

IN 91
Supreme Court of the United States

SAN CARLOS AVENUE LABEL

Petitioner

State of Arizona, Gila River Indian Community, Asarco LLC,
Philip Dodge Incorporated, San Carlos Irrigation and Drainage
District, City of National Gila Valley Irrigation District,
Franklin Irrigation District, Salt River Project, City of
Goodyear, BHR Capital Incorporated, and
United States of America

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

**BRIEF IN OPPOSITION FOR RESPONDENTS
GILA VALLEY IRRIGATION DISTRICT AND
FRANKLIN IRRIGATION DISTRICT**

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QUESTION PRESENTED

Whether the Arizona Supreme Court was correct in declining to consider the San Carlos Apache Tribe's claim that a consent decree, entered by the United States District Court for the District of Arizona, is not binding on the Tribe because the United States allegedly inadequately represented the Tribe in the underlying litigation and when negotiating the terms of the consent decree.

CORPORATE DISCLOSURE STATEMENT

The Gila Valley Irrigation District and the Franklin Irrigation District are Arizona municipal corporations facilitating the delivery of water from the Gila River in Graham and Greenlee counties in Arizona. The Irrigation Districts do not issue stock and interests in the Irrigation Districts are not publicly traded.

TABLE OF CONTENTS

1
3
1
1
1

	<i>Page</i>
Question Presented	i
Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	ix
Statement of the Case	1
A. The Globe Equity Decree and the Apache Tribe's Water Resources.	1
B. The Apache Tribe's poverty.	6
Reasons for Denying the Petition	6
A. Introduction.	6
B. This Court's decision in Arizona v. San Carlos Apache Tribe does not require the state courts to determine the United States inadequately represented the Tribe in District Court.	13
C. The decision below does not violate the due process and equal protection provisions of the fifth and fourteenth amendments to the Constitution.	17
Conclusion	21

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES	
<i>Arizona v. California</i> , 373 U.S. 546 (1963)	10, 18
<i>Arizona v. California</i> , 460 U.S. 605 (1983)	9
<i>Arizona v. San Carlos Apache Tribe</i> , 463 U.S. 545 (1983)	13
<i>Brooks v. United States</i> , 119 F.2d 636 (9 th Cir. 1941)	14
<i>Calderon v. Thompson</i> , 523 U.S. 538 (1998)	12
<i>Colorado River Water Conservation Dist. v. United States</i> , 424 U.S. 800 (1976)	13
<i>Fort Mohave Tribe v. United States</i> , 32 Fed. Cl. 29 (1994)	10
<i>Gila Valley Irrigation District v. United States</i> , 118 F.2d 507 (9 th Cir. 1941)	14
<i>Heckman v. United States</i> , 224 U.S. 413 (1912) ...	12
<i>In re: The Application For Water Rights of United States</i> , 101 P.3d 1072 (Colo. 2004)	12

Cited Authorities

	<i>Page</i>
<i>In re the General Adjudication of All Rights to Use Water in the Gila River System and Source</i> , 195 Ariz. 411, 989 P.2d 739 (1999)	5, 20
<i>In re the General Adjudication of All Rights to Use Water in the Gila River System and Source</i> , 212 Ariz. 64, 127 P.3d 882, (2006), <i>reconsideration denied</i> , 134 P.3d 375 (2006)	1, 2, 7, 13, 14
<i>In re the General Adjudication of All Rights to Use Water in the Gila River System and Source</i> , 212 Ariz. 127 P.3d 882 (2006)	14
<i>Kasper v. Board of Election Com'rs of the City of Chicago</i> , 814 F.2d 332 (7 th Cir. 1987)	11
<i>Nevada v. United States</i> , 463 U.S. 110 (1983)	8, 9, 16, 18
<i>Orion Tire Corp. V. Goodyear Tire & Rubber Co.</i> , 268 F.3d 1133 (9 th Cir. 2001)	17
<i>Plotner v. AT&T Corp.</i> , 224 F.3d 1161 (10 th Cir. 2000)	17
<i>Rivet v. Regions Bank of Louisiana</i> , 522 U.S. 470 (1998)	16
<i>San Carlos Apache Tribe, et al. v. Superior Court of Arizona</i> , 193 Ariz. 195, 972 P.2d 179 (1999) ...	19

