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

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	W-1 (Salt) W-2 (Verde) W-3 (Upper Gila) W-4 (San Pedro) Consolidated **Contested Case No. W1-203** REPORT OF THE SPECIAL MASTER

CONTESTED CASE NAME: *In re the Water Rights of the Gila River Indian Community*

DESCRIPTIVE SUMMARY: The Special Master submits his report to the Superior Court on motions for summary judgment filed by the Gila Valley Irr. Dist. *et al.* (Mar. 1, 1999) (Docket No 119), San Carlos Apache Tribe *et al.* (Mar. 1, 1999) (Docket No 118), San Carlos Irr. & Drainage Dist. (Oct. 4, 1999) (Docket No 206), and ASARCO Inc. (April 25, 1999) (Docket No 202). The report includes findings of fact, conclusions of law, recommendations, proposed order, and a motion that the proposed order be entered by the Court. Objections to the report must be filed by **July 26, 2000**, and responses by **August 9, 2000.** The hearing on any objections will be taken up at the next scheduled conference or hearing before Judge Bolton held after August 9, 2000, or as otherwise ordered.

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I. INTRODUCTION

The Pimas and Maricopas of the Gila River Indian Community, perhaps of all American Indian tribes, epitomize the agrarian, pastoral, and civilized communities envisioned when the federal government sought to restrict native people to ever-diminishing reservations. The Pima and Maricopa people were generally cordial and helpful to the Europeans and Americans who entered and settled within their aboriginal range. Their hospitality was not always returned in kind, as settlers continually encroached on Indian lands and water.

The Pimas and Maricopas of the Gila River Indian Reservation, established by Congress in 1859, had abundant arable lands but the misfortune of a middle-river location that allowed upstream settlers, who moved into the upper valley from Florence to the Duncan-Virden area starting in the 1860s, to easily diminish Gila River flows. Having assumed fiduciary obligations for these Indian people, the United States government undertook a series of initiatives to secure adequate water for the reservation. During the 50 years from 1875 to 1925, the federal government sought to buffer Indian agriculture by additions to the reservation made through a series of seven presidential executive orders (expanding the size of the reservation from 100 to 580 square miles); encouraged Indian groundwater use; authorized and constructed the San Carlos Project, a collection of water storage and distribution facilities (most notably Coolidge Dam and San Carlos Reservoir); and initiated

federal court litigation, now widely known as *Globe Equity No. 59,*[1] to settle water rights on the upper mainstem of the Gila River.

For the 65-year period since it was entered in 1935, the *Globe Equity* consent decree has comprised the "law of the Gila River" although the meaning of the legal regime has often been litigated and debated. Although among the principal beneficiaries of the *Globe Equity Decree*, the Gila River Indian Community (GRIC) is not a party to the decree. Indeed, its predecessor, the Pima Indian Tribal Council, was denied the opportunity to intervene and participate in the *Globe Equity* litigation, days before the consent decree was entered. Until 1982, the interests of these Indians in the Gila River were asserted by the United States, although the fidelity of federal representation has often been challenged by the Community in other venues. Simply stated, the Community does not believe the *Globe Equity Decree* embodies all of their rights and interests to the Gila River and its tributaries.

Arizona's general stream adjudication has applied another layer of complexity to the upper Gila River and the Community's rights in those waters. The Gila River Indian Community, supported by the United States, believes that additional water rights beyond those established in *Globe Equity* can be claimed and established in the Gila River system through this state court adjudication. Non-Indian claimants assert that the Community's claims to Gila River water are limited by the preclusive effect of the *Globe Equity Decree* and certain contractual obligations entered into by the Community or the United States in its behalf. The *Globe Equity Decree* has always cast a long shadow over the Gila River adjudication. The

[1] United States v. Gila Valley Irr. Dist., Globe Equity No. 59 (D. Ariz. 1935).

motions for summary judgment considered in this report finally provide the adjudication court with an opportunity to determine *Globe Equity's* significance for these proceedings.

II. STATEMENT OF THE CASE

According to the Gila River Indian Community, its aboriginal territory originally consisted of 3.75 million acres, an area that today is bounded by the Gila Bend and White Tank Mountains on the west, present-day Lake Pleasant and confluence of Salt and Verde Rivers on the north, Tortilla Mountains on the east, and the I-10 and I-8 highway corridor on the south. Statement of Claimant No. 39-36340. The area comprises almost all of the Phoenix metropolitan area.

Both the United States and the Gila River Indian Community filed statements of claimant in the Gila River adjudication for water rights attributable to the Gila River Indian Reservation. The federal claim as trustee was filed in the Lower Gila River Watershed[2] and asserts a current use of 270,000 acre-feet per year [hereinafter "ac-ft/yr"] and a future use of more than 1.5 million ac-ft/yr for irrigation and other purposes including domestic, industrial-commercial, and mining. An unquantified storage right is also asserted. The water is claimed for Indian lands both within and without the San Carlos Project. The source of water includes the Gila River, as well as tributaries not adjudicated by the *Globe Equity Decree*. The claim also says that, in the event that the *Globe Equity Decree* is not

[2] Statement of claimant forms were identified by major watersheds allowing claimants to identify the area in which their claimed water rights were located. The federal claim was filed in the Lower Gila River Watershed where the reservation is located.

found to be determinative of the federal claim, the United States asserts additional rights in the Gila River system sufficient to satisfy the Community's reserved water rights. Statement of Claimant No. 39-35092; *see also* ARIZONA DEPARTMENT OF WATER RESOURCES [ADWR], PRELIMINARY HYDROGRAPHIC SURVEY REPORT FOR THE GILA RIVER INDIAN RESERVATION App. F, at F-53 (Rev. Feb. 3, 1999) [hereinafter "PRELIMINARY HSR"].

The Indian Community also filed six statements of claimant on its own behalf in the state general stream adjudication. These claims were filed in five of the seven watersheds comprising the Gila River adjudication (Upper Gila River, Lower Gila River, San Pedro River, Verde River, and Salt River watersheds; not filed in the Upper Santa Cruz or Agua Fria watersheds).[3] Generally, these claims assert water rights of almost 1.6 million ac-ft/yr for irrigated agriculture and a variety of other uses, 205,000 ac-ft/yr for hydropower production, 267,000 ac-ft/yr in storage, as well as groundwater. The irrigation claim is for both San Carlos Project and non-project lands. Statements of Claimant Nos. 39-12652, 39-5478, 39-41142, 39-60083, 39-36340, 39-37360; *see also* PRELIMINARY HSR App. F, at F-52.

The motions for summary judgment at issue here comprise one phase in the progressive determination of the water rights of the Gila River Indian Community, a proceeding known as contested case no. W1-203. In 1995, the Arizona Legislature requested early consideration of the claims of Indian tribes and federal agencies as a

[3] It is unclear whether the Community filed claims throughout most of the Gila River system so as to assert diversions, places of use, or claims to the water arising in these many watersheds. *See supra* note 2.

strategy for reducing the cost and complexity of Arizona's ongoing general stream adjudications. H.B. 2276, § 24(C), 42d Leg., 1st Sess. (Ariz. 1995). Based on this suggestion and the court's own experience, Judge Susan R. Bolton, the superior court judge presiding over the adjudication, ordered the preparation of the hydrographic survey report (HSR) for the Gila River Indian Reservation. Minute Entry at 1 (Aug. 31, 1995). The Arizona Department of Water Resources prepared a preliminary HSR, issued in January 1997, limited to an estimate of water supply physically available to the reservation, the amount of arable land on the reservation, current water uses on the reservation, and an economic analysis of irrigation practices on or near the reservation. This work was later folded into a more complete preliminary HSR that was released by ADWR on February 3, 1999. This preliminary HSR included information on the available water supply on the date of its creation in 1859 and subsequent additions, irrigation water duties, and a summary of the Community's nonagricultural water right claims. On May 2, 2000, Judge Bolton directed ADWR to proceed with completion of the final HSR once certain allottee information is received from the Gila River Indian Community. Minute Entry at 4 (May 2, 2000). The filing of the final HSR will commence a statutory 180-day objection period and set the stage for evidentiary hearings.

Judge Bolton also set in motion other threshold activities to coincide with ADWR's efforts. In order to complete much of the discovery necessary for this contested case, parties intending to participate at trial were ordered to disclose potentially relevant documents. After a series disclosures extending from 1998 to the present, 18,600 documents, consisting of 146,400 pages, have been submitted to

the Office of the Special Master and made available to the parties. Upon the suggestion of many parties, Judge Bolton also ordered the filing of motions that could limit the scope of litigation. Minute Entry at 2-3 (Sept. 11, 1998). The motions considered here are among a series of motions for summary judgment that purport to preclude or limit the water right claims of the Gila River Indian Community in this general stream adjudication. These motions, which were referred to Special Master John E. Thorson on February 1, 2000, are as follows:

1. Motion for Summary Judgment filed by the Gila Valley Irrigation District, Franklin Irrigation District, San Carlos Irrigation and Drainage District, Salt River Project, and City of Tempe (Mar. 1, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are precluded by the *Globe Equity Decree* (Docket No. 119).[4]

2. Motion for Summary Judgment filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (Mar. 1, 1999), asserting that any water right claims of the Gila River Indian Community, or on its behalf, to the San Carlos River are precluded by the *Globe Equity Decree* and other documents (Docket No. 118).

3. Motion for Summary Judgment filed by the San Carlos Irrigation and Drainage District (Oct. 4, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are conditioned on certain agreements commonly known as the Florence-Casa Grande

[4] The discussion and determination of this motion also includes similar assertions made by the San Carlos Irrigation and Drainage District (Docket No. 206). *See* note 5, *infra*.

Landowners' Agreement, San Carlos Irrigation Project Landowners' Agreement, and the Project Repayment Contract (Docket No. 206).[5]

4. Motion for Summary Judgment filed by ASARCO Incorporated (Oct. 4, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are conditioned by the Water Rights Settlement and Exchange Agreement (Jan. 1, 1977) and the Consent to Assignment [of the Water Rights Settlement and Exchange Agreement] (April 25, 1993) (Docket No. 202).

The litigants joining and opposing these motions are identified in Appendix A, which is also an index of all pleadings filed concerning these motions.

III. PRECLUSIVE EFFECT OF THE *GLOBE EQUITY DECREE*

Motion for Summary Judgment filed by the Gila Valley Irrigation District (GVID), Franklin Irrigation District (FID), San Carlos Irrigation and Drainage District (SCIDD), Salt River Project (SRP), and City of Tempe (Mar. 1, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are precluded by the *Globe Equity Decree* (Docket No. 119).

A. Introduction

Globe Equity No. 59 was a federal district court proceeding initiated by the United States in 1925 to assist the San Carlos reclamation project by establishing water rights in the Gila River. The San Carlos Project, among the West's first federal reclamation efforts, was envisioned when the federal Reclamation Act was passed in 1902. The idea was realized in a series of congressional enactments

[5] Portions of this motion urge the preclusive effect of the *Globe Equity Decree*. For purposes of this discussion and determination, these allegations are combined with the motion for summary judgment filed by the Gila Valley Irrigation District *et al*. (Docket No. 119).

authorizing the construction of the San Tan Canal in 1905, the Florence-Casa Grande Irrigation Project in 1916 resulting in the construction of two diversion dams and canals, and the San Carlos Irrigation Project Act of 1924, authorizing the construction of the San Carlos (later Coolidge) Dam and Reservoir. Act of Mar. 3, 1905, 33 Stat. 1081; Act of May 18, 1916, 39 Stat. 123-30; Act of June 7, 1924, 43 Stat. 475. As stated by the United States,

> The San Carlos Project was intended to be a "combined Indian and white man's irrigation project." Pima Indians and the San Carlos Irrigation Project Hearing on S. 966 Before the House Commissioner [sic] on Indian Affairs, 68 Cong. 1st Session, at 3 (1924). Non-Indian participation in the project was deemed necessary in order to pay for its construction costs.

United States' Response 3 (Oct. 5, 1999) [Docket No. 232].

The federal government brought the *Globe Equity* litigation in its own name but beneficially for the Indians living on the Gila River Indian Reservation, the San Carlos Apache Reservation, and the reclamation project and its anticipated non-Indian water users who had pledged water rights to enable to project. Among the defendants were many of the litigants (or their successors) now bringing this motion. The litigation concluded in a consent decree entered in 1935 and included detailed schedules of approximately 3,000 water right diversions determined in the proceeding. *Globe Equity Decree* [OSM No. 4].[6] The resulting lengthy, convoluted *Globe Equity Decree* has been the subject of numerous enforcement actions in

[6] The "OSM No." designation refers to documents submitted to the Office of the Special Master during disclosure by the parties. The full serial number is "OSM No. W1-203-4."

federal court over the years, and certain interpretative and administration issues are even now pending before federal district court.

Globe Equity is essentially an agricultural decree. Virtually all of the water rights adjudicated are irrigation water rights. One exception appears to be certain industrial, municipal, and domestic rights are recognized for the Kennecott Copper Corporation. *Globe Equity Decree* art. X(1).

In their motion, the moving litigants assert that the *Globe Equity Decree* "resolved all claims of the United States, as trustee for the Indians of the Gila River Indian Reservation, to water from the Gila River for use on the Gila River Indian Reservation." GVID's Motion for Summary Judgment at 1 (Docket No. 119). They ask the court to recognize the preclusive effect of the *Globe Equity Decree*, under the doctrine of *res judicata*. The Gila River Indian Community and the United States respond (Docket Nos. 216 and 232) that the requirements of a *res judicata* bar are not satisfied; the Community's claims in this adjudication are not precluded by the earlier litigation; and, since material facts are in dispute, such a determination cannot be reached on a motion for summary judgment. The Arizona general stream adjudication statute provides "that when rights to the use of water or dates of appropriation have previously been determined in a prior decree of a court, the court shall accept the determination of such rights and dates of appropriation as found in the prior decree unless such rights have been abandoned." ARIZ. REV. STAT. ANN. § 45-257(B)(1) (Supp. 1999).

At issue in this case are tribal and federal claims for two types of land: (a) additional water rights for the approximately 50,000 acres of reservation land that

was awarded water under *Globe Equity*; and (b) water rights for the approximately 325,000 acres of reservation land that were allegedly omitted from the *Globe Equity* litigation. Because the 50,000 acres were originally intended to be allotted to individual Indian farmers, this land is referred to as "allotted" or "allotment" lands in this report. The latter category of land is referred to as "surplus" lands since people at the time assumed the land was surplus to the Indians' needs and eventually would be conveyed to non-Indian farmers by homesteading, sale, or other transactions.

The moving parties here consist of parties to *Globe Equity*, their successors and privities, and other water users who claim they have relied on the finality of that adjudication. Thus, general principles of the *res judicata* doctrine are central to this report. In the following, *res judicata* is often referred to as "claim preclusion." The related concept of collateral estoppel is often referred to as "issue preclusion."

This controversy closely resembles preclusion litigation concerning the federal *Orr Ditch Decree*, on Nevada's Truckee River, that culminated in a famous U.S. Supreme Court decision, *Nevada v. United States*, 463 U.S. 110 (1983). Our case is also similar to aspects of the even more famous *Arizona v. California* litigation concerning water rights to the Colorado River, and a June 2000 decision in the continuing saga of that case is also of assistance in resolving the issues presented by this motion for summary judgment. A detailed understanding of these cases is necessary to ascertain the guidance the Supreme Court has provided.

B. *Nevada v. United States (Orr Ditch Decree)*

The *Orr Ditch* litigation concerning the Truckee River was originally brought as an equitable action ("Equity No. 3") by the United States in federal district court in 1913, in an effort to adjudicate water rights for the benefit of the Pyramid Lake Indian Reservation and the Newlands Reclamation Project, the first project to be constructed under the 1902 Reclamation Act. The Truckee River originates in the Sierra Nevada Mountains of California, flows into Lake Tahoe, and then north from the lake and easterly into Nevada terminating in Pyramid Lake (on the Indian reservation), a body even larger than Tahoe. The Truckee River is a closed basin that contains 1,872 square miles. Compared to the Gila River, the Truckee has relatively few tributaries, *e.g.*, the Little Truckee River.

