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

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE LITTLE COLORADO RIVER SYSTEM AND SOURCE	DATE: April 24, 2013 No. CV 6417
In re Hopi Tribe Priority	Contested Case No. CV 6417-201 REPORT OF THE SPECIAL MASTER; MOTION FOR ADOPTION OF REPORT; AND NOTICE FOR FILING OBJECTIONS TO THE REPORT

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

HSR INVOLVED: None.

DESCRIPTIVE SUMMARY: The Special Master files his report concerning the determinations of seven issues regarding the priority of water rights claimed by the Hopi Tribe. The report contains findings of fact, conclusions of law, and recommendations. Objections to the report must be filed with the Clerk of the Superior Court of Apache County on or before **Monday, July 1, 2013**. Responses to objections are due on or before **Friday, August 16, 2013**. A hearing on any objections will be held at a time and place to be set by the Court.

NUMBER OF PAGES: 77.

DATE OF FILING: April 24, 2013 (sent to the Clerk of the Apache County Superior Court by FedEx).

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I. INTRODUCTION AND SUMMARY

This report addresses the seven issues the Special Master designated for briefing arising from the claims of the Hopi Tribe and the United States to water rights for the Hopi Indian Reservation located in Northern Arizona. The Hopi Tribe of Arizona is a federally recognized Indian tribe.[1] The report contains a chronology of the proceedings, findings of fact, conclusions of law, recommendations, a motion for adoption of the report, and time lines for filing objections to the report and responses.

The Special Master's determinations are summarized as follows:

1. The Hopi Tribe holds water rights with a priority of time immemorial only in the area within Land Management District 6. The Hopi Tribe does not hold time immemorial water rights on other tribal lands within the 1882 Executive Order Reservation or Moenkopi Island. Its aboriginal water rights were incidents of aboriginal title, and the extinguishment of the Hopi Tribe's aboriginal title, as determined by the Commission, terminated aboriginal water rights to those lands.

2. The Hopi Tribe does not hold water rights with a priority date of 1848 as a result of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1848). The treaty did not create or establish water rights but protected existing property rights within the lands acquired by the United States.

3. The Hopi Tribe holds an implied reserved water right with a priority of December 16, 1882, to the Hopi Partitioned Lands within the 1882 Executive Order Reservation. President Chester A. Arthur's Executive Order of December 16, 1882, impliedly reserved water for the Hopi Tribe.

4. The Hopi Tribe holds an implied reserved water right to Moenkopi Island with a priority of June 14, 1934, pursuant to the Act of June 14, 1934, 48 Stat. 960.

The Special Master does not make any findings of fact, conclusions of law, and recommendations regarding the priority of water rights for the Hopi Industrial Park and the Aja, Clear

[1] *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218 and 40,220 (Aug. 11, 2009), latest version available at www.federalregister.gov.

Creek, Drye, and Hart Ranches. The Special Master recommends that the Court direct the Arizona Department of Water Resources ("ADWR") to complete the investigations of the claimed water rights for the four ranches.

The priorities of the Hopi Tribe's water rights in the lands within the boundaries of the 1882 Executive Order Reservation and Land Management District 6 are not affected by the reported conveyances and reacquisitions of lands by the United States beginning in the 1860s.

5. The Hopi Tribe is precluded from asserting claims of aboriginal title that were litigated and determined by the Indian Claims Commission, but is not precluded from asserting a reserved water right. Non-parties to the prior litigation before the Indian Claims Commission and partition cases may assert claim and issue preclusion.

6. The settlement of the Hopi Tribe's action before the Indian Claims Commission was an accord and satisfaction of claims to aboriginal title to land but not water rights.

7. This issue cannot be resolved by summary judgment due to genuine disputes over material facts and the lack of an adequate record to support summary relief.

II. CHRONOLOGY OF PROCEEDINGS

This contested case was initiated on September 8, 2008. Its progress has been affected by settlement negotiations, the Hopi Tribe's substitution of legal counsel and replacement of an expert witness, and briefing of the issue concerning the Treaty of Guadalupe Hidalgo separate from the others.

A. Case Initiation Order and Designation of Issues for Briefing

On March 19, 2008, after considering groupings of issues and comments submitted by parties, the Court undertook to address the Hopi Tribe's water rights claims. As part of that undertaking, the Court directed "the Special Master to commence proceedings in accordance with the practices and

procedures of the Special Master to resolve the question of whether the claims to water rights asserted by, or on behalf of the Hopi Tribe in this adjudication have a priority of 'time immemorial' or are otherwise senior to the claims of all other claimants."[2]

After reviewing the proposals of parties, on September 8, 2008, the Special Master issued a Case Initiation Order and Designation of Issues for Briefing ("Case Initiation Order") organizing this case, designating seven issues for briefing, and setting time lines for disclosure statements, expert reports, discovery, and dispositive motions.

The following issues were designated for briefing:

A. Does the Hopi Tribe hold water rights with a priority of time immemorial?

B. Does the Hopi Tribe hold water rights with a priority date of 1848 as a result of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (Feb. 2, 1848)?

C. Does the Hopi Tribe possess water rights with a priority date of 1882 as a result of the establishment of the Hopi Reservation under the Executive Order of December 16, 1882?

D. Does the Hopi Tribe possess water rights with another date of priority as a result of Congressional acts and court decisions adding property to the Hopi Reservation?

E. Does claim or issue preclusion or both preclude any claims by or on behalf of the Hopi Tribe to water rights more senior to those held by any other claimant?

F. Does accord and satisfaction preclude any claims by or on behalf of the Hopi Tribe to water rights more senior to those held by any other claimant? And,

G. May the Hopi Tribe assert a priority that is senior to the Navajo Nation for water resources that are shared by both tribes in light of the process for the allocation of resources established by the Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403, and the Act of December 22, 1974, Pub. L. No. 93-531, 88 Stat. 1712, as amended?[3]

As a result of requests as the matter proceeded, the order's schedules were modified seven times.

B. Disclosure Statements

The Case Initiation Order limited disclosure statements to matters concerning the issues designated for briefing. Parties had a continuing duty to disclose as required by Arizona Rule of Civil

[2] Order at 2 (Mar. 19, 2008). The text is available at http://tinyurl.com/9uaahst.

Procedure 26.1(b)(2).

Arizona Public Service Company ("APS"), Catalyst Paper (Snowflake) Inc., City of Flagstaff, Freeport-McMoRan Corporation ("Freeport-McMoRan"), Hopi Tribe, Navajo Nation, Salt River Project ("SRP"), and the United States filed disclosure statements. A group of claimants who designated themselves the "LCR Claimants" joined in the disclosure statement of Catalyst Paper (Snowflake) Inc. Catalyst Paper (Snowflake) Inc., Hopi Tribe, Navajo Nation, and the United States submitted supplemental disclosures. Historical documents, books, reports, journals, judicial records, executive documents, and congressional acts were disclosed. Some 6,616 documents were disclosed.

ADWR developed and maintained on its internet site an electronic data base and index of all disclosed documents. All disclosing parties were directed to submit to ADWR an electronic copy, paper copy, and index of disclosed documents. ADWR made available to any claimant, upon payment of the standard fee, a copy of a disclosed document.

1. Navajo Nation's Motion to Strike Supplemental Disclosure

On April 13, 2012, the Navajo Nation moved to strike the Hopi Tribe's third supplemental disclosure. The Special Master denied the motion.[4]

C. Discovery and Exchange of Expert Reports

The Case Initiation Order limited discovery to matters concerning the issues designated for briefing. Discovery was allowed according to Arizona Rules of Civil Procedure 26 through 37, and as applicable, pretrial orders issued in the Little Colorado River Adjudication and the Rules for Proceedings Before the Special Master.

The Hopi Tribe and the Navajo Nation deposed expert witnesses. These parties and the United States filed and exchanged reports prepared by expert witnesses. This process was extended as the

[3] Special Master's Order at 3-4 (Sept. 8, 2008). The text is available at http://tinyurl.com/9vsotcw.
[4] Special Master's Order (June 18, 2012). The text is available at http://tinyurl.com/acjnbbl.

Hopi Tribe had to replace an expert witness for reasons unrelated to this case.

1. Hopi Tribe's Motion in Limine

On August 10, 2012, the Hopi Tribe filed a Motion in Limine and Request for Oral Argument to exclude evidence of the following matters:

1. Navajo presence in the Little Colorado River Basin;
2. Navajo water use in the Little Colorado River Basin;
3. The creation of the Navajo Reservation;
4. The homeland intent of the Navajo Reservation;
5. The federal government's efforts to manage the Navajo Nation's lands;
6. The federal government's efforts to catalogue and develop water resources on the Navajo Reservation and for the benefit of the Navajo inhabitants in the Little Colorado River Basin;
7. The trust obligation of the United States to the Navajo Nation; and
8. The location of Navajo members within the boundaries of the 1882 Reservation.

The Special Master denied the motion.[5]

D. Motions for Summary Judgment

Catalyst Paper (Snowflake) Inc., Hopi Tribe, Navajo Nation, and the United States filed motions for full or partial summary judgment on one or more of the issues designated for briefing. These parties filed various responses and replies. No other parties submitted dispositive motions.

APS, City of Flagstaff, Freeport-McMoRan, LCR Claimants, and SRP joined in the motions, responses, and replies filed by Catalyst Paper (Snowflake) Inc. APS and Freeport-McMoRan partially joined in the City of Flagstaff's statement of facts in support of its joinder in Catalyst Paper (Snowflake) Inc.'s response to the Hopi Tribe's motion for summary judgment.

E. Briefing and Oral Argument of Motions for Summary Judgment

Telephonic conferences were held on June 2, 2008, May 5, 2010, October 14, 2010, April 19,

2011, September 7, 2011, and March 6, 2012. The status of settlement negotiations, compliance with time lines, and procedural matters were discussed at the conferences.

On October 24, 2012, the Special Master heard oral argument on all summary judgment motions for a full court day. Catalyst Paper (Snowflake) Inc., Hopi Tribe, Navajo Nation, and the United States presented opening, rebuttal, and closing arguments. The City of Flagstaff gave rebuttal argument. The Special Master adopted the participants' proposed schedule of presentation.

1. Hopi Tribe's Motion to Strike Supplemental Citation

On October 17, 2012, a week prior to oral argument, the Special Master received from Catalyst Paper (Snowflake) Inc. three supplemental citations to federal decisions (copies of the opinions were not included). In preparation for the oral argument, the Special Master read the decisions.

On Friday, November 30, 2012, the Special Master received a letter from the Hopi Tribe's attorney requesting the Special Master to "disregard" the supplemental citations. The letter contained responses to the three decisions. On Monday, December 3, 2012, the Special Master directed counsel to file a motion and deliver a copy to all persons listed on the Court approved mailing list for this case.

On January 14, 2013, the Special Master received a copy of the Hopi Tribe's motion to strike the supplemental citation of legal authority. Catalyst Paper (Snowflake) Inc. responded. The Hopi Tribe replied.

The Hopi Tribe requested leave to respond to the citations if the Special Master decided to accept the supplemental citations, and "[i]n anticipation of the court granting the Hopi Tribe leave to respond, it has taken the liberty of including its response to the Supplemental Citations."[6]

The Arizona Supreme Court's opinion in *Stone v. Arizona Highway Commission*, 93 Ariz. 384, 395, 381 P.2d 107, 114 (1963) is instructive for this motion. No finding is made whether Rule 12(f)

[5] Special Master's Order (Sept. 24, 2012). The text is available at http://tinyurl.com/an8v7gc.

applies, but the Supreme Court crafted two criteria that resolve this motion, namely, (1) "it is clear that [the material being struck] can have no possible relation to the subject matter of the litigation," and (2) "the movant can show he is prejudiced by the [material]."

The cited decisions are related to the issues being briefed, and the citations have not prejudiced the Hopi Tribe. The Hopi Tribe's Motion to Strike Catalyst Paper (Snowflake) Inc.'s Supplemental Citation of Legal Authority is denied; its request to respond is granted and is considered complete.

2. Hopi Tribe's Request for a Draft Report

In a post-oral argument brief, the Hopi Tribe requested the Special Master to submit a draft report. Rule 53(f) states: "Before filing a report, a master may submit a draft of the report to the parties for the purpose of receiving comments." In 2005, when the Arizona Supreme Court considered proposed amendments to Rule 53, the Special Master successfully argued to retain this provision and, in fact, he suggested the current language of Rule 53(f).[7]

Although a reasonable request, a draft report will unnecessarily delay this case without providing a benefit to effective judicial management. The request is denied.

III. STANDARD FOR SUMMARY JUDGMENT

Arizona Rule of Civil Procedure 56(a) (effective January 1, 2013) states that the "court shall grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." The Arizona Supreme Court has held that summary judgment "should be granted if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense."[8]

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[6] Hopi Tribe Memo. in Support of its Motion to Strike Catalyst Paper (Snowflake) Inc.'s Supp. Citation of Legal Authority at 5 (Jan. 11, 2013).

[7] Ariz. Sup. Ct. No. R-05-0001 (Sept. 27, 2005). The amendment became effective on January 1, 2006.

[8] *Orme School v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990).

The United States Supreme Court has held that:

> By its very terms, [the standard now found in Rule 56(a)] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact (emphasis in original).
>
> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.…
>
> [S]ummary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.[9]

Conclusion of Law No. 1. The arguments made by the prevailing parties do not encompass genuine disputes about material facts that preclude summary judgment, and the prevailing party is entitled to judgment as a matter of law.

In complex litigation, the Special Master "needs to be concerned with whether the record is adequately developed to support summary judgment."[10] This is an important check when considering a motion for summary disposition.

The briefing covered the following areas associated with the Hopi Tribe:

1. Land Management District 6
2. Hopi Partitioned Lands within the 1882 Executive Order Reservation
3. Moenkopi Island
4. Hopi Industrial Park, and the
5. Aja, Clear Creek, Drye, and Hart Ranches

The priority of water rights concerning Land Management District 6 will be considered in Section IV, Hopi Partitioned Lands in Section VI, and Moenkopi Island, Hopi Industrial Park, and the

[9] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

four ranches in Section VII.

IV. DOES THE HOPI TRIBE HOLD WATER RIGHTS WITH A PRIORITY OF TIME IMMEMORIAL?

A. Land Management District 6

Land Management District 6 is wholly located inside the boundaries of the lands described in President Chester A. Arthur's Executive Order of December 16, 1882, generally referred in this proceeding and in this report as the 1882 Executive Order Reservation.

The litigation known as *Healing v. Jones* "was instituted in the United States District Court for the District of Arizona on August 1, 1958, to obtain a determination of the rights and interests of the Navajo Tribe, Hopi Tribe, and individual Indians to the area set aside by Executive Order of December 16, 1882. The instituting of such an action was authorized by Congress by the Act of July 22, 1958, Pub. L. 85-547, 85th Cong., 1st Sess., 72 Stat. 402."[11] The Hopi Tribe was plaintiff. The first decision, designated *Healing I*, addressed jurisdictional issues. *Healing II* addressed substantive matters.

Healing II described the creation of Land Management District 6:

> On June 18, 1934, Congress enacted the Indian Reorganization Act, 48 Stat. 984. Under § 6 of that act, the Secretary of the Interior was directed to make rules and regulations for the administration of Indian reservations with respect to forestry, livestock, soil erosion and other matters. Pursuant to the authority thus conferred, the Commissioner, with the approval of the Secretary, on November 6, 1935, issued regulations affecting the carrying capacity and management of the Navajo range. …
>
> These regulations provided a method of establishing land management districts …
>
> Early in 1936, boundaries for these land management districts were defined. … Several such districts (Nos. 1, 2, 3, 4, 5 and 7) included parts of the Navajo reservation and part of the 1882 reservation.

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[10] *ANNOT*. MANUAL FOR COMPLEX LITIGATION (THIRD) § 21.34 (Summary Judgment) (2001 and 1995).

[11] *Healing v. Jones*, 174 F. Supp. 211, 213 (D. Ariz. 1959) ("*Healing I*"). The United States argued that the district court lacked jurisdiction because the action presented a political and not a judicial question. The argument was rejected. The district court also ruled on preliminary motions.

District 6, which laid entirely within the 1882 reservation, was specifically designed to encompass the area occupied exclusively by Hopis. (Emphasis added.)[12]

From 1936 through April 24, 1943, there were several meetings, conferences, and reports concerning the boundaries of Land Management District 6. "On April 24, 1943, the Office of Indian Affairs approved the boundaries … [of Land Management District 6] … as recommended by the two ["Hopi and Navajo"] superintendents on November 20, 1942."[13] The boundaries approved on April 24, 1943, encompassed 631,194 acres of land.

Under the judgment entered in *Healing II*, dated September 28, 1962, "about one quarter of the 1882 reservation, consisting of district 6 as defined in 1943, will be completely removed from controversy, having been awarded exclusively to the Hopi Indian Tribe."[14] The Ninth Circuit Court of Appeals would later hold that in "an exhaustive opinion, the three-judge district court concluded that the Hopi were exclusively entitled to about one-quarter of the 1882 Reservation, consisting of District 6 as defined in 1943, and the court quieted the Hopi title to that land."[15]

The judgment entered in *Healing II* described a survey that showed total acreage of 650,013 acres of land. The survey was done from November 6, 1963, to March 30, 1964.[16]

Exhibit A is a map contained in *Healing II* that shows the boundaries of the 1882 Executive Order Reservation and Land Management District 6. "The 1882 Reservation is rectangular, about

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[12] *Healing v. Jones*, 210 F. Supp. 125, 158 (D. Ariz. 1962), *aff'd per curiam sub nom. Jones v. Healing*, 373 U.S. 758 (1963) ("*Healing II*").
[13] 210 F. Supp. at 166; the reference to the "Hopi and Navajo" superintendents is on page 165.
[14] 210 F. Supp. at 192.
[15] *Sekaquaptewa v. MacDonald*, 575 F.2d 239, 246 (9th Cir. 1978). Later, the Indian Claims Commission found that pursuant "to the provisions of 'Sec. 2' of the Act of July 23, 1958, … the Court in Healing v. Jones entered a judgment wherein the Hopi Tribe was decreed to be the exclusive owner of the land in 'land management district 6' and said tribe was awarded reservation title thereto." *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, at 310 (1970).
[16] A copy of the survey is available in Catalyst Paper (Snowflake) Inc. Second Supp. Disc. No. 32, FCHP00790-805.

seventy miles long and fifty-five miles wide."[17] The map is used here solely for illustration.

