

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 Nos.
W-1-203 (Docket No.
118-119, 202, 206,
209-214 and 224-225)

AMENDED ORDER

The Order dated February 20, 2002 is amended, *nunc pro tunc*, to provide as follows:

Hearings were held on November 27 and 28, 2001, on the requests for summary disposition pending in the above-referenced dockets. These motions were filed by the Gila Valley Irrigation District ("GVID"), Franklin Irrigation District ("FID"), San Carlos Irrigation and Drainage District ("SCIDD"), Salt River Project ("SRP"), the City of Tempe ("Tempe"), the San Carlos Apache Tribe, Tonto Apache Tribe, and Yavapai-Apache Tribe (the "Apache Tribes" collectively), ASARCO Incorporated ("ASARCO"), Buckeye Irrigation Company ("Buckeye") and Arlington Canal Company ("Arlington"), and sought relief against the Gila River Indian Community ("GRIC") and the United States (sometimes referred to as the "Government"). These matters were previously referred to Special Master Thorson on February 1, 2000 and July

14, 2000. After permitting oral argument the Special Master filed two reports, which were dated, respectively, June 30, 2000 ("SM June Rep.") and December 28, 2000 ("SM Dec. Rep.") and contained the Special Master's factual findings ("FOF"), legal conclusions ("COL") and recommendations. The Clerk of the Court gave proper notice of the filing of these reports, and the parties were permitted to submit their comments and objections. This court has considered all filed memoranda, arguments of counsel, findings and conclusions of the Special Master, and has otherwise become fully advised as to the issues presented. This Order shall constitute the court's findings of fact and conclusions of law with respect to the pending motions in accordance with Ariz. R. Civ. P. 52.

I. Initial Considerations

A. Scope of Inquiry

Many of the motions presented assert that GRIC's claims are precluded or limited due to operation of legal principles such as *res judicata*, various forms of estoppel (including collateral, statutory, "quasi", equitable, and judicial estoppel), and general principles of contract law. If applicable, these precepts summarily resolve disputes and, as the Special Master recognized, "when rights to the use of water or dates of appropriation have previously been determined in a prior decree of a court . . .," this court, "shall accept the

determination of such rights and dates of appropriation as found in the prior decree unless such rights have been abandoned." SM June Rep., p.12 (citing Ariz. Rev. Stat. §45-257 (B)(1)). GRIC and the United States point out that proper consideration of these maxims requires that the court consider whether, and when, each principle can be applied to GRIC and/or the Government. If generally applicable, the court must decide if the requisites for successful assertion of each form of preclusion have been met with respect to each motion. But, prior to addressing these issues, the court must address the United States' contention that this court lacks jurisdiction to consider matters previously considered by federal courts.

B. Jurisdiction

Various federal forums have asserted, and in at least one instance continue to exercise, jurisdiction over issues that are the subject of the motions currently before this court. For example, one motion centers on the question of whether the decree relating to rights to water flow from the upper mainstem of the Gila River that was entered in *United States v. Gila Valley Irr. Dist., Globe Equity No. 59* (D. Ariz. 1935) (the "Globe Equity Decree" or the "Decree") triggers issue and/or claim preclusion with respect to claims of GRIC and the Government in this adjudication. Because the federal district court retained exclusive jurisdiction to interpret and enforce

the *Globe Equity Decree*, the United States argues that any review of the *Decree's* terms would necessarily be interpretive, and thus outside the scope of this court's jurisdiction. This argument rests primarily on the Government's interpretation of the Ninth Circuit Court of Appeals' holding in *United States v. Alpine Land & Reservoir Company*, 174 F.3d 1007 (9th Cir. 1999). In *Alpine*, the court of appeals upheld the continuing and exclusive jurisdiction of a federal district court to interpret and apply provisions contained in previously issued decrees. The court held federal jurisdiction to be exclusive based both on the explicit language contained in the decrees and, more importantly, on the fact that the rights declared in the decrees were determined in what were, in effect, *in rem* proceedings:

The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment. Such an arrangement would potentially frustrate the federal district court's purpose.

Alpine, 174 F.3d 1013 (citing *Flanagan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998)).

While acknowledging the principles upon which the *Alpine* decision rests, this court does not believe they apply to this adjudication. The United States fails to distinguish situations in which a state court recognizes the validity and preclusive effect of judgments as opposed to instances in which it purports

to interpret or enforce these edicts. That the former undertaking is permitted is not subject to question. The decision of the United States Supreme Court in *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 118 S. Ct. 921 (1998), authorizes state courts to consider and rule on the extent of issue and claim preclusion that accompanies federal judgments. Justice Ginsburg wrote “[C]laim preclusion by reason of a prior federal judgment is a ... defensive plea Such a defense is properly made in the state proceedings, and the state courts’ disposition of it is subject to [The Supreme] Court’s ultimate review.” 522 U.S. 478, 118 S. Ct. 926

Adopting the Government’s view of jurisdiction could result in this court ignoring binding resolutions regarding issues arising in this adjudication, thereby permitting awards of water rights that are in conflict with these determinations. For these reasons, the court concludes that principles of issue and claim preclusion do not cause this court to invade the exclusive jurisdiction of the federal courts. When properly applied, acknowledging the binding effect of prior decrees promotes judicial economy and assists the court in complying with state and federal law mandates.

II. Resolution of Pending Motions

The history relating how the motions before the court arose is accurately and adequately described in Special Master

Thorson's reports, portions of which are incorporated as part of this Order.

A. Motions concerning the preclusive effect of the Globe Equity Decree

[Docket Nos. 118 and 119]

Asserting various theories, GVID, FID, SCIDD, SRP¹, Tempe, and the Apache Tribes have each filed motions claiming that the *Globe Equity Decree* limits² water rights asserted by, or on behalf of, GRIC.

The *Globe Equity Decree* concluded litigation initiated by the United States for the benefit of, among others, Indian tribes living on the Gila River Indian Reservation. A number of the current movants (or their predecessors in interest) were defendants in the case. There is no dispute that the *Decree* purported to resolve approximately three thousand water right diversions. The Special Master characterized the *Decree* as a lengthy, convoluted edict that has spawned numerous federal court actions relating to administration and interpretation of its terms.

As already noted, Ariz. Rev. Stat. §45-257 requires that this court generally accept prior judicial determinations as to the right to use water. Movants argue that this statute and the doctrine of *res judicata* each requires that the court recognize

¹ "SRP" also refers to the Salt River Valley Water Users' Association.

² Additional parties joined in this and other motions addressed in this Order.

