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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	CIVIL NO. 6417-201 **NAVAJO NATION'S OBJECTIONS TO THE SPECIAL MASTER'S REPORT**

Contested Case Name: *In re Hopi Tribe Priority.*
HSR Involved: None.
Descriptive Summary: The Navajo Nation files objections to the Special Master's Report (Apr. 24, 2013).
Number of Pages: 37
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The Navajo Nation files these objections to the *Report of the Special Master; Motion for Adoption of Report; and Notice for Filing Objections to the Report* (Apr. 24, 2013) ("Special Master's Report" or "Report"). In the question referred to the Special Master by the Superior Court, the Superior Court put the issues of the Hopi Tribe's relative priority over other claimants squarely before the Special Master when he asked "whether the [Hopi Tribe's water rights] claims . . . have a priority of 'time immemorial' or are otherwise senior to the claims of all other claimants."[1] *Minute Entry* at 2 (Mar. 19, 2008) ("March 19 Minute Entry"). The Special Master chose, however, to organize the case around seven sub-issues rather than answer the referred question directly, and only addressed those seven sub-issues in his 76-page Report. In so doing, the Special Master made two fundamental errors regarding the seven sub-issues and left unresolved numerous other important issues.

The Special Master erred when he concluded that (1) the Hopi Tribe cannot possess a time immemorial water right in areas where it no longer maintains aboriginal title, even though the Hopi Tribe may have exercised continuous and ancient uses of water in those areas, and (2) the Hopi Tribe's reserved water rights at Moenkopi are only entitled to a 1934 priority date, even though the lands in question were withdrawn from the public domain for Indian purposes in 1900. *See* Exec. Order of Jan. 8, 1900 ("1900 Executive Order"). Like the Hopi Tribe, the Navajo Nation has continuous and ancient water uses on its Reservation lands to which it either lost or never had aboriginal title, and most of the lands covered by the 1900 Executive Order are a part of the Navajo Reservation. As a result, correction of these errors is in the Navajo Nation's direct interest.

[1] This question is referenced herein as the "referred question."

The Navajo Nation also asserts that the heart of the referred question – and the dispute between the Navajo Nation and the Hopi Tribe (collectively "Tribes") – is the relative priority of the Hopi Tribe's massive claim for senior future rights to use the scarce water resources shared by the two Tribes. Although the Navajo Nation argued before the Special Master that issues of relative priority were central to the referred question, the Special Master never considered the relative rights of the two Tribes nor did the Master provide any explanation for his rejection of the Navajo Nation's understanding of the referred question. It is important that the Court confirm that the significant issues of relative priority have not been resolved and remain subject to future determination by the Court.

The Court should correct the Special Master's errors by holding that the Hopi Tribe's time immemorial priority is not, as a matter of law, defined by the status of the Hopi Tribe's aboriginal title to lands and that the reserved rights for the Moenkopi lands have a priority date at least as early as 1900. The Court should further declare that the Special Master's Report does not determine issues of relative priority between the Tribes, including relative priorities for future or expanded uses.

I. BACKGROUND

The Special Master's Report contains an extremely brief procedural history of this subcase. It does not discuss the Tribes' unique history in the Basin, does not consider the circumstances that led Judge Ballinger to refer the case to the Special Master in the first instance, does not analyze the referred question itself and its precise meaning, and gives no attention to the difficult underlying issues implicated by this subcase. *See* Special Master's Report at 4-10. Thus, the Special Master's Report lacks the necessary background to view this subcase in the proper overall context.

The extensive briefing filed by the Navajo Nation before the Special Master provides a more comprehensive history of the two Tribes in the LCR Basin and a more complete procedural history. *See generally Navajo Nation's Statement of Undisputed Facts* (Mar. 26, 2010) ("Navajo Nation's Facts"); *Memorandum in Support of the Motion of the Navajo Nation for Summary Judgment on Issue G* (Mar. 26, 2010) ("Navajo Nation's Brief"); *Response of the Navajo Nation to the Hopi Tribe's and United States' Statements of Fact* (Dec. 20, 2011) ("Navajo Nation's Responsive Facts"); *Navajo Nation's Response to the Hopi Tribe's Motion for Summary Judgment on Hopi Water Rights Priorities Excluding Spanish Law Rights, and United States' Motion for Summary Judgment that the Hopi Tribe Holds Water Rights with Priority Date of Time Immemorial* (Dec. 20, 2011) ("Navajo Nation's Response"); *Navajo Nation's Reply Memorandum* (Feb. 15, 2012); *Navajo Nation's Response to Hopi Tribe's Motion in Limine* (Aug. 27, 2012) ("Response to Motion in Limine"). It is important to note at the outset that the status of the Hopi Tribe and the Navajo Nation as independent sovereigns in the federal system with a unique shared history, as well as the Tribes' competing claims to the sources of water which only they share, make this case sui generis. *E.g.*, Navajo Nation's Brief at 3-4. Both Tribes have been present in the LCR Basin, interacting with each other and using the Basin's resources, since long before the United States took command of the Southwest. *See* Navajo Nation's Responsive Facts at Part III. Sometimes such interactions were amicable, and sometimes they were adverse. Following the imposition of the United States' control over modern-day Arizona, competition between the Tribes for land and resources in the Basin increased, and the Tribes have now been involved in legal disputes over various reservation lands and resources for more than a century. *See generally* Navajo Nation's Facts.

The Hopi Reservation and portions of the Navajo Reservation are comprised of lands set aside in the same two organic documents. *See* Act of June 14, 1934, 48 Stat. 960 ("1934 Boundary Act" codifying lands into the "1934 Act Reservation");[2] Exec. Order of Dec. 16, 1882 ("1882 Executive Order" creating the "1882 Reservation"). Each document contains ambiguous language granting undefined rights to both Tribes. The resulting disputes between the Tribes over these lands have necessitated extensive federal involvement, as Congress has sought to bring an end to the conflicts through the passage of several settlement acts, authorizing both mediation and litigation, and as a result, the Tribes have spent the last fifty years in litigation seeking to determine their respective rights to their Reservation lands. *See, e.g.,* 25 U.S.C. §§ 640d to 640d-31("1974 Settlement Act"); Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403 ("1958 Settlement Act"); *Healing v. Jones*, 210 F. Supp. 125, 192 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (litigation to determine rights to the 1882 Reservation, pursuant to the 1958 Settlement Act); *Hopi-Navajo Land Dispute, Public Law 93-531, Mediator's Report and Recommendations*, Vol. II (mediator's report, part of further litigation to determine rights to the 1882 Reservation, pursuant to the 1974 Settlement Act); *Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978) (further litigation to determine rights to the 1882 Reservation, pursuant to the 1974 Settlement Act); *Masayesva v. Zah*, 65 F.3d 1445 (9th Cir. 1995) (litigation to determine rights to the 1934 Act Reservation, pursuant to the 1974 Settlement Act); *see also* Navajo Nation's Facts ¶¶ 21-71.

[2] The 1934 Boundary Act codified into one reservation a number of existing executive order reservations, including the 1900 Executive Order reservation. For the sake of simplicity, the Navajo Nation refers here to the area within the boundary established by the 1934 Boundary Act as the 1934 Act Reservation, even though most of the land was reserved prior to 1934.

Because both Reservations were acknowledged by acts of the federal government recognizing or otherwise authorizing the interests of both Tribes in the lands subject to those federal actions, the Navajo Nation asserts that the referred question – a question of the relative water rights of the Tribes – cannot be considered outside of the context of this shared history. Moreover, for many of the water sources in the LCR Basin, such as the N Aquifer and the washes that traverse Hopi and Navajo lands, the two Tribes are the most significant users, and the only substantial dispute regarding rights to such water sources is the determination of the two Tribes' relative interests.