The Pyramid Lake Reservation had been initially set aside for the Paiute Tribe by the Secretary of the Interior in 1859 with President Grant signing an executive order confirming the reservation in 1874. One of the purposes for this reservation "was to enable the Tribe to take advantage of the Pyramid Lake fishery, then consisting of a native species of cutthroat trout, and the cui-ui, which exist nowhere else." *United States v. Truckee-Carson Irr. Dist.*, 649 F.2d 1286, 1290 (9th Cir. 1981). The Indians also began modest irrigated agriculture, consisting of about 1,000 acres at the turn of the century. This compared to about 40,000 acres of non-Indian irrigated agriculture in the Reno area alone. *Id.*

Shortly after passage of the Reclamation Act, the Secretary withdrew public lands for the Newlands Project, to be supplied by water from both the Truckee and Carson Rivers, and asserted claims for all unappropriated water in the Truckee

River. In 1904, Congress authorized the Secretary to include reservation lands within the project. About 20,000 acres of the 322,000–acre reservation were thought to be irrigable. The Interior Department planned to convey irrigable land to Indians in 5-acre allotments with the surplus lands being sold to settlers.

The federal government believed a determination of existing water rights was necessary before the Newlands Project could be completed. The extent and relative priorities of Indian and non-Indian rights would have to be determined before Interior could ascertain how much additional water could be claimed for the project. The case was ultimately filed as a quiet title action on March 3, 1913, naming as defendants all existing water users on the Truckee River in Nevada. The federal complaint, filed by some of the same federal attorneys also involved in the *Globe Equity* proceedings (John Truesdell and, later, Ethelbert Ward), asserted a claim of 10,000 cubic feet per second [cfs] for the project and 500 cfs for the reservation.

For six years after the complaint was filed, the United States completed engineering studies to buttress its claims. Reservation lands fell into two categories: 2,400 acres of riparian lands that were mostly developed and 19,000 acres of less desirable bench lands. While all this land was to be included in the project, the federal attorneys assumed that only 3,000 acres of bench lands would be allotted to Indians; the remaining bench lands would be sold as surplus lands to settlers who would have "'to depend for their water right upon the general project water right.'" *Id*. at 1291 (quoting Ex. U-88 at 2). Thus, the claim asserted in behalf of the Indians was for 5,400 acres (2,400 acres of bottom lands and 3,000 acres of bench lands--out of a reservation of 322,000 acres!).

The case languished in court, but following evidentiary hearings between 1919 and 1921, the Special Master suggested the entry of a temporary restraining order that could be evaluated during a trial period. The temporary order was entered by the federal judge in 1926 and awarded the reservation with 12,412 ac-ft/yr with an 1859 priority date for 3,130 acres of bottom lands, as well as water for the expected number of Indian allotments of bench land. The reclamation project was awarded water for 232,800 acres although only 65,000 acres would ever be developed. That same year, the federal government signed a contract with the Truckee-Carson Irrigation District allowing this organization of irrigators to operate the reclamation project.

During the 1920s, increasing upstream diversions and the accumulation of logging debris in the waterways combined to decimate the Truckee River fishery. Between 1920 and 1940, the level of Pyramid Lake declined 40 feet, the cut-throat trout were extinct, and cui-ui were just barely surviving. Reno area Indian agents wrote the Commissioner of Indian Affairs in 1935: "'You have assured us . . . that it will be practically impossible at this late date to obtain any assured flow of water from the Truckee River into the Lake. The time for that was when the original Truckee River water rights were being adjudicated.'" *Id*. at 1294.

After the Indian Reorganization Act (Wheeler-Howard Act) ended reservation allotments in 1934, ch. 216, 48 Stat. 984 (June 18, 1934), federal attorney Ward suggested to the Bureau of Indian Affairs that a federal reserved right be asserted for all 19,000 acres of arable bench lands. The BIA rejected this possibility because of its "'doubtful feasibility from all standpoints.'" *Id*.

The *Orr Ditch* parties also negotiated a final agreement during the 1930s. The Interior Department, while obtaining an increase in water duty over the 1926 order, agreed to limit its reservation claims to 3,130 acres of bottom land, 2,745 acres of bench land, and no water for the fishery. A consent decree along these lines was entered in 1944.

The United States appeared in the *Orr Ditch* litigation as trustee for the Pyramid Lake Indians and as representative of the predominately non-Indian reclamation project. While the government succeeded in establishing irrigation rights benefiting both the reservation and the reclamation project, it failed to establish water rights protective of the fishery that was central to the culture and economy of the Paiute Tribe. In 1951, the Pyramid Lake Tribe sued the federal government in the Indian Claims Commission for damage to the fishery, and the Commission found the government liable, leading to a compromise settlement of $8 million. The settlement allowed the Tribe to seek additional rights in the Truckee River. *Id*. at 1295.

1. Federal District Court Proceedings

The decline of the fishery led to a separate federal court action filed in 1973 by the United States and the Pyramid Lake Tribe seeking to quiet title to water sufficient to sustain the Pyramid Lake fishery. Non-Indian water users in the basin defended on the basis of *res judicata*, *i.e.*, the Tribe's rights had been determined in the original *Orr Ditch* litigation. After bifurcating the case and conducting an evidentiary hearing on the *res judicata* defense, the federal district court (Anderson, J.) determined that the original *Orr Ditch Decree* was a bar to the second action.

Memorandum Decision, set forth in App. E, Petition for Writ of Certiorari filed by State of Nevada, *Nevada v. United States,* No. 81-2245 (June 7, 1982). This result was affirmed by the U.S. Court of Appeals, *United States v. Truckee-Carson Irr. Dist.*, 649 F.2d 1286 (9th Cir. 1981) (Skopil, J.), and by a unanimous U.S. Supreme Court, *Nevada v. United States*, 463 U.S. 110 (1983) (Rehnquist, J.).

The district court determined that the causes of action in both cases were the same. The Tribe, one of the plaintiffs in the second action, was in privity with the United States, the plaintiff in the original action. As to whether federal attorneys and officials had a conflict of interest in the original litigation, the district court ruled that federal agency officials had weighed the competing, congressionally imposed policy considerations and reached a decision that resulted in the extinguishment of the alleged fishery purposes water right. The federal attorneys involved in the original *Orr Ditch* proceedings did not have a conflict of interest when implementing the policy choices of their superiors, and the Tribe had not been injured in a way that would defeat the water rights obtained by the defendant non-Indian water users in the original litigation.

2. U.S. Court of Appeals Decision

The court of appeals rejected arguments distinguishing the two causes of action. Dismissing the Tribe's argument that different evidence would be offered to establish a fisheries (rather than irrigation) water right, the court responded:

> The basis for either kind of reserved right would be the same: the executive actions by which the Reservation was established, and the intent that motivated those actions. The priority date depended on the same evidence. The water rights are appurtenant to the same reservation, and relate to the same source of water. Though a

> determination of quantity would depend on different evidence, this by itself is insufficient to distinguish this cause of action from the *Orr Ditch* cause of action.

649 F.2d at 1301 (citations omitted). The court also concluded that the federal government intended an all-inclusive, final adjudication of the Truckee River and that the decree prevented relitigation of both those claims that were litigated and those that could have been litigated, the federal government having "placed in issue the full Reservation cause of action." *Id.* at 1302.

The court addressed the significance of the federal government's conflicting policy interests in the context of privity. The Tribe could be bound by the actions of its fiduciary, the United States, unless other water users were aware of and benefited from the fiduciary's failure to fulfill its trust responsibility. Since the trial court had found that the original defendants lacked such knowledge, the appellate court concluded that the Tribe remained in privity with the United States, the original plaintiff, and *res judicata* could be imposed. The court also extended the benefits of its *res judicata* finding to subsequent appropriators who were not parties to *Orr Ditch* but who had reasonably relied on the finality of the original degree. *Id.* at 1308.

The court of appeals, however, concluded that the Truckee-Carson Irrigation District could not assert the preclusive effect of the original *Orr Ditch Decree*. Like the Tribe, the district had not been party to the original litigation and, like the Tribe, its interests had been represented by the United States. The district did participate in and signed the agreement that was ratified by the 1944 consent decree. Even so, the court concluded that the Tribe and district were not adverse to one another on the

record, a stance commonly necessary for *res judicata* to apply. The district was thereby left as the only party vulnerable to the Tribe's claims for additional water to protect its fishery, an ironic result that was criticized by Judge Schroeder in her partial dissent. *Id.* at 1313.

3. U.S. Supreme Court Opinion

Justice William Rehnquist began his opinion addressing this very issue and providing the rationale for reversing the court of appeals on this question. The solicitor general had characterized the court of appeals' decision (in allowing additional claims against the district) as simply allowing the reallocation of federal reclamation project water to the Indian fishery. Rehnquist indicated that Newlands Reclamation Project water rights were not "like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit." 463 U.S. at 126. Once surplus Indian land had been acquired by settlers, the beneficial ownership of the project water appurtenant to the surplus land also passed to the settlers. The federal government held only nominal title to those rights.

Later in the opinion, Rehnquist quoted approvingly from an Idaho Supreme Court decision: "'[I]t matters but little who are plaintiffs and who are defendants in the settlement of cases of this character; the real issue being who is first in right to the use of the waters in dispute.'" *Id.* (quoting *Morgan v. Udy*, 79 P.2d 295, 299 (Idaho 1938)). Rehnquist also observed that the United States had pleaded the separate interests of the reclamation project and the Tribe. The district had its own attorneys when the settlement was concluded. For these and other reasons, the Supreme Court reversed the court of appeals and determined that the earlier

positions of the Pyramid Lake Tribe and the Truckee-Carson Irrigation District were sufficiently adverse to enable the district to benefit from the *res judicata* defense, precluding new claims for water to support the tribal fishery.

In all other respects, the Supreme Court affirmed the lower courts. The Court emphasized the importance of *res judicata* as a doctrine of finality; otherwise, "'the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if . . . conclusiveness did not attend the judgment of such tribunals.'" *Id.* at 129 (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 49 (1897)). Rehnquist elaborated in a footnote:

> The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water. . . . A quiet title action for the adjudication of water rights, such as the *Orr Ditch* suit, is distinctively equipped to serve these policies because "it enables the court of equity to acquire jurisdiction of all the rights involved and also of all the owners of those rights, and thus settle and permanently adjudicate in a single proceeding all the rights, or claims to rights, of all the claimants to the water taken from a common source of supply." 3 C. Kinney, Law of Irrigation and Water Rights § 1535, p. 2764 (2d ed. 1912).

463 U.S. at 129 n. 10.

The Court rejected an overly legalistic comparison of the cause of action asserted in the original *Orr Ditch* litigation and the cause of action asserted in the newer case pending before the Court. Rehnquist studied the government's amended complaint and the decree to find references to "the several rights" of the United States, the need to protect Indians' fishing, and language whereby the parties were "forever enjoined" from asserting rights in the Truckee other than those set forth in the *Orr Ditch Decree*. Rehnquist concluded:

> We find it unnecessary . . . to parse any minute differences which these differing tests [for determining *res judicata*] might produce, . . . the only conclusion allowed by the record . . . is that the Government was given an opportunity to litigate the Reservation's entire water rights to the Truckee, and that the Government intended to take advantage of that opportunity.

Id. at 131.

The majority opinion also approved of the manner in which the federal government sought to represent both the interests of the Paiute Tribe and the non-Indian irrigators in the *Orr Ditch* litigation. Distinguishing the Interior Department's obligations from those of a private fiduciary, the Court noted that Congress had required the Secretary "to carry water on at least two shoulders" and "it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well." *Id.* at 128. Thus, both the United States and the Paiute Tribe (because its interests were represented by the federal government) were bound by the *Orr Ditch Decree*. *Id.* at 135.

Finally, the Court listed those parties who could use the *Orr Ditch Decree* preclusively against the federal government and the Tribe. They include the parties to the original decree, the farmers comprising the Truckee-Carson Irrigation District, and persons who appropriated Truckee River water subsequent to the *Orr Ditch Decree*. Even though mutuality[7] (a traditional requirement of *res judicata*) was lacking and these subsequent appropriators could not themselves be bound by *Orr*

[7] As a traditional requirement of the collateral estoppel doctrine, the mutuality rule requires that the party seeking to benefit from estoppel in the second proceeding actually have been at risk in the earlier suit. 18 JAMES WM. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE § 132.04[2][a] (3d ed. 2000).

Ditch, the Court recognized that an exception to the mutuality requirement was warranted. These water users

> 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 to permit subsequent appropriators" to hold the Reservation to the claims it made in *Orr Ditch* . . . .

Id. at 144. A summary of the ability of the various parties and nonparties to the *Orr Ditch* litigation to rely on the decree is provided in Table 1.

Table 1: Preclusive Effect of *Orr Ditch Decree*

Could the Pyramid Lake Paiute Tribe assert as against these persons:	**Claims for additional water rights to support the tribal fishery?**
Parties and successors to the *Orr Ditch Decree*?	No. "There is no dispute that the *Orr Ditch* defendants were parties to the earlier decree and that they and their successors can rely on the decree." 463 U.S. at 136-37.
Truckee-Carson Irr. Dist. and the Project farmers it represents	No. Even though the United States earlier represented the Tribe and the Project, their interests "were sufficiently adverse so that both are now bound by the final decree entered in the *Orr Ditch* suit." *Id.* at 143.
Nonparties such as subsequent appropriators	No. They "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." It would be "'manifestly unjust'" not "to hold the Reservation to the claims it made in *Orr Ditch* . . . ." *Id*. at 144.

The Supreme Court's construction of this mutuality exemption is somewhat confusing. The Court recognizes that "mutuality has been for the most part abandoned in cases involving collateral estoppel," *Id*. at 143; but the Court

apparently does not believe that a defensive use of collateral estoppel or issue preclusion alone would be sufficient to protect subsequent appropriators from the tribal fishery claim. Thus, the Court reaches to create a mutuality exception to the *res judicata* doctrine, which normally requires the same parties or their privities in both actions. The subsequent appropriators, however, were obviously not parties (or in privity with parties) to the original *Orr Ditch* proceeding. The Court's awkward construction of this mutuality exception favoring subsequent appropriators seems to be tacit recognition that (a) the fishery claim *could* have been litigated in the *Orr Ditch* case (justifying *res judicata* or claim preclusion) and (b) the fishery claim *was not* actually and necessarily litigated (necessary for collateral estoppel or issue preclusion in the subsequent case). *See* 18 JAMES WM. MOORE *ET AL*., MOORE'S FEDERAL PRACTICE § 132.03 (3d ed. 2000) [hereinafter "MOORE 3D"].

4. Comparison of *Orr Ditch* and *Globe Equity*

Orr Ditch neglected water for the important tribal fishery. The Gila River Indian Community asserts that the *Globe Equity Decree* omitted sufficient water for both decreed (allotted) lands and almost 325,000 acres of surplus reservation land. The similarities between the cases do not end there. Both proceedings were initiated on interstate rivers to assist in the construction of federal reclamation projects in water-short basins.

Both proceedings were initiated on interstate rivers to assist in the construction of federal reclamation projects in water-short basins. Both proceedings were brought in federal district court, went through an evidentiary phase before a special master, and resulted in the entry of consent decrees ratifying settlements

reached by the parties. Both cases involved the same "cast of characters": the federal government as plaintiff, an Indian Tribe who was not a party to the litigation but whose interests were represented by the United States as trustee, existing non-Indian water users in the upper basin, non-Indian irrigators who would participate in the reclamation project and organize an irrigation district, water users who would establish their water rights subsequent to the decree. Some of the same federal attorneys worked in both cases.

Both cases involved the same types of tribal lands: (a) more arable bottom lands susceptible to easily cultivation; and (b) less arable, less desirable bench or grazing lands. The bottom lands were expected to be allotted to individual Indians in small, irrigated parcels (5 acres each of the Pyramid Lake Reservation). Most of the bench or grazing lands were expected to be transferred as "surplus" lands to non-Indians under the homestead or reclamation acts. Once owned by non-Indians, these lands would receive water, if at all, under rights and sources different from those benefiting the Indian reservation. In both cases, the consent decrees were entered *after* Congress had passed the Indian Reorganization Act that ended the federal program of allotting in severalty the lands of most Indian reservations.