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."³ SM June Rep., p.12. GRIC and the United States argue that the law does not permit the *Decree* to serve as the basis for a *res judicata* bar, that the elements necessary for this affirmative defense are not present, and that, in any event, disputes regarding material facts preclude summary disposition.⁴

"Simply put, the doctrine of *res judicata* provides that when a final judgement has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.'" *Nevada*

³ The motions seek to limit claims relating both to the fifty thousand acres of reservation land for which water rights were explicitly recognized in the Decree ("Allotted Lands") and to the three hundred twenty-five thousand acres located within the reservation for which the *Globe Equity Decree* did not make any provision ("Surplus Lands").

⁴ GRIC argues at length that summary judgment is never appropriate if there is "the slightest doubt" as to any disputed fact or "any doubt as to whether there are issues of fact to be litigated under any theory of liability advanced." GRIC Objections to SM June Rep., p. 4 GRIC relies on outdated authority that describes a superceded standard governing when summary adjudication is appropriate. This court will abide by the standard adopted by the Arizona Supreme Court in *Orme School v. Reeves*, 166 Ariz. 301, 802 P. 2d 1000 (1990). In *Orme*, the Supreme Court recognized that when considering summary judgment requests, trial courts are not to "pass on the credibility of witnesses with differing versions of material facts ... weigh the quality of documentary or other evidence ... [or] choose among competing or conflicting inferences." 166 Ariz. 311, 802 P. 2d 1010. But if a viable motion is presented, summary judgment is to be granted if the opposing party does not come forward with evidence that would permit a reasonable jury to find, directly or by inference, against the movant.

v. United States, 463 U.S. 110, 129-130, 103 S. Ct. 2906, 2918 (1983) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 S. Ct. 195, 196 (1877)). Generally, for *res judicata* to apply two requirements must be met: 1. The "cause of action" currently before the court must be the same as that asserted in a prior proceeding, and 2. If it is, the court must determine whether the parties to the current action are identical or in privity with those in the former action.⁵

GRIC and the Government also urge that issue and claim preclusion are not applicable to consent judgments such as *Globe Equity Decree* because disputed matters were not resolved by a decision rendered at the conclusion of an evidentiary hearing. Both those supporting and challenging this assertion rely primarily on the United States Supreme Court's decision in *Arizona v. California*, 530 U.S. 392, 120 S. Ct. 2304 (2000) ("*Arizona III*") and the authorities cited therein. For example, the United States asserts that, "In the case of a judgment by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of [Restatement (Second) of

⁵ The Special Master correctly concluded that here these determinations are to be made by applying federal law, both because of the strong federal interest in litigation such as that giving rise to the Decree and because of Arizona courts' recognition that the law of the jurisdiction from which a judgment arose should be used when evaluating preclusion issues.

Judgments § 27⁶ (1982)] does not apply with respect to any issue in a subsequent action.” United States Exceptions/Objections to SM June Rep., p. 5 (emphasis omitted) (citing *Arizona III*, 530 U.S. 414, 120 S. Ct. 2319).

Those seeking summary disposition cite *Arizona III* for the proposition that consent judgments are treated just like any other judgments for preclusion purposes. GVID’s and FID’s Response to GRIC’s Objections to SM June Rep., p. 3 (quoting *Arizona III*’s holding that “[c]onsent judgments ordinarily support claim preclusion ...” *Id.*).⁷

The confusion present in these competing citations arises due to 1. The parties’ attempts to apply rules relating to issue preclusion when considering claim preclusion (and vice versa), and 2. The fact that decisions of the United States Supreme Court indicate that claim preclusion is to be applied more liberally in cases fairly characterized as general water adjudications.

The dispute regarding whether consent judgments can serve as the basis for claim preclusion is easily resolved by reference to the Supreme Court’s analysis in *Nevada* and *Arizona III*. In both opinions the Court recognized the distinction

⁶ The opinion refers to this section of the Restatement as providing the “general rule that *issue* preclusion attaches only ‘[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgement, and the determination is essential to the judgment’.” (emphasis added) 530 U.S. 414, 120 S. Ct. 2319. The significance of this distinction is discussed *infra*.

⁷ See also *Suttle v. Seely*, 94 Ariz. 161, 382 P.2d 570 (1963).

between the claim preclusion effect of *res judicata* versus the issue preclusion that is a consequence of successful assertion of collateral estoppel. In *Nevada*, the Court recognized that "final judgment puts an end to the cause of action, which cannot be brought into litigation between the parties upon any ground whatsoever." 463 U.S. 130, 103 S. Ct. 2918.⁸ The *Nevada* court held that *res judicata* was an effective bar to a government water right claim even though the relevant prior decree was rendered when "[t]he district court entered a final decree adopting [a settlement] agreement" 469 U.S. 118, 103 S. Ct. 2912.

Justice Ginsburg's opinion in *Arizona III* also supports the conclusion that consent decrees can preclude parties from relitigating claims. *Arizona III* dealt, in part, with the question of whether a 1983 consent judgment of the United States Claims Court ("Claims Court") extinguished unasserted disputed title claims that were at issue in the litigation. The Court, consistent with its reasoning in *Nevada*, recognized that the judgment resulting from the parties' settlement, "indeed had, and was intended to have, *claim-preclusive* effect . . . [b]ut settlements ordinarily occasion no *issue preclusion* (sometimes

⁸ The footnote reference to this quotation explains the difference between the doctrines at issue here: "The corollary preclusion doctrine to *res judicata* is collateral estoppel. While the latter may be used to bar a broader class of litigants, it can be used only to prevent 'relitigation of issues actually litigated' in a prior lawsuit. *Parklane Hosiery Co. Inc. v. Shore*, 439 U.S. 322, 326, n. 5 (1979)." 463 U.S. 130, 103 S. Ct. 2918, n. 11.

called collateral estoppel), unless it is clear ... the parties intended their agreement to have such an effect." 530 U.S. 414, 120 S. Ct. 2319 (emphasis in opinion). With respect to *res judicata*, *Arizona III* and *Nevada* demonstrate that decrees entered by stipulation are to be treated as any other judgments.