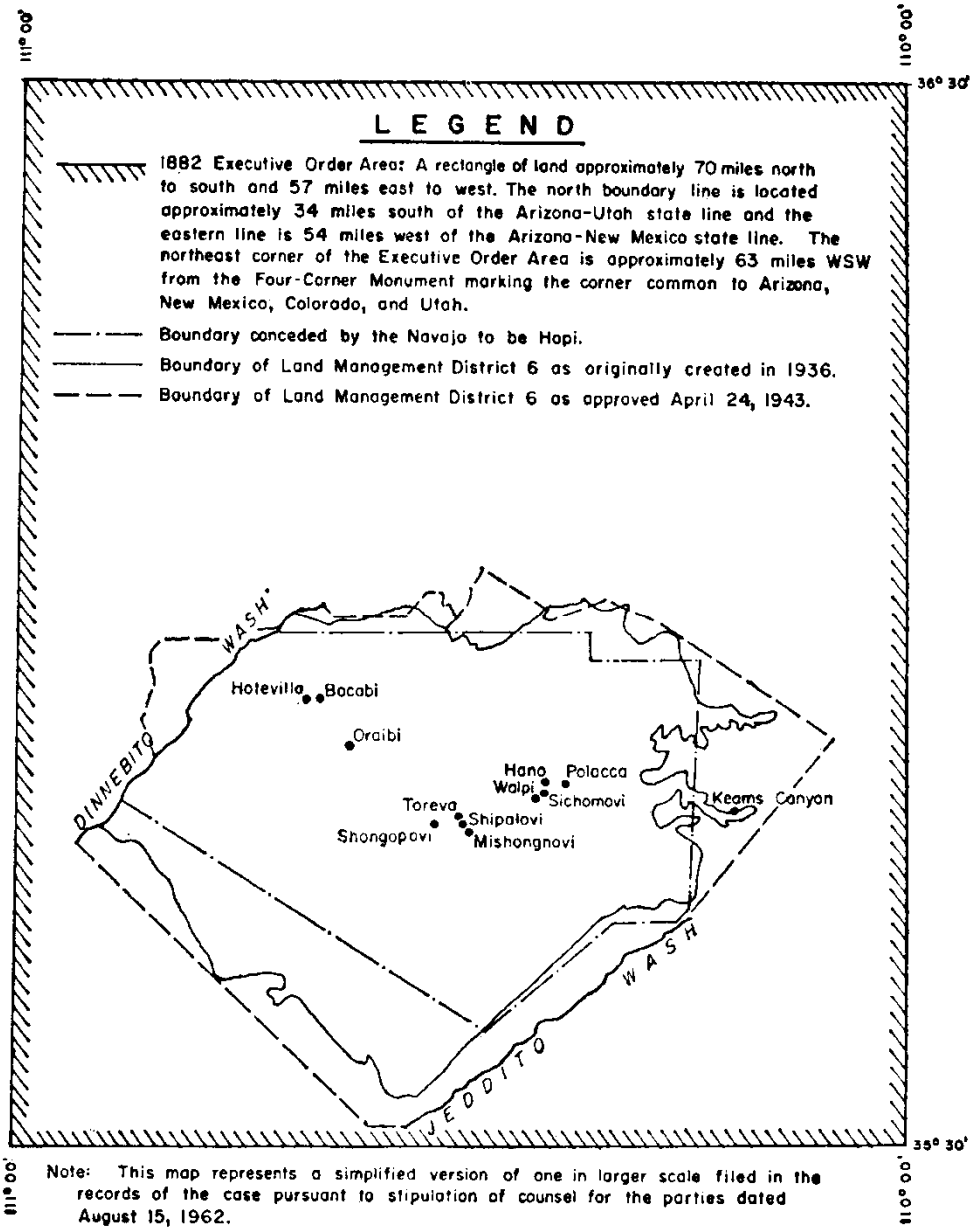

Exhibit A: Source: *Healing v. Jones*, 210 F. Supp. 125, 133 (D. Ariz. 1962).[18]

[17] *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 114 (9th Cir. 1980). The area "contains approximately 2,500,000 acres, or 3,900 square miles." Finding of Fact No. 5, *Healing II*. A copy of *Healing II's* Findings of Fact is available in the Navajo Nation Initial Disc. Index No. 4464, NN027610-24.

[18] The map was later described as "a simplified version of a larger scale map of the 1882 Reservation, which was filed by the parties pursuant to stipulation." 575 F.2d at 246. A copy of the map is also found in 575 F.2d at 249 and *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, following page 311.

In *Healing II*, the federal district court made the following findings:

> No Indians in this country have a longer authenticated history than the Hopis. As far back as the Middle Ages the ancestors of the Hopis occupied the area between Navajo Mountain and the Little Colorado River, and between the San Francisco Mountains and the Luckachukas. In 1541, a detachment of the Spanish conqueror, Coronado, visited this region and found the Hopis living in villages on mesa tops, cultivating adjacent fields, and tending their flocks and herds. [Footnote 4 accompanying this sentence stated: "In 1692 another Spanish officer, Don Diego De Vargas, visited the area where he met the Hopis and saw their villages. American trappers first encountered the Hopis in 1834. In 1848, by the Treaty of Guadalupe Hidalgo, 9 Stat. 922, this area came under the jurisdiction of the United States."]
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> The level summits of these mesas are about six hundred feet above the surrounding sandy valleys and semi-arid range lands. The village houses, grouped in characteristic pueblo fashion, were made of stone and mud two, three, and sometimes four stories high. Water had to be brought by hand from springs at the foot of each mesa.[19]

The Indian Claims Commission, in litigation subsequent to *Healing II* described later in this section, made the following findings of fact:

> Before 1300 A.D. the ancestors of the Hopi were identified in the area between Navajo Mountain in the northwest corner of the overlap area and the Little Colorado River to the south, and between the San Francisco Mountains well south of the overlap area and the Luckachuais Mountains in the northeast portion of the subject tract.
>
> Archaeological evidence indicates that the Hopi village of Oraibi has existed in its present form since the 12th century. Oraibi is located near the center of the subject area and within the confines of the Hopi Reservation that was established by the Executive Order of December 16, 1882 (I Kappler 805).
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> It was in the summer of 1541 that the Hopi Indians first became known to white men. At that time, General Francisco Coronado sent Don Pedro de Tovar and a small detachment westward from the Zuni country to investigate the seven Pueblos in the province of Tusayan, as the Hopi country was then referred to, for the purpose of gaining information relative to the area and its people. There Tovar found the Hopis in villages on the mesa tops. The level summits of these mesas rise about six hundred feet above the surrounding valleys and range lands.… De Tovar found that Hopis of this period wore cotton garments and that they possessed such things as dressed hides, flour, salt, pinon nuts, fowl and jewelry. They also cultivated fields of maize, beans, peas, melons, and pumpkins. The areas away from their village sites provided the Hopi Indians with a hunting ground for bears, mountain lions, wild cats, and other wild life.[20]

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[19] 210 F. Supp. at 134 n.4.

[20] *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, at 292-93, *motions to amend findings denied*, 31 Ind. Cl. Comm. 16, 37 (1973) and 33 Ind. Cl. Comm. 72 (1974), *aff'd mem.*, *Hopi Tribe v. United States*,

In its opinion denying the Hopi Tribe's motion to amend the Commission's findings concerning extinguishment of Hopi aboriginal title, the Commission stated that the "record clearly shows that for a long time prior to the establishment of the 1882 Executive order reservation, and also for a long time prior to the 1848 date of American sovereignty, the Hopi Indians pursued a static, nonnomadic, nonexpansionist, agricultural mode of life," and from "their ancient pueblos high atop three mesas in east central Arizona," they "descended to the valleys below to cultivate neighboring fields for grain and fruit and to pasture small flocks of sheep."[21]

The Special Master adopts, as modified, the following three findings of fact submitted by the Hopi Tribe:[22]

Finding of Fact No. 1. The Hopi used their aboriginal lands for villages, farming for food, farming cotton, making textiles for use and trade, making pottery for use and trade, herding, and coal mining, with an economy that changed as new activities and crops were introduced. 210 F. Supp. at 134; E. Charles Adams, Ph.D., *Hopi Use and Development of Water Resources in the Little Colorado River Drainage Basin of Arizona: An Archeological Perspective to 1700*, 90-105 (March 2009); J. O. Brew, *Hopi Prehistory and History to 1850* ("Coal Mining"), 9 Handbook of North American Indians 517-19 (William C. Sturtevant and Alfonso Ortiz, eds., Smithsonian Inst. 1979); Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 8, 10, 14-15, 18-21 (March 2009); Charles R. Cutter, Ph.D, *Documentary Evidence for Hopi Agriculture and Water*

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sub nom. Burket v. United States, 529 F.2d 533 (Table) (Ct. Cl. 1976), *cert. dismissed*, 429 U.S. 1030 (1976). The decisions of the Indian Claims Commission are available at http://digital.library.okstate.edu/icc/index.html. The case name citation is due to the fact that the Hopi Tribe's action was consolidated with a petition filed by the Navajo Nation also alleging the uncompensated taking of Navajo aboriginal land. The name of the mountains has been reported as Luckachukas, Luckachuais, and currently Lukachukai. Oraibi is located within Land Management District 6.

[21] *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 21. The Commission denied a second motion to amend the findings on January 23, 1974, 33 Ind. Cl. Comm. 72.

Use in the Spanish and Mexican Periods, 9-10 (March 30, 2009).

Finding of Fact No. 2. Hopi extensive use of its water and land was noted by the earliest Spanish explorers and later visitors from Coronado's expedition in 1540 forward. Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900,* 11-12, 14 (March 2009).

Finding of Fact No. 3. "In the sixteenth century, Hopi seems to have been the principal supplier of cotton for the indigenous Southwest and perhaps beyond: 'From all accounts Hopiland was supplying Zuni and the Rio Grande towns with woven cloth and also some cotton fiber, a practice which has continued until the present time.'" Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 13 (March 2009).

The Special Master adopts, as modified, the following three findings of fact submitted by the United States:

Finding of Fact No. 4. The Puebloan people that comprise the Hopi Tribe have lived in the Little Colorado River Basin for centuries and were well-established in the Basin at the time of European contact. Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900,* 1-4 (March 2009); Hana Samek Norton, Ph.D., *The Establishment of the Hopi Reservation and Hopi Agricultural Developments, 1848-1935*, 3 (March 30, 2009).

Finding of Fact No. 5. The Hopi are credited with farming techniques that were specialized to growing crops in an arid climate like the Little Colorado River Watershed. T. J. Ferguson, Ph.D., *Hopi Agriculture and Water Use*, 18 (March 2009); Hana Samek Norton, Ph.D., *The Establishment of the Hopi Reservation and Hopi Agricultural Developments, 1848-1935*, 4-9 (March 30, 2009).

Finding of Fact No. 6. In addition to farming, the Hopi utilized springs and other water sources

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[22] The findings of fact adopted in this report attributed to a party are taken from the proposed statements of fact electronically submitted following oral argument. The Special Master verified each citation and admits the

to support livestock. T. J. Ferguson, Ph.D., *Hopi Agriculture and Water Use*, 195-97 (March 2009); Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900*, 42-43 (March 2009).

The foregoing findings made in *Healing II*, by the Indian Claims Commissions, and Findings of Fact Nos. 1-6 establish that Hopi Indians lived and subsisted within Land Management District 6 as far back as, at least, the Middle Ages as we use that historical classification. At a minimum, a specific year marker is 1541.

The United States Supreme Court has held that:

> By the time of the Revolutionary War, several well-defined principles had been established governing the nature of a tribe's interest in its property and how those interests could be conveyed. It was accepted that Indian nations held "aboriginal title" to lands they had inhabited from time immemorial. See Cohen, Original Indian Title, 32 Minn. L. Rev. 28 (1947). The "doctrine of discovery" provided, however, that discovering nations held fee title to these lands, subject to the Indians' right of occupancy and use.[23]

Aboriginal title - or the right of occupancy and use - also called "Indian title,"[24] depends upon a factual determination. Aboriginal title "must rest on actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property."[25]

In the partition case *Sekaquaptewa v. MacDonald*, "[t]he Navajo conceded that the Hopi had exclusive interest" in Land Management District 6.[26]

Finding of Fact No. 7. The Hopi Tribe has enjoyed actual, exclusive, and continuous use and occupancy of the lands within the boundaries of Land Management District 6. Although *Healing II* noted that a federal survey submitted in December, 1940, "reported that 2,618 Hopis and 160 Navajos

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exhibits cited in the adopted findings of fact.

[23] *Oneida County, N.Y. v. Oneida Indian Nation of N. Y. State*, 470 U.S. 226, 233-34 (1985).

[24] *Oneida Indian Nation of N.Y. State v. Oneida County, N.Y.*, 414 U.S. 661, 667 (1974) ("That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act.").

[25] *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183, 1187-88 (D. Ariz., 1978), *aff'd in part and rev' in part*, 619 F.2d 801 (9th Cir. 1978), *cert. denied*, 449 U.S. 1010 (1980).

were living within the boundaries of district 6 as it then existed,"[27] the Hopi Tribe has been recognized in prior judicial proceedings and treated as having had actual, exclusive, and continuous use and occupancy of Land Management District 6.

Conclusion of Law No. 2. The lands within the boundaries of Land Management District 6, as approved on April 24, 1943, and legally enlarged thereafter, are aboriginal lands of the Hopi Indians.

Aboriginal title includes "an aboriginal right to the water used by the Tribe as it flow[s] through its homeland."[28]

Conclusion of Law No. 3. The aboriginal land title of the Hopi Tribe includes an aboriginal right to use the water that flows on those lands.

Conclusion of Law No. 4. Aboriginal "water rights necessarily carry a priority date of time immemorial;" where "a tribe shows its aboriginal use of water … the water right thereby established retains a priority date of first or immemorial use."[29] Aboriginal rights "arise[ing] from occupancy and use of land by the Indians from time immemorial."[30] Aboriginal water rights predate the establishment of an Indian reservation.

Conclusion of Law No. 5. The water rights that the Hopi Tribe uses on the lands within the boundaries of Land Management District 6 have a priority of time immemorial.

The lands outside Land Management District 6 are not aboriginal lands of the Hopi Tribe because the tribe's aboriginal title was extinguished.

B. Extinguishment of Aboriginal Title

The Indian Claims Commission Act, 60 Stat. 1049, was enacted on August 13, 1946.

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[26] 575 F.2d at 246.
[27] 210 F. Supp. at 160 n.44.
[28] *United States v. Adair*, 723 F.2d 1394, 1413 (9th Cir. 1983), *cert. denied sub nom. Oregon v. United States*, 467 U.S. 1252 (1984).
[29] 723 F.2d at 1414.

According to the United States Supreme Court the Act "had two purposes," namely:

> The "chief purpose of the [Act was] to dispose of the Indian claims problem with finality." H.R. Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945). This purpose was effected by the language of § 22(a): "When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims...." (footnote omitted). Section 22 (a) also states that the "payment of any claim ... shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy."…
>
> The second purpose of the Indian Claims Commission Act was to transfer from Congress to the Indian Claims Commission the responsibility for determining the merits of native American claims.[31]

The Act established the Indian Claims Commission. The District Court for the District of Arizona held that "claims before the Indian Claims Commission are not based in law, but on Congress' policy decision to provide limited compensation to Indian Tribes for the extinguishment of nonrecognized Indian title."[32]

In 1951, the Hopi Tribe filed Petition No. 196 with the Indian Claims Commission.

Finding of Fact No. 8. In paragraph 1 of its Petition dated August 3, 1951, the Hopi Tribe asserted that "[p]rior to their being placed on the reservation they now occupy, its members, by permission of the tribe, used and occupied from time immemorial the lands described in paragraph 7 hereof." Paragraph 7 alleged that:

> On July 4, 1848 and prior thereto from time immemorial, petitioner owned or continually held, occupied and possessed a large tract of land described generally as follows, to wit: Beginning at the juncture of the Colorado and Little Colorado Rivers; thence in a southeasterly direction along the said Little Colorado River to its juncture with the Zuni River; thence in a northeasterly direction along the said Zuni River to a point where the same now intersects the state line between the States of Arizona and New Mexico; thence in a northerly direction along said state line until said state line intersects the San Juan River; thence along the San Juan River in a general westerly direction to its juncture with the Colorado River; and thence in a southwesterly direction along the said Colorado River to the point of beginning.

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[30] *Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998), *cert. denied*, 526 U.S. 1966 (1999).

[31] *United States v. Dann*, 470 U.S. 39, 45 (1985).

[32] *Masayesva v. Zah*, 793 F. Supp. 1495, 1500 (D. Ariz. 1992), *aff'd in part and rev'd in part*, 65 F.3d 1445 (9th Cir. 1995), *cert. denied sub nom. Secakuku v. Hale*, 517 U.S. 1168 (1996).

Finding of Fact No. 9. The first sentence of paragraph 8 of the petition alleged that:

> On July 4, 1848, when the defendant obtained sovereignty over the area owned or occupied by the petitioner, the members of petitioner tribe were an agricultural and pastoral people who from time immemorial had lived in permanent dwellings and raised their crops and pastured their flocks on the surrounding land.

