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IN THE  
**Supreme Court of the United States**

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SAN CARLOS APACHE TRIBE,

*Petitioner,*

v.

STATE OF ARIZONA; GILA RIVER INDIAN COMMUNITY; ASARCO LLC;  
PHELPS DODGE INCORPORATED; SAN CARLOS IRRIGATION AND DRAINAGE  
DISTRICT; CITY OF SAFFORD; GILA VALLEY IRRIGATION DISTRICT;  
FRANKLIN IRRIGATION DISTRICT; SALT RIVER PROJECT; CITY OF  
GOODYEAR; BHP COPPER INCORPORATED, AND  
UNITED STATES OF AMERICA,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- ISSUE 1:** Where the United States as trustee for the San Carlos Apache Tribe, and the Apache Tribe on its own behalf, were required by this Court to adjudicate all the Tribe's federal reserved, aboriginal and other water rights in Arizona's general stream adjudication under the McCarran Amendment, 43 U.S.C. § 666, and where opposing claimants in the general stream adjudication raised the affirmative defense of *res judicata* in motions for summary judgment arguing that a previous federal consent decree on the Gila River precluded the United States and the Tribe from adjudicating water rights to the Gila River mainstream for the Apache Reservation, did the Arizona Supreme Court err where it assumed the existence of privity and affirmed the trial court's decision on *res judicata*, concluding as a "matter of federal law" that comity compelled the Apache Tribe to present its defenses to *res judicata* in the federal district court which entered the prior consent decree?
- ISSUE 2:** Does it violate the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution to apply the **affirmative defense** of *res judicata* to preclude the United States as trustee for a federally recognized Indian Tribe, and the Tribe on its own behalf, from adjudicating certain federal reserved, aboriginal and other water rights in a state general stream adjudication conducted under the McCarran Amendment, without allowing the Indian Tribe to present its **defenses** to *res judicata* in the state forum in which it was raised?

## PARTIES TO THE PROCEEDING

This Petition for writ of certiorari arises out of Arizona's general stream adjudication, *In re the General Stream Adjudication of All Rights to Use Water in the Gila River System and Source*, W-1, W-2, W-3, W-4 (consolidated) ("Gila River Adjudication").<sup>1</sup> The Gila River Adjudication involves more than 27,000 parties and over 77,000 claims. See *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 186 (Ariz. 1999). The United States was joined as a party pursuant to the McCarran Amendment, 43 U.S.C. § 666, for itself and as trustee for sixteen Arizona Indian Tribes, including Petitioner, the San Carlos Apache Tribe ("Apache Tribe" or "Tribe), a federally recognized Indian Tribe, recognized pursuant to the Apache Treaty, July 1, 1852, 10 Stat. 979 (App. 294a), and organized under Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 476 *et seq.*

The Respondents are those claimants in the Gila River Adjudication in the Maricopa County Superior Court who filed a notice of appearance and participated in the proceedings before the Supreme Court of Arizona from which this Petition arises, case number WC-02-0003-IR [Contested Case No. W1-206]. These Respondents are the United States of America; the State of Arizona; the Gila River Indian Community; ASARCO LLC; Phelps Dodge Incorporated; San Carlos Irrigation and Drainage District; the City of Safford; Gila Valley Irrigation District; Franklin Irrigation District; Salt River Project; City of Goodyear; and BHP Copper Incorporated.

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1. The Gila River Adjudication is the consolidated action to adjudicate *inter sese*, water rights, including federally protected Indian water rights, to the Upper Salt, Verde, Upper Gila, Lower Gila, Agua Fria, Upper Santa Cruz and San Pedro watersheds in Arizona.

Thousands of parties have filed claims in the underlying Gila River Adjudication before the Maricopa County Superior Court, but have **not** filed a notice of appearance or participated in the Interlocutory Appeal before the Arizona Supreme Court in WC-02-0003. These additional claimants are not designated Respondents to this Petition under the Rules of the Supreme Court of the United States.

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Petitioner, the San Carlos Apache Tribe, respectfully requests that this Court grant its Petition and issue a writ of certiorari to review the decision of the Arizona Supreme Court entered on February 6, 2006, and the Order Denying Motion for Reconsideration entered on May 3, 2006 (collectively the “decision below”), where the Arizona Supreme Court conclusively ruled that the United States as trustee for the Apache Tribe, and the Tribe on its own behalf, are precluded under the doctrine of *res judicata* from adjudicating the Tribe’s federal reserved, aboriginal, and other water rights claims to the mainstream of the Gila River in the Gila River Adjudication,<sup>2</sup> and further, that the Apache Tribe is barred by general principles of comity from presenting its defenses to *res judicata* in the Gila River Adjudication, the forum in which the **affirmative defense** of *res judicata* was originally raised.

#### OPINIONS BELOW

The original Opinion and Order of the Arizona Supreme Court (App. 1a-53a) is reported in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 127 P.3d 882 (2006) (“*Gila VI*”). The Order Denying Motion

2. The Apache Tribe owns water rights separate and of a different character than those rights “reserved” for the Apache Reservation by the United States. Federal reserved rights are those rights reserved by the United States with a priority at least as early as the date on which the reservation was created, as may be necessary to accomplish the federal purposes of the Reservation. *See Winters v. United States*, 207 U.S. 564 (1908). Aboriginal rights are those rights reserved or retained by the Tribe **unto itself**. *See United States v. Winans*, 198 U.S. 371 (1904); *Winters*, 207 U.S. at 576. The aboriginal rights of the Apache Tribe to the Gila River have never been ceded or extinguished. In addition, the Tribe owns prior appropriative rights on the Gila River under the doctrine of prior appropriation. *See* Statement of Claimant for by the Apache Tribe (Supplemental Appendix (“Supp. App.”) 42-66). These water rights are owned by the Apache Tribe pursuant to the Law of Nations, as well as under Spanish, Mexican, and American law. Though not yet “quantified”, these water rights are real, “present,” and “perfected.” *See Arizona v. California*, 373 U.S. 546, 600 (1963) (“*Arizona I*”).

for Reconsideration (App. 54a-61a) is reported in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 134 P.3d 375 (2006). The Superior Court's May 17, 2002, Minute Entry Order in Contested Case W1-206 (App. 62a-65a), the Superior Court's March 7, 2002, Amended Order adopting the Special Master's Report and Recommendation on the claims to the Gila River by and for the Gila River Indian Community ("GRIC") in Contested Case W1-203 (App. 66a-107a), and the June 30, 2000, Special Master's Report and Recommendation in Contested Case W1-203 (App. 108a-211a), are all unpublished decisions. These decisions are reprinted in the Appendix to this Petition.

### **JURISDICTION**

The decision of the Arizona Supreme Court was filed on February 6, 2006. The decision of the Arizona Supreme Court denying the Apache Tribe's Motion for Reconsideration was filed on May 3, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

The relevant Constitutional and Statutory Provisions cited in this Petition are set forth in the Appendix at App. 284a-288a.