Cited Authorities

	<i>Page</i>
<i>Stovall v. City of Cocoa, Fla.</i> 117 F.3d 1238 (11 th Cir. 1997)	11
<i>United States v. City of Miami, Florida</i> , 664 F.2d 435 (5 th Cir. 1981) (en banc)	11
<i>United States v. Gila Valley Irrigation District</i> , 117 F.3d 425 (9 th Cir. 1997)	13, 14
<i>United States v. Gila Valley Irrigation District</i> , 804 F. Supp. 1 (D. Ariz. 1992)	14
<i>United States v. Gila Valley Irrigation District</i> , 920 F. Supp. 1444 (D. Ariz. 1996)	4, 14
<i>United States v. Gila Valley Irrigation District</i> , 959 F.2d 242 (9 th Cir. 1992) (unpublished)	14
<i>United States v. Gila Valley Irrigation District</i> , 961 F.2d 1432 (9 th Cir. 1992)	14
<i>United States v. Gila Valley Irrigation District</i> , 804 F. Supp. 1 (D. Ariz. 1992)	14
<i>United States v. Gila Valley Irrigation District</i> , Globe Equity 59 (1935)	3
<i>Watts v. Pinckney</i> , 752 F.2d 406 (9 th Cir. 1985)	17

Cited Authorities

	<i>Page</i>
OTHER AUTHORITIES	
Annual Report on the Distributions of Waters of the Gila River, by the Water Commissioner to the United States District Court for the District of Arizona (2005), http://www.gilawater.org/annual.pdf	15
Charles J. Meyers, <i>The Colorado River</i> , 17 Stan. L. Rev. 1 (1966)	10
F. Cohen, <i>Handbook of Federal Indian Law</i> (1988), § 8 P. 101	12
1B <i>Moore's Federal Practice</i> , 0.409(5) (2d ed. 1980)	11
<i>Restatement (Second) Judgments</i> , § 42(1)(e)	8
San Carlos Apache Tribe, Recreation & Wildlife Dept. (Fishing), http://www.sancarlosrecreationandwildlife.com/fishing.html	5

Cited Authorities

	<i>Page</i>
U.S. CONSTITUTION RULES & STATUTES	
Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, Titles II and III, 118 Stat. 3478	16, 20
Federal Rule of Civil Procedure 60(b)	15
Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, Title IV, 104 Stat. 4469	20
Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549	20
United States Supreme Court Rule 10	7, 16

STATEMENT OF THE CASE

The Gila Valley Irrigation District and the Franklin Irrigation District (the “Upper Valley Irrigation Districts”) incorporate by reference the statement of facts in part I of the opinion below, *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. 64, 67-69, 127 P.3d 882, 885-87 (2006), *reconsideration denied*, 212 Ariz. 470, 134 P.3d 375 (2006); Petitioner’s Appendix A at 2a-8a (hereinafter “Petitioner’s App. ___”).

The only issue to be decided is whether the Arizona Supreme Court erred when, on grounds of comity, the Court refused to consider whether the alleged inadequate representation by the United States of the San Carlos Apache Tribe (“Apache Tribe” or “Tribe”) deprives the Globe Equity No. 59 Decree of *res judicata* effect. Despite the narrowness of this issue, the Apache Tribe devotes much of its Statement of the Case and its Petition to describing the relatively poor current economic conditions of the Apache Tribe, understating the Tribe’s water resources, and criticizing the state court adjudication process in Arizona. These contentions, introduced in the Tribe’s Statement of Facts and found throughout Apache Tribe’s Petition, are unfounded, misleading, and not relevant to the issue presented.

A. The Globe Equity Decree and the Apache Tribe’s Water Resources.

The Apache Tribe mischaracterizes the nature of its water rights under the Decree that was given preclusive effect by the Arizona Supreme Court.¹ The Decree is based on litigation that

1. The decree (hereinafter the “Decree”) entered by the United States District Court for the District of Arizona in 1935, decrees 6000 acre-feet of water to the United States on behalf of the Apache Tribe. In

(Cont’d)

began in 1925. The claims of the United States on behalf of the Apache Tribe (and others) were initially stated in the Amended Complaint, dated December 5, 1927. In that complaint, on behalf of the Apache Tribe, the United States alleged federal reserved rights, aboriginal rights, and prior appropriation rights. *See In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. at 76-77, 127 P.3d at 894-95; Petitioner's App. A at 26a-31a; Appendix to the Phelps Dodge Corporation's Conditional Cross-Petition for Writ of Certiorari, p. 56, ¶ 7 (aboriginal rights), pp. 58-60, ¶ 9 (aboriginal and reserved rights), and p. 60, ¶ 7 (prior appropriation rights). The United States eventually negotiated a settlement, now embodied in the Decree, whereby the United States, on behalf of the Apache Tribe, was decreed the rights to 6000 acre-feet of water from the mainstem of the Gila River with a priority right senior to all other rights, except those of the United States on behalf of the Gila River Indian Reservation.² *See Decree* (the "Decree")

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this Brief, for purposes of simplicity, the water rights, while belonging to the United States, are often described as the Apache Tribe's rights without repeating that title is held by the United States.