Finding of Fact No. 10. The Hopi Tribe alleged that the United States converted the tribe's aboriginal lands to its own use without just compensation. In paragraph 36, the Hopi Tribe prayed in the alternative for judgment against the United States:

> Wherefore, petitioner prays that it be awarded judgment against the defendant after the allowance of all just credits and offsets for (1) an amount which will provide just compensation for the lands taken from the petitioner by the defendant; or (2) an amount which will provide just compensation to the petitioner for the damages caused by the defendant's failure to deal fairly and honorably with petitioner in the taking of the petitioner's lands; or (3) an amount which will provide just compensation for the lands taken from the petitioner by the defendant in violation of the terms and obligations of the Treaty of Guadalupe Hidalgo; or (4) an amount which will provide just compensation to the petitioner for the damages caused by the defendant's failure to deal fairly and honorably with the petitioner in the taking of the petitioner's lands in violation of the terms and obligations of the Treaty of Guadalupe Hidalgo; or (5) an amount which will provide just compensation for the use of said lands to the date hereof; or (6) an amount which will provide just compensation to the petitioner for the damages caused by defendant's failure to deal fairly and honorably with the petitioner in depriving petitioner of the use of said lands to the date hereof; or (7) an amount which will provide just compensation to the petitioner for damages caused by defendant's seizing and depriving the petitioner of the use of said lands in violation of the terms and obligations of the Treaty of Guadalupe Hidalgo; or (8) an amount which will provide just compensation to the petitioner for the damages caused by the defendant's failure to deal fairly and honorably with the petitioner in the seizing and depriving of the use of said lands in violation of the terms and obligations of the Treaty of Guadalupe Hidalgo; and (9) that defendant be required to make a full, just and complete accounting for all property or funds received or receivable and expended for and on behalf of petitioner, and for all interest paid or due to be paid on any and all funds of petitioner, and that judgment be entered for petitioner in the amount shown to be due under such an accounting; and (10) for such other relief as to the Commission may seem fair and equitable.[33]

The Indian Claims Commission made findings that involved the aboriginal title claims of the Hopi Tribe to lands outside the boundaries of the 1882 Executive Order Reservation, and second, to lands inside the reservation but outside Land Management District 6. First, the Commission found:

> Based upon the preceding findings of fact and all the evidence of record, the

[33] A copy of the petition is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 21, FCHP00164-171.

> Commission finds that the issuance of the Presidential order on December 16, 1882, establishing the Hopi Executive Order Reservation effectively terminated and extinguished, without the payment of any compensation to the Hopi Tribe, its aboriginal title claims to all lands situated outside of said reservation.[34]

Second, the Commission found that:

> Commencing on February 7, 1931, when the Secretary of Interior approved a recommendation calling for a Navajo-Hopi division of the 1882 Executive Order Reservation, administration officials followed a policy designed primarily to exclude Hopi Indians from that part of the 1882 Reservation upon which Navajo Indians were being settled with implied Secretarial consent. This policy of segregating the two tribes was pursued further with the issuance of grazing regulations designed to control the grazing capacity of the lands within the newly formed "land management district 6", which district insofar as the grazing regulations were concerned was designated as a "Hopi Reservation". The Commission finds that administration action on June 2, 1937, effectively terminated all Hopi aboriginal title to the lands within the 1882 Executive Order Reservation outside the boundaries of "land management district 6" as established and approved by the Office of Indian Affairs on April 24, 1943.[35]

Finding of Fact No. 11. The "administrative action on June 2, 1937" involved the adoption of grazing regulations that provided a method of establishing land management districts.[36]

The Commission's interlocutory order dated June 29, 1970, stated in pertinent part as follows:

> On December 16, 1882, the United States without the payment of any compensation, extinguished the Hopi Indian title to all lands … lying outside the boundaries of the 1882 Executive Order Reservation.
>
> On June 2, 1937, the United States extinguished the Hopi Indian title to some 1,868,364 acres of land within the 1882 Executive Order Reservation, said acreage being the balance of the land in the 1882 Reservation lying outside of that part of the reservation known as "land management district 6."[37]

The Commission granted the Hopi Tribe a rehearing but denied the tribe's "motion to amend the Commission's findings previously entered herein with respect to the extent of [the tribe's] aboriginal or

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[34] *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, at 305.

[35] *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, at 309-10; *see also* 31 Ind. Cl. Comm. 16, at 17.

[36] The "Commission chose June 21 [sic 2], 1937, as the climactic date, since on that date the restrictive grazing regulations as approved by the Secretary of Interior were put into effect, thus substantially confining future Hopi activity within the boundaries of land management district 6.…" *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 34-35; *see also* 30-31 for further explanation about the creation of the district.

Indian title to the claimed area, and the dates said Indian title was extinguished by the United States."[38]

The interlocutory decision was appealed to the Court of Claims which on January 30, 1976, affirmed the decisions and orders of the Indian Claims Commission.[39]

In 1976, the Hopi Tribe and the United States settled the Hopi Tribe's claim for payment of $5 million, and the Commission entered judgment. The Hopi Tribe agreed in the settlement that:

> Entry of final judgment in said amount shall finally dispose of all rights, claims or demands which the plaintiff presented or could have presented to the Indian Claims Commission pursuant to the Act of August 13, 1946, ch. 949 [sic 959], 60 Stat. 1049, 25 U.S.C. § 70 et seq., and the plaintiff shall be barred thereby from asserting any such rights, claims or demands against the United States in any future actions.[40]

The District Court for the District of Arizona on two occasions noted the Hopi Tribe's litigation before the Indian Claims Commission. In 1978, the District Court stated as follows:

> In 1951 the Hopi tribe brought an action against the United States before the Indian Claims Commission alleging the government occupied and possessed without compensation the tribe's aboriginal land. …
>
> The Indian Claims Commission denied the Hopi tribe's aboriginal title claim to all of the territory alleged. Rather, the Commission held the Hopi tribe possessed aboriginal title to a smaller area which included the 1882 Reservation. This title was extinguished without compensation as to all lands outside the 1882 Reservation when the Executive Order of December 16, 1882 issued. The Hopis' aboriginal title to land within the 1882 Reservation was extinguished partially in 1937 when the Navajo tribe was administratively settled within the area."[41]

In 1992, the District Court held that "the Hopi Tribe's aboriginal claims … were previously adjudicated by the Indian Claims Commission; the Commission held that Hopi aboriginal claims were extinguished by the passage of the 1882 Executive Order withdrawing lands for the Hopi. *Hopi Tribe v. United States*, 31 Ind. Cl. Comm. 16 (1973); *Hopi Tribe v. United States*, 23 Ind. Cl. Comm. 277

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[37] *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 312 (nos. 3 and 4) (1970).
[38] *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 36; Order Denying Hopi Mot. to Amend Findings, 31 Ind. Cl. Comm. 37 (1973). A second motion to amend the findings was denied on January 23, 1974.
[39] *Hopi Tribe v. United States*, 39 Ind. Cl. Comm. 204, at 207 (1976). On March 26, 1976, the Court of Claims denied the Hopi Tribe's motion for a rehearing en banc.
[40] *Id*. at 211 (no. 2); *see also* 207-08.

(1970)."[42]

The Little Colorado River Adjudication Court is bound by the decisions of the Indian Claims Commission concerning the Hopi Tribe's aboriginal title and cannot review or fade those decisions.

Conclusion of Law No. 6. The Hopi Tribe's aboriginal land title claims were extinguished to the extent found by the Indian Claims Commission.

The question becomes whether the Hopi Tribe's aboriginal water rights were extinguished when Indian title to land was terminated.

C. Extinguishment of Aboriginal Water Rights

Much case law has been presented on this issue. The cases have a common element, namely, the interpretation of treaties between the United States and Indian tribes, and on occasion, executive orders and congressional acts. The cases have involved treaties of peace, land cessions, and reservations of usufructuary rights such as hunting, fishing, and gathering. The right to use water, a usufruct of land, is usufructuary.

The United States puts great weight on the following holding of the United States Supreme Court for the proposition that usufructuary rights, such as water rights, are separate incidents from title to land: "the Chippewa's usufructuary rights under the 1837 Treaty existed independently of land ownership; they were neither tied to a reservation nor exclusive. … [t]here is no background understanding of the rights to suggest that they are extinguished when title to the land is extinguished."[43] Although posited as stating black letter law, such it is not. The statement simply accords with the Court's holding that the Chippewa had not relinquished rights to hunt, fish, and gather on ceded lands because the Chippewa had been guaranteed those rights in the land cession treaty. As the Court explained: "The Chippewa agreed to sell the land to the United States, but they

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[41] 448 F. Supp. at 1187-88.
[42] 793 F. Supp. at 1501.

insisted on preserving their right to hunt, fish, and gather in the ceded territory," and the United States "guaranteed to the Chippewa the right to hunt, fish, and gather on the ceded lands."[44] The Chippewa's guaranteed rights to hunt, fish, and gather were indeed separate from their ownership of the ceded lands, not by legal effect but by treaty negotiation.

On the other side, Catalyst Paper (Snowflake) Inc. points to the following holding involving two Indian land cessions (also made by the Chippewa in Minnesota):

> If the cessions extinguished Indian title to the ceded areas, they also would have the effect of abrogating any aboriginal hunting, fishing, trapping, or wild ricing rights. These rights are mere incidents of Indian title, not rights separate from Indian title, and consequently if Indian title is extinguished so also would these aboriginal rights be extinguished.[45]

The Special Master has not been pointed to any treaties or reservations of water rights in agreements involving the Hopi Tribe that are similar to those considered in the cited cases. There are no treaties involving Hopi water rights that must be addressed in this report.[46] The Special Master has not been presented evidence showing that the Hopi Tribe qualified its settlement agreement during the course of the proceedings before the Indian Claims Commission to reserve aboriginal water rights.[47]

The cases cited by the parties have been studied. The Special Master finds that the prevailing law is that usufructuary water rights are incidents of aboriginal or Indian land title, and the extinguishment of aboriginal title terminates aboriginal water rights existing on those lands.

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[43] *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 201-202 (1999) ("*Mille Lacs*").

[44] 526 U.S. at 175.

[45] *United States v. Minnesota*, 466 F. Supp. 1382, 1385 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980). The Court noted, unlike *Mille Lacs*, that "[n]one of the documents mention the retention of hunting, fishing, trapping, or wild ricing rights."

[46] Catalyst Paper (Snowflake) Inc., whose papers show much research, states, "[t]here was no treaty between the [Hopi] Tribe and the United States." Resp. to Hopi Tribe's Mot. for Summ. J. Excluding Spanish Law Rights at 23 (Dec. 20, 2011); *see also* its Reply to Hopi Tribe's Resp. in Opp. to Catalyst's Mot. for Partial Summ. J. at 20 (Feb. 15, 2012).

[47] The Commission's record presented to the Special Master shows that the Commission was presented evidence that the Hopi Tribe used water for agricultural and stockwatering purposes. It cannot be said that the Commission was not aware of the Hopi Tribe's uses of water. Nothing more on this point can be derived from

This determination is supported by the decisions in *United States v. Minnesota, supra,* and *Western Shoshone Nat. Council v. Molini.* In *Molini,* the Court held that:

> "the [Indian Claims] Commission award establishes conclusively that Shoshone title has been extinguished. We further hold that absent some express reservation, hunting and fishing rights are subsumed within an unconditional transfer of title."[48]

Conclusion of Law No. 7. Aboriginal water rights are incidents of aboriginal title.

The Supreme Court of California surveyed the case law on "the nature and scope of Indian title and the effect of extinguishment of such title" in a matter involving the right to hunt. That matter involved extinguishment of aboriginal title as a result of an action brought before the Indian Claims Commission and a settlement agreement. The Court held that, "[w]hen the tribe's Indian title was extinguished, so too, under the law, were the tribe's aboriginal hunting rights." [49] The right to hunt was held to be an incident of aboriginal title.

The Indian Claims Commission held the view that extinguishment of aboriginal title terminated aboriginal water rights. In a matter involving another Arizona Indian community, the Commission held as follows:

> Plaintiff's aboriginal title entitled it to use the land in its traditional Indian fashion, including the irrigation of its agricultural lands with Gila River water. Thus the plaintiff had as part of its aboriginal title the right to divert water from the Gila River for the purpose of irrigating its land. … This water right terminated with the extinguishment of plaintiff's aboriginal title.[50]

Conclusion of Law No. 8. The Hopi Tribe's aboriginal water rights were incidents of its aboriginal or Indian title. The extinguishment of the Hopi Tribe's aboriginal title terminated its

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the record of this briefing.

[48] *Western Shoshone Nat. Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991), *cert. denied*, 506 U.S. 822 (1992) ("We therefore hold that Shoshone aboriginal hunting and fishing rights were taken when 'full title extinguishment' occurred."). *Accord, Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d at 462 ("[t]he creation and acceptance of an Indian reservation by treaty constitutes a relinquishment of aboriginal rights to lands outside the reservation. (citations omitted). The Tribe signed the 1854 Treaty which created the Wolf River reservation and extinguished any aboriginal rights the Menominee possessed, including aboriginal rights in land or water not specifically mentioned in any treaty.").

aboriginal water rights existing on those lands.

V. DOES THE HOPI TRIBE HOLD WATER RIGHTS WITH A PRIORITY DATE OF 1848 AS A RESULT OF THE TREATY OF GUADALUPE HIDALGO, 9 STAT. 922 (FEB. 2, 1848)?

This issue was briefed separately from the others due to the Hopi Tribe's substitution of an expert witness and scheduling of depositions.

Finding of Fact No. 12. The United States acquired sovereignty over that portion of what is now Arizona north of the Gila River through the Treaty of Peace, Friendship, Limits, and Settlement between the United States of America and the Mexican Republic. The treaty, known as the Treaty of Guadalupe Hidalgo, was signed by diplomatic representatives on February 2, 1848.[51]

Finding of Fact No. 13. Article VIII of the Treaty of Guadalupe Hidalgo declared that "property of every kind, now belonging to" Mexican citizens living in the lands acquired by the United States "shall be inviolably respected," and the then present owners of the property, their heirs, and all Mexicans who may thereafter acquire the "property by contract, shall enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."[52] Article IX declared that Mexicans living in the ceded territories who wished to become citizens of the United States "shall be maintained and protected in the free enjoyment of their liberty and property."[53]

Conclusion of Law No. 9. "Water rights are property rights."[54]

In 1888, the United States Supreme Court held in a partition action, involving land granted by the Mexican government prior to the Treaty of Guadalupe Hidalgo, that:

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[49] *In Re Wilson,* 30 Cal. 3d 21, 35, 177 Cal. Rptr. 336, 345, 634 P.2d 363, 372 (1981).
[50] *Gila River Pima-Maricopa Indian Comm. v. United States*, 29 Ind. Cl. Comm. 144, at 151 (1972).
[51] 9 Stat. 922. A copy of the treaty is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 1, FCHP00001-23. The treaty, ending the Mexican-American War (1846-1848), was signed at the Basilica of Guadalupe at Villa Hidalgo within the present city limits of Mexico City.
[52] 9 Stat. 922, 929-30.
[53] 9 Stat. 922, 930.
[54] *In the Matter of the Rights to the Use of the Gila River*, 171 Ariz. 230, 235, 830 P.2d 442, 447 (1992).

> Article 8 of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the Constitution, laws, or treaties of the United States. There was nothing done but to provide that if they did in fact exist under Mexican law, or by reason of the action of Mexican authorities, they should be protected.[55]

In a case involving an 1833 land grant, the Territorial Supreme Court of Arizona held that:

> The contention … that, under the Treaty of Guadalupe Hidalgo, the owner of a Mexican grant, title to which had vested at the date of the treaty, retained all vested rights of property to which he was entitled under the laws of Mexico, is undoubtedly sound. The Legislature of Arizona has no power or authority to deprive any such owner of any such rights, at least without due compensation.[56]

The Hopi Tribe concedes that the "Treaty of Guadalupe Hidalgo is not an independent source of water rights, nor does it serve as an independent priority date for water rights that pre-date the creation of the reservation."[57] The United States "does not claim water rights on behalf of the Hopi Tribe based on the Treaty itself, but asserts instead that the Treaty simply protected the aboriginal water rights that were in existence at that time."[58]

Conclusion of Law No. 10. The Treaty of Guadalupe Hidalgo neither created nor established new water rights by virtue of its provisions.

Conclusion of Law No. 11. The Treaty of Guadalupe Hidalgo protected property rights, including water rights, held by Mexican citizens who lived in the lands acquired by the United States as a result of the treaty.

The Hopi Tribe does not hold water rights with a priority of 1848 as a result of the Treaty of Guadalupe Hidalgo. The Special Master recommends that the Court deny the Hopi Tribe's Motion for

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[55] *Phillips v. Mound City Land & Water Ass'n*, 124 U.S. 605, 610 (1888). *Accord*, *Townsend v. Greeley*, 72 U.S. 326, 334 (1866) ("The treaty of Guadalupe Hidalgo does not purport to divest the pueblo, existing at the site of the city of San Francisco, of any rights of property, or to alter the character of the interests it may have held in any lands under the former government.").

[56] *Boquillas Land & Cattle Co. v. St. David Coop. Com. & Dev. Ass'n.*, 11 Ariz. 128, 138, 89 P. 504, 507 (Terr. 1907), *aff'd*, 213 U.S. 339 (1909).

[57] Hopi Tribe Resp. in Opp'n. to Catalyst Paper's Mot. for Partial Summ. J. at 32.

Summary Judgment on Hopi Water Rights under the Treaty of Guadalupe Hidalgo to the extent the motion requests the adjudication of discrete water rights with a priority date of 1848.

VI. DOES THE HOPI TRIBE POSSESS WATER RIGHTS WITH A PRIORITY DATE OF 1882 AS A RESULT OF THE ESTABLISHMENT OF THE HOPI RESERVATION UNDER THE EXECUTIVE ORDER OF DECEMBER 16, 1882?

A. Hopi Partitioned Lands Within the 1882 Executive Order Reservation

The analysis of the priorities of the Hopi Tribe's water rights in the Hopi Partitioned Lands and Moenkopi Island revolves around the congressional Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403 ("1958 Act"), the Act of December 22, 1974, Pub. L. No. 93-531, 88 Stat. 1712, ("1974 Act"), and the federal district court litigation brought by the Hopi Tribe pursuant to both Acts.[59]

The lands within the boundaries of the 1882 Executive Order Reservation which were partitioned and distributed to the Hopi Tribe pursuant to the 1958 Act and 1974 Act are referred to as the "Hopi Partitioned Lands." The Hopi Partitioned Lands are located within the boundaries of the tract of land President Chester A. Arthur withdrew and set apart for the use and occupancy of the Hopi Tribe by his Executive Order dated December 16, 1882 (the "1882 Executive Order Reservation"). However, the Hopi Partitioned Lands are located outside Land Management District 6.