### **STATEMENT OF THE CASE**

The creation story of the Apache People in their ancestral lands places them in what is now Arizona from the beginning of life on Earth. The aboriginal territory of the Apache People was vast and full of abundant resources, including water. In 1872, the San Carlos Apache Tribe was confined to a larger Reservation of several million acres in what is now New Mexico and Arizona. Since this time, the San Carlos Apache Reservation ("Reservation") has been reduced to approximately 2 million acres. Today, the Apache Tribe (with a population of almost 13,000 members) struggles to exist within the confines of this much smaller land base, and while these lands are generally harsh and arid, the Reservation remains the "permanent home

and abiding place” for the Apache People. *See Winters*, 207 U.S. at 565.

The Gila River runs for 40 miles through the very heart of the Reservation, with nearly 1,500,000 acres in the Gila River drainage. *See Map of the San Carlos Reservation and Gila River* (Supp. App. 1).<sup>3</sup> The presence of the Gila River was a primary reason for the original boundaries of the Reservation.<sup>4</sup>

The waters of the Gila River mainstream are absolutely essential to the future of the Tribe. It is among the very poorest, if not the poorest ethnic group in the United.<sup>5</sup> Upstream and downstream, the non-Indian communities prosper on over 50,000 acres of verdant lands legally and illegally watered by the Gila River mainstream. Downstream from the Reservation over 100,000 acres of lands may be irrigated as part of the United States’ project, known as the San Carlos Irrigation Project (“SCIP”). Within the Reservation is San Carlos Reservoir. The Apaches are not allowed to use the water in this Reservoir under the *Globe Equity Decree*.<sup>6</sup> Yet the Gila River flows through lands of the Apache Reservation which are so scorched and dry

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3. Like the Fort Belknap Reservation in *Winters*, 207 U.S. at 577, the lands of the Apache Reservation are also “arid and, without irrigation, . . . practically valueless.”

4. *See Annual Report of the Commissioner of Indian Affairs*, November 30, 1857, 35<sup>th</sup> Congress, First Session at 583.

5. The Federal District Court charged with enforcing the 1935 federal consent decree on the Gila River known as the “*Globe Equity No. 59 Decree*” (“*Globe Equity Decree*”) has observed “[t]o say that the Tribe is poor is to severely understate the plight of the Apaches. The infant mortality rate is seven times the national average. Malnutrition abounds. Housing varies from inadequate to non-existent, as does running water and electricity. Unemployment is not just rampant, it is the rule; the exceptions are the two in ten Apaches who have work.” *United States v. Gila Valley Irrigation District*, 801 F. Supp. 1, 4 (D. Ariz. 1992) (internal citation omitted).

6. The construction of Coolidge Dam and San Carlos Reservoir on the Apache Reservation destroyed the town of Old San Carlos, as well as the flour mill, farms, homes, family cemeteries and religious sites of many Apaches within its path.



that one is stunned by the contrast at the boundary. No marker, sign or fence is necessary. On one side, the waters of the Gila mainstream are used by the non-Indians. On the Apache side, the River runs through, but its waters are unavailable to quench the thirst or to remedy the acute poverty and despair of the Apache People.

Water and prosperity are inseparable in Arizona. This Court's decisions in *Winans*, *Winters*, *Arizona I*, and its expectations for Arizona's stream adjudication are rendered a mockery by the conditions on the Apache Reservation today. The Tribe must be able to use the waters of the Gila River mainstream if conditions for the Apache Tribe are ever to improve.

In 1983, this Court required the United States to present **all claims** for federal reserved water rights for the Apache Reservation in Arizona's general stream adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666. *See Arizona v. San Carlos*, 463 U.S. at 571.<sup>7</sup> Having required the United States to adjudicate its federally reserved water rights for the Apache Reservation in a **state** forum, this Court warned that state courts like Arizona, "have a solemn obligation to follow federal law . . .", and further promised:

[A]ny state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a **particularized and exacting scrutiny** commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

*Id.* (emphasis added). The time for this Court to honor its promise to protect Indian water rights and to hold states to their "solemn obligation" to follow federal law is now. The Apache Tribe respectfully requests that this Court grant the Apache Tribe's Petition.

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7. In doing so, this Court also suggested that Indian tribes consider intervening in the state general stream adjudications in order to protect themselves. *Id.* at 545, 567, n. 17.

### A. History of the Gila River Adjudication

The Gila River Adjudication began as an administrative proceeding in 1974, when Respondent, Salt River Project, filed a Petition with the Arizona Land Department to determine conflicting water rights claims in the Salt River above Granite Reef Dam outside of Phoenix. This administrative proceeding evolved into the first of Arizona's two "general" stream adjudications, namely, the Little Colorado Adjudication and the Gila River Adjudication, which are presided over by state superior courts charged under Arizona law with determining the nature, extent and relative priority of the many thousands of competing state and federal claims to Arizona's rivers and streams. *See* A.R.S. § 45-252(a) (App. 287a).

Early during Arizona's attempt to conduct its stream adjudication through administrative procedures in the State Land Department, certain Indian Tribes in Arizona, including the San Carlos Apache Tribe, sought to have their federally protected water rights adjudicated as original actions in **federal** court pursuant to 28 U.S.C. § 1362. Thus, in 1979, the San Carlos Apache Tribe filed an original action in the United States District Court for the District of Arizona, seeking to adjudicate its federal reserved, aboriginal and other water rights claims in a **federal** forum. *See, e.g., San Carlos Apache Tribe of Arizona v. State of Arizona, et al.*, CIV 79-186 PHX-PGR. The Tribe's action was stayed by the Ninth Circuit, however, following this Court's decision in *Arizona v. San Carlos*, 463 U.S. at 571.<sup>8</sup> The Tribe's action to adjudicate its federally protected water rights is still pending before the Arizona District Court today, although it is subject to a continuing stay order.

In *Arizona v. San Carlos*, this Court held that Congress waived the sovereign immunity of the United States under the McCarran Amendment, 43 U.S.C. § 666 (App. 286a-287a) for the limited purposes of "comprehensive" state water rights adjudications in the Enabling Act states of Arizona and Montana.

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8. *See San Carlos Apache Tribe of Arizona et al. v. State of Arizona et al.*, 721 F.2d 1187 (9<sup>th</sup> Cir. 1983).

463 U.S. at 555.<sup>9</sup> Pursuant to the directive of this Court, the United States as trustee for the Apache Tribe, and the Tribe on its own behalf, filed defensible Statements of Claimant in the Gila River Adjudication in 1985, claiming, under oath, federal reserved, aboriginal and other water rights to the Gila River mainstream and its tributaries (Supp. App. 68-102).<sup>10</sup> Since that time, the Apache Tribe has faithfully participated in the Gila River Adjudication, seeking a comprehensive, fair, equal, and timely adjudication of its federally protected water rights *inter sese* with state water rights.

While this Court anticipated in *Arizona v. San Carlos* that the “specialized resources” and “experience” of the state courts would result in an efficient process for the comprehensive adjudication of state and federal water rights, *see* 463 U.S. at 551-553, 569, as explained in greater detail at Section F, *infra.*, the history of the Gila River Adjudication has done little to fulfill these expectations.

### **B. Proceedings Below**

This Petition arises out of two different “contested cases” in the Gila River Adjudication, one involving the water rights claims by and for the Apache Tribe and one involving the water rights claims by and for the Pima Indians of the Gila River Indian Community. Because these cases have been intertwined in the proceedings below, a short procedural history of these cases is set forth here.