As to the question of whether *Globe Equity* involved the same "cause of action" asserted by and on behalf of GRIC in this adjudication, the Supreme Court's opinion in *Nevada* again provides guidance. In determining that the causes before the federal district court were the same, Justice Rehnquist looked primarily at three factors contained within the record: 1. The relief sought in the pleading filed in the original action, 2. The language of the decree that concluded that litigation, and 3. The relief sought in the second case.⁹

The facts in *Nevada* dealt with what is referred to as the *Orr Ditch* case, in which the United States brought suit, in 1913, to adjudicate water rights to the Truckee River on behalf of both the Pyramid Lake Indian Reservation ("PLR") and the proposed Newlands Reclamation Project. A final decree was

⁹ Adopting the analytical method outlined in *Nevada* also permits the court to avoid review of the secondary sources considered by the Special Master, an undertaking to which GRIC objects. To support his legal conclusions regarding preclusion, the Special Master made findings of fact regarding a number of materials (e.g. letters authored by individuals involved in *Globe Equity*). SM June Rep., pp. 34-41; Findings of Fact ("FOF") nos. 10, 18, 19, 20, 21, 26, and 28. While review of these documents was consistent with the methods employed in *Nevada*, the court notes its resolution of the motions relating to the *Decree* did not require consideration of these secondary materials.

entered, in accordance with a settlement among the parties, more than thirty years after the case was filed. The United States acquired some water rights for PLR under this judgment, but failed to obtain any allotment of unaided river flows to permit the Indians to maintain an important fishery. For this reason, the Government filed a second action, almost thirty years after the prior decree was entered, seeking a right to water sufficient to permit maintenance of a natural spawning ground on PLR land lying within the lower reaches of the Truckee River. This claim was barred because the federal district court upheld defendants' *res judicata* affirmative defense. The court of appeals affirmed this part of the district court's decision. *United States v. Truckee-Carson Irr. Dist.*, 649 F.2d 1286 (9th Cir. 1981), *modified*, 666 F.2d 351 (1982).

Speaking for a unanimous Supreme Court, Justice Rehnquist evaluated the "cause of action" issue by referring to the Government's intention in initiating and the relief requested, in the original action. The amended complaint averred that:

Until the several rights of the various claimants ... including the United States, to the use of the waters flowing in said river and its said tributaries in Nevada or used in Nevada have been settled, and the extent, nature, and order in time of each right to divert said waters from said river and its tributaries has been judicially determined the United States cannot properly protect its rights in and to the said waters, and to protect said rights otherwise than as herein sought if they could be protected would necessitate a multiplicity of suits.

[t]he United States, having for a long time previous [to 1859] recognized the fact that certain Pah Ute and other Indians were ... residing upon and using certain lands [in and around the Truckee River Valley and Pyramid Lake], ... and being desirous of protecting said Indians and their descendants ... and their use of said lands and waters ... did reserve said lands from any and all forms of entry or sale and for the sole use of said Indians, and for their benefit and civilization ... did ... reserve from further appropriation, appropriate and set aside for its own use in, on, and about said Indian reservation, and the land thereof, from and of the waters of the said Truckee River, five hundred (500) cubic feet of water per second of time. (citations to the record omitted).

463 U.S. 132-133, 103 S. Ct. 2919-2920 (emphasis in opinion).

The Court held that the language of the Government's amended complaint evidenced that it intended to, and was given the opportunity to, assert all of PLR's water right claims, including those implied by law under the doctrine announced in *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207 (1908). Justice Rehnquist looked no further than the language of the decree entered in *Orr Ditch* to conclude that the United States succeeded in accomplishing its intended task stated in the amended complaint:

The final decree in *Orr Ditch* clearly shows that the parties to the settlement agreement and the District Court intended to accomplish [the Tribe's water rights]. The decree provided in part:

'The parties ... successors in interest ... in or to the water rights or lands herein mentioned or described, are and each of them is hereby forever enjoined and restrained from asserting or claiming any

rights in or to the waters of the Truckee River or its tributaries, or the waters of any of the creeks or streams or other waters hereinbefore mentioned except the rights, specified, determined and allowed by this decree...'. "

463 U.S. 132, 103 S. Ct. 2919 (citation to record omitted) (emphasis in opinion).

Finally, the Court compared the broad assertion of water rights claimed by the Government in the original litigation and the scope of the *Orr Ditch* decree with the assertions in its second lawsuit. While recognizing that the allegations in the latter action focused more on PLR's reliance on fishing as a basis for a water right, the Court found that the causes of action in the two cases were the same because "it seems quite clear to us that [claimants] are asserting the same reserved right ... that was asserted in *Orr Ditch*." 463 U.S. 134, 103 S. Ct. 2920.

In the present situation, the amended complaint filed by the Government in *Globe Equity* contains allegations very similar to (and in some respects broader than) those quoted by the

Supreme Court from the *Orr Ditch* record.¹⁰ The *Globe Equity Decree*, just like the *Orr Ditch Decree*, clearly shows that the parties intended the *Decree* to resolve their relative water rights.¹¹ And there is no dispute that claims to the water source that was the subject of the *Globe Equity Decree* have been filed both by and on behalf of GRIC in this adjudication. The broad assertion of water rights in *Globe Equity*, when coupled with the other factors explained above, establishes that the portion of GRIC water claims in this adjudication that relates to the segment of the Gila River previously addressed by the federal district court constitutes the same cause of action resolved by the *Globe Equity Decree*.

¹⁰ Paragraph 15(a) of the amended complaint filed in *Globe Equity* states in pertinent part:

(a) Until the rights of the various claimants ... including the United States, to divert and use the waters flowing in said river within the area above defined, or to store such water above, with the extent, nature, and priority of such rights, have been judicially determined, the United State can not properly protect its rights to said waters; and to protect them otherwise than is herein sought, if they could be so protected, would necessitate a multitude of suits.

Paragraph 7(b) states in pertinent part, "the 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."

The court is aware that those opposing summary adjudication differentiate the allegations and prayers for relief in *Orr Ditch* and *Globe Equity* by pointing out that *Orr Ditch* dealt with an adjudication of all those known to claim rights to water from the Truckee River and its tributaries while the scope of the *Globe Equity Decree* was more limited. These objections are addressed *infra*.

¹¹ Article XIII of the *Globe Equity Decree* provides in pertinent part:

[E]ach and all of the parties ... and successors in interest...are hereby forever enjoined and restrained from asserting or claiming - as against any of the parties 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....

Two arguments made by and on behalf of GRIC deserve special mention. First, the assertion that *Globe Equity* was not a comprehensive enough proceeding to support application of *res judicata*. Even GRIC acknowledges that *Globe Equity* involved, "a very complicated water rights litigation, involving thousands of parties and hundreds of thousands of acres of land, evolving over ten years" GRIC Objections, p. 11. The record reflects that the Government's amended complaint in *Globe Equity* sought to determine the rights to all those known to have water claims to the portion of the Gila River at issue. The water rights addressed in the *Decree* were the same rights described in paragraph 15 of the amended complaint filed in *Globe Equity*. As explained in the SM June Rep., the scope of the undertaking in *Globe Equity* was more than sufficient to permit the resulting decree to have a preclusive effect. See *United States v. District Ct., County of Eagle, Colo.*, 401 U.S. 520, 523, 91 S. Ct. 998 (1971).