In organizing the subcase to address the Court's referred question, and at the suggestion of the parties, the Special Master asked the parties to "submit comments or specific issues that will assist to resolve the question referred to the Special Master." *Order Allowing Comments and Proposed Issues on the Question Referred to the Special Master* at 2 (June 5, 2008) ("Order Allowing Comments"). One of the Hopi Tribe's suggested issues asked "whether 'the Navajo Nation or any other party hold water rights with a priority date equal or senior to the rights of the Hopi Tribe?'" *Case Initiation Order and Designation of Issues for Briefing* at 2 (Sept. 8, 2008) ("Case Initiation Order"). The Master did not adopt this proposal, not because it was irrelevant, but rather because it flipped the question, looking at relative priorities from the Navajo Nation's standpoint and not the Hopi Tribe's. *Id.* (refusing to designate the issue for briefing because it "turns around the question referred to the Special Master which concerns Hopi Tribe priorities"). Ultimately, the Special Master adopted a list of seven issues to be addressed in this contested case. *Id.* at 3-4. The Case Initiation Order did not indicate whether the Special Master believed that these seven issues comprised the entirety of the referred question, such that answering these issues would necessarily answer the referred question. Indeed, the Case Initiation Order implied

otherwise, titling them "Initial Issues." *Id.* at 3. Oral argument on all the summary judgment motions was held on October 24, 2012, and the Special Master issued his final Report on April 24, 2013. The Report indicates the Special Master's belief that "he has answered the question the Court referred." Special Master's Report at 74.

II. THE SPECIAL MASTER MADE TWO FUNDAMENTAL ERRORS

Rather than directly answer the referred question, the Special Master instead sought to determine priority dates for the unadjudicated and, therefore, hypothetical water rights of the Hopi Tribe. The Master did so by answering the seven issues that he had previously adopted to "assist to resolve the question referred to the Special Master." Order Allowing Comments at 2; *accord* Special Master's Report at 4 (noting that the Report "addresses the seven issues the Special Master designated for briefing"). The Special Master made two fundamental errors in answering the seven issues: first, the Master inappropriately required aboriginal title in order to establish a water right with a time immemorial priority, never considering that historic water usage can also establish such a right, and second, the Master incorrectly determined that the withdrawal of land by the 1900 Executive Order did not reserve water for the Indians living on those lands.[3]

A. THE SPECIAL MASTER INAPPROPRIATELY EQUATED A TIME IMMEMORIAL PRIORITY WITH ABORIGINAL TITLE.

The Special Master's Report holds that the Hopi Tribe possesses a time immemorial priority only for water rights on land management district 6 ("District 6"), but not for any other portion of the Hopi Reservation. Special Master's Report at 4. The Special Master arrived at

[3] In addition to these two fundamental errors contained within the explicit text of the Report, the Special Master also avoided all of the difficult issues of relative priority implicated by both the referred question and the seven designated issues. *See infra* Part III.

this holding by taking a simplistic approach to a very complex set of facts. Essentially, the Special Master determined that aboriginal title for all but District 6 was extinguished in the Hopi Tribe's Indian Claims Commission ("ICC") case, that aboriginal water rights are subsumed within aboriginal title, and that only aboriginal water rights enjoy a time immemorial priority. *See id.* at 4, 12-27. Through this formulaic approach, the Special Master ultimately concluded that aboriginal title to land is required to recognize a time immemorial priority date for water rights. However, the Special Master should have considered the extensive tribal histories and facts presented in this subcase to determine whether valid claims exist for water rights with a time immemorial priority separate from aboriginal title to land.

The Special Master concluded as a matter of law that aboriginal title encompasses aboriginal water rights, so when aboriginal title is extinguished, aboriginal water rights are necessarily extinguished as well. *Id.* at 24-27. The Special Master assumed without explanation that only aboriginal water rights, that is to say rights associated with existing aboriginal title, can have a priority of time immemorial. *See id.* at 19. The Special Master never considered whether other legal principles or an Indian tribe's history or facts can support water rights with a time immemorial priority even in the absence of aboriginal title. The Special Master cited cases involving aboriginal hunting and fishing rights on off-reservation lands, but those cases do not address the question presented here which requires a different analysis. No court, in fact, has decided that a tribe that has continuously occupied and used water on lands since time immemorial – lands originally excluded from the reservation but later added because of continued tribal occupancy and use – should not receive a time immemorial water right priority. Nor has any court expressly held that a tribe cannot hold water rights with a time immemorial priority that exist separate and apart from aboriginal title. Indeed, contrary to the Special

Master's assumption, when the historical record is taken into account and the principles of federal Indian law are applied, water rights with a time immemorial priority can exist independent of aboriginal title.

Indian tribes possess a unique status under federal law, and each tribe possesses a unique history, so the determination of tribal rights requires a careful consideration of the facts and circumstances on a case-by-case basis. Indeed, "[u]nusual, ironic and paradoxical situations are more the rule than the exception where federal Indian law is concerned," *United States v. Johnson*, 637 F.2d 1224, 1244 n.31 (9th Cir. 1980), *abrogation on other grounds recognized by United States v. Rivera-Alonzo*, 584 F.3d 829, 833 (9th Cir. 2009), and "'[f]ederal Indian law is a subject that cannot be understood if the historical dimension of existing law is ignored.'" *Sac & Fox Tribe of Miss. in Iowa v. Licklider*, 576 F.2d 145, 147 (8th Cir. 1978) (quoting *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 686 (8th Cir. 1973)). To determine the water rights associated with an executive order reservation, for example, courts must "consider the document and circumstances surrounding its creation, and the history of the Indians for whom it was created." *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir. 1981). If any "plausible ambiguity" exists in the historical record, such "ambiguities are to be resolved in [the Indian tribe's] favor," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999), so a judicial finding with respect to an Indian tribe in one context may not apply to another tribe in a different context with a different history. *See, e.g., id.* at 201-02 (similar language in two treaties for different tribes were interpreted differently based on historical record, context of negotiations, purposes of treaties, and tribal understanding); *Confederated Salish & Kootenai Tribes v. Namen*, 380 F. Supp. 452, 462 (D. Mont. 1974) ("In the complex, and sometimes uncertain, area of Indian law, care must be exercised in attempting to apply

language used in one factual situation in a totally different context."), *aff'd*, 534 F.2d 1376 (9th Cir. 1976). This approach, based on the fiduciary relationship between the government and Indian tribes, "is equally applicable to the federal government's actions with regard to water for Indian reservations." *In re General Adjudication of All Rights to Use Water in the Gila River System & Source* (*Gila V*), 35 P.3d 68, 74 (Ariz. 2001); *see Winters v. United States*, 207 U.S. 564, 576 (1908) ("ambiguities occurring will be resolved from the standpoint of the Indians").

Here, the Special Master recited portions of the historical record to conclude that the Hopi Tribe retained water rights with a time immemorial priority in District 6, Special Master's Report at 12-19,[4] but largely ignored that record in determining that no such rights exist elsewhere. The Special Master simply concluded as a matter of law that "[a]boriginal water rights are incidents of aboriginal title," *id.* at 26, so "[t]he extinguishment of the Hopi Tribe's aboriginal title terminated its aboriginal water rights existing on those lands." *Id.* at 26-27. The Special Master pointed to the decisions of the ICC finding that the Hopi Tribe's aboriginal title outside of District 6 had been extinguished, *id.* at 19-24, and then relied upon case law concerning aboriginal hunting and fishing rights to find that the Hopi Tribe's aboriginal water rights were also extinguished. *Id.* at 24-27 & nn.43-45, 48. However, the Special Master never examined whether a time immemorial priority date could exist in areas where the Hopi Tribe's aboriginal title had been extinguished, and the inherent complexities involved in federal Indian law cases counsel against the Special Master's approach. For example, in *United States v. Minnesota* (*Minnesota*), a case relied on by the Special Master, *see* Special Master's Report at 25-26, the court explained that even though the extinguishment of aboriginal title also

[4] While the Special Master held that the Hopi Tribe retained aboriginal water rights in District 6, the Master never made any findings regarding what specific water uses of the Hopi Tribe are aboriginal. *See infra* Part III.B.

extinguished aboriginal hunting and fishing rights, this did "not necessarily preclude the possibility that similar rights" still existed. 466 F. Supp. 1382, 1386 (D. Minn. 1979), *aff'd sub nom. Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir. 1980). The court, in fact, found that it was still required to "examine the prior history, surrounding circumstances, and subsequent construction by the parties to determine whether there was an understanding, not reduced to writing, that the [tribal] members could continue permanently to hunt, fish, trap, and gather wild rice in the ceded areas." *Id.* The Special Master, however, never considered whether time immemorial water rights may still exist by implication. *See* Special Master's Report at 25 (citing *Minnesota* and then noting that no treaty or other express agreement operated to "reserve aboriginal water rights").