2. The Tribe's description of the rights of the United States on behalf of the Gila River Indian Community and the San Carlos Project is misleading because the description makes it appear as if the rights under various priorities are all cumulative. *See Petition* at 7 n.11. In fact, many rights with a particular priority are subsumed in rights with another priority. *See Decree* 105, Petitioner's Supp. App. at 217

That certain of the foregoing rights, as listed under items (1), (3) and (4) above are inclusive one of the other so that diversions thereunder do not accumulate, and the amounts in acre feet per season and cubic feet per second stated in the 3rd item include those given in the 1st and those stated in the 4th item include those given in the

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entered in *United States v. Gila Valley Irrigation District*, Globe Equity 59, June 29, 1935, at 14, 86; Supplemental Appendix to Petitioner's Petition for Certiorari, at 126,198 (hereinafter "Petitioner's Supp. App. __").

The Decree was intended to be a final and complete determination of all the parties' rights, forever barring them from claiming additional rights. See Decree at 6, 113; Petitioner's Supp. App. at 118 ("[T]he plaintiff and the parties defendant . . . have concluded and settled all issues in this cause as between plaintiff and said parties defendant"). The Decree enjoins the parties, their successors, and assigns from claiming any additional rights to the Gila River.

[E]ach and all of the parties to whom rights to water are decreed in this cause . . . their assigns and successors . . . and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming . . . 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. *Id.* at 113, Petitioner's Supp. App. at 225.

Nevertheless, in the general adjudication below,³ the Apache Tribe and the United States on behalf of the Tribe claimed

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1st and 3rd; in each instance representing the total diversion allowable under that priority and those prior thereto as described in said items.

3. The state court case below is entitled the *In re all Rights to Use Water In the Gila River System and Source*, Maricopa County Superior Court Cause Nos. W1, W-2, W-3, and W-4 (Consolidated) (hereinafter the "General Adjudication")

additional rights to the Gila River far beyond those provided by the Decree. *See* Petitioner's Supp. App. 42-102.

The Apache Tribe claims that the Decree limits its water usage to irrigation and that the members of the Tribe are not permitted to allow their livestock to drink the water or even to drink the water themselves. *See* Petition, at 7 n.11, & 14-15, 26. Ironically, it was the Tribe that, over the objections of other parties to the Decree, convinced the federal District Court to rule that the Decree initially limits use of water to irrigation. *See United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444, 1476-77 (D. Ariz. 1996) ("The government and the Apache Tribe argue that Article XI of the Decree limits the use of the Gila River water to irrigating 'crops of value' *** The Court concludes, therefore, that the Decree was intended to establish an order of priorities for water that would be devoted primarily to agriculture"). More important, however, the Tribe's argument is misleading. While the initial use of water permitted by the Decree is irrigation, the Decree also provides that any party may change the use and the District Court has established detailed procedures for changing the use. *Id.* at 1476-77

Not all such uses would necessarily violate the Decree. . . . [the] parties may change the purpose of the use of decree waters, 'so far as they may do so without injury to the rights of other parties.' . . . To the extent that a change in use reduces a user's water requirement, the Commissioner must ensure that the diversion is appropriately limited;

Memorandum and Order, dated September 30, 1993, at 16-18, Upper Valley Irrigation Districts' Appendix C at 32a-41a (hereinafter "UVID App. ____"). (Providing procedures for changing a use of water under the Decree).

The Tribe also argues that the Decree left it with water resources that are woefully inadequate for the needs of its reservation. See Petition at 3, 9 n.15, 14-15, 22, 26. That claim is also misleading. The Tribe is not limited to using water from the mainstem of the Gila River. The San Carlos Apache Tribe Water Rights Settlement Act of 1992 confirmed the Tribe's rights to 71,445 acre-feet of surface water per year from the Salt and Black Rivers for use on its reservation.⁴ In addition, the Arizona Supreme Court held that Indian tribes have a reserved right to groundwater for use on Indian reservations. See *In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 195 Ariz. 411, 418-19, 989 P.2d 739, 746-47 (1999). The amount of groundwater available to the Tribe on its reservation has not been quantified, but it is undoubtedly substantial. Finally, the decision by the Arizona Supreme Court did not preclude the Tribe's claims to the tributaries to the Gila River. Just two of those tributaries produce an average runoff that exceeds 52,000 acre-feet per year, some of which the Tribe is already using.⁵ While the decision below did preclude the

4. Pub. L. No. 102-575, §§ 3701 *et seq.*, 106 Stat. 4600, 4740.

5. See USGS, *Water Resources Data Arizona Water Year 2005*, UVID Appendix D at 50a. The San Carlos River produces an average runoff of 43,200 acre-feet per year; Bonita Creek produces 8,810 acre-feet per year. The Apache Tribe is already taking advantage of the San Carlos River, having dammed the San Carlos and Blue rivers to create Talkalai Lake with a surface area of approximately 600 acres, which the Tribe uses for fishing and recreational purposes. See *San Carlos Apache Tribe, Recreation & Wildlife Dept. (Fishing)*, <http://www.sancarlosrecreationandwildlife.com/fishing.html>. Similarly, while the Tribe claims it is not permitted to use the water in the San Carlos Reservoir (Petition at 3), it nevertheless uses that water for fishing and recreational purposes. *Id.* Data for other tributaries is not readily available.