But there are differences between the two cases as well. The Gila River basin contains 57,850 square miles while the Truckee River basin extends 1,872 square miles. The *Orr Ditch* proceeding involved the entire length of the river in Nevada and all of the Truckee River tributaries in Nevada. *Globe Equity* concerned a 150-mile segment of the river, adjudicated mainstem water rights in both Arizona and New Mexico, but did not establish water rights on the tributaries.

While the Tribes in both basins have sought to revisit the old determinations, the procedural status is different. In Nevada, the United States brought a new proceeding in federal court in 1973 seeking additional rights on the Truckee River to support the tribal fishery and attempted to distinguish the earlier decree as determining only irrigation water rights for the reservation. The Pyramid Lake Paiute Tribe was allowed to intervene.

In Arizona, the United States commenced enforcement proceedings in the *Globe Equity* court and the Gila River Indian Community (along with the San Carlos Apache Tribe) was allowed to intervene in those proceedings. Now, Arizona's general stream adjudication has allowed the Community, and the United States in its behalf, to file claims more extensive than the water rights established for the Community in the *Globe Equity Decree.*

C. ***Arizona v. California***

In the original *Arizona v. California* litigation, the U.S. Supreme Court determined water rights as among Arizona, California, and Nevada. 373 U.S. 546 (1963). The Court also adjudicated water rights for several federal agencies and five Tribes having land along the mainstem of the river. The water rights determined for the reservations were based on the practicably irrigable acreage standard that had been proposed by Special Master Simon Rifkind. In that round of litigation, commonly known as *Arizona I,* the Supreme Court rejected the Master's efforts to finalize contested boundaries for two of the reservations, saying that the quantity of water for those reservations "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective

reservations are finally determined . . . ." *Arizona v. California*, 376 U.S. 340, 345 (1964) (*Decree*). While the Court did not accept Rifkind's boundary recommendations (which yielded less acreage than alleged by the United States), the Court did quantify water rights based on the acreage Rifkind had calculated using his proposed boundaries. Later, boundary disputes arose concerning the other three reservations including the Fort Yuma Reservation, home of the Quechan Tribe. *Arizona v. California,* 460 U.S. 605, 630-31 (1983) (*Arizona II*).

In the 1970s, the Department of the Interior took several administrative steps to resolve the contested reservation boundaries. Generally, these actions were secretarial orders or solicitor's opinions "issued unilaterally and without a hearing." *Id.* at 631. One such order was a 1978 secretarial order that purported to nullify an earlier Quechan Tribe land cessation due to the failure of the United States to provide the promised consideration. *Arizona v. California,* 530 U.S. __, slip. op. at 9 (June 19, 2000). While several California governmental agencies sued in federal court to avoid these administrative actions, *Metropolitan Water Dist. v. United States,* Civ. No. 81-0678-GT(M) (S.D. Cal. Apr. 28, 1982), the United States and the Tribes (after they were permitted to intervene in the original jurisdiction action) moved the Supreme Court to reopen the 1964 decree to enlarge tribal water rights based on the Department's actions.

These rights alleged by the United States and Tribes were for two types of land: (a) "omitted" lands, apparently irrigable lands within reservation boundaries that had not been claimed by the federal government in the original *Arizona I*

litigation; and (b) "boundary" lands for which Master Rifkind recommended boundary adjustments. 460 U.S. at 612.

As to the omitted lands, the Supreme Court recognized the *res judicata* effect of the 1964 decree. *Id*. at 616. Except for a continuing jurisdiction provision in that decree, the Court indicated that "[t]here is no question that if these claims were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of res judicata." *Id.* at 617. The exercise of continuing jurisdiction should be limited, however, and "subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated." *Id.* at 619. The Court found neither exception to be present.

In language foreshadowing the Supreme Court's *Orr Ditch* decision issued later that term, the Court addressed any conflict of interest issues involving the federal government as follows:

> We find no merit in the Tribes' contention that the United States' representation of their interests was inadequate whether because of a claimed conflict of interests arising from the Government's interest in securing water rights for other federal property, or otherwise. The United States often represents varied interests in litigation involving water rights, particularly given the large extent and variety of federal land holding in the West.

Id. at 627.

As to the boundary lands, the Court disagreed with Special Master Elbert P. Tuttle that the boundary issues had been "finally determined" by secretarial action. *Id.* at 636. The Court recalled that in the original proceedings before Master Rifkind, all parties had contemplated *judicial* resolution of the boundary issues. *Id.* at 637.

The Court, therefore, urged resolution of these issues in the action still pending in the *Metropolitan* case or in another available judicial forum. *Id.* at 639.

The boundary issues were not resolved in federal district court as the United States finally prevailed on its claim of sovereign immunity in that litigation. *California v. United States,* 490 U.S. 920 (1989) (*per curiam*). The Colorado River Basin States, without opposition from the United States or Tribes, then asked the Supreme Court to determine whether Fort Yuma and other Tribes were entitled to the disputed boundary lands, and if so, to adjudicate additional water rights. 530 U.S. at __, slip. op. at 5. Proceedings before Special Master Frank McGarr resulted in his recommendation that no additional water rights be awarded.

The Supreme Court disagreed with the Special Master's result and his reasoning. The Special Master recognized the *res judicata* effect of a Court of Claims judgment in the Quechan Tribe's favor (a basis promptly rejected by the Court) but afforded no *res judicata* effect to the *Arizona I* proceedings because of changed circumstances, *i.e.*, the 1978 secretarial order. The Court also rejected this reasoning, saying "[t]he 1978 Order did not change the underlying facts in dispute; it simply embodied one party's changed view of the import of unchanged facts." 530 U.S. at __, slip. op. at 13. Ultimately, the Court did allow the Quechan Tribe to pursue its claims for additional water, finding that the States' "preclusion defense is inadmissible at this late date . . . ." *Id.* The tribal claims concerning the boundary lands were returned to the Special Master for a determination on the merits. 530 U.S. at __, slip. op. at 25.

The totality of this litigation establishes several principles that are important to the resolution of our case. First, the Supreme Court considers the stability of land and water right titles to be of great importance in the West:

> Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open. Certainty of rights is particularly important with respect to water rights in the Western United States . . . . Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case.

460 U.S. at 620.

Second, the Court could find no reason to excuse the United States' failure to assert water rights for the omitted lands undisputedly within the reservation. This holding supports the moving parties here who contend that the United States' earlier failure to establish water rights for the surplus lands on the Gila River Indian Reservation is of no legal consequence now.

Third, the "changed circumstances" exception to the finality of past adjudications is to be narrowly drawn. The Court affords little legal significance to a subsequent event, the 1978 secretarial order, indicating that it did not alter the underlying facts in dispute, *i.e.*, the reservation's water rights entitlement. 530 U.S. at __, slip op. at 13. This suggests that even less significance should be given to events that preceded the *Globe Equity Decree*, such as the passage of the 1934 Indian Reorganization Act, ending the allotment period, or even subsequent developments in the federal reserved water rights doctrine.

D. Findings of Fact

With the discussion of this important litigation in mind, I return to the *Globe Equity Decree* and address the preclusive effect of this federal court determination. I begin by enumerating those material facts necessary to my decision, which continue to tell the story of the *Globe Equity No. 59* litigation (drawn from the statements of fact submitted by the parties), about which there appears to be no genuine issue or dispute.[8] *See* ARIZ. R. CIV. P. 56(c).

1. Finding of Fact No. 1. The Gila River Indian Reservation was created by Congress in 1859. Act of Feb. 28, 1859, 11 Stat. 401 [OSM No. 112].

2. Finding of Fact No. 2. The Gila River Indian Reservation was enlarged through a series of presidential executive orders issued between 1876 and 1915. Exec. Order (Aug. 31, 1876) [OSM No. 134], *as modified by* Exec. Order (Aug. 27, 1914) [OSM No. 144]; Exec. Order (June 14, 1879) [OSM No. 136]; Exec. Order (May 5, 1882) [OSM No. 137]; Exec. Order (Nov. 15, 1883) [OSM No. 138]; Exec. Order (July 31, 1911) [OSM No. 141]; Exec. Order (June 2, 1913) [OSM No. 143]; and Exec. Order (July 19, 1915) [OSM No. 146].

3. Finding of Fact No. 3. On February 8, 1887, Congress passed the Dawes or Indian General Allotment Act. Ch. 119, 24 Stat. 388 (Feb. 8, 1887). This legislation set forth the federal Indian policy, known as the Assimilation Period, that extended until 1934 when the Indian Reorganization Act was passed. Ch. 216, 48 Stat. 984 (June 18, 1934). The allotment program contemplated that Indian

[8] Findings of fact and conclusions of law are numbered consecutively throughout the report for easy reference and to avoid confusion.

reservations including the Gila River Indian Reservation would be broken up, irrigable tribal lands conveyed to individual Indians, and remaining surplus tribal lands sold for development.

4. Finding of Fact No. 4. By no later than 1872, upstream settlers in the Safford and Duncan-Virden Valleys and in the Florence-Casa Grande area settled along the Gila River and began diverting water from the river for irrigation. PRELIMINARY HSR at C-4. After these diversions began, federal authorities and members of the Gila River Indian Reservation complained that the Gila Indians were being deprived of water that was rightfully theirs. Bill of Complaint at 5-6, *United States v. Gila Valley Irr. Dist*., Globe Equity No. 59 (D. Ariz. June 29, 1935) [hereinafter *"Globe Equity No. 59"*] [OSM No. 293].

5. Finding of Fact No. 5. The San Carlos Project, among the West's first federal reclamation projects, was envisioned when the federal Reclamation Act was passed in 1902. The Project was built following a series of congressional enactments beginning with the construction of the San Tan Canal in 1905 and the Florence-Casa Grande Irrigation Project in 1916 (authorizing two diversion dams and canals). Act of Mar. 3, 1905, 33 Stat. 1081 [OSM No. 116]; Act of May 18, 1916, 39 Stat. 123-30 [OSM No. 124].

6. Finding of Fact No. 6. In 1924, Congress authorized the San Carlos Project itself and the construction of what would be known as Coolidge Dam across the Gila River near San Carlos, Arizona. An Act for the Continuance of Construction Work on the San Carlos Federal Irrigation Project in Arizona and for

Other Purposes, 43 Stat. 475-476 (June 7, 1924) [OSM No. 129]. The act stated that the purpose of the Project would be:

> [F]irst, of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Indian Reservation, Arizona, now without an adequate supply of water and, second, for the irrigation of such other lands in public or private ownership, as in the opinion of the said Secretary, can be served with water impounded by said dam without diminishing the supply necessary for said Indian lands: *Provided*, That the total cost of the project shall be distributed equally per acre among the lands in Indian ownership and the lands in public or private ownership that can be served from the waters impounded by said dam.

Id.

7. Finding of Fact No. 7. The San Carlos Project was intended to be a "combined Indian and white man's irrigation project." Pima Indians and the San Carlos Irrigation Project Hearing on S. 966 Before the House Committee on Indian Affairs, 68 Cong., 1st Session, at 3 (1924). Non-Indian participation in the project was deemed necessary in order to pay for its construction costs. The project was expected to provide water to between 80,000 and 90,000 acres. *Id.* at 35.

8. Finding of Fact No. 8. In 1924, the Secretary prepared and subsequently executed a "Landowners' Agreement with the Secretary of the Interior, San Carlos Project: Act of June 7, 1924," as required by the 1924 legislation. The 1924 Landowners' Agreement provided that up to 50,000 acres of Indian allotted lands on the Gila River Indian Reservation could receive water from the San Carlos Project. [OSM No. 153 at 9].

9. Finding of Fact No. 9. On October 2, 1925, the United States, on behalf of itself and the Indians living on the Gila River Indian Reservation and the

San Carlos Apache Reservation, filed a Bill of Complaint in *Globe Equity No. 59* in the U.S. District Court for the District of Arizona to adjudicate the waters of the Gila River. The Gila Valley Irrigation District, Franklin Canal Company, and numerous other farmers and diverters in the Safford and Duncan-Virden Valleys were named as defendants [hereinafter "Upper Valley Defendants"]. Bill of Complaint, *Globe Equity No. 59* [OSM No. 293].

10. Finding of Fact No. 10. The United States represented multiple interests in the litigation, including the interests of the water users who subsequently formed the San Carlos Irrigation and Drainage District. Edward Smith, Special Assistant to the U.S. Attorney General, stated:

> To put it another way, we have the Government representing itself and the Indians and also representing the water users of the Florence-Casa Grande Valley by reason of the contract [landowner agreements]; opposed to them are the water users of the three districts in the upper valley . . . .

Letter from Edward A. Smith, Special Assistant to the U.S. Attorney General to the U.S. Attorney General (Aug. 8, 1927) at 13-14 [OSM Nos. 5215 and 5216].

11. Finding of Fact No. 11. The Bill of Complaint alleged, among other things, that the United States had "reserved and appropriated . . . all of the waters of the said Gila River and its tributaries . . . which may be necessary for the economical and successful irrigation and cultivation" of the lands of the Gila River Indian Reservation. [OSM No. 293, at 21]. It requested that the Court "determine the relative rights of the parties hereto . . . into and of the waters of the said Gila River . . . ." *Id.* at 23.

12. Finding of Fact No. 12. Answers to the Bill of Complaint were filed by the Gila Valley Irrigation District, the Franklin Irrigation District, and farmers and water users in those districts. Answer of the Gila Valley Irr. Dist. *et al.*, *Globe Equity No. 59* (Jan. 30, 1926) [OSM No. 1888]; Answer of the Franklin Irr. Dist. *et al.*, *Globe Equity No. 59* (Mar. 8, 1926) [OSM No. 302].

13. Finding of Fact No. 13. Two years after filing the original complaint, the United States filed an Amended Complaint, again naming the Upper Valley Defendants as defendants. Amended Complaint, *Globe Equity No. 59* (Dec. 5, 1927) [OSM No. 5261].

14. Finding of Fact No. 14. The Amended Complaint in *Globe Equity No. 59* limits the territorial scope of the adjudication to an area along the Gila River "as it flows between a line 10 miles east of the parallel to the dividing line between Arizona and New Mexico, and the confluence of the Salt River with the Gila River, and after the following tributaries of the Gila River, the San Francisco River, the San Carlos River, the San Pedro River, and the Santa Crus [sic] River, respectively, have joined the main stream . . . ." *Id.* at 32-33.

15. Finding of Fact No. 15. The Amended Complaint alleged, among other things:

a. That the suit was "brought by the United States for itself and as Trustee and Guardian for the Pima and Apache Indians, occupants and possessors of large areas of land with water rights appertaining thereto in the Gila River Indian Reservation . . . ." *Id.* at 11, ¶3.

b. "That the Pima Indians, from time immemorial until the first reservation was made for them by the United States . . . occupied and possessed a large area of land on the Gila River . . . which area included the lands now embraced in the Gila River Indian Reservation . . . . With the lands of said reservation, the Pima Indians also did and do occupy and possess to a large extent the usufruct of the waters of the Gila River, and with said waters at all times have irrigated large areas of said land. The waters thus possessed by said Indians are a quantity sufficient to irrigate the lands subsequently allotted to them as irrigable allotments, said allotments being made to individuals among said Indians and amount to 49,896 acres . . . ." *Id*. at 17-18, ¶¶5-6.

c. That "the United States, by a series of acts of Congress, proclamations, and Executive orders. . .recognized that the lands and waters. . . belonged to the Pima Indians under their title of occupancy and possession and confirmed and made more secure those rights as far as they covered or related to said reservation, and reserved for said Indians the lands and water rights comprised in or connected with the Gila River Indian Reservation. The lands in said reservation are situate in the Counties of Pinal and Maricopa, and comprise about 375,422 acres." *Id*. at 18-19, ¶7(a).

d. That "[t]he water rights reserved in connection with the reservation of said land for the Pima Indians are alleged to be the following, to wit: So much of the waters of the Gila River as should be needed to carry out the purposes of the United States in recognizing and in making said reservation of

lands, and also in accomplishing the civilization and bringing about the prosperity of said Indians." *Id*. at 19, ¶7(b).