The Special Master relied on several court opinions involving aboriginal hunting and fishing rights, Special Master's Report at 25-26 & nn.43-45, 48 (citing *Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449 (7th Cir. 1998); *W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200 (9th Cir. 1991); *Minnesota*, 466 F. Supp. 1382; *In re Wilson*, 634 P.2d 363 (Cal. 1981)), to conclude that the Hopi Tribe's aboriginal rights had been lost. However, each of those cases is based on unique facts and none addresses the question of continued tribal use of water in an area where a tribe has lost aboriginal title. In *Thompson*, an Indian tribe asserted aboriginal fishing rights in several off-reservation lakes and rivers. 161 F.3d at 462. In *Molini*, an Indian tribe claimed aboriginal hunting and fishing rights in an off-reservation area that was encroached upon by non-Indians and otherwise disposed of by the United States. 951 F.2d at 201. In *Minnesota*, an Indian tribe sought recognition of its aboriginal hunting, fishing, trapping, and wild ricing rights on 2.6 million acres of off-reservation land. 466 F. Supp. at 1383. In *Wilson*, a tribal member asserted tribal aboriginal hunting rights in a large area settled by non-

Indians that the tribe had not physically possessed for over 100 years. 634 P.2d at 365, 371. None of these cases involved tribal lands that were continuously occupied and used exclusively by the tribe asserting the rights. The lands or bodies of water in question were large off-reservation areas that were settled by non-Indians, so the Indian presence on those lands was minimal and sporadic. These cases stand in stark contrast to the instant case, where the lands and associated water rights have been continuously and exclusively used by the Tribes[5] and such lands are currently contained within their reservations.

Moreover, in the above-cited cases the very existence of the tribes' off-reservation hunting and fishing rights was questioned, but here, the *priority*, not the existence, of the water rights is currently at issue. The question of the existence of off-reservation hunting and fishing rights and the question of the priority of water rights on reservation lands require two very different analyses. In a prior appropriation regime, water rights are typically obtained by putting water to beneficial use, and the priorities of such rights date from the time of first use,[6] so that senior users may take water before junior users. Of course, a person who engages in hunting or fishing does not appropriate a judicially enforceable right to continue to hunt or fish, and such activities also lack the temporal component, i.e., priority, that is an integral component of a water right. Thus, the Special Master faced a question related to priority that the courts in the aboriginal hunting and fishing right cases did not address.

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[5] In the present litigation, which Tribe used which lands and waters, and whether that Tribe used those lands and waters continuously and exclusively since time immemorial, is a disputed factual matter. What is not in dispute, however, is that in total the lands and waters in question had been used by both the Navajo Nation and the Hopi Tribe for a long time prior to the establishment of the Reservations.

[6] The reserved rights doctrine creates some exceptions, not relevant here, to the first in time, first in right nature of appropriable water rights.

Even if aboriginal water rights were extinguished, time immemorial water rights may still exist if the historical record, surrounding circumstances, and subsequent understanding of the parties implicitly allow it. *See Minnesota*, 266 F. Supp at 1386. Such a determination regarding priority requires a careful examination of when an Indian tribe first put the water to use. In *United States v. Adair*, for example, the principal argument put forth by the United States and the Klamath Tribe was "that a pre-reservation priority date is appropriate for tribal water uses that pre-date establishment of the reservation." 723 F.2d 1394, 1412 (9th Cir. 1983). After noting the tribe's "uninterrupted use and occupation of land and water" since time immemorial, *id.* at 1413, the *Adair* court agreed, holding that a priority corresponding to the reservation creation date "would ignore one of the fundamental principles of prior appropriations law that priority for a particular water right dates from the time of first use." *Id.* at 1414. While the court discussed the concept of aboriginal title, it resolved ambiguities in favor of the tribe and ultimately based its holding on the well-established principle that a prior water use deserves an earlier priority than the reservation creation date. *Id.* at 1412-14.

The Special Master cited an ICC decision regarding the Gila River Pima-Maricopa Indian Community ("Community") for the proposition that aboriginal water rights are terminated when aboriginal title is extinguished. Special Master's Report at 26 & n.50 (quoting *Gila River Pima-Maricopa Indian Cmty. v. United States* (*Gila River*), 29 Indian Cl. Comm'n 144, 151 (1972)). However, the history of the Community's reservation and its decreed water rights are more complicated than the statement quoted by the Special Master suggests and are illustrative of why the historical record is so important in cases like this. The Community's reservation was originally set aside by Congress in 1859, but was enlarged numerous times by executive orders between 1876 and 1915 to include the Indians who continued to live in their traditional manner

outside the original reservation. *See Gila River Pima-Maricopa Indian Cmty. v. United States*, 24 Indian Cl. Comm'n 301, 303, 333-35 (1970); *see also Gila River Pima-Maricopa Indian Cmty. v. United States*, 27 Indian Cl. Comm'n 11, 17-18 (1972). In 1935, the Community was awarded a time immemorial water right to divert 210,000 acre-feet of water for use on its entire reservation without consideration of aboriginal title. *See Gila River*, 29 Indian Cl. Comm'n at 160 (citing *United States v. Gila Valley Irrigation Dist.*, Globe Equity No. 59 art. V (D. Ariz. 1935) ("Globe Equity")).[7] Consistent with basic water law principles and irrespective of whether aboriginal title existed on the subsequently added lands, the Community was found to hold water rights with a time immemorial priority because the Community had irrigated its lands for hundreds of years beforehand and its presence and use predated non-Indian water users in the region. *See United States v. Gila River Pima-Maricopa Indian Cmty.*, 586 F.2d 209, 211 & n.2 (Ct. Cl. 1978) (noting that the Community's time immemorial priority and its historic irrigation activities are consistent with Arizona's prior appropriation doctrine).

The principles of *Adair* and Globe Equity apply directly to the instant case. Where a continuous use of water since time immemorial can be established on current reservation lands, there must be water rights with a time immemorial priority regardless of whether aboriginal title to land and the accompanying aboriginal water rights were extinguished. To allow a non-Indian water user who arrived in the 1890s to enjoy a priority that is senior to a tribe's prior and uninterrupted use of water – where the tribe's use was recognized by the federal government when it later included those lands as part of the tribe's reservation – would violate principles of fundamental fairness and contravene the "essential purpose of Indian reservations": to provide

[7] While the Globe Equity decree was a consent decree and not fully litigated, it nevertheless represents the district court's approval of the Community's time immemorial priority based on historic irrigation.

tribes "with a 'permanent home and abiding place,'" *Gila V*, 35 P.3d at 74 (quoting *Winters*, 207 U.S. at 565), and "a 'livable' environment.'" *Id.* (quoting *Arizona v. California*, 373 U.S. 546, 599 (1963)); *see also id.* (noting that "an arbitrary patchwork of water rights" based on each change to a reservation's boundaries "would be unworkable and inconsistent with the concept of a permanent, unified homeland"). Indeed, a priority corresponding to the date of the reservation for uses preceding that reservation establishment date is fundamentally at odds with basic water law principles. If an Indian tribe has put water to use since time immemorial to the present day, it is axiomatic that the tribal priority must be senior to later arriving non-Indian water users.

Even if the extinguishment of aboriginal title extinguished aboriginal water rights, the Special Master was required to consider the unique facts of this case, the historical record, surrounding circumstances, and the parties' understanding of their rights to determine if rights with a time immemorial priority may still exist. The Special Master's reliance on cases involving aboriginal hunting and fishing rights was misplaced, because the question here relates to the priority of the tribal water rights, not the existence of such rights. As in *Adair*, tribal water uses that predate the establishment of a reservation are entitled to a pre-reservation priority. This result is consistent with basic water law principles, the canons of construction favoring Indians, fundamental fairness, and the purposes for which Indian reservations are created.