Tribe from making additional claims to the mainstem of the Gila River, the Tribe grossly overstates the decision's impact on its overall water supplies.

B. The Apache Tribe's poverty.

The Apache Tribe also argues that it is poor. The Tribe argues that no boundary marker is necessary to show where the reservation begins because there is obvious prosperity on one side of the boundary line and "stunning" poverty and despair on the Apache side. *See* Petition at 3-4. The Tribe does not cite to any evidence that would establish an immediate and abrupt contrast in prosperity at the boundary of its reservation. Nor does the Tribe offer any evidence that its poverty is attributable to the *res judicata* effect of the Globe Equity Decree. Moreover, if the farmlands on the Apache side of the Reservation boundary are in fact impoverished, the Globe Equity Decree offers a solution. The Decree authorizes the United States to acquire farmland for the Tribe "within the valley of the Gila River above the eastern boundary of said Reservation." *Id.* at 86, Petitioner's Supp. App. at 198.

REASONS FOR DENYING THE PETITION

A. Introduction.

The decision by the Arizona Supreme Court is a narrow one. In the state trial court, the Upper Valley Irrigation Districts and other parties successfully argued that the Decree, entered in 1935 by the United States District Court for the District of Arizona, has preclusive effect on the Apache Tribe's claims to the mainstem of the Gila River. On appeal to the Arizona Supreme Court, the Apache Tribe

argued, among other things, that the Decree should not have preclusive effect because the United States had not adequately represented the Tribe in the United States District Court. The Arizona Supreme Court rejected the argument on grounds of comity, ruling that the Tribe should have raised its inadequate representation arguments in the District Court when it successfully intervened in 1990 to represent its own interests in the Globe Equity litigation. *See* Pet. App. at 46a-47a; *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. at 73, 127 P.3d at 901.

The Apache Tribe requests that this Court grant certiorari and reverse the decision of the Arizona Supreme Court, but the Tribe does not persuasively advance any of the usual reasons for granting certiorari. *See* United States Supreme Court Rule 10. There is no allegation that there is a conflict between the decision of the Arizona Supreme Court and the decision of a court of last resort of another state or decision of a United States Court of Appeals. While the Tribe does argue that the decision of the Arizona Supreme Court is inconsistent with decisions of this Court, the Tribe's argument falls short of establishing that the Arizona Supreme Court's decision directly conflicts with any decision of this Court. At best, the Tribe is arguing that the Arizona Supreme Court misapplied decisions of this Court in a way that uniquely disadvantages the Apache Tribe, without any readily apparent impact on other potential litigants.

Even the ultimate impact on the Apache Tribe is not clear. The Apache Tribe is arguing a procedural error: that the Arizona Supreme Court is requiring the Apache Tribe to make arguments in federal court when it would prefer to have those arguments considered in state court. It is doubtful, however,

that the Apache Tribe would prevail regardless of the forum where its arguments are heard. The Tribe relies on the Restatement (Second) Judgments § 42(1)(e) for the proposition that the alleged inadequate representation by the United States is a defense to *res judicata*. See Petition at 8, 11, 23. But the United States is not the same as an ordinary private fiduciary. In a similar context, this Court refused to follow other provisions of the Restatement applicable to private trustees when determining whether a consent decree had preclusive effect on an Indian tribe. See *Nevada v. United States*, 463 U.S. 110, 140-41 (1983):

The Court of Appeals . . . analogiz[ed] the Government's position to that of a trustee under the traditional law of trusts. But as we have indicated previously, we do not believe that this analogy from the world of private law may be bodily transposed to the present situation. The Court of Appeals went on to conclude: 'By representing the Tribe and the Project against the Orr Ditch defendants, the government compromised its duty of undivided loyalty to the Tribe. See Restatement (Second) of Trusts, *supra*, § 170 . . . As we previously intimated, we think the Court of Appeals' reasoning here runs aground because the Government is simply not in the position of a private litigant or a private party under traditional rules of common law or statute. Our cases make this plain in numerous areas of the law.

Moreover this Court has expressed a strong reluctance to overturn court decisions involving Indian tribes based on claims of inadequate representation, reasoning that the tribes'

remedies should be against the United States for breach of fiduciary duty. *See Arizona v. California*, 460 U.S. 605, 627-28 & n.20 (1983);⁶ *Nevada v. United States*, 463 U.S. 110, 135 & n.14, p. 144 n.16 (1983);⁷ *Nevada v. United States*, 463 U.S. at 145 (Brennan, Justice, concurring).⁸

6. As a fiduciary, the United States had full authority to bring the Winters rights claims for the Indians and bind them in the litigation. . . . 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. *** [T]he other cases relied upon by the dissent, involve suits brought in the Court of Claims by Indian Tribes seeking compensation from the United States for alleged takings of Indian lands. . . . If these cases are at all relevant, it is to suggest that in an appropriate case the Tribes' remedy for inadequate representation by the government may lie in the Court of Claims.

