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

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

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

DESCRIPTIVE SUMMARY: The Special Master submits his second report to the Superior Court on motions for summary judgment filed in this contested case. These motions are as follows: (1) Motion for Partial Summary Judgment re Preclusive Effect of Decision in Claims Court Docket No. 228 on Gila River Indian Community's Claims, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 209 & 210); (2) Motion for Partial Summary Judgment re Preclusive Effect of *Haggard Decree*, Court of Claims Docket No. 236-D, and 1936 Maricopa Contract on Gila River Indian Community's Claims to Waters of the Salt River, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 213 & 214); (3) Motion for Partial Summary Judgment re Preclusive Effect of 1907 Sacaton Agreement, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 211 & 212); and (4) Motion for Partial Summary Judgment re Preclusive Effect of Buckeye-Arlington Agreements and Claims Court Docket No. 236-F on Gila River Indian Community's Claims, filed by the Salt River Project, City of Tempe, Buckeye Irrigation District, and Arlington Canal Co. (Oct. 4, 1999) (Docket Nos. 224 & 225). The report includes findings of fact, conclusions of law, recommendations, proposed order, and a motion that the proposed order be entered by the Court. **Objections** to the Special Master's report must be filed by **February 9, 2001**, and **responses by March 2, 2001**. The hearing on any objections

will be held at a time and place to be ordered by the assigned judge for the Gila River adjudication.

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SECOND REPORT OF THE SPECIAL MASTER
Contested Case No. W1-203
In re the Water Rights of the Gila River Indian Community
Motions for Summary Judgment
Heard on August 8, 2000

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I. INTRODUCTION

The motions determined here are among a series of motions for partial summary judgment arguing that certain past proceedings and contracts now preclude or limit the water right claims of the Gila River Indian Community ("Community" or "Indian Community"), and of the United States in the Community's behalf, in the Gila River general stream adjudication. The claims of the Community and the United States have been organized into a subsidiary unit of the Gila River adjudication, *In re the Water Rights of the Gila River Indian Community*, Contested Case No. W1-203. The background of those claims is set forth in my first report in this contested case, which addressed the first round of motions for summary judgment. Report of the Special Master 4-10 (June 30, 2000) ("*Globe Equity* Report"). The proceedings in this case are unfolding progressively, as also described in my first report. *Id.* This series of motions for summary judgment was referred to me by the Honorable Susan R. Bolton, assigned Superior Court judge for the Gila River adjudication. Minute Entry (July 14, 2000). The individual motions are as follows:

1. Motion for Partial Summary Judgment re Preclusive Effect of Decision in Claims Court Docket No. 228 on Gila River Indian Community's

Claims, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 209 & 210).

2. Motion for Partial Summary Judgment re Preclusive Effect of *Haggard Decree*, Court of Claims Docket No. 236-D, and 1936 Maricopa Contract on Gila River Indian Community's Claims to Waters of the Salt River, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 213 & 214).

3. Motion for Partial Summary Judgment re Preclusive Effect of 1907 Sacaton Agreement, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 211 & 212).

4. Motion for Partial Summary Judgment re Preclusive Effect of Buckeye-Arlington Agreements and Claims Court Docket No. 236-F on Gila River Indian Community's Claims, filed by the Salt River Project, City of Tempe, Buckeye Irrigation District, and Arlington Canal Co. (Oct. 4, 1999) (Docket Nos. 224 & 225).

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

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II. PRECLUSIVE EFFECT OF CLAIMS COURT DOCKET NO. 228

Motion for Partial Summary Judgment re Preclusive Effect of Decision in Claims Court Docket No. 228 on Gila River Indian Community's Claims, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 209 & 210).

A. Background

The Salt River Project ("SRP")[1] and others have moved for partial summary judgment on the proposition that previous proceedings brought by the Gila River Indian Community (comprised of Pima and Maricopa Indians) under the Indian Claims Commission Act, Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049-1056, limit the Community's water right claims in this adjudication. The Indian Claims Commission Act allowed Indian tribes to assert monetary claims against the federal government, otherwise barred by sovereign immunity, arising before passage of the act in 1946 and based on treaty or contractual violations, legal and equitable claims, land confiscation, and other "claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity." *Id.* § 70a; *see generally* H.D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION (1990); IMRE SUTTON (ed.), IRREDEEMABLE AMERICA (1985); Note, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359 (1973). While the Indian Claims Commission ("commission" or "claims commission") was expected to

[1] "Salt River Project" or "Project" are used interchangeably with "Salt River Valley Water Users Ass'n" or "SRVWUA."

complete its work within five years, Congress terminated the commission in 1978 and transferred its unfinished work to the U.S. Court of Claims.[2]

In 1951, the Gila River Indian Community filed its claims under the act. One set of claims was denominated as Docket 228 and asserted the Community's allegations that its aboriginal territory had been taken, without compensation, by the United States.

The Indian Claims Commission divided Docket 228 into three phases to determine in progressive fashion the validity of the aboriginal title of the Pima and Maricopa Indians, the date upon which the United States extinguished title, and the value of the lands involved. Most of the proceedings, including a trial on the value issue, occurred between 1962 and 1978 when the commission's statutory authorization lapsed. The unfinished proceedings were transferred to the U.S. Court of Claims for completion. Utilizing the record before him, Judge Kenneth R. Harkins of the claims court issued his decision in 1982, *Gila River Pima-Maricopa Indian Community v. United States*, 2 Cl. Ct. 12 (1982), which was modified by the U.S. Court of Appeals for the Federal Circuit. *See* Decision, *Gila River Indian Community v. United States*, Docket No. 228, Appeal No. 83-1108 (Apr. 12, 1984) (OSM No. 109)[3]; Decision, *Gila River Indian Community v. United States*, Docket

[2] The Court of Claims itself has undergone several transformations. The U.S. Court of Claims was renamed in 1982 as the U.S. Claims Court. It was again renamed in 1992 as the U.S. Court of Federal Claims. In this report, "claims commission proceedings," or similar words, refer both to proceedings actually before the Indian Claims Commission and the U.S. Court of Claims (and its subsequent transformations) after the commission was terminated.

[3] The "OSM No." designation refers to documents submitted to the Office of the Special Master during disclosure by the parties. The full serial number is "OSM No. W1-203-109."

No. 228 (Feb. 22, 1985) (OSM No. 9289). Ultimately, the Gila River Indian Community was awarded almost $6.3 million for the uncompensated taking of agricultural, grazing, township, and mining lands. 2 Cl. Ct. at 32.

Specifically, the award included $3.6 million for the extinguishment of 375,000 acres of agricultural land, valued at $9.75 per acre. Evidence concerning regional water supply and the value of irrigated land was introduced at trial, and Judge Harkins determined the per-acre land value as "inclusive of water rights." *Id.* at 12, 32.

The Salt River Project asserts that these proceedings under the Indian Claims Commission Act estop the Community from making any additional water right claims in this adjudication, other than water the Community is entitled to under the *Globe Equity Decree*, *see Globe Equity* Report, and the *Haggard Decree*. *See* discussion, *infra* at 33-45. Because of these earlier proceedings, according to SRP, the Community has been compensated for its former water rights and cannot assert them again here. Under the legal doctrines of judicial estoppel, collateral estoppel, and quasi-estoppel, SRP maintains that the Community is precluded from doing so.

B. Judicial Estoppel

The proceedings under the Indian Claims Commission Act resulted in findings of fact that the Pima and Maricopa Indians occupied an aboriginal territory of 3,751,000 acres of land in the vicinity of present-day Phoenix. After deducting the acreage of the present-day reservations for these Indians, an award area of 3,312,858 acres of extinguished aboriginal land was recognized. The extinguishment date for the award areas was determined to be November 15, 1883, the date of the last major

addition to the Gila River Indian Reservation, which was initially established in 1859.

During the valuation phase of the case, evidence was received from a total of nine expert witnesses for the Community and the United States. The Community's experts offered reports discussing the water available to the award area under undeveloped (virgin) water flow conditions and other hypothetical scenarios based on the assumption of two additional storage reservoirs in the system. Under virgin flow conditions, the Community's experts estimated that 2,271,900 acre-feet of water per year (ac-ft/yr) would be available to the award area lands. The Community's experts did not deduct from this estimate any of the water being used or expected to be used on the Gila River Indian Reservation itself. Because the Community essentially applied all available regional water to the award area, which supported the $3.6 million award for agricultural land, SRP now maintains that the Community was compensated for all this water. In SRP's view, these rights have essentially been purchased by the United States as the result of the Indian Claims Commission Act proceedings and they cannot be asserted anew in this adjudication.

The Salt River Project argues that the Community is barred by judicial estoppel from asserting water right claims in this adjudication. The essence of SRP's position is:

> GRIC's argument that the entire flow of the rivers in central Arizona was available to lands outside the Reservation as of November 15, 1883, is directly contrary to any legal argument that the United States reserved waters for the Reservation in 1859, 1876, 1879, 1882, or 1883. If the United States had, as a matter of fact, reserved water for the Reservation on any of those dates, the entire flow of the rivers would

> not have been available for lands outside the Reservation as of November 15, 1883.

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Judicial estoppel prevents persons from taking inconsistent positions in separate judicial proceedings. Two reasons are usually given as the basis of the doctrine: (1) the estoppel protects the sanctity of the oath given by parties and witnesses in testimony and documents; and (2) the estoppel protects the integrity of the judicial process, in the eyes of the litigants and the public, by preventing inconsistent judicial determinations. Comment, *Precluding Inconsistent Statements, The Doctrine of Judicial Estoppel*, 80 NW. U. L. REV. 1244, 1250-54 (1986). Jurisdictions that emphasize the sanctity of the oath have developed an absolute judicial estoppel rule that bars inconsistent assertions, whether or not they were relied upon by a court. Jurisdictions that seek to protect the integrity of the judicial process have developed judicial estoppel rules that require that the first assertion actually had influenced the judicial decisionmaking process. *Id.* at 1252-53.

Judicial estoppel is also to be distinguished from other forms of estoppel, such as collateral estoppel or equitable estoppel (estoppel *in pais*). Both of these doctrines apply to the relationship between litigants. Judicial estoppel, by comparison, involves the relationship between the litigant or witness and the court in its fact-finding capacity. *Id.* As the U.S. Supreme Court has stated, "tampering with the administration of justice . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot be tolerated consistently with the good order of

society." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, *reh'g denied*, 322 U.S. 772 (1944) (false representation to the court).

The Arizona Supreme Court recognizes three requirements for judicial estoppel in civil or criminal cases in our state: (1) the same parties must be involved in both proceedings; (2) the same question must be involved in both proceedings; and (3) the party asserting the inconsistent position must have been successful in the first action. *State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996) (Feldman, C.J.) (state's inconsistent use of same testimony not barred). Under the explicit requirements of this decision, SRP cannot invoke judicial estoppel here because it was not a party to the proceedings under the Indian Claims Commission Act.

Most other Arizona appellate cases are in accord with the supreme court's formulation of the judicial estoppel doctrine. *See, e.g., Sailes v. Jones*, 17 Ariz. App. 593, 598, 499 P.2d 721, 726 (App. Div. 1 1972). Many of these cases (including *Towery* itself) are better described as equitable estoppel, rather than judicial estoppel, cases since they focus on fairness in the relationship between parties. Because it is a relationship-based doctrine, equitable estoppel usually requires the same parties in both actions, one party's detrimental reliance on the opponent's prior position, and the possibility of prejudice now if the opponent is allowed to change its position.

The Arizona Court of Appeals, Division 1, has recognized the more appropriate formulation of the judicial estoppel doctrine in *Mecham v. City of Glendale*, 15 Ariz. App. 402, 489 P.2d 65 (App. Div. 1 1971). The Mechams successfully sued their vendor for failing to dedicate a right-of-way to the city.

Thereafter, the Mechams sued the city arguing that the right-of-way was valid. While the parties were not the same, the court used judicial estoppel to prevent a second suit that could have diminished judicial integrity by allowing conflicting determinations.

The *Mecham* decision appropriately anchors judicial estoppel on the integrity of the judicial fact-finding process, rather than on the impacts on other litigants which may be addressed by other forms of estoppel. This formulation of the judicial estoppel doctrine advances the same purpose behind Rule 11, ARIZ. R. CIV. P., in requiring truthfulness when verifying pleadings. Since both the Arizona Supreme Court in *Towery*, and more recently, the Court of Appeals in *Bank of America v. Maricopa County*, 196 Ariz. 173, 993 P.2d 1137 (App. Div. 1 1999), have so clearly stated the "same person" requirement, I am unable to apply the judicial estoppel doctrine where, as here, the same parties are not present in consecutive litigation.

C. Quasi-Estoppel Doctrine

The Salt River Project also argues that the Community's claims in this adjudication should be barred under the doctrine of quasi-estoppel. The doctrine has been described as precluding a "party from asserting a claim inconsistent with a position previously taken by him . . . where it would be unconscionable to permit a person to maintain a position inconsistent with one in which he acquiesced or one in which he accepted a benefit." *Sailes v. Jones*, 17 Ariz. App. 593, 597, 499 P.2d 721, 725 (App. Div. 1 1972) (citations omitted); *see also Unruh v. Industrial Comm'n*, 81 Ariz. 118, 301 P.2d 1029 (1956). Another party does not have to rely on the inconsistency, *Sailes*, 17 Ariz. App. at 597, n. 1, 499 P.2d at 725 n. 1, but the person

making the representation must have done so with full knowledge of the facts. *Donaldson v. LeNore*, 112 Ariz. 199, 202, 540 P.2d 671, 674 (1975).

The Project maintains that:

> GRIC already has been compensated for 378,760 acres of land outside the Reservation on the basis that those lands had an available water supply. It would be manifestly unjust for GRIC, having accepted compensation for water rights for those 378,760 acres, to be allowed to argue that those lands do not have water rights or that they have water rights that are inferior to those for the Reservation lands.

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The Community's proceedings before the Indian Claims Commission were in pursuit of a monetary remedy, under specific legislation, for the alleged unfair treatment of the Pima and Maricopa Indians by the United States. The action for extinguishment of aboriginal title was similar to an inverse condemnation action where the landowner seeks to prove monetary damages based on the value of the property. The Indian Claims Commission frequently used the "highest and best use," fair market value approach:

> "Market price is the highest price estimated in terms of money which land will bring if exposed for sale in the open market with a reasonable time allowed to find a purchaser buying with knowledge of *all the uses and purposes to which it is best adapted and for which it is capable of being used.*"

Osage Nation of Indians v. United States, 3 Ind. Cl. Comm'n 231, 236 (1954) (emphasis added; quoting *Sacramento S.R.R. v. Heilbron*, 156 Cal. 408 (1909)).

While the availability of water entered into the valuation question of the Gila River Indian Community's aboriginal lands, the claims commission proceeding did not directly involve the ownership of or title to water rights.

The valuation of a land claim, utilizing available water as one aspect of value, is different from asserting a claim of ownership or title to the water itself. Also, the facts are uncertain and disputed as to whether the Community and its attorneys and experts, at the time of the claims commission proceedings, had full knowledge of how their valuation claim for aboriginal lands, which included several water supply scenarios, might relate to the water rights claimed for the reservation itself. Further, the facts mustered by SRP, while demonstrating inconsistencies and perhaps sloppy water accounting, do not rise to the level of unconscionability under the guiding Arizona cases. The Community's previous assertions may, however, be used to test the credibility of some of the Community's witnesses in the present proceeding. *See* ARIZ. R. EVID. 613 (impeachment by prior inconsistent statement).

Finally, SRP does not appear to assert the quasi-estoppel claim against the United States, and I do not believe such an assertion would be warranted. The United States, as the defendant before the commission, was not asserting a claim for relief and was not advancing the argument concerning available regional water.

D. <u>Collateral Estoppel</u>

Determinations under the Indian Claims Commission Act may be entitled to collateral estoppel in subsequent legal proceedings involving the tribe. Thus, in *Oglala Sioux Tribe v. Homestake Mining Co.*, 722 F.2d 1407 (8th Cir. 1983), the tribe's quiet title suit against a mining company was barred because the commission had previously awarded more than $106 million to the Sioux Tribes for the extinguishment of aboriginal title. *See also* discussion at pp. 53-37, *infra*. *Oglala* recites the four requirements of collateral estoppel: identical issues in both

proceedings; final judgment on the merits; the estopped party was a party or the privity of a party in the earlier litigation; and the estopped party had a full and fair opportunity to be heard. *Id.* 1413. The only question here is whether both proceedings considered an identical issue, since the Gila River Indian Community was a party before the claims commission, had a full and fair opportunity to be heard, and those proceedings produced final judgments on the merits. *See United States v. Dann,* 470 U.S. 39, 47 (1985); *see also Globe Equity* Report at 59-63.

The Community's cause of action before the Indian Claims Commission raised issues different from those being asserted in this general stream adjudication by the Community and the United States in its behalf. In the claims commission proceedings, the Community asserted a statutory monetary remedy for the extinguishment of the Indians' aboriginal title to land in the Gila-Salt River valleys. While water was discussed, it was raised as an aspect of land value. The issue of ownership or title to the water was never joined or decided as an issue.[4] In this adjudication, the Community's cause of action is for recognition of the Community's water rights and their characteristics.

The commission and claims court considered available water supply in the Gila-Salt River valleys. The Community's experts even estimated agricultural lands on the assumption that the entire regional water supply would be available to the taken, aboriginal lands. This evidence still does not support a conclusion that legal title to the Community's water rights was adjudicated or determined in the claims

[4] Also, the claims commission proceedings were not in the nature of a general determination of title as discussed at pp. 53-57, *infra*.

commission proceedings. Nor was title or ownership of these water rights an issue actually or necessarily determined in calculating the award area or the value of that land. Indeed, as the United States rightfully points out, "Reserved water rights could not have been adjudicated in Docket No. 228 because the land at issue was the aboriginal territory of the Pima and Maricopa Indians, not the [reserved rights pertaining to] the GRIC Reservation." United States Response 8 (Apr. 24, 2000).

What the Community was required to prove in the claims commission proceeding (other than the actual extinguishment of title) was the value of the taking. The "highest and best" use standard was used in claims commission cases to estimate this value. *Cf. Tlingit & Haida Indians v. United States*, 389 F.2d 778, 783-84 (Ct. Cl. 1968) (decided under legislation specific to these tribes); *see also* discussion at p. 15, *supra*. The Community's experts appear to have used all the available regional water supply to estimate the maximum amount of acreage that would be susceptible to irrigated agriculture. These experts were attempting to prove the "highest and best use" of the land, not to make assertions on the ownership of the water rights that might be applied to the land. The final result, as the claims court notes, was "an estimated value." 2 Cl. Ct. at 28.