B. THE SPECIAL MASTER INCORRECTLY FOUND A 1934 PRIORITY DATE FOR THE MOENKOPI ISLAND.

The Special Master determined that "the Hopi Tribe cannot assert a reserved water right priority of January 8, 1900, for water rights to Moenkopi Island." Special Master's Report at 47. The Special Master found instead that "[t]he Hopi Tribe holds an implied reserved water right to Moenkopi Island with a priority of June 14, 1934." *Id.* at 4. The Special Master's conclusion

fails to account for the historical context in which President McKinley issued the 1900 Executive Order, which described a parcel immediately to the "west of the Navajo and [Hopi] reservations" and withdrew that parcel "from sale and settlement until further ordered." The large tract of land described in the 1900 Executive Order, which included the Moenkopi Island, was later confirmed to be withdrawn for the benefit of the Indians living there. *See* 1934 Boundary Act. The 1900 Executive Order withdrawal followed years of attempts to set aside Moenkopi and surrounding lands for Indian purposes, and the President issued the 1900 Executive Order in direct response to a request by the Secretary of the Interior for an order approving the enlargement of the Navajo Reservation. Although the 1900 Executive Order withdrawal did not specify in express terms the purpose for which the lands were withdrawn, the Court must look at the contemporaneous documents which indicate the intent of the withdrawal was to provide a tribal home.[8] The Special Master failed to look to the historical context in which the President issued the 1900 Executive Order and, therefore, misinterpreted the order. Accordingly, for the reasons set forth below, the Court should reject the Special Master's determination regarding the priority date for the lands within the Moenkopi Island and should instead conclude that the Moenkopi Island lands have a priority date at least as early as January 8, 1900.[9]

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[8] The Court must also interpret the 1900 Executive Order in favor of the two Tribes, since the lands described in the order are clearly tribal lands set aside to benefit tribal interests. *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 337 (9th Cir. 1939) ("Treaties with the Indians and statutes disposing of property for their benefit have uniformly been given a liberal interpretation favorable to the Indian wards. The rule has its basis in the obligation which the Government has assumed toward a dependent people. We see no reason why the same rule should not apply in the construction of executive orders." (citations omitted)).

[9] As noted previously, the Special Master also neglected to consider whether any water uses predated the withdrawal of the land from the public domain; such water rights may have a priority date earlier than 1900. *See supra* Part II.A.

1. **The Priority Date for the Moenkopi Island Is At Least As Early as the First Federal Action Withdrawing the Lands from the Public Domain for Indian Purposes.**

It is well-settled that when land is first withdrawn from sale and settlement, and that act is later confirmed to be for Indian purposes, the reservation date for purposes of water rights priority is the first action withdrawing the land from sale and settlement, as the subsequent action "merely gave formal sanction to an accomplished fact." *United States v. Walker River Irrigation Dist.*, 104 F.2d 334, 338 (9th Cir. 1939). Thus, with respect to the Moenkopi Island lands, January 8, 1900, should be the latest possible priority date for water rights, as it represents the date of the federal action that first withdrew the lands from the public domain, thereby excluding them from entry and settlement by non-Indians. The 1934 Boundary Act "merely gave formal sanction to [the] accomplished fact" that the Moenkopi Island lands were withdrawn in 1900. *See id.* at 338. Thus, the Special Master's conclusion that "[t]he date of priority of the Hopi Tribe's reserved water right in Moenkopi Island is June 14, 1934," Special Master's Report at 51, is erroneous. Consistent with well-settled law, the Court should correct the Special Master's error by determining that the Moenkopi lands have a priority date at least as early as January 8, 1900.

Contrary to the conclusion reached by the Special Master, the fact that the 1900 Executive Order uses the word "withdrawn" without using the word "reserved" does not preclude the recognition of water rights with a 1900 priority date. *See* Special Master's Report at 44-47. The plain language of a statute or executive order is not, in and of itself, determinative of the purpose underlying that statute or executive order. *See In re General Adjudication of All Rights to Use Water in the Gila River System & Source* (*State Trust Lands*), 289 P.3d 936, 942 (Ariz. 2012) ("That Congress uses the word 'withdraw' or 'reserve' in a statute granting land

does not necessarily mean that the land is withdrawn or reserved for purposes of public land law."). The Arizona Supreme Court's holding is consistent with *Arizona v. California*, where at issue were, inter alia, the water rights of five Indian reservations located in Arizona and California. 373 U.S. at 595-96. The lands comprising each of those reservations had been withdrawn by a number of executive orders, and these executive orders used varying language. Many did not use the express words "reserved" or "reservation," *see, e.g.*, Exec. Order of Sept. 27, 1917; Exec. Order of Feb. 2, 1911, yet the Court looked at each of the executive orders and placed them in the larger context of the United States' purpose in identifying lands to be withdrawn from the public domain and not be subject to entry by non-Indians.

The executive orders regarding Fort Mohave are particularly instructive. In 1890, the President transferred the Fort Mohave lands, held by the War Department as a military reservation, to the Department of the Interior for Indian school purposes. Exec. Order of Sept. 19, 1890. It was not until 1911 that those Indian school lands were explicitly made a part of the Fort Mohave Indian Reservation. Exec. Order of Feb. 2, 1911 (identifying lands "withdrawn from settlement and entry and set apart as an addition to the present Fort Mojave Indian Reservation"). The Court found the priority date for federal reserved water rights to serve the Indian reservation purpose of those lands dated back to the transfer of the lands from the War Department to the Department of the Interior, that is September 19, 1890, not the subsequent declaration adding those lands to the Fort Mohave Indian Reservation. *See Decree, Arizona v. California*, 376 U.S. 340, 345 (1964). Thus, whether an executive order transferred lands from a military reservation to Indian school purposes, added to an existing reservation created by Congress, or set aside lands for a tribe's homeland, the Court looked to the broader context in which the executive order was issued to determine whether the purpose of the executive order

was to reserve lands to serve as permanent homeland for the affected tribe, with water rights dating back to the original federal action setting those lands aside for the tribe:

> Arizona also argues that, in any event, water rights cannot be reserved by Executive Order. Some of the reservations of Indian lands here involved were made almost 100 years ago, and all of them were made over 45 years ago. In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. *Congress and the Executive have ever since recognized these as Indian Reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as reservations by map makers, surveyors, and the public.* We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.

Arizona v. California, 373 U.S. at 598 (emphasis added).

The 1900 Executive Order employs language parallel to that of the executive orders at issue in *Arizona v. California*. The 1900 Executive Order states that the lands identified there are "hereby, withdrawn from sale and settlement until further ordered" and explicitly describes that the lands extend from the then-existing Navajo and Hopi Reservations. Congress subsequently confirmed in the 1934 Boundary Act that the withdrawal of those lands was for Indian purposes, but the date of the first federal action withdrawing the lands is the date of the water rights priority for those lands. *See Decree, Arizona v. California*, 376 U.S. at 345; *Walker River*, 104 F.2d at 338. The Special Master's determination of a 1934 priority date for the Moenkopi lands is not consistent with established law.

The Special Master placed much weight on the absence of any statement in the 1900 Executive Order identifying the purpose of the withdrawal, as well as the absence of express reservation language in that order. Special Master's Report at 44. But the Arizona Supreme Court was clear in its determination that the inclusion or absence of special words does not equate with a federal purpose underlying a withdrawal of lands from the public domain: "That

Congress uses the word 'withdraw' or 'reserve' in a statute granting land does not necessarily mean that the land is withdrawn or reserved for purposes of public land law." *State Trust Lands*, 289 P.3d at 942. Rather, it is the historical context in which the federal government makes – or does not make in the case of the state trust lands – the withdrawal or set aside of former public domain lands that determines the federal purpose. *Walker River*, 104 F.2d at 336 ("The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved."). Indeed, the *State Trust Lands* court explicitly held that "[t]o determine whether the federal government impliedly reserved water rights, the superior court must . . . 'examine the documents reserving the land from the public domain and the underlying legislation authorizing the reservation [and] determine the precise federal purposes to be served by such legislation,'" which "requires review of the pertinent documents to determine whether the land in question was withdrawn from the public domain and reserved for a federal purpose." 289 P.3d at 941-42 (quoting *Gila V*, 35 P.3d at 74). Accordingly, the President's omission of the special word "reservation" in the 1900 Executive Order does not mean that the federal government did not intend to set aside the subject lands for Indian purposes. The factual history of the lands described in the 1900 Executive Order, as discussed below, demonstrates that the 1900 Executive Order's purpose was to set aside those lands for the benefit of the Indians.