Second, in its filed objections, GRIC agrees that *res judicata* may be applicable in this adjudication, but that it is limited to "the cause of action" asserted in *Globe Equity*. GRIC Objections, p.19. GRIC wants the court to limit the scope of the *Decree's* preclusive effect to the Allotted Lands for which the Government obtained water rights. As the United States did not seek to protect water rights for GRIC's Surplus Lands, which

constitute the vast majority of reservation realty, GRIC logically believes it should not be prejudiced for the Government's failure. This argument is best characterized as an assertion that the Government split its claim in *Globe Equity*, a procedure that movants claim is not permitted, but which the *Nevada* opinion suggests may be permitted.¹² This court sympathizes with GRIC's belief that the United States did not adequately represent its interests in *Globe Equity*, but the amended complaint filed in that litigation does not support GRIC's claim that anything less than its entire water right was put at issue by the Government. This court is bound to abide by the framework for applying preclusion that was employed by the United States Supreme Court in *Nevada*. In that case, the Court affirmed the principle that "after the United States on behalf of its wards ... invoke[s] the jurisdiction of its courts ... wards should [not] themselves be permitted to relitigate"¹³ 463 U.S. 135, 103 S. Ct. 2921.

However, the record also establishes that the Government intended to limit the water rights asserted in *Globe Equity* to those flowing within that portion of the river system described

¹² See 463 U.S. 134, 103 S. Ct. 2920, n. 13

¹³ The Supreme Court recognized the consequences its ruling visited upon Indians represented by the Government. ("We, of course, do not pass judgment on the quality of the representation that the Tribe received. In 1951 the Tribe sued the Government before the Indian Claims Commission for damages, basing its claim of liability on the Tribe's receipt of less water for the fishery than it was entitled to.") 463 U.S. 135, 103 S. Ct. 2921, n.14. See n. 18, *infra*.

in paragraph 15 of the amended complaint. The request for relief in this paragraph is distinguishable from that considered in *Nevada*, in that the *Orr Ditch* proceeding involved a situation in which river tributaries were included both in the claim for relief and the final judgment. Such is not the case in this adjudication. The Government's amended complaint in *Globe Equity* and the *Decree* establish that only water rights to flow from the mainstem of the Gila River were adjudicated by the federal district court.

Having determined that this adjudication, in part, involves the same cause of action that was asserted in *Globe Equity*, the court must decide which of the parties are bound by, or may benefit from, the effect of preclusion by judgment. The *Nevada* decision makes it clear that the United States, GRIC, SCIDD, FID, and GVID, and those in privity with them, may assert claim preclusion because their interests were represented in *Globe*

Equity.¹⁴ The more difficult question concerns the extent to which subsequent water claimants who were not parties to *Globe Equity* (or a party's privy or successor) can assert preclusion. The Special Master Thorson found that *res judicata* could not benefit this class of litigants so he attempted to resolve the matter by determining whether the facts and applicable law would justify applying collateral estoppel principles. He noted that none of the movants had asserted a collateral estoppel argument, but he considered the scope of *Globe Equity's* reach within the framework of preclusion because issues present in this proceeding were actually in dispute (e.g., entitlements for Allotted Lands) in *Globe Equity*. For that reason, the Special

¹⁴ GRIC objects to SCIDD's assertion of *res judicata* because the Government represented both parties in *Globe Equity*. GRIC claims this representation shows there was a lack of adversity between GRIC and SCIDD that prevents claim preclusion from being applied. The Supreme Court has rejected this argument. The principle urged here by GRIC does not apply to water adjudications:

A strict adversity requirement does not necessarily fit the realities of water adjudications. All parties'/ water rights are interdependent Stability in water rights therefore requires that all parties be bound in all combinations. Further, in many water adjudications there is no actual controversy between the parties; the proceedings may serve primarily an administrative purpose

[And] ... where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects, and has even authorized the inclusion of reservation land within a project, the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.

(citations omitted). 463 U.S. 139, 143, 103 S. Ct. 2922-2923, 2924.

The Court went on to hold that in circumstances in which a water adjudication addresses claims by the Government on behalf of an Indian tribe, a reclamation project, and a large number of other claims, "it is unnecessary to decide whether there would be adversity of interests between the Tribe, on the one hand, and the settlers and [the project], on the other" 463 U.S. 143, 103 S. Ct. 2924.

Master concluded the parties could be deemed to have intended for those disputed claims resolved by the *Globe Equity Decree*.

The court respectfully disagrees with the Special Master's analysis for two reasons. First, on the record before it, the court cannot find that issue preclusion applies. The *Globe Equity Decree* arose from a settlement. The district court did not enter a decision after considering arguments and evidence submitted by the parties. For the court to rule that collateral estoppel applies at this juncture would require a finding that the stipulated judgment entered in *Globe Equity* was clearly intended by the parties to preclude further consideration of the issues involved. *Arizona III*, 530 U.S. 414, 120 S. Ct. 2319. The record does not support entry of summary judgment on this issue.

The more important reason to reject issue preclusion is because controlling United States Supreme Court authority renders it moot with respect to the *Globe Equity Decree*. In *Nevada*, the Court eliminated the *res judicata* doctrine's mutuality requirement in instances in which the initial litigation giving rise to a claim preclusion defense can be fairly characterized as a comprehensive water rights adjudication. In resolving the issue in *Nevada*, the Court characterized the treatment of subsequent water claimants who were not parties to the *Orr Ditch* decree as a "difficult

question" and conceded that "mutuality ... has remained a part of the doctrine of *res judicata*." 463 U.S. 143, 120 S. Ct. 2925 (citations omitted) Nevertheless, because the *Orr Ditch* decree resulted from a comprehensive determination of water rights that subsequent appropriators had relied on for years, the Court held it would be manifestly unjust not to apply *res judicata* principles. This holding establishes an exception to mutuality that applies when claim preclusion is asserted in a water case.

Case law and the record confirm there is no genuine dispute that *Globe Equity* was an adjudication comprehensive enough to fulfill the first prong of the Supreme Court's mutuality exception. See *United States v. District Court*, 401 U.S. 520, 91 S. Ct. 998 (1971); GRIC's Objection, p. 11. Satisfying the second requisite turns on whether this court can determine that there has been sufficient reliance on the *Globe Equity Decree*. In *Nevada*, the United States Supreme Court, without reference to the record, held that "[n]onparties such as subsequent appropriators in this case have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties" 463 U.S. 144, 120 S. Ct. 2925. In its *Orr Ditch* opinion, the Ninth Circuit Court of Appeals held that the *Orr Ditch* decree, which contains relevant language similar to that found in the *Globe Equity Decree*, evidenced that, "clearly, the government intended to enable

[subsequent appropriator] reliance when it consented to entry of the final decree." *United States v. Truckee-Carson Irr. Dist.*, 649 F.2d 1286, 1308. (1981). Nothing in either the Supreme Court's or court of appeals analysis suggests that determinations regarding mutuality were based upon evidentiary presentations at the trial level. To the contrary, Justice Rehnquist's reference to subsequent appropriators as among those who may rely on a water rights decree supports the view that common knowledge of the vast development in western states over the past decades may, in some cases, support use of the Court's *res judicata* mutuality exception.