E. Findings of Fact

1. Finding of Fact No. 1. The Gila River Indian Reservation (the "reservation") was established in 1859. Act of Feb. 28, 1859, ch. 66 § 4; *see also Gila River Indian Community v. United States*, 695 F.2d 559, 560 (Fed. Cir. 1982) (OSM No. 7202). The reservation was enlarged in 1876, 1879, 1882, 1883, and several times

between 1910 and 1915. *See* Petition ¶ 26, at 6, *Gila River Indian Community v. United States*, Docket No. 228 (Aug. 8, 1951) (OSM Nos. 9163 & 9236 ("228 Petition").

2. Finding of Fact No. 2. On August 13, 1946, President Truman signed "An Act to Create an Indian Claims Commission, to provide for the powers, duties, and functions thereof, and for other purposes." 2 U.S.C. § 70a (1976). The commission was created to adjudicate and provide monetary damages for failures of the United States to engage in fair and honorable dealings with the various Indian tribes and for breach of the United States' fiduciary duty to its beneficiaries, the various Indian tribes. *See also Gila River Indian Community v. United States*, 2 Cl. Ct. 12, 14 n.3; E. Angel, *A History of Land and Water Use on the Gila River Indian Reservation* at 435 (Mar. 1999) ("Angel").

3. Finding of Fact No. 3. The 1946 act created a commission that would "receive claims for a period of five years after the date of the approval of this Act . . . ." This date, and the existence of the commission, was later extended. *See* Angel, *supra*, at 436.

4. Finding of Fact No. 4. In 1951, the Gila River Indian Community ("Community") Tribal Council authorized its attorney to present its claims to the Indian Claims Commission (the "commission"). The Community submitted claims to the commission covering numerous assertions. *See id.* at 437.

5. Finding of Fact No. 5. On August 8, 1951, the Community filed its petition with the commission relating to claims for the United States' taking of the aboriginal lands of the Pima and Maricopa Indians. These claims were designated as Docket No. 228 and included the claims of the Salt River Indian

Community and the Ak-Chin Indian Community. *See* 228 Petition, *supra*; *see also* *Gila River Indian Community v. United States*, 2 Cl. Ct. at 14; Angel, *supra*, at 437.

6. Finding of Fact No. 6. In its petition, the Community contended that the aboriginal lands of the Pima and Maricopa Indians in central Arizona were much larger than the lands that were included in the reservation. According to the petition, the aboriginal lands of these tribes included the area ranging from the Mohawk Mountains near Yuma on the west, the present-day Lake Pleasant on the north, just east of the present Mormon Flat Dam at Canyon Lake on the Salt River on the east, and the town of Picacho on the south. Attached to the petition was a map of these alleged aboriginal lands. *See* 228 Petition, *supra*, ¶ 22; *see also* Angel, *supra*, at 438-39. (The map was designated as Exhibit A to the petition and as Petitioner's Exhibit M-15 in the 228 trial.)

7. Finding of Fact No. 7. In its petition, the Community claimed damages for the taking of the aboriginal lands of the Pima and Maricopa Indians that were outside the boundaries of the present Gila River Indian Reservation, Salt River Indian Reservation, and Ak-Chin Indian Reservation. *See* 228 Petition, *supra*, ¶¶ 22, 28, 29; *see also* Angel, *supra*, at 438-39; *Gila River Indian Community v. United States*, 2 Cl. Ct. at 16 (noting that the reservation and certain other areas were excluded from the aboriginal area in calculating the damages award).

8. Finding of Fact No. 8. The only parties to Docket 228 were the United States, the Gila River Indian Community, the Salt River Indian Community, and the Ak-Chin Indian Community.

9. Finding of Fact No. 9. The proceedings in Docket No. 228 were divided into three phases: (1) the validity of aboriginal title held by the Pima and Maricopa Indians; (2) the date upon which the United States extinguished that aboriginal title; and (3) valuation of the lands for which title was extinguished. These three phases are referred to herein as Phase 1, Phase 2, and Phase 3.

10. Finding of Fact No. 10. Following a trial on Phase 1 in July 1962, the commission issued its Findings of Fact and Opinion for Phase 1 on December 17, 1970. *See* Findings of Fact and Opinion, *Gila River Indian Community v. United States*, Docket No. 228 (Dec. 17, 1970) (OSM No. 103); *see also* Angel, *supra*, at 441. The commission found that the Pimas and Maricopas "exclusively used and occupied" lands within an area stretching from the present town of Gila Bend to the confluence of the Salt and Verde Rivers:

> Commencing at the town of Gila Bend, Arizona; thence northwesterly in a straight line to the peak of Face Mountain; thence northeasterly in a straight line to the town of Wintersburg; thence northeasterly in a straight line to the northernmost edge of the White Tank Mountains; thence northeasterly in a straight line to the most southern edge of Lake Pleasant; thence southeasterly in a straight line to the juncture of the Salt and Verde Rivers; thence southeasterly in a straight line to Dromedary Peak; thence southerly in a straight line to the town of Price on the Gila River; thence south-southeasterly in a straight line to the peak of Black Mountain; thence west-southwesterly in a straight line to the town of Redrock; thence west-northwesterly in a straight line to Picacho Peak; thence west-northwesterly in a straight line to the northernmost northeast corner of the Papago Indian Reservation; thence west along the northern border of that reservation to its northwest corner; thence west to the peak of Table Top Mountain; thence west-northwesterly through Lost Horse Tank to the point of beginning at Gila Bend.

Gila River Indian Community v. United States, 2 Cl. Ct. at 26 n.9 (quoting the commission's Finding of Fact No. 23). This tract contained 3,751,000 acres and

comprised an area "about 175 miles in the east-west direction and 100 miles in the north-south direction." *Id.* at 16; *see also* Angel, *supra*, at 442.

11. Finding of Fact No. 11. For purposes of calculating the damages award, the claims court deducted 438,142 acres from the 3,751,000 acres of aboriginal land to arrive at an "award area" of 3,312,858 acres. *Gila River Indian Community v. United States*, 2 Cl. Ct. at 16. The 438,142-acre reduction included the Gila River Indian Reservation, the Salt River Indian Reservation, the Ak-Chin Indian Reservation, and eighty other miscellaneous acres. *Id.*

12. Finding of Fact No. 12. The commission concluded that the Pimas and Maricopas held aboriginal title to the lands described in its Finding of Fact No. 23. *See* Angel, *supra*, at 442.

13. Finding of Fact No. 13. In Phase 2, the commission proceedings then addressed the date of extinguishment of the Pimas' and Maricopas' aboriginal title. On January 20, 1972, the commission found that the date of taking was "November 15, 1883, for those lands which had not been entered by white settlers before that point in time." *See* Opinion of the Commission, at 15, *Gila River Indian Community v. United States*, Docket No. 228 (Jan. 20, 1972) (OSM No. 104); *see also* Angel, *supra*, at 443. While the extinguishment date was earlier for certain homesteaded lands, the parties agreed to use the 1883 date for the convenience of valuation. This 1883 date coincided with one of the executive orders that enlarged the reservation. "The Commission's determination that November 15, 1883 was the date of taking was based on the finding that enlargement of the Gila River Indian Reservation 'manifested the Government's intention to assert dominion over the

entire subject tract.'" *Gila River Indian Community v. United States*, 2 Cl. Ct. at 27 (*quoting Gila River Indian Community v. United States*, 24 Ind. Cl. Comm. 301, 336 (Dec. 17, 1970)).

14. Finding of Fact No. 14. The Community and the United States appealed the commission's decision on the date of extinguishment of aboriginal title. *Gila River Indian Community v. United States*, 494 F.2d 1386 (Cl. Ct. 1974) (OSM No. 9269). The claims court affirmed the commission's Phase 2 finding that November 15, 1883, was the date of extinguishment. *Id.*

15. Finding of Fact No. 15. In July 1976, the Community and the United States presented evidence and argument to the commission regarding Phase 3, the valuation of the award area as of 1883. *See Gila River Indian Community v. United States*, 2 Cl. Ct. at 15; *see also* Angel, *supra*, at 444-45.

16. Finding of Fact No. 16. The experts' written reports were admitted during the trial as the witness' direct testimony, with the bulk of the questioning focusing on cross-examination by opposing counsel. *See* Transcript of Trial at I-4, *Gila River Indian Community v. United States*, Docket No. 228 (July 19, 1976) (OSM No. 9274) (discussion by Commissioner Yarborough). The Community's primary witness in Phase 3 was William S. Gookin, Sr., who, along with his son, William S. Gookin, Jr., co-authored and submitted a multi-volume report. *See* W.S. Gookin & Associates, *Study of Pima-Maricopa Land* (filed June 29, 1976) (OSM Nos. 9272 & 9273) ("Gookin Report"). The Gookin Report declared that approximately 1,265,728 acres of land within the award area "had soils suitable for agricultural production and could have been irrigated by means of gravity." *See id.* vol. I, at 16;

see also Angel, *supra*, at 444-45. The report recognized that available land exceeded the water supply in the award area and stated: "Consideration was given not only to the water available for irrigation but also to the quantity of land that is practicably irrigable." *See* Angel, *supra*, at 445.

17. Finding of Fact No. 17. To determine the total number of acres in the award area for which a water supply existed as of 1883, the Gookins first determined that the total average virgin flow of the Gila River, Santa Cruz River, Salt River, Agua Fria River, Hassayampa River, and "miscellaneous unmeasured tributaries" was 2,271,900 ac-ft/yr. *Gila River Indian Community v. United States*, 2 Cl. Ct. at 19; *see also* Gookin Report, *supra*, vol. I, at 30. They then assumed that the total amount of water being used in the Safford and Duncan-Virden Valleys (upstream from the award area) in 1883 was 17,900 ac-ft annually. Gookin Report, *supra*, vol. I, at 31. They deducted this 17,900 from the 2,271,900 ac-ft total virgin flow to get 2,254,000 ac-ft/yr. *Id.* They deducted an additional 15,000 ac-ft/yr to account for other streamflow depletions, leaving an "adjusted virgin flow" number of 2,239,000 ac-ft/yr. *Id.* at 34 & 35.

18. Finding of Fact No. 18. Using the entire 2,239,000 ac-ft/yr figure as the annual "adjusted virgin flow," the Gookins then calculated average and median monthly flows to determine the amount of water that would be available at the right time of year to grow crops. *Gila River Indian Community v. United States*, 2 Cl. Ct. at 19. Based upon these calculations, they came to conclusions about the amount of "agricultural" land that could be irrigated in the award area. Gookin Report, *supra*, vol. I. The Gookins indicated that more than

half of the unregulated water could not be used "because the water was available at the wrong time for the crops." The Gookins' calculations did not account for any water use on the reservation. *Gila River Indian Community v. United States*, 2 Cl. Ct. at 19.

19. Finding of Fact No. 19. The Gookins performed their calculations under three different scenarios. The first two scenarios assumed that the flow of the rivers was "unregulated," *i.e.*, that no storage dams were constructed on the rivers. Each of the two "unregulated flow" scenarios used different assumptions about the types of crops that would be grown–the "actual 1885 cropping pattern" and the "hypothetical cropping pattern." The third scenario assumed that the flow of the rivers was "partially regulated" by dams constructed at the Buttes site on the Gila River and at the Orme site on the Salt River. *Id.* at 19 & 29 n.23.

20. Finding of Fact No. 20. The conclusions in the Gookin Report regarding the amount of "agricultural land" in the award area as of 1883 were as follows:

	Irrigated	Fallow	Total
Unregulated Flow			
Actual 1885 cropping pattern	400,000	100,000	500,000
Hypothetical cropping pattern	575,000	143,750	718,750
Partially Regulated Flow			
Hypothetical cropping pattern	796,000	199,000	995,000

Gila River Indian Community v. United States, 2 Cl. Ct. at 19.

21. Finding of Fact No. 21. The Gookins' methodology to determine the area of grazing lands was "to exclude from plaintiffs' total award area (3,312,938 acres), agricultural lands (995,000 acres)[,] townsites (1,920 acres), highways (2,720 acres), railways (2,279 acres), and rivers, streams, washes, and mountains (413,534 acres) to arrive at 1,897,485 acres of grazing land." *Gila River Indian Community v. United States*, 2 Cl. Ct. at 20.

22. Finding of Fact No. 22. Based upon a 1902 University of Arizona Agricultural Experiment Station report, the United States' expert concluded that there were 137,500 acres of land in the award area that had a potential to be irrigated as of November 15, 1883, as follows:

Salt River Valley	110,000 acres
Gila Bend area	3,000 acres
Florence / Casa Grande area	7,000 acres
Buckeye area	17,500 acres

Id. The Community successfully moved to exclude the opinions of the United States' expert regarding valuation of "agricultural" land, on the argument that the expert's opinion was based upon analysis of illegal transactions. *See* Motion to Exclude Defendant's Valuation of Farm Land, *Gila River Indian Community v. United States*, Docket No. 228 (July 21, 1976) (OSM No. 9275); *see also Gila River Indian Community v. United States*, 2 Cl. Ct. at 29-30 ("The excluded material is limited to the actual conclusions of a dollar value for the farmland based on illegal or noncomparable sales, it does not extend to the expert's conclusion on the amount of irrigable land."). The expert's opinion on per-acre valuation relied, in substantial

part, upon analysis of sales of land by homestead entrymen prior to obtaining a full patent from the United States. The court ruled that the applicable statutes prohibited sales of such inchoate rights. *See generally Gila River Indian Community v. United States*, 2 Cl. Ct. at 29-30.

23. Finding of Fact No. 23. On May 8, 1978, the commission by order certified and transferred Docket No. 228 to the United States Court of Claims. *See id.* at 14.

24. Finding of Fact No. 24. On October 29, 1982, Judge Kenneth R. Harkins of the claims court issued his valuation opinion. The judge stated: "On the valuation date, the highest and best uses for various tracts in the award area would have been for agriculture, townsites, and for grazing. Land which can be valued as agricultural land in the award area is most valuable." *Id.* at 29.

25. Finding of Fact No. 25. Judge Harkins indicated:

> [L]ittle credit has been given to the reports and conclusions of the various experts. In some particulars, they have been rejected for error, unreliability, or inconsistency with, or not justified by, other evidence in the record.
>
> Resolution of the disputes and contradictions among the expert witnesses, and the ultimate conclusion on value, is based on an analysis of the experts' opinions and a culling of relevant facts from the entire record.

Id. at 16.

26. Finding of Fact No. 26. Judge Harkins also rejected the Gookins' opinions regarding the "partially regulated flow" scenario. *Id.* at 29 n.23. He stated: "These computations, however mathematically artistic, are pure speculation, as are the calculations based on a hypothetical cropping pattern, and are

without merit in a determination of available farming acreage for purposes of a sale in 1883." *Id.*

27. Finding of Fact No. 27. Judge Harkins found that 300,000 acres of land in the award area had a highest and best use as "agricultural" land. *See id.* at 21. He made his findings using assumptions of "unregulated flow" and the "actual 1883 cropping pattern." *See id.* The judge accepted the Gookins' methodology using these assumptions, but rejected their final result because he disagreed with how they had addressed the fallowing of land:

> It may be valid that in 1883 a hypothetical purchaser might expect 20 percent of the farming land would have to lie fallow each year. Such a purchaser, however, would not add it to the total acreage for which water could be expected to be available. The hydrology expert's calculations of water availability for 400,000 acres rest on a tenuous analysis of 1885 cropping patterns and assumes ideal irrigation and farming practices. To give effect to these uncertainties, a purchaser would subtract the 100,000 acres for fallow land from the total for which water could be expected to be available.

Id. at 29. Judge Harkins deducted 100,000 acres from the Gookins' 400,000 acres to reach 300,000 acres. *Id.* He stated: "The final determination that 300,000 acres in the award area is to be valued as agricultural land, takes into account the exaggerations in the mathematics of plaintiffs' expert and makes an appropriate adjustment for 100,000 acres of fallow land." *Id.* at 31.

28. Finding of Fact No. 28. Judge Harkins found that 2,590,565 acres of land in the award area had a highest and best use as "grazing" land. *See id.* at 21. He awarded the Community compensation for this land at a rate of $0.60 per acre, for a total of $1,554,339. *Id*. at 34.

29. Finding of Fact No. 29. Judge Harkins stated:

> Most of the award area is covered with soil suitable for cultivation if provided with sufficient water. Although the soil in the area is not rich in nitrogen or humus and there are tendencies in some areas for alkali buildup, availability of water is the most important limitation on agricultural use of land. . . .

Id. at 17.

30. Finding of Fact No. 30. Judge Harkins found:

> Based on historical documents in the record and in consideration of the deficiencies in the analyses proposed by the respective experts, it is determined that the 300,000 acres of land in the award area suitable for agricultural purposes on November 15, 1883, had a value of $13 per acre, *inclusive of water rights*. Appropriate deductions must be made for discounts for the size of the purchase and for a purchaser's expenses, which should be a cumulative total of 25 percent. The fair market value of the agricultural lands, accordingly, on the taking date is determined at $9.75 per acre.

Id. at 32 (citations omitted, emphasis added).

31. Finding of Fact No. 31. In addition to agricultural land, Judge Harkins also ruled with regard to the value of the other components of the 3,312,858-acre award area. His findings on "highest and best use" and valuation are shown below:

Type of Land	Acres Valued	Value per Acre	Total Valuation
Agricultural Lands	300,000	$9.75	$ 2,925,000
Townsites	3,760	$266.00 (average)	1,000,000
Rangelands	2,590,565	$0.60	1,554,339
Other Lands (Limited Utility, Highways, Roadways)	418,533	0.00	(no independent value)
Mineral Enhancement	N/A	N/A	50,000
TOTAL	3,312,858		$ 5,529,339

Id. at 21, 34-35.

32. Finding of Fact No. 32. The Community appealed Judge Harkins' decision to the U.S. Court of Appeals for the Federal Circuit. The Federal

Circuit upheld most of Judge Harkins' rulings, but remanded the case to him for further information about how he accounted for the amount of agricultural land that would lie fallow each year. *See* Decision, *Gila River Indian Community v. United States*, Docket No. 228, Appeal No. 83-1108 (Apr. 12, 1984), 11 INDIAN L. REP. 2074 (May 1984) (OSM No. 109).[5]

33. Finding of Fact No. 33. On remand, Judge Harkins reiterated his prior ruling. *See* Order for Entry of Judgment, *Gila River Indian Community v. United States*, Docket No. 228 (July 3, 1984) (OSM No. 9288). He stated: "On the basis of reexamination of the record and the requested findings, briefs and argument of counsel, it is concluded that the final determination, that 300,000 acres in the award area are to be valued as agricultural land, is valid." He decided, therefore, not to adjust the damages award contained in his earlier opinion. *See id.* ¶ 8; *see also* Angel, *supra*, at 449.