By Minute Entry Order dated September 11, 1998 (App. 274a), the Superior Court conducting the Gila River Adjudication directed the filing of motions for summary

9. *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 811 (1976); *United States v. District Court for Eagle County*, 401 U.S. 520 (1971).

10. The United States’ Statement of Claimant Nos. 39-64257, 39-64258, and 39-64259, filed November 1, 1985, claim more than 209,643 acre-feet of water per year from the Gila River mainstem (Supp. App. 68-102). The Apache Tribe’s Statement of Claimant No. 39-63614, filed November 1, 1985, claims more than 643,026 acre-feet of water per year from the Gila River mainstem (Supp. App. 42-67).

judgment by those parties to the Adjudication who “believed” that the 1935 *Globe Equity Decree* may have a “preclusive effect” in the Adjudication on the water rights claims to the Gila River and tributaries made by and for GRIC.<sup>11</sup> This proceeding was designated “Contested Case W1-203.” On August 24, 1999, the Superior Court issued a similar Minute Entry Order (App. 282a) directing the filing of motions for summary judgment regarding the “preclusive” effects of the *Globe Equity Decree* for, *inter alia*, the Apache Tribe.<sup>12</sup> This became “Contested Case W1-206.”

The Special Master issued a Report and Recommendation in W1-203 containing findings of fact and conclusions of law regarding the preclusive effects of the *Globe Equity Decree* as to GRIC’s claims on the Gila River on June 30, 2000 (App. 108a-211a). After objections and argument, the Superior Court entered an Amended Order in Contested Case W1-203 on March 7, 2002 (App. 66a-107a), adopting most of the Special Master’s

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11. In the *Globe Equity Decree*, the United States stipulated for the Apache Tribe to water rights for no more than 6,000 acre feet of water from the Gila River mainstream for the irrigation of 1,000 acres of land, which could only be used for the production of “crops of value” (Supp. App. 198 & 224), while the United States secured 2,470,276 acre feet of water rights from the Gila River for its own federal project, the San Carlos Irrigation Project, as follows: (1) 210,000 acre feet with an immemorial priority (Supp. App. 198); (2) 372,000 acre feet with a priority date of 1916 (*Id.*); (3) 603,276 acre feet with priority ranging from very early (*Id.* at 210); and (4) 1,285,000 acre feet of stored water with a priority date of 1924 (*Id.* at 217), plus all groundwater underneath SCIP lands.

12. The Apache Tribe was not a “party” to the *Globe Equity Decree*, therefore opposing claimants asserting the *Decree* as preclusive of the Tribe’s federally protected water rights claims in the Gila River Adjudication under *res judicata* have the burden, both on summary judgment and under the standards applicable for *res judicata*, to demonstrate three separate elements: (1) an identity of claims; (2) a final judgment on the merits; and (3) privity between parties. *See Richards v. Jefferson County*, 517 U.S. 793 (1966); *see also Moore’s Federal Practice*, § 131.52 (Matthew Bender 3<sup>rd</sup> ed. 2000).

Report and ruling, *inter alia*, that *res judicata* precluded GRIC, and the United States on behalf of GRIC, from claiming any additional aboriginal, federal reserved, and other water rights to the Gila River mainstream, other than the substantial water rights secured by the United States for GRIC in the *Globe Equity*, and other decrees.

Thereafter, the Superior Court (without substantive discussion) issued a short Minute Entry on May 17, 2002, in Contested Case W1-206 (App.62a-65a), adopting its decision for GRIC in Contested Case W1-203, as the basis for granting summary judgment against the Apache Tribe in Contested Case W1-206, ruling, *inter alia*, that the United States and the Apache Tribe were precluded by the doctrine of *res judicata*, from adjudicating any federal reserved, aboriginal and other water rights claims to the Gila River mainstream, other than the annual irrigation right to 6,000 acre feet of water described in the *Globe Equity Decree*.

On November 19, 2002, the Tribe petitioned the Arizona Supreme Court for Interlocutory Review of six issues arising out of the Superior Court's decision in Contested Case W1-206.<sup>13</sup> The Petition was granted on November 29, 2004.

The Arizona Supreme Court issued the opinion below on February 9, 2006. The opinion summarized the "central issue" of the case as "whether claims advanced by the Tribe (and the United States on the Tribe's behalf) are precluded by a consent decree entered in 1935 by the United States District Court for the District of Arizona." *Gila VI*, 127 P.3d at 884. In answer to this question, the Supreme Court concluded "that the decree precludes the Tribe's claims to additional water from the Gila

13. On September 26, 1989, the Arizona Supreme Court adopted a Special Procedural Order Providing For Interlocutory Appeals and Certifications in the Gila River Adjudication ("Special Procedural Order") (App. 262a-271a). The Arizona Supreme Court has explained: "In a case of this magnitude, which is expected to continue for at least three or four decades, it is imperative that any significant error be corrected immediately to avoid conducting forty years of litigation only to discover the need to begin anew." *See Gila I*, 830 P.2d at 445 n.2.

River mainstream, but not to water from tributaries of the Gila.” *Id.*<sup>14</sup> In doing so, the Supreme Court declined to allow the Apache Tribe to prove its **defenses** to *res judicata*,<sup>15</sup> ruling “as a matter of federal law that the doctrine of comity prevents us from considering the Tribe’s argument that the [Globe Equity] Decree should not be enforceable against it because of the absence of privity . . . .” *Id.* at 801, n.22.<sup>16</sup> It reasoned that general principals

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14. This Petition focuses on the Supreme Court’s decision below which precludes the Apache Tribe and the United States as its trustee from adjudicating its federal reserved, aboriginal and other water rights to **mainstream** of the Gila River. This Petition does not address at this time the Supreme Court’s decisions regarding the **tributaries**.

15. The Apache Tribe has **not** sought to upset or invalidate the *Globe Equity Decree* in the Adjudication Court, as is suggested in the opinion below. The Tribe has simply stated, *inter alia*, that the United States, acting in “good faith”, could not have intended to adjudicate all of the Apache Tribe’s water rights at the time of the *Decree*, or alternatively that there was no “privity” between the United States and the Tribe in *Globe Equity* because the United States failed to adequately represent the Tribe in a myriad of ways, including by (1) failing to investigate, prepare, and prosecute the Tribe’s water rights claims with any degree of due diligence or reasonable prudence; (2) including no water for most of the historically irrigated acreage on the Reservation; (3) failing to include any water to drink for the Apaches or their livestock; (4) agreeing to only a mere fraction of the water rights to which the Tribe was entitled under *Winters*, without even including sufficient water for existing needs at the time, or any water for “future” needs; (5) acting under a profound bias in favor GRIC and the non-Indian farmers in SCIDD and the Upper Valleys, while paying only nominal and occasional lip service to the Apaches’ rights and claims; and (6) engaging in aggressive self-dealing, and negotiating under an actual conflict of interest, all to the profound detriment of the Tribe.

16. The Arizona Supreme Court failed to examine the *Globe Equity Decree* and its affect on the claims by and for the Apache Tribe based upon the law that existed at the time of the *Decree*, choosing instead to apply current trends regarding the law of *res judicata*. In addition, while the Arizona Supreme Court correctly described the general standards applicable to ordinary consent decrees, noting that such agreements

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of comity “compelled” the Tribe to present its challenge to the preclusive effect of the *Decree* in the federal district court which entered the *Decree*, and that such defenses were not available to the Tribe in the Gila River Adjudication. *Id.* at 897-902.