2. <u>The Historical Context of the 1900 Executive Order Makes Clear that the Withdrawal Was for Indian Purposes</u>.

"'[I]t is important, in approaching a solution of the question stated, to have in mind the circumstances in which the reservation was created – the power of Congress in the premises, the location and character of the islands, the situation and needs of the Indians and the object to be

attained.'" *Walker River*, 104 F.2d at 336 (quoting *Alaska Pac. Fisheries v. United States*, 248 U.S. 78, 87 (1918)). The federal government always considered the Moenkopi Island as lands that should be set aside for the Indians' benefit. Such consideration was first articulated in "the early 1870s, [when] various recommendations had coalesced into a focused effort to remove the Hopis from their mesas into the Moenkopi area." Daniel Gallacher, *Water Use and Boundary Disputes in the Little Colorado River Basin, 1860s-1940s* at 6 (Mar. 2009) ("Gallacher Report"), attached to Navajo Nation's Facts as Ex. 3 and attached hereto as Ex. 1.[10] The concept early on was that the withdrawal of the Moenkopi Island lands would benefit the Hopi Tribe by providing more suitable farming and grazing land. *Id.* In addition, the Hopi Indian Agent expressed the need for withdrawal to prevent encroaching Mormon settlement. *Id.* at 7.

Although the Hopis rejected the attempts to move them en masse from the mesas to Moenkopi, the Indian agents, recognizing the need for additional lands to serve both the Hopi Tribe and the Navajo Nation, redoubled their efforts in the late 1800s to withdraw more lands, including Moenkopi, to serve the growing needs of both Tribes. The agents' efforts resulted in the Department of the Interior's determination to investigate additional lands – lands that included Moenkopi – for withdrawal and dedication to Indian purposes. *Id.* at 44-45 (noting that the existing Navajo Reservation lacked sufficient water and grass to support the tribe's herds, and the lack of resources caused frequent conflict with nearby white settlers). The appointed inspector, James McLaughlin, was instructed to examine the lands and recommend an addition to the Navajo Reservation "that would 'promote the welfare of the Indians, with due regard to the rights and interests of the white settlers of that section.'" *Id.* at 45 (quoting Thomas Ryan,

[10] The Gallacher Report is attached for the Court only, as the parties should already possess it. Any party wishing to receive another copy may contact the undersigned.

Acting SOI, to James McLaughlin, U.S. Indian Inspector, March 14, 1899, in Senate, *Enlargement of Navajo Indian Reservation, in Arizona*, 56th Cong., 1st sess., 1900, S. Doc. 68, serial 3850, 3). Inspector McLaughlin agreed that the then-existing land base for the two Tribes was inadequate, and was adamant that the Department of the Interior should seek to withdraw Moenkopi, and the lands surrounding it, from the public domain to prevent further non-Indian settlement on them so that they could be dedicated to serving Indian purposes:

> Arguing that the Navajos could not maintain their flocks and herds "upon the sandy and impoverished ranges within their present boundaries," McLaughlin told the Interior Department he would "strongly recommend enlarging their reservation." He proposed adding nearly 1.3 million acres by extending the reservation to include the area between the western boundary of the Hopi Reservation and the Colorado and Little Colorado rivers. This would not only make it "more reasonabl[e]" for them to "remain within their reservation," but also would lessen the existing tension with non-Indian ranchers in nearby counties. While McLaughlin considered a larger addition—inclusive of the area lying south of the 1882 reservation—to be "desirable," he also recognized that such an extension was "very objectionable to the citizens of Coconino County." He, thus, offered the smaller addition as a compromise.

Id. at 45-46 (quoting McLaughlin to the SOI, June 13, 1899, in Senate, *Enlargement of Navajo Indian Reservation, in Arizona*, 56th Cong., 1st sess., 1900, S. Doc. 68, serial 3850, 5-8).

Secretary of the Interior Ethan Hitchcock agreed with McLaughlin's recommendation, writing to the Commissioner of Indian Affairs that "he was 'satisfied, taking into consideration the interests of both the Indians and the whites, that the reservation should be enlarged, as recommended by the inspector.'" *Id.* at 46 (quoting E.A. Hitchcock, SOI, to the CIA, August 29, 1899, in Senate, *Enlargement of Navajo Indian Reservation, in Arizona*, 56th Cong., 1st sess., 1900, S. Doc. 68, serial 3850, 15). Secretary Hitchcock subsequently wrote the President to recommend McLaughlin's proposed extension of the Navajo Reservation, noting "that 'there seems clearly to be insufficient grazing on the present reservation, together with portions of that

set apart for the Moquis, which [the Navajos] also use for the purpose.'" *Id.* (quoting E.A. Hitchcock, SOI, to the President, January 5, 1900, in Senate, *Enlargement of Navajo Indian Reservation, in Arizona*, 56th Cong., 1st sess., 1900, S. Doc. 68, serial 3850, 16-17). Following the Secretary's January 5, 1900, recommendation, President McKinley issued the recommended order on January 8, 1900, approving the expansion of the Navajo Reservation to the west of the existing Navajo and Hopi Reservations. *Id.* at 46-47; 1900 Executive Order.

The historical context leading up to the issuance of the 1900 Executive Order clearly shows that the order's purpose was to set aside lands to meet expanding Navajo and Hopi needs. There was no ambiguity in that purpose. Thus, even though the plain language of the 1900 Executive Order states that the lands were "withdrawn from sale and settlement until further ordered," the reason for the withdrawal could not be more plain: the lands were reserved to serve Indian purposes. By focusing solely on "[t]he express wording" of the 1900 Executive Order and relying on the absence of any special words setting aside those lands "for an Indian reservation or a federal purpose," Special Master Report at 44, the Special Master erred.

III. ISSUES REGARDING THE RELATIVE PRIORITY OF THE TRIBES' WATER RIGHTS REMAIN UNDECIDED

As part of the LCR adjudication, the Court must ultimately determine the relative rights of the Navajo Nation and the Hopi Tribe to use water on the lands of the Navajo and Hopi Reservations and determine how the scarce water supplies available to the two Tribes will be allocated among their competing needs. These fundamental issues are among the most significant to be resolved in the entire LCR adjudication. At the heart of the dispute between the two Tribes is the relative priority of the Hopi Tribe's massive claim for senior future rights to use the water resources shared by the two Tribes. The Hopi Tribe's claims, coupled with the

unique shared history of the two Tribes, raise complex issues of federal law that have never been addressed by any court. Nowhere else in the country has the United States set aside land for the ultimate benefit of two Tribes that resided or were settled on those lands, and subsequently partitioned the respective rights of each Tribe in those lands; these facts cannot be ignored. *See Confederated Salish & Kootenai Tribes*, 380 F. Supp. at 462 ("In the complex, and sometimes uncertain, area of Indian law, care must be exercised in attempting to apply language used in one factual situation in a totally different context."). Because of the unique nature of this case and the homeland purposes of both Reservations, the Navajo Nation has always asserted that neither Tribe may assert an all-encompassing senior priority over the other. *See generally* Navajo Nation's Brief. These unique circumstances were central to the referred question, but the Special Master brushed aside any consideration of the Tribes' relative rights, never even addressing the Navajo Nation's contention that such issues were the subject of the referred question. Thus, these significant issues have not yet been resolved and remain subject to future determination by the Court.

A. THE REFERRED QUESTION ADDRESSED ISSUES OF RELATIVE PRIORITY.

For decades, the Hopi Tribe has asserted not only a time immemorial priority for all of its claimed water rights, but has also asserted that those rights were "senior to that of any other claimant, Indian or non-Indian." *E.g., Statement of Claims of the Hopi Tribe* at 5 (Nov. 1985); *The Hopi Tribe's Amended Statement of Claimant* at 5 (Jan. 30, 2004) (asserting occupation of the Basin "long before the . . . Navajos came" and once again "claim[ing] a water right with immemorial priority senior to that of any other claimant, Indian or non-Indian"); *The Hopi Tribe's Second Amended Statement of Claimant* at 5 (Nov. 12, 2009) ("Statement of Claimant"). The Hopi Tribe asserts rights not only to serve its current needs, but also for future expanded

uses. Statement of Claimant at 22-23, 33. The Hopi Tribe claims a total of 52,214 acre-feet per year ("afy"), all with a senior priority to every other claimant, including the Navajo Nation. *Id.* at 23. Incorporated within this senior time immemorial priority claim are claims for water for a number of future uses, including domestic, commercial, municipal and industrial uses for a projected population of over 52,000, although the Hopi Tribe's current population is less than 10,000. *Id.* at 22. The Hopi Tribe also claims a senior time immemorial right of 6,000 afy for a proposed coal-fired power plant. *Id.* at 33.