460 U.S. at 627-28 & n.20.

7. We also hold that the Tribe, whose interests were represented in Orr Ditch by the United States, can be bound by the Orr Ditch Decree. . . . We, of course, do not pass judgment on the quality of representation that the Tribe received. *** If, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties.

463 U.S. at 135 & n.14, p. 144 n.16.

8. If, however, the United States actually causes harm through a breach of its trust obligations the Indians should have a remedy against it. I join the Court's opinion on the understanding that it reaffirms that the Pyramid Lake Paiute Tribe has a remedy against the United States for

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Finally, the Apache Tribe's argument rests on the untested supposition that if the attorneys for the United States had litigated, the Tribe would have received a better result than the 1935 Decree. The supposition is speculative. At least until this Court's decision in *Arizona v. California*, 373 U.S. 546 (1963), the extent and measure of reserved rights had not yet been fully developed and litigants and courts struggled with quantification issues. See Charles J. Meyers, *The Colorado River*, 17. Stan. L. Rev. 1, 70 (1966) ("With no guidance on the measurement of Indian rights from the Supreme Court, the lower federal courts have been struggling with the problem of quantification since *Winters*."); *Fort Mohave Tribe v. United States*, 32 Fed.Cl. 29, 35 (1994).⁹

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the breach of duty that the United States has admitted. In the final analysis, our decision today is that thousands of small farmers in northwestern Nevada can rely on specific promises made to their forebears two and three generations ago, and solemnized in a judicial decree, despite strong claims on the part of the Pyramid Lake Paiutes. . . [T]he law can and should fix responsibility for loss and destruction that should have been avoided, and it can and should require that those whose rights are appropriated for the benefit of others receive appropriate compensation.

9. When evaluating plaintiffs' claim of breach of trust, however, it is crucial to evaluate the government's actions at the time the actions were taken rather than with the benefit of the crisp vision of hindsight. When the United States was litigating *Arizona I*, not only did it lack precedent in which experts applied PIA standards, but it also lacked the benefit of an established PIA standard. As described above, *Winters* merely granted Indian tribes water rights sufficient to carry out the purposes for which their reservations were created and did not explain how to translate that standard into a specific quantity of water rights.

It may not be proper to fault attorneys working in the late 1920s and early 1930s for betting on the security of a settlement instead of risking the decision by a judge in what was still a developing area of the law.

Regardless of the merits of the underlying argument, however, the Arizona Supreme Court was correct when it ruled that issues concerning inadequate representation should be raised by direct attack in the District Court that entered the Decree, not by a collateral attack in state court. The decision of the Arizona Supreme Court is particularly compelling when applied to this Decree. The underlying litigation was “instituted at the suggestion of the Secretary of the Interior and by direction and authority of the Attorney General.” See Amended Complaint, Appendix 48 to the Phelps Dodge Corporation’s Conditional Cross-Petition for Writ of Certiorari, ¶ 3. The stipulation for entry of Decree was signed by Secretary of Interior Harold L. Ickes and Attorney General Homer Cummings. See Stipulation (“UVID App. A at 1a”). The District Court Judge, before signing the Decree, was required to decide that it was fair and reasonable and did not violate the Constitution or undermine the rightful interests of third parties. See *Stovall v. City of Cocoa, Fla.* 117 F.3d 1238, 1242 (11th Cir. 1997) (“The district court could have — indeed, should have — rejected the consent decree if it determined the decree was unreasonable, unfair, or, as the City alleges, unconstitutional”); *Kasper v. Board of Election Com’rs of the City of Chicago*, 814 F.2d 332, 338 (7th Cir. 1987) (similar); *United States v. City of Miami, Florida*, 664 F.2d 435, 440-41 (5th Cir. 1981) (en banc) (similar).¹⁰

10. See also 1B *Moore’s Federal Practice* 0.409(5), at 1030 (2d ed. 1980) (“[T]he judgment is not an inter partes contract; the court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication.”)