In this adjudication, the court is fortunate to have guidance as to how to resolve the reliance issue. Among the questions faced by the Arizona Supreme Court in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993), was whether the court should revisit water law principles it had established more than seventy years earlier in *Maricopa County Municipal Water Conservation District No. One v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931) *modified*, 39 Ariz. 367, 7 P.2d 254 (1932). The court refused to reconsider its prior water law edicts even though it recognized that rules it had pronounced, "may [have been] based on an understanding of

hydrology less precise than current theories ..." 175 Ariz. 389, 857 P.2d 1243.

What is relevant to consideration of the current motions is the court's stated reason for its decision: the belief that it would be fundamentally unjust to address anew rules relating to water entitlements decades after the state's water users had acted in reliance upon the court's prior determinations. This reasoning applies with equal force to the social and economic development following entry of the judgment in *Globe Equity*.¹⁵ The Arizona Supreme Court's recognition of this state's dramatic economic expansion, coupled with generally known facts relating to Arizona's evolution during the past sixty-seven years, justifies this court taking judicial notice of reliance on the *Globe Equity Decree* by subsequent appropriators, sufficient to satisfy the mutuality exception carved out in *Nevada*.¹⁶

¹⁵ Chief Justice Feldman 's opinion reflects the court's intention to apply finality to water right decisions even to those for whom preclusion would be generally unavailable:

We perceive our role as interpreting *Southwest Cotton*, not refining, revising, correcting, or improving it. We believe it is too late to change or overrule the case. More than six decades have passed since *Southwest Cotton* was decided. The Arizona legislature has erected statutory frameworks for regulating surface water and groundwater based on *Southwest Cotton*. Arizona's agricultural, industrial, mining, and urban interests have accommodated themselves to those frameworks. *Southwest Cotton* has been part of the constant backdrop for vast investments, the founding and growth of towns and cities, and the lives of our people.

175 Ariz. 389, 857 P.2d 1243.

¹⁶ One of the U. S. Supreme Court's decisions in *Arizona v. California* also supports the view that little, if any, specific reliance must be shown to trigger the mutuality exception in water adjudications: "even the absence of detrimental reliance cannot open an otherwise final determination of a fully litigated issue."

460 U.S. 605, 626, 103 S. Ct. 1382, 1395 (1983) ("*Arizona II*").

Because this adjudication is equitable in nature, evaluating the consequences of this court's rulings is appropriate. Here, the Government, as GRIC's guardian and trustee, put at issue all of the Tribe's water rights, but sought an award for less than fifteen percent of land within the Gila River Indian Reservation. As was the case in *Orr Ditch*, a legitimate question is raised about the quality of representation the Tribe received. This concern also arose in *Arizona II*. The facts in that case provide as strong an argument for not applying claim preclusion as those present here. Justice Brennan's dissent in *Arizona II* pointed out that "[t]he United States completely failed to present evidence regarding [water claims] ..." thereby causing the relevant Indian tribes to suffer "a manifest injustice." 460 U.S. 643, 648, 103 S. Ct. 1404, 1406. In *Arizona II*, *Nevada*, and this case, it may be true that Indian tribes "bear the cost of the United State's error." 460 U.S. 649, 103 S. Ct. 1407. But controlling Supreme Court authority dictates that those presiding over water adjudications apply claim preclusion liberally to final judgments rendered in prior comprehensive proceedings. Any resulting harm visited upon Indian tribes as a result of this mandate must continue to be addressed in other

forums.¹⁷

None of the other matters raised by the parties, such as legally significant "changed circumstances" or consideration of what is referred to by the parties as the 1924 Landowners' Agreement, affect the results required with respect to the motions brought in these dockets. Accordingly,

IT IS ORDERED GRANTING movants' motions for summary judgment. In this adjudication, neither GRIC nor the United States on behalf of GRIC shall be entitled to claim water rights relating to the mainstem of the Gila River, including flow from the San Carlos River, except to the extent such rights were granted to them by the *Globe Equity Decree*.

B. SCIDD's motion relating to the Florence-Casa Grande Landowners' Agreement, San Carlos Irrigation Project Landowners' Agreement, and the Project Payment Agreement

[Docket No. 206]

After reviewing the record and considering the positions of the interested parties, the court determines that the above-referenced motion is moot as a result of the February 9, 2000,

¹⁷ The Special Masters' reports describe how relief can be had. In 1946, the Indian Claims Commission Act of August 13, 1946, (ch. 959, 60 Stat. 1049-1056, 25 U.S.C. § 70) was enacted to permit Indian tribes "to assert monetary claims against the federal government, otherwise barred by sovereign immunity, arising before passage of the act in 1946 and based on treaty or contractual violations, legal and equitable claims, land confiscation, and other claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." SM Dec. Rep., pp.8 & 9, n. 2 (citations omitted). As discussed *infra*, GRIC has sought reparation under the Act. See *Gila River Pima-Maricopa Indian Community v. United States*, 2 Cl. Ct. 12 (1982).

decision of the federal district court in *Globe Equity*. For this reason,

IT IS FURTHER ORDERED DENYING SCIDD's motion for summary judgment.

C. ASARCO'S motions asserting that GRIC's water rights are subject to a Water Rights Settlement and Exchange Agreement and Consent to Assignment

[Docket No. 202]

With one minor exception, the court agrees with the Special Master's factual findings and legal conclusions relating to ASARCO's motion. The determination as to whether or not GRIC and ASARCO's adjudicated water right abstracts should be annotated to refer to the contractual agreements between these parties need not be decided at this time. The remainder of the SM June Rep. concerning this motion is adopted by this reference.¹⁸ Based upon the foregoing,

IT IS ORDERED DENYING ASARCO's motion for summary judgment.

D. Motion for determination that water claims of GRIC and/or the Government are limited by the judgment entered in *Gila River Pima-Maricopa Indian Community v. United States*, Docket No. 236-D

[Docket Nos. 213 and 214]

SRP and Tempe request a ruling that neither GRIC nor the Government can lawfully assert a right to water in the Salt

¹⁸ Specifically, Section VI, FOF Nos. 38-40 and COL No.38.

River system except with respect to those rights attributable to a parcel of land situated in the northwest corner of the Gila River Indian Reservation. Movants believe they are entitled to relief due to the effect of the Claims Court's decision in *Gila River Pima-Maricopa Indian Community v. United States*, which was affirmed, in part, by the Court of Appeals for the Federal Circuit. 695 F.2d 559 (1982) ("*Gila 236*"). SRP and Tempe claim *Gila 236* represents a binding determination that GRIC possesses only a very limited right to use water originating from the Salt River system.