34. Finding of Fact No. 34. On a second appeal, the Federal Circuit vacated Judge Harkins' decision and entered judgment in favor of the Community. *See* Decision, *Gila River Indian Community v. United States*, Docket No. 228 (Feb. 22, 1985) (OSM No. 9289).[6] The court held that Judge Harkins should have added 75,000 acres to his total agricultural lands to represent fallow lands. The court found "that in order to have utilized each year the 300,000 acres for which water was available, the farmer would have needed 375,000 acres, since 20 percent of the later

[5] This decision is also reported in a table at 738 F.2d 452 (1984) (OSM No. 9286).
[6] This decision is also reported in a table at 765 F.2d 160 (1985) (OSM No. 9290).

acres (75,000) would lie fallow" (which implicitly would not need water). *Id.* at 8. The court then multiplied $9.75 per acre, the value of land in 1883, by 75,000 acres, and increased the award to the Community by that amount–from $5,529,339 to $6,260,589. *Id.*; *see also* Angel, *supra*, at 519.

35. Finding of Fact No. 35. The Community filed a petition for rehearing with the Federal Circuit on the valuation issues. That petition was denied. *See* Order, *Gila River Indian Community v. United States*, Docket No. 228, Appeal No. 84-1580 (Mar. 20, 1985) (OSM No. 9291).

36. Finding of Fact No. 36. On April 1, 1985, the claims court entered judgment in favor of the Community on the aboriginal land claim in Docket No. 228 for $6,260,589. *See* Judgment, *Gila River Indian Community v. United States*, Docket No. 228 (Apr. 1, 1985) (OSM No. 9292).

37. Finding of Fact No. 37. In this adjudication proceeding, the Community has claimed rights to 1,599,252 ac-ft annually from the Lower Gila River watershed. *See* the Community's Statement of Claimant No. 39-36340 (Jan. 20, 1987). The United States has claimed as trustee for the Community 1,817,160 ac-ft annually for current and future uses in the Lower Gila River watershed. U.S. Statement of Claimant No. 39-35092 (Jan. 20, 1987).

F. Conclusions of Law

1. Conclusion of Law No. 1. Since neither the Salt River Project nor the City of Tempe was a party to Docket No. 228, brought under the Indian Claims Commission Act, they are unable to assert judicial estoppel against the Gila River Indian Community or the United States in this contested case. Under

Arizona law, judicial estoppel requires the same parties to have been involved in both proceedings.

2. Conclusion of Law No. 2. The Salt River Project and the City of Tempe are unable to assert quasi-estoppel against the Gila River Indian Community since the Community's presentation of evidence and law in Docket No. 228 was not unconscionable. Also, the material facts are disputed and unsettled as to whether the Community and its attorneys and expert witnesses, at the time of the Docket No. 228 proceedings, had full knowledge of how their valuation claim, including water supply assumptions, would eventually relate to later claims in this proceeding for water rights for the reservation itself.

3. Conclusion of Law No. 3. The Salt River Project and the City of Tempe are unable to assert collateral estoppel against the Gila River Indian Community and the United States since the issue of water rights title and ownership was not asserted, adjudicated, or otherwise decided during Docket No. 228 proceedings.

G. Recommendation

The Superior Court should DENY the motion of the Salt River Project and the City of Tempe requesting the court to find that Docket 228 precludes the Gila River Indian Community, or the United State in its behalf, from asserting claims in this adjudication.

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III. PRECLUSIVE EFFECT OF THE *HAGGARD DECREE*, COURT OF CLAIMS DOCKET NO. 236-D, AND THE 1936 MARICOPA CONTRACT

Motion for Partial Summary Judgment re Preclusive Effect of *Haggard Decree*, Court of Claims Docket No. 236-D, and 1936 Maricopa Contract on Gila River Indian Community's Claims to Waters of the Salt River, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 213 & 214).

These proceedings and documents are related, and I discuss them in chronological order.

A. ***Haggard Decree***

The Salt River Project and the City of Tempe have argued, in their motion for partial summary judgment, that the 1903 *Haggard Decree* precludes the Gila River Indian Community and the United States from asserting any water rights to the Salt River system beyond the rights recognized in that decree.

1. Background

On July 17, 1901, the United States filed suit in behalf of individual Maricopa Indians against other Salt River water users. The case, *United States v. Haggard,* No. 19, was brought in the federal district court for the territory of Arizona. While the original complaint has not been found, the suit apparently sought an injunction against non-Indian irrigators preventing them from interfering with the Indians' own use of the water on lands known as the Maricopa Colony.

The final decree, issued by Judge Edward Kent on June 11, 1903, is part of the record in this proceeding. OSM No. 46. The decree includes a schedule of water rights, by location and priority date, for the Indian and non-Indian lands involved in the case.

In 1914, another lawsuit, this time in state court, was brought asking for an adjudication of certain Salt River water rights and seeking to join as defendants two federal officials assigned to the Gila River Indian Reservation. These officials were dismissed from the litigation and the United States and the Indians were never joined in the litigation. The tabulation of water rights contained in the *Haggard Decree,* however, was also incorporated into the final decree issued in this case, the *Benson-Allison Decree*.

The earlier *Haggard* litigation joined a relatively few number of parties. The case caption indicates that the United States brought the suit as "Guardian of Chief Charley Juan Saul [Sol] & Cyras Sam . . . & 400 Other Maricopa Indians Similarly Situated." The defendants included two canal companies and approximately twenty individuals.

The case also involved a relatively small amount of acreage, at least when compared to the 33 million acres of the Arizona portion of the Gila River basin. Approximately 17,300 acres were decreed by Judge Kent. (OSM No. 46). The amount of Indian land decreed, 1,080 acres, also was small when compared to the present-day Gila River Indian Reservation, an area of 373,760 acres.

The Salt River Project bases its motion on the doctrine of *res judicata.* This doctrine of claim preclusion, and the related doctrine of collateral estoppel or issue preclusion, were discussed extensively in my report on motions pertaining to the *Globe Equity Decree*. *See Globe Equity* Report. The Project argues that the same *Haggard* parties, or their privities, are involved in this contested case and in the umbrella Gila River adjudication. Also, SRP argues that the same cause of action,

namely the claims of the Gila River Indian Community and the United States, as trustee for the Community, to the Salt River were at issue in *Haggard* and are being asserted again in this adjudication.

2. Federal Law of *Res Judicata*

In my *Globe Equity* report, I determined that the federal law of *res judicata* applies when the earlier judgment was issued by a federal court and the federal interest in that litigation was strong. The *Haggard Decree* was a federal court decree, albeit a decree issued by a federal district court sitting in pre-statehood territory of Arizona. The sufficiency of the federal interest in the case is demonstrated by the simple fact that the United States itself brought the litigation. The federal law of *res judicata,* therefore, applies to the resolution of SRP's motion.

In my *Globe Equity* report, I set forth my understanding of the federal law of *res judicata*. I said:

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

Globe Equity Report at 48.

On the respondents' side of the equation, the United States is one and the same party in both the 1901-03 litigation and the current proceeding. The Gila River Indian Community is a privity of the United States by virtue of being the beneficiary of the federal trust relationship concerning all reservation lands, including the Maricopa lands considered in *Haggard*.

The moving parties' side of the "privity" equation is much less certain. In its motion, SRP asserts that on the face of the *Haggard Decree* itself, it can been seen that "numerous [SRP] shareholders were parties to the *Haggard* proceeding." SRP Motion at 12. The decree, predating the formation of the Salt River Project, does not identify which members or lands ultimately became part of the Project. In a supplemental statement of facts, SRP indicates that 25 acres of land presently denominated as "SRP member lands" fall within the legal description of a quarter-section described in the *Haggard Decree*, but no information is provided about the ownership in 1903, the chain of title, or the current owner. Affidavit of David C. Roberts, Ex. 2 to SRP Response to Statement of Facts (May 22, 2000). This supplemental statement also indicates that the City of Tempe, another moving party, owns SRP member lands, but these lands are not described or related to the lands included in the *Haggard Decree*. *Id.* As the result, there are genuine uncertainties as to a material fact: whether the moving parties are privities of the original *Haggard* parties.

In considering the "same cause of action" question, the parties and the courts are disadvantaged by not having the original complaint in *Haggard*. We do not know the nature of the federal government's allegations in the suit. The resulting

decree itself appears to be only a tabulation of existing, appropriative irrigation rights. The decree does not mention any other reservation water right related to the date of the reservation or any of its additions. Nor does the decree contemplate the future agricultural needs of the reservation.

If this uncertainty about the original cause of action were not enough, the Community argues the additional position that the U.S. Supreme Court's 1908 *Winters v. United States* reserved water rights decision constituted a significant "change of circumstances" that now prevents claims preclusion. 207 U.S. 564 (1908). In my *Globe Equity* report, much of the debate concerned the impact of "changed circumstances" on the claims preclusion doctrine. *Globe Equity* Report at 57-59. I indicated that "[c]hanges in law resulting from appellate decisions usually do not create new causes of action. . . . New or evolving legal theories rarely provide an opportunity to reopen civil cases decided under earlier law." *Id.* at 57. I determined that the federal reserved water rights doctrine had been well-formulated and articulated before the entry of the *Globe Equity Decree* in 1935. Even if there were some uncertainty whether the United States had advanced the reserved rights (*Winters*) doctrine in that litigation (which I determined they indeed had advanced), I indicated that "*Winters* constituted only a different legal theory that could and should have been asserted in *Globe Equity*, even if it was not." Conclusion of Law No. 29, *Globe Equity* Report at 69.

The "changed circumstances" here are of a different character. Unlike the *Globe Equity Decree*, which was entered 27 years *after* the *Winters* decision, the *Haggard Decree* was entered five years *before* the U.S. Supreme Court articulated the

reserved water rights doctrine in water rights cases. The moving parties attempt to discount this chronology by suggesting that, elsewhere in the West, "the United States was arguing for federal reserved rights for other Indians about the same time that the *Haggard* case was litigated." SRP Motion at 16. Most of the cases to which SRP refers were decided after *Haggard*, *e.g.*, the trial court decision in *Winters* (1905); the court of appeals decision in *Winters v. United States,* 148 F. 684 (9th Cir. 1906); as well as *United States v. Winans,* 198 U.S. 371 (1905) (fishing rights).

Several cases cited by the moving parties do predate *Haggard*. While these decisions may have been important in the gradual evolution of the federal reserved rights doctrine, they are insufficient to place a federal attorney on notice in 1903 that a reserved right could be claimed in water. *Missouri, Kansas & Texas Ry. Co. v. Roberts,* 152 U.S. 114 (1893), discussed only the federal power to set lands aside for Indians, as well as to grant railroad rights-of-way across those lands. *United States v. Rio Grande Irr. Co.*, 174 U.S. 690 (1899), concerned only the scope of the federal navigation power in the face of private efforts to construct a dam across the Rio Grande. While the court indicates "that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of government property," *id.* at 703, the statement is dicta. Also, the case did not arise in the context of an Indian reservation, appears to contemplate beneficial appropriative rights, and does not suggest that these rights would generally have priority dates senior to everyone else. *Gutierres v. Albuquerque Land Co.*, 188 U.S. 545 (1903), simply repeats the *Rio*

Grande language in a case that actually dealt with the ability of a canal company to deliver water available under the federal Desert Lands Act. None of these cases so clearly predicts the coming of the reserved water rights doctrine as to obligate the federal attorneys bringing the *Haggard* litigation to include such a cause of action in their complaint.

U.S. Supreme Court recognition of the federal reserved water rights doctrine, recognizing a separate water rights regime for western Indian reservations, thereby protecting the security of their resource base, provides a "rare" but sufficiently changed circumstance to provide an exception under the federal claims preclusion doctrine. Litigating before *Winters*, I do not believe the federal attorneys in *Haggard* had an obligation to assert a claim that had not been authoritatively recognized. Without the original complaint in *Haggard*, there is also a genuine, material question about what grounds they did indeed allege. Each of these reasons is sufficient to defeat the moving parties' request for summary judgment.

3. Findings of Fact

a. Finding of Fact No. 38. The "Maricopa Colony" consists of Maricopa Indians who reside on the Gila River Indian Reservation (the "reservation") in central Arizona, near the Gila River's confluence with the Salt River. This group, and the area in which they reside, form the "Maricopa District" of the reservation. Opinion, *Gila River Pima-Maricopa Indian Community v. United States*, No. 236-D (Ct. Cl. Sept. 28, 1981).

b. Finding of Fact No. 39. The reservation was expanded several times, including in 1879, when it was expanded to include (among other lands) the

lands upon which the Maricopa Indians reside near the Gila/Salt confluence. *See Gila River Indian Community v. United States*, 695 F.2d 559, 560 (Fed. Cir. 1982) (OSM No. 7202).

c. Finding of Fact No. 40. Other than for approximately 1,490 acres in the Maricopa District, no canal or other delivery system has ever been developed to directly divert water for irrigation from the Salt River to the reservation. *See* 236-D Opinion, *supra*, at 7.

d. Finding of Fact No. 41. Maricopa Indians living near the Gila/Salt confluence began using water from the Salt River to irrigate crops sometime prior to 1900. *See* Decree, *United States v. Haggard*, No. 19 (D. Ariz. 1903) (*Haggard Decree*) (OSM No. 46).

e. Finding of Fact No. 42. Officials from the United States Government observed in 1899 that white settlers had constructed a ditch upstream from the Maricopas' diversion on the Salt River, thereby allegedly depriving the Maricopas of the water that they had been using from the Salt River. *See* Angel, *supra*, at 111; Letter from Elwood Hadley, U.S. Indian Agent, to Commissioner of Indian Affairs (Sept. 20, 1900) (OSM No. 7042); Letter from Robt. E. Morrison, U.S. Attorney, to Attorney General (Oct. 20, 1900) (OSM No. 7045) (stating that it is "advisable to take immediate action of civil nature including injunction to protect the interests of the Indians"); Letter from E.A. Hitchcock, Secretary of the Interior, to Attorney General (Nov. 9, 1900) (OSM No. 7047) ("respectfully request[ing] that action be taken to protect the interests of the Indians").

f. Finding of Fact No. 43. The United States, acting on behalf of two specifically named Maricopa Indians and 400 other unnamed Maricopa Indians, brought suit in the Arizona territorial court to stop the non-Indian irrigators from interfering with the waters used by the Maricopas. The suit named numerous non-Indian irrigators as defendants. *See Haggard Decree*, *supra*; *see also* Angel, *supra*, at 111; Memorandum from Secretary to U.S. Attorney for Arizona (Nov. 10, 1900) (OSM No. 7048) (authorizing U.S. Attorney to take legal action); Letter from Elwood Hadley, U.S. Indian Agent, to Commissioner of Indian Affairs (July 17, 1901) (OSM No. 7049); Letter from Thomas Bennett, Assistant U.S. Attorney, to Elwood Hadley, Esq. (July 27, 1901) (OSM No. 7051) (suggesting Albert T. Colton as a competent "man on the ground to work up our law suit and make maps, etc."); Letter from Elwood Hadley, U.S. Indian Agent, to Commissioner of Indian Affairs (July 27, 1901) (OSM No. 7052); Letter from Thos Ryan, Acting Secretary, to Commissioner of Indian Affairs (July 30, 1901) (OSM No. 7053) (authorizing payment of costs for filing complaint).

g. Finding of Fact No. 44. The United States' complaint has not been found and is not before the court.

h. Finding of Fact No. 45. On June 11, 1903, Judge Edward Kent of the United States District Court for the Territory of Arizona issued the *Haggard Decree*.

i. Finding of Fact No. 46. In the *Haggard Decree*, Judge Kent set priority rights for the United States, on behalf of more than 400 Maricopa Indians, and for the non-Indian water users who were defendants in the case. The decree

stated that the Maricopa Indians had rights to water from the Salt River for 1,080 acres of land in Townships 1 South and 1 North, Range 1 East. The largest single block was 480 acres with a date of appropriation "prior to the year 1894." *Haggard Decree, supra*.

j. Finding of Fact No. 47. The non-Indian parties in the *Haggard* case also had their Salt River water rights decreed, for various amounts of land and with various priority dates. *Id.*

k. Finding of Fact No. 48. The Indian Community, including the Maricopa Colony, is in privity with the United States, a party to the *Haggard* litigation.

l. Finding of Fact No. 49. Material facts are in genuine dispute as to whether the moving parties here are privities of any of the parties involved in the *Haggard* litigation.

m. Finding of Fact No. 50. On January 2, 1914, Nels Benson filed a suit in the Maricopa County Superior Court against John Allison and a large number of other parties, including federal officials Frank Thackery and I.C. Stacy. Mr. Thackery was the Superintendent of the Reservation, and Mr. Stacy was the BIA Superintendent of Ditches. Mr. Benson alleged that his claims to irrigation water were superior to those of the defendants and requested that the court adjudicate water rights in a specific area. *See* Decree, *Benson v. Allison* (Maricopa County Super. Ct. Nov. 14, 1917) (OSM No. 51) ("*Benson-Allison Decree*"); *see also* Angel, *supra*, at 167, 515.

n. Finding of Fact No. 51. On September 19, 1914, the Superior Court sustained the United States' objection to jurisdiction and dismissed the action against Mr. Thackery and Mr. Stacy. *See* Angel, *supra*, at 168; Letter from Ernest Knaebel, Assistant Attorney General, to Secretary of the Interior (Sept. 24, 1914) (OSM No. 7121).

o. Finding of Fact No. 52. The suit proceeded against the remaining defendants. On November 14, 1917, Judge R.C. Stanford issued his decree in *Benson-Allison*. *Benson-Allison Decree, supra*. The decree represented an adjudication of all rights within the subject area for the remaining non-federal defendants and also incorporated the rights and priorities set forth in Judge Kent's 1903 *Haggard Decree*. Judge Stanford also included a statement that the water duty was "subject, however, to an increase or decrease if such standard or conditions may hereafter require."

p. Finding of Fact No. 53. Although the United States did not participate in *Benson-Allison*, the decree in that case included the table from *Haggard* showing lands decreed in the Maricopa District on the reservation. *Id.*; *see also* Angel, *supra*, at 168.

q. Finding of Fact No. 54. Based on the record before me, I am unable to determine what knowledge, if any, the federal attorneys filing the *Haggard* litigation in 1901, had (or should have had) of any theories or bases for the federal reserved water rights doctrine which was authoritatively announced by the U.S. Supreme Court in *Winters v. United States*, 207 U.S. 564, in 1908.

r. Finding of Fact No. 55. Without the complaint in the *Haggard* litigation, I am unable to determine what claims and causes of action the United States did indeed place in issue in that litigation.

4. Conclusions of Law

a. Conclusion of Law No. 4. The federal law of *res judicata* must be applied to determine the preclusive effect of the *Haggard Decree* for purposes of this contested case.

b. Conclusion of Law No. 5. Material facts are incomplete, and in genuine dispute, as to whether the Salt River Project and the City of Tempe, moving parties, are in privity with any of the parties in the *United States v. Haggard* litigation. Summary judgment on the question of the preclusive effect of the *Haggard Decree* to the benefit of these moving parties, therefore, is unavailable.

c. Conclusion of Law No. 6. Material facts are unknown, inconclusive, and genuinely in dispute as to whether the issue of the federal reserved water rights doctrine could have been, or was actually, determined in the *Haggard* litigation. Summary judgment on the question of the preclusive effect of the *Haggard Decree*, therefore, is unavailable.