Because of the delays by the Arizona Department of Water Resources ("ADWR") in producing a hydrographic survey report ("HSR") for the Hopi Tribe's claims, the Court sought input on issues that could be considered in the absence of a Hopi HSR. *See, e.g., Minute Entry: Status Conference* at 6-7 (Oct. 18, 2005); *Minute Entry* at 1 (Dec. 16, 2005); *see also Navajo Nation's Identification of Issues Which May Be Expeditiously Adjudicated* (Oct. 13, 2005); *Navajo Nation's Listing of Issues in Response to Minute Entry (Dec. 16, 2005)* (Dec. 28, 2005) ("Navajo Nation's Issues"). In offering its suggestions to the Court, the Hopi Tribe titled a section of its pleading as follows: "The Hopi Tribe's Claim of a First Priority to Water in the Basin Should Be Tried as a Contested Case . . . ." *Response of the Hopi Tribe to Suggestions of Issues for Expedited Resolution* at 3 (Mar. 3, 2006) ("Hopi Tribe's Issues").[11] The Hopi Tribe

[11] The Navajo Nation also suggested that the Hopi Tribe's claims to a senior priority over all other users be litigated as a contested case but limited the question to whether a senior priority for Hopi could be asserted in light of the homeland purpose of the Navajo Reservation for the Navajo people and "in light of the complex federal process for the allocation of resources between the Navajo Nation and the Hopi Tribe established by" acts of Congress and the subsequent court decisions that partitioned the Navajo and Hopi Reservations. Navajo Nation's Issues at 2; *see Minute Entry: Status Conference* at 7 (May 12, 2006) (discussing the Hopi Tribe's claims of first priority); *see generally* Navajo Nation's Brief.

argued that "[r]esolution of the Hopi Tribe's priority *relative to other claimants* . . . is a logical first step in this adjudication."[12] *Id.* (emphasis added).

Following a discussion of the suggested issues, the Court put the issues of the Hopi Tribe's relative priority over other claimants squarely before the Special Master: "[t]he Court agrees that the Hopi Tribe's position that its claims in the adjudication are of first priority and senior to all other parties is amenable to resolution." March 19 Minute Entry at 2. Thus, the Court directed "the Special Master to commence proceedings . . . to resolve the question of whether the [Hopi Tribe's water rights] claims . . . have a priority of 'time immemorial' or *are otherwise senior to the claims of all other claimants*." *Id.* (emphasis added). In apparent consistency with that referred question, the Special Master specifically directed the Hopi Tribe and the United States, acting as trustee for the Hopi Tribe, to "designate all water rights claimed to be more senior than those asserted by all other claimants in this adjudication." Case Initiation Order at 6. For much of the subsequent conduct of this subcase, the Hopi Tribe continued to assert a senior priority to the Navajo Nation, including the exchange of an expert report entirely devoted to Navajo occupancy of the LCR Basin, or lack thereof in the Hopi Tribe's view. *See generally The Hopi Tribe's Rule 26.1 Disclosure Statement* (Jan. 30, 2009) (replete with statements asserting the lack of Navajo presence and water use in the Basin, and claiming that the evidence demonstrates that the Hopi Tribe is entitled to a senior priority over the Navajo Nation); Peter M. Whiteley, *The Historical Evolution of Navajo Occupancy Areas in the Southwest, with Particular Reference to Black Mesa and the Hopi Washes* (Mar. 2009)

[12] The Hopi Tribe further explained that its assertion of first priority relative to the Navajo Nation was based on its belief that the Navajo people entered "'Arizona in the last half of the eighteenth century.'" Hopi Tribe's Issues at 4 (quoting *Healing*, 210 F. Supp. at 134) (emphasis omitted); *see also id.* at 8 (describing Navajos as "more recent comer[s] to the area").

("Whiteley Report"); *see also Specific Facts Relied upon in Support of the Hopi Tribe's Motion for Summary Judgment* ¶¶ 14-15 (Mar. 26, 2010) (directly relying on the Whiteley Report regarding Navajo presence in the Basin); *Hopi Tribe's Memorandum in Support of its Motion for Summary Judgment on Hopi Water Rights Priorities Excluding Spanish Law Rights* at 2-3, 12-18 (Mar. 26, 2010) ("Hopi Tribe's Brief") (arguing against Navajo aboriginal presence in the Basin, to support the proposition that Hopi possessed a senior priority); Response to Motion in Limine at 4-8 (describing the Hopi Tribe's longstanding litigation position of a senior priority).

It was not until *The Hopi Tribe's Reply to Responses to its Motion for Partial Summary Judgment* (Feb. 15, 2012) ("Hopi Tribe's Reply") that the Hopi Tribe asserted for the first time that "[t]he relative priority dates of the Hopi and Navajo cannot be determined in this sub-proceeding," *id.* at 20, even as it continued to "claim[] a senior priority right to that of the Navajo Nation based on its prior use." *Id.* at 4; *see Hopi Tribe's Memorandum in Support of its Motion in Limine* at 4 (Aug. 10, 2012) ("The purpose of this sub-proceeding is *not* . . . to determine if one tribe's water rights are superior to the other.").[13] The Hopi Tribe's Reply did not attempt to explain why the Court's referred question should be amended nor did it disclaim or otherwise explain the Hopi Tribe's prior disclosures and briefing on the issues of relative priority.[14] Subsequent to the Hopi Tribe's assertion in its reply brief, the Hopi Tribe sought to

[13] This change in the Hopi Tribe's position followed the filing of the Navajo Nation's Responsive Facts, which described facts refuting the Hopi Tribe's argument that its presence in the LCR preceded that of the Navajo people and their ancestors.

[14] At oral argument on the summary judgment motions, the Hopi Tribe for the first time admitted that if the Navajo Nation can prove a time immemorial priority water right, that such a water right would be equal in priority to any Hopi Tribe time immemorial right, although counsel for the Hopi Tribe vowed to contest any such time immemorial priority claim by the Navajo Nation. *Reporter's Transcript of Proceedings* at 131-34 (Oct. 24, 2012). The Hopi Tribe's altered position, however, is not indicated anywhere in the Special Master's Report, and cannot serve to erase the central purpose of this subcase as represented by the referred question,

exclude all evidence of Navajo presence in the LCR Basin, even though the Hopi Tribe had heavily relied on its own expert evidence regarding Navajo occupancy in its summary judgment briefing. *See Hopi Tribe's Motion in Limine* (Aug. 10, 2012) ("Motion in Limine"); *see* Response to Motion in Limine at 5-8, 11-12. While the Special Master denied the Motion in Limine, he did not provide a detailed analysis of the referred question. *See Order Denying the Hopi Tribe's Motion in Limine and Request for Oral Argument* (Sept. 24, 2012). Nevertheless, he did indicate a belief that relative priorities were relevant to this proceeding. *Id.* at 2 (noting that "the Court's order of reference to the Special Master and the case initiation order make it problematic to grant the motion for the reasons it is asserted"). That apparent understanding did not, however, carry over into the Special Master's Report, where the Special Master provided no discussion or analysis of the referred question and left untouched all issues of relative priority.

B. THE SPECIAL MASTER DID NOT DECIDE ISSUES OF RELATIVE PRIORITY BETWEEN THE TRIBES.

The LCR adjudication has been ongoing for thirty years, yet very little has actually been adjudicated. Although the Arizona Revised Statutes require an HSR as part of the process to adjudicate the existence and attributes of a water right, ADWR has been unable to produce HSRs in a timely fashion, and the Court has looked for ways to move the adjudication of the Hopi Tribe's water rights forward in the absence of the required Hopi HSR. The referred question was intended to do just that by addressing the difficult questions associated with the relative priority of the Hopi Tribe's water rights, questions that arise because of the unique history of the Hopi Tribe and Navajo Nation in the LCR Basin and because of the Hopi Tribe's assertions of a senior priority for all of its water rights, including historic, present, and future uses. The Special

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which has always been to determine the relative priorities of the two Tribes.