16. Finding of Fact No. 16. For relief, the United States requested in its Amended Complaint that the Court "determine the rights of the parties hereto to the waters of said river and its tributaries and the right of said parties to divert water from said river within the area aforesaid and for storage above, to the end that it may be known how much of said waters may be diverted from said river by the parties hereto and for what purposes, where, by means of diversion and with what priorities." *Id.* at 34.

17. Finding of Fact No. 17. The United States, in its brief filed on December 6, 1927, one day after the amended complaint, discussed the scope of the litigation: "This suit is one to adjudicate water rights within a specified area of the Gila River. . . . The idea is to settle rights of diversion along this stretch of the stream, excluding, however, rights to divert water of the tributaries . . . ." Brief of the United States at 1, *Globe Equity No. 59* (Dec. 6, 1927) [OSM No. 10127].

18. Finding of Fact No. 18. John Truesdell, a principal federal attorney involved in *Globe Equity No. 59*, summarized the legal theories that were asserted in the litigation:

a. Rights based on "the Indian right of occupancy and possession prior to the advent of the white man."

b. Rights based upon the "reservations of water made by the United States when Arizona was a territory."

c. Rights based upon "the doctrine of the Winters case" [*Winters v. United States*, 207 U.S. 564 (1908) (recognizing the federal reserved rights doctrine)].

d. Rights based upon "reservations of water made by the United States after Arizona became a State under the doctrine of federal ownership of the usufruct of innavigable waters in the public-land states."

e. Rights based upon "simple appropriations."

Letter from John F. Truesdell, Superintendent of Irrigation, to Edward A. Smith, Special Assistant to the Attorney General at 2-3 (Dec. 13, 1926) [OSM No. 5154].

19. Finding of Fact No. 19. John F. Truesdell also discussed the purpose and geographic scope of the litigation:

> The object of the suit is to adjudicate rights to divert water from the Gila River within a defined area, or store it above for use within that area. The suit is in the nature of one to quiet title to real estate. This suit is one to adjudicate water rights within a specified area of the Gila River. That area is defined in the complaint and roughly embodies the stretch of the river extending from the lower or western end of the Gila River Indian Reservation, up that stream, to a line parallel with the boundary between the States of Arizona and New Mexico, but 10 miles east thereof.

Truesdell also indicated that the "idea [of the suit] is to settle rights of diversion along this stretch of the stream, excluding, however, rights to divert water of the tributaries." This would create an "opportunity" for a "full settlement of rights within that area—a settlement between the defendants among themselves, if they so desire, as well as a settlement between the defendants and the plaintiff." Draft Brief of the United States, forwarded by J. Truesdell to G.A. Iverson, Special Assistant to the U.S. Attorney General (Nov. 30, 1927) [OSM Nos. 5259 & 15808].

20. Finding of Fact No. 20. John F. Truesdell also discussed the United States' claim for adjudicating a quantity of water for the Gila River Indian Reservation:

> The utmost quantity of water that could be reserved in a stream in the Western States for irrigation purposes would be the amount needed to irrigate all of the irrigable lands on the reservation. But obviously that is only one limit. There are others—such as the number of Indians—and all sorts of other things which go to measure the needs of the Government to carry out its purpose. In practice, we have usually adopted as the best index of those needs, the practice of the Government in alloting [sic] irrigable lands to the Indians and using irrigable lands on the reservation for administrative areas. We, therefore, in this case, claim as our outside claim, under the Indian Title and the broad doctrine of Federal ownership and the doctrine of the Winters case, the quantity of water needed to irrigate the Indian allotments and the administrative area, which together amount practically to 50,000 acres.

Letter from John F. Truesdell, Superintendent of Irrigation, to Edward A. Smith, Special Assistant to the U.S. Attorney General at 8 (Aug. 3, 1927) [OSM No. 5210].

21. Finding of Fact No. 21. As to other reservation lands not included in this 50,000-acre figure, Truesdell indicated that "[w]e are keeping fully in mind the fact that the Pima Indians will have a vast area beyond this that will be susceptible of irrigation and perhaps can be irrigated by wells, return flow water or otherwise." Letter from John F. Truesdell to Pima Agency (Aug. 4, 1924) [OSM No. 5025].

22. Finding of Fact No. 22. The Gila Valley Irrigation District and Franklin Irrigation District filed answers to the Amended Complaint, denying many of the allegations, including the claims that the United States had reserved water rights for the Gila River Indian Reservation. Answer of Gila Valley Irr. Dist. *et al.*,

Globe Equity No. 59 (Aug. 18, 1928) [OSM No. 360]; Answer to Amended Bill of Complaint by Franklin Irr. Dist. *et al.*, *Globe Equity No. 59* (Jan. 5, 1929) [OSM No. 15674].

23. Finding of Fact No. 23. The Court appointed a Special Master, Califford R. McFall, who heard arguments and testimony and admitted exhibits. Index of Exhibits and Transcript of Court Proceedings, Vol. 1 & 2, *Globe Equity No. 59* [OSM Nos. 15678 & 15679].

24. Finding of Fact No. 24. After filing of the Complaint and the Amended Complaint, the United States and the Upper Valley Defendants engaged in settlement negotiations for many years. Letter from John F. Truesdell, Superintendent of Irrigation, to Charles Burke, Commissioner of Indian Affairs (Feb. 1, 1929) [OSM No. 393].

25. Finding of Fact No. 25. The negotiations eventually resulted in a draft consent decree. Letter from Homer Cummings, U.S. Attorney General, to Harold L. Ickes, U.S. Secretary of Interior at 2 (May 3, 1934) (the proposed consent decree "is purposed to take care of the rights of all litigants who are deemed necessary to a complete adjudication") [OSM No. 584].

26. Finding of Fact No. 26. Ethelbert Ward, another Special Assistant to the U.S. Attorney General, worked to ensure that the proposed consent decree correctly included all necessary defendants. In a progress report to the U.S. Attorney General, dated November 28, 1933, Ward explained the changes in the number of defendants in the suit since the filing of the original Bill of Complaint:

> The original bill of complaint named 420 defendants as claiming diversion rights from the Gila river [sic] and from its tributaries. The amended bill of complaint named 1364 defendants as claiming diversion rights from the Gila river [sic] only and not from its tributaries. The proposed decree sought to be consented to by all parties names something over 1700 defendants as claiming diversion rights from the Gila river [sic] only.

Letter from Ethelbert Ward to the U.S. Attorney General (Nov. 28, 1933) [OSM Nos. 1286 & 17179].

27. Finding of Fact No. 27. Between the filing of the original bill of complaint and the entry of the consent decree, several hundred defendants were dismissed from the litigation without prejudice, many of whom maintained water uses on tributaries to the Gila River. Letter from Ethelbert Ward to the U.S. Attorney General (Dec. 14, 1933) [OSM No. 5607]; Order Setting Aside Order Pro Confesso and Dismissing as to Certain Defendants, and Order Dismissing Certain Defendants, *Globe Equity No. 59* (both dated Mar. 30, 1935) [OSM Nos. 5687 & 5688]; *see also Globe Equity Decree* art. I & III [OSM No. 4].

28. Finding of Fact No. 28. Between the filing of the original bill of complaint and the entry of the consent decree, Congress passed the Indian Reorganization Act effectively ending the allotment and assimilation period of federal Indian policy. The IRA encouraged Indian self-government and self-determination including Indian control over their property and resources.

29. Finding of Fact No. 29. The draft consent decree, which was to "definitely determine[ ] the rights of all landowners on the river," was reviewed and approved by the U.S. Attorney General and the Secretary of Interior. Letter from

John Collier, Commissioner of Indian Affairs, to Rudolph Johnson, President of Pima Indian Tribal Council at 1 (June 24, 1935) [OSM No. 656].

30. Finding of Fact No. 30. On June 25, 1935, the Pima Indian Tribal Council moved to intervene in *Globe Equity No. 59* as representatives of the Indians on the Gila River Indian Reservation. Petition for Leave to Intervene, *Globe Equity No. 59* (June 25, 1935) [OSM No. 659]. The Court denied the motion. Minute Entry, *Globe Equity No. 59* (June 29, 1935) [OSM No. 5720].

31. Finding of Fact No. 31. The proposed consent decree was entered by U.S. District Court Judge Albert M. Sames in *Globe Equity No. 59* on June 29, 1935. The Gila Decree still governs diversions from the Gila River. Final Decree, *Globe Equity No. 59* [OSM No. 4].

32. Finding of Fact No. 32. At the time the *Globe Equity Decree* was entered, the Gila River Indian Reservation constituted approximately 375,422 acres. Amended Complaint at 19, ¶7(a) [OSM No. 5261].

33. Finding of Fact No. 33. Some of the rights of the United States on behalf of the Gila River Indian Reservation are stated in Article VI of the *Globe Equity Decree* as follows:

a. "The right on behalf of the Pima and other Indians of the Gila River Indian Reservation, their descendants, successors and assigns, to divert 210,000 acre feet of the waters of the Gila River . . . as of an immemorial date of priority . . . for the reclamation and irrigation of the irrigable Indian allotments on said reservation, which amount to 49,896 acres, as they now are or hereafter may be made, and of the administrative area on said Reservation which amounts to 650

acres, to the extent that the herein described water right, which is sufficient for and limited to the needs of 35,000 acres, will reclaim and irrigate the same." Art. VI, ¶1 [OSM No. 4, at 86].

b. "The right to divert 372,000 acre feet of the waters of the Gila River . . . for the reclamation and irrigation of the 62,000 acres of the irrigable lands of the so-called Florence-Casa Grande Project, or its equivalent, more particularly described as follows: (a) The aforesaid Indian allotments now or hereafter made on the said Indian Reservation, and the said administrative area, amounting in the aggregate to 50,546 acres [49,896 + 650] . . . ." *Id.*

c. "The right to divert 603,276 acre feet of the water of the Gila River . . . for the reclamation and irrigation of the 100,546 acres of the irrigable lands of the San Carlos Project . . . said 100,546 acres of project lands being more particularly described as follows: (a) 49,896 acres of land within the Gila River Indian Reservation which have been, or may be allotted to individuals among the Indians thereof . . . ." *Id*. at 98.

34. Finding of Fact No. 34. Article XIII of the *Globe Equity Decree* states as follows:

> [E]ach and all of the parties to whom rights to water are decreed in this cause . . . their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through, or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree . . . the Court retains jurisdiction hereof for the limited purposes above described, this decree otherwise being deemed a final determination of the issues in this cause and of the rights herein defined.

Art. XIII [OSM No. 4, at 113].

E. Conclusions of Law

As these facts illuminate, the *Globe Equity* litigation was pitched on the divide between two periods of American Indian law. The general allotment period, which commenced with the passage of the Dawes Act in 1887, came to an ignoble end in 1934 with the enactment of the Indian Reorganization Act (IRA). While millions of acres of tribal land had passed into non-Indian ownership during this half-century, the IRA slowed the fragmentation of Indian lands, renewed the federal government's commitment to reservation life, and reinvigorated tribal governments.

While the IRA ended the allotment program, the legislation did not alter the United States' *Globe Equity* litigation strategy, focused as it had always been on acquiring water for the 50,000 acres of reservation land anticipated to pass to Indian allottees. The federal attorneys had originally assumed the balance of the reservation, consisting of less desirable lands, would be transferred as surplus lands to non-Indians under federal homestead laws or in other transactions. These litigation decisions were made with little or no consultation with the tribe or tribal members. Indeed, the United States opposed the attempt of the Pima Indian Tribal Council (precursor of the present tribal government and, at the time, apparently encouraged by the IRA's self-government pronouncements) to intervene in *Globe Equity* days before the consent decree was entered.

Because of the IRA, the surplus lands on the Gila River Indian Reservation largely did *not* pass into non-Indian hands; and the Community is left with a *Globe Equity* water rights entitlement that omits much of its land base. The Community and the United States have both used the opportunity afforded by the Gila River adjudication to assert additional claims to both lands decreed under *Globe Equity* and for the surplus lands that were not awarded water. These claims are vigorously opposed by two groups: upper valley water users who were original parties (or privities to such parties) to the *Globe Equity* litigation and who rely on the *res judicata* doctrine, and other water users in the Gila River system who say they have reasonable and settled expectations in the nature and extent of the reservation's water rights as defined by *Globe Equity No. 59.*

More specifically, the preclusive effect of the decree is best established by referring to four specific groups of persons:

1. Persons who were parties to the original *Globe Equity* litigation and who are also before the court in the Gila River adjudication, *e.g.*, the United States, Gila Valley Irrigation District.

2. Successors and privities of persons who were parties to the original *Globe Equity* litigation and who are now before the court in the Gila River adjudication in their own right, *e.g.*, the Gila River Indian Community.

3. Persons or their privities who had water rights in the Gila River system when the *Globe Equity Decree* was entered but were not joined in that litigation or dismissed from it. These persons may have used

water upstream in New Mexico, on the Gila's tributaries, or downstream from the area adjudicated in the federal decree.

4. Persons who were not parties to the *Globe Equity* litigation but who have established water rights anywhere in the Gila River system (mainstem or tributaries) since entry of the *Globe Equity Decree*. (While this category may be further divided, such distinctions are unnecessary here).

Groups 1 and 2 raise the question of *res judicata* (claims preclusion). Groups 3 and 4 raise the question of collateral estoppel (issue preclusion). Before addressing these *res judicata* and collateral estoppel issues, I must decide whether federal or Arizona law specifies the requirements to be satisfied before the *Globe Equity Decree* can be afforded *res judicata* or collateral estoppel effect in this adjudication.

1. Choice of Law

The moving parties argue that the federal law of *res judicata* must be applied to determine the claim preclusion effect of the *Globe Equity Decree* in this adjudication. The Community responds that Arizona law defines *res judicata* for purposes of this proceeding (although they also argue that even under federal law, *res judicata* does not apply).

a. Conclusion of Law No. 1. The general rule is that the *res judicata* effect of a federal court judgment is determined by federal law. 1B JAMES WM. MOORE *ET AL*., MOORE'S FEDERAL PRACTICE ¶¶ 86 & 87 (2d ed. 1996) [hereinafter "MOORE 2D"]. The same rule applies in determining the collateral estoppel effect of

a prior judgment, an issue also implicated here. This choice of law selection is especially appropriate when the federal interest was strong in the earlier litigation.

b. Conclusion of Law No. 2. The federal law of *res judicata* and collateral estoppel must be applied to determine the preclusive effect of the *Globe Equity Decree* for purposes of this case. This is because the federal interest in the *Globe Equity* litigation was especially strong. The *Globe Equity* litigation involved many federal concerns, *i.e.*, water rights for two Indian reservations, water supply for a federal reclamation project, and an interstate river. Also, Arizona courts have recognized that the law of the jurisdiction in which the judgment was entered should define the preclusive effect of the judgment. *See, e.g., Lofts v. Superior Court*, 140 Ariz. 407, 410, 682 P.2d 412, 415 (1984); *Bill Alexander Ford, Lincoln Mercury, Inc. v. Casa Ford, Inc.*, 187 Ariz. 616, 618, 931 P.2d 1126, 1128 (App. 1996) (Arizona courts follow RESTATEMENT (SECOND) OF CONFLICTS OF LAW (1971), which indicates that effect of valid judgment is determined with reference to the law under which it was rendered).

2. Federal Doctrine of *Res Judicata*

Res judicata is a fundamental social and legal doctrine of finality for disputes that have been fully heard and decided by a fair tribunal. A cause of action asserted and decided once cannot be asserted between the same parties again. The law "prevents an encore" after a party has an opportunity to present his or her case and the matter has been decided. Time and later circumstances may demonstrate the decision to have been ill-advised or incorrect, but the public interest remains strongly against reopening settled controversies.