As a predicate to this ruling, the Arizona Supreme Court re-characterized the Apache Tribe’s efforts to present its defenses to *res judicata* as nothing more than a collateral “attack” on the *Globe Equity Decree*, which the Tribe should present in a Rule 60(b) motion in the *Globe Equity* court.<sup>17</sup> By recasting the Apache Tribe’s defenses to *res judicata* as an attack on the federal *Decree*, the Arizona Supreme Court laid a foundation for its ruling that comity requires the Apache Tribe to present its defenses to opposing claimants’ affirmative defense of *res judicata* in the federal district court which retained limited jurisdiction to enforce the *Globe Equity Decree*,<sup>18</sup> instead of in

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(Cont’d)

“have many of the attributes of ordinary contracts . . .”, *Gila VI*, 127 P.3d at 890, n.12, it completely failed to appreciate or consider that standard principles of contract interpretation **do not** have their usual force in cases involving federal Indian law. These flaws permeate the decision below on all levels. The canons of construction applicable in Indian law are rooted in the “unique trust relationship between the United States and the Indians” *County of Oneida v. Oneida Indian Nation of N. Y.*, 470 U.S. 226, 247 (1985); *see also Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). The canons require that treaties and other agreements purporting to affect Indian Tribes must be liberally construed most strongly in favor of the Indians; ambiguous expressions must be resolved in favor of the Indians; and, are to be construed as the Indians would have understood them. *See Winters*, 207 U.S. at 576-77; *see also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); Apache Treaty, Article 11 (App. 297a). These liberal cannons of construction favoring Indian Tribes have been specifically applied to interpretations of the *Globe Equity Decree*. *See, e.g., United States v. Gila Valley Irrigation District*, 31 F.3d 1428, 1438 (9<sup>th</sup> Cir. 1994).

17. *See Gila VI*, 127 P.3d at 901 (original opinion); *see also In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 134 P.3d at 375.

18. *See Article XIII, Decree* (Supp. App. 225).

the state Gila River Adjudication where the affirmative defense of *res judicata* was raised.<sup>19</sup> This ruling calls for immediate review by this Court.

### C. Finality of the Decision Below

The decision below constitutes a “final judgment” for purposes of this Court’s jurisdiction under 28 U.S.C. § 1257(a). The issuance of a writ of certiorari at this time is both consistent with this Court’s promise to review with “particularized and exacting scrutiny” any state-court decision alleged to abridge Indian water rights protected by federal law, *see Arizona v. San Carlos*, 463 U.S. at 561, and in conformance with prior decisions of this Court regarding finality of judgments under 28 U.S.C. § 1257(a).<sup>20</sup>

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), this Court observed that the “requirement of finality is to be

19. The Supreme Court then went further to speculate, without the aid of briefing, a trial on the merits, or oral argument, how it believed the *Globe Equity* court **would have** ruled if the Tribe had attempted to “attack” the *Globe Equity Decree* in the *Globe Equity* court. *See Gila VI*, 127 P.3d at 901. The Supreme Court based its decision on a 1983 ruling of the *Globe Equity* court involving GRIC, where that court ruled that GRIC would not be permitted to intervene in the *Globe Equity* case to “complain of its representation back in 1935” (App. 212a-220a). However, the 1983 ruling (decided under standards for intervention under Fed. R. Civ. P. 24, and not in the context of an inadequate representation defense within the meaning of *Restatement (Second) Judgments*, § 42(1)(e)) relates to another Indian Tribe with a factual situation that is completely different than the Apache Tribe. The Apache Tribe was not a party in the *Globe Equity* case until 1990, whereas GRIC moved to intervene in the case **before** the *Decree* was entered. Its motion was denied in 1935, and GRIC **failed to appeal** that decision. It was this reasoning that guided the *Globe Equity* court’s decision in 1983. Nevertheless, the *Globe Equity* court has never ruled as to the preclusive effect of the *Globe Equity Decree* as to the Apache Tribe or as to GRIC. *Id.*

20. In fact, the Arizona Supreme Court anticipated that there would be instances in which its interlocutory decisions rendered in the Gila River Adjudication would be immediately reviewable by this Court under *Cox Broadcasting*. *See Gila River I*, 830 P.2d at 445, n.2.



given a practical rather than technical construction”, 420 U.S. at 478 (internal citation omitted), and recognized “at least four categories” of cases where the Court will treat state-court judgments as “final” for jurisdictional purposes, despite the fact that further proceedings remain to take place in state court. *Id.* at 477; *see also Flynt v. Ohio*, 451 U.S. 619, 620-21 (1981).

The decision of the Arizona Supreme Court in this case falls squarely within the first and second categories enumerated by *Cox Broadcasting*. The first category of cases are those cases “in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained.” *Cox Broadcasting*, 420 U.S. at 479; *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306-307 (1989).

In the decision below, the Arizona Supreme Court expressly precluded the Apache Tribe and the United States as its trustee from **asserting or proving** the Tribe’s federal reserved, aboriginal, or other water rights claims to the mainstream of the Gila River in the Gila River Adjudication. This makes the functional result of the Adjudication for the Apache Tribe **no different** today than it will be when, upon the entry of a final decree in the Adjudication, the judgment will become “unquestionably final and appealable” to this Court. *See Mills v. Alabama*, 384 U.S. 214, 217-218 (1966). In the likely never ending “meanwhile”, the Tribe will be denied due process and equal protection under the law and will be unable to use the mainstream of the Gila River beyond the nominal right described in the *Globe Equity Decree*.

Thus, the decision of the Arizona Supreme Court is “the final word of a final court.” *See Jefferson v. City of Tarrant, Alabama*, 522 U.S. 75, 81 (1997).<sup>21</sup> This decision is plainly “conclusive” as to the water rights claims by and for the Apache Tribe to the mainstream of the Gila River, and the outcome of

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21. Quoting *Market Street R. Co. v. Railroad Comm’n of Cal.*, 324 U.S. 548, 551 (1945).

any further proceedings in the Adjudication regarding these claims is “preordained.” *See Cox Broadcasting*, 420 U.S. at 479; *see also Pierce County v. Guillen*, 537 U.S. 129 142-143 (2003).

For many of the same reasons, the decision below also falls within the second category of *Cox Broadcasting*. The second category involves cases where “the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.” 420 U.S. at 480. For cases in this category, nothing could happen in the course of the proceeding below which would moot or otherwise make unnecessary the decision on the federal questions in issue. *Id.*

As noted above, the Apache Tribe’s federal water rights claims to the Gila River mainstream have been effectively “adjudicated” by the decision of the Arizona Supreme Court below. Although the future of the State Adjudication process may require the resolution of many different legal questions under both state and federal law, and will entail the eventual adjudication of tens of thousands of competing water rights claims through the Gila River System and Source, nothing may occur in the course of the Adjudication that will “moot” the legal and constitutional claims being raised by the Tribe in this Petition. These federal issue will survive and require eventual review by this Court regardless of the outcome of the Adjudication.