The Special Master has determined that the Hopi Tribe does not have aboriginal water rights to the lands outside Land Management District 6. It is argued in the alternative that the Hopi Tribe holds a reserved water right to the Hopi Partitioned Lands. The Hopi Tribe and the United States assert that the priority of a reserved right is December 16, 1882. Catalyst Paper (Snowflake) Inc. counters that the priority of a reserved water right for the Hopi Partitioned Lands cannot be prior to February 10, 1977, or when the federal district court entered a judgment of partition.

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[58] U.S. Resp. to Hopi Tribe's Mot. for Summ. J. on Hopi Water Rights Under Treaty of Guadalupe Hidalgo at 3-4 (June 20, 2012).

1. Executive Order of December 16, 1882

Finding of Fact No. 14. After the transfer of sovereignty under the Treaty of Guadalupe Hidalgo, the "Hopis persistently expressed interest in the protections afforded by their inclusion" within the United States.[60]

Finding of Fact No. 15. Between November 14, 1876, and December 13, 1882, federal agency staff recommended that a reservation be established for the Hopi Indians. This history is described in *Healing II*.[61]

Finding of Fact No. 16. On December 16, 1882, President Chester A. Arthur issued an Executive Order which stated in pertinent part as follows:

> It is hereby ordered that the tract of country in the Territory of Arizona lying and being within the following-described boundaries … be, and the same is hereby, withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon.[62]

The term "other Indians" is noteworthy. "Reservations were commonly created with similar language;" for example, the Executive Order of July 2, 1872, creating the Colville Indian Reservation in the State of Washington stated as follows:

> It is hereby ordered that the country bounded on the east and south by the Columbia River, on the west by the Okanogan River, and on the north by the British possessions, be, and the same is hereby, set apart as a reservation for said Indians, and for such other Indians as the Department of the Interior may see fit to locate thereon.[63]

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[59] The 1974 Act was codified as the Navajo-Hopi Land Settlement Act of 1974. *See* 25 U.S.C. §§ 640d1-10 (2001). Copies of the 1958 and 1974 Acts are available in Catalyst Paper (Snowflake) Inc. Initial Disc. Nos. 25 and 48, FCHP00180-81 and FCHP00393-405, respectively.

[60] Peter M. Whiteley, Ph.D., *Historic Hopi Use and Occupancy of the Little Colorado Watershed, 1540-1900* at 106 (no. 7).

[61] 210 F. Supp. at 135-37.

[62] I CHARLES J. KAPPLER (ed.), INDIAN AFFAIRS: LAWS AND TREATIES 805 (GPO, Washington, D.C., 2d ed. 1904). A digital edition of Kappler's compilation is available at http://digital.library.okstate.edu/Kappler/. A copy of the handwritten executive order is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 2, FCHP00824-27, and in the Navajo Nation Initial Disc. Index No. 4483, 027722. In historical documents, Hopi Indians are often referred to as Moqui Indians. "The 'Hopi' and the 'Moqui' are one and the same Indian people." 210 F. Supp. at 129 n.1.

[63] *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 n.8 (9th Cir. 1981), *cert. denied*, 454 U.S. 1092 (1981) ("*Walton*").

The federal district court made the following finding in *Healing II*:

> The executive order reservation of December 16, 1882, was established for the following purposes: (1) to reserve for the Hopis sufficient living space as against advancing Mormon settlers and Navajos, (2) to minimize Navajo depredations against Hopis, (3) to provide a legal basis for curbing white intermeddlers who were disturbing the Hopis, and (4) to make available a reservation area in which Indians other than Hopis could, in the future, in the discretion of any Secretary of the Interior, be given rights of use and occupancy.[64]

Its decision stated as follows:

> "The circumstances which led to the issuance of [the 1882] executive order … demonstrate that the primary purpose was to provide a means of protecting the Hopis from white intermeddlers, Mormon settlers, and encroaching Navajos. It was thus intended that the Hopis would be provided such means of protection immediately upon the issuance of the executive order, no further proceedings by way of Secretarial settlement or otherwise being required. Hence … based on the language of the order … the Hopis acquired immediate rights in the 1882 reservation upon issuance of the December 16, 1882 order." [65]

The Indian Claims Commission's findings of fact nos. 16 and 17 in 1970 indicate that federal agents wanted and recommended that a "reservation" be established for the Hopi Indians:

> 16. In an effort to cope with the rapidly increasing Indian population and the steady pressure from nearby Mormon settlements, the Indian Agent at Fort Defiance, Arizona, recommended in 1876 that a reservation fifty miles square be set aside for the benefit of the Hopi Tribe. A second recommendation for a Hopi reservation was forwarded to Washington in 1878. Nothing came of either of these proposals. …
>
> 17. [O]n March 22 [sic 27], 1882, the Hopi Indian Agent, J. H. Fleming, addressed a letter to the Secretary of Interior recommending that a Hopi reservation be established that would include within its boundaries all of the Hopi Pueblos, the agency buildings at Kearns Canyon, and sufficient lands for agricultural and grazing purposes. Agent Fleming cited the need of protecting the Hopis from the intrusions of other Indians, Mormon settlers, and white intermeddlers. Other responsible government officials voiced their support for such a reservation.[66]

Healing II found that it "was the official intention, in creating this reservation, that the Hopi

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[64] Finding of Fact No. 16, *Healing II*, *supra*.

[65] 210 F. Supp. at 137-38.

[66] *Hopi Tribe and Navajo Tribe v. United States*, 23 Ind. Cl. Comm. 290, at 302-303. A copy of Mr. Fleming's letter is available in the Navajo Nation Initial Disc. Index No. 3640, NN021034-39. In a subsequent letter dated

Indians would immediately have, subject to the limitation [that the Secretary of the Interior could settle other Indians on the reservation] the usual Indian title in and to all parts of the described area, whether or not then actually used and occupied by them and without the need of any action on the part of the Secretary, express or implied, settling them on the reservation or otherwise confirming their rights therein. [67]

2. Partition of the Joint Use Area

The Hopi Tribe and Navajo Nation disagreed regarding tribal authority over certain lands within the 1882 Executive Order Reservation outside Land Management District 6.[68] The disagreements were prompted in part by the fact that both Hopis and Navajos were living inside the 1882 Executive Order Reservation as *Healing II* found:

> Navajo Indians used and occupied parts of the 1882 reservation, in Indian fashion, as their continuing and permanent area of residence, from long prior to the creation of the reservation in 1882 to July 22, 1958. The Navajo population in the reservation has steadily increased all of these years, growing from about three hundred in 1882 to about eighty-eight hundred in 1958. During the same period the Hopi population in the reservation increased from about eighteen hundred to something over thirty-two hundred.[69]

Attempts to resolve mutually the dispute were unsuccessful. Congressional efforts to address the conflict led to enactment of the 1958 and 1974 Acts and the partition actions filed under both Acts.

The litigation resulted in the following principal cases, pertinent to this briefing, collectively referred in this report as the "partition cases" *Healing I and II, Sekaquaptewa v. MacDonald* 448 F. Supp. 1183, (D. Ariz. 1978, *aff'd in part, rev'd in part*, 619 F.2d 801 (9th Cir. 1980), *cert. denied*, 449 U.S. 1010 (1980); *Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978), *Sekaquaptewa v.*

December 4, 1882, Mr. Fleming specified the "boundaries of the proposed reservation, the lines which were later described in the Executive Order of December 16, 1882." 210 F. Supp. at 137.

[67] Finding of Fact No. 17, *Healing II*, *supra*.

[68] "For centuries, the Hopi and Navajo peoples have disagreed on their tribes' respective rights to lands in northeastern Arizona. The dispute has been the subject of extensive litigation and legislation. … The Hopi 1882 reservation has been the subject of much litigation between the Navajo and Hopi tribes." 65 F.3d at 1450.

MacDonald, 626 F.2d 113 (9th Cir. 1980); *Masayesva v. Zah*, 792 F. Supp. 1155 (D. Ariz. 1992), *aff'd in part, rev'd in part*, 65 F.3d 1445 (9th Cir. 1995), *cert. denied sub nom. Secakuku v. Hale*, 517 U.S. 1168 (1996); *Masayesva v. Zah*, 793 F. Supp. 1495 (D. Ariz. 1992), *aff'd in part, rev'd in part*, 65 F.3d 1445 (1995), *cert. denied sub nom. Secakuku v. Hale*, 517 U.S. 1168 (1996); *Masayesva v. Zah*, 816 F. Supp. 1387 (D. Ariz. 1992), *aff'd in part, rev'd in part*, 65 F.3d 1445 (9th Cir. 1995), *cert. denied sub nom. Secakuku v. Hale*, 517 U.S. 1168 (1996). There are other cases, but those are not pertinent to the issues of this briefing or are in the nature of enforcement actions.

The 1958 Act authorized the Hopi Tribe and Navajo Nation acting through the chairmen of their tribal councils, and the Attorney General of the United States, to commence or defend an action in federal district court "for the purpose of determining the rights and interests of said parties in and to said lands ["described in the" December 16, 1882, Executive Order] and quieting title thereto in the tribes or Indians establishing such claims pursuant to such Executive order as may be just and fair in law and equity," and directed the federal district court to determine whether either tribe had "exclusive interest" in any part of the 1882 Executive Order Reservation.[70]

Section 2 of the 1958 Act states in pertinent part as follows:

> Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi Indians are determined by the court to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe.[71]

Section 2 of the 1958 Act is similar to section 8(b) of the 1974 Act, which provided that lands in which the Navajo Nation was determined to have exclusive interest "shall continue to be a part of the Navajo Reservation; lands in which the Hopi Tribe was determined to have the exclusive interest

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[69] Finding of Fact No. 20, *Healing II, supra*.
[70] 72 Stat. 403.

"shall thereafter be a reservation for the Hopi Tribe;" and lands in which the district court found that both tribes had a joint or undivided interest were to be partitioned "on the basis of fairness and equity," and any "area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively."[72]

Finding of Fact No. 17. On January 6, 1959, Assistant Secretary of the Interior Roger Ernst signed Public Land Order 1773 revoking the December 16, 1882, Executive Order pursuant to the delegation of authority in § 1 of Executive Order No. 10355 (May 26, 1952).[73] Public Land Order 1773 states that the "lands were declared by the [1958 Act] to be held by the United States in trust for the Hopi Indians and such other Indians, if any, as theretofore had been settled thereon by the Secretary of the Interior pursuant to the Executive Order of December 16, 1882," and this "order, therefore, has no effect upon the lands involved in the withdrawal of December 16, 1882, other than as an administrative measure to clear the records of such withdrawal."

Healing I and *II* were the result of the Hopi Tribe's action filed pursuant to the 1958 Act. *Healing II* found that the Hopi Tribe had exclusive interest in Land Management District 6 as defined on April 24, 1943, and second, as "to the remainder of the reservation, the Hopi and Navajo Indian Tribes have joint, undivided and equal interests as to the surface and sub-surface including all resources appertaining thereto, subject to the trust title of the United States."[74] The area of joint interest is referred to as the "Joint Use Area" of the 1882 Executive Order Reservation.

The district court in *Healing II* did not distribute the Joint Use Area because the court determined it lacked jurisdiction under the 1958 Act to partition and distribute "jointly-held lands," a

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[71] *Id*.
[72] 88 Stat. 1712, 1715-16.
[73] 24 Fed. Reg. 282 (Jan. 13, 1959). A copy of the order is available in Catalyst Paper (Snowflake) Inc. Second Supp. Disc. No. 24, FCHP00754-59. The order's heading is "Revoking Executive Order of December 16, 1882, Which Reserved Lands for Moqui (or Hopi) Reservation."
[74] 210 F. Supp. at 191-92.

factor that "preclude[d] a complete resolution of the Hopi-Navajo controversy."[75] The distribution of the Joint Use Area was later accomplished under the 1974 Act.

Differences arose between the Hopi Tribe and Navajo Nation regarding the Joint Use Area. To resolve the dispute, Congress enacted the 1974 Act which authorized "supplemental proceedings in" the *Healing* litigation to partition the Joint Use Area.[76] The legislation called for the "partition of the relative rights and interests, as determined by the decision in" *Healing II*, of the Hopi Tribe and Navajo Nation "to and in lands within the reservation established by the Executive order of December 16, 1882, except land management district no. 6." [77] The legislation provided for the use of a mediator to assist in settlement negotiations and the partition process. A mediator was used.

The 1974 Act also allowed the filing of an action in federal district court by a tribe "claiming any interest in or to the area described in the Act of June 14, 1934, 48 Stat. 960, except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes."[78] This provision led to the partition of Moenkopi Island that is addressed in the next section of this report.

Pursuant to the 1974 Act, the Hopi Tribe filed an action. In accordance with the 1974 Act and the mediator's report, the federal district court partitioned and distributed the Joint Use Area between the Hopi Tribe and Navajo Nation.[79]

Finding of Fact No. 18. On February 10, 1977, the district court entered a judgment of partition. In pertinent part, the judgment states that "all of the property partitioned to the Hopi Tribe … shall be held in trust by the United States exclusively for the Hopi Tribe and as a part of the Hopi

[75] 210 F. Supp. at 192.
[76] *See* 575 F.2d at 241 and 25 U.S.C. § 640d-3(a) ("supplemental proceedings in the Healing case.").
[77] 88 Stat. 1712.
[78] 88 Stat. 1712, 1715.
[79] *See* 575 F.2d at 241-43.

Reservation."[80]

The Ninth Circuit Court of Appeals affirmed the district court's decision to partition the Joint Use Area, but vacated and remanded the partition decree to permit resolution of a dispute over the boundary of the 1882 Executive Order Reservation.[81]

Conclusion of Law No. 12. The Ninth Circuit Court of Appeals held that by declaring "that the administration of their respective halves of the Joint Use Area is to be the responsibility of the respective tribes and by requiring the surveying and fencing of the lands partitioned," the partition order had "practically severed" the Hopi and Navajo interests.[82]

Finding of Fact No. 19. On April 18, 1979, the district court entered its Summary Judgment on the Boundary Issue and Judgment of Partition, *Sekaquaptewa v. MacDonald*, Civil No. 579 PCT (D. Ariz.). The court held that "all of the property partitioned to the Hopi Tribe … shall be held in trust by the United States exclusively for the Hopi Tribe and as a part of the Hopi Reservation," and "readopted and confirmed, except as expressly modified herein, or by intervening orders of the court," the "Judgment of Partition dated February 10, 1977."[83] The judgment of partition was final on April 18, 1979.

It is noted that the 1977 and 1979 judgments, entered in proceedings supplemental to the *Healing* litigation derived from the 1958 Act, stated that the lands partitioned and distributed to the Hopi Tribe were to be held in trust for the Hopi Tribe "as a part of the Hopi Reservation." Section 2 of the 1958 Act provided that such lands "shall thereafter be a reservation for the Hopi Indian Tribe."

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[80] *See* page 3 of the judgment. A copy of the Judgment of Partition is available in the Navajo Nation Initial Disc. Index No. 4481, NN027714-18.

[81] The Court of Appeals revisited the boundary issue in *Sekaquaptewa*, 626 F.2d 113, *supra*. The Court affirmed the district court's reliance on a 1965 survey that accurately reflected the legal description contained in the 1882 Executive Order. 626 F.2d at 116-19.

[82] 575 F.2d at 243.

[83] *See* page 3 of the judgment. A copy of the Summary Judgment on the Boundary Issue and Judgment of Partition is available in the Navajo Nation Initial Disc. Index No. 4402, NN024658-60.

Finding of Fact No. 20. Since December 16, 1882, the United States has held ownership of the lands within the 1882 Executive Order Reservation in trust for Indians.

3. Analysis

Catalyst Paper (Snowflake) Inc. argues that President Arthur's December 16, 1882, Executive Order did not create a vested right in the Hopi Tribe to the reservation. It points to the following determinations made in *Healing II*:

> The right of use and occupancy gained by the Hopi Indian Tribe on December 16, 1882, was not then a vested right. As stated in our earlier opinion, an unconfirmed executive order creating an Indian reservation conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such use and occupancy may be terminated by the unilateral action of the United States without legal liability for compensation. The Hopis were therefore no more than tenants at the will of the Government at that time. (citation omitted). No vesting of rights in the 1882 reservation occurred until enactment of the Act of July 22, 1958.[84]

It is argued that the Hopi Tribe did not obtain a vested right in the 1882 Executive Order Reservation until passage of the 1958 Act. The Hopi Tribe did not obtain a beneficial interest in the Hopi Partitioned Lands, and those lands did not become a reservation, until at least February 10, 1977, when the judgment of partition was entered. Hence, the priority of a reserved water right in the Hopi Partitioned Lands cannot be prior to February 10, 1977.

Catalyst Paper (Snowflake) Inc. presents a well-structured and argued position. However, the Special Master finds that the Hopi Tribe has an implied reserved water right in the Hopi Partitioned Lands with a priority of December 16, 1882. The other attributes of this right must be addressed in future proceedings. This determination deals only with the priority of a reserved water right.

The Special Master bases his determination on principles arising from litigation, and harmonized by courts, on all judicial levels, in numerous decisions over the past 100 years, concerning Indian reservations. The Ninth Circuit Court of Appeals declared some of these longstanding concepts

[84] 210 F. Supp. at 138, *see also* 170; 448 F. Supp. at 1192 ("The *Healing* Court held that equitable interests in

regarding Indian reservations as follows:

> The rule of construction applicable to executive orders creating Indian reservations is the same as that governing the interpretation of Indian treaties. Executive orders, no less than treaties, must be interpreted as the Indians would have understood them 'and any doubtful expressions in them should be resolved in the Indians' favor.' *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970); *United States v. State of Washington,* 969 F.2d 752, 755 (9th Cir.1992), *cert. denied,* 507 U.S. 1051 (1993). In interpreting statutes that terminate or alter Indian reservations, we construe ambiguities in favor of the Indians. *DeCoteau v. District County Court for Tenth Judicial Dist.,* 420 U.S. 425, 444 (1975); *Confederated Salish and Kootenai Tribes of Flathead Reservation, Mont. v. Namen,* 665 F.2d 951, 955 (9th Cir.1982), *cert. denied,* 459 U.S. 977 (1982). Rights arising from these statutes must be interpreted liberally, in favor of the Indians. *Pacific Coast,* 494 F.Supp. at 633 n.6 (citing *Choate v. Trapp,* 224 U.S. 665, 675 (1912)).[85]

The Arizona Supreme Court agrees that "[c]ourts construe Indian treaties according to the way in which the Indians themselves would have understood them."[86] Although it spoke of treaties, the Court must be deemed to have approved the long established rule for interpreting executive orders creating Indian reservations.