Federal law, which defines the *res judicata* doctrine for purposes of this case, compares the causes of action or claims asserted in the earlier and later actions to ascertain whether they are the same. The doctrine necessitates that the parties involved in the second case be the same as those in the first proceeding, or be the successors or "privities" of the earlier litigants. The concept of "privity" usually refers to (a) persons having a concurrent relationship to the same property (*e.g.*, trustee—beneficiary); (b) persons having a successive relationship to the same property (*e.g.*, vendor—vendee); or (c) one person representing the interests of another person (*e.g.*, agent). 1B MOORE 2D ¶ 0.411[1]. Generally, a claim or cause of action consists of all of plaintiff's rights to remedies against a defendant arising out of the same transaction or series of transactions. The claim or cause of action "is defined by the injury for which the claimant seeks redress and not by the legal theory on which the claimant relies." *Id.* ¶ 0.410[1].

Relying on *Nevada v. United States*, the moving parties argue strongly that the Community's Gila River adjudication claims or causes of action are the same as those in *Globe Equity*. Since the moving parties or their predecessors were parties to *Globe Equity*, they should benefit from those earlier determinations. The statements of claimant filed in this adjudication by the Community and the United States advance a broad array of water rights for the reservation. Many undisputed material facts, however, support the conclusion that this same portfolio of claims was asserted earlier by the United States in *Globe Equity*. This is most convincingly demonstrated in the language of the amended complaint, *e.g.*, "[t]he water rights reserved in connection with the reservation of said land for the Pima Indians are

alleged [as] . . . So much of the waters of the Gila River as should be needed to carry out the purposes of the United States in recognizing and in making said reservation of lands, and also in accomplishing the civilization and bringing about the prosperity of said Indians." Amended Complaint ¶ 7(b) [OSM No. 5261]; *see* Finding of Fact No. 15(d), *supra*. John F. Truesdell's summary of legal theories asserted in *Globe Equity* also persuasively demonstrates that the federal government placed in issue its complete portfolio of claims. *See* Finding of Fact No. 18. *Orr Ditch* clarifies that the consideration of the amended complaint is an appropriate inquiry. *See* 463 U.S. at 133.

The Community develops a two-pronged defense to the moving parties' *res judicata* argument. The Community begins by specifying numerous examples of supposed ambiguity or uncertainty the Community believes rise to the level of disputed material facts. The Community then develops four principal, legal arguments why *res judicata* cannot bar its claims in this adjudication, *i.e.*, consent decrees do not quality for *res judicata* or preclusive effect, the causes of action are different, the parties are different, and circumstances have changed significantly since 1935 making inequitable a preclusive application of the earlier decree. Since I believe the resolution of the Community's legal arguments disposes of many of the factual questions, I take up these arguments first.

a. Consent Decrees

The law is settled that a consent judgment, such as the *Globe Equity Decree*, is entitled to *res judicata* in the same fashion as judgments entered after the completion of litigation. While some decisions have denied *res judicata* effect to a

consent decree, saying it is simply a contract, this approach is disfavored. A leading commentator has said, "The [consent] judgment is not, like the settlement agreement out of which it arose, a mere contract *inter partes*. The court is not properly a recorder of contracts; it is an organ of government constituted to make judicial decisions, and when it has rendered a consent judgment it has made an adjudication." 1B MOORE 2D ¶ 0.409[5].

[1] Conclusion of Law No. 3. Although entered as a consent decree, the *Globe Equity Decree* may have *res judicata* effect, so long as the other requirements of the *res judicata* or claim preclusion doctrine are satisfied.

b. Same Claim or Cause of Action

The Community argues that its Gila River adjudication claims vary from the rights asserted in *Globe Equity* because the latter claims require different evidence and modes of proof. The Community suggests that different evidence will be necessary to prevail on legal theories that were not asserted in *Globe Equity*, principally the reserved water rights or *Winters* doctrine to establish water rights for lands omitted from the 1935 decree; and to establish water quantities using methods (practicably irrigable acreage (PIA)) that were not recognized in 1935. The Community also goes to great length to distinguish the geographic scope of the two proceedings. GRIC's Response at 21-22.

I have already determined that federal law, focused on the respective causes of action or claims, and not Arizona's "same evidence test," applies to determine the preclusive effect of the federal court decree. In any event, the Community's specification of different legal theories and evidence is unpersuasive. A litigant has

an obligation to assert all his legal theories arising from a cause of action in the first instance. A leading treatise indicates, "As a general principle, then, the plaintiff must assert in his first suit all the legal theories that he wishes to assert, and the failure to assert them does not deprive the judgment of its effect as res judicata." 1B MOORE 2D ¶ 0.410[1] (footnotes omitted); *see also id.* at III-193 ("the prevailing view in the courts is in favor of requiring a plaintiff to present in one suit all the claims for relief that he may have against the defendant arising out of the same transaction or occurrence"). The federal attorneys bringing the *Globe Equity* litigation were aware of the reserved rights doctrine, whether or not it is encapsulated in the decree, as is readily apparent from the documents accompanying the motion. *See* Finding of Fact No. 18, *supra*. Here, as in *Orr Ditch*, the federal government "placed in issue the full Reservation cause of action." 649 F.2d at 1302.

The U.S. Supreme Court itself has indicated that different legal theories do not support an effort to assert in a second round of litigation those remedies that could have been brought in earlier litigation. In *United States v. Southern Ute Tribe or Band of Indians*, 402 U.S. 159 (1971) (Brennan, J.), Congress had passed two statutes (1880 and 1895) terminating the Ute's ownership of lands in southwestern Colorado, the second statute being necessary because the Southern Ute had failed to relocate to Utah. In 1950, the Southern Ute obtained an award from the Indian Claims Commission under the 1880 statute. The Court ruled that a second effort a year later to bring a claim under the 1895 statute, essentially a different legal theory, was barred by *res judicata.*

The differences in geographic scope between the *Globe Equity* litigation and the present adjudication also do not support the conclusion that a new claim or cause of action is being asserted in the Gila River adjudication. For its time, *Globe Equity* was a large case, encompassing most of the settled area of the entire basin adjudicating thousands of relative rights of water users along that segment of the river. It is roughly comparable to the area adjudicated in *Orr Ditch*. The U.S. Supreme Court has recognized that the adjudication of entire river system is unnecessary to qualify the proceeding as a general stream adjudication for McCarran Amendment purposes.[9] *United States v. District Court*, 401 U.S. 520, 523 (1971) (*Eagle County*) ("We deem almost frivolous the suggestion that the Eagle and its tributaries are not a 'river system' within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States."). While the Gila River adjudication comprises the entire basin, the main purpose of this proceeding is the same as in *Globe Equity*: to determine the existing water rights of the parties. *See* ARIZ. REV. STAT. ANN. § 45-252 (1994).

The key to this examination is whether the underlying federal claims or causes of action are the same, and they are. From 1925 to 1935, the federal government, as trustee, sought to establish the water rights for its beneficiaries, the Indians residing on the Gila River Reservation. In retrospect, the federal

[9] 43 U.S.C. § 666 (1986). The McCarran Amendment is a congressional waiver of federal sovereign immunity allowing the adjudication of federal water rights in comprehensive general stream adjudications.

government may have performed this task poorly, omitting almost 325,000 acres of land from its calculus of water necessary for the reservation. But the federal government had the opportunity—indeed, the obligation—to assert all aspects of its claim; and the language of the decree itself speaks to that aim, *e.g.*:

- The United States is authorized to divert from the Gila River water for those rights "owned by the United States for and on account of the Indians of the Gila River and San Carlos Indian Reservations . . . ." Art. V.
- The United States "has and owns rights in the waters of the Gila River, and in and to the use of said waters, as follows: [listing of rights]." Art. VI.
- The parties to the decree, including the United States "are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree . . . ." Art. XIII.

The federal government's failure to adequately assert all aspects of the Community's claims have properly been the subject of various actions brought by the Community in other forums.

[1] Conclusion of Law No. 4. In the *Globe Equity* litigation, extending from 1925 to 1935, the United States was obligated to assert all of its claims to water in the mainstem of the Gila River on behalf of the Indians of the Gila River Reservation, including any rights claimed under the federal reserved water rights doctrine.

[2] Conclusion of Law No. 5. The United States represented the interests of the Gila River Indian Community and the members of that community in the *Globe Equity* litigation. The United States, as trustee, held the legal title to the land and appurtenant water rights considered in that proceeding. The Community and its members held equitable title.

[3] Conclusion of Law No. 6. As to the water rights pledged to the San Carlos Project, the United States represented the interests of the San Carlos Irrigation and Drainage District and its members in the *Globe Equity* litigation.

[4] Conclusion of Law No. 7. In the *Globe Equity* litigation, the United States did intend and did indeed place in issue any and all claims it could assert to water in the mainstem of the Gila River on behalf of the Indians of the Gila River Reservation.

[5] Conclusion of Law No. 8. The *Globe Equity Decree* has *res judicata* or claim preclusion effect. As to original *Globe Equity* parties, their successors, or their privities, neither the United States nor the Indian Community may assert in the Gila River adjudication any additional water rights to the mainstem of the Gila River as these claims are the same claims or causes of action asserted in the *Globe Equity* litigation. The only water right claims not precluded are any claims for appropriative or reserved water rights for land acquired or withdrawn since the entry of the *Globe Equity Decree*.

c. Same Parties

The Gila River Indian Community argues that *res judicata* cannot be granted because the parties involved in *Globe Equity* are different from those involved in

the present adjudication. The Community's central point is that water users outside the upper Gila region were left out of *Globe Equity* while the present adjudication includes most of these users. *Globe Equity* involved the United States and many of the same Upper Valley Defendants who are now claimants in the Gila River adjudication, while neither the Community nor the San Carlos Irrigation and Drainage District were parties to *Globe Equity* (although SCIDD through its attorney ultimately signed the consent decree). Since the Community and SCIDD were both represented by the United States, the Community also argues, the litigation lacked the adversity necessary for the *Globe Equity Decree* to be acknowledged as an adjudication as between them.

Concerning the question of party identity, the *res judicata* doctrine does not require a complete identity of parties between the first and second actions—only that the party seeking claim preclusion and the precluded party (or their privities) have been involved in both cases. Both the Community and SCIDD were privities of the United States since the federal government represented and asserted their rights in the case. *See* Finding of Fact No. 10, *supra*. Since many water users, such as the Gila Valley Irrigation District and the Franklin Irrigation District, are parties in both cases, they are able to urge *Globe Equity's* preclusive effect. As to other Gila River adjudication claimants who were not parties (or privities) to *Globe Equity*, they may benefit from collateral estoppel or issue preclusion only as to those matters actually litigated in *Globe Equity*. *See* discussion, *infra* pp. 59-65.

As to the alleged lack of adversity between the interests of the Community and SCIDD, our situation is closely resembles that considered by the Supreme Court

in *Orr Ditch.* Distinguishing the proceeding from one involving normal trust law, the Court indicated there that "under the circumstances . . . the interests of the Tribe and the Project landowners were sufficiently adverse so that both are now bound by the final decree." 463 U.S. at 143. If this were not the outcome in our case, SCIDD (who participated as a partner in the San Carlos Project) would be vulnerable to tribal claims for additional water for both the allotted and surplus lands. The District, an original partner in the San Carlos Project, would be left with some of the poorest water rights in the basin. A leading commentator suggests the absurdity of such a result: "There would be very little to be said for a rule that would make a determination conclusive against a party in litigation with anyone in the world except his co-party." MOORE 2D at ¶ 0.411[2].

[1] Conclusion of Law No. 9. The Gila River Indian Community was in privity with the United States, a party to the *Globe Equity* litigation.

[2] Conclusion of Law No. 10. The San Carlos Irrigation and Drainage District was in privity with the United States, a party to the *Globe Equity* litigation.

[3] Conclusion of Law No. 11. The *Globe Equity Decree* accomplished a thorough and complete specification of the water rights determined in that proceeding, including the relative water rights of the San Carlos Irrigation and Drainage District and the Gila River Indian Reservation to the mainstem of the Gila River. *See* discussion p. 20, *supra*.

[4] Conclusion of Law No. 12. Under the holding of *Nevada v. United States*, 463 U.S. 110 (1983), the interests of the Gila River Indian Community and the San Carlos Irrigation and Drainage District were adverse.

d. Changed Circumstances

The Community suggests that "[t]here have been overwhelming changes in the law, the technology, and legal circumstances" since *Globe Equity* that would allow relitigation of the Community's claims in this adjudication. GRIC's Response at 32. Authorization for the Gila River adjudication, says the Community, is itself an example of such a significant change. The Community also points to changes in legal theories, *e.g.*, whether *Winters* rights may be asserted in behalf of executive order reservations, and recognition of the "practicably irrigable acreage (PIA)" standard by the U.S. Supreme Court. *Arizona v. California*, 373 U.S. 546 (1963).

New facts since the original litigation do not usually create new claims or causes of action. Theories of liability that could have been asserted in the first action are barred in the second action. This includes actions based on different legal theories but having the same factual basis and actions based on different statutes. *See* discussion *supra* pp. 50-54. Changes in law resulting from appellate decisions usually do not create new causes of action. 18 MOORE 3D § 131.21. New or evolving legal theories rarely provide an opportunity to reopen civil cases decided under earlier law. *See generally* 1B MOORE 2D ¶ 0.410[1].

Arizona's general stream adjudication is not a substantive basis for establishing new water rights but a procedural mechanism for recognizing existing rights. The Community cannot assert additional water rights in the adjudication

any more than a tort victim, who successfully litigated a claim, can bring a new action based on a doctor's bill omitted from the proof in the first action. Indeed, the Arizona statute compels the recognition, not the reopening, of prior decrees. ARIZ. REV. STAT. ANN. § 45-257(B)(1) (Supp. 1999).

The undisputed facts demonstrate that the United States advanced a complete array of legal theories for water rights for reservation lands, including lands added by presidential executive order. *See* Findings of Fact No. 18-20, 34. The allotted lands had been selected because of their arability. While the practicably irrigable acreage (PIA) standard had not been specifically adopted by the *Globe Equity*-era courts, PIA is only a different evidentiary method, much like using new magnetic resonance imagery (MRI), rather than x-rays, to prove soft-tissue injuries. We do not reopen adjudicated cases because of such advances in evidentiary proof.

[1] Conclusion of Law No. 13. The claims asserted by the United States and the Gila River Indian Community in the Gila River adjudication have the same factual and legal basis as the claims asserted by the United States in the *Globe Equity* litigation.

[2] Conclusion of Law No. 14. Changes in facts, law, technology, or legal circumstance since the original litigation do not normally justify the assertion of new claims or causes of action in subsequent litigation.

[3] Conclusion of Law No. 15. There are no changes in facts, law, technology, or legal circumstance sufficient to overcome the *res judicata* or claim preclusion effect of the *Globe Equity Decree* that would allow the United States or the Community to assert new water right claims in this adjudication to the Gila

River mainstem. An exception would be for any claims for appropriative or reserved water rights for land acquired or withdrawn since the entry of the *Globe Equity Decree*.

3. Federal Doctrine of Collateral Estoppel

Under the collateral estoppel doctrine, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1978) (citations omitted). Collateral estoppel, also known as issue preclusion, shares the same purpose as the related *res judicata* doctrine, *i.e.*, that once "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction [, it] cannot be disputed in a subsequent suit between the same parties or their privities." MOORE 3D at § 132.01[4][a]. The doctrines differ, however, in important respects.

First, the traditional requirement of mutuality is relaxed, allowing nonparties to the original litigation to benefit from the preclusive effect of an earlier judgment or determination. Preclusion can be urged in either an offensive or defensive manner. A nonparty to the original litigation may assert the earlier determination as an affirmative defense, urging that the issue was determined adversely to the plaintiff in the first case. A nonparty may also assert the original determination as the plaintiff in a new lawsuit, arguing that the defendant's liability or vulnerability on an issue was established in the earlier case.