It is also significant, as this Court noted in *Cox Broadcasting*, that of all the considerations surrounding questions of finality, “the most important competing considerations are the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other.” *Cox Broadcasting*, 420 U.S. at 478 (internal citations omitted). The balance of these competing considerations weighs heavily in favor of finality in this instance.

On the one hand, the inconvenience and cost of piecemeal review is slight. The issuance of the writ of certiorari to the Arizona Supreme Court requested in this Petition would not

stay or disrupt the Gila River Adjudication process in any substantive way. The Adjudication will continue to move forward, though at its historically glacial pace, just as it has in the past. Questions going to threshold legal issues can continue to be addressed by the Special Master and the Adjudication Court, existing contested cases can proceed without disruption, and the adjudication of other claimants' water rights will not be subject to any additional delay should this Court grant this Petition.

In contrast, a decision to deny this Petition could have serious consequences for the Adjudication process in the long run, if the Apache Tribe is required to await the conclusion of the Gila River Adjudication before it can bring its federal claims to this Court for review. Should this Court ultimately determine that the Arizona Supreme Court's decision regarding the federally protected water rights claims by and for the Apache Tribe was in error, "the entire comprehensive state-court water rights decree [entered in the Gila River Adjudication] may require massive readjustment." *See San Carlos Apache Tribe*, 463 U.S. at 579 (Justice Stevens, dissenting). This, of course, would result in "a completely unnecessary waste of time and energy" for the Adjudication Court and for all of the parties. *See Cox Broadcasting*, 420 U.S. at 478.

On the other hand, "the danger of denying justice by delay" is profound, for it thrusts an unconscionable burden on the Apache Tribe. This Court has held that there exists a "powerful federal interest" in safeguarding federally protected Indian water rights "from state encroachment." *Arizona v. San Carlos*, 463 U.S. at 571.<sup>22</sup> The decision below has effectively "adjudicated" the United States' and Apache Tribe's federal reserved, aboriginal, and other water rights claims to the Gila River mainstream, leaving the Tribe without the right to use a single drop of water from the Gila River mainstream for any other purpose or in any other amount other than for the irrigation of

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22. *See also Winters*, 207 U.S. at 565.

1,000 acres of land as described in the *Decree*. The Tribe cannot use the waters of the Gila mainstream as a source of drinking water, for the raising of livestock, the growing of gardens, as a fundamental component of economic development, or to achieve any of those arts and industries of civilization contemplated by this Court in *Winters*.<sup>23</sup>

Yet, as the decision of the Arizona Supreme Court stands today, non-Indian claimants may continue to use water resources in Arizona (both legally and illegally) unfettered by any ruling from the Adjudication Court, pending the entry of a “comprehensive” water rights decree at some point in the distant future (if ever), while the Apache Tribe is prohibited **today** from using any water from the Gila River mainstream for the purposes described above. This makes the danger of delaying justice in this case profound and urgent for the Apache Tribe.

Finally, this Court has already recognized that, given the “virtually unique” nature of water rights adjudications,<sup>24</sup> interlocutory review of federal reserved water rights claims asserted in ongoing state court proceedings can be necessary. On at least two occasions, this Court has issued writs of certiorari to review the interlocutory decisions of state supreme courts regarding the nature or extent of specific federal reserved water rights. *See Wyoming v. United States*, 488 U.S. 1040 (1989), *affirmed without opinion*, 492 U.S. 406 (1989); *United States v. New Mexico*, 438 U.S. 696 (1978). Issues of equal significance and urgency are raised in this Petition. The decision of the Arizona Supreme Court below is “final” for purposes of this Court’s jurisdiction under 28 U.S.C. § 1257(a).

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23. *Winters*, 207 U.S. at 565; *see also Gila V*, 35 P.3d at 76.

24. *See Arizona v. San Carlos*, 463 U.S. at 571.

## REASONS FOR GRANTING THE PETITION

There are several compelling reasons why this Petition should be granted as contemplated by Rule 10(c) of the Rules of the United States Supreme Court. First, the Arizona Supreme Court has decided an important question of federal law which is in conflict with relevant decisions of this Court, including *Arizona v. San Carlos*, 463 U.S. 545, and *Winters*, 207 U.S. 564. Second, the decision of the Arizona Supreme Court involves important questions of law that have not been, but should be, settled by this Court.

### A. **The Arizona Supreme Court Has Decided an Important Question of Federal Law in Conflict with Relevant Decisions of this Court, Including *Arizona v. San Carlos* and *Winters*, and Which Defeats the Purpose of the McCarran Amendment**

In the decision below, the Arizona Supreme Court refused to allow the Apache Tribe to present its **defenses** to *res judicata*, ruling “as a matter of federal law” that general principles of comity “compelled” the Tribe to present its challenge to the preclusive effect of the *Globe Equity Decree* in the federal district court which entered the *Decree*, and that such defenses were not available to the Tribe in the Gila River Adjudication. *See Arizona v. San Carlos*, 463 U.S. at 897-902. This decision stands on its head this Court’s (and the Tribe’s) expectations under the McCarran Amendment, *Colorado River*, *Arizona v. San Carlos*, and the Arizona Adjudication. Unless reversed, the decision of the Arizona Supreme Court would send the Tribe back to federal court, and thereby “work the very mischief that [this Court’s] decision in *Colorado River* sought to avoid.” *Id.* at 855. The Court below developed this novel approach to federal law based upon several significant and material misunderstandings of the history of this case and the claims which the Tribe and the United States made to the Gila River mainstream, as explained below.

**1. The History of this Court's Decision in *Arizona v. San Carlos* Demonstrates that the Novel Application of Comity Called for by the Arizona Supreme Court Will Defeat the Purposes of the McCarran Amendment**

The Apache Tribe was first introduced to this Court on August 20, 1982, when the Tribe filed its Brief in Opposition to Arizona's May 12, 1982, Petition for Writ of Certiorari, which appealed certain of the rulings of the Ninth Circuit arising out of the Apache Tribe's original action filed in the United States District Court for the District of Arizona pursuant to 28 U.S.C. § 1362. In the original action, the Tribe sought to adjudicate and protect its unique property rights to water from the rivers and streams on its Reservation.

The Apache Tribe's original action, as well as other original actions filed by a number of Arizona Indian Tribes, including the Navajo Nation, (collectively the "Tribes"), arose, in part, out of the Tribes' fear that the enormous non-Indian migration to Arizona, and the alarming unconstrained increase in water use by new residents,<sup>25</sup> would further deplete and exhaust the water supply of Arizona, leaving the Tribes' Reservations without any reliable source of water.<sup>26</sup> Indeed, at the time the

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25. The population of Arizona has increased exponentially in the last 80 years. The population has grown from 435,573 persons in 1930, to more than 749,587 people by 1950. See Hobbs, Frank and Nicole Stoops, U.S. Census Bureau, Census 2000 Special Reports, Series CENSR-4, *Demographic Trends in the 20<sup>th</sup> Century*. By 1970, Arizona's population had jumped to almost 1,770,990 people. *Id.* This number has only continued to increase over the last three decades, with population numbers totaling approximately 2,718,215 people in 1980, 3,665,228 people in 1990, 5,130,632 in 2000, and with a total of 5,939,292 (est) people calling Arizona home in 2005. *Id.* The Indian population in Arizona has also grown from 95,812 people in 1970 to 270,662 in 2004. *Id.*