In that opinion, the Arizona Supreme Court defined longstanding principles of Indian water rights and law that apply in this matter:

> Federal water rights are different from those acquired under state law. Beginning with *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court has consistently held that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." (citation omitted).
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> According to *Winters* and its progeny, a federal right vests on the date a reservation is created, not when water is put to a beneficial use. *Arizona v. California,* 373 U.S. 546, 600 (1963). …
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> The Supreme Court, recognizing the "lands were arid, and, without irrigation, were practically valueless," (citation omitted), held that Congress, by creating the Indian reservation, impliedly reserved "all of the waters of the river ... necessary for ... the

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the 1882 executive order reservation were not vested until congressional recognition in 1958.").

[85] *Parravano v. Babbitt*, 70 F.3d 539, 544 (9th. Cir. 1995), *cert. denied*, 518 U.S. 1016 (1996); *see Walton*, 647 F.2d at 47.

[86] *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 314, 35 P.3d 68, 75 (2001).

> purposes for which the reservation was created." (citation omitted). As noted by the Court, the purpose for creating the Fort Belknap reservation was to establish a permanent homeland for the Gros Ventre and Assiniboine Indians.…
>
> Granted, *Winters* was not a general stream adjudication. Moreover, congressional intent to reserve water was not expressed in the Fort Belknap treaty; it was found by the Court to be implied. The principle outlined in *Winters*, however, is now well-established in our nation's jurisprudence: the government, in establishing Indian or other federal reservations, impliedly reserves enough water to fulfill the purpose of each such reservation. (citations omitted).…
>
> Since *Winters*, the Supreme Court has strengthened the reserved rights doctrine. In *Arizona I*, the government asserted rights to Colorado River water on behalf of five Indian reservations in Arizona, California, and Nevada. Arizona claimed that because each of the reservations was created or expanded by Executive Order, rather than by treaty, water rights were not retained. This argument was expressly rejected by the Court. *Arizona I*, 373 U.S. at 598. It noted that when these reservations were established, the federal government was aware "that most of the lands were of the desert kind - hot, scorching sands - and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." (citation omitted). As such, the Court found that the United States reserved water rights "to make the reservation[s] livable." *Id.* (citation omitted.).…
>
> Indian reservations, however, are different. In its role as trustee of such lands, the government must act for the Indians' benefit. (citation omitted). This fiduciary relationship is referred to as "one of the primary cornerstones of Indian law." Felix S. Cohen, *Handbook of Federal Indian Law* 221 (1982). Thus, treaties, statutes, and executive orders are construed liberally in the Indians' favor. (citation omitted). Such an approach is equally applicable to the federal government's actions with regard to water for Indian reservations. "The purposes of Indian reserved rights ... are given broader interpretation in order to further the federal goal of Indian self sufficiency. (citation omitted).[87]

Usually, congressional intent to reserve water for tribal reservations is not express but implied. Such is the case here. As the Arizona Supreme Court held, it "is doubtful that any tribe would have agreed to surrender its freedom and be confined on a reservation without some assurance that sufficient water would be provided for its well-being.[88]

The Court held "that the purpose of a federal Indian reservation is to serve as a 'permanent

[87] 201 Ariz. at 310-313, 35 P.3d at 71-74.
[88] 201 Ariz. at 314, 35 P.3d at 75.

home and abiding place' to the Native American people living there."[89] This "conclusion comports with the belief that '[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed.'"[90]

Regarding the priority of an implied Indian water right when interpreting an executive order, the following holding of the New Mexico Court of Appeals is instructive:

> [F]or purposes of setting a priority date for water rights, the priority date should be the date the United States promised to create a reservation and promised to give that promise a liberal construction, while at the same time exacting promises from the Indians, which subjected them to the authority of the United States. Any contrary holding would be a crabbed interpretation of the dealings between the Indians and the United States, an interpretation that the weight of authority teaches us to avoid. … [A] contrary holding would be inconsistent with the very *Winters* doctrine upon which the Indians' water rights are based.[91]

The New Mexico Court of Appeals cautioned, as other appellate courts have, that "treaties and like documents are not to be construed in such a manner as to rewrite them, and they are not to be expanded beyond their clear terms, even to remedy injustice."[92] Courts cannot change the meaning of a document under the guise of a liberal interpretation and cannot remake history.

Healing II found "that neither before nor after the Secretarial settlement of Navajos, did the Hopis abandon their previously-existing right to use and occupy that part of the 1882 reservation in which Navajos were settled," and "Hopi rights of use and occupancy in that part of the reservation were not terminated by Congressional enactment, administrative action, or abandonment."[93]

Hopi Indians have lived and subsisted on the Hopi Partitioned Lands since before 1882. As the Indian Claims Commission found, the "record clearly shows that for a long time prior to the

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[89] 201 Ariz. at 315, 35 P.3d at 76.
[90] *Id*. The Court cited *Walton, supra*.
[91] *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 203, 861 P.2d 235, 244 (N.M. App., 1993).
[92] 116 N.M. at 200, 861 P.2d at 241. *See e.g. United States v. Minn.*, 466 F. Supp. at 1385 ("The Supreme Court has cautioned that the courts cannot remake history or expand treaties and legislation beyond their clear terms to remedy a perceived injustice suffered by the Indians.").
[93] 210 F. Supp. at 189.

establishment of the 1882 Executive order reservation, and also for a long time prior to the 1848 date of American sovereignty, the Hopi Indians pursued a static, nonnomadic, nonexpansionist, agricultural mode of life," and from "their ancient pueblos high atop three mesas in east central Arizona," they "descended to the valleys below to cultivate neighboring fields for grain and fruit and to pasture small flocks of sheep."[94]

The Indian Claims Commission made the following determinations that are striking in light of the foregoing principles courts apply to Indian reservations:

> It is clear that the Government expected that the 1882 Executive order would enable it to protect the Hopis from the Navajos and from white settlers and also provide the Hopis with enough land to sustain them. … **It was intended that the Hopi reservation would be a permanent home for the Hopis**. Responsible government officials believed that sufficient land had been set aside to accommodate present and future Hopi tribal needs and therefore the Hopis would confine their activities within the boundaries of the reservation. The record does not disclose any Hopi protest or objection at the time as to the size of the new reservation. (Emphasis added.)[95]

The Commission found that the "implied Hopi acceptance coupled with the Government's manifest intent to confine future Hopi tribal activity within the boundaries of the 1882 reservation, terminated the Hopi's aboriginal title to lands outside of the reservation."[96]

The Hopi Indians may have had a right of use and occupancy and lacked an exclusive interest in the Hopi Partitioned Lands prior to partition and distribution, but these lands were withdrawn from settlement and sale and set apart for them after six years of federal agents recommending the establishment of a reservation for Hopis. The Indian Claims Commission, who considered much evidence of Hopi history, found that it "was intended that the Hopi reservation would be a permanent home for the Hopis." The Hopis acquiesced in the reservation that became to those living there their permanent home and abiding place. Hopis have lived in the area of the 1882 Executive Order

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[94] *See* n.21, *supra*.
[95] *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 26.
[96] *Id*. at 28.

Reservation, at least, since prior to 1541. In the words of the Arizona Supreme Court, it is doubtful that the Hopis would have agreed to surrender their freedom and be confined on a reservation without some assurance that sufficient water would be provided for their well-being.

Catalyst Paper (Snowflake) Inc. points to the distinction made in section 2 of the 1958 Act, namely, lands in which the Navajo Indians were found to have an exclusive interest "shall thereafter be a part *of* the Navaho Indian Reservation," but Hopi partitioned lands "shall thereafter be a reservation *for* the Hopi Indian Tribe." (Emphasis added.)[97] Several counter arguments were presented, but none were conclusively persuasive. Hardly anything was said about the 1958 Act's legislative history so likely that avenue is not helpful.[98]

It is again noted that the 1977 and 1979 partition judgments stated that the lands partitioned and distributed to the Hopi Tribe were to be held in trust for the Hopi Tribe "as a part of the Hopi Reservation."

In 1958, the Navajo Nation had a larger reservation created by treaty and congressional legislation. The Hopi Tribe had an executive order reservation. Perhaps the drafters of the 1958 Act read something into this distinction that cannot be fathomed.[99] It is incongruous that the drafters envisioned a reservation to be established in the 1960s or 1970s for people whose authenticated history in the area then went back over 400 years. The Special Master cannot find that this distinction overrides the long held principles courts have consistently adhered to when considering the status of Indians and reservations. Viewed within the background of these principles, the distinction is not dispositive.

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[97] 72 Stat. 403.

[98] Apparently, the lack of useful legislative history is common to both the 1934 and 1974 Acts. 448 F. Supp. at 1193 ("The congressional record on the 1934 Act is sparse."); 793 F. Supp. at 1500 ("The legislative history of the 1934 Act is sparse…" and "The language and legislative history of the Navajo-Hopi [Land] Settlement Act [of 1974] is similarly unhelpful.").

[99] *See* Finding of Fact No. 28, *Healing II*, *supra* ("On May 25, 1918, 40 Stat. 570, 25 U.S.C. § 211, was enacted, prohibiting the creation of any Indian reservation or the making of any additions to existing

Conclusion of Law No. 13. President Chester A. Arthur's Executive Order of December 16, 1882, was intended to establish a reservation for Hopi Indians.

Conclusion of Law No. 14. The December 16, 1882, Executive Order impliedly reserved water for the use of the Hopi Indians.

Conclusion of Law No. 15. The date of priority of the Hopi Tribe's reserved water right in the Hopi Partitioned Lands within the 1882 Executive Order Reservation is December 16, 1882.

No findings are made concerning the other parameters of an implied reserved water right. Those will be determined in future proceedings.

VII. DOES THE HOPI TRIBE POSSESS WATER RIGHTS WITH ANOTHER DATE OF PRIORITY AS A RESULT OF CONGRESSIONAL ACTS AND COURT DECISIONS ADDING PROPERTY TO THE HOPI RESERVATION?

This section covers several areas associated with the Hopi Indian Tribe. The first is Moenkopi Island.

A. Moenkopi Island

Moenkopi Island is located west of the 1882 Executive Order Reservation. According to the United States, the area "is referred to as an island because it is a portion of land within the overall Navajo Nation Reservation."[100] The "Hopis use the spelling 'Moenkopi'; some government documents and previous court decisions utilized the spelling 'Moencopi.'"[101]

The Hopi Tribe and the United States argue that the Hopi Tribe has aboriginal water rights to Moenkopi Island. The Special Master has determined that the Hopi Tribe does not have aboriginal water rights to lands outside the 1882 Executive Order Reservation.

In the alternative, the Hopi Tribe and the United States assert that the Hopi Tribe holds an

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reservations in the States of New Mexico and Arizona, except by Act of Congress."); *see also* Act of March 3, 1927, 44 Stat. 1347.

[100] U.S. Stmt. Undisp. Facts in Support of U.S. Mot. for Summ. J. at 5 (no. 7 but should be 8) (Mar. 26, 2010).

[101] 793 F. Supp. at 1502 n.8.

implied reserved water right to Moenkopi Island. The United States posits alternative reserved right priorities based on a January 8, 1900, Executive Order of President William McKinley or the Act of June 14, 1934, which was the genesis of a partition action commenced by the Hopi Tribe under the 1974 Act.

Catalyst Paper (Snowflake) Inc. counters that the priority of a reserved water right for Moenkopi Island cannot be prior to December 21, 1992 (final judgment in *Masayesva v. Zah*, CIV 842 PCT EHC (D. Ariz.) (later *Honyoama v. Shirley)*), or December 4, 2006 (incorporation of the December 21, 1992, final judgment in *Honyoama v. Shirley*, No. CIV 74-842-PHX-EHC (D. Ariz.)). Both dates reflect the entry of a final judgment in the partition action involving Moenkopi Island.

1. Executive Order of January 8, 1900

The United States argues that a reserved water right priority for Hopi rights on the Moenkopi Island is January 8, 1900, the date President William McKinley issued the following Executive Order:

> It is hereby ordered that the tract of country lying west of the Navajo and Moqui reservations in the Territory of Arizona, embraced within the following described boundaries, viz, beginning at the southeast corner of the Moqui Reservation and running due west to the Little Colorado River; thence down that stream to the Grand Canyon Forest Reserve; thence north on the line of that reserve to the northeast corner thereof; thence west to the Colorado River; thence up that stream to the Navajo Indian Reservation, be, and the same is hereby, withdrawn from sale and settlement until further ordered.[102]

Finding of Fact No. 21. The Moenkopi Island is situated within the "tract of country" withdrawn from sale and settlement described in the January 8, 1900, Executive Order.[103]

The express wording states that the lands were withdrawn from sale and settlement, but were not reserved for an Indian reservation or a federal purpose. Both a withdrawal of land and a reservation for a federal purpose are requirements of a reserved water right as the Arizona Supreme

[102] I KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 877, *supra*. A copy of the executive order is available in Catalyst Paper (Snowflake) Inc. Third Supp. Disc. No. 1, FCHP00816-820.

[103] 448 F. Supp. at 1191 ("The Hopi village of Moencopi is within the 1900 executive order reservation.").

Court recently held.

Conclusion of Law No. 16. "In each case dealing with federal reserved water rights, it has been obvious that there has been a withdrawal and reservation of the subject lands."[104]

Conclusion of Law No. 17. "Although often used interchangeably, the terms 'withdraw' and 'reserve' have different meanings."[105] "It is important to note at the outset that 'withdrawal' and 'reservation' are not synonymous terms. … A withdrawal makes land unavailable for certain kinds of private appropriation under the public land laws"[106] such as the operation of federal mining, homestead, preemption, desert entry, and other federal land laws. Withdrawn lands "are tracts that the government has placed off-limits to specified forms of use and disposition," but a withdrawn parcel "may also be reserved for particular purposes, and often is."[107] A withdrawal of public domain land removes the land from the operation of federal public land laws and makes the land unavailable for settlement, public sale, or other disposition under the federal public land laws.

Conclusion of Law No. 18. "Reserved lands … are those that have been expressly withdrawn from the public domain by statute, executive order, or treaty, and are dedicated to a specific federal purpose."[108] "A reservation … goes a step further: it not only withdraws the land from the operation of the public land laws, but also dedicates the land to a particular public use … [a] reservation necessarily includes a withdrawal; but it also goes a step further, effecting a dedication of the land 'to specific public uses.'"[109] Reservations or reserved lands "are the federal tracts that Congress or the Executive

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[104] *Sierra Club v. Block*, 622 F. Supp. 842, 854 (D. C. Colo. 1985), *vacated on other grounds sub nom. Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990).
[105] 622 F. Supp. at 854.
[106] *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735, 784 (10th Cir. 2005) (*Southern Utah*").
[107] 1 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, Public Natural Resources Law, § 1:12 at 1-16 (2004) ("The main distinction between withdrawn and reserved lands is that a withdrawal is negative, forbidding certain uses, while a reservation is a positive declaration of future use.").
[108] 622 F. Supp. at 854.
[109] 425 F.3d at 784.

has dedicated to particular uses (footnote omitted). The dedication removes them from availability for contrary use or disposition."[110]

In *Southern Utah*, the 10th Circuit Court of Appeals quoted the definition of "reservation" from the first edition of Black's Law Dictionary, a reputable legal dictionary, published in 1891. The dictionary is in its ninth edition. The first edition defined "reservation" as follows: "In public land laws of the United States, a reservation is a tract of land, more or less considerable in extent, which is by public authority withdrawn from sale or settlement, and appropriated to specific public uses; such as parks, military posts, Indian lands, etc."[111] At least as of the late 1880s, it was recognized that a reservation of public domain consisted of a withdrawal of the land from disposal and its dedication to a specific public use - requisites consistent with today's law of reserved water rights.

The Arizona Supreme Court upheld these requirements in its decision concerning State Trust Lands, holding that because "the State Trust Lands were not withdrawn and reserved for a federal purpose. … [t]hese lands cannot include federal reserved water rights."[112] The Special Master has not seen any authority that makes these requirements inapplicable to Indian reserved water rights.

Noteworthy is that the Navajo Nation in *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183, 1191, "suggest[ed] that land withdrawn by the Executive Order of January 8, 1900, was permanently reserved by Congress." The argument was based on a 1902 federal appropriations act. The district court rejected the argument holding that:

> [N]othing in the legislative history cited by the Navajo tribe indicates such a clear purpose. Indeed, the Navajo position leads to an anomalous result. The Hopi village of Moencopi is within the 1900 executive order reservation. One stumbling block to passage of the 1934 Act was the presence of this Hopi village. The Navajo tribe would read the status of the Moencopi village completely out of the 1934 Act.[113]

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[110] 1 COGGINS & GLICKSMAN § 1:11 at 1-15.
[111] 425 F.3d at 784.
[112] *In re the General Adjudication of All Rights to Use Water in the Gila River and Little Colorado River System and Source (Consol.)*, 231 Ariz. 8, 16, 289 P.3d 936, 944 (2012).
[113] 448 F. Supp. at 1192.

Relevant to this proceeding is the further evidence that Moenkopi Island was a Hopi area prior to the 1934 Act, and its "status" was within the scope of that legislation.

Conclusion of Law No. 19. The January 8, 1900, Executive Order of President William McKinley withdrew public lands from sale and settlement, but did not reserve those lands for an Indian reservation or a federal purpose.

Conclusion of Law No. 20. The January 8, 1900, Executive Order is not a basis to determine that the Hopi Tribe holds a reserved water right for Moenkopi Island with a priority of that date. However, the Executive Order withdrew Moenkopi Island from sale and settlement.