Second, under collateral estoppel, the preclusive effect of the earlier determination is limited to issues of law or fact that were actually and necessarily decided in the earlier case. As compared to claim preclusion,

> issue preclusion does not prohibit a party from litigating issues that were never argued or decided in the prior proceeding. Inasmuch as the cause of action involved in the second proceeding is not "swallowed by the judgment in the prior suit," the parties are free to litigate points that were not at issue in the first proceeding, even though those points might have been tendered and decided at that time.

18 MOORE 3D at § 132.01[4][c].

Third, earlier consent judgments are not given preclusive effect under collateral estoppel. Consent judgments, however, may have preclusive effect if the parties clearly express their intention to that end. *Id.* § 132.03[2][i] & [ii]. *See also Sekaquaptewa v. MacDonald,* 575 F.2d 239 (9th Cir. 1978) (although the Hopi and Navajo tribes had stipulated to boundary line adjustments in earlier litigation, the issue was not actually litigated or necessary to the determinations made in the earlier case).

In the present case, collateral estoppel or issue preclusion is urged by those persons not parties (or privities of parties) to the *Globe Equity* litigation. These persons include those (such as the Salt River Project) who had water rights in the Gila River system when *Globe Equity* was decided but who had not been joined in that litigation or were dismissed from it, as well as post-*Globe Equity* users of water in the system. *See* categories 3 & 4, *supra* pp. 45-46. The moving parties, however, do not fashion a collateral estoppel argument in favor of these persons. They rather

rely on the mutuality exception to the *res judicata* doctrine crafted by the U.S. Supreme Court in *Orr Ditch.* They suggest:

> As the Supreme Court emphasized in Nevada, the *in rem* nature of comprehensive water rights adjudications requires that such proceedings be excepted from the mutuality of parties requirement, usually applicable to prior actions given *res judicata* effect.

GVID's Motion at 28-29 (footnotes omitted). This mutuality exception is addressed in more detail in the next section.

The Gila River Indian Community responds by delineating its reasons why the *Orr Ditch* rationale is inapplicable to the present case. The Community notes that the moving parties did not specifically advance a collateral estoppel argument, saying such an argument would fail because the issues now before the court were not actually litigated or essential to the *Globe Equity* decision. GRIC's Response at 45. In support, the United States adds that *Globe Equity* did not adjudicate "all of the United States' rights to the Gila Decree as against all claimants within the river system and source." United States' Response at 9.

One is required to ascertain whether an issue pending in the present case was "actually and necessarily" litigated in the earlier proceeding. In *Montana, supra,* the U.S. Supreme Court prevented the federal government from renewing a challenge to a state's gross receipts tax, saying that the "precise constitutional claim" had been litigated and lost in the state courts. 440 U.S. at 156. The Court borrowed from an earlier case to state the applicable test: "the 'question expressly and definitely presented in this suit is the same as that definitely and actually litigated and adjudged' adversely to the Government in state court." *Id.* at 157 (quoting *United*

States v. Moser, 266 U.S. 236, 242 (1924)). To avoid this result, the federal government would have to demonstrate significant changes in important facts or legal principles, or other special circumstances. *Id.* at 157-58.

THE RESTATEMENT (SECOND) OF JUDGMENTS provides guidance in determining whether an issue is the same between an earlier and later case. The treatise suggests the consideration of these factors:

1. Is there is substantial overlap between the evidence or argument?
2. Does the new evidence or argument in the second case involve the same rule of law as in the previous case?
3. Could pretrial preparation and discovery in the earlier case reasonably embrace the issue?
4. How closely related are the claims in both cases.

RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. c (1982).

I conclude that the collateral estoppel doctrine actually does resolve some of the questions raised in the moving parties' motion. In our case, the question is whether water rights for the surplus lands was an issue actually and necessarily determined in the *Globe Equity* litigation. While some parties might argue that additional water rights or uses for allotted lands were issues not decided in *Globe Equity*, I believe that there is no question that the full array water rights for the allotted lands was an issue "actually and necessarily" determined in those proceedings. *See* Finding of Fact No. 18 & Conclusion of Law No. 7, *supra*.

As to the surplus lands, however, the RESTATEMENT guidelines fail to suggest a definitive result which is a sufficient reason in itself to avoid a finding of collateral estoppel as to these lands. The facts are uncertain as to whether water rights were "actually and necessarily" adjudicated in *Globe Equity* for the surplus lands. In

some respects, the issue appears identical between both proceedings: the legal basis for both allotted and surplus lands was the same (*i.e.*, appropriative rights and the federal reserved rights doctrines). The arability and other characteristics of this land could have been addressed in discovery, to the extent discovery was practiced in the 1920s and 1930s. The evidence for the surplus lands, however, would have needed to be customized for those lands. All told, the question is a close call.

A separate and sufficient reason exists for denying collateral effect to *Globe Equity* proceedings as to the surplus lands. As discussed above, consent decrees like *Globe Equity* are not entitled to such preclusive effect unless the parties so intend. While I believe there is no question that the *Globe Equity* parties had this intent as to the allotted lands, *see* Finding of Fact No. 34, the facts are unsettled as to whether the parties also intended that the decree have such issue preclusion effect as to the surplus lands. *See* Finding of Fact No. 21. On this motion for summary judgment, therefore, I find that nonparties cannot assert the preclusive effect of the *Decree* under the collateral estoppel doctrine as to surplus lands.

There is credible evidence that the *Globe Equity* court did not specifically consider, and did not adjudicate, water rights for the surplus lands on the apparent assumption that these lands would be watered, if at all, from some other sources. The *Globe Equity Decree* determined water rights for the allotted lands; it apparently did not do so for the surplus lands.

a. Conclusion of Law No. 16. The water rights of the Indian Community and its members to allotted lands were actually and necessarily litigated and determined in the *Globe Equity* proceedings.

b. Conclusion of Law No. 17. Consent decrees, such as the *Globe Equity Decree,* do not have collateral estoppel or issue preclusion effect unless the parties specifically intend such effect.

c. Conclusion of Law No. 18. The water right determinations for the allotted lands have collateral estoppel or issue preclusion effect since there is no genuine dispute that the parties to the *Globe Equity Decree* intended such preclusive effect. Nonparties[10] to the decree may assert the preclusive effect of the decree as to these allotted lands.

d. Conclusion of Law No. 19. The material facts are in dispute as to whether water rights for the surplus lands was an issue actually and necessarily determined in the *Globe Equity* proceedings. Indeed, much of the evidence runs contrary, *i.e.,* supporting the conclusion that other sources of water would have to be acquired for these lands.

e. Conclusion of Law No. 20. There has been no credible showing here that the *Globe Equity* parties specifically intended the decree to have preclusive effect on the issue of water rights for the surplus lands.

f. Conclusion of Law No. 21. Material facts are genuinely in dispute as to whether the issue of water rights for surplus lands was actually and necessarily determined in *Globe Equity*. Summary judgment on the question of the

[10] In these conclusions of law, "nonparty" means a person who was not a party to the *Globe Equity Decree*, a successor of such a party, or a person in privity with such a party. *See* pp. 48, *supra*, for a discussion of the meaning of "privity."

preclusive effect of the *Globe Equity Decree* as to surplus lands, therefore, is unavailable.

g. Conclusion of Law No. 22. Because it is uncertain whether *Globe Equity* actually determined federal reserved rights or appropriative rights for surplus lands, nonparties to the decree may not assert collateral estoppel against the Community on that issue. Unless an evidentiary hearing establishes that *Winters* or other water rights to surplus lands were actually determined in *Globe Equity*, the Community and United States are free to pursue water rights for these surplus lands in this adjudication. Such rights, if established, would be enforceable only against those persons who were not parties, successors, or privities to the *Globe Equity Decree*.

4. *Orr Ditch* Exception to *Res Judicata's* Mutuality Requirement

As previously reviewed, the Supreme Court in *Orr Ditch* created an exception to the traditional mutuality requirement for the *res judicata* doctrine. *See* discussion, *supra* pp. 22-23. The Court reasoned why subsequent Truckee River water users, who were not parties to the *Orr Ditch* litigation, could hold the Tribe to the water rights adjudicated in the earlier proceeding. Not relying on a collateral estoppel argument to reach this result, the Court seems to recognize that (a) the tribal fishery claim *could* have been litigated in *Orr Ditch* (thus justifying claim preclusion) and (b) the fishery claim *was not* actually and necessarily litigated (required for issue preclusion in the subsequent case).

Since I am unable to conclude that the Gila River Indian Community's present claim to water for the surplus lands was an issue previously decided in

Globe Equity, I must address the *Orr Ditch* exception to the mutuality requirement for *res judicata.* The argument which is strongly and repeatedly urged by the moving parties is that, like *Orr Ditch,* nonparties throughout the Gila River system have detrimentally relied on the *Globe Equity Decree* as the final statement of all water rights for the reservation.

Every sophisticated water user in the Gila River system is aware of *Globe Equity's* existence if not its precise meaning. However, when Justice Rehnquist concluded that "[n]onparties such as the subsequent appropriators in these cases 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," 463 U.S. at 144, he was doing so based on a factual record demonstrating that reliance. Indeed, the trial judge had found

> That the defendants in *Orr Ditch* and their successors in interest in this case, as well as other persons, firms, corporations, entities, governmental units, agriculture, business, industry, and labor have detrimentally relied upon the terms and conditions and the final and conclusive nature of the *Orr Ditch* final decree.

Finding of Fact No. 27, set forth in App. F to Petition for Writ of Certiorari filed by State of Nevada, *Nevada v. United States,* No. 81-2245 (June 7, 1982). This determination had been reached after evidentiary hearings extending over many months on the *res judicata* defense.

In our case, there is no uncontroverted showing of detrimental reliance by nonparties on the *Globe Equity Decree.* While there are examples of such reliance, they are not so commonly and undisputedly known as to allow judicial notice to be

taken of such reliance. It would be improvident to grant the motion for summary judgment on this affirmative defense without an evidentiary hearing.

a. Conclusion of Law No. 23. Since material facts are in dispute whether many nonparties relied to their detriment on the *Globe Equity Decree's* determination of water rights for the Gila River Indian Community, nonparties cannot invoke the *Orr Ditch* exception to the mutuality requirement of the *res judicata* doctrine. Nonparties, therefore, cannot assert that water right claims in this adjudication for surplus lands are precluded by *res judicata,* and the United States and the Community may continue to assert water rights for these lands. Nonparties can assert, however, that additional water right claims for allotted lands are barred under the collateral estoppel or issue preclusion doctrine, as previously recognized in Conclusion of Law No. 18, *supra*.

5. Responses to Other of the Community's Arguments

The Community identifies many instances of what they believe are unsettled, ambiguous, or disputed material facts. Because of these uncertain facts, the Community concludes that summary judgment cannot be granted. I address most of the instances identified by the Community. In all cases, I conclude that there is no genuine dispute concerning a fact material to the motion for summary judgment or, if a factual uncertainty exists, is immaterial to the present inquiry.

a. Conclusion of Law No. 24. Is the *Globe Equity Decree* Ambiguous? The Community argues that the *Globe Equity Decree* is ambiguous and its interpretation requires the consideration of extrinsic evidence, an impermissible inquiry on a motion for summary judgment. Even if the decree is

itself ambiguous, this ambiguity does not concern a material fact that would prevent summary judgment. The motion here does not seek an interpretation of a decree or contract. Rather, the motion asks for a determination of the *Globe Equity Decree's* preclusive effect. To decide this motion and interpret what was decided in the earlier litigation, the court is entitled to compare the records in both proceedings. Evidence beyond the decree itself can be used so long as its satisfies the requirements of Rule 56(c), ARIZ. R. CIV. P. The court can examine the amended complaint and other pleadings, as did the federal courts considering the *Orr Ditch Decree*. *See, e.g.*, 463 U.S. at 132 ("we return to the amended complaint, where it is alleged . . . .").

b. Conclusion of Law No. 25. Did *Globe Equity* adjudicate the entire Gila River system? This issue has been addressed in the foregoing discussion. *See* discussion, pp. 52-53, *supra*. The Community's claims or causes of action were the same in both proceedings. *Globe Equity* did not adjudicate the entire Gila River, but that fact is inconsequential.

c. Conclusion of Law No. 26. Did *Globe Equity* adjudicate reservation lands outside the boundaries of the San Carlos Project? For *res judicata* purposes, the question is immaterial since the United States had the obligation to place all of its claims at issue. The question does have significance for collateral estoppel purposes, which has been previously discussed. *See* discussion, pp. 59-65, *supra*.

d. Conclusion of Law No. 27. Did *Globe Equity* adjudicate all lands owned by non-Indian parties? The pending motion is addressed to the water right claims of the Gila River Indian Community. The question is immaterial to that

motion. The possible preclusive effect of the *Globe Equity Decree* on other parties to the adjudication is an issue raised by other motions before the court. To the extent this question relates to the comparability of *Globe Equity* and this adjudication, it is an issue discussed elsewhere. *See* discussion, pp. 50-54, *supra*.

e. Conclusion of Law No. 28. Did *Globe Equity* adjudicate the water rights appurtenant to all lands within four counties, all lands within Arizona, or all lands within New Mexico? While the Community's argument here is unclear, it is apparently a variation of the Community's principal argument about the differences between *Globe Equity* and the present adjudication. That argument is addressed elsewhere, *see* discussion pp. 50-54, *supra*, leading to the conclusion that the geographic scope of the cases is immaterial since the same claim or cause of action was asserted by or for the Community in both cases.

f. Conclusion of Law No. 29. Did *Globe Equity* adjudicate federal reserved water (*Winters*) rights for allotment lands? I have determined that the United States asserted in *Globe Equity* a full array of legal theories, including the reserved rights doctrine for allotted lands. This finding is beyond genuine controversy. *See* Findings of Fact Nos. 18-20. Even assuming there was factual uncertainty as to whether the United States asserted reserved rights for allotment lands, the factual uncertainty would have no legal significance. The *Winters* doctrine was announced decades before the *Globe Equity* litigation and was well-known to the federal attorneys involved in the case. *Winters* constituted only a different legal theory that *could* and *should* have been asserted in *Globe Equity*, even if it was not.

g. Conclusion of Law No. 30. Did *Globe Equity* adjudicate federal reserved (*Winters*) rights for the entire reservation, including the surplus lands that ultimately remained part of the reservation? For *res judicata* or claim preclusion purposes, the factual uncertainty does not have legal significance. The *Winters* doctrine was announced decades before the decree and was well-known to the federal attorneys involved in the case. The Indian Reorganization Act, which ended the allotment and surplus land disposal program, was enacted a year before the decree. The United States was obligated to assert all claims arising from the same transaction or series of transactions, here the original and all subsequent land withdrawals for the reservation. If the United States failed to assert these claims, the Indian Community and United States are barred under the claim preclusion doctrine. *See* discussion pp. 47-59, *supra*.

I do agree with the Community that it is factually uncertain whether *Globe Equity* constituted a specific adjudication of federal reserved rights (*Winters* rights) for the surplus lands that were originally intended to be sold or transferred to non-Indians. *See* Conclusion of Law No. 19. Thus, the question has significance under the collateral estoppel doctrine, as previously discussed. *See* discussion pp. 53-59, *supra*.

h. Conclusion of Law No. 31. Were water users on the Gila River's tributaries also parties to *Globe Equity?* Unless they also had rights on the Gila River mainstem, water users on the Gila River's tributaries were not joined as defendants in the *Globe Equity* litigation or were dismissed from the case without prejudice. Although they were not parties, these tributary users can use the *Orr*

Ditch exception to the *res judicata* mutuality requirement, as well as the collateral estoppel doctrine, to hold the Community to the *Globe Equity* award of water for allotment lands. *See* discussion pp. 59-65, *supra*.

i. Conclusion of Law No. 32. Was *Globe Equity* a sufficiently comprehensive adjudication so as to provide a legal basis for detrimental reliance by others, including water users on tributaries and subsequent users? This question has been discussed in the context of whether the United States' and the Community's claims are the same in *Globe Equity* and this proceeding. Both cases involve a significant geographic scope. In both cases, the federal and tribal claims have the same factual and legal basis. *See* discussion pp. 50-54, *supra*.