5. Recommendation

The Superior Court should DENY the motion of the Salt River Project and the City of Tempe requesting the court to find that the *Haggard Decree*, on the basis of *res judicata*, precludes the United States from asserting claims on behalf of the Gila River Indian Community in this adjudication.

B. Maricopa Contract (1936)

The *Haggard Decree* established surface water rights for the parties to that litigation. In their pleadings now, the moving parties discuss how upstream diversions by non-Indians eventually diminished the Maricopa Indians' water rights. The Maricopa Contract was apparently entered into in 1936 by the United States and the Salt River Project, and approved by the Pima Tribal Council, to substitute a groundwater supply for the Indians' diminished surface water sources. The Salt River Project urges that I find that this contract constitutes an accord and satisfaction of any violation of the *Haggard Decree*. Thus, the Project argues that the 1936 contract itself precludes any additional tribal or federal claim to water from the Salt River system.

The contract is integrally related to the 1903 *Haggard Decree* and the rights under that decree. Since I have determined that the material facts are unsettled and generally at issue concerning any preclusive effect of that decree, I am, therefore, unable to address any preclusive effect of the contract that derives from, substitutes for, or satisfies any rights set forth in the decree.

1. Findings of Fact

a. Finding of Fact No. 56. In the 1920s and 1930s, Federal officials became concerned about diminishment of flows in the Salt River below a level that would allow the Maricopa Indians to obtain the water for the 1,080 acres of reservation land for which rights were decreed in *Haggard*. *See* Angel, *supra*, at 263-68, 375; Letter from Arthur E. Stover to A.L. Wathen (June 20, 1929) (OSM No. 7238); Letter from John F. Truesdell, Superintendent of Irrigation, to C.C. Cragin, Salt

River Valley Water Users' Association ("SRVWUA") (June 29, 1929) (OSM No. 7240); Letter from Secretary of the Interior to SRVWUA (May 11, 1934) (OSM No. 7255).

b. Finding of Fact No. 57. On May 5, 1936, the United States entered into the 1936 Contract with SRVWUA. Contract for Pumping Water for Maricopa Indians on Gila River Indian Reservation (1936) ("Maricopa Contract") (OSM No. 154); *see also Gila River Indian Community v. United States*, 695 F.2d at 562; Letter from A.L. Wathen, Director of Irrigation, to A.E. Robinson, Superintendent of Pima Agency (July 28, 1936) (OSM No. 7264) (stating that the Department of the Interior approved the contract on July 23, 1936); Letter from H.J. Lawson, SRVWUA General Superintendent and Chief Engineer, to A.E. Robinson, Superintendent of Pima Agency (Nov. 18, 1936) (OSM No. 7268) (stating that SRVWUA approved the contract on May 5, 1936).

c. Finding of Fact No. 58. The recitals to the 1936 contract stated, among other things, that "in order to settle and compose the difference between [SRVWUA] on the one hand and the United States and the Maricopa Indians on the other, and to provide said Indians with a permanent and adequate water supply for their said lands, it is hereby agreed as follows . . . ." Maricopa Contract, *supra*, at 2.

d. Finding of Fact No. 59. As to the duration of the contract, it stated that it "shall endure so long as [SRVWUA], its successors, or assigns shall continue to operate the Salt River Project." *Id.* art. IX, at 5.

e. Finding of Fact No. 60. In the 1936 contract, the United States and SRVWUA agreed that the federal government would drill a well through

which the Maricopa Indians could withdraw the water for 1,080 acres of land decreed to them in *Haggard*. SRVWUA agreed to equip, operate, and maintain the well. Article II of the Contract provides:

> It is the intention of the contracting parties hereto that the Association shall, during the life of this contract, furnish all necessary facilities for making available pumped water to make up any deficiency in the river flow below 324 miner's inches, as above defined, without cost to the United States except for the drilling of said well, ...

Id. art. II, at 3.

f. Finding of Fact No. 61. Article X of the 1936 contract provided:

> The execution of this contract is intended as a compromise and settlement of the disputes between the Association and the United States in this matter and the fulfillment by the Association of the obligations hereby assumed shall be accepted as a complete settlement of the dispute over the Association's liability in connection with the alleged depletion of the Salt River water supply for said 1080 acres of Indian lands. It is not the intention, however, of the parties hereto to determine the priorities of the parties hereto of their respective rights to the use of water from the Salt River and it is the intention hereof to leave both parties unprejudiced in that matter. In consideration of the settlement and assurance to the Indians aforesaid of what seems an adequate water supply the United States does, so far as it is legally possible by this contract so to do, release said Association from all claims whatsoever in connection with shortages in said river supply prior to the date hereof.

Id. art. X, at 4-5.

2. Conclusion of Law

a. Conclusion of Law No. 7. Since the Maricopa Contract is integrally related to the 1903 *Haggard Decree*, and material facts are unsettled about any preclusive effect of that decree, material facts are likewise genuinely unsettled and in dispute concerning any preclusive effect of the contract, or an accord and

satisfaction of disputes involving the decree. Summary judgment on the question of the preclusive effect of the 1936 Maricopa Contract, therefore, is unavailable.

3. Recommendation

The Superior Court should DENY the motion of the Salt River Project and the City of Tempe requesting the court to find that the Maricopa Contract precludes the United States or the Gila River Indian Community from asserting claims on behalf of the Gila River Indian Community in this adjudication.

C. Docket 236-D

In their motion for summary judgment, the Salt River Project and the City of Tempe advance a separate basis for arguing that the Gila River Indian Reservation and United States have no claims to the Salt River system beyond those recognized in the *Haggard Decree*. These moving parties maintain that, in proceedings brought by the Community under the Indian Claims Commission Act, the federal courts ruled that the federal government did not reserve water in the Salt River system benefiting the reservation. The specific legal theories supporting this position are said to be collateral, judicial, and statutory estoppel.

The Gila River Indian Community responds that the criteria for these various doctrines are not satisfied and, in any event, these forms of estoppel cannot be applied against the United States or the Indian Community. With great emphasis, the Community argues that determinations by courts under the Indian Claims Commission Act, because of the narrow remedial nature of that statute designed specifically to benefit tribes, are not entitled to preclusive effect in

subsequent litigation. The United States agrees that collateral estoppel cannot be applied against the United States.

1. Background

On August 14, 1951, the Gila River Indian Community filed a petition with the Indian Claims Commission, concerning water, property, and accounting disputes with the United States, denominated as Docket No. 236. In 1968, pursuant to the commission's order, amended petitions were filed so that the fourteen causes of action asserted in the original petition were then divided into subsidiary docket numbers (Nos. 236-A through 236-N). Docket No. 236-D asserted the Community's monetary claims concerning the Salt River.

Docket 236-D appears to have been divided into separate phases which, as we have seen, was common for Indian Claims Commission cases. The first phase was to establish if the Community had any rights to the Salt River (entitlement), followed by additional phases concerning liability and damages. *See Gila River Pima-Maricopa Indian Community v. United States*, 695 F.2d 559 (Fed. Cir. 1982). The "entitlement" trial concerning Docket No. 236-D was held before the commission in December 1974. Post-trial briefing had not been completed by 1978 when the Indian Claims Commission itself statutorily expired. The commission's uncompleted work was transferred to the U.S. Court of Claims and, since Docket No. 236-D had not been completed, it also was transferred in July 1978 to the claims court. 42 Ind. Cl. Comm'n 202 (July 13, 1978).

The docket was assigned to Judge James F. Merow who, apparently based on the trial record and requested findings of fact and conclusions of law, issued a

decision in Docket No. 236-D on September 28, 1981. Finding that the Community had failed to establish any "entitlement to any Salt River water relevant to the award of monetary compensation from the United States for its loss," dismissed the Community's petition. Opinion at 13-14, *Gila River Pima-Maricopa Indian Community v. United States,* No. 236-D (Ct. Cl. Sept. 28, 1981) (OSM No. 92). The U.S. Court of Appeals affirmed most of this decision, noting however that the trial court had recognized a water right entitlement for the 1,490 acres comprising the Maricopa Colony in the northwest portion of the reservation (the area having *Haggard Decree* rights and, following 1936, receiving a substitute supply under the Maricopa Contract). The court of appeals directed additional proceedings concerning the liability and damages for any deprivation of this entitlement. 695 F.2d at 562.

The remaining history concerning Docket No. 228-D is somewhat fragmentary. In February 1985, the Gila River Indian Community sought to disqualify Judge Merow because of an alleged ownership interest in a firm doing business within Arizona. The motion was denied in 1986. Order (Cl. Ct. May 1, 1986). No other event in Docket No. 236-D seems to have occurred until April 1999 when the United States and the Indian Community filed a stipulation and joint motion for entry of a final judgment in Docket 236-D. Stipulation and Join Motion for Entry of Final Judgment, Docket No. 236-D (Fed. Cl. Apr. 27, 1999). Final judgment was entered by now senior Judge Merow. Order, Docket No. 236-D (Fed. Cl. May 3, 1999). The stipulation recites a $7 million settlement for both Docket 236-C and -D. After apparently thirteen years of inactivity concerning Docket No. 236-D, this stipulation and order came only a short time after the adjudication court

announced the schedule for this series of motions for summary judgment. *See* Minute Entry (Mar. 26, 1999).

2. Determinations Made in Earlier Proceedings

The cause of action asserted by the Indian Community under the Indian Claims Commission Act was for "monetary compensation for water they say they could have put to beneficial use in the irrigation of their reservation lands but which was used elsewhere by others." 695 F.2d at 560. As previously stated, the court of appeals agreed with the trial court that no entitlement to Salt River waters had been demonstrated (differing with the trial court only on the entitlement of the 1,460 acres of the Maricopa Colony).

The pleadings, proceedings, and opinions rendered in Docket No. 236-D all abundantly demonstrate that the fundamental issue before the commission and later the claims court was "the extent of the plaintiffs' right, if any, to use the waters of the Salt River for irrigation activity on the Gila River Indian Reservation." Opinion, Docket No. 236-D, at 2. This issue is stated numerous times by the trial and appellate courts, always leading to the conclusion that a reserved water rights entitlement benefiting the reservation was the issue at stake:

- "Trial proceedings in this matter were . . . limited to the issue of the extent of the plaintiffs' right, if any, to use the waters of the Salt River for irrigation activity on the Gila River Indian Reservation." Finding of Fact No. 2, *Id*. at 15.
- "[T]he question which must be resolved is whether, in creating and enlarging the Gila River Indian Reservation, the United States

reserved water from the Salt River for the irrigation of the Reservation lands." *Id*. at 11.

- "Salt River water cannot be held to be appurtenant to the Reservation land–either historically or in the sense that the United States intended, when creating and enlarging the Reservation, that this water be so attached to the Reservation lands." *Id.* at 12.
- "[I]n the absence of evidence of any action or intent by the United States to reserve Salt River water for the Gila River Indian Reservation when it was created and enlarged, plaintiffs' claim to such entitlement fails." *Id.* at 12-13.
- "Appellants assert an entitlement to the waters of the Salt River to irrigate 113,498 acres of land on the Gila River Indian Reservation, representing all the practicably irrigable land on the reservation. . . . Appellants' claim to Salt River water is based on the so-called '*Winters* doctrine.'" 695 F.2d at 561.

Pleadings and statements by the Community and its attorneys also amply demonstrate that the Community advanced its reserved water rights entitlement to the Salt River as the central issue before the commission and the claims court. The 1974 pretrial order, signed by the Community's attorney, states the issue to be decided as "What is the measure of the Pima-Maricopa right to the waters of the Salt River on the Gila River Reservation and to what extent is this right affected by the availability of Gila River water?" Pretrial Order at 2-3, Docket No. 236-D (Jan. 1974). The Community's attorney reiterated the same view in his opening statement at

trial before the commission: "[T]he only issue on the present trial is the extent of Plaintiff's right to use the water of the Salt River on the Gila River Indian Reservation. . . . The extent of the *Winters* Doctrine right, that is what we feel we are trying, the extent of the *Winters* Doctrine right." Excerpt from Reporter's Transcript of Proceedings at 3 & 9, Docket No. 236-D (Dec. 16, 1974). Similar statements are set forth in the Community's brief before the Court of Appeals, *e.g.*, "The only issue at this stage of this proceeding is the extent of Plaintiffs' *Winters* Doctrine Right to use Salt River water on Plaintiffs' Gila River Indian Reservation . . . ." Plaintiffs' Reply Brief at 1 (undated).

There is no escape from the conclusion that the issue actually, necessarily, and fairly litigated before the Indian Claims Commission and U.S. Court of Claims was whether the Gila River Indian Reservation benefited from a federal reserved water right to the Salt River. Except for the 1,490 acres of the Maricopa Colony, no such reserved right entitlement was recognized.

3. Preclusive Effect of Determinations Under the Indian Claims Commission Act

The reserved water right issue was determined adversely to the Community in proceedings before the U.S. Court of Claims. I have previously determined that such rulings can have preclusive effect in subsequent proceedings. *See supra*, pp. 16-18. I again return to this issue since the Community argues forcefully here that "[i]t is outlandish to argue that an Act of Congress [the Indian Claims Commission Act], intended to remedy past sins of the United States against its Indian beneficiaries and wards, should be subverted to prevent the Indian tribes from attempting to protect

their land and water from the further depletions of non-Indians in the courts . . . ." Community Response at 37 (Apr. 24, 2000). Yet, as I have discussed, there is abundant precedent for claims commission determinations having preclusive effect in other judicial proceedings. Several of these cases have been decided by the U.S. Court of Appeals, Ninth Circuit, which, since the present matter involves an interpretation of federal law, are controlling here.

In two cases, the Ninth Circuit has held that statutory preclusion attends determinations by the claims commission. As recounted in *United States v. Pend Oreille Pub. Util. Dist. No. 1,* 926 F.2d 1502 (9th Cir. 1991), the Kalispel Indian Tribe of Washington filed petition before the claims commission alleging that the United States had improperly disposed of tribal land. The commission reached that result after trial and, five years later, the federal government agreed to pay $3 million for the loss of dry and submerged land. Years later, the United States brought a trespass action against a utility charging the inundation of tribal land. The tribe and state intervened, both asserting title to the river bed. The federal district court held that the state had title, and the court of appeals agreed saying that "[t]his court has repeatedly held that payment of a Commission award of compensation for a taking of aboriginal land conclusively establishes that the aboriginal title has been extinguished." 926 F.2d at 1508. This judicial determination benefited both the utility and the State of Washington, neither of which was a party before the claims commission.

Similarly, in *Western Shoshone National Council v. Molini,* 951 F.2d 200 (9th Cir. 1991), the court of appeals prevented the Shoshone Tribe from suing the State of

Nevada to prevent alleged interference with off-reservation aboriginal and treaty rights to hunt and fish. The state defended against the tribal claim saying that the claims commission had determined that tribal title had been extinguished and the tribe had been paid $26 million as compensation. The court of appeals agreed, saying that in *Pend Oreille*, "[w]e therefore found that the Commission award barred the Tribe from relitigating the issue of title in a subsequent proceeding against the State of Washington. . . . We hold that the award [before the claims commission] constituted a *general determination* of title which bars the Shoshone from asserting title against the State of Nevada." *Id.* at 202 (emphasis added).

Thus, in spite of the Community's arguments, there is ample authority that claims commission determinations have preclusive effect and can be asserted against both the Indian tribe or community and the United States. The cases cited by the Indian Community, from other circuits, do not weaken that holding. In *Cayuga Indian Nation v. Cuomo,* 667 F. Supp. 938 (N.D.N.Y. 1987), the state parties could not defend against the tribal suit on the basis of *res judicata* because they were not parties in the earlier claims commission proceedings. The state parties could not defend on the basis of collateral estoppel only because the claims commission proceedings were ambiguous. *Id.* at 948 (the findings "do not support the conclusion that there was plain, unambiguous, and explicit ratification of either the 1795 or 1807 conveyances").

In another case cited by the Community, a tribe's subsequent quiet title action against the United States, State of North Dakota, and an irrigation district was not

barred because the earlier settlement before the claims commission also was ambiguous. *Devils Lake Sioux Tribe v. North Dakota,* 917 F.2d 1049 (8th Cir. 1990).

Likewise, in *State ex rel. Martinez v. Kerr-McGee,* 898 P.2d 1256 (N.M. App. 1995) (Rio San Jose adjudication), the state could not defend against the Pueblos' claims in the adjudication on the basis of *res judicata* since that cause of action could not have been brought before the claims commission (and implicitly, the state was not a party to the claims commission proceedings). The state also could not prevail on the bases of issue or statutory preclusion since "we are not persuaded that the liability phase ever determined the precise issue before us: liability for loss of water on retained lands." *Id.* at 1262 & 1264. However, the New Mexico court agreed that the Pueblos are bound by claims commission proceedings if the later court can ascertain what was actually and necessarily determined before the claims commission. *Id.* at 1258.

The facts of *Kerr-McGee* are in marked distinction to our situation where there is no question that the issue of the Gila River Indian Community's reserved water entitlement to the Salt River was actually and adversely determined under the Indian Claims Commission Act. Indeed, *Kerr-MGee* indicates that consent judgments, stipulations or settlements in claims commission cases are entitled to issue preclusion in later cases. The claims commission act contemplated bifurcated cases and a determination of liability was commonly followed, years later in some instances, by a settlement. The court indicated,

> Where, as here, split trials are permitted–segregating liability from damages–we cannot necessarily be satisfied with the general presumption against grounding issue preclusion on a mere settlement.

> To find out, we must focus on whether, within that liability phase, a particular issue may have been actually and necessarily determined by the forces of litigation.

Id. at 1261 (citations omitted).

Having reiterated that estoppel can result from determinations of the Indian Claims Commission, I now address the specific grounds alleged by the Salt River Project and the City of Tempe in their motion.

a. Collateral Estoppel

In my *Globe Equity* report, I discussed the features of the federal formulation of the collateral estoppel doctrine. *See Globe Equity* Report at 59-63. Parties such as SRP can urge the preclusive effect of claims commission determinations even though they were not parties to those earlier proceedings. *Id.* at 59 ("A nonparty to the original litigation may assert the earlier determination as an affirmative defense, urging that the issue was determined adversely to the plaintiff in the first case."). The party against whom collateral estoppel is alleged must have been a party to the earlier case, and, here, the Indian Community and United States both were parties to the claims commission proceedings. Collateral estoppel is limited to issues of law or fact that were actually or necessarily decided in the earlier case. *Id.* at 60. I have already examined the numerous indications in the record supporting my conclusion that the Community's asserted reserved right entitlement to the Salt River was an issue "actually and necessarily" determined adversely to the Community before the claims commission. *See supra* pp. 51-52.