The Hopi Tribe cannot assert a reserved water right priority of January 8, 1900, for water rights to Moenkopi Island.

2. Act of June 14, 1934, and Partition Litigation

The 1934 Act defined the exterior boundaries of the Navajo Indian Reservation by perimeter legal descriptions and provided for exchanges, consolidations, purchases, relinquishments, and reconveyances of lands. The Act provided that all vacant, unreserved, and unappropriated public lands within those boundaries are "permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon."[114] Hopi Indians resided on some of those lands.

The 1934 Act stated that "nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882."[115] The Act excluded from its scope other specified lands not pertinent to this proceeding.

Finding of Fact No. 22. The Moenkopi Island was occupied by members of the Hopi Tribe on June 14, 1934, when the 1934 Act was enacted. The federal district court took "judicial notice that a

[114] 48 Stat. 960, 961. A copy of the 1934 Act is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 16, FCHP00148-151.

Hopi village existed at Moencopi on June 14, 1934," and "Moencopi is within the 1934 Act land grant, and, therefore, the Hopi are within the 'such other Indians' clause and are holders of equitable interests."[116]

Disagreements arose between the Hopi Tribe and Navajo Nation concerning Moenkopi Island, and efforts to resolve them mutually failed. The Congress enacted the 1974 Act in part to resolve the conflict concerning the lands of the 1934 Act.[117]

The 1974 Act authorized the Hopi Tribe and Navajo Nation, acting through the chairmen of their tribal councils, to commence and defend an action in federal district court to determine the rights and interests of the tribes in or to the area described in § 1 of the 1934 Act, "except the reservation established by the Executive Order of December 16, 1882," and "quieting title thereto in the tribes."[118]

Section 8(b) of the 1974 Act provided that lands in which the Navajo Nation was determined to have exclusive interest "shall continue to be a part of the Navajo Reservation;" lands in which the Hopi Tribe was determined to have the exclusive interest "shall thereafter be a reservation for the Hopi Tribe;" and lands in which the district court found that both tribes had a joint or undivided interest were to be partitioned "on the basis of fairness and equity," and any "area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively."[119] With the exception of the reference to joint interest lands, section 8(b) contains the same language as section 2 of the 1958 Act.[120]

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[115] *Id.*

[116] 448 F. Supp. at 1193.

[117] 65 F.3d at 1460 ("Congress decided that the dispute should be brought to an end by litigation, and exercised its power to provide for the standards which should be used.").

[118] 88 Stat. 1712, 1715.

[119] 88 Stat. 1712, 1715-16.

[120] Section 2 of the 1958 Act states in pertinent part as follows:

> Lands, if any, in which the Navaho Indian Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation. Lands, if any, in which the Hopi Indian Tribe, including any Hopi village or clan thereof, or individual Hopi

Pursuant to the 1974 Act, the Hopi Tribe brought suit against the Navajo Nation to determine the Hopi Tribe's rights to lands within the scope of the 1934 Act. The litigation was split into two phases. The following is an overview of the extended litigation.

The first phase determined "who were 'such other Indians' entitled to assert interests in the 1934 [Act] Reservation, which lands in the 1934 [Act] Reservation were subject to litigation, and where 'such other Indians' were 'located' in 1934."[121] Phase II "more specifically delineate[d] the boundaries of the area which [the court] found Hopis had exclusively used, and that area found to have been jointly used by Hopis and Navajos in 1934," and the district court partitioned the lands that were jointly used.[122]

The Ninth Circuit Court of Appeals "affirmed the District Court's interpretation of the 1934 Act that Hopi interest in the 1934 lands depended on Hopi occupation, possession, or use of the lands on June 14, 1934," holding that the "purposes, history, and language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by Hopis."[123] The Court of Appeals agreed with the district court that this was the meaning of the "such other Indians as may already be located thereon" provision.

The Ninth Circuit Court of Appeals noted that "[t]his dispute probably" had lasted for over four centuries, and that "[i]t can never be ended in a way which satisfies both tribes."[124] The Special Master is optimistic that the same will not be said of the water rights adjudication. Except for a determination regarding the location of Hopi religious sites, the Court of Appeals held that the dispute

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Indians are determined by the court to have the exclusive interest shall thereafter be a reservation for the Hopi Indian Tribe. 72 Stat. 403.

[121] 793 F. Supp. at 1498.
[122] 816 F. Supp. at 1394.
[123] 793 F. Supp at 1499.
[124] 65 F.3d at 1460.

resolution process between the Hopi Tribe and Navajo Nation "has largely been completed."[125]

Finding of Fact No. 23. On December 21, 1992, the federal district court entered a final judgment in *Masayesva v. Zah*, No. CIV 74-842 PCT EHC (D. Ariz.) (later *Honyoama v. Shirley*).[126] The lands of Moenkopi Island were recognized as held in trust by the United States for the Hopi Tribe.

Finding of Fact No. 24. The federal district court's judgment was incorporated in the court's Order and Final Judgment dated December 4, 2006, entered in *Honyoama v. Shirley*, No. CIV 74-842 PHX EHC (D. Ariz.).[127]

Finding of Fact No. 25. The United States has held ownership of the lands of Moenkopi Island in trust for Indians.

Catalyst Paper (Snowflake) Inc. argues that Moenkopi Island was added to the Hopi Indian Reservation upon the entry of the judgment of partition, at least December 21, 1992, and not earlier. Until the judgment of partition, the Hopi Tribe held an undivided one-half interest in the land. It was only then that Moenkopi Island was added to the Hopi Reservation, hence, a reserved water right for Moenkopi Island cannot have an earlier priority.

The Special Master adopts the same principles and reasoning used to determine a priority for a reserved water right for the 1882 Executive Order Reservation. Although the 1934 Act did not explicitly withdraw lands from sale and settlement and reserved them for a Hopi Indian Reservation, the legislation recognized the presence of Hopis in areas within the exterior boundaries of the Navajo Indian Reservation and provided a judicial means to have those "pockets" reserved for Hopi Indians.

Catalyst Paper (Snowflake) Inc. reiterates its arguments concerning the wording of the 1974 Act

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[125] *Id*.

[126] A copy of the judgment is available in the Hopi Tribe Initial Disc. Index No. 709, HP015480-88 excluding attachments. The judgment includes the determinations made concerning the interests of the San Juan Southern Paiute Tribe in a portion of the 1934 Act lands, but the Hopi Tribe does not have any interest in any portion of the Paiute lands.

[127] A copy of the judgment is available in the Hopi Tribe Initial Disc. Index No. 709, HP015474-78.

that the lands in which the Hopi Tribe was determined to have the exclusive interest "shall thereafter be a reservation for the Hopi Tribe" as opposed to being "a part of" the Hopi Indian Reservation. It is noteworthy that the district court that spent years immersed in the partition issues related to the 1934 Act appears to have itself been confused by the wording. In summarizing its tasks, the court stated that:

> Thus, this Court need only address Navajo use of lands on which the Hopi Tribe has proved Hopis were "located" in 1934, in order to decide whether Hopis were "exclusively" or "jointly" located on that land. **If Hopis were exclusively located on an area of land, it will become a part of the Hopi Reservation**." (Emphasis added.)[128]
>
> And later:
>
> Upon completion of a survey of the exclusive Hopi lands by a competent surveyor appointed by the Court or by stipulation of the parties, and upon the Court's approval of that survey, title to the lands so identified shall be quieted in the Hopi Tribe, subject to the trust title of the United States, and all **such lands shall be a part of the Hopi Reservation**. (Emphasis added.)[129]

The district court did not say shall "be a reservation for the Hopi Tribe" as the 1974 Act provided but stated shall be "a part of the Hopi Reservation."

Conclusion of Law No. 21. The 1934 Act defined the boundaries of the Navajo Indian reservation and recognized the presence of other Indians within those lands including Hopi Indians residing in Moenkopi Island.

Conclusion of Law No. 22. The 1934 Act impliedly reserved water for the use of Hopi Indians residing in Moenkopi Island.

Conclusion of Law No. 23. The date of priority of the Hopi Tribe's reserved water right in Moenkopi Island is June 14, 1934.

No findings are made concerning the other parameters of an implied reserved water right which will be determined in future proceedings.

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[128] 793 F. Supp. at 1501.
[129] 793 F. Supp. at 1531.

B. Hopi Industrial Park

The Hopi Industrial Park consists of approximately 200 acres of land located near Winslow, Arizona, south of the 1882 Executive Order Reservation. According to the United States, it approved on October 17, 1966, the purchase of the Hopi Industrial Park in trust for the Hopi Tribe. The industrial park is not, and has never been, part of the Hopi Indian Reservation.

Catalyst Paper (Snowflake) Inc. alleges that the United States assembled the industrial park in 1966 and 1967 through an indenture and two deeds, and the date of acquisition is a disputed issue of material fact. Furthermore, it argues that because the Hopi Industrial Park has not been added to the Hopi Indian Reservation, the park is not within the Court's order of reference to the Special Master.

There was little briefing concerning the Hopi Industrial Park. The record is insufficient to determine by summary judgment the priority of water rights for the Hopi Industrial Park. Furthermore, in light of the position of Catalyst Paper (Snowflake) Inc. that this issue is not within the scope of the referral to the Special Master, the alternatives are to wait until ADWR prepares the appropriate report to address the priority issue or the Court clarifies the referral to the Special Master, and the record is augmented and briefed as needed.

The Special Master does not make findings of fact, conclusions of law, and recommendations concerning the priority of water rights for the Hopi Industrial Park.

C. Aja, Clear Creek, Drye, and Hart Ranches

According to the United States, these ranches were purchased in the 1990s by the Hopi Tribe pursuant to the Navajo-Hopi Land Dispute Settlement Act of 1996, Pub. L. No. 104-301, 110 Stat. 3649, and the Secretary of the Interior has taken these four ranches into trust for the Hopi Tribe.

The Navajo-Hopi Land Dispute Settlement Act of 1996 "specifically limits the Ranches to"

surface water and groundwater rights.[130] Section 12 (a)(1) of the Act states in pertinent part as follows:

> [N]ewly acquired trust lands shall have only the following water rights:
>
> (A) The right to the reasonable use of groundwater pumped from such lands.
>
> (B) All rights to the use of surface water on such lands existing under State law on the date of acquisition, with the priority date of such right under State law.
>
> (C) The right to make any further beneficial use on such lands which is unappropriated on the date each parcel of newly acquired trust lands is taken into trust. The priority date for the right shall be the date the lands are taken into trust.[131]

The United States has submitted as part of the latest federal amended statement of claimant abstracts of the water rights claimed for the ranches. According to Catalyst Paper (Snowflake) Inc., there are 330 abstracts, 121 of which raise issues of material fact involving priority. The abstracts include state law based water rights claims.[132]

Based on his experience in adjudication matters, the Special Master takes judicial notice that 330 abstracts likely present numerous factual and legal questions. Furthermore, Arizona state law based water rights raise issues not pertinent to reserved rights claims, such as abandonment, forfeiture, subflow, pre-June 12, 1919 priority, and ownership.

Because state law based surface water and groundwater rights, and a large number, are involved, the Special Master finds that determining the priority of these rights should be deferred until ADWR prepares the appropriate report to address the issue. The record is insufficient to determine by summary judgment water rights priorities associated with the ranches.

The Special Master does not make findings of fact, conclusions of law, and recommendations concerning the priority of water rights for the Aja, Clear Creek, Drye, and Hart Ranches. However, the

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[130] U. S. Mot. for Summ. J. at 20 (Mar. 26, 2010).

[131] 110 Stat. 3649, 3653. Section 12 (d) provides in part that the Hopi Tribe's "water rights on newly acquired trust lands shall be adjudicated with the rights of all other competing users in the court now presiding over the Little Colorado River Adjudication." 110 Stat. 3649, 3654. A copy of the Navajo-Hopi Land Dispute Settlement Act of 1996 is available in Catalyst Paper (Snowflake) Inc. Initial Disc. No. 54, FCHP00504-11.

Special Master recommends that the Court direct ADWR to complete the investigations of the claimed water rights for these ranches.

D. Reacquired Lands

The Special Master adopts, as modified, the following nine findings of fact submitted by Catalyst Paper (Snowflake) Inc. to provide the background of certain conveyances and reacquisitions of lands made by the United States within and surrounding the 1882 Executive Order Reservation.

Finding of Fact No. 26. Congress granted lands to the Atlantic and Pacific Railroad Company in aid of construction of a railroad line from Springfield, Missouri, to the Pacific Ocean. Act of July 27, 1866, ch. 278, § 1, 14 Stat. 292, 293 ("1866 Act"). The grantee received a right of way. *Id*. § 2, 14 Stat. 294. In addition, it received:

> every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States …. and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers….

Id. § 3, 14 Stat. 294-95. The grantee was permitted to select "in lieu" lands to replace sections disqualified from the grant due to their mineral character. *Id*. 14 Stat. 295. In summary, the 1866 Act granted the Atlantic and Pacific Railroad Company alternate odd-numbered sections of land on each side of the railroad right of way extending outward for forty miles, plus the right to select as "in lieu" lands alternate odd-numbered sections within an additional ten miles on each side of the right of way. *See Santa Fe Pacific Railroad Co. v. United States*, 294 F.3d 1336, 1338-39 (Fed. Cir. 2002); *Chapman v. Santa Fe Pac. Railroad Co*. 198 F.2d 498, 499 (D.C. Cir. 1951), *cert. denied*, 343 U.S.

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[132] Catalyst Paper (Snowflake) Inc. Resp. to U.S. Mot. for Summ. J. at 14 (Dec. 20, 2011).

964 (1952).

Finding of Fact No. 27. The grant to the Atlantic and Pacific Railroad Company was *in praesenti*. The United States Supreme Court, quoting from its opinion in *St. Paul & Pacific Railroad Co. v. Northern Pacific Railroad Co.*, 139 U.S. 1, 5-6 (1891), explained:

> The language of the statute is, 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one *in praesenti*; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

United States v. Southern Pac. Railroad Co., 146 U.S. 570, 593 (1892) (citation in *St. Paul & Pac. Railroad Co. v. Northern Pac. Railroad Co.*, *supra*, omitted).

Finding of Fact No. 28. The Atlantic and Pacific Railroad Company filed a map of definite location with the Secretary of the Interior on March 12, 1872, and thereafter the railroad was constructed. *Chapman v. Santa Fe Pac. Railroad Co*. 198 F.2d at 499. At that point, its title to the designated lands was no longer "floating" but attached as of July 27, 1866 (the date of the 1866 Act). *United States v. Southern Pac. Railroad Co.*, 146 U.S. at 595.

Finding of Fact No. 29. The St. Louis & San Francisco Railroad Company succeeded to the interest of the Atlantic and Pacific Railroad Company. The St. Louis & San Francisco Railroad Company later sold one-half of that interest to the Atchison, Topeka & Santa Fe Railway Company. Eventually the bulk of the Atlantic and Pacific Railroad Company's interest came to be owned by the Santa Fe Pacific Railroad Company (an affiliate of the Atchison, Topeka & Santa Railway Company), the Aztec Land and Cattle Company, and the New Mexico and Arizona Land Company. SANFORD A. MOSK, LAND TENURE PROBLEMS IN THE SANTA FE RAILROAD GRANT AREA at 12-13 (Univ. Cal. Press

1944; Arno Press Inc. reprint 1981).

Finding of Fact No. 30. Congress authorized the Government to reacquire granted lands after 1866 to accomplish various purposes. *E.g.*, Act of June 22, 1874, ch. 400, 18 Stat. 194 (authorizing the relinquishment of railroad grant lands in the possession of a settler who entered the lands under the preemption or homestead laws after the railroad grant attached to them, and substitution of "in lieu" lands; Act of April 21, 1904, ch. 1402, 33 Stat. 189, 211 ("1904 Act") (authorizing the exchange of private land over which an Indian reservation was extended by executive order for vacant, non-mineral, non-timbered, surveyed public lands).

Finding of Fact No. 31. Pursuant to the 1904 Act, 33 Stat. 211, Santa Fe Pacific Railroad Company conveyed to the United States at least[133] 183,200 acres of its land situated within the boundaries established by the 1882 Executive Order. Santa Fe Pacific Railroad Company received "in lieu" lands in return for these conveyances.

Finding of Fact No. 32. The United States acquired land within the area subject to the 1934 Act and in the vicinity of the area subject to the 1882 Executive Order by way of deeds from various landowners. Catalyst Paper (Snowflake) Inc. See Exhibit 1 and Revised Exhibit 2.

Finding of Fact No. 33. On August 25, 1934, Santa Fe Pacific Railroad Company conveyed land to the United States along the western and southern limits of the area subject to the 1882 Executive Order. *See* Deed dated Aug. 25, 1934, First Supp. Disc. No. 28, FCHP00620-27. While some of the land conveyed lies within the area subject to the 1882 Executive Order, the majority does not. Santa Fe Pacific Railroad Company received monetary compensation for this conveyance. *Id*.

Finding of Fact No. 34. Pursuant to the 1934 Act, Santa Fe Pacific Railroad Company

[133] Catalyst Paper (Snowflake) Inc. derived the conveyance and acreage information from deeds it obtained from the federal Bureau of Land Management. Additional deeds, if any, that the Bureau could not locate or otherwise did not provide are not reflected in this account. The maps designated Exhibits 1 and 2 are based on these deeds.

conveyed land to the United States along the southern limits of the area subject to the 1882 Executive Order. *See* Deed dated Oct. 20, 1934, First Supp. Disc. No. 29, FCHP00628-42. While some of the land conveyed by this deed lies within the area subject to the 1882 Executive Order, the majority does not. Santa Fe Pacific Railroad Company received "in lieu" lands in return for this conveyance. *See* Phoenix No. 075761, Patent No. 1107275, Second Supp. Disc. No. 28, FCHP00775-83.

Catalyst Paper (Snowflake) Inc. submitted with its summary judgment motion two maps designated Exhibit 1 and Revised Exhibit 2 (revised December 2011). Exhibit 1 identifies the United States' land reacquisitions by grantor. Revised Exhibit 2 shows the chronology of the United States' reacquisitions of land, by year of acquisition from 1909 to 1963, within and in the vicinity of the 1882 Executive Order Reservation.