Accordingly, a decision that the Decree should be overturned based on inadequate representation will also require a determination that the United States District Court judge, the Secretary of Interior, and the Attorney General all did not do their jobs.¹¹ If decisions of a District Court Judge, the Secretary of Interior, and the Attorney General regarding the entry of a decree should be subject to later judicial review, certainly it is appropriate for the courts to require that the review be initially sought in the United States District Court where the decree was entered. As the Arizona Supreme Court pointed out, the Apache Tribe elected not to seek that review in District Court, but instead

11. Both the Attorney General and the Secretary of Interior, as members of the executive branch, are entitled to deference based on comity. *See Calderon v. Thompson*, 523 U.S. 538, 551 (1998) (“Comity is not limited to the judicial branch of a state government. . . . the Court of Appeals should have considered as well the more vital interests of California’s executive branch.”); *cf.* F. Cohen, *Handbook of Federal Indian Law* (1988), § 8 p. 101 (“The acts of the Secretary of Interior with respect to Indian affairs are “presumed to be the acts of the President.”); *Heckman v. United States*, 224 U.S. 413, 444-445 (1912)

There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents . . . nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

See also In re: The Application For Water Rights of United States, 101 P.3d 1072, 1080 (Colo. 2004) (“The scope of the waiver of sovereign immunity under the McCarran Amendment is not so broad that it allows state courts to evaluate or adjudicate the federal agency decision making processes leading the United States to make a particular water application in a given case.”)

chose the state trial court. *See* Pet. App. at 44a-45a; *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. at 73, 127 P.3d at 900.

B. This Court's decision in *Arizona v. San Carlos Apache Tribe* does not require the state courts to determine the United States inadequately represented the Tribe in District Court.

The Tribe argues that the decision by the Arizona Supreme Court, requiring it to challenge the inadequacy of the representation of the Tribe in the court that entered the Decree, misapplied principles established in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). *See* Petition at 17-23. *Arizona v. San Carlos*, however, is factually distinct. In that case, the San Carlos Apache Tribe and other Indian tribes instituted new litigation in federal court to determine their respective water rights rather than permit those rights to be determined in the general adjudications that were already pending in state court pursuant to the McCarran Amendment. 463 U.S. at 557. This Court stayed the proceedings in federal court based on *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), in part to further the judicial bias against "piecemeal litigation." *See* 463 U.S. at 569-71. By contrast, in this case, the District Court that entered the Globe Equity Decree had retained jurisdiction over the Decree. *See* Decree at 113, Petitioner's Supp. App. at 225. Pursuant to its continuing jurisdiction, the District Court has considered and resolved numerous disputes among the parties to the Decree.¹²

12. *See, e.g., United States v. Gila Valley Irrigation District*, 117 F.3d 425 (9th Cir. 1997); *United States v. Gila Valley Irrigation District*, 31 F.3d 1428 (9th Cir. 1994); *United States v. Gila Valley* (Cont'd)

The Apache Tribe intervened in the District Court case to represent its own interests, but did not seek to attack the decree itself or challenge the previous adequacy of the representation of the Tribe by the United States. *See* Pet. App. at 44a-45a; *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. at 72, 127 P.3d at 900. After the Apache Tribe's intervention, at the request of the Tribe and other parties, the District Court has enforced numerous provisions of the Decree, resulting in five reported decisions and many other unreported decisions and orders.¹³ Even when finding that a particular provision of the Decree was harsh as applied to the Apache Tribe, the District Court still enforced the Decree, holding that "the Decree was intended as a complete statement of the rights of the various parties to the waters of the Gila River." *United States v. Gila Valley Irrigation District*, 804 F. Supp. 1, 10 (D. Ariz. 1992). Certainly, if "piecemeal litigation" is to

(Cont'd)

Irrigation District, 961 F.2d 1432 (9th Cir. 1992); *United States v. Gila Valley Irrigation District*, 959 F.2d 242 (9th Cir. 1992) (unpublished); *United States v. Gila Valley Irrigation District*, 454 F.2d 219 (9th Cir. 1972); *Gila Valley Irrigation District v. United States*, 118 F.2d 507 (9th Cir. 1941); *Brooks v. United States*, 119 F.2d 636 (9th Cir. 1941); *United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444 (D. Ariz. 1996); and *United States v. Gila Valley Irrigation District*, 804 F. Supp. 1. (D. Ariz. 1992).

13. *See United States v. Gila Valley Irrigation District*, 117 F.3d 425 (9th Cir. 1997); *United States v. Gila Valley Irrigation District*, 31 F.3d 1428 (9th Cir. 1994); *United States v. Gila Valley Irrigation District*, 961 F.2d 1432 (9th Cir. 1992); *United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444 (D. Ariz. 1996); and *United States v. Gila Valley Irrigation District*, 804 F. Supp. 1. (D. Ariz. 1992); Memorandum and Order, dated September 30, 1993, UVID Appendix at 19a.

be avoided, the Apache Tribe, after having repeatedly sought and obtained enforcement of the Decree in federal court, should not now be permitted to collaterally attack that same Decree in state court. As the Arizona Supreme Court reasoned, if the Apache Tribe wanted to challenge the validity of the Decree, it should have done so directly in the federal court that entered the Decree. *See* Fed. R. Civ. P. 60(b).