Also in my *Globe Equity* report, I indicated that earlier consent judgments are not given preclusive effect under collateral estoppel. *Id.* at 60. I do not believe that

limitation applies here because the reserved rights entitlement was actually litigated to the detriment of the Community, in a distinct phase of the overall litigation, a result that was substantially affirmed by the court of appeals. The stipulated judgment, entered fifteen years later, does not change the "actually litigated" character of that adjudicated determination. As *Kerr-McGee* discusses, bifurcated proceedings were common before the claims commission and settlements in later stages of the case do not prevent preclusive effect being given to issues actually determined in earlier stages of the case. 898 P.2d at 1261.

Finally, there can be no question that the proceedings before the claims commission were fair and provided the Community with ample opportunity to be heard.

Since the necessary criteria are met, collateral estoppel does preclude the Indian Community from relitigating a claim in this adjudication based on the assertion of a reserved water right in the Salt River system benefiting the Gila River Indian Reservation beyond the 1,460 acres comprising the Maricopa Colony.

The next question then arises: Is the United States also precluded as trustee for the Community, based on its participation as a defendant in Docket No. 236-D, from asserting a reserved right claim now to the Salt River system? During the entitlement phase before the commission, the United States defended and prevailed on the basis that no reserved right was established in the Salt River system. For the United States to assert such a right in this adjudication is a wholesale reversal of its earlier position. Except for the "same party" requirement I recognize under Arizona

law, *supra* at p. 13, this otherwise would be an appropriate opportunity to apply judicial estoppel–independent of the collateral estoppel doctrine.

The United States also argues that collateral estoppel cannot apply to it, based on the holding of *United States v. Mendoza*, 464 U.S. 154 (1984). In that case, the Court held that nonmutual collateral estoppel could not apply to the United States. Mendoza, a Filipino national, sought naturalization by claiming that a statute easing the requirements for noncitizens, who had served in the American Armed Forces, had been unconstitutionally applied in his situation. Before the trial court, Mendoza successfully prevailed on his argument that the same issue had been determined adversely against the United States in other, earlier litigation.

The Court describes the *Mendoza* situation as one involving the "offensive use of collateral estoppel" that seeks to prevent a defendant (in this case, the United States) from "relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or different party." *Id.* at 159, n.4. That stance is different from the one now presented. Here SRP seeks to celebrate the United States' victory in the earlier litigation, not its defeat. Still, I believe the rationale discussed by the courts is sufficient to prevent an application of collateral estoppel against the United States. Among the reasons given by the *Mendoza* Court for not applying the doctrine are (1) "such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue," *id.* at 160; (2) "successive administrations of the Executive Branch [would be unable to] take differing positions with respect to the resolution of a particular issue," *id.* at 161; and (3) the United States would be forced

to appeal every judgment entered against it to minimize the collateral application of these results against it, *id.* at 163.

While these considerations may be applicable in a normal case, I do not believe they apply where, as here, the issue before the claims court was in the nature of a general determination of title (*see* next section), upon which a large number of other persons might reasonably rely and order their affairs. *Cf. Nevada v. United States*, 463 U.S. 110 (1983); *Globe Equity* Report at 30. Consequently, I do believe the United States is collaterally estopped, because of the claims commission proceedings, from asserting a reserved right in the Community's behalf to the Salt River system.

b. Statutory Estoppel

I also believe that both the Indian Community and the United States are precluded, as a matter of statutory estoppel, from reasserting a reserved water right claim to the Salt River system after the determination made by the claims court that no such right was reserved. As discussed in *Kerr-McGee*, the statutory preclusion cases "recognize that by creating the ICC, Congress intended that an ICC determination of liability would conclusively establish that title had been extinguished and could not be reasserted by the tribe." 898 P.2d at 1263.

Our case is similar to *Western Shoshone*, previously discussed. The claims commission had determined after trial that the Shoshone's aboriginal title to land in several western states had been extinguished. Years later, the tribe sued the State of Nevada claiming interference with the tribe's aboriginal fishing and hunting rights. The court held that "the award [by the claims commission] in *Shoshone*

Nation constituted a general determination of title which bars the Shoshone from asserting title against the State of Nevada." 951 F.2d at 202.

A "general determination" of title is in the nature of a completed quiet title action. The goal of such proceedings is finality and security of title. This is a goal shared by the Indian Claims Commission Act. As recognized in *Pend Oreille*,

> "The 'chief purpose of the Act [establishing the Commission] was to dispose of the Indian claims problem with finality.'" *United States v. Dann*, 470 U.S. 39, 45 . . . (1985) (quoting H.R.Rep. No. 1466, 79th Cong., 1st Sess., 10 (1945)). Consistent with this purpose, this court has repeatedly held that payment of a Commission award of compensation for a taking of aboriginal lands conclusively establishes that the aboriginal title has been extinguished.

926 F.2d at 1508 (citations omitted).

Our case presents an especially strong argument for finality when the claims commission, in the first instance, has determined that the Community did not have title or other interest, in the nature of a reserved right, in the Salt River system beyond water rights for the 1,460 acres of the Maricopa Colony. Finality in water right determinations is especially warranted in the western region because of the interdependency of rights on the same river system. As discussed in my *Globe Equity* report, the U.S. Supreme Court "considers the stability of land and water titles to be of great importance in the West . . . ." *Globe Equity* Report at 30.

4. Findings of Fact

a. Finding of Fact No. 62. Over time, the claims asserted by the Community under the 1946 Indian Claims Commission Act became consolidated into two dockets: 228 and 236. Docket No. 228 addressed the aboriginal rights claims of the Community and other Indian communities, and Docket No. 236 concerned its

water, property, and accounting disputes with the United States. *See* Petition, *Gila River Indian Community v. United States*, Docket No. 236-D (OSM No. 7154) (236-D Petition); *see also* Angel, *supra*, at 437.

b. Finding of Fact No. 63. The Community submitted its original petition in Docket No. 236 on August 14, 1951. *See* 236-D Petition, *supra*. In 1968, the commission subdivided the Community's grievances into fourteen causes of action, Docket Nos. 236-A to 236-N. *Id.*; *see also* Angel, *supra*, at 450.

c. Finding of Fact No. 64. In 1978, portions of the Docket No. 236 were transferred from the defunct commission to the U.S. Court of Claims. *See* Angel, *supra*, at 450.

d. Finding of Fact No. 65. Docket No. 236-D included the Community's claims for "monetary compensation for the water from the Salt River which, [the Community] asserted, should and could have been put to beneficial use in the irrigation of their Reservation but which was, instead, utilized for other purposes." Opinion at 2, *Gila River Pima-Maricopa Indian Community v. United States*, No. 236-D (Ct. Cl. Sept. 28, 1981) (OSM No. 92).

e. Finding of Fact No. 66. In its opinion in Docket No. 236-D, the Court of Claims stated: "The present proceedings are limited to determining the extent of the plaintiffs' right, if any, to use the waters of the Salt River for irrigation activity on the Gila River Indian Reservation." *Id.*

f. Finding of Fact No. 67. In Docket No. 236-D, the Community argued that the United States had reserved for the Indians on the reservation sufficient waters from the Salt River to irrigate all arable reservation lands

practicably irrigable from those waters. *Gila River Indian Community v. United States*, 695 F.2d at 561.

g. Finding of Fact No. 68. In its Requested Findings of Fact, the Community included a Finding No. 6, entitled "*Winters* doctrine water rights in reservation enlargement." Plaintiff's Requested Findings of Fact and Brief, at 4, *Gila River Indian Community v. United States*, Docket No. 236-D (Jan. 31, 1977) (OSM No. 7194); *see also* Plaintiff's Objections to Defendant's Requested Findings of Fact, *Gila River Indian Community v. United States*, Docket No. 236-D (Sept. 28, 1979) (OSM No. 7198). In proposing its Finding of Fact No. 6, the Community argued that the Court should find that, "[i]n expanding the Gila River Indian Reservation by Executive order dated June 14, 1879 (1 KAPP. 806), the [United States] reserved for the use of [the Community] sufficient waters from the Salt River to irrigate all arable reservation lands practicably irrigable from those waters." *Id.*

h. Finding of Fact No. 69. In its Pretrial Statement in the 236-D case, the Community set forth issues of law to be addressed by the court, including: "Under the *Winters* Doctrine, what is the measure of the Pima-Maricopa right to the waters of the Salt River on the Gila River Indian Reservation and to what extent is this right affected by the availability of Gila River water." Plaintiff's Pretrial Statement at 3, *Gila River Indian Community v. United States*, Docket No. 236-D (Dec. 13, 1973) (OSM No. 1968). The court phrased the issue as "[t]he extent of the plaintiff's right to use the waters of the Salt River on the Gila River Indian Reservation." Pretrial Order at 3, *Gila River Indian Community v. United States*, Docket No. 236-D (Apr. 1, 1974) (OSM No. 1970).

i. Finding of Fact No. 70. The Community claimed that 113,498 acres on the reservation were irrigable from the Salt River. Using a water duty of 4.58 ac-ft, the Community sought compensation from the federal government for 550,465 ac-ft annually of water of which the Community allegedly had been deprived. *See* 236-D Petition, *supra*; *see also* Angel, *supra*, at 458; "Summary Sheet" used as the Community's Exhibit No. 7 in the 236-D case (Dec. 17, 1974) (OSM No. 7192) (showing 114,138 acres as "[t]otal acreage irrigable from the Salt River on the Gila River Indian Reservation bounded on the South by the Santa Cruz River").[7]

j. Finding of Fact No. 71. The Community's petition in 236-D also criticized the federal government for entering into the 1936 Contract with the Salt River Project, contending that the water that the Indians received from the well was of a lesser quality than that which they had historically diverted from the river. *See* Angel, *supra*, at 458-59; *see also Gila River Indian Community v. United States*, 695 F.2d at 562. The United States defended, in part, saying that some injuries, if proven, were suffered by individual Indian allottees. OSM No. 7185. The courts never resolved this issue. 695 F.2d at 559, 562.

k. Finding of Fact No. 72. Judge Merow of the United States Court of Claims issued his decision in Docket No. 236-D on September 28, 1981. The judge found:

> Under the established principle [of federal reserved rights], the question which must be resolved is whether, in creating and enlarging the [reservation], the United States reserved water from the Salt River for the irrigation of the Reservation lands. On the record evidence, the

[7] Digests of all the exhibits used by the Community and the United States in the 236-D case are included in the Special Master's index as OSM Nos. 7190, 7191, & 7206.

> answer is in the negative, except for the extreme northwest corner which is within the Salt River watershed. The evidence of record demonstrates that the Gila River and groundwater were the intended sources for irrigation water to be utilized on the [reservation]. There exists no evidence that the Salt River water was exploited by the Pima-Maricopa Indians for irrigation of the [reservation] within the Gila River watershed; clearly, it was not once "thoroughly and exclusively" so exploited. . . .
>
> . . .
>
> With respect to the [reservation], except for the northwest corner, Salt River water cannot be held to be appurtenant to the Reservation lands–either historically or in the sense that the United States intended, when creating and enlarging the Reservation, that this water would be so attached to the Reservation lands.

236-D Opinion, *supra*, at 11-13.

In Finding of Fact No. 11, Judge Merow specifically found:

> There exists no indication in the evidence of record that, when creating and enlarging the Gila River Indian Reservation, the United States ever intended or contemplated reserving, using or diverting water from the Salt River for the purpose of irrigating the Gila River Indian Reservation lands located in the Gila River watershed.

Id. at 20.

l. Finding of Fact No. 73. The Community appealed Judge Merow's decision to the United States Court of Appeals for the Federal Circuit. The parties filed briefs on appeal, with the Community continuing to assert its federal reserved rights argument.

m. Finding of Fact No. 74. On December 10, 1982, the Federal Circuit affirmed Judge Merow's opinion in part, reversed it in part, and remanded it to the Court of Claims. *Gila River Indian Community v. United States*, 695 F.2d 559. The court found that Judge Merow was correct in his determination that no federal

reserved right existed to the Salt River for any of the reservation outside, at most, 1,490 acres in the Maricopa District. Specifically, the Federal Circuit stated:

> [T]he court must resolve whether in creating and enlarging the Gila River Indian Reservation the United States reserved water from the Salt River for the irrigation of reservation lands. The weight of the credible evidence clearly leads to a negative answer except for the 1,490-acre segment at the extreme northwest border of the reservation. Gila River water and groundwater constituted the intended sources for irrigation of the Gila River Reservation.

Id. at 561.

n. Finding of Fact No. 75. The Federal Circuit, however, remanded on other issues relating to the United States' liability to pay damages concerning deprivation of water for the 1,490 (or fewer) acres in the Maricopa District. *See* Angel, *supra*, at 463. Those issues have since been resolved with the entry of final judgment in Docket No. 236-D on May 3, 1999.

5. Conclusions of Law

a. Conclusion of Law No. 8. Issues actually determined in proceedings brought under the Indian Claims Commission Act may have preclusive effect in other subsequent judicial proceedings, such as in this contested case.

b. Conclusion of Law No. 9. A material issue actually and necessarily determined by the U.S. Court of Claims, in proceedings in Docket No. 236-D brought under the Indian Claims Commission Act, was whether the United States, in creating and enlarging the Gila River Indian Reservation, reserved water from the Salt River for the benefit of the reservation.

c. Conclusion of Law No. 10. Except for water necessary for the 1,490 acres of the Maricopa Colony, the court of claims determined that no other water had been reserved from the Salt River for the benefit of the Gila River Indian Reservation.

d. Conclusion of Law No. 11. Since the Gila River Indian Community was a party to Docket No. 236-D, and had a full and fair opportunity to be heard in those proceedings, the Community is precluded as a matter of collateral estoppel or issue preclusion from asserting a reserved water right to the Salt River beyond the water necessary for the 1,490 acres of the Maricopa County.

e. Conclusion of Law No. 12. The holding and rationale of *United States v. Mendoza,* 464 U.S. 159 (1984), is inapplicable where, as here, the issue decided under the Indian Claims Commission Act was in the nature of a general determination of title, upon which a large number of other persons might reasonably rely and order their affairs. Consequently, the United States is also precluded, as a matter of issue preclusion or collateral estoppel, from asserting a reserved water right to the Salt River, for the benefit of the Community, in this adjudication.

f. Conclusion of Law No. 13. The decision of the U.S. Court of Claims in Docket No. 236-D, as affirmed by the appellate court, while considering the monetary claims of the Community, resulted in a general determination of any title asserted by the Indian Community or the United States in its behalf to the waters of the Salt River. Beyond the water necessary for the 1,490 acres of the Maricopa Colony, the court of claims determined that neither the Community nor

the United States had title or other interest, in the nature of a reserved right, in the Salt River system beyond the water rights for the 1,490 acres of the Maricopa Colony.

g. Conclusion of Law No. 14. Both the Gila River Indian Community and the United States, in behalf of the Community, are precluded as a matter of statutory estoppel from asserting any reserved water right to the Salt River system in this adjudication, other than the water rights for the 1,490 acres of the Maricopa Colony.

6. Recommendation

The Superior Court should GRANT the motion of the Salt River Project and the City of Tempe to the extent that (1) both the Gila River Indian Community and the United States are barred, as a matter of collateral estoppel, from asserting a reserved water right claim to the Salt River system, and (2) both the Gila River Indian Community and the United States are barred, as a matter of statutory estoppel, from asserting a reserved water right claim to the Salt River system for the benefit of the reservation. This preclusion should not extend to the water rights benefiting the 1,490 acres of the Maricopa Colony.

IV. PRECLUSIVE EFFECT OF THE 1907 SACATON AGREEMENT

Motion for Partial Summary Judgment re Preclusive Effect of 1907 Sacaton Agreement, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 211 & 212).

A. Background

The Salt River Project has moved for summary judgment on the terms of the 1907 Sacaton Agreement entered into between SRP and the United States (the

"contract" or "agreement") (OSM No. 149). In its pleadings, SRP requested four measures of relief; in oral argument, its attorney indicated that the motion could be resolved by a judicial determination "that the Sacaton Contract precludes the furnishing of Salt River Project water to the Indians of the [Gila River] Reservation." SRP Reply at 20 (June 5, 2000).

The contract was dated June 3, 1907, and bears the signatures of Secretary of the Interior James R. Garfield and SRP's president. The contract has as its stated purpose the implementation of the 1902 National Irrigation Act (the Reclamation Act), as manifested locally in the Salt River Project then being organized and constructed in central Arizona.

The contract specifically concerns the distribution and use of hydroelectric power that would be produced at Roosevelt Dam and other generation facilities on the Salt-Verde river systems. Contract at 1-2. The contract recognizes that available hydropower would likely exceed the needs of Salt River Project members. The federal government sought to acquire some of this hydropower to aid the Pima and Maricopa Indians of the Gila River Indian Reservation in applying pumped water to their lands. Specifically, the contract discusses the acquisition of 1,000 horsepower to be used in applying water to 10,000 acres of Indian land along the Gila River. *Id.* at 2. The agreement frequently mentions the use of hydropower for the pumping of groundwater. *Id.* at 3. At the time of this agreement, the United States was attempting to augment tribal water supplies, which had been encroached upon by upper Gila River irrigators, by encouraging groundwater pumping. *See Globe Equity* Report at 4.

The contract also anticipates that Indian farmers would eventually become members of the Salt River Project. Contract at 2. Under the agreement, however, only 10,000 acres of Indian land could be annexed to the Project. *Id.* at 5. The agreement notes two immediate barriers to such membership. Both the Reclamation Act and SRP's articles of incorporation limited Project membership to farmers who owned their land in fee. *Id.* at 2. At the time, reservation lands were held in trust by the United States but federal Indian policy was based on the assumption that Indian allottees would receive fee title to their allotments. With the passage of the Indian Reorganization Act in 1934 effectively ending the allotment period, the possibility of individual ownership was no longer available. *See* Act of June 18, 1934, ch. 576, 48 Stat. 984. Consequently, no Indian lands were taken into the Project under the 1907 contract.

In its motion, SRP is more concerned with contractual language affecting water rights than in the hydropower provisions. The Project points to the following language in the 1907 agreement:

> It is further agreed and understood that the Government may not, and that the Association [SRP] shall not be obliged, either under the terms of this contract or after the Indians may have become shareholders of the said Association in pursuance of it, to furnish any water, whether pumped or from the surface, from the natural flow of the water courses or of stored water or of developed water, to any of the lands of the Indians within said Reservation; the sole obligation being that of delivering electric power to the reservation line as expressed in this agreement.

Contract at 6.