GRIC and the Government, the only parties to *Gila 236*, posit two objections to the motion: 1. Decisions such as *Gila 236* are not to be given preclusive effect, and 2. Movants have not satisfied the requisites for preclusion.

The circumstances giving rise to issuance of the *Gila 236* decision are adequately discussed in SM Dec. Rep., pp. 49-53. For purposes of this Order, the following are the most relevant, undisputed facts:

- In 1951, GRIC filed an action against the United States pursuant to the Indian Claims Commission Act seeking awards relating to a number of disputes. One of these disputes, designated "Docket 236-D," dealt with the Tribe's claim for compensation for Salt River water that should have been put to use on the GRIC reservation, but was used for other purposes.

- One phase of the litigation dealt with the extent of GRIC's Salt River water rights and specifically addressed GRIC's claim that it was entitled, "to the waters of the Salt River to irrigate 113,498 acres of land on the Gila River Indian Reservation, representing all the practicably irrigable land on the reservation." 695 F.2d 561.
- *Gila 236* held that GRIC's Salt River water right claims were limited to 1,490 acres situated in the northwest corner of the reservation (hereinafter the "Maricopa Colony"):

[T]he court must resolve whether in creating and enlarging the Gila River Indian Reservation the United States reserved water from the Salt River for the irrigation of reservation lands. The weight of the credible evidence clearly leads to a negative answer except for the ...[Maricopa Colony]

695 F.2d 561.

- Approximately seventeen years after the *Gila 236* decision became final, GRIC and the United States resolved the remaining issues in the case by a stipulated judgment.

Movants believe GRIC and the Government are collaterally estopped from arguing positions inconsistent with the holdings in *Gila 236*. The most important prerequisite for asserting collateral estoppel -- that an identical issue was actually and necessarily decided in an earlier case is clearly present here. The *Gila 236* decision directly addressed and unambiguously declared the land for which GRIC may claim Salt River water

rights.¹⁹ Despite this fact, GRIC and the Government argue that collateral estoppel does not apply to consent judgments such as that stipulated to in *Gila 236*.²⁰ But abundant authority supports the general proposition that they do. More importantly, in *Gila 236*, the Claims Court rendered its decision after the issue of GRIC's Salt River water rights was litigated by two adverse parties. It was this decision, which was contested on appeal, that is the basis for collateral estoppel here. The fact that more than a decade after the *Gila 236* decision resolved the parties' liability dispute, GRIC and the Government decided to settle the issue of damages is of no consequence. See *United States v. Pend Oreille Public Utility Dist. No 1*, 926 F.2d 1502 (9th Cir. 1991) (court of appeals applied preclusion to a resolution by the Indian Claims Commission involving the determination of liability by way of contested litigation, although damages were later resolved of by stipulated settlement) Collateral estoppel prevents GRIC from

¹⁹ GRIC disagrees claiming that "[t]he right of an Indian Tribe to have been treated fairly and honorable [sic] by its trustee ... is distinct, different and separate from the right of the Indian tribe to have its *Winters*, aboriginal, and prior appropriation rights quantified, as against other claimants, for future application and enforcement." GRIC Objections, p. 15. For purposes of the current motion, the court is only focused on the issues of whether, and to what extent, GRIC may claim any water rights in the Salt River system. This issue was squarely before the Claims Court and the U.S. Court of Appeals for the Federal Circuit in *Gila 236*.

²⁰ The Court has considered and rejected GRIC's claim that Claims Court decisions cannot generally support preclusion after reviewing the case law cited by the parties and the Special Master.

successfully asserting water rights that are inconsistent with the *Gila 236* decision.

The United States insists that even if otherwise pertinent, issue preclusion may not be used in this proceeding to limit Government water claims. This argument is based upon the U.S. Supreme Court's opinion in *United States v. Mendoza*, 464 U.S. 154, 104 S. Ct. 568 (1984), in which the Court held that mutuality is required when attempting to apply collateral estoppel against the Government. This additional requirement for issue preclusion was recognized because of the Supreme Court's belief that: 1. Absent such a rule, development of important legal principles would be thwarted by premature finality, 2. Successive federal administrations would be bound to positions they do not support, and 3. The Government would be forced to appeal cases of limited legal significance.

In his report, Special Master Thorson recognized the rules laid out in *Mendoza*, but found them to be inapplicable to this case. He believed there is an exception to the *Mendoza* rule similar in nature and scope to that recognized in *Nevada* for *res judicata*. Movants urge adoption of the Special Master's decision by arguing that *Mendoza* is limited to its facts, and subsequent cases have indicated that nonmutual collateral estoppel may be raised against the United States in some instances.

The rule announced in *Mendoza* exists as a pronouncement of the nation's highest court that "nonmutual offensive collateral estoppel is not to be extended to the United States". 464 U.S. 158, 104 S. Ct. 571. Of course, in this instance both GRIC and the Government, albeit not adverse, are parties, and *Mendoza* made clear that "[t]he concerns underlying our disapproval of collateral estoppel against the government are for the most part inapplicable where mutuality is present" 464 U.S. 163-164, 104 S. Ct. 574. But lower courts need firm footing when distinguishing unambiguous Supreme Court pronouncements. There may be valid exceptions to the *Mendoza* rule, but the current situation does not present the extent of mutuality sufficient for this proceeding to fall outside of the ambit of *Mendoza*. In addition, the *Gila 236* litigation did not involve the same type of comprehensive resolution of widely-held rights that caused the Supreme Court to carve out an exception to traditional rules of claim preclusion. The rule announced in *Mendoza* prevents movants from prevailing against the Government on a collateral estoppel defense.

The policy considerations that caused the Supreme Court to fashion the *Mendoza* rule do not arise when courts consider whether the integrity of the judicial process requires that the United States be prohibited from taking a position inconsistent with one successfully asserted in a previous action. This

evaluation invokes the doctrine of judicial estoppel. The United States does not dispute that it is subject to this type of preclusion, although both the Government and GRIC assert that Arizona law does not permit its use in this case.

The Arizona Supreme Court's most recent application of judicial estoppel appears in *State v. Towery*, 186 Ariz. 168, 920 P.2d 290 (1996). There the court set forth the elements of judicial estoppel by citing to its prior decision in *Standage Ventures, Inc. v. State*, 114 Ariz. 480, 562 P.2d 360 (1977):

Three requirements must exist before the court can apply judicial estoppel: (1) the parties must be the same, (2) the question involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding.

186 Ariz. 182, 920 P.2d 304.

There can be no legitimate dispute that two of the elements listed above are present here. This court has already held that *Gila 236* dealt with an issue identical to one present in this adjudication: GRIC's entitlement to water from the Salt River system. And the record shows that the Government was successful in convincing the Claims Court that water from the Salt River was not generally reserved for the Gila River Indian Reservation. It is only the mutuality component of judicial estoppel that, on first reading, seems to bar this type of preclusion.