The Apache Tribe argues, however, that it does not intend to “upset or invalidate” the Globe Equity Decree. *See* Petition at 9 n.15. The argument is nonsensical. The Decree adjudicates thousands of water rights to the mainstem of the Gila River. *See* Decree 14-85, Petitioner’s Supp. App. 126-197. The Apache Tribe is claiming more than 643,026 acre-feet of water from the mainstem, which is almost three times all the decreed rights for *all* the parties in Hidalgo County, New Mexico, and Graham and Greenlee Counties in Arizona and more than all the Gila River water that entered the Safford Valley during the year 2005, a very wet year. *See* Petition at 6 n.10; *compare* Decree at 14-85, Petitioner’s Supp. App. 126-198.¹⁴ If the Tribe is successful in its claim, the Decree and all the decisions obtained by the Tribe and other parties interpreting the Decree will be meaningless.

Finally, presumably attempting to show that the decision below will have impacts that extend beyond the Apache Tribe

14. *See the Annual Report on the Distributions of Waters of the Gila River, by the Water Commissioner to the United States District Court for the District of Arizona* (2005), <http://www.gilawater.org/annual.pdf>, Plate 29-9 (summarizing all diversion rights under the Decree) and Plate 37 (showing flows of water in the Gila River at the head of the Safford Valley). The portion of the San Carlos Apache Reservation adjacent to the Gila River is in the Safford Valley, downstream from the gauging station at the head of the Valley and upstream from the Gila River’s confluence with the San Carlos River.

and the facts of this case, the Apache Tribe argues that the Arizona Supreme Court's decision will mean that any Indian tribe, which in some prior proceeding has been represented by the United States, will be barred by principles of *res judicata* from raising claims that could have been raised in the prior proceeding. *See* Petition at 21-22. It is true that normal principles of *res judicata* bar a party and its privies from litigating claims that could have been litigated in a previous proceeding that resulted in a judgment. *See Rivet v. Regions Bank of Louisiana*, 522 U.S. 470, 477 (1998). But this case is unique. Here, the federal court that entered the prior decree has retained jurisdiction and continues to actively administer and enforce the decree. Yet, at the same time the federal court was enforcing the decree, the state courts were addressing whether the decree should be given preclusive effect. It is highly unlikely that similar facts will be encountered again. Contrary to the Tribe's argument, even assuming the decision by the Arizona Supreme Court is wrong (which it is not), at worst, the decision was a misapplication of law to a unique set of facts, not justifying review by this Court. *See* United States Supreme Court Rule 10.¹⁵

15. Only two other tribes are known to have faced somewhat similar circumstances, but neither will be litigating this issue. The Gila River Indian Community, which also has claims under the Decree, has settled its water disputes. *See Arizona Water Settlements Act of 2004*, Pub. L. No. 108-451, Titles II & III, 118 Stat. 3478, 3499, 3536. The Orr Ditch Decree, entered about the same time as this Decree, has already been found by this Court to have preclusive effect on the claims for the Pyramid Lake Indian Reservation, despite allegations that the United States had inadequately represented the interests of the Reservation. *See Nevada v. United States*, 463 U.S. at 145.

C. The decision below does not violate the due process and equal protection provisions of the fifth and fourteenth amendments to the Constitution.

The Apache Tribe argues that the decision below deprived it of its rights to due process and equal protection. *See* Petition at 23-27. The Tribe does not allege that there is any conflict between the decision of the Arizona Supreme Court and the decision of a court of last resort of another state or decision of a United States Court of Appeals and the Tribe does not allege a direct conflict with any decision of this Court. Instead, the Tribe argues that well-established general propositions of law were misapplied.

The Tribe's due process argument is that it has never had its "day in court" to argue its defense of inadequate representation to *res judicata*. *Id.* The Tribe does not cite to any authority, however, that due process entitles it to any particular forum. Indeed, there is nothing about the decision below that would prevent the Tribe from making a direct attack on the Decree. *See Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1135-36 (9th Cir. 2001); *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1170 (10th Cir. 2000); *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985). It may be that the District Court, after having heard and decided numerous arguments of the Tribe regarding the enforcement of the Decree, might hold that the Tribe has waived any right to now upset the Decree. Such a ruling, however, would not be based on the decision of the Arizona Supreme Court below; instead it would be based on the Apache Tribe's decision to

intervene in the federal litigation without making a direct attack upon the Decree.¹⁶

The Tribe's equal protection argument is based on two claims. First, the Tribe claims that the trial court improperly invited non-Indian parties to assert that the Decree had preclusive effect on the Apache Tribe "with no risk to their own claims." *See* Petition at 29-30. The Apache Tribe is wrong. At the same time that the trial court heard motions for summary judgment regarding the preclusive effect of the Decree on the Apache Tribe, it also heard similar motions regarding its preclusive effect on the Gila Valley Irrigation District and the Franklin Irrigation District. *See* Order dated April 4, 2002, UVID App. B at 17a-18a. The court found that the Decree had preclusive effect on the Irrigation Districts, as well as on the Apache Tribe. *See* Order dated May 17, 2002, Pet. App. at 64a-65a.