F. Recommendation

The motion of the Gila Valley Irrigation District *et al.* should be GRANTED IN PART and DENIED IN PART. The original parties to the *Globe Equity Decree*, their successors, and their privities (categories 1 and 2 of persons, including the San Carlos Irrigation and Drainage District; *see* pp. 45-46, *supra*) can successfully use the affirmative defense of *res judicata* or claim preclusion to bar the United States and the Gila River Indian Community from asserting any additional water rights for the Gila River Indian Reservation (including the allotted and surplus portions). These persons are entitled to maintain that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that Community, and the United States on their behalf to water for all purposes appurtenant to the Gila River Indian Reservation.

Nonparties to the *Globe Equity Decree* (categories 3 and 4 of persons) can successfully invoke both collateral estoppel (issue preclusion) and the *Orr Ditch res judicata* mutuality exception as affirmative defenses to prevent the United States and the Gila River Indian Community from asserting any additional water rights or uses appurtenant to the allotted land portion of the reservation. For this allotted portion of the reservation, nonparties are entitled to maintain that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that Community, and the United States on their behalf to water for all purposes appurtenant to the allotted portion of the reservation.[11]

As against nonparties to the *Globe Equity Decree*, the United States and the Gila River Indian Community may continue to assert additional water right claims for the surplus land portion of the reservation. These nonparties, however, may attempt to prove the basis for the *Orr Ditch res judicata* mutuality exception during trial on the merits of the federal and tribal claims or during a specifically scheduled evidentiary hearing on the question. A summary of these determinations is set forth in Table 2.

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[11] This report does not preclude the United States or the Community, by invoking the appropriate legal procedures, from seeking changes of use in the water rights already adjudicated or acquired for the reservation.

Table 2: Preclusive Effect of *Globe Equity No. 59 Decree*

Can GRIC/US assert as against these parties:	Additional water rights for allotment lands?	Additional water rights for surplus lands?
Original parties to *Globe Equity*	No, barred by *res judicata* (claim preclusion)	No, barred by *res judicata* (claim preclusion)
Successors to or privities of *Globe Equity* parties	No, barred by *res judicata* (claim preclusion)	No, barred by *res judicata* (claim preclusion)
Water users who were not joined in *Globe Equity* or dismissed from it (*e.g.*, certain NM users, tributary users, downstream users	No, barred by collateral estoppel (defensive issue preclusion as to issue "actually litigated") & by *Orr Ditch* mutuality exception to *res judicata* doctrine	Yes, consent judgment not entitled to collateral estoppel effect; genuine issue about whether issue was "actually litigated"
Water users subsequent to *Globe Equity*	No, barred by collateral estoppel (defensive issue preclusion as to issue "actually litigated") & by *Orr Ditch* mutuality exception to *res judicata* doctrine	Yes, consent judgment not entitled to collateral estoppel effect; genuine issue about whether issues was "actually litigated"

IV. CLAIMS TO THE SAN CARLOS RIVER

Motion for Summary Judgment filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (Mar. 1, 1999), asserting that any water right claims of the Gila River Indian Community, or on its behalf, to the San Carlos River are precluded by the *Globe Equity Decree* and other documents (Docket No. 118).

A. Introduction

The 1924 Landowners' Agreement between the United States and the landowners to be included in the San Carlos Project included an itemization of the water rights being pledged to the project by the signatories to the agreement. These

sources of water included (a) the water rights of the earlier Florence-Casa Grande Project; (b) water rights (except well water rights) appurtenant to other private land being brought into the new project; (c) water rights acquired by the United States for the project; and (d) certain Indian water rights in the Gila River above the inflow of the Salt River. OSM No. 153, at 7.

This last category of pledged water rights is the subject of the motion for summary judgment filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation. The category of water rights is more specifically described in the Landowners' Agreement as "so much of the water rights from the Gila River above the confluence therewith of the Salt River now owned by the United States or said Indians for or on account of or appurtenant to said Gila River Indian Reservation and the San Carlos Indian Reservation . . . ." *Id.*

The United States may not have pledged all of this Indian water to the San Carlos Project. The language of the Landowners' Agreement continues by qualifying the earlier language, saying "except water rights in that tributary of the Gila River known as the San Carlos River, and except water rights of the United States or of the Indians in the Gila River, which shall be retained by the Secretary of the Interior for the use of the Indians of the said San Carlos Reservation . . . ." *Id.* at 7-8. So, from that larger group of water rights benefiting the Gila River Indian Reservation and the San Carlos Indian Reservation, the San Carlos Apache Tribe argues that water rights benefiting the San Carlos Indian Reservation were withdrawn from the pledge of federally held water rights to the San Carlos Project.

The San Carlos Apache Tribe also uses this language as the basis for its argument that the United States, for itself and in behalf of the Gila River Indian Community and the San Carlos Irrigation and Drainage District, waived any water right claims it might assert to the San Carlos River. They indicate that this waiver has been incorporated into the *Globe Equity Decree*; however, the language referred to by the San Carlos Apache Tribe in its pleading does not directly support this contention. *See* San Carlos Apache Tribe's Motion at 3.

The Gila River Indian Community responds, repeating earlier arguments that the *Globe Equity Decree* is ambiguous; the Community and the San Carlos Apache Tribe were co-parties, not adversaries, in the *Globe Equity* litigation; and the causes of action are different between the two cases. The United States takes no position on the issue.

I believe the language of the Landowners' Agreement only means that the United States had control over several "pots" of water that it could pledge to the San Carlos Project, *e.g.*, Gila River Indian water rights, San Carlos Indian water rights, and other water rights acquired for the reclamation project. The federal government pledged most of these "pots" of water to the project; but, under the exclusion language discussed, it apparently did not pledge water rights that the San Carlos Apache Tribe might establish in the San Carlos River. What rights the San Carlos Apache Tribe may have in the San Carlos River is beyond the scope of this proceeding concerned, as it is, with the water rights of the Gila River Indian Community.

Rather than resolve the exact implications of the Landowner's Agreement on any Gila River Indian Community's claims to the San Carlos River, I believe the Apache Tribes' motion should be granted for a different but stronger reason. I have already determined that *res judicata* binds the parties and privities to *Globe Equity*, not only as to what was determined by decree in 1935 but also what could have been litigated in that proceeding. *See* discussion pp. 47-59, *supra*. The United States, as a party to *Globe Equity*, and the Gila River Indian Community, as a privity of the United States, can establish no additional rights to the Gila River system against other parties and privities to the *Globe Equity* litigation, including the San Carlos Apache Tribe, beyond those rights set forth in that decree. While they were both represented by the United States in the *Globe Equity* litigation, there was no lack of adversity between the Gila River Indian Community and the San Carlos Apache Tribe under the U.S. Supreme Court's holding in *Nevada v. United States*, which has been previously discussed. *See* discussion pp. 20-24, *supra*.

B. Findings of Fact

1. Finding of Fact No. 35. Both the Gila River Indian Community and the San Carlos Apache Tribe are privities of the United States, which represented their interests in the *Globe Equity* litigation.

C. Conclusions of Law

1. Conclusion of Law No. 33. While they were both represented by the United States in the *Globe Equity* litigation, there was no lack of adversity between the Gila River Indian Community and the San Carlos Apache Tribe under the U.S. Supreme Court's holding in *Nevada v. United States*, 463 U.S. 110, 126

(1983) ("'it matters but little who are plaintiffs and who are defendants in the settlement of cases of this character'").

2. Conclusion of Law No. 34. The San Carlos Apache Tribe is entitled to assert that Gila River Indian Community can establish no additional rights to the Gila River system against the San Carlos Apache Tribe beyond those rights set forth in the *Globe Equity Decree.*

D. Recommendation

The motion of the San Carlos Apache Tribe *et al.* should be GRANTED since the these Apache Tribes are privity to an original party to the *Globe Equity Decree*, *i.e.*, the United States, and the interests of the Gila River Indian Community and these Apache Tribes were sufficiently adverse in that litigation.

The San Carlos Apache Tribe is entitled to assert that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that Community, and the United States on their behalf, to water (including the water of the San Carlos River) for all purposes appurtenant to the Gila River Indian Reservation (including the lands described as "allotted" and "surplus" in this report).

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V. EFFECT OF LANDOWNER AND REPAYMENT AGREEMENTS

Motion for Summary Judgment filed by the San Carlos Irrigation and Drainage District (Oct. 4, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are conditioned on certain agreements commonly known as the Florence-Casa Grande Landowners' Agreement, San Carlos Irrigation Project Landowners' Agreement, and the Project Repayment Contract (Docket No. 206).

A. Introduction

Because of political and engineering necessities during the early decades of the 20th Century, the San Carlos Project was constructed with common features to serve both Indian and non-Indian agriculture. The joint approach broadened public support for the project and included features that could serve both communities.

One of the first components of the San Carlos Project was the Florence-Casa Grande Project, authorized by Congress in 1916. The legislation called for the construction of two diversion dams on the Gila River and distribution facilities that would later be merged into the larger San Carlos Project. To make the project feasible, the legislation authorized the Secretary of the Interior to enter into contracts with non-Indian farmers whereby these landowners pledged their water rights to the federal government, promised to repay certain of the costs, and suffered liens on their property to secure the debt. In exchange, the Secretary promised to make water rights appurtenant to the Gila River Indian Reservation available to the project, pool the Indian and non-Indian water, and distribute the water according to a percentage formula. The agreements embodying this arrangement are known as the Florence-Casa Grande Project Act Landowners' Agreements. OSM No. 213.

After Congress authorized the construction of Coolidge Dam and San Carlos Reservoir in 1924, 38,000 additional acres were brought into the reclamation project. Once again, the Secretary was authorized to obtain landowners' agreements reciting water distribution and repayment provisions similar to the earlier Florence-Casa Grande agreements. This second set of agreements is known collectively as the San Carlos Irrigation Project Landowners' Agreements. OSM No. 153.

In 1931, the United States and the San Carlos Irrigation and Drainage District entered into a Repayment Contract whereby the District agreed to repay the costs of the project works including Coolidge Dam, Ashurst-Hayden Dam, and water distribution canals and contribute money toward the ongoing operational and maintenance costs of the system. OSM No. 458 at 6-8, 10-13. This agreement also referred to the common water supply of the project. *Id*. at 4.

The *Globe Equity Decree* makes several references to the Florence-Casa Grande Project Act Landowners' Agreement and appears to incorporate the pooling provisions of that agreement. *E.g.*, art. VII, OSM No. 4.

The San Carlos Irrigation and Drainage District has filed a motion for summary judgment asserting that the Florence-Casa Grande Landowners' Agreement, the San Carlos Irrigation Project Landowners' Agreement, the Repayment Contract, and the *Globe Equity Decree* all recognize and require the pooling arrangement. Thus, it is alleged, "any water rights decreed to GRIC in this Adjudication for any lands within [the San Carlos Project] must be pooled with SCIDD water rights as part of a common Project water supply for use on [San Carlos Project] lands." SCIDD's Motion for Summary Judgment at 2.

The Gila River Indian Community opposes SCIDD's motion because it believes the question of a pooling arrangement is properly and exclusively before the federal district court as part of the interpretation and enforcement of the *Globe Equity Decree*. The Community further argues that the motion does not satisfy the criteria necessary for summary judgment. The United States agrees (joined by Gila Valley Irrigation District and Franklin Irrigation District on this point) that the question is properly before federal court. Further, the federal government argues, the adjudication court has no subject matter jurisdiction to interpret any contractual obligations concerning a pooling arrangement.

B. Findings of Fact

1. Finding of Fact No. 36. The federal district court recently considered a similar motion filed by the San Carlos Irrigation and Drainage District. On February 9, 2000, Judge John C. Coughenour upheld the water pooling provisions of the *Globe Equity Decree*, which incorporate the earlier provisions of the Florence-Casa Grande Landowners' Agreements and the San Carlos Irrigation Project Landowners' Agreements.

2. Finding of Fact No. 37. In its memorandum decision, the federal court said:

> SCIDD has identified several places in the Decree, including Articles V, VI, and VII, where this formula [providing an approximate division of 60 percent of the water to the Indian Community and 40 percent to the non-Indian farmers of SCIDD] is either explained or explicitly referenced. No party presently challenges that this formula has been incorporated as a provision enforceable under the Decree. Accordingly, the Court finds that water called for by these parties should be allocated according to the formula as described in Article VI(3) of the Decree.

Order at 3, *United States v. Gila Valley Irr. Dist.*, Globe Equity No. 59 (D. Ariz. Feb. 9, 2000).

C. Conclusions of Law

1. Conclusion of Law No. 35. The ruling made by Judge John C. Coughenour on the motion filed by the San Carlos Irrigation and Drainage District in federal court decides the issue presented by SCIDD in this proceeding and moots SCIDD's motion for summary judgment. Since the question presented involves an interpretation of the *Globe Equity Decree*, the question has been properly addressed and answered by the federal court.

2. Conclusion of Law No. 36. Once decreed, the abstracts for water rights subject to these water pooling conditions should contain annotations in the "Other Remarks" field to the applicable provisions of the *Globe Equity Decree* and other agreements. This will further the court's interest in making a public record of contractual arrangements or other decrees that affect the use of the public waters of Arizona. The annotations should be confined to comments to this effect: "The water rights adjudicated in this Abstract may be subject to certain water pooling requirements set forth in the Florence-Casa Grande Landowners' Agreement (1919), San Carlos Irrigation Project Landowners' Agreement (various dates), San Carlos Project Repayment Contract (1931), and *Globe Equity Decree* (1935)."

3. Conclusion of Law No. 37. Left unanswered, however, is the question of whether the water pooling agreements apply to additional sources of water potentially adjudicated to project lands in this adjudication. For instance, if the Gila River Indian Community were able to establish additional or improved

water rights for its reservation lands within project boundaries (overcoming my earlier determinations of GVID's motion for summary judgment), would this additional water be subject to the water pooling agreements? Once again, this is in the first instance a matter of interpretation and enforcement to be addressed by the federal district court. The question should not be addressed or decided by the adjudication court.

D. Recommendation

The motion for summary judgment filed by the San Carlos Irrigation and Drainage District on the question of pooling arrangements should be DENIED as moot as the issue has been decided in SCIDD's favor by the federal district court in its enforcement and administration of the *Globe Equity Decree.*

Once decreed, the abstracts for water rights subject to these water pooling conditions should contain annotations in the "Other Remarks" field to the applicable provisions of the *Globe Equity Decree* and other agreements.

VI. EFFECT OF WATER RIGHTS SETTLEMENT AND EXCHANGE AGREEMENT

> Motion for Summary Judgment filed by ASARCO Incorporated (Oct. 4, 1999), asserting that the water right claims of the Gila River Indian Community, or on its behalf, are conditioned by the Water Rights Settlement and Exchange Agreement (Jan. 1, 1977) and the Consent to Assignment [of the Water Rights Settlement and Exchange Agreement] (April 25, 1993) (Docket No. 202).

A. Introduction

Kennecott Copper Corporation held surface water rights in the upper basin of the Gila River system. The water was used in Kennecott's mining and milling operations at Ray and Hayden, Arizona, as well as for some farming along the Gila

River. Some of the company's rights were incorporated into the *Globe Equity Decree*, but Kennecott and the Gila River Indian Community apparently disagreed over the nature and extent of their respective water rights.

Kennecott and the Community entered into a Water Rights Settlement and Exchange Agreement in January 1977 to resolve some of these disagreements. OSM No. 158. Under the main features of the agreement, Kennecott was allowed to continue to use its water rights under *Globe Equity*. Kennecott promised to pay $1.5 million in satisfaction of the Community's claims for damages resulting from Kennecott's past use of water in the Gila River system. Kennecott could use Gila River system water in excess of its *Globe Equity* rights if it paid liquidated damages to the Community or provided replacement Central Arizona Project water. Thus, the agreement had both forbearance and exchange provisions. The agreement was signed by Kennecott, the Indian Community, and the Secretary and other officials of the Department of Interior. The agreement apparently was not reviewed or approved by any court or other governmental entity.