Movants argue that the "same parties" portion of Arizona's judicial estoppel test is merely *dictum* and that the Arizona Supreme Court has never refused to apply judicial estoppel due to the absence of mutuality. Review of the history of Arizona's judicial estoppel doctrine supports the claim that this state's supreme court has not addressed substantively the question of whether mutuality is a requisite for applying judicial estoppel.

In *Towery*, the court merely recites the judicial estoppel elements recognized in *Standage*. While the *Standage* court noted that its early decisions referred to a mutuality limitation as part of judicial estoppel (citing *Martin v. Wood*, 71 Ariz. 457, 229 P.2d 710 (1951)), it acknowledged lower appellate court authority (specifically, *Mecham v. City of Glendale*, 15 Ariz. App. 402, 489 P.2d 65 (1971))²¹ holding that mutuality is not necessary. The *Standage* court did not consider this conflict because in the case before it the relevant party had not previously obtained relief based upon an inconsistent

²¹ The court also cited and quoted from *State Farm Auto. Ins. Co. v. Civil Service Employees Ins. Co.*, 19 Ariz. App. 594, 509 P.2d 725 (App. 1973), a case in which lack of mutuality was not case dispositive and one in which the court recognized the unsettled state of the mutuality issue. See 19 Ariz. App. 599 n. 2.

position.²² And its reliance on the *Martin* case is tenuous. To the extent germinated from *Martin*, this state's mutuality requirement rests entirely on: 1. A reference to a general discussion of judicial estoppel found at 31 C.J.S. 19, and 2. The Arizona Supreme Court's 1928 decision in *Rossi v. Hammons*, 34 Ariz. 95, 268 P. 181 (1928). It is noteworthy that in *Rossi*, the party against whom preclusion was found applicable had prevailed in a prior action by arguing that the then plaintiff could not sue because the state superintendent of banks held the asserted claim. Preclusion was found when the same defendant attempted to challenge assertion of the same claim in a subsequent suit by the superintendent, who was not a party in the first case.

The decisions discussed above buttress the claim that the Arizona Supreme Court has not yet focused its attention on resolving whether mutuality is a requisite for invoking judicial estoppel. However, the Arizona Court of Appeals has weighed in on the subject. In *Mecham*, the court held that parties in an

²² Mutuality was not vital to the decision in *Towery* either. There, estoppel was denied because "judicial estoppel is generally not applied when the first inconsistent position was not a significant factor in the initial proceeding." 186 Ariz. 183, 920 P.2d 305. And while *Towery*, like *Standage*, lists mutuality as an element, it too suggests, at least implicitly, that judicial estoppel may apply even when the parties in a subsequent action are not identical. ("criminal courts have indicated that judicial estoppel would preclude the state from changing its version of the facts in separate proceedings involving the same matter to protect the defendant's right to due process. See *People v. Gayfield* [Citations omitted] (suggesting that the state would be estopped from inconsistently claiming in separate proceedings that different defendants shot the same victim)."

186 Ariz. 182, 920 P.2d 304 (emphasis added)

action could successfully use judicial estoppel even when they were not involved in the prior relevant litigation. It is true, as GRIC and the Government point out, that there are other intermediate Arizona appellate decisions that cite *Towery* and *Standage* and recognize mutuality as a judicial estoppel requisite. See *De Alfy Properties v. Pima County*, 195 Ariz. 37, 985 P.2d 522 (App. 1998). To resolve this conflict, the court has looked to the Arizona Supreme Court's statement regarding the fundamental purpose for this type of preclusion:

[p]rotecting the integrity of the judicial process is the universally recognized purpose of judicial estoppel.

[I]t is not intended to protect individual litigants but is invoked to protect the integrity of the judicial process by preventing a litigant from using the courts to gain an unfair advantage.

Towery, 186 Ariz. 182-183, 920 P.2d 304-305.

Keeping these edicts in mind, the court cannot comprehend how mutuality aids in preventing the wrong judicial estoppel is designed to prevent. To the contrary, such a requirement could aid a party in obtaining an unfair advantage in litigation or blemishing the integrity that is so important to maintaining public confidence in our judicial process. Based on the foregoing,

IT IS ORDERED GRANTING SRP's and Tempe's motions. Both GRIC and the United States shall be prohibited from asserting any claim in this adjudication that is inconsistent with the judgment of the Claims Court in *Gila River Pima-Maricopa Indian Community v. United States*, Docket No. 236-D.

E. Motion for partial summary judgment as to the preclusive effect of the Claims Court's decision in *Gila River Pima-Maricopa Indian Community v. United States*, Docket No. 228

[Docket Nos. 209 and 210]

SRP and Tempe also seek an Order summarily holding that the judgment rendered in *Gila River Pima-Maricopa Indian Community v. United States*, Docket No. 228 ("*Docket 228*")²³ precludes GRIC and the Government from asserting any rights to water other than those recognized in the decrees entered in *Globe Equity* and *United States v. Haggard*, No. 19. This litigation resolved GRIC's claim that the Government had taken its aboriginal territory without providing just compensation. GRIC prevailed and was awarded more than six million dollars.

Movants assert the award obtained by GRIC in *Docket 228* permits assertion of the legal doctrines of judicial, collateral and "quasi" estoppel to limit GRIC's and the Government's water claims in this case.

²³ 2 Cl. Ct. 12 (1982). The U.S. Court of Appeals for the Federal Circuit twice considered the Claims Court's award. The final judgment appears at 2 Cl. Ct. 33 (1984).

Each doctrine asserted has as one of its elements the requirement that issues here be the same as those considered in another proceeding. Movants argue that this requirement is satisfied because as part of the *Docket 228* proceeding GRIC allocated all of its claimed aboriginal water rights in the Gila River system to the confiscated land that gave rise to *Docket 228's* monetary award. This award purportedly prevents GRIC from seeking entitlement to these same water rights in this proceeding. GRIC, the Government and the Special Master distinguish *Docket 228* by characterizing the relevant issue as involving the valuation of land, which only tangentially considered water rights and, therefore, cannot be used to justify preclusion.

In formulating the *Docket 228* judgment, did the Claims Court resolve water right issues present in this adjudication? Answering this question requires an understanding of the scope of each proceeding. This adjudication of claims to the Gila River system focuses on the extent and priority of rights to use water in the river system and its source. The court is required to evaluate competing demands for a scarce commodity - water flowing within the relevant watersheds. Close attention to whether any asserted claim is valid as to entitlement and priority is vital. How does this undertaking compare with that faced by the Claims Court?