26. As of September 5, 2005, there were approximately 171,910 "registered wells" in Arizona. Many more are not. There were 108,433

Apache Tribe filed its original action in federal court in 1979, the Tribe was already being denied the use of water from the Gila mainstream on its Reservation.<sup>27</sup>

In seeking to adjudicate their federally protected water rights in federal court, the Tribes argued, among other things, that Arizona lacked *in rem* and *in personam* jurisdiction over the Tribes and their Reservations, and urged that an adjudication of their federally protected water rights would be completed more rapidly, fairly, and competently in federal court, given the federal courts' expertise in federal Indian law and the political disinterest of federal judges, who have lifetime appointments to the federal bench.<sup>28</sup> The Tribes also explained that once a federal court adjudicated the federally protected water rights of the Tribes, these rights could simply be integrated *inter sese* by priority with other rights described in any future decree eventually

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wells registered and installed in the Gila Watershed from 1931 through September 2005. Of these wells, 64,320 were installed since this Court's 1983 decision in *Arizona v. San Carlos*. See ADWR Wells 55, Data Base, Version 9-05. The flow of all rivers in Arizona have been substantially reduced as a direct result of this pumping. There are extended periods now, where there is no flow in the Gila River mainstream on the Apache Reservation. Therefore, with the "pigs squeal" "used twice" on the Gila in Arizona in 1955 (App. 322a-326a), non-Indian water use remains largely unchecked, while the Tribe has diligently participated in the State adjudication to protect its "prior and perfected rights."

27. Arizona represented in briefing before this Court even as early as 1931, and most certainly by 1955, that the Gila River was fully consumed within the State before it could reach its confluence with the Colorado River. See Opening Brief of the United States in *Arizona v. California* (App. 324a-326a).

28. Given the history of rampant discrimination in Arizona against Indians, the Tribes acutely understood that resolving their federally protected water rights in a state court forum was fraught with peril. See *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684 (Ariz. 1992), *Goddard v. Babbitt*, 536 F. Supp. 538 (Ariz. 1982).

entered in the State proceedings. Nevertheless, this Court granted Arizona's Petition for Writ of Certiorari on October 4, 1982, in Nos. 81-2147 and 81-2188 Consolidated. A decision in *Arizona v. San Carlos Apache Tribe* was issued on July 1, 1983.

In *Arizona v. San Carlos*, Arizona sought this Court's approval to acquire *in rem* and personal jurisdiction over the Apache Tribe and water rights appurtenant to its land within the Reservation, and over the United States as trustee for the Tribe. Arizona justified these efforts as necessary to obtain a "comprehensive" stream adjudication of **all** those rights to use the waters of the Gila River and its Sources, pointing to the McCarran Amendment, 43 U.S.C. § 666, and this Court's teaching in *Colorado River*, 424 U.S. 800. Arizona also promised that it would apply federal law to those property rights protected by federal law, such as the federal reserved water rights of the United States, and assured this Court that it had the "expertise" and "administrative machinery available [in its] state courts" to manage and adjudicate the tens of thousands of water claims in Arizona in a unified, comprehensive, orderly, and expeditious adjudication. *See Arizona v. San Carlos*, 463 U.S. at 570.

This Court ultimately agreed with Arizona, ruling that the McCarran Amendment waived the sovereign immunity of the United States for the limited purposes of comprehensive stream adjudications, and therefore, Arizona could acquire "**concurrent**" jurisdiction over the United States in this "limited" setting. Although this Court reaffirmed that federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them", *see Arizona v. San Carlos*, 463 U.S. at 571, it nevertheless concluded that such "general propositions" could not control in the case, given the fact that a "water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute . . ." *Id.* Thus, this Court required that the federal courts **defer** to Arizona's general stream adjudication for the



adjudication of the Tribes' federally protected water rights, concluding that any other decision would be:

[I]nconsistent with the McCarran Amendment's policy of recognizing the availability of comprehensive state systems for adjudication of water rights as the means for conducting unified water proceedings, likely to generate additional litigation as a result of inconsistent dispositions of property, and permeated with state-law issues entirely tangential to any conceivable federal interest.<sup>29</sup>

Also paramount in the Court's reasoning, was its strong concern that concurrent federal proceedings would almost certainly result in "piecemeal litigation" which was likely to be:

[D]uplicative and wasteful, generating 'additional litigation through permitting inconsistent dispositions of property' and that since a judgment by either court would ordinarily be *res judicata* in the other, the existence of such concurrent proceedings creates the serious potential for spawning an unseemly and destructive race to see which forum can resolve the same issue first – a race contrary to the entire spirit of the McCarran Amendment and prejudicial, to say the least, to the possibility of reasoned decisionmaking by either forum.<sup>30</sup>

Such a result, this Court opined, was the "very mischief that our decision in *Colorado River* sought to avoid." *Id.* at 564.

Finally, this Court admonished that "state courts, as much as federal courts, have a solemn obligation to follow federal law . . . [and] any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought before this Court, a particularized and exacting scrutiny

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29. *Id.* at 566 (quoting *Colorado River*, 424 U.S. at 819-820) (internal quotation marks and brackets omitted).

30. *Id.* at 567 (quoting *Colorado River*, 424 U.S. at 819) (internal citations omitted).

commensurate with the powerful federal interest in safeguarding those rights from state encroachment.” *Id* at 571.

Twenty three years after this Court’s decision in *Arizona v. San Carlos*, the Apache Tribe is before the Court to request its protection from the decision of the Arizona Supreme Court below which, if allowed to stand, will unravel the very purpose and reasoning behind this Court’s decision in *Arizona v. San Carlos*.

**2. The Arizona Supreme Court’s Application of General Principles of Comity In This McCarran Amendment Proceeding Is the Antithesis of this Court’s Rationale in *Arizona v. San Carlos***

The Arizona Supreme Court’s reliance on general principles of comity to require the Apache Tribe to present its defense to the application of *res judicata* in the federal court which has continuing enforcement jurisdiction over the *Globe Equity Decree*, instead of in the state Adjudication where the affirmative defense of *res judicata* was raised, is irreconcilable with the rationale expressed by this Court in *Arizona v. San Carlos*. Indeed, since this Court has determined that the policies of the McCarran Amendment and concerns over “piecemeal litigation” should be elevated above the general, but strong, proposition that federal courts have a “virtually unflagging obligation” to exercise the jurisdiction given them, *see id.* at 569-571, this Court most certainly should not countenance the use of general principles of “comity”, as expressed by the Arizona Supreme Court in the decision below, to trump today the very same policies or create the same concerns this Court sought to avoid in 1983 in *Arizona v. San Carlos*.

There are dozens of matters involving streams in Arizona and throughout the west where the United States may have appeared at some time in the past, whether as trustee for an Indian Tribe or in some other capacity. The danger of state courts applying comity in these situations is very real, for such an application will undoubtedly send countless parties back to the court in which the United States originally appeared to resolve

any outstanding issues regarding such representation. This is especially true for Indian Tribes throughout the west, who almost always are alleged (whether rightly or wrongly) to have been “represented” by the United States in many different proceedings involving their federally protected water rights.