The United States and the Gila River Indian Community both oppose SRP's motion. The United States argues that the interpretation and enforcement of the

contract are outside the jurisdiction of the adjudication court and, in any event, materials facts are in dispute thus preventing the entry of summary judgment. United States Response (Jan. 27, 2000). The Indian Community argues that the contract was procured through fraud upon the United States, was not authorized by law, has been breached, has become impossible to perform due to intervening events, and is vague and ambiguous. Community Response (Jan. 26, 2000).

The Salt River Project replies that many of these assertions were decided against the Gila River Indian Community in proceedings before the Indian Claims Commission. SRP Reply (June 5, 2000).

For the reasons expressed below, I find that SRP's motion should be granted on a limited basis.

B. Contract Affects Water Right Characteristics

The United States argues that the interpretation and enforcement of the Sacaton Agreement is beyond the jurisdiction of this court. Salt River Project's allegation of a contractual limit on the claims by or on behalf of the Indian Community, according to the federal government, are essentially counterclaims that are barred by federal sovereign immunity. Nor does the McCarran Amendment waive federal immunity to consider the contract, according to the United States.

The Project's assertions under the Sacaton Agreement do not constitute a counterclaim. The Project's arguments are in the nature of affirmative defenses to the water right claims of the Indian Community and the United States. ARIZ. R. CIV. P. 12(b). In response to the large federal and tribal claims, SRP defends by saying the 1907 agreement prevents these claims from being made to Salt River Project

water. The Project asserts no separate cause of action and seeks no other affirmative relief under the contract. As indicated by a leading commentator,

> Counterclaims are affirmative claims that either arise from the same transaction or occurrence as, or exist independently of, the subject matter of the original pleader's underlying claim. . . . Counterclaims are distinguishable from affirmative defenses, which challenge the plaintiff's legal right to bring an action but . . . do not allow for recovery . . . .

3 JAMES W M. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE § 13.90[1], at 13-77 to -78 (3d ed. 2000).

This case is unlike *Metropolitan Water Dist. v. United States*, 830 F.2d 139 (9th Cir. 1987), where as an outgrowth of interstate litigation affecting the Colorado River, the water district sought, as affirmative relief in a separate action, a determination that the Secretary of the Interior's boundary survey was erroneous. Here, SRP does not seek to establish the validity or extent of its water rights but only a determination that, under the contract, the Community's rights do not extend to or include the Project's rights, whatever they are.

Even if the federal sovereign immunity argument were valid, the McCarran Amendment constitutes an immunity waiver sufficient to determine the water right characteristics necessary to adjudicate individual water rights and fashion an enforceable decree. Those necessary water right characteristics usually include ownership, legal basis of the right, source of water, priority date, point of diversion, place of use, quantity, flow rate, and period of use. 45 ARIZ. REV. STAT. ANN. § 45-254(c) & -257 (b) (Supp. 1999). The adjudication court is required to consider prior decrees, legislation, and the provisions of private agreements that affect these water

right attributes. *See id.* at § 45-261. The Sacaton Agreement contains provisions that relate to the ownership, source of water, amount, and place of use of the claimed tribal rights. Jurisdiction under the McCarran Amendment to examine water right-related features of such contracts extends this far so that a competent adjudication may be accomplished. *See also* discussion, *infra*, p. 91.

C. Standing of Indian Community

The Sacaton Agreement is between the United States and the Salt River Project. The Gila River Indian Community is not a signatory to the agreement. While the United States maintains there are uncertainties in the agreement, it backs away from an outright assertion that the agreement is vague or ambiguous. More importantly, the United States does not join the Indian Community in alleging that the agreement was void *ab initio* or has been breached by SRP.

Only the United States, and not the Indian Community, has standing to make these arguments concerning the validity or current effect of the agreement. The United States contracted as trustee with SRP for the benefit of the Indian Community. A beneficiary of a trust cannot sue on a contract entered into by a trustee unless the trustee has wrongfully refused to act. RESTATEMENT (SECOND) OF TRUSTS §§ 280 & 282 (1957). The Indian Community has not demonstrated any wrongful refusal by the United States to assert its rights under the contract. The Community alleged in its complaint before the Indian Claims Commission that it had a proportionate part of the Salt River Project, but the allegation was dismissed with prejudice by the U.S. Claims Court in 1992. Final Order, *Gila River Indian Community v. United States* (Cl. Ct. Sept. 11, 1992) (OSM No. 8921).

The United States has been aware of the Community's allegations for many decades. The allegations of fraud were publicized in the congressional hearings in 1913, but the United States did not respond by taking steps to cancel or sue upon the contract.

On its face, the Sacaton Agreement is not as egregious as the one upheld in *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956). There, acting after little consultation with his supervisors or the U.S. Department of Justice, the chief irrigation engineer for the Bureau of Indian Affairs compromised the water rights of Washington's Yakima Indian Tribe in a very unfavorable manner. The tribe was given only 25 percent of the natural flow of Ahtanum Creek, which forms the northern boundary of the reservation. This 1908 agreement was endorsed by the first assistant secretary of the Department of the Interior. While federal officials soon recognized the folly of the agreement, they failed to do anything until a quiet title suit was brought in the 1950s.

The court acknowledged the "sad history of the Government's dealings" with Indian tribes, *id.* at 337, and indicated that the "numerous sanctimonious expressions [of goodwill toward Indians] . . . are but demonstrations of a gross national hypocrisy." *Id.* at 338. Still, the court concluded by recognizing the validity of the agreement: "The Secretary's mistakes, his poor judgment, his overlooking or ignoring of the true measure of the Indians' rights, his lack of bargaining skill or determination may add up to an abuse of his power, but do not negative it, or make his act ultra vires." *Id.*

Other of the Community's allegations are also without merit. Passage of the Indian Reorganization Act in 1934, terminating the allotment program, did prevent individual Indian farmers from becoming members of SRP. This development, however, does not satisfy the requirements for legal impossibility. For a period of twenty-seven years, performance of the contract was possible as the United States could have conveyed fee ownership to individual Indian farmers, thereby allowing them to utilize the SRP membership features of the 1907 contract. The United States, a party to the agreement, itself passed the legislation preventing individual Indian ownership. As a leading treatise indicates:

> The burden of proof is upon the party who asserts impossibility. He must show that the thing to be done could not be achieved by any means including substitute performances. *A fortiori* if a party creates the impossiblity by his own voluntary act he is not excused.

JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 13-14, at 565 (3d. ed. 1987).

D. <u>Contract is Not Vague or Ambiguous</u>

Both the United States and the Indian Community argue that because the 1907 agreement is vague and ambiguous, extrinsic evidence is necessary to interpret its meaning–and the extrinsic evidence is conflicting.

The contractual provisions concerning the Community's claims to SRP water are not ambiguous. The Project would deliver 1,000 horsepower of electricity to the northern reservation boundary for pumping purposes. The Project agreed that Indian owners could become members of the association so long as total acreage did not exceed 10,000 acres. More acreage could be brought into the association with SRP's additional consent. The agreement, however, did specify that the federal

government could not require SRP to furnish any type of water to "any of the lands of the Indians within said Reservation . . . ." Contract at 6. This limitation specifies that SRP has no contractual obligation to deliver water to either the 10,000 acres or any other part of the reservation.

In its pleadings and during oral argument, SRP indicated that its reliance on the 1907 contract does not, by itself, prevent the United States or the Indian Community from asserting and possibly proving water rights in the Salt River system (*e.g.*, aboriginal, reserved, or appropriative rights). What SRP seeks to clarify, in its view, is that it has no contractual obligation to deliver project water, or otherwise make project water directly available, to the Community.

The Sacaton Agreement is certainly not a waiver of the Community's reserved water right claim to the Salt River system. While I believe the limiting features of the contract to be effective, the Community could nevertheless ultimately prove Salt River water rights, independent of the contract, more senior than those of SRP.[8] In enforcing such rights, the Community could insist that SRP operate its upstream reservoirs in such a way that the Community's rights are satisfied (*e.g.*, by allowing pass-through flows). Absent some reclamation law provision or other requirement that has not been brought to the court's attention, the Community could not insist, however, that SRP deliver water to the reservation by artificial means such as by canal or pipeline.

[8] I have determined elsewhere, however, that both the Community and the United States are barred as a result of Docket No. 236-D, under the Indian Claims Commission Act, from asserting reserved water rights to the Salt River system. *See* discussion pp. 48-68, *supra*.

In an argument raised orally but not in the briefs, the Indian Community maintains that its claim does indeed extend to the waters stored and developed by SRP. The Community relies on the U.S. Supreme Court's holding in *Arizona v. California*, 373 U.S. 546 (1963), for this view. The Court there adjudicated water rights for several of the Colorado River Indian Tribes. In its decree entered a year later, 376 U.S. 340 (1964), the Court directed the United States to deliver the respective tribal entitlements from the "mainstream" of the river. *Id.* at 344-45. "Mainstream" was defined as "the mainstream of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs thereon . . . ." *Id.* at 340.

There is nothing exceptional about this requirement and little that would support the Community's position here. Under the *Colorado River* decree, the water master (*i.e.*, the United States) is required to operate the system in such a way that the tribes' senior rights can be satisfied. The Court's language does not support the Community's apparent belief that the Colorado River Indian Tribes thereby gained a special ownership or proprietary interest in the dams along the Colorado River. Similarly, while the Gila River Indian Community may properly insist on diligent enforcement of the priorities along the Salt River system, if it has water rights to protect, the Community has no special claim, by virtue of any senior rights, to utilize the reservoirs, canals, and other works of the Salt River Project.

E. Findings of Fact

1. Finding of Fact No. 76. On June 3, 1907, the United States and the Salt River Valley Water Users' Association entered into a contract, known as the

Sacaton Agreement. The contract was signed and duly executed by James Rudolph Garfield, Secretary of the Interior, for the United States, and B. A. Fowler, President, for the Salt River Valley Water Users' Association. OSM No. 149.

2. Finding of Fact No. 77. The Sacaton Agreement was not signed or entered into by the Gila River Indian Community or any members thereof. *Id*.

3. Finding of Fact No. 78. The contract acknowledged that, as part of the contribution of the Salt River Project, "that there will be developed for utilization a large amount of power in excess of that which may under any circumstances be utilized for pumping water for the irrigation of the lands of the members of said Association. . . ." *Id*. at 2.

4. Finding of Fact No. 79. A principal purpose of the contract was to transmit excess hydropower from the Salt River Project to the boundary of the Gila River Indian Reservation so that the electricity could be used by the Indians to irrigate, by pumping, 10,000 acres of land:

> [S]aid Government is desirous of supplying to and for the use by Indians water for the irrigation of ten thousand acres of land on and along the Gila River in Pinal and Maricopa counties in said Territory of Arizona and within the Gila River Indian Reservation, and for the part accomplishment of that purpose to use one thousand horse power of the electric power generated and to be generated as aforesaid by the works constituting the said Salt River project, and for that purpose to transmit the same by proper and convenient means of transmission forming constituent parts of said project to some convenient point on the South line of township 2 S. R. 5 E., G. & S.R.B. & M. line, being on the north boundary line of said Indian Reservation. . . .

Id.

5. Finding of Fact No. 80. The parties to the contract indicated their desire that the Indians of the Gila River Indian Community become members of the association:

> The Government is desirous and the said Association is willing that the said Indians shall ultimately become constituent members of said Association, but recognizes, as does said Association, that under neither the Articles of Incorporation of the said Association or under the provisions of the said National Irrigation Act [the Reclamation Act of 1902] can they become so until they have become owners in fee simple in severalty of said lands occupied by them which now they are not. . . .

Id.

6. Finding of Fact No. 81. The contract then set the following conditions under which the Indian lands could be member lands in the association:

> Whenever the Indians on said Reservation shall become the owners severally in fee simple of their lands, and be enabled to contract concerning them as fully and freely and to the same effects as can the members of said Association now are or may be, the extent of lands including said ten thousand acres shall be by the Association if so directed by the Secretary of the Interior . . . annexed to and be deemed a part of the Reservoir District. . . .

Id. at 5.

7. Finding of Fact No. 82. The contract imposed three additional conditions upon subsequent membership of the Indian lands in the association. First, no more than the owners of 10,000 acres of Indian lands could become shareholders without the consent of the association. Second, the association would be under no obligation to supply more than 1,000 horsepower to the reservation in the absence of a separate, additional agreement between the parties. Third, the contract provided that:

> The Association shall not be obliged, either under the terms of this contract or after the Indians may have become shareholders . . . to furnish any water whether pumped or from the surface from the natural flow of the water courses or of stored water or of developed water, to any of the lands of the Indians within said Reservation; the sole obligation being that of delivering electric power to the Reservation line as expressed in this memorandum. . . .

Id. at 6.

8. Finding of Fact No. 83. Beginning in 1917, with the opening of the Salt River Federal Reclamation Project, the Gila River Indian Reservation received power from the Salt River Project pursuant to the Sacaton Contract. *See* Angel, *supra*, at 366.

9. Finding of Fact No. 84. In 1937, the Sacaton Agreement was modified by an Agreement Between the United States, the San Carlos Irrigation and Drainage District, Salt River Valley Water Users' Association, and Salt River Project Agricultural Improvement and Power District. OSM No. 6745. The agreement required SRP, at the option of the United States, to change the point of delivery of electricity being delivered pursuant to the 1907 contract. *Id.* at 17-18. The 1937 agreement specified certain conditions for such a change but indicated that the other terms of the 1907 agreement would remain in effect. *Id.* at 18.

10. Finding of Fact No. 85. The 1937 agreement, by its terms, was to continue in full force and effect until April 2, 1949. *Id*. at 19.

11. Finding of Fact No. 86. In 1946, the United States and the Association agreed, pursuant to the 1937 amendment, to a change in the point of delivery that would permit 60-cycle power to be furnished to the reservation through the Bureau of Reclamation's Phoenix substation. Angel, *supra*, at 370. The

change was implemented that same year. *Id.* Under the new arrangement, 60-cycle electricity was transmitted over a Bureau of Reclamation line from Phoenix to Coolidge. From Coolidge, the power was then delivered over San Carlos Project lines to the Pima Agency at Sacaton. *Id.* at 370. Salt River Project power deliveries to the reservation continued under this arrangement until the 1950s when the Bureau of Reclamation discontinued the use of its line from Phoenix to Coolidge. *Id.*

12. Finding of Fact No. 87. In 1934, Congress passed the Indian Reorganization Act which ended the practice of allotments and extended indefinitely the trust period for existing allotments still in trust. Act of June 18, 1934, ch. 576, 48 Stat. 984.

13. Finding of Fact No. 88. The Pima Indians of the Gila River Indian Reservation consistently opposed the use of groundwater to compensate for surface water supplies being diverted by upstream, non-Indian users. OSM No. 3954. The Pima Indians and a subcommittee of the U.S. House of Representatives alleged in 1913 that the 1907 Sacaton Contract was procured through fraud. OSM No. 3269, at 9-10. Additionally, the Community alleges that SRP has never provided the benefits required by the 1907 Contract. Community Statement of Fact No. 49. No facts indicate that Congress took any action based on this report. The United States, a party to the contract, has not been shown to have challenged the validity of the contract; and it does not attempt to do so in this proceeding. *See* United States Response (Jan. 27, 2000). Other than its action before the Indian Claims

Commission, *infra* at Finding of Fact No. 90, the Community, not a party to the 1907 Contract, has never legally challenged the validity of the contract.

14. Finding of Fact No. 89. To date, the Pimas and Maricopas on the Gila River Indian Reservation have not acquired fee simple ownership of reservation lands. *See* Angel, *supra*, at 366. No reservation lands have been annexed to or made part of the Salt River Project. *Id.*

15. Finding of Fact No. 90. In 1951, the Gila River Pimas and Maricopas filed a suit against the federal government before the Indian Claims Commission seeking restitution for "damages and suffering . . . brought about through the negligence of the government to properly protect the interests of its wards against encroachments by outsiders or otherwise." Gila River Pima-Maricopa Indian Community Council Resolution (Jan. 3, 1951) (OSM No. 9298). One such claim filed by the Indian Community asserted that the 1907 Indian Appropriations Act and the Sacaton Contract gave the Community the right to membership in the Salt River Project. Angel at 470; *Gila River Pima-Maricopa Indian Community v. United States*, Docket No. 236-N, Issue D.

16. Finding of Fact No. 91. During trial, the U.S. Claims Court considered evidence that the Indians "never satisfied the requirements for eligibility to become parts of or to have a membership in the Salt River Project." Reporter's Transcript of Proceedings 1364-71, Docket No. 236-N (Cl. Ct. Nov. 22, 1983) (OSM No. 8918). The court indicated: "I'm here to determine whether Plaintiff has such an interest in the Salt River Project that an accounting is to be ordered." *Id.* at 1371. The court accepted a stipulation of the parties dismissing this Issue D with prejudice.

See Stipulation and Joint Motion for Entry of Final Judgment (Sept. 9, 1992) (OSM No. 9963), which was adopted by the U.S. Court of Federal Claims in its final order of September 11, 1992 (OSM No. 8921).

17. Finding of Fact No. 92. In the present contested case, the Gila River Indian Community has asserted a claim to stored water from the Salt River Project in its statement of claimant filed with the court. Statement of Claimant Nos. 39-12652, 39-36340, & 39-36360; ADWR Hydrographic Survey Report, Appendix F, pp. F-16, F-18, F-20, F-32. The Indian Community's claimed basis for an entitlement to Salt River Project membership is the 1907 Indian Appropriations Act. *Id.* The Indian Community's responsive disclosure statement, filed in this contested case, also asserts that the Community is entitled to membership in the Salt River Project, and to receive water stored and developed by Project facilities. Gila River Indian Community's Disclosure Statement at 28.

F. Conclusions of Law

1. Conclusion of Law No. 15. The United States and the Salt River Valley Water Users' Association entered into a valid, enforceable contract on June 3, 1907, concerning, among other things, the delivery of hydroelectric power to the boundary of the Gila River Indian Reservation.

2. Conclusion of Law No. 16. This Sacaton Agreement was modified by a 1937 agreement among the United States, SRP, and other parties. While the 1937 agreement, by its own terms, terminated in 1949, the 1937 agreement did not explicitly terminate the 1907 Sacaton Agreement. Indeed, the 1937 agreement indicated that, except for the modifications, "[a]ll other terms and

conditions of said Agreement of June 3, 1907 shall remain in full force and effect." OSM No. 6745, at 18. Since neither signatory has challenged the contract, the 1907 Sacaton Agreement, therefore, remains a valid and enforceable contract allowing the transmission of hydroelectric power to the Gila River Indian Reservation boundary.

3. Conclusion of Law No. 17. Since the Gila River Indian Community was not a party to the 1907 Sacaton Agreement (or the 1937 agreement), it does not have standing to challenge the validity of the 1907 Sacaton Agreement.

4. Conclusion of Law No. 18. The Gila River Indian Community has demonstrated no sufficient legal basis why it may challenge the 1907 Sacaton Agreement as the beneficiary of that agreement.