In *Docket 228*, the relevant question was the estimated value, as of November 15, 1883, of land appropriated by the Government. Although carefully and thoroughly studied by the parties and evaluated by the Claims Court, this type of retrospective appraisal unavoidably resulted from a somewhat cursory look at a number of factors (of which water availability is but one) to arrive at an imprecise conclusion.²⁴ Movants correctly point out that the Claims Court made an award that included agricultural acreage, the amount of which was "determined by the amount of water available for irrigation, not the acreage of arable land . . .," and that the award relating to agricultural land was "inclusive of water rights." 2 Cl. Ct. 29, 32. But the Claims Court did not consider what specific water rights plaintiffs held, their relative priority, or whether if as of 1883 there were any limits on the Indian tribes' right to

²⁴ The Claims Court held:

Where the fair market value of a large tract of land is to be found at a remote date in the past, without an active, open market, the Commission and the court have considered a variety of factors including evidence of private sales or auction sales, the location and physical characteristics of the land, climate, the type of settlers, the history and development of the area, economic conditions, natural resources ... and size of the area.

* * *

The final result is an estimated value, not an actual value The task in this case is to estimate what a single, hypothetical, well-informed purchaser would have paid a hypothetical, well-informed seller for 3,312,858 acres of Arizona land on November 15, 1883, ... with a recognition that different tracts in the award area could have different most profitable uses.

2 Cl. Ct. 27, 28-29.

stream flow. The court's opinion evidences that neither the Claims Court nor any of the parties focused on quantifying entitlements to stream flows, or other issues relevant to water adjudications. For example, the court held that water availability was the primary factor limiting the amount of land that could be considered as having an agricultural use, but not even plaintiff's hydrology expert considered sufficiently whether it would be appropriate to discount upstream diversions based upon the tribe's prior aboriginal water rights.²⁵

The only water related issue that this court can definitely determine was addressed in *Docket 228* was whether, in valuing the land for which compensation was to be awarded, the Claims Court should assume that adequate water was available for the uses asserted. Because movants have not fulfilled the identical

²⁵ The Claims Court held:

The factor limiting the amount of land in the award area that actually could be used as agricultural land was the availability of water.

[P]laintiffs' hydrology expert ... calculated the Gila River, Santa Cruz River, Salt River, Agua Fria River, Hassayampa River and miscellaneous unmeasured tributaries, in 1883, in the award area had a total virgin flow of 2,271,900 acre-feet. *This was adjusted for upstream depletions (mainly from irrigation farming) calculated to be present in 1883 ... to derive ... the virgin flow into the award area.*) (Emphasis added) In addition, this court is unclear as to the weight given to the fact that much of the water flow in 1883 was unregulated. The *Docket 228* opinion indicates that more than half of water available for irrigation was not utilized because means were not in place to store and regulate flows. Plaintiffs' expert computed hypothetical partial regulated flows, but the Claims Court rejected this analysis and, in any event, did not quantify and declare Indian water rights in order to determine its valuation award.

issues element that is requisite to granting the relief they have requested, and because the record reflects genuine disputes as to material facts,

IT IS ORDERED DENYING movants' motion for summary judgment as to the preclusive effect of the Claims Court's decision in *Docket 228*.

F. Motion for judgment as to the effect of the 1903 decree entered in *United States v. Haggard* and the 1936 Maricopa Contract

[Docket Nos. 213 and 214]

The SM June Rep. (pp. 33-35, 45) contains an adequate description of the facts surrounding the decree and contract at issue in this motion. On the current record, even if preclusion doctrines were otherwise applicable, the court agrees with the Special Master's conclusion that the United States Supreme Court's "recognition of the federal reserved water rights doctrine ... provides a 'rare' but sufficiently changed circumstance to provide an exception under the federal claims preclusion doctrine."²⁶ Accordingly,

IT IS ORDERED DENYING movants' request for summary judgment as to the preclusive effect of the decree entered in *United States v. Haggard* or the contract between the Government and

²⁶ SM Dec. Rep., p.39. Although not discussed in this Order, the court did consider, and reject, GRIC's claim that changed circumstances prevented preclusion principles from applying in connection with motions that were discussed in the SM June Rep.

SRP, approved by the Pima Tribal Council that is referred to in the SM Dec. Rep. as the "Maricopa Contract."

G. Request for judgment regarding the effect of the 1907 Sacaton Agreement between SRP and the United States

[Docket Nos. 211 and 212]

For the most part, SRP's motion concerning the effect of its 1907 hydroelectric power agreement with the United States (the "Sacaton Agreement") is rendered moot by the court's ruling regarding GRIC's ability to assert rights to water from the Salt River. To the extent the motion remains viable, the court incorporates by this reference SM Dec. Rep. FOF Nos. 76-92 and COL Nos. 15, 16, 18, 19, 20 (to the extent consistent with this Order), and 21. Based on these findings and conclusions, and on the 1992 Claims Court decision in *Gila River Indian Community v. United States* referred to in the SM Dec. Rep. p. 73,

IT IS ORDERED GRANTING SRP's motion. Neither GRIC nor the United States on behalf of GRIC shall be permitted to assert, in this adjudication, a claim that GRIC possesses any interest, ownership, or right to use, the dams, reservoirs, canals or other works owned by SRP that are related to the Sacaton Agreement.

H. Request for judgment regarding the binding effect of the Buckeye-Arlington Agreements.

[Docket Nos. 224 and 225]

Buckeye, Arlington, and others moved for judgment against GRIC and the Government based upon the provisions of two agreements, one entered into by the United States and Arlington, and the other by Buckeye and the Government, and each dated May 29, 1947 (collectively the "Buckeye-Arlington Agreements"). These contracts arose as the result of the settlement among the parties of an action commenced in 1929 that affected interests of GRIC addressed in a proceeding designated as Docket 236-F in the *Gila River Pima-Maricopa Indian Community v. United States* case ("Gila 236-F").²⁷ The request for relief with respect to the Buckeye-Arlington Agreements cannot be granted for two reasons:

1. Judicial estoppel does not apply because the record does not establish that any party obtained prior judicial relief by asserting a position that was both a significant factor in obtaining the relief granted and inconsistent with positions taken in this adjudication. *Towery*, 186 Ariz. 168, 920 P.2d 290, and
2. Genuine disputes as to material facts exist that preclude summary adjudication. See SM Dec. Rep., pp. 93-95.

²⁷ The decision of the Claims Court in this case is found at 9 Cl. Ct. 660 (1986).

Accordingly,

IT IS ORDERED DENYING movants' motion with respect to the Buckeye-Arlington Agreements.

IT IS FURTHER ORDERED the motions of Special Master Thorson for approval of his reports are approved to the extent consistent with this Order.

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

/s/Eddward P. Ballinger, Jr.

March 7, 2002

The Honorable Eddward P. Ballinger, Jr.
Judge of the Superior Court