If the Arizona Supreme Court’s decision on comity is allowed to stand, it would leave opposing claimants free to argue (without challenge) and in violation of Constitutional protections of due process, that if the United States appeared at all, it was required to bring all claims that it could have brought at the time, and if it did not, tough luck, **regardless** of the intent or the quality of representation by the United States. Such a result would eviscerate the policy of comprehensive and unified proceedings anticipated by Congress in the passage of the McCarran Amendment.

This Court directed the Tribe towards the Arizona’s stream adjudication by holding that the United States **must** file its claims on behalf of the Apache Tribe in Arizona’s state Adjudication Court. Having asked for and received these claims, the Adjudication Court **should** be required to resolve all questions necessary for the adjudication of these claims, as well as any possible affirmative defenses presented in response to such claims, like *res judicata*, and it may not simply ignore any corresponding **defenses** raised in response to such affirmative defenses, including the Tribe’s challenge to privity.

Finally, and perhaps more fundamentally, to employ the “tool” of comity to prevent the Tribe from proving its rights to the mainstream of the Gila River defeats the very purpose behind the Apache Reservation, because, without the waters of the Gila River mainstream, the Tribe will be unable to support itself in its “permanent tribal homeland” as anticipated by this Court in *Winters*. As the Court was reminded by the dissent in *Arizona v. San Carlos*, “[t]his court has repeatedly recognized that the Government, when it created each Indian reservation, intended to deal fairly with the Indians by reserving for them the waters

without which their lands would have been useless.” 463 U.S. at 573 (internal quotations omitted).

**B. The Question of Whether Comity May Be Used to Bar An Indian Tribe From Presenting a Defense to *Res Judicata* in a State General Stream Adjudication Is an Important Question of Law of Constitutional Magnitude Which Should be Decided by This Court**

The decision below prohibited the Apache Tribe from proving its defenses to *res judicata* in the General Adjudication. *See Gila VI*, 127 P.3d at 898. As a result, the Tribe has never been given the opportunity at any level of the Gila River Adjudication, whether before the Special Master, in the Superior Court, or in the Arizona Supreme Court, to argue that the affirmative defense of *res judicata* cannot bar the Tribe’s claims to the mainstream of the Gila River, because there was no “privity” between the United States and the Tribe in *Globe Equity* under any principle of equity, or within the meaning of *Restatement (Second) Judgments*, § 42(1)(e) (App. 121a).<sup>31</sup>

The Apache Tribe has not uncovered a single case in which this Court has ruled that the defense of inadequate representation is **unavailable** as a matter of law in cases involving Indian water rights claims presented in state general stream adjudications.<sup>32</sup>

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31. The defense of inadequate representation as set forth in § 42(1)(e), provides, in relevant part:

A person is not bound by a judgment for or against a party who purports to represent him if: [ ]The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent. (Emphasis added).

32 This Court also did not consider or rule against the viability of the legal defense of inadequate representation in *Nevada v. United States*, 463 U.S. 110 (1983), which is a case often cited for principles of *res judicata* in matters involving federally protected Indian water rights. While the defense of inadequate representation was raised in a 43-day

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The contrary, this Court assumed the **viability** of the inadequate representation defense in *Arizona v. California*, 460 U.S. 605 (1983) (“*Arizona II*”), when it analyzed the argument made by a number of Indian Tribes on the Colorado River that the United States had inadequately represented the Colorado River Tribes when it secured over 782,000 acre feet of water rights to the Colorado River for the Tribes in the *Arizona v. California Decree*. See 460 U.S. at 627-28.

Although this Court ultimately determined, as a **factual matter**, that the Colorado River Tribes had failed to demonstrate inadequate representation, the Court nevertheless acknowledged the defense of inadequate representation as viable under the law, and examined each of the legal elements of this defense in light of the factual record below. *Id.*<sup>33</sup>

The new “rule” of law established by the Arizona Supreme Court in the decision below, however, elevates general principles of comity above the Constitutional protections of due process and equal protection guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution (App. 284a-285a), and breaks Arizona’s promise that “Indian interests [can] be satisfactorily protected under regimes of state law . . . .” in Arizona’s stream adjudication. See *Arizona v. San Carlos*, 463 U.S. at 551 (quoting *Colorado River*, 424 U.S. at 812-813).

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trial before the trial court and was argued and rejected as a **factual matter** on appeal to the Ninth Circuit, see *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1295 (9<sup>th</sup> Cir. 1981), *modified* at 666 F.2d 351 (9<sup>th</sup> Cir. 1982), the viability of the legal defense of inadequate representation was **not** one of the issues raised on appeal and considered by this Court in *Nevada*.

33. Following an examination of the facts in the record, the Court found that the United States had obtained “substantial water allocations” on the Colorado River for the Tribes in the *Arizona v. California Decree*, and that this demonstrated the “competency of the United States’ representation . . . .” of the Tribes. *Arizona II*, 460 U.S. at 628 & 628 n.20.

In *Hansberry v. Lee*, 311 U.S. 32, 37 (1940), this Court ruled that it violates the Due Process Clauses of the Fifth and Fourteenth Amendment to the U.S. Constitution to bind litigants to a judgment rendered in an earlier litigation to which they were not parties and in which they were not **adequately** represented. This holding has been reiterated in subsequent rulings by this Court. *See, e.g., Richards v. Jefferson County*, 517 U.S. 793 (1996). In addition, in *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475-476 (1918), a decision which precedes *Hansberry v. Lee* by several decades, this Court warned that “extreme applications of *res judicata* may be inconsistent with a federal right that is ‘fundamental in character’”, explaining that:

The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.

*Newport*, 247 U.S. at 476 (internal citations omitted). Discussing the requirement of privity in *Jefferson County*, this Court observed “[t]his rule is part of our ‘deep-rooted historic tradition that **everyone should have his own day in court.**’” 517 U.S. at 799 (emphasis added) (quoting 18 C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure* § 4449, p417 (1981)).

The Apache Tribe has never had its “own day in court”, whether to adjudicate its federal reserved, aboriginal, and other

water rights claims to the Gila River mainstream, or to present its defenses to *res judicata* in a trial on the merits. The ruling below, therefore, compounds the initial violation of due process visited on the Tribe through the inadequate representation of the Tribe by the United States in *Globe Equity*, with a new violation of due process, stemming from the ruling below, wherein the Arizona Supreme Court refused to allow the Apache Tribe to prove its defenses to *res judicata* in the Gila River Adjudication, despite the fact that it was in this proceeding that the affirmative defense was raised by the Tribe's opponents.

The Apache People are also entitled to equal protection under the law. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976). The Apache Reservation is comprised of almost 2 million acres. While the Reservation is arid and hot, and often devoid of any meaningful rainfall, over these lands flow the waters of the Gila River; and while the Gila River is beyond a doubt the single most important source of water on the Reservation, the Apaches are prohibited by the decision below from even taking a drink from the Gila River mainstream as it flows on their Reservation. Instead, for approximately 1,500,000 acres in the Gila River drainage, the Tribe is entitled to use water for no more than 1,000 acres of land, because (according to the decision below), this is the water right described for the Tribe in the *Globe Equity Decree*.