Kennecott's land and water rights in the Gila River basin were acquired by ASARCO in 1986. On April 25, 1993, the Indian Community signed a Consent to Assignment of the Water Rights Settlement and Exchange Agreement to ASARCO. OSM No. 162. This consent was not signed by Interior Department officials.

ASARCO now seeks a summary determination that the Gila River Indian Community's water rights are conditioned by its obligations to ASARCO under the 1977 Water Rights Settlement Agreement and Exchange Agreement and the 1993 assignment.

The Indian Community opposes the summary judgment request, arguing that it has not waived its sovereign immunity for the interpretation of its contracts, the agreement contains a specific choice of forum provision, and the matter should be addressed in the first instance by the *Globe Equity* court.

Other parties have weighed in against ASARCO's motion for other reasons. The Salt River Project and Tempe suggest that the agreement structures an off-reservation lease of Indian water which is impermissible without congressional approval and the Consent to Assignment has never been approved by the Department of Interior. The San Carlos Irrigation and Drainage District agrees with these contentions and adds that any federal approval of the agreement could not bind SCIDD. The United States maintains that it was not a party to the 1977 agreement and, therefore, cannot be bound by its terms. The San Carlos Apache Tribe joins in many of these arguments.

ASARCO and the Indian Community both suggest that the agreement has worked well between them although there appears to be some dispute as to whether ASARCO has satisfied its obligations to provide "make-up" CAP water. While problems lurk in the shadows, such as whether the federal government ever approved the agreement, they probably would not threaten the parties' working relationship under the agreement if the matter had not been illuminated by the general stream adjudication's sometimes harsh light.

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B. Findings of Fact

1. Finding of Fact No. 38. Kennecott Copper Corporation and the Gila River Indian Community entered into a Water Rights Settlement and Exchange Agreement on January 1, 1977, to resolve certain disagreements. The agreement was signed by Kennecott, the Indian Community, and the Secretary and other officials of the Department of Interior. [OSM No. 158].

2. Finding of Fact No. 39. Kennecott's land and water rights in the Gila River basin were acquired by ASARCO in 1986. On April 25, 1993, the Indian Community signed a Consent to Assignment of the Water Rights Settlement and Exchange Agreement to ASARCO. This consent was not signed by Interior Department officials. [OSM No. 162].

3. Finding of Fact No. 40. Paragraph 35 of the Water Rights Settlement and Exchange Agreement requires the Indian Community and ASARCO to submit "all actions for the enforcement or interpretation" of the agreement to federal court. The parties waive any immunity they might have to federal court litigation and each relinquishes any right "to have any dispute arising hereunder determined in any state court, tribal court or under tribal law or custom, and covenants that it will not in any manner seek to have this Agreement or its rights or obligations hereunder enforced or adjudicated in any state court, tribal court, or under tribal law." [OSM No. 158, at 30]. In the event a federal court does not agree to hear the dispute, the contracting parties agreed to have the dispute arbitrated.

C. Conclusions of Law

ASARCO properly brought its motion for summary judgment after being directed by superior court to identify prior decrees, agreements, or documents that may affect the water rights of the Gila River Indian Community. The identification of the Water Rights Settlement and Exchange Agreement and the Consent to Assignment helps describe the complex weave that is the law of Gila River. While the adjudication court has a strong interest in identifying and publicizing these documents, it has little interest in gratuitously resolving every conceivable legal problem that may accompany these prior legal arrangements. While the adjudication court is obliged to determine the respective water rights of the Indian Community, United States, ASARCO, and others, it does not need to interpret contracts about the leasing or use of the water under these rights, or the validity of the agreements themselves, until an actual dispute is properly before the court.

The choice of forum provision of the agreement provides the proper basis for deciding ASARCO's motion. Other than to say they are substantial issues, I need not discuss at length the tribal sovereign immunity questions raised by asking the adjudication court to interpret contracts between water users. A similar issue was raised in the Little Colorado River Adjudication, *i.e.,* whether the adjudication court had jurisdiction to interpret provisions of the Navajo Nation Water Code. Among other reasons, I ruled that by filing claims in the adjudication, the Navajo Nation did not waive its immunity to allow a state court to interpret its water code. Report of the Special Master at 19-21, *In re Atkinson's Ltd. of Az. Dba Cameron Trading Post*, No. 6417-34-1 (Little Colorado River Adjudication Sept. 15, 1999); *see also*

McClendon v. United States, 885 F.2d 627 (9th Cir. 1989) (tribal action concerning ownership of land is not waiver of immunity for interpretation of lease).

1. Conclusion of Law No. 38. The choice of forum provision contained in paragraph 35 of the Water Rights Settlement and Exchange Agreement is dispositive of ASARCO's motion. The paragraph requires the Indian Community and ASARCO to submit "all actions for the enforcement or interpretation" of the agreement to federal court. The parties waive both any immunity they might have to federal court litigation and each relinquishes any right "to have any dispute arising hereunder determined in any state court, tribal court or under tribal law or custom, and covenants that it will not in any manner seek to have this Agreement or its rights or obligations hereunder enforced or adjudicated in any state court, tribal court, or under tribal law." [OSM No. 158, at 30]. If the federal courts do not agree to hear the dispute, the contracting parties agree to have the dispute arbitrated. The adjudication court should honor this choice of forum provision.

2. Conclusion of Law No. 39. To further the interest of the adjudication court in preparing a public record of agreements or arrangements that may affect the use and management of the public waters of the State of Arizona, the appropriate water right abstracts of the Gila River Indian Community and ASARCO, once they are prepared, should be annotated in the "Other Remarks" section with a reference to the Water Rights Settlement and Exchange Agreement and Consent to Assignment. The annotations should be limited to comments of this effect: "The water rights adjudicated in this Abstract may be subject to the Water Rights Settlement and Exchange Agreement between the Gila River Indian Community

and Kennecott Copper Corporation, dated January 1, 1977, and the Consent to Assignment [to ASARCO], dated April 25, 1993."

D. Recommendation

The motion should be DENIED for the reason that the question presented should be decided by a federal court or an arbitrator selected under the choice of forum provisions contained in the Water Rights Settlement and Exchange Agreement.

The appropriate water right abstracts of the Gila River Indian Community and ASARCO, once they are prepared, should be annotated in the "Other Remarks" section with a reference to the Water Rights Settlement and Exchange Agreement and Consent to Assignment, using language substantially similar to that set forth in Conclusion of Law No. 39.

VII. MOTION FOR APPROVAL OF MASTER'S REPORT AND FOR ENTRY OF PROPOSED ORDER

Based on Findings of Fact, Conclusions of Law, and other discussion set forth in this report, the Special Master recommends the disposition of the pending motions as specifically set forth in the preceding discussion. The Master additionally recommends that these determinations be reflected in subsequent hydrographic survey reports prepared by the Arizona Department of Water Resources.

The Master hereby submits a proposed order effectuating these recommendations. The proposed order appears as Appendix B to this report.

The Special Master hereby MOVES the Superior Court, under the provisions of Rule 53(h), ARIZONA RULES OF CIVIL PROCEDURE, to adopt his report and enter the proposed order after the appropriate notice has been given.

VIII. NOTICE OF SUBSEQUENT PROCEEDINGS

This report has been filed with the Clerk of the Court and posted to the Special Master's website (http://www.supreme.state.az.us/wm/) on June 30, 2000. Printed copies will be mailed on July 5, 2000.

NOTICE IS HEREBY GIVEN that any claimants in the Gila River adjudication may file an objection to the report on or before **Wednesday, July 26, 2000**.[12] Any responses to objections must be filed with the Clerk of the Court on or before **Wednesday, August 9, 2000**. Objections and responses must be filed with the Clerk of the Superior Court, Maricopa County, 101/201 W. Jefferson St., Phoenix, AZ 85003-2205, Attn: Water Case W1-203. Copies of objections and responses must be served personally or by mail on all persons appearing on the service list for this contested case attached as Appendix C to this report.

NOTICE IS ALSO GIVEN that the hearing on the Master's motion to approve the report, and any objection to the report, will be taken up at the next scheduled conference or hearing before Judge Bolton held after August 9, 2000, or as otherwise

[12] The period for filing objections to the report includes the ten-day period, not including intermediate Saturdays, Sundays, and legal holidays, as specified by Rules 6(a) and 53(h), ARIZ. R. CIV. P. The five-day period for filing responses is specified in Rule 4(a), UNIFORM RULES OF PRACTICE. An additional five-day period is required when service has been made by mail (Rule 6(e), ARIZ. R. CIV. P.). Since the report does not cover an entire subwatershed or reservation, but only motions concerning an aspect of the case, the 180-day period prescribed by ARIZ. REV. STAT. ANN. § 45-257(A)(2) (Supp. 1998) does not apply.

ordered. Rule 53(h) ARIZONA RULES OF CIVIL PROCEDURE, provides that "[t]he court shall accept the master's findings of facts unless clearly erroneous. . . . [and] the court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

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RESPECTFULLY SUBMITTED this 30th day of June 2000.

_____

JOHN E. THORSON
Special Master

Appendix A

Contested Case No. W1-203
In re the Water Rights of the Gila River Indian Community

INDEX OF ALL PLEADINGS CONCERNING MOTIONS HEARD ON APRIL 26, 2000
Docket Numbers in ( )

I. MOTION FOR SUMMARY JUDGMENT (March 1, 1999) filed by Gila Valley Irrigation District, Franklin Irrigation District, San Carlos Irrigation and Drainage District, Salt River Project, and City of Tempe (119).

A. Joined by: City of Phoenix (125); Cities of Chandler, Glendale, Mesa & Scottsdale (126); City of Goodyear (130); City of Safford (limited joinder) (124); Arizona Public Service Co. (127); BHP Copper Inc. (128); LDS Church (129); Buckeye Irrigation Co. & Arlington Canal Co. (122); Pomerene Water Users Ass'n (limited joinder) (133).

B. Responses by: San Carlos Apache Tribe (204); Gila River Indian Community (216); United States (232).

C. Replies by: Gila Valley Irrigation District, Franklin Irrigation District, San Carlos Irrigation & Drainage District, Salt River Project, and City of Tempe (319).

II. MOTION FOR SUMMARY JUDGMENT (March 1, 1999) filed by San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (118).

A. Responses by: Gila Valley Irrigation District & Franklin Irrigation District (205) (joined by San Carlos Irrigation and Drainage District (259)); Gila River Indian Community (219).

B. Reply by: San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (323).

III. MOTION FOR PARTIAL SUMMARY JUDGMENT RE PRECLUSIVE EFFECTS OF PRIOR AGREEMENTS AND DECREES ON WATER RIGHTS OF GILA RIVER INDIAN COMMUNITY (Oct. 4, 1999) filed by San Carlos Irrigation and Drainage District (206).

A. Responses by: Gila River Indian Community (272); Gila Valley Irrigation District & Franklin Irrigation District (280); United States (285).

B. Reply by San Carlos Irrigation and Drainage District (300).

IV. MOTION FOR SUMMARY JUDGMENT REGARDING EFFECT OF PRIOR AGREEMENTS (Oct. 4, 1999) filed by ASARCO Inc. (202).

A. Responses by: Salt River Project & City of Tempe (265); San Carlos Irrigation and Drainage District (268); San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (271); Gila River Indian Community (275); Gila Valley Irrigation District & Franklin Irrigation District (278); United States (283).

B. Replies by ASARCO Inc. (305, 306, 307, 308, 309, 310).

Appendix B

PROPOSED ORDER

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

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	W-1 (Salt) W-2 (Verde) W-3 (Upper Gila) W-4 (San Pedro) Consolidated **Contested Case No. W1-203** ORDER

THIS MATTER came before the court on the Motion for Summary Judgment filed by the Gila Valley Irrigation District, Franklin Irrigation District, San Carlos Irrigation and Drainage District, Salt River Project, and City of Tempe (Mar. 1, 1999) (Docket No. 119); Motion for Summary Judgment filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation (Mar. 1, 1999) (Docket No. 118); Motion for Summary Judgment filed by the San Carlos Irrigation and Drainage District (Oct. 4, 1999) (Docket No. 206); and Motion for Summary Judgment filed by ASARCO Incorporated (Oct. 4, 1999) (Docket No. 202); consideration of these motions having been referred to the Special Master on Feb. 1, 2000; the Master having filed a report with the Clerk of the Court and provided notice as provided by law; the Master having moved the court for an order approving the report and recommendations; and the court having considered the report, objections to the report, and being fully advised;

THE COURT FINDS that notice of the Master's report has been given as required by law and the period for filing objections to the report has passed;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. The motion of the Special Master to approve the report is GRANTED.

2. The court approves and adopts the findings of fact, conclusions of law, and recommended disposition of the pending motions, as set forth in the report.

3. As to the motion filed by the Gila Valley Irrigation District *et al.*, the motion is GRANTED in behalf of original parties to the *Globe Equity Decree*, successors of original parties to the *Globe Equity Decree*, and privities of original parties to the *Globe Equity Decree*. These persons are entitled to assert that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that community, and the United States on their behalf, to water for all purposes appurtenant to the Gila River Indian Reservation, whether allotted or not.

4. Also as to the motion filed by the Gila Valley Irrigation District *et al*., the motion is GRANTED in behalf of all other claimants in the Gila River system but only to the extent of the lands anticipated in 1935 to be transferred into Indian allotments. For these allotted lands, all other claimants in the Gila River system are entitled to assert that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that community, and the United States on their behalf to water for all purposes appurtenant to the allotted portion of the reservation. An evidentiary hearing is necessary to ascertain whether claims for water for the surplus lands were part of the cause of action

asserted by the United States in *Globe Equity*. Until then, the United States and the Community may continue to claim additional water for these surplus lands as against those other claimants in the Gila River system who were not parties to *Globe Equity* or successors or privities thereto.

5. As to the motion filed by the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Nation, the motion is GRANTED since these Apache Tribes are privity to an original party to the *Globe Equity Decree, i.e.*, the United States, and the interests of the Gila River Indian Community and the these Apache Tribes were sufficiently adverse. These Apache Tribes are entitled to assert that *Globe Equity* was a complete and final adjudication of all claims of the Gila River Indian Community, the members of that community, and the United States on their behalf, to water (including the water of the San Carlos River) for all purposes appurtenant to the Gila River Indian Reservation, whether allotted or not.

6. As to the motion filed by the San Carlos Irrigation and Drainage District, the motion should be DENIED for the reason that the question presented is moot as it has been decided in favor of the San Carlos Irrigation and Drainage District by the federal district court in its enforcement and administration of the *Globe Equity Decree*. Once decreed, the abstracts for water rights subject to these water pooling conditions should contain annotations in the "Other Remarks" field to the applicable provisions of the *Globe Equity Decree* and other applicable agreements, using language substantially similar to that recommended by the Master.

7. As to the motion filed by ASARCO, the motion should be DENIED for the reason that the question presented should be decided by a federal court or arbitrator under the choice of forum provisions contained in the Water Rights Settlement and Exchange Agreement. The appropriate water right abstracts of the Gila River Indian Community and ASARCO, once they are prepared, should be annotated in the "Other Remarks" section with a reference to the Water Rights Settlement and Exchange Agreement and Consent to Assignment, using language substantially similar to that recommended by the Master.

IT IS FURTHER ORDERED that the Arizona Department of Water Resources prepare subsequent hydrographic survey reports in accordance with the determinations made in this order.

IT IS FURTHER ORDERED that proceedings continue in this contested case in accordance with this order.

Dated this _____ day of _____ 2000.

_____
SUSAN R. BOLTON
Judge of the Superior Court

Court-approved Mailing List
Gila River Adjudication
W-1, W-2, W-3, W-4
(66 names; alphabetized by **last name**)
Prepared by the Office of the Special Master
June 16, 2000

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CERTIFICATE OF SERVICE

I certify that the original of the foregoing Report was delivered to the Maricopa County Superior Court this 30th day of June 2000 for filing. Also, a copy will be mailed on July 5, 2000, to those persons appearing on the Court-approved mailing list for Case No. W-1, W-2, W-3, W-4 dated June 16, 2000 (Appendix C). This is the same mailing list for this aspect of Case No. W1-203.

_____

Kathy Dolge