5. Conclusion of Law No. 19. Performance of the Sacaton Agreement was not frustrated or made impossible by the subsequent passage of the 1934 Indian Reorganization Act. Between 1907 and 1934, when this legislation ended the allotment of Indian trust lands, members of the Gila River Indian Community had the opportunity and ability to obtain fee title to their allotments and, thereby, secure membership in the Salt River Valley Water Users' Association under the provisions of the 1907 contract.

6. Conclusion of Law No. 20. During this adjudication (and independent of any provision of the Sacaton Agreement), the Gila River Indian Community may prove its claims and establish water rights in the Salt River system. These rights, if and when established, will be administered according to priority along with all other established rights in the system.

7. Conclusion of Law No. 21. The Sacaton Agreement, however, does not provide a legal basis for the Community to claim any interest or ownership in the dams, reservoirs, canals, or other works of the Salt River Project.

G. Recommendation

The Salt River Project's motion for summary judgment should be GRANTED to the limited extent that the Sacaton Contract does not provide a legal basis for the Gila River Indian Community to claim any interest or ownership in, or any right to utilize, the dams, reservoirs, canals, or other works of the Salt River Project.

V. PRECLUSIVE EFFECT OF 1945 BUCKEYE-ARLINGTON AGREEMENTS AND CLAIMS COURT DOCKET NO. 236-F

> Motion for Partial Summary Judgment re Preclusive Effect of Buckeye-Arlington Agreements and Claims Court Docket No. 236-F on Gila River Indian Community's Claims, filed by the Salt River Project, City of Tempe, Buckeye Irrigation District, and Arlington Canal Co. (Oct. 4, 1999) (Docket Nos. 224 & 225).

A. Background

The Buckeye Irrigation Co. and the Arlington Canal Co. ("companies" or "canal companies"), along with the Salt River Project and the City of Tempe, have also asked the court for partial summary judgment concerning what they believe are limiting features of two contracts ("agreements") with the United States. The first agreement is the United States-Buckeye Irrigation Co. contract (OSM No. 75). The second agreement is the United States-Arlington Canal Co. contract (OSM No. 76). Both contracts are dated May 29, 1947.

The origin of these agreements is well described by the Judge Harkins of the U.S. Claims Court in *Gila River Pima-Maricopa Indian Community v. United*

States, 9 Cl. Ct. 660 (1986). Concerned about the continued diminishment of Gila River, Salt River, and Agua Fria River flows due to upstream development, these canal companies filed suit in state court in 1929 against approximately 5,200 defendants including the Salt River Project, the engineer of the San Carlos Irrigation Project (SCIP), individual Indians, and several federal officials. *Buckeye Irrigation Co. v. Salt River Valley Water Users' Ass'n,* No. 30869 (Maricopa County Super. Ct., filed Sept. 21, 1929) (OSM No. 7161). The plaintiffs sought an adjudication of water rights and an injunction preventing interference with their rights.

The United States made a special appearance on behalf of the federal officials and Indians named in the litigation and suggested that the court lacked jurisdiction over these persons and the United States generally. The court overruled or ignored this argument and retained jurisdiction over these defendants.

The suit languished although the parties exchanged proposals and mediation was attempted. Finally, an agreement was reached in 1945 and Congress appropriated money for the settlement, $104,000 for Buckeye and $10,000 for Arlington, to be added to the repayment obligation of the San Carlos Irrigation Project. Dep't of the Interior Appropriations Act, Pub. L. No. 123, 59 Stat. 318, 330-31 (July 3, 1945) (OSM No. 133). This appropriations bill required that, before settlement was complete, the Gila River Indian Community would have to consent to the imposition of a lien securing its portion of the additional repayment amount (similar assurances were required of the San Carlos Irrigation and Drainage District (SCIDD), representing the owners of the non-Indian portion of the San Carlos Project). The Indian Community did so in 1947. In a final step (separate agreements

having been reached with some of the other defendants), the plaintiffs dismissed their lawsuit with prejudice.

The two agreements are identical in their substantive features. Many of the recital clauses describe the United States' role in developing the Florence-Casa Grande Irrigation Project and the San Carlos Irrigation Project. *E.g.,* Buckeye Agreement ¶¶ 2, 4-6. Other recital clauses describe the United States' ownership, in trust, of project water rights. *Id.* ¶¶ 3 & 7. These clauses also recite the United States' rights under the *Globe Equity No. 59 Decree, id.* ¶¶ 8 & 9, the water rights for Indian lands known as the "Gila Crossing District," *id.* ¶ 10, and water rights for four Indian farms, *id.* ¶ 11. Other than these references, no specific mention is made of the Gila River Indian Community in the recitals. The structure and content of these recitals, I believe, supports the reasonable inference that the United States was wearing its "reclamation hat," rather than its "Indian trustee hat" when negotiating these agreements.

One other recital clause, *id.* ¶ 26, discusses the United States' desire to pay money "to settle all past disputes and avoid future controversies" for a release by the canal companies of their "past, present and future claims" resulting from the operation of the San Carlos Project or the use of water on Gila Crossing lands and certain other non-project lands.

In the substantive sections of the agreement, the canal companies release any past, present, and future claims resulting from existing storage and diversions (including diversions for Gila Crossing lands), as well as any claims resulting from

any new storage or diversions from new storage upstream from Sacaton Dam. *Id.* ¶ 30.

The United States agrees to pay money to the companies, *id.* ¶¶ 28 & 29 ($104,000 to Buckeye, $10,000 to Arlington). The agreements also impose limitations on the United States' future actions:

- Water from existing reservoirs or "new reservoirs or storage works" may only be used on San Carlos Irrigation Project lands, Florence-Casa Grande Project lands that are not within the San Carlos Project, and Gila Crossing lands. *Id.* ¶ 30.
- Subject to this place of use limitation, the United States may build new diversion or storage dams for the San Carlos Project anywhere on the Gila River mainstem or tributaries above Sacaton Dam. *Id.* ¶ 31.
- Subject to the same place of use restriction, the United States may also "drill such new wells and install pumps therein as may be necessary to fully utilize its water rights enumerated in paragraph 9 hereof [direct diversion rights, storage rights earlier than June 7, 1925, and 'underground rights including the right to pump from the subsurface flow of the Gila River' in a specified reach]." *Id.*

These agreements were the basis for some of the claims filed by the Indian Community against the United States under the Indian Claims Commission Act. The Community alleged in Docket 236-F that the United States, by relying on these agreements, had violated its trust responsibility by "refus[ing] to aid, and in fact prevent[ing], the development of underground water for irrigation of areas of the

reservation suitable for agriculture by pumped water." 9 Cl. Ct. at 661. The Community's claim was eventually dismissed by the court. *Id.* 702.

B. Discussion

The moving parties assert that these agreements limit the claims of both the United States and the Gila River Indian Community in this adjudication. The moving parties interpret these agreements as narrowing both the source of water available to the reservation and the lands upon which water can be applied. Specifically,

> [t]hese Agreements prohibit the drilling of wells on Reservation lands other than those lands designated as part of the San Carlos Irrigation Project ("SCIP") and certain other areas delineated in the Agreements. They also prohibit future surface water diversions below the Sacaton Diversion Dam for use on the Reservation and prohibit the irrigation of additional acreage on the Reservation beyond the lands described in the Agreements.

Buckeye-Arlington Motion at 2.

In addition to arguing that the United States' contractual obligations limit the reservation's claims, the moving parties also assert that both the United States and the Indian Community are bound by the doctrines of *res judicata*, resulting from the settlement reached in the state court litigation, and judicial estoppel, resulting from the proceedings under the Indian Claims Commission Act. The moving parties, however, have withdrawn their *res judicata* argument; and the merits of that argument are not addressed here.

Based on my determinations earlier in this report, the judicial estoppel argument is not applicable since the "same parties" requirement, *see supra* pp. 10-14, is not satisfied as Buckeye and Arlington were not parties to the earlier proceedings

under the Indians Claims Commission Act. In the absence of a judicial estoppel argument, the Salt River Project and the City of Tempe do not have standing to assert the preclusive effect of these agreements on the basis of contract law. The "practical realities of water rights litigation," Buckeye-Arlington Reply at 17, do not afford such a legal basis. The agreements do not evidence an intent to make SRP and Tempe the third party beneficiaries of the agreements. Indeed, SRP was a defendant in the original state court litigation brought by Buckeye and Arlington and reached its own separate settlement with the plaintiffs. At most, SRP and Tempe are incidental beneficiaries of the Buckeye and Arlington agreements. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981).

The Gila River Indian Community is unquestionably bound by these agreements. Paragraph 37 in each agreement indicates that it is binding on both the San Carlos Irrigation and Drainage District and the Gila River Pima-Maricopa Indian Community. Even though the Community argues that its governing council only approved the sufferance of liens on reservation land, Indian Community Statement of Fact No. 4, it did pass an "appropriate resolution," consenting to the lien on Indian lands, as required by the federal statute authorizing the agreements. *Id.* at No. 23 (*citing* OSM No. 16340).

The United States argues, among other things, that the adjudication court lacks jurisdiction to interpret or enforce the provisions of contracts entered into by the United States, even though the agreements affect water rights. The United States suggests that the Tucker Act, 28 U.S.C.A § 1346 (1993), vests exclusive jurisdiction over such contractual claims in the U.S. District Court or U.S. Court of

Federal Claims. It is not entirely clear that the recognition and description of a water right would fall within the meaning of Section 1346, allowing monetary claims based on "[a]ny civil action or claim against the United States, not exceeding $10,000, founded . . . upon any express or implied contract with the United States . . . ."

I have already determined that contracts can be considered and interpreted in this general stream adjudication when their terms affect the characteristics of water rights that must be adjudicated. *See supra* pp. 71-73. A case cited by the moving parties, *State Dep't of Ecology v. Yakima Reservation Irr. Dist.*, 850 P.2d 1306 (Wash. 1993), supports this view. The Washington Supreme Court upheld the trial court's interpretation of an agreement entered into between the United States and the Yakima Indian Nation to settle the tribe's claims under the Indian Claims Commission Act.

An even more vivid example defeats the United States' claim that contracts entered into by the United States can only be considered by the federal district court or claims court under the Tucker Act. Often, the source of the reserved rights claims asserted by many western Indian tribes, and the United States in their behalf, are the various treaties entered into between those tribes and the federal government. These treaties are essentially contracts between sovereigns. Unless these agreements are before the adjudication court, there is no basis for adjudicating a reserved right. If the United States was right on its "limited jurisdiction" theory, United States Response at 7, this would defeat the adjudication court's subject matter jurisdiction, a defect that could not be cured by the concurrence of the tribe and the United States.

The McCarran Amendment, as a separate waiver of federal sovereign immunity, provides the answer to this dilemma and allows the adjudication court to consider those aspects of contractual agreements that establish, describe, or limit the water rights being considered by the court.

Clarifying the adjudication court's jurisdiction to consider contracts such as the Buckeye and Arlington agreements is easier, in this instance, than interpreting what these agreements actually mean for the Gila River Indian Reservation. The moving parties believe that Buckeye and Arlington dismissed their causes of action in state court in exchange for money and promises from the United States to limit the use of Gila River water and groundwater upon SCIP and reservation lands. The Community responds in part that the agreements afforded the canal companies only a modest compensation to resolve their "nuisance claims." Reporter's Transcript of Proceedings 183:3 (Aug. 8, 2000). I do not believe that the members of Buckeye and Arlington companies, or the residents of the Gila River Indian Reservation for that matter, view upstream interference with their water uses as merely a "nuisance" matter.

The United States and the Indian Community interpret these agreements as forbearance agreements with the federal government retaining the ability to exceed the limits on the use of water–thereby exposing itself to additional claims by Buckeye and Arlington. The United States and the Indian Community also suggest that the agreements were more a limit on the San Carlos Irrigation Project than on the water rights of the reservation itself.

I believe that the agreements are ambiguous in at least three important, material respects, thereby defeating the requests for partial summary judgment. A trial would assist the court by illuminating, with additional facts and interpretation, these nagging uncertainties.

First, it is unclear on the existing record whether the agreements, while certainly limiting water use on San Carlos Project, Florence-Casa Grande, and Gila Crossing lands, also intended to limit water use on non-project, reservation lands. While these agreements must be read along with the *Globe Equity Decree*, and that ruling limits (in my view) decreed water to project lands, an opportunity appears to remain for the federal government and Community to apply other sources of water, *e.g.*, state-law water rights, to the surplus, non-project lands. *See Globe Equity* Report at 71-73. It is uncertain whether the Buckeye and Arlington agreements really meant to defeat the application of such water rights to non-project lands.

A second uncertainty is the meaning of "underground rights" in the agreement. Paragraph 31 imposes the same place of use limit on new wells and pumps necessary to use the United States' water rights enumerated in paragraph 9. These water rights include "underground rights including the right to pump from the subsurface flow of the Gila River . . . ." Does the place of use limitation apply only to the pumping of subflow? Does the limitation also apply to percolating groundwater? As the claims court recounts, the Community's attorney, Z. Simpson Cox, convinced the Bureau of Indian Affairs in 1951 that percolating groundwater was not covered by the agreements. 9 Cl. Ct. at 680-81. Unfortunately, most Arizona groundwater concepts are inherently and perpetually clouded in ambiguity.

Third, there is uncertainty about what the United States promised under the agreements. Without question, money was promised and delivered. Beyond the money, however, the agreements are bereft of any other explicit promises by the United States. Are the source and land restrictions implicit promises made by the United States or merely conditions that, if broken, allow the canal companies to assert additional damage claims?

On the one hand, the agreements have as their purpose the settlement of past, present, and future controversies concerning the United States' right to control and use Gila River water above the river's mouth. *See* Agreements ¶¶ 26 & 28. The agreements specifically release the United States, San Carlos Irrigation District, and the Pima Indians from claims for "past, present, and future" storage of water at Coolidge Dam, diversions at Ashurst-Hayden and Sacaton dams, new dams and storage above Sacaton Dam, and diversions at Gila Crossing. *Id.* ¶ 30.

On the other hand, while the agreements repeatedly speak of a desire to settle existing controversies and avoid future ones, one is unable to find any specific promise by the United States to do anything but pay $104,000 to Buckeye and $10,000 to Arlington. Even these amounts would eventually be repaid, at least as to non-Indians, by project users under their repayment obligations.

I suspect that the canal companies believed that the United States promised to limit its future water uses to specified locations. The United States and the Indian Community, however, interpret these agreements as forbearance agreements or "conditional waiver[s] of claims," United States Response 11. As I understand this argument, the place of use limits are not promises but express conditions that, in the

event they occur, trigger additional causes of action by the canal companies against the United States. *See* CALAMARI § 11-9 (3d ed. 1987); 8 CORBIN ON CONTRACTS § 31.1 (Joseph M. Perillo ed., rev. ed. 1999). Such agreements are not unknown in the water rights field.

Such a reading, of course, does violence to the common interpretation an ordinary reader would give the agreements. Also, such a reading runs counter to the legal presumption in favor of finding language of promise rather than language of condition. CALAMARI § 11-9, at 446; *see also Main Elec. Ltd. v. Printing Serv. Corp.*, 980 P.2d 522 (Colo. 1999) (if there is doubt as to the parties' intention, a contract clause is interpreted as a promise rather than a condition). That presumption, however, at this point of the proceedings is insufficient to overcome the critical weight I must give to the existent facts.

C. Findings of Fact

1. Finding of Fact No. 93. Buckeye is a farmer-owned non-profit corporation organized in 1907 to assume control of the Buckeye Canal and related facilities delivering water diverted from the Gila River immediately west of the confluence of the Gila, Salt, and Agua Fria Rivers for the irrigation of lands on the north side of the Gila River. *See* Statement of Claimant No. 39-07-982. The *Benson-Allison* Decree of 1917 adjudicated water rights for the irrigation of 19,837 acres under the Buckeye Canal, with priorities from 1887 through 1915. *See Benson v. Allison,* No. 7589 (Maricopa County Super. Ct. Nov. 14, 1917) (OSM No. 51).

2. Finding of Fact No. 94. Arlington is also a farmer-owned non-profit corporation that was formed in 1897 to operate the Arlington Canal system

providing water diverted from the Gila River west of the Buckeye diversion for the irrigation of lands west of the Gila River downstream from its confluence with the Hassayampa River. *See* Statement of Claimant Nos. 39-L836004 & 39-L836005. The *Simpson* Decree of 1940 adjudicated water rights for the irrigation of 3,857 acres of land under the Arlington Canal, with priorities from 1891 through 1911. *See Arlington Canal Co. v. Simpson,* No. 40828-Div. 3 at 2-4 (Maricopa County Super. Ct. Apr. 9, 1940).

3. Finding of Fact No. 95. In 1929, Buckeye and Arlington sued 5,206 parties in Maricopa County Superior Court. Among these were the Superintendent of the Gila River Indian Reservation ("Reservation"), SRVWUA, the Roosevelt Irrigation District ("RID"), the Verde Irrigation and Power District, the Roosevelt Water Conservation District, Maricopa County Municipal Water Conservation District No. 1 ("MCMWCD"), the engineer of the San Carlos Irrigation Project ("SCIP"), numerous individual landowners, various corporate and governmental entities, individual Indian allottees, and other defendants. *See* Complaint, *Buckeye Irrigation Co. v. Salt River Valley Water Users' Ass'n,* No. 30869 (Maricopa County Super. Ct., filed Sept. 21, 1929) (OSM No. 7161) ("*Buckeye v. SRVWUA*").

4. Finding of Fact No. 96. In their complaint, Buckeye and Arlington alleged that:

> [A]ll of the surface and subsurface waters of the valleys of [the Gila, Salt, and Agua Fria] rivers, including as a part thereof the waters flowing in and beneath the present surface bed and channel of each of said rivers, are a part of and go to make up the Gila River System and are tributary to said Gila River, and in their natural state did flow, and, but for the

> wrongful and unlawful interference therewith . . . by the defendants, . . . would flow into and constitute and make valuable contributions to said Gila River at points above and upstream from the diversion dams, headings, canals, laterals and irrigation works of each of the plaintiffs . . . and the plaintiffs further allege that all of the said subsurface waters of the valleys of each of said rivers in their natural and unobstructed state flowed and would now flow in well-defined underground channels through said valleys to their ultimate outlets in said Gila River. . . .

Id. § IX, at 42.

5. Finding of Fact No. 97. Buckeye and Arlington asked that the court establish by decree their right to divert a combined total of up to 562 cubic second-feet of water flowing continuously throughout the year, with a limitation of 200,000 ac-ft/yr. They also requested an injunction to prevent the defendants from "interfering with, obstructing, intercepting, diverting, pumping, taking, using, consuming or otherwise disposing of any of the waters of said Gila River System, the effect of which does or will reduce, deplete or impair in any manner or to any extent the rights of the plaintiffs." *Id.* at 48-49.