Non-Indian farmers, local towns, mining companies and businesses, among other non-Indian interests are **not** bound by the same restrictions. While these non-Indians have lands on the Gila River for which **specific water** rights are described in the *Globe Equity Decree*, just like the Apache Tribe, and while many of these non-Indians **also** own additional lands on Gila River which **do not** have water rights described in the *Decree*, the non-Indians are permitted to claim in the Adjudication (and continue to divert and use) as much of the waters of the Gila River mainstream for these additional non-Decreed lands as they think they can "beneficially use" under Arizona law. The Apache Tribe is not.

Such unequal treatment under the law in Arizona's stream adjudication violates equal protection which is guaranteed to all persons under the U.S. Constitution.<sup>34</sup>

**C. Arizona Has Broken its Promise to this Court, the United States, and the Tribes, that Indian Water Rights in Arizona Will Be Adjudicated in a Fair and Comprehensive Manner**

Since this Court's decision in *Arizona v. San Carlos* in 1983, the State has done little to fulfill its promise of conducting a fair, expeditious, and comprehensive general adjudication of Indian water rights in Arizona. The hard fact is that not a single non-Indian water right has been adjudicated over the last 23 years.

At the outset of the Adjudication, however, the future of the Adjudication seemed not without hope. The non-Indian rights were joined with the rights of the Apache Tribe and those of the United States in the same sub-watershed for *inter sese* adjudication, and the Tribe participated actively and successfully in cases before the Special Master, the Superior Court, and the Arizona Supreme Court to establish the fundamental rules and law by which the adjudication would proceed.<sup>35</sup>

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34. As explained at Section F, *infra.*, Arizona has failed to fulfill its promises of conducting a "comprehensive" general stream adjudication in which the rights of all claimants, Indian or non-Indian, are adjudicated *inter sese*. Instead, Arizona has chosen to single out only Indian rights for adjudication. This too violates equal protection. Moreover, the Tribe's unequal treatment in the Adjudication should be reviewed under standards of "strict scrutiny" given the Apaches' position as a "suspect class" under the law.

35. *See, e.g., Gila III*, 989 P.2d 739 (holding that the federal reserved water rights doctrine applies to groundwater as well as appropriable surface water, and that groundwater necessary to satisfy these federal reserved water rights is entitled to greater protection than state based rights); *Gila V*, 35 P.3d 68 (holding that federal reserved water rights encompass all water necessary to preserve Indian tribes in



The Hydrographic Survey Report ("HSR") for the San Pedro River was published on November 11, 1991. The HSR contained a Watershed File Report for each federal and state claim in the San Pedro sub-watershed. Objections to any claim required specific reference to the applicable state or federal laws, and required verification by the attorney for the party filing the objection.

On May 4, 1993, the Tribe, along with several other parties, filed several hundred objections to the claims presented. In order to resolve these objections, the Court established several contested cases with discovery and trial dates. The Tribe participated and substantially prevailed in these cases.

One contested case, W1-11-1676, was set for trial on April 4, 1995. Unknown to the Tribes and the United States, however, the state parties, including ADWR, drafted legislation to reverse previous decisions of the Adjudication Court favorable to the Tribe, as well as to "cure" the defects to the non-Indian claims illuminated in by the Objections filed in the San Pedro HSR, and to legislatively "adjudicate" substantially all of the non-Indian rights. On March 17, 1995, the Legislature passed H.B. 2276 and it was immediately signed by the Governor under an emergency clause which made it effective in 30 days. Shortly thereafter, the Adjudication Court stayed the trial in W1-11-1176, because it appeared from the "new law" that the Legislature had resolved the objections by simply changing all the laws upon which they were based.

On April 14, 1995, the Apache Tribes filed a Petition for Special Action with the Arizona Supreme Court requesting that it stay the implementation of H.B. 2276 and declare its provisions unconstitutional. The Arizona Supreme Court accepted the Tribes' Petition, but in May 1995, in what can only

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their permanent tribal homelands both now and in the future, and that in order to quantify such rights the adjudication court should examine a myriad of factors and not just the extent of practically irrigable acreage or "PIA" found on the reservations).

be described as a punitive reaction to the Tribes' previous and valid objections to non-Indian claims, the Arizona Legislature singled out federal and Indian claims for early adjudication, declaring that "an early focus by the general stream adjudication courts" should be "the trial of Indian and non-Indian federal water claims." See *Gila VI*, 127 P.3d at 886 (quoting 1995 Ariz. Sess. Laws, Ch. 9, § 25(c)). In the meantime, while the Tribe's Special Action challenging HB 2276 was pending before the Arizona Supreme Court, the State Legislature in 1995 drastically cut funding for any efforts by ADWR involving the adjudication of non-Indian claims, and today the funding for Arizona's stream adjudication has dwindled to less than a trickle.<sup>36</sup>

On January 23, 1999, the Arizona Supreme Court struck down substantially all of H.B. 2276 on various constitutional grounds. See *San Carlos Apache Tribe, et al., v. Superior Court of Arizona*, 972 P.2d 179 (1999)

On August 24, 1999, the Adjudication Court (App. 282a) invited opposing water rights claimants to file motions for

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36. See May 19, 2006, *Report of the Special Master In the Little Colorado Adjudication Concerning Funding of the Arizona Department of Water Resources* (Supp. App. 37); see also *Arizona Department of Water Resources Status Report in the Gila River Adjudication*, dated January 13, 2006, stating in part:

Since ADWR began working on the adjudications in the 1980s, ADWR's budget has been severely reduced. **In the mid-1990s, while legal issues were being addressed in each of the adjudications, ADWR's staffing level was reduced substantially.** When proceedings resumed, ADWR was experiencing department-wide budget constraints, some which were the result of significant shortfalls in state revenues \* \* \* The overall lack of revenues through fiscal year 2006 affected the level of resources available for ADWR for the technical and administrative support to the Gila And LCR adjudications. Although state revenues have begun to recover . . . **ADWR has not been able to obtain additional adjudication resources, and at this time appears to have lost overall resources for FY07.** (Supp. App. 20) (emphasis added).

summary judgment challenging the water rights claims made, *inter alia*, by and for the Apache Tribe, citing the purported “preclusive” effect of the federal *Globe Equity Decree*. With no risk to their own claims, which had been on hold for four years, the non-Indian parties eagerly accepted the Court’s invitation, raising the affirmative defense of *res judicata* and urging the Adjudication Court to refuse to hear any evidence of the Tribe’s claims for water originating on and flowing through the Reservation in the mainstream of the Gila River and its tributaries. They also urged the Court to refuse to hear any defenses of the Tribe to *res judicata*. The rulings of the Adjudication Court on this issues are what eventually gave rise to the Petition currently before this Court.

The Arizona’s stream adjudication has simply come to this. Arizona has ceased to fund the “expertise and administrative machinery available to the state courts” necessary to adjudicate any non-Indian water rights claim. *See Arizona v. San Carlos*, 463 U.S. at 570. Arizona cannot use the McCarran Amendment and the facade of “comprehensive” general adjudication as a ruse to adjudicate only the Indian rights. This would be the very antithesis of this Court’s rulings.

### CONCLUSION

For the foregoing reasons, the San Carlos Apache Tribe respectfully requests that this Court grant its Petition and issue a writ of certiorari as to Issue 1 and Issue 2 to the Arizona Supreme Court on the decision below.

Respectfully submitted,

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