navajo Nation for a permanent homeland**
 - This means enough water to accomplish the Nation's vision of a thriving community, including amenities such as hospitals, schools, shopping centers, housing, community centers, roads, restaurants, other types of commercial development such as gaming facilities, warehouses, shipping facilities, forest products, industrial development such as mining, agriculture including irrigated crops where feasible, and livestock, tourism, and recreation.
- 2. Secure the earliest priority date for the water rights recognized**
- 3. Ensure that historic Navajo water uses are recognized to their full extent**
- 4. Ensure that Navajo voices are heard**

Upcoming Activities

Phase II and III Claims

- Gather information to present Phase III claim (irrigation) in Amended Statement of Claim (ASOC)
- Retain experts to provide reports for Phase II and III claims
- Gather relevant documents and/or those that will be used in the Phase II/III trial
- Retain witnesses that can testify to the Phase II and III claims

The Legal Framework



Federal Reserved Water Rights



United States v. Winans, 198 U.S. 371 (1905)

- Time immemorial rights for aboriginal water uses on lands with original Indian title
- Limited primarily to Treaty Tribes

Winters v. United States, 207 U.S. 564 (1908)

- Reservation date priority for the purposes of the reservation
- Right is not limited by the use at the date of the Reservation but expands to meet both present and future needs.

A photograph of a cornfield at dusk or dawn. The corn plants are in the foreground, their green leaves reflecting the low light. In the background, a range of mountains is visible under a dark sky. The overall tone is somber and agricultural.

Setting the Standard for Quantification

***Arizona v. California*, 373 U.S. 546 (1963)**

- Held that water rights were reserved at the time of creation of the reservation.
- Tribes entitled to enough water to irrigate all practically irrigable acreage ("PIA") on the reservation.

What waters are included?

Is it only surface water? Is groundwater included?

***Cappaert v. United States*, 426 U.S. 128 (1976)**

- United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.

***In re General Adjudication of Big Horn River System*, 753 P.2d 76 (Wyo.1988)**

- No reserved groundwater right in connection with reservation of water rights for Indian reservation at time of creation of the reservation.

***In re General Adjudication of the Gila River System ("Gila III")*, 989 P.2d 739 750 (Ariz. 1999)**

- Federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation.

***Agua Caliente Band V. Coachella Valley Water Dist.*, 849 F.3d 1262 (9th. Cir.2017)**

- Tribe has a reserved right to groundwater underlying its reservation as a result of the purpose for which the reservation was established.

Arizona Creates a New Standard



In Re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 35 P.3d 68 (Ariz. 2001) ("Gila V")

- Purpose of Indian reservations is to provide a "permanent homeland and abiding place."
- The quantity of water for such purpose must satisfy both present and future needs of the reservation as a livable homeland.
- PIA is not the exclusive quantification measure for determining water rights on Indian lands.
- Determining the amount of water necessary to accomplish an Indian reservations' purpose is a fact-intensive inquiry that must be made on a reservation-by-reservation basis.

Gila V Tribal Factors to Consider

Tribe's history

Culture

Geography

Topography and natural resources

Tribe's economic base

Employment opportunities

Past water uses

Present and future projected population

A group of approximately 15 people, including men and women of various ages, are standing in a line on a dirt construction site. They are holding shovels and looking towards the camera. In the background, a large blue sign reads "FUTURE HOME" and "TWIN ARROWS TRAVEL CENTER". The sky is blue with some clouds. The overall scene is a groundbreaking ceremony.

Under Gila V:

A trial court, when determining an Indian tribe's federally reserved water rights, may consider information it deems relevant, and the only requirement is that the proposed purposes be reasonably feasible, which entails a two-part analysis: first, development projects need to be achievable from a practical standpoint, i.e. they must not be pie-in-the-sky ideas that will likely never reach fruition, and second, projects must be economically sound.

Importance of Building a Strong Case



- One shot at claiming the future water needs of the tribe.
- Once determined by Court, and awarded quantity, source and priority, unlikely that a tribe can change to the disadvantage of other users.
- Ensures that the tribe will be able to maintain the reservation as a homeland and abiding place.



Practical Tips

Expert Witnesses

- Locating your expert(s)
- Scope and Budget
- Access to tribal land/government records
- Access to national archives
- Establishing Deadlines
- Coordination
- Final Product(s)

Fact Witnesses

- Identifying and Locating your witness(es)
- Getting to know your witness(es)
- Maintaining contact with your witness(es)
- Preparing your witness(es) for deposition(s) and trial





Questions?