Second, the Tribe claims that non-Indian farmers, towns, and private companies, unlike the Tribe, are free to make additional claims to the Gila River for lands not covered by the Decree. *See* Petition at 26-27. Since the Tribe does not cite to any fact or authority in support of this claim, it should be ignored. Moreover, the decision of the state trial court that barred the Apache Tribe from making additional claims to the Gila River also barred the Upper Valley Irrigation Districts from making additional claims to the River. *See* Orders dated April 4, 2002, UVID App. B, and May 17, 2002, Pet. App. at 64a-65a. Contrary

16. Even if the Tribe has waived its rights to directly attack the Decree, it still may have a remedy for inadequate representation. *See Arizona v. California*, 460 U.S. at 627-28 n.20 ("[I]n an appropriate case the Tribes' remedy for inadequate representation by the government may lie in the Court of Claims."); *Nevada v. United States*, 463 U.S. at 144 n.16 ("If, in carrying out their role as representative, the Government violated its obligations to the Tribe, then the Tribe's remedy is against the Government, not against third parties.")

to the suggestion by the Tribe, the *res judicata* decision by the trial court was not based on the ethnicity of the claimants, instead the Court ruled that parties whose rights had been adjudicated by the Globe Equity Decree were precluded regardless of whether they were non-Indian members of the Upper Valley Irrigation Districts or were Indian tribes represented by the United States. If other persons and entities, not precluded by the Globe Equity Decree, are making additional demands on the Gila River, the Apache Tribe, like any other party, may challenge those demands in the General Adjudication.

Finally, the Apache Tribe argues that the General Adjudication in Arizona has been a failure, has taken too long, and suggests that the Tribe has not been treated fairly in the Adjudication, perhaps implicating constitutional requirements of due process and equal protection. *See* Petition at 6, 16, 18 & n.28, 21, 26, 27, 30. In support of its argument, the Tribe cites to allegedly prejudicial state legislation that was passed while the General Adjudication was proceeding in the state courts. *See* Petition at 27-30. After the legislation was passed, however, the Apache Tribe challenged the legislation and both the state trial court and the Arizona Supreme Court, on interlocutory appeal, ruled that most of the legislation was unconstitutional. *See San Carlos Apache Tribe, et al. v. Superior Court of Arizona*, 193 Ariz. 195, 972 P.2d 179 (1999). The decision in *San Carlos Apache Tribe* is just one of various interlocutory appeals in the General Adjudication where the Arizona Supreme Court has ruled in favor of the Apache Tribe and other federal parties. *See In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001) (Accepting the Apache Tribe's and other Indian tribes' arguments that the tribes' reserved water rights are not limited by the PIA standard); *In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 198 Ariz. 330, 9

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P.3d 1069 (2000) (Broadly interpreting the meaning of “subflow” as argued by the Apache Tribe and other federal parties); *In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 195 Ariz. 411, 418-19, 989 P.2d 739, 746-47 (1999). (Ruling that Indian tribes have a reserved right to groundwater). Contrary to the Tribe’s argument, and the Tribe’s one loss (in the decision below) and its many victories (in earlier decisions) do not demonstrate that the General Adjudication in Arizona has been less than adequate to protect the rights of Indian tribes, including those of the Apache Tribe.¹⁷

17. The Tribe’s criticism of the General Adjudication also ignores the 1992 settlement of some of its own claims and the significant benefits other Arizona Indian tribes have received by settlement. *See, e.g.*, Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549; Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, Title IV, 104 Stat. 4469, 4480; Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, Titles II & III, 118 Stat. 3478, 3499, 3536 (regarding both the Gila River Indian Community and the Tohono O’odam Nation). The Tribe argues that the trial court in the General Adjudication has improperly chosen to adjudicate Indian water claims before other water claims. *See* Petition at 27 n. 34. The Indian water claims are very large and many have priority claims that are senior to most, if not all, private water rights. Surely, there are non-discriminatory administrative explanations for the trial court’s choice to litigate Indian water claims first. Moreover, the initial focus on Indian water rights may have resulted in at least some of the settlements of Indian water rights claims. The Tribe is correct, however, when it argues that the General Adjudication has taken longer than some persons anticipated. Undoubtedly, a large portion of the delay is attributable to both the settlements and the numerous interlocutory appeals.

CONCLUSION

The decision by the Arizona Supreme Court was correct. But even if it were wrongly decided, there is no allegation that there is a conflict between the decision of the Arizona Supreme Court and the decision of a court of last resort of another state or decision of a United States Court of Appeals. Nor does the Tribe show that the decision of the Arizona Supreme Court directly conflicts with decisions of this Court. At most, the Apache Tribe argues that the Arizona Supreme Court misapplied well-established principles of law. The Upper Valley Irrigation Districts request that the Apache Tribe's Petition for Writ of Certiorari be denied.

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