Master, however, approached this subcase as if it were solely intended to determine one singular attribute – priority – for all of the Hopi Tribe's water rights, even though no such water rights have yet been proven, leading the Master to arrive at priority dates for what can only be called presumed or hypothetical water rights. The Special Master did not even acknowledge, let alone analyze or answer, any of the difficult questions inherent in the referred question. Indeed, the Special Master barely acknowledged the referred question, indicating instead that the Report "addresses the seven issues the Special Master designated for briefing." Special Master's Report at 4; *accord id.* at 1 (noting that the "report concern[s] the determinations of seven issues regarding the priority of water rights"). Moreover, in addressing those seven designated issues, the Special Master avoided any consideration of questions involving the relative priorities of the two Tribes, never discussing the Navajo Nation's arguments regarding relative priorities. The Court should, accordingly, acknowledge that the difficult issues of relative priority between the Tribes remain undecided.

The Navajo Nation asserts that at its core, this subcase was intended to address "the Hopi Tribe's priority *relative to other claimants*." Hopi Tribe's Issues at 3 (emphasis added); *see* March 19 Minute Entry at 2 (Hopi Tribe's suggested issue "is amenable to resolution"). Given the unique history of the two Tribes in the Basin, and given that for many of the water sources of the Basin the Tribes are the only substantial claimants, the priority for water rights relative to each other presents important issues that are not well-suited to the normal HSR water rights determination process. Because the HSR process is designed to adjudicate the attributes – including priority – of all water rights, little utility is gained by separately adjudicating the priority dates for water rights, prior to and independent of the comprehensive determination of all other attributes such as quantity, place of use, and type of use. There is, however, utility in

examining – outside of the HSR process – the unique shared history of the Tribes in the Basin, and the federal government's involvement in that history, in order to determine the priority of each Tribe's water rights *relative to the other Tribe.*

The Special Master nevertheless failed to speak to the difficult questions of relative priority. With respect to the determination of time immemorial priorities, the Special Master merely offered a blanket time immemorial priority for District 6, ignoring a complex set of facts regarding Hopi and Navajo water uses and ignoring the very important issue of what specific water uses are entitled to that priority. In the briefing before the Special Master, the Hopi Tribe never demonstrated any particular water use from any particular water source, *see* Navajo Nation's Response at 28-29, and never demonstrated that it had "uninterrupted use and occupation of land and water" sufficient to create aboriginal title.[15] *See Adair*, 723 F.2d at 1413; *see also* Navajo Nation's Response at 23-29. Proving such uses is an integral part of demonstrating the contours of an aboriginal right to water, yet the Special Master ignored the disputed evidence before him, and instead relied entirely upon the holding in the Hopi Tribe ICC case – that the Hopi Tribe maintained its aboriginal title in District 6 – for the basis of the Hopi Tribe's time immemorial water right. *See* Special Master's Report at 12-27. While the Navajo Nation has never contested "that historically the Hopi Tribe has used water for a variety of purposes for a long time," Navajo Nation's Response at 28, the Special Master's determination based solely on the ICC case left numerous questions unanswered.

[15] A tribe can have aboriginal title extinguished by acts of the federal government yet still retain a time immemorial priority date for its water uses, as actual continuous usage can give rise to such a priority. *Supra* Part II.A. Nevertheless, a tribe that has not had aboriginal title extinguished by federal action must still demonstrate that it had "uninterrupted use and occupation of land and water" sufficient to prove that it possesses aboriginal title. *See Adair*, 723 F.2d at 1413.

Adair holds that a tribe must demonstrate exclusive use and occupancy to prove a time immemorial usufructuary right, and must demonstrate specific usufructuary uses to prove a time immemorial priority for them. *See* 723 F.2d at 1413-14, 1416 n.25. By solely relying on the Hopi Tribe ICC case, the Special Master made no independent finding regarding Hopi exclusive use and occupancy, and made no finding regarding particular water uses or particular water sources.[16] Instead, the Special Master made findings regarding Hopi land uses that noticeably lack any mention of water. *See id.* at 16 (holding that "[t]he Hopi used their aboriginal *lands* for" purposes such as villages and farming) (emphasis added). The Report nowhere indicates whether these land uses include a usufructuary right to water.

The Special Master also ignored the stark and important reality that very little surface flows exist in the LCR Basin in general and on the Hopi Reservation in particular. The rights at issue primarily are rights to groundwater, but the Special Master described the Hopi Tribe's "aboriginal right to use the water that flows on those lands." *Id.* at 19. Both the Hopi Tribe's and the United States' Spanish law experts acknowledged that aboriginal Hopi practices did not involve the use of surface flows. *See Navajo Nation's Response to Hopi Tribe's Statement of Undisputed Facts* ¶ 5 (June 20, 2012). This lack of surface flows is significant, as the Hopi Tribe has never possessed exclusive control over the groundwater resources. The Navajo Nation has previously demonstrated that Navajo people have been using groundwater from the very same aquifers for centuries, and the Hopi Tribe has never exercised control over those uses. *See*

[16] The Special Master relied on "prior judicial proceedings" for the determination of "actual, exclusive, and continuous use," even though the Master acknowledged conflicting evidence indicating that the Hopi Tribe did not exercise exclusive use and despite the fact that the Master made no determination that those "prior judicial proceedings" are binding here. *See* Special Master's Report at 18-19. The Special Master's Report does not even indicate what "prior judicial proceedings" are being referenced. *See id.* at 19.

generally Navajo Nation's Responsive Facts at Part III. The Special Master's Report, however, is silent on this point.

Essentially, the Special Master never addressed what Hopi water rights have a time immemorial priority. The Special Master held that "[t]he water rights that the Hopi Tribe uses on . . . District 6 have a priority of time immemorial." Special Master's Report at 19. This statement does not explain whether that priority attaches only to historic uses or whether it attaches to all uses from now into perpetuity. It also does not indicate whether all Hopi water uses on District 6 have this priority or whether some uses on District 6 – now or in the future – do not enjoy a time immemorial priority. Simply put, the Special Master's holding on this issue leaves numerous questions unanswered.

The Master's holding with respect to an 1882 priority for the Hopi Tribe on the Hopi Partitioned Lands ("HPL") similarly avoids complex issues implicating relative priority.[17] Once again, the Special Master applied a simplistic template to the determination of priorities, and avoided all consideration of the complex facts regarding occupancy of the 1882 Reservation or water uses on the 1882 Reservation. The Special Master declared that the 1882 Executive Order "was intended to establish a reservation for Hopi Indians" and "impliedly reserved water for the use of the Hopi Indians." Special Master's Report at 43. These conclusions ignore the text of the 1882 Executive Order, which explicitly reserved land – and impliedly reserved water – for

[17] As demonstrated above, *supra* Part II.A., water uses proven to date back to time immemorial should receive a time immemorial priority, regardless of whether the ICC determined that aboriginal title was extinguished by acts of the federal government. Thus, the Special Master should have considered water uses on the joint use area and whether such uses deserve a priority of time immemorial. Of course, the very nature of a "joint use area" might prevent the Hopi Tribe from proving specific exclusive uses of specific water sources dating back to time immemorial, but the Special Master never even considered the possibility that such uses, if proven, deserve recognition.

both the Hopi Indians "and such other Indians as the Secretary may see fit to settle thereon." Thus, in 1882 the President created the 1882 Reservation and in so doing protected a certain quantity of water to serve the Reservation, not specifically to serve the Hopi Tribe. *See Arizona v. California*, 373 U.S. at 600 (water reserved for "the future as well as the present needs of the Indian *Reservations*" (emphasis added)); *Gila V*, 35 P.3d at 77 (water reserved for the "present and future needs of the *reservation*" (emphasis added)); Navajo Nation's Response at 12.