Catalyst Paper (Snowflake) Inc. argues that the priority of any tribal water right associated with lands conveyed to private owners and reacquired cannot predate the United States' reacquisition of the lands. While the conveyances may have been subject to the Hopi Tribe's aboriginal or Indian title when the conveyances attached as of July 27, 1866, that encumbrance was removed from the grant lands when the Hopi Tribe's claimed aboriginal title was extinguished as of 1882 and 1937.

Neither Exhibit 1 nor Revised Exhibit 2 show land conveyances inside the Moenkopi Island. The land conveyances shown are inside Land Management District 6, outside District 6 but within the boundaries of the 1882 Executive Order Reservation, and on the southwestern, southern, and southeastern exterior vicinity of the 1882 reservation. Exhibit 1 identifies seven grantors by names.

Finding of Fact No. 35. According to Exhibit 1, the Santa Fe Pacific Railroad Company was the only grantor of reacquired lands within the boundaries of the 1882 Executive Order Reservation including Land Management District 6.

As Justice William O. Douglas wrote for the United States Supreme Court:

> If the right of occupancy of the [Hopis] was not extinguished prior to the date of definite location of the railroad in 1872, then the respondent's predecessor took the fee subject to the encumbrance of Indian title. (citation omitted). For on that date the title of respondent's predecessor attached as of July 27, 1866.[134]

The Hopi Tribe's Indian title was its right of occupancy and use. For over 200 years, it has been well-defined under the doctrine of discovery "that discovering nations held fee title to these lands, subject to the Indians' right of occupancy and use."[135]

Finding of Fact No. 36. The Hopi Tribe's aboriginal title to Land Management District 6 has not been extinguished.

Hence, the lands inside District 6 that were conveyed to others and were reacquired by the United States, beginning in and continuing after 1909, remained subject to the Hopi Tribe's Indian title.

Finding of Fact No. 37. The Hopi Tribe's aboriginal title to the lands outside Land Management District 6 but within the 1882 Executive Order Reservation was terminated on June 2, 1937.

Finding of Fact No. 38. According to the map shown on Catalyst Paper (Snowflake) Inc.'s Revised Exhibit 2, the United States reacquired the lands inside the boundaries of the 1882 Executive Order Reservation in 1909, 1910, 1911, and 1913.

From the foregoing finding it follows that the reacquired lands within the boundaries of the 1882 Executive Order Reservation, but outside Land Management District 6, remained subject to the Hopi Tribe's aboriginal title from their original conveyances in the 1860s to after they were reacquired by the United States between 1909 and 1913. The Hopi Tribe's aboriginal or Indian title was

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[134] *United States v. Santa Fe Pac. Railroad Co.*, 314 U.S. 339, 347 (1941). The "encumbrance of Indian title," when a sovereign grants lands "while yet in possession of the natives," was recognized by the principal European nations that populated the Americas. *Johnson v. M'Intosh*, 21 U.S. 543, 574 (1823) ("These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy.").

[135] 470 U.S. at 234.

extinguished after these lands were conveyed to others and were reacquired.

Catalyst Paper (Snowflake) Inc. cites the following footnote in Justice Douglas' opinion:

> In case of any lands in the reservation which were not part of the ancestral home of the Walapais and which had passed to the railroad under the 1866 Act, the railroad's title would antedate the creation of the reservation in 1883 and hence not be subject to the incumbrance of Indian title.[136]

In this case, the evidence shows that the lands within the 1882 Executive Order Reservation, including Land Management District 6, were "part of the ancestral home of the" Hopis when the conveyances were made in the 1860s. The Indian Claims Commission answered that issue.

The peculiarity of this case is that the reacquired lands situated within the boundaries of the 1882 Executive Order Reservation remained subject to the Hopi Tribe's aboriginal title from prior to July 27, 1866, to June 2, 1937. The conveyances and reacquisitions made during that period do not affect the priority of the Hopi Tribe's water rights as argued.

The United States cites the Wyoming Supreme Court's *Big Horn River Adjudication* decision as authority for the proposition that reacquired lands that return to the status of "reservation lands" retain the priority of the reservation's implied reserved water right. The Court held that:

> "Because all the reacquired lands … of the reservation are reservation lands, … the same reserved water rights apply. Thus, reacquired lands on both portions of the reservation are entitled to an 1868 priority date."[137]

The Court held that because the reacquired lands had again become part of the existing reservation, which was held to have a reserved water right with an 1868 priority, the reacquired lands were entitled to the same priority. The Court did not find it necessary to examine the transactional details of the reacquired lands. At a minimum, this holding supports the conclusion that the priorities of the Hopi Tribe's water rights for lands within the boundaries of the 1882 Executive Order

[136] 314 U.S. at 359 n.24.

Reservation are not affected by the conveyances as argued.

Conclusion of Law No. 24. The priorities of the Hopi Tribe's water rights for lands within the boundaries of the 1882 Executive Order Reservation, including Land Management District 6, are not affected by the conveyances of lands to private parties by the United States beginning in the 1860s because the lands remained subject to the Hopi Tribe's aboriginal title.

VIII. DOES CLAIM OR ISSUE PRECLUSION OR BOTH PRECLUDE ANY CLAIMS BY OR ON BEHALF OF THE HOPI TRIBE TO WATER RIGHTS MORE SENIOR TO THOSE HELD BY ANY OTHER CLAIMANT?

The Arizona Supreme Court has held that:

> Federal law dictates the preclusive effect of a federal judgment. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001) (noting that state courts cannot give federal judgments "merely whatever effect they would give their own judgments, but must accord them the effect that [the United States Supreme] Court prescribes"); *Heck v. Humphrey*, 512 U.S. 477, 488 n.9 (1994) ("State courts are bound to apply federal rules in determining the preclusive effect of federal-court decisions on issues of federal law.").[138]

The defense of claim preclusion - which formerly encompassed merger and bar and is often referred to as res judicata - "has three elements: (1) an identity of claims in the suit in which a judgment was entered and the current litigation, (2) a final judgment on the merits in the previous litigation, and (3) identity or privity between parties in the two suits."[139]

Issue preclusion - which formerly encompassed collateral and direct estoppel - "attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the

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[137] *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 114 (Wyo. 1988), *aff'd per curiam by equally div'd court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989). The Wind River Indian Reservation was established by treaty in 1868.

[138] *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 212 Ariz. 64, 69, 127 P.3d 882, 887 (2006), *cert. denied*, 549 U.S. 1156 (2007); *see Maricopa-Stanfield Irr. & Drainage Dist. v. Robertson*, 211 Ariz. 485, 491, 123 P.3d 1122, 1128 (2005), *cert. denied sub nom. Carranza v. Maricopa-Stanfield Irr. & Drainage Dist*., 547 U.S. 1163 (2006).

[139] 212 Ariz. at 69-70, 127 P.3d at 887-88 (citing *Blonder-Tongue Lab, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24 (1971)).The United States Supreme Court has stated that claim and issue preclusion "are collectively referred to as 'res judicata.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

determination is essential to the judgment."[140] A year earlier, the Arizona Supreme Court held that a "party asserting the bar must show that (1) the issue was litigated to a conclusion in a prior action, (2) the issue of fact or law was necessary to the prior judgment, and (3) the party against whom preclusion is raised was a party or privy to a party to the first case."[141]

The United States Supreme Court has held that:

> Under the doctrine of claim preclusion, a final judgment forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." (citation omitted). Issue preclusion, in contrast, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim. (citation omitted). By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," these two doctrines protect against "the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions."[142]

A. Assertion of Preclusive Effect by a Non-Party to the Prior Litigation

The Hopi Tribe and the United States argue that Catalyst Paper (Snowflake) Inc. cannot assert either claim or issue preclusion because the company was not a party to the Indian Claims Commission action, *Healing II*, or the partition cases and, second, is not in privity with a party in those matters.

"Ordinarily the application of claim preclusion requires 'mutuality' - both the party asserting the preclusive effect of a prior judgment and the party against whom preclusion is asserted must have been parties in the prior litigation."[143] Our highest Court has held that "mutuality has been for the most part abandoned in cases involving collateral estoppel [note: issue preclusion]" but "it has remained a

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[140] 212 Ariz. at 70, 127 P.3d at 888 (citing *Blonder-Tongue Lab, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323-24 (1971)).
[141] 211 Ariz. at 491-92, 123 P.3d at 1128-29 (citing *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980)).
[142] 553 U.S. at 892; *Montana v. United States*, 440 U.S. 147, 153-54 (1979) ("*Montana*").
[143] 212 Ariz. at 83, 127 P.3d at 901.

part of the doctrine of *res judicata* [note: claim preclusion]."[144] The United States concedes that under *Montana* "mutuality is not required for issue preclusion," but only when the party being precluded "had a full and fair opportunity to litigate the issue in the first case."[145]

This position agrees with the requirement of issue preclusion that "an issue of fact or law is actually litigated and determined by a valid and final judgment." For this reason, consent agreements and judgments ordinarily do not support issue preclusion because "none of the issues is actually litigated" in the prior law suit.[146]

In summary, mutuality is not required for issue preclusion if the Hopi Tribe actually litigated issues concerning its water rights or priorities before the Commission or the federal district court. Issue preclusion is supported if those issues were actually litigated and determined by a valid and final judgment.

Is mutuality required for claim preclusion? After holding that mutuality has remained a part of res judicata or claim preclusion, the United States Supreme Court carved the following exception in a case involving an Indian tribe and a request for additional water rights filed sixty years after the first action that resulted in the *Orr Ditch Decree*:

> Nevertheless, exceptions to the *res judicata* mutuality requirement have been found necessary, (citation omitted), and we believe that such an exception is required in this case.…
>
> [E]veryone involved in *Orr Ditch* contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to. … Nonparties such as the subsequent appropriators in this case have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties of that case. We agree with the Court of Appeals that under "these circumstances it would be manifestly unjust ... not

[144] *Nevada v. United States*, 463 U.S. 110, 143 (1983) ("*Nevada*").
[145] U. S. Resp. Brief in Support of its Mot. for Summ. J. at 30 (Dec. 20, 2011).
[146] *Arizona v. California*, 530 U.S. 392, 414 (2000) ("In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion.").

> to permit subsequent appropriators" to hold the Reservation to the claims it made in *Orr Ditch;* "[a]ny other conclusion would make it impossible ever finally to quantify a reserved water right."[147]

In the Gila River Adjudication, the Arizona Supreme Court applied this exception emphasizing the reliance of non-parties on the prior *Globe Equity Decree*:

> "[E]xceptions to the *res judicata* mutuality requirement have been found necessary...." (*Nevada* citation omitted). The Supreme Court established such an exception in *Nevada,* holding that the Orr Ditch litigation was "a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." (citation omitted). Because of the scope of the litigation, "[n]onparties [including] subsequent appropriators ... have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties to that case." (citation omitted). Under those circumstances, the Court recognized a limited exception to the requirement of mutuality for claim preclusion, enabling those later appropriators to assert the preclusive effect of the decree against parties to the decree.…
>
> [G]iven the long history of the [*Globe Equity*] Decree, it is clear that those not party to the Decree have in fact relied upon it in the same manner as the later appropriators in *Nevada.* With respect to the Gila River mainstem, the *Nevada* exception to mutuality applies and those who were not party to the Decree are entitled to assert its preclusive effects against parties to the Decree and their successors.[148]

The United States argues that the *Nevada* exception to mutuality or privity still requires adversity of interests between parties. The Special Master does not so interpret *Nevada*, but finds that reliance by non-parties on a prior judgment is the dispositive element rather than adversity of interest.

Non-parties such as Catalyst Paper (Snowflake) Inc. have relied "just as much on" the existence and effect of the prior judgments "in the development of" northern Arizona as have the Hopi Tribe, Navajo Nation, and the United States. Moreover, "any other conclusion would make it impossible ever finally to quantify" all water rights in the Little Colorado River Watershed. Those prior judgments have influenced the nature of claims to water rights in the Little Colorado River

[147] 463 U.S. at 143-44. The following year, the Court explained that in *Nevada* "we applied principles of res judicata against the United States as to one class of claimants who had not been parties to an earlier adjudication, (citation omitted), but we recognized that this result obtained in the unique context of 'a

Watershed and will influence the adjudication of water rights in the basin.

Finding of Fact No. 39. Catalyst Paper (Snowflake) Inc. was not a party in the Hopi Tribe's action before the Indian Claims Commission, *Healing II*, or the partition cases.

Conclusion of Law No. 25. Catalyst Paper (Snowflake) Inc. satisfies the *Nevada* exception of mutuality or privity to the doctrine of claim preclusion.

Conclusion of Law No. 26. Catalyst Paper (Snowflake) Inc. is not barred from asserting either claim or issue preclusion based on the Hopi Tribe's action before the Indian Claims Commission, *Healing II*, and the partition cases.

B. Preclusive Effect

The parties argued at length about the nature of relief sought by the Hopi Tribe before the Indian Claims Commission and the Commission's jurisdiction to consider claims for loss or diminishment of water rights. Catalyst Paper (Snowflake) Inc. argues that the Hopi Tribe sought compensation in Count 5 of its petition for the loss of "use" of tribal aboriginal lands, and that use included water sources. Hence, the count for deprivation or loss of "use" included loss of water rights.

The same relief was also petitioned in Counts 6, 7, and 8 (see Finding of Fact No. 10). However, the Commission noted that the Hopi Tribe "[i]n further explanation" of these counts had stated that Counts 5 through 8 were based on claims for the reasonable rental value of lands the United States had allowed Navajos to use prior to the taking of Hopi lands.[149] This explanation of Counts 5 through 8 erodes the contention that the counts for loss of use of lands clearly encompassed claims for lost water rights. The Hopi Tribe's petition did not expressly mention the loss or diminution of water rights.

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comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to.'" *United States v. Mendoza*, 464 U.S. 154, 163 n.8 (1984).

[148] 212 Ariz. at 83-84, 127 P.3d at 901-902.

[149] *Hopi Tribe and Navajo Tribe v. United States*, 31 Ind. Cl. Comm. 16, at 35-36.

Catalyst Paper (Snowflake) Inc. points to the decisions of the Commission in several cases that considered compensation for water rights claims. In those matters, the Indian plaintiffs expressly raised the loss or minimization of water rights. Their petitions and arguments were not silent concerning water. That is not the case with the Hopi Tribe's petition which was silent as to water.

Finding of Fact No. 40. The Hopi Tribe's petition before the Indian Claims Commission did not expressly seek compensation for the loss or infringement of water rights.

The Special Master does not find anything in the record of the Commission's decisions submitted to him showing that water rights and their priorities were actually litigated. The federal district court's decisions in the litigations of *Healing v Jones*, *Sekaquaptewa v. MacDonald*, and *Mayayesva v. Zah* do not show that the Hopi Tribe's water rights or their priorities were actually litigated and determined by a valid and final judgment in those extended cases.

As an observation, we have spent years, economic resources, judicial time, and intellectual capital addressing Indian water rights. The Indian Claims Commission may have considered water issues in certain cases, but the Special Master wonders if the Commission could have done what we are doing. The attributes of water rights must be known before the rights' economic worth can be appraised and value assessed. Indian water law was in its infancy. Adjudications were barely emerging as ways to resolve seminal water issues and conflicts. Perhaps water rights were purposefully left off the Commission's agenda.

The Indian Claims Commission determined the extent of the Hopi Tribe's aboriginal title to certain lands located inside and outside the 1882 Executive Order Reservation. The issue of aboriginal title concerning those lands issue was actually litigated and determined by a valid and final judgment.

Conclusion of Law No. 27. The Hopi Tribe is precluded from litigating claims of aboriginal title that were actually litigated and determined before the Indian Claims Commission.

Conclusion of Law No. 28. The Hopi Tribe's water rights and their priorities were not actually litigated and determined by a valid and final judgment in the Indian Claims Commission, *Healing II*, or the partition cases.

Conclusion of Law No. 29. The Hopi Tribe is not precluded from asserting a reserved water right in the Little Colorado River Adjudication.

Conclusion of Law No. 30. The Hopi Tribe is not precluded from asserting water rights senior to those held by any other claimant.

The Special Master has determined that the Hopi Tribe's aboriginal water rights were incidents of aboriginal or Indian title, and the extinguishment of the Hopi Tribe's aboriginal title, as determined by the Indian Claims Commission, terminated the Hopi Tribe's aboriginal water rights to those lands. While the Hopi Tribe is not barred by claim or issue preclusion from asserting a time immemorial priority, it will not prevail concerning the lands for which the Commission determined that aboriginal title had been extinguished.

IX. DOES ACCORD AND SATISFACTION PRECLUDE ANY CLAIMS BY OR ON BEHALF OF THE HOPI TRIBE TO WATER RIGHTS MORE SENIOR TO THOSE HELD BY ANY OTHER CLAIMANT?

Federal District Court Judge Susan R. Bolton, who presided in this adjudication when she was a state superior court judge, explained accord and satisfaction as follows:

> Accord and satisfaction is a method for discharging a cause of action, whereby the parties enter into a new agreement (accord), and the new agreement is performed (satisfaction). *Green v. Huber*, 66 Ariz. 116, 119, 184 P.2d 662, 664 (1947). The elements of an accord and satisfaction are as follows: (1) A proper subject matter; (2) competent parties; (3) an assent or meeting of the minds of the parties; and (4) a consideration. *Vance v. Hammer*, 105 Ariz. 317, 320, 464 P.2d 340, 343 (1970). The claim that is discharged is defined by the terms of the accord.[150]

[150] *Daly v. Royal Ins. Co. of America*, 2002 WL 1768887 at 2 (D. Ariz. 2002, not reported in F. Supp. 2d). *See Flagel v. Southwest Clinical Physiatrists, P.C.*, 157 Ariz. 196, 200, 755 P.2d 1184, 1188 (App. 1988); *Solar-West, Inc. v. Falk*, 141 Ariz. 414, 419-20, 687 P.2d 939, 944-45 (App. 1984); and *Rossi v. Stewart*, 90 Ariz. 207, 210, 367 P.2d 242, 244 (1961).