The Special Master never considered what priority dates attached to the rights reserved at that time and whether those rights were altered, sub silentio, by the act of formally settling the Navajo Nation on the 1882 Reservation in the 1930s. Although the Special Master recognized that Navajo people were settled on the 1882 Reservation under the "such other Indians" clause, requiring a subsequent partition of the Reservation, the Special Master never grappled with the question of what happened to the Reservation's water rights – protected in 1882 – during the difficult history of the 1882 Reservation. Rather, the Master essentially concluded, without stating as much or analyzing the issue, that in 1882 the federal government reserved water rights to serve the entire 1882 Reservation, but at some point in the 1930s altered those rights for a portion of the Reservation, even though no changes occurred on the ground, and the Indians there continued living as they always had done. That conclusion ignores the general rule of Indian law that as tribal property, such a change to water rights should not be "lightly implied." *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 354 (1941); *accord* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 120 (2005 ed.) (stating that "tribal property rights . . . are preserved unless Congress's intent to the contrary is clear and unambiguous"). Given the Tribes' shared history on the 1882 Reservation, issues of relative priority are inescapable, yet the Special Master never addressed or even acknowledged them.

The Special Master, in fact, seemed to go out of his way to avoid the difficult issues of relative priority. For example, the last of the seven designated issues, Issue G, squarely asks whether the Hopi Tribe can claim a superior priority in light of the long history of federal involvement with both Tribes and Reservations. *See* Case Initiation Order at 4 ("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 [1958 Settlement Act] and the [1974 Settlement Act]?"). The Special Master never ruled on this issue, declaring instead that there are disputed material facts, Special Master's Report at 70, even though the Master did not list or otherwise explain what those facts are, nor did the Master explain how the Report can be deemed to fully answer the referred question without a ruling on Issue G.[18] *See id.* In sum, by failing to address all of the difficult issues that the referred question was intended to address, the Special Master's Report barely advances the overall LCR adjudication.

Avoiding all the difficult issues of relative priority and rights to future uses of water, the Special Master simply determined that the Hopi Tribe possesses a time immemorial priority for water rights in District 6, an 1882 priority for water rights in the HPL, and a 1934 priority for water rights in Moenkopi, and does not possess any water rights with a priority of 1848 based on the Treaty of Guadalupe-Hidalgo. Special Master's Report at 4. The Report contains no discussion of whether those priorities attach to future expanding uses such that the Hopi Tribe might be able to assert a superior priority for future uses against the Navajo Nation. For

[18] The Special Master's only explanation of these disputed facts was that they "concern the meaning and effect of the 1958 and 1974 Acts, prior congressional and executive actions, and court decisions." Special Master's Report at 70. These listed items, however, are legal, not factual, in nature.

example, as noted above, the Hopi Tribe claims a senior time immemorial right of 6,000 afy for a proposed coal-fired power plant. Statement of Claimant at 33; *see* Hopi Tribe's Brief at 22 (arguing for a time immemorial priority for expanded future uses, including uses related to coal). Applied at its harshest extreme in the arid environment of the LCR Basin, recognition of a senior priority for such future uses could result in a reduction of available drinking water for members of the Navajo Nation in favor of water for the Hopi Tribe's proposed power plant. *See* Navajo Nation's Brief at 5; Navajo Nation's Response at 9. Contrary to the Hopi Tribe's claims, the Navajo Nation asserts that a senior priority for all of the Hopi Tribe's water rights, including expanded future uses, directly conflicts with the United States' intent in establishing the Navajo Reservation and cannot, therefore, be reconciled with that intent. The Navajo Nation has amply demonstrated that there is no basis in federal law to assume that the United States intended to protect fully the expansion of the uses of water by the Hopi Tribe and defeat the reservation of water that was required for the Navajo Reservation to serve as the permanent homeland for the Navajo people. *See, e.g.*, Navajo Nation's Response at 8-17.

The issues of the relative rights of the Tribes can be addressed in this adjudication without the completion of an HSR, and the Navajo Nation believes it is these issues that the Hopi Priority subcase was intended to address. The Special Master's Report, however, is silent regarding future uses and relative priorities, and never addresses the Navajo Nation's arguments regarding such future uses and relative priorities. The Court, therefore, should declare that these difficult legal issues regarding relative priorities and rights to future uses of water remain unresolved and are subject to further briefing and fact finding.

IV. CONCLUSION

In the LCR adjudication, the Court must ultimately consider the long, unique, and intertwined history of the Navajo Nation and the Hopi Tribe in order to determine how the scarce water supplies available to the two Tribes will be allocated among the competing tribal needs. The most significant issue raised by the differing tribal claims is the relative priority of the Hopi Tribe's massive claim for senior future rights to use the scarce water resources shared by the two Tribes. While the Navajo Nation asserted that this issue was at the heart of the referred question, the Special Master ignored the Navajo Nation's arguments and never addressed the Tribes' relative rights. The Special Master also failed to consider several significant issues implicated by the findings and conclusions that he did make, never addressing critical questions related to the nature of the Hopi Tribe's aboriginal water rights in District 6 and difficult questions related to the establishment and partition of the 1882 Reservation. It is important that the Court confirm that these significant issues have not been resolved and remain subject to future judicial determination.

In addition to the issues the Special Master did not address, the Special Master made two fundamental errors. The Special Master incorrectly held that the Hopi Tribe cannot have a time immemorial priority for water rights on lands where it lost aboriginal title, regardless of historic water uses on such lands, and also erred in concluding that the Hopi Tribe's reserved rights for Moenkopi did not originate until 1934, even though the lands were first reserved for Indian purposes in January of 1900. The Court should correct these errors.

The Navajo Nation submits that the Court should hold as follows:

1. The Hopi Tribe has a time immemorial priority date for any present use of water on its Reservation that dates back to time immemorial, regardless of the Hopi Tribe's aboriginal

title to such lands. To prove such a right, the Hopi Tribe must show that any specific use of water dates back to time immemorial. What additional facts are necessary to prove such a right have not been determined and remain to be addressed as a part of further briefing or during the adjudication of the Hopi Tribe's rights pursuant to the Hopi HSR.

2. The reserved rights of the Hopi Tribe for Moenkopi have a priority date at least as early as January 8, 1900, when the lands in question were first set aside by executive order for Indian purposes.

3. In holding that the Hopi Tribe retains its aboriginal rights in District 6 and has a reserved right for the HPL and Moenkopi, the Special Master did not determine whether the Hopi Tribe may be entitled to water rights that are senior or otherwise superior to those of the Navajo Nation for any use of water, including uses of water initiated or expanded after the United States' reservation of the land and any future uses of water. The issues of the Hopi Tribe's water rights relative to the Navajo Nation's water rights have not been determined and remain to be addressed as a part of further briefing or during the adjudication of the Hopi Tribe's rights pursuant to the Hopi HSR.

The Navajo Nation requests that the Court set a schedule for further briefing and any necessary fact finding on the unresolved issues related to the relative rights of the two Tribes, provided the Court's docket permits it to address those complex and novel issues. Alternatively, the Navajo Nation requests that those issues be deferred until completion of the Hopi HSR.

Respectfully submitted this 28th day of June, 2013.

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By: _____
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Co-Counsel for the Navajo Nation

CERTIFICATE OF SERVICE

I hereby certify that I have placed a true and correct copy of the foregoing *Navajo Nation's Objections to the Special Master's Report* in the U.S. Mail, first-class postage prepaid thereon, on this 28th day of June, 2013 addressed to all counsel listed on the court-approved mailing list prepared by the Office of the Special Master dated January 10, 2013.

_____

McElroy, Meyer, Walker & Condon
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Via Overnight Courier

June 28, 2013

Sue Hall, Clerk of the Court
Superior Court for Apache County
Attention: Water Case No. 6417
70 W. Third South
St. Johns, AZ 85936

Re: *In re the General Adjudication of all Rights to use Water in the Little Colorado River System and Source*, CIV No. 6417-201 (Hopi Tribe Priority)

Dear Ms. Hall:

Enclosed for filing in the above-entitled matter is the original and one copy of the *Navajo Nation's Objections to Special Master's Report*. Please date stamp the copy and return it to our offices in the enclosed self-addressed stamped envelope.

Thank you for your assistance with this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,

SBM'Elroy

Scott B. McElroy
SBM/dav
enc.: As stated
cc: Stanley Pollack, Bidtah Becker