The issue arises from the settlement of the Hopi Tribe's action before the Indian Claims Commission for a payment of $5 million. Did the settlement agreement and payment constitute a contract of accord and satisfaction, and if so, what is its preclusive effect?

As *Daly* held, the "claim that is discharged is defined by the terms of the accord." The terms of the agreement are examined to determine if there was the requisite "meeting of the minds" for a valid accord and satisfaction.

The following case history is set forth in the Commission's Findings of Fact and Conclusions of Law on Compromise Settlement.[151] On August 25, 1976, the Hopi Tribe submitted an offer to the United States to settle the tribal claims for $5 million. On October 5, 1976, the United States accepted the offer subject to certain conditions. On November 11, 1976, representatives of the Hopi Tribe and the United States executed a Stipulation for Entry of Final Judgment. On December 2, 1976, after considering all the evidence presented at a hearing, the Commission issued its Findings of Fact and Conclusions of Law on Compromise Settlement and the Final Award regarding the settlement of the Hopi Tribe's action.

The Stipulation for Entry of Final Judgment stated in the second preamble that "the Hopi Tribe claims aboriginal possession and Indian title to the lands described in its Petition before" the Commission "as reduced to conform with Petitioner's proof at the time of trial."[152] This preamble expressly describes the scope of the Hopi Tribe's petition, namely, an action for loss of aboriginal possession and Indian title to lands. The preamble defines the scope of the litigation.

Finding of Fact No. 41. The Stipulation for Entry of Final Judgment dated November 11, 1976, does not mention the settlement or resolution of any claims involving water uses or rights.

Finding of Fact No. 42. The Final Award entered by the Indian Claims Commission on

[151] *Hopi Tribe v. United States*, 39 Ind. Cl. Comm. 204, at 208-12. The Final Award is in 39 Ind. Cl. Comm. 223 (1976).

December 2, 1976, approving the Stipulation for Entry of Final Judgment, does not mention the settlement or resolution of claims involving water rights or payment of compensation for their loss.

Conclusion of Law No. 31. The settlement agreement was an accord and satisfaction of the Hopi Tribe's claim for loss of aboriginal title to lands as determined by the Indian Claims Commission. The terms of the settlement did not expressly include or encompass water rights or their priorities. Accordingly, it was not a contract of accord and satisfaction that applied to the Hopi Tribe's claim for loss of aboriginal water rights.

Accord and satisfaction does not preclude the Hopi Tribe from claiming a reserved water right or a right more senior to those held by another claimant. However, because the Special Master has determined that the Hopi Tribe's aboriginal water rights were incidents of its aboriginal title, and the extinguishment of the Hopi Tribe's aboriginal title as determined by the Commission terminated the Tribe's aboriginal water rights existing on those lands, while the Hopi Tribe can claim an aboriginal priority, it will not prevail concerning the lands for which the Commission determined that aboriginal or Indian title had been extinguished.

X. MAY THE HOPI TRIBE ASSERT A PRIORITY THAT IS SENIOR TO THE NAVAJO NATION FOR WATER RESOURCES THAT ARE SHARED BY BOTH TRIBES IN LIGHT OF THE PROCESS FOR THE ALLOCATION OF RESOURCES ESTABLISHED BY THE ACT OF JULY 22, 1958, PUB. L. NO. 85-547, 72 STAT. 403, AND THE ACT OF DECEMBER 22, 1974, PUB. L. NO. 93-531, 88 STAT. 1712, AS AMENDED?

The Navajo Nation proposed this issue for briefing.[153] The Nation makes a twofold argument, first, that as a matter of federal law "with consideration" of the two tribes' "long common history in the federal system and the actions of Congress, the President and the courts in providing for the determination of the Tribes' rights in their reservations" the answer to this question is No, and second, as "an ancillary matter," the allocation of shared water resources must be done "on the basis of

[152] 39 Ind. Cl. Comm. 204, at 209.

equitable apportionment."[154]

The Hopi Tribe and the Navajo Nation agree that a date of priority for tribal water rights must be adjudicated. This position is in harmony with both the statutes governing this adjudication, which require determination of priority, and the judicial doctrine of equitable apportionment.

A.R.S. § 45-254(C)(8) requires that a statement of claimant "shall include" the "time of the initiation of the right and the date when water was first used for beneficial purposes for the various amounts and times claimed." A.R.S. § 45-257(B)(1) mandates that the court "shall … [d]etermine the … priority date" of a water right.

Concerning equitable apportionment, in an opinion that led to a decree involving the states of Nebraska, Wyoming, and Colorado based on equitable considerations, the United States Supreme Court held that:

> "Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle."[155]

Conclusion of Law No. 32. The priority of the water rights claimed by the Hopi Tribe must be determined in this adjudication regardless whether a standard of equitable apportionment is implemented to adjudicate those rights.

Concerning its second argument that the allocation of shared water resources must be done using the standard of equitable apportionment, the Navajo Nation concedes that the request to adopt this standard is "not necessarily encompassed by the Special Master's questions or the Court's order of reference," but the request is "an effort to advance the litigation."[156] The Special Master agrees that adoption of an equitable apportionment standard exceeds the Court's order of reference and the scope of the issues being briefed, but these are only two elements of the answer to the question.

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[153] *See* Stmt. of Issues of the Navajo Nation at 8 (no. 1c) (July 7, 2008).
[154] Memo. In Support of Mot. of the Navajo Nation for Summ. J. on Issue G at 3-4 and 2 (Mar. 26, 2010).

Issue G cannot be resolved by summary judgment because there are genuine disputes about material facts, and the existing record is not adequately developed to support summary relief.

First, the Hopi Tribe points to the "number of disputed facts … [that] … demonstrate that Navajo has failed to meet its burden to support a summary judgment motion."[157] The disputed facts concern the meaning and effect of the 1958 and 1974 Acts, prior congressional and executive actions, and court decisions.

Second, this case is limited to the priority of the Hopi Tribe's claimed water rights. In order to answer this issue, there must be an adequate record concerning the priority of the Navajo Nation's water rights to the shared resources. The lack of an adequate record precludes the resolution of the issue by summary judgment.

The Special Master needs to be concerned with whether the record is adequately developed to support summary judgment. Other matters meriting further factual development and legal analysis, based on pleadings filed in this briefing, are the hydrologic and geographic extent of the shared water resources and the possible existence of other claimants using the shared resources.

Third, the Navajo Nation concedes that further fact finding and briefing are needed to resolve Issue G. In its summary judgment motion, the Navajo Nation states that "the Special Master should determine that the shared water supplies between the two Tribes should be equitably apportioned after further legal briefing and fact-finding", and "the Special Master should determine as part of the present proceeding that the court should equitably apportion the available water shared by the two tribal sovereigns after the necessary further briefing and fact-finding".[158] In reply, the Navajo Nation states that "[f]urther briefing on the proper implementation of [the equitable apportionment] standard

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[155] *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).
[156] Navajo Nation Resp. to Hopi Tribe's Mot. for Summ. J. and U.S. Mot. for Summ. J. at 2 (Dec. 20, 2011).
[157] Hopi Tribe Memo. in Resp. to Navajo Nation's Mot. for Summ. J. on Issue G at 4-8 (Dec. 20, 2011).
[158] Mot. of the Navajo Nation for Summ. J. on Issue G at 7 and 17.

in the circumstances of this case is appropriate."[159]

Four, the United States, the trustee of both tribes, states that the equitable apportionment issue "presents complicated questions regarding tribal sovereignty, the role of the federal trustee, and how such federal law concepts intersect with state water law under the McCarran Amendment;" an "entire body of federal law exists regarding each one of these issues."[160] These legal issues have not been fully or even cursorily briefed in this case.

The United States avows that it "is not likely that the priority date system provides an effective method to allocate these two exclusively tribal resources [referring to the N-Aquifer and the Washes]," and if the two tribes possess equal priorities to the shared resources, "distribution of the resources must proceed under another standard.[161] The Hopi Tribe disagrees with this view and argues that if the Court forgoes the application of reserved rights law, the Court "must conduct an intensive fact-finding review to determine what approach should be applied to the apportionment of the waters claimed by the two tribes in light of the 1958 and 1974 Acts."[162] The need for a fuller record reiterates itself.

Five, it is not clear that the Court has the jurisdictional power to adopt and implement an equitable apportionment standard even should it wish to do so. The jurisdiction of the Court to do so was amply discussed at oral argument. The Navajo Nation and the United States offered differing views. Noteworthy, Arizona's general stream adjudication statutes do not explicitly provide for the use of this standard, and counsel could not cite precedent for its adoption found in the decisions of other Western adjudication courts.[163]

Arguably, the doctrine might not apply in this proceeding. The United States Supreme Court

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[159] Navajo Nation Reply Memo. at 26 (Feb. 15, 2012).
[160] U. S. Resp. Brief in Support of its Mot. for Summ. J. at 35.
[161] *Id*.
[162] Hopi Tribe Memo. in Resp. to Navajo Nation's Mot. for Summ. J. on Issue G at 4.

considered the issue in the 1963 *Arizona v. California* opinion. Answering Arizona's argument that equitable apportionment should be used to allocate the water between the Indian tribes and the other claimants in the State of Arizona, the Supreme Court held as follows:

> The doctrine of equitable apportionment is a method of resolving water disputes between States. It was created by this Court in the exercise of its original jurisdiction over controversies in which States are parties. An Indian Reservation is not a State. And while Congress has sometimes left Indian Reservations considerable power to manage their own affairs, we are not convinced by Arizona's argument that each reservation is so much like a State that its rights to water should be determined by the doctrine of equitable apportionment. Moreover, even were we to treat an Indian Reservation like a State, equitable apportionment would still not control, since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations.[164]

On the other hand, the federal district court partitioned land and allocated certain water sources between the Hopi Tribe and Navajo Nation "on the basis of fairness and equity."[165]

Issue G cannot be answered by summary judgment. There are genuine disputes about material facts, and the record is not adequately developed to support summary judgment. This question can be briefed when the omissions are remedied. Nothing said in this report should be construed to be an indication of how the Special Master views the use of equitable apportionment in this adjudication.

The Special Master recommends that the Court deny the Navajo Nation's Motion for Summary Judgment on Issue G. Although a dispositive determination of this issue is not made, the Special Master submits this report so the Court has the opportunity to consider ways to proceed with this issue.

XI. RECOMMENDATIONS

The Special Master recommends that the Court:

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[163] The Navajo Nation cites *United States v. Washington*, 573 F.3d 701 (9th Cir. 2009), a case of an intertribal dispute over a shared fishery. The Ninth Circuit Court of Appeals affirmed the district court's dismissal of the lawsuit on procedural pleading grounds. No decision implementing equitable apportionment was entered.

[164] *Arizona v. California*, 373 U.S. 546, 597 (1963).

[165] *See* 25 U.S.C.A. § 640d-7(b); 816 F. Supp. at 1423 ("equitably distributing water sources" and "Partition … is an equitable result.").

1. Approve and adopt these findings of fact, conclusions of law, and recommendations.

2. Grant and deny to the extent consistent with this report the following five motions:

A. Hopi Tribe's Motion for Summary Judgment on Hopi Water Priorities Excluding Spanish Law Rights (dated Mar. 26, 2010),

B. Hopi Tribe's Motion for Summary Judgment on Hopi Water Rights Under the Treaty of Guadalupe Hidalgo (dated Apr. 27, 2012),

C. Motion of the Navajo Nation for Summary Judgment on Issue G (dated Mar. 26, 2010),

D. United States' Motion for Summary Judgment that the Hopi Tribe Holds Water Rights with Priority Date Time Immemorial (dated Mar. 26, 2010), and

E. Catalyst Paper (Snowflake) Inc.'s Motion for Partial Summary Judgment on Issues Designated for Briefing by the Case Initiation Order and Designation of Issues for Briefing (Sept. 8, 2008) (dated Mar. 26, 2010).

3. Direct ADWR to complete the investigations of the claimed water rights for the Aja, Clear Creek, Drye, and Hart Ranches. And,

4. Direct ADWR to implement the determinations in this report adopted by the Court.

XII. AVAILABILITY OF THE REPORT

This report and a transcript of the oral argument held on October 24, 2012, will be filed with the Clerk of the Superior Court of Apache County. A copy of the report will be distributed to all the persons listed on the Court approved mailing lists for both the Little Colorado River Adjudication and this contested case dated January 10, 2013, as updated. The lists are posted on the internet at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/mailingLists.asp.

All papers and orders are available at the Clerk of the Apache County Superior Court, 70 West

3rd South, St. Johns, Arizona, under docket Civil No. 6417-201; contact Deputy Clerk Elisa Y. Craig at 1-928-337-7671. Ms. Debbie Croci reported the oral argument. Electronic copies of all orders are posted on the Special Master's website on the page titled *Little Colorado River Adjudication* under the heading In re Hopi Tribe Priority, Contested Case No. 6417-201, at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/.

XIII. TIME TO FILE OBJECTIONS TO THE REPORT

At oral argument, the Special Master invited parties to submit briefs concerning the length of the period for filing objections to the Special Master's report should a report be filed with the Court. A.R.S. § 45-257(A)(2), which prompted the discussion, states that the "master shall:"

> For all determinations, recommendations, findings of fact or conclusions of law issued, prepare and file with the court a report in accordance with rule 53(g) of the Arizona rules of civil procedure, which shall contain those determinations, recommendations, findings of fact and conclusions of law. Each claimant may file written objections with the court to any rule 53(g) report within the later of sixty days after the report is filed with the court or within sixty days after the effective date of this amendment to this section. If the report covers an entire subwatershed or federal reservation, each claimant may file with the court written objections to the report within one hundred eighty days of the date on which the report was filed with the court.

The question is does this report require a 60-day or a 180-day objection period. The Hopi Tribe and the Navajo Nation submitted helpful briefs.

First, the Special Master believes he has answered the question the Court referred of "whether the claims to water rights asserted by, or on behalf of the Hopi Tribe in this adjudication have a priority of 'time immemorial' or are otherwise senior to the claims of all other claimants." The Special Master agrees with the Navajo Nation that the 180-day objection period should not apply to decisions that do not fully answer a referred question.

Second, this report addresses a specific question referred by the Court to the Special Master. The report does not arise from a contested case organized to resolve objections generated by a hydrographic survey report ("HSR").

Third, the report answers the referred question and branch issues limited to one attribute of a water right, namely, priority. All the other attributes of the Hopi Tribe's claimed water rights await adjudication. The scope of this report is narrow.

Four, the 60-day objection period was added to A.R.S. § 45-257(A)(2), effective March 17, 1995, when the following language was enacted:

> Each claimant may file written objections with the court to any rule 53(g) report within the later of sixty days after the report is filed with the court or within sixty days after the effective date of this amendment to this section. If the report covers an entire subwatershed or federal reservation …[166]

By March, 1995, ADWR had published two final HSRs (San Pedro River Watershed and Silver Creek Watershed) and one preliminary HSR (Upper Salt River Watershed) as well as several technical reports covering limited specific subjects. Special Master John E. Thorson was completing the fifth year of his appointment; the extent and scope of his decisions was known.

It is reasonable to conclude that when A.R.S. § 45-257(A)(2) was amended in 1995, the Legislature knew the distinction between a large watershed-wide and a smaller scale technical report, and that the Special Master would issue reports of varying scopes of determinations. It follows that the Legislature intended to provide a shorter objection period than 180 days for reports that address limited discrete issues, hence, the addition of a 60-day objection period.

For the foregoing reasons, the Special Master finds that the 60-day period specified in A.R.S. § 45-257(A)(2) for filing objections to a Rule 53(g) report applies to this report.

The Court's March 19, 2008, order of reference stated that the Special Master "may determine the time periods to file objections, comments, and responsive memoranda to his report."[167] The Special

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[166] 1995 Ariz. Sess. Laws, ch. 9, § 20 (1st Reg. Sess.). A copy of the 1995 legislation is found in Appendix A of *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 219-240, 972 P.2d 179, 203-224 (1999). The cited language was not affected by the Supreme Court's opinion.

[167] Order at 2. The Special Master suggested this provision to the Court in order to allow parties more than the ten day period to file objections provided in Rule 53(h)(1).

Master will provide a period of sixty-seven (67) days to file objections and a subsequent period of forty-six (46) days to file responses to objections.

Any claimant in the Little Colorado River Adjudication may file a written objection to this report on or before **Monday, July 1, 2013**. Responses to objections must be filed on or before **Friday, August 16, 2013.** All objections and responses must be filed with the Clerk of the Apache County Superior Court, P. O. Box 365, St. Johns, Arizona 85936.

A copy of all papers filed with objections and responses shall be served on all persons listed on the Court approved mailing list for the contested case In re Hopi Tribe Priority, No. CV 6417-201, dated January 10, 2013, as updated. The list is posted on the Special Master's website at http://www.superiorcourt.maricopa.gov/SuperiorCourt/Adjudications/mailingLists.asp.

XIV. MOTION FOR ADOPTION OF THE REPORT

The Special Master moves the Court under A.R.S. § 45-257 and Rule 53(h) to adopt the findings of fact, conclusions of law, and recommendations contained in this report. A proposed order will be lodged as the Court may direct upon consideration of the report.

XV. NOTICE OF SUBSEQUENT PROCEEDINGS

Rule 53(h)(5) states that the Court "may adopt or affirm, modify, wholly or partly reject or reverse, or resubmit to the master with instructions." The Special Master's motion to approve the report and any objections and comments will be taken up as ordered by the Court.

Submitted this 24th day of April, 2013.

/s/ George A. Schade, Jr.
GEORGE A. SCHADE, JR.
Special Master

On April 24, 2013, the report was sent by FedEx to the Clerk of the Apache County Superior Court for filing and distributing a copy to the persons who appear on the Court approved mailing lists for the Little Colorado River Adjudication, No. CV 6417, and In re Hopi Tribe Priority, No. CV 6417-201, dated January 10, 2013. On the same date, the Special Master distributed an electronic copy of the report.

/s/ Barbara K. Brown
Barbara K. Brown