6. Finding of Fact No. 98. Federal officials named as defendants in the complaint made special appearances to object to the jurisdiction of the court over them personally, over individual Indians named in the complaint, and over the United States. *See* Special Appearance and Objection to Jurisdiction by Defendants N.W. Irsfeld *et al.*, *Buckeye v. SRVWUA* (filed Oct. 23, 1929) (OSM No. 7433); Special Appearance and Objection to Jurisdiction by Albert H. Kneale, *Buckeye v. SRVWUA* (filed Nov. 29, 1929) (OSM No. 7434); Suggestion by the United States of America, *Buckeye v. SRVWUA* (filed Nov. 29, 1929) (OSM No. 7435).

7. Finding of Fact No. 99. Federal officials argued that "this suit as to these defendants is in effect and intent a suit against the United States, although it is not named as a party therein," and that the United States could not be sued under principles of sovereign immunity. *See* Special Appearance and Objection to Jurisdiction by Defendants N.W. Irsfeld *et al.* at 2, *Buckeye v. SRVWUA* (filed Oct. 23, 1929) (OSM No. 7433).

8. Finding of Fact No. 100. The court either overruled or ignored the suggestions made by the United States and retained jurisdiction over all defendants. *See* Letter from Geraint Humpherys to Frank E. Flynn, United States Attorney (Feb. 23, 1939) (OSM No. 7514) (noting that Judge Rodgers had "overruled the Government's suggestions filed by Mr. Morton many years ago"); letter from Geraint Humpherys to the Comm'r of Indian Affairs (Mar. 3, 1945) (OSM No. 7620).

9. Finding of Fact No. 101. The case lay dormant for many years after it was filed. *See* Letter from Floyd E. Dotson, Ass't Secretary, to the Attorney General (Jan. 3, 1938) (OSM No. 7470). Settlement negotiations began in 1938 after Buckeye and Arlington had successfully moved to substitute named defendants. *See* Letter from Geraint Humpherys to the Comm'r of Indian Affairs (Mar. 3, 1945) (OSM No. 7620). Negotiations continued for the next several years. *Id.*; *see also Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 664 (1986) (OSM No. 101) ("236-F Decision"); Letter from Peter Van Liere, President of Buckeye, to Harold L. Ickes, Secretary of the Interior, at 3 (Apr. 25, 1939) (OSM No. 9743) (stating that several conferences had been held in the previous year between Buckeye, SCIP, and the Indian Department). In 1941, the Secretary of the Interior

("Secretary") appointed Judge Clifford H. Stone as mediator in the case. *See* Letter from Geraint Humpherys to the Comm'r of Indian Affairs (Mar. 3, 1945) (OSM No. 7620).

10. Finding of Fact No. 102. On November 5, 1938, Buckeye submitted a settlement proposal to the Secretary. *See* 236-F Decision at 664; Floyd M. Stahl and Lynn M. Laney, Proposal of Buckeye Irrigation Co. for Settlement of Water Litigation (OSM No. 7377). The proposal sought a commitment by the United States to install twelve pumps on Buckeye land to supply underground water for irrigation. The proposal stated that future additions to irrigation facilities or irrigated acreage on the reservation would create a new cause of damage:

> The foregoing proposal is made on the basis of the dams[,] pumps and irrigation works of users of water to whom this proposal is submitted as such works now exist or are under construction and on the basis of the lands of such users of water now in cultivation and under irrigation, and it is understood that in the event of further works or development or the bringing into cultivation of additional lands, or in the event the diversions and pumping of such users causes a reduction in the river flow at the Buckeye Dam to a point lower than has occurred up to the present time, the Buckeye Irrigation Company shall reserve the right to object to and protect itself and its stockholders against any loss of water thereby occasioned.

Id.

11. Finding of Fact No. 103. After consideration and further negotiations, federal officials accepted the proposal as a basis of settlement in 1941. *See* Memorandum of Understanding Between Representatives of the Buckeye Irrigation Company, United States Office of Indian Affairs, Bureau of Reclamation, and Mr. Frank C. Wright (Feb. 17, 1941) (OSM No. 7536); Letter from E. K. Burlew, First Ass't Secretary of the Interior, to Adm'r of the Federal Emergency Admin. of

Public Works (Dec. 23, 1938) (OSM No. 7502) (finding Buckeye's proposal to be reasonable); Letter from William Zimmerman, Ass't Comm'r of Indian Affairs, to Geraint Humpherys (Jan. 17, 1944) (OSM No. 6041).

12. Finding of Fact No. 104. Congress appropriated the money needed for the settlement in 1945. *See* Dep't of the Interior Appropriations Act, Pub. L. No. 123, 59 Stat. 318, 330-31 (July 3, 1945) (OSM No. 133). The payment to Buckeye and Arlington was to be repaid to the United States by SCIDD and the Indian Community as part of the construction charges for SCIP (these charges are not collectable against reservation lands so long as the lands remain in Indian ownership. *See* Act of July 1, 1932, ch. 369, 47 Stat. 564 (codified as amended at 25 U.S.C. § 386a)); Letter from A. E. Robinson to Gila River Pima-Maricopa Indian Community Council (Mar. 17, 1947) (OSM No. 7706). The appropriation states that no money would be paid to Buckeye and Arlington until (1) contracts had been executed between the Secretary and the two companies; (2) the Indian Community had adopted a resolution consenting to the charge of its share of the payment against reservation lands within SCIP; and (3) SCIDD had contracted with the Secretary to repay its share of the funds. *Id*.

13. Finding of Fact No. 105. Buckeye and Arlington's stockholders approved the proposed settlement in November 1945. The officers of both companies executed formal agreements embodying the proposals. *See* Letter from Geraint Humpherys to A. E. Robinson, Superintendent of Pima Agency (Dec. 13, 1945) (OSM No. 16198).

14. Finding of Fact No. 106. Final settlement of the case was held up for almost two years awaiting approval of necessary documents by the Indian Community. The Indian Community approved a resolution consenting to the charge of its share of the payment against reservation lands within SCIP in 1947. *See* Resolution of Gila River Pima-Maricopa Indian Community Council (Apr. 16, 1947) (OSM No. 7708). The remaining settlement documents were executed and became final shortly thereafter. *See* Buckeye and Arlington Agreements.

15. Finding of Fact No. 107. As required by the agreements, Buckeye and Arlington moved for dismissal of the case against all federal defendants with prejudice on plaintiffs' complaint. *See* Motion of Plaintiffs to Dismiss Action as to Certain Defendants, *Buckeye v. SRVWUA* (filed June 10, 1947) (OSM No. 7878). Buckeye and Arlington based their motion for a dismissal with prejudice on the fact that they had "entered into agreements with the United States of America for the compromise and settlement of all claims asserted by the plaintiffs in said action against said defendants and each of them." *Id.*

16. Finding of Fact No. 108. The court granted the motion on June 17, 1947. *See* Order Dismissing Plaintiffs' Action as to Certain Defendants, *Buckeye v. SRVWUA* (OSM No. 7879). Buckeye and Arlington received the funds provided for by the settlement on September 25, 1947. *See* United States Indian Irrigation Service Vouchers prepared at Coolidge, Ariz. (Sept. 25, 1947) (OSM No. 10316).

17. Finding of Fact No. 109. The Buckeye-Arlington agreements state that the agreements are entered into by Buckeye, Arlington, and the United

States through the Secretary of the Interior. *See* Buckeye Agreement ¶ 1. The Secretary's authority to contract is based on:

> Acts of Congress approved May 18, 1916 (39 Stat. 123-130), June 7, 1924 (43 Stat. 475) and March 7, 1928 (45 Stat. 200) and Acts amendatory thereof or supplementary thereto, particularly the Act of July 3, 1945 (Public No. 123-79th Cong., 1st Sess. at page 14), ...

Id.

18. Finding of Fact No. 110. In the agreements, the United States agreed to pay Buckeye $104,400, and agreed to pay Arlington $10,000. *See id.* ¶ 29; Arlington Agreement ¶ 29.

19. Finding of Fact No. 111. Payment was based on four conditions: (1) the approval of the agreements by the stockholders of Buckeye and Arlington, SCIDD, and the Indian Community; (2) the filing of a motion to dismiss by Buckeye and Arlington; (3) the availability of the funds through a congressional appropriation; and (4) the execution of the agreements by the parties. *See* Buckeye Agreement ¶ 29. As described above, all four of these conditions were met, and the money was distributed, in September 1947.

20. Finding of Fact No. 112. Paragraph 30 of each agreement says:

> The Company . . . hereby fully and in all respects releases the United States, the San Carlos Irrigation and Drainage District, and the Pima Indians from all damages or claims of damage by reason of past, present or future operation and use of Coolidge Dam and the storage of Gila River water in the San Carlos Reservoir, for the past, present or future diversions of water at Ashurst-Hayden and Sacaton Diversion Dams, also on account of the construction of any new storage and/or diversion dams on the Gila or its tributaries above the Sacaton Bridge and Diversion Dam and/or the storage of water therein or diversions therefrom, and for past, present or future diversion at Gila Crossing for the irrigation of the hereinbefore mentioned 2992.5 acres of Indian lands, PROVIDED, that the construction of new reservoirs or other

> storage works that may be built by the United States or its assigns to store and divert additional quantities of Gila River waters together with existing reservoirs and other works shall not be used for the purpose of irrigating more than 100,546 acres of San Carlos Irrigation Project lands plus 1545 acres of Florence-Casa Grande Project lands not in the San Carlos Project and said 2992.5 acres of non-project Indian lands under the Gila Crossing irrigation system.

Id. ¶ 30.

21. Finding of Fact No. 113. Federal representatives stated at the time the contracts were written that the practical effect of the waivers and releases was to allow SCIP to "manipulate the flow of the Gila River and use it by storage and direct diversion so as to completely shut off the flow at a 'point 100 feet above the mouth of the Salt River.'" *See* Letter from Geraint Humpherys to the Comm'r of Indian Affairs (Mar. 3, 1945) (OSM No. 7620).

22. Finding of Fact No. 114. Paragraph 9 of the agreements describes the United States' "rights to use the waters of the Gila River for the irrigation of lands in [SCIP]" as:

> (1) direct diversion rights, the earliest of which has an immemorial date of priority, (2) storage rights with a priority of not later than June 7, 1924, and (3) underground rights including the right to pump from the subsurface flow of the Gila River at any and all points between the San Carlos Project Ashurst-Hayden Diversion Dam and the western boundary of the said San Carlos Irrigation Project. . .

Buckeye Agreement ¶ 9.

23. Finding of Fact No. 115. The agreements state that, subject to the limitation in paragraph 30, diversions and wells are allowed upstream of Sacaton Diversion Dam:

> Subject to the foregoing limitation [in paragraph 30] the United States and/or its assigns may build for the San Carlos Irrigation Project

> such other storage and diversion dams on the Gila River or any of its tributaries at any point or points it may choose upstream from Sacaton Bridge and Diversion Dam. It is further agreed that subject to the same limitation the United States may drill such new wells and install pumps therein as it may deem necessary to more fully utilize its water rights enumerated in paragraph 9 hereof.

See Buckeye Agreement ¶ 31.

24. Finding of Fact No. 116. The agreements allowed the continued irrigation of four lease farms on the Gila Reservation by the use of wells and allowed new wells to be drilled on these farms as necessary. These were the "Lone Butte," "Broadacres Ranch," "Collier," and "Cheatham" lease farms. *Id.* ¶ 33. The agreements also stated that:

> [T]his agreement shall not be construed as affecting or in any way limiting rights of the Maricopa Indians to the use of water from Salt River, which rights were determined, defined and described in the decree of the Federal Court for the District of Arizona in the case of United States of America vs. N. W. Haggard, et al., neither shall it be construed as in any way affecting or limiting the rights of the United States or its Indian wards to use water from the Salt River and tributaries for the irrigation of Indian lands on the Salt River and Fort McDowell Indian Reservations.

Id. ¶ 34.

25. Finding of Fact No. 117. The SCIP project engineer stated in 1938 that Buckeye's proposed settlement was a good one, in that it gave the federal government "the perpetual right to divert all of the waters of Gila River that are available at the Ashurst-Hayden Dam or to hold all of the available flood waters in the Buttes Reservoir when that is constructed." *See* Letter from C. J. Moody, Project Eng'r, to Geraint Humpherys (Sept. 10, 1938) (OSM No. 7487); *see also* Letter from Geraint Humpherys to Comm'r of Indian Affairs (Feb. 26, 1944) (OSM No. 6043)

(suggesting acceptance of settlement offer and stating that proposal would grant United States complete control of the Gila River above Sacaton Dam); Letter from Geraint Humpherys to A. L. Wathen, Dir. of Irrigation (Nov. 25, 1938) (OSM No. 7496); Letter from Geraint Humpherys to Charles H. Reed (Mar. 10, 1938) (OSM No. 7476) (settlement would leave Gila River "to the control and use of the San Carlos Project").

26. Finding of Fact No. 118. The agreements state that they are binding upon the United States and the Indian Community:

> It is intended that the terms and provisions of this contract shall be binding upon and shall inure to the benefit of the United States and its assigns, the San Carlos Irrigation and Drainage District, its successors or assigns, also the Gila River Pima-Maricopa Indian Community, and the Company, ...

Buckeye Agreement ¶ 37.

27. Finding of Fact No. 119. In August 1951, the Gila River Indian Community submitted numerous claims against the United States to the Indian Claims Commission ("ICC"). *See* Angel, *supra*, at 437; 236-F Decision at 661; *Gila River Pima-Maricopa Indian Community v. United States*, 140 F. Supp. 776 (Ct. Cl. 1956). These claims were consolidated into two dockets: Docket No. 228 addressed the Indian Community's aboriginal claims, and Docket No. 236 addressed the Indian Community's water, property and accounting claims against the United States. Angel at 505.

28. Finding of Fact No. 120. In 1968, the Indian Claims Commission divided the Indian Community's claims under Docket No. 236 into fourteen causes

of action, numbering them Docket No. 236-A through 236-N. *See* 236-F Decision at 661.

29. Finding of Fact No. 121. In Docket No. 236-F, the Indian Community sued the United States for damages, alleging that the United States had breached its trust responsibility when it "refused to aid, and in fact prevented" the Indian Community from utilizing reservation lands for agriculture "by means of pumped water." *See* Petition at 2, *Gila River Pima-Maricopa Indian Community v. United States*, Docket No. 236-F (filed June 12, 1968) ("*Gila River Indian Community v. United States*"). The Indian Community also alleged that the United States had prevented it from pumping or using percolating waters adjacent to the reservation. *Id*. at 3. The Indian Community contended that the requirements of the Buckeye-Arlington agreements did not justify the United States' decision to prohibit new irrigation wells. *See* Reply Brief and Plaintiffs' Objections to Defendant's Requested Finding of Fact on Liability at 11-12, *Gila River Indian Community v. United States* (filed Mar. 9, 1982) (submitted in Fifth Supplemental Disclosure filed by the Salt River Project and City of Tempe on Aug. 16, 1999).

30. Finding of Fact No. 122. In 1972, Docket No. 236-F was consolidated for purposes of trial on liability issues with Docket No. 236-I. *See* 236-F Decision at 661.[9] The consolidated claims were transferred to the U.S. Claims Court on May 8, 1978. *See* Order Certifying and Transferring Cases to the United States

[9] Docket No. 239-I involved claims that the United States failed to obtain adequate compensation for the Indian Community from leases of reservation lands. *See* Opinion on Defendant's Motion for Preliminary Adjudication, 25 Ind. Cl. Comm'n 305 (May 19, 1971) (OSM No. 99).

Court of Claims, 41 Ind. Cl. Comm'n 304 (1978) (OSM No. 100).

31. Finding of Fact No. 123. The claims court dismissed all claims in Docket Nos. 236-F and 236-I. 9 Cl. Ct. 660, 702 (1986).

32. Finding of Fact No. 124. The Federal Circuit Court of Appeals upheld the Claims Court's decision and its dismissal of all of the claims in Docket No. 236-F. *See Gila River Indian Community v. United States*, 877 F.2d 961, 963 (Fed. Cir. 1989) (OSM No. 102).

D. Conclusions of Law

1. Conclusion of Law No. 22. The moving parties cannot invoke the doctrine of judicial estoppel since they were not parties to the proceedings brought by the Indian Community under the Indian Claims Commission Act (Docket Nos. 236-F & 236-I).

2. Conclusion of Law No. 23. The Salt River Project and the City of Tempe do not have standing as third party beneficiaries to assert, as a matter of contractual law and obligation, any preclusive effect of the Buckeye and Arlington agreements.

3. Conclusion of Law No. 24. As the result of action by its trustee, the federal government, the Indian Community is bound by the terms and conditions of the Buckeye and Arlington agreements.

4. Conclusion of Law No. 25. The Buckeye and Arlington agreements are ambiguous on three important issues: their applicability to non-project reservation lands, the meaning of "underground [water] rights" and the

limitations on pumping, and whether the land and source of water restrictions contained in the agreements are promises or conditions.

5. Conclusion of Law No. 26. Because of uncertainties and genuine disputes as to material facts, summary judgment may not be granted.

E. Recommendation

The Superior Court should DENY the motion of the Salt River Project, City of Tempe, Buckeye Irrigation District, and Arlington Canal Co. requesting the court to find that the United States-Buckeye Irrigation District agreement and the United States-Arlington Canal Co. agreement limit the claims of the United States and Gila River Indian Community in this adjudication.

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

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

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

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

VII. NOTICE OF SUBSEQUENT PROCEEDINGS

This report has been filed with the Clerk of the Court, mailed to persons appearing on the Court-approved mailing list (Appendix C), and posted to the Special Master's website (<http://www.supreme.state.az.us/wm/>) on December 28, 2000.

NOTICE IS HEREBY GIVEN that any claimant in the Gila River adjudication may file an objection to the report on or before **Friday, February 9, 2001**.[10] Any responses to objections must be filed with the Clerk of the Court on or before **Friday, March 2, 2001**. Objections and responses must be filed with the Clerk of the Superior Court, Maricopa County, 101/201 W. Jefferson St., Phoenix, AZ 85003-2205, Attn: Water Case No. W1-203. Copies of objections and responses must be served personally or by mail on all persons appearing on the service list for this contested case attached as Appendix C to this report.

NOTICE IS ALSO GIVEN that the hearing on the Master's motion to approve the report, and any objections to the report, will be taken up as subsequently ordered by the Superior Court. Rule 53(h), ARIZONA RULES OF CIVIL PROCEDURE, provides that "[t]he court shall accept the master's findings of fact unless clearly erroneous. . . .

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[10] Under ordinary circumstances, the period for filing objections and responses would be calculated under ARIZ. R. CIV. P. 53. The period for filing objections to the report normally includes the ten-day period, not including intermediate Saturdays, Sundays, and legal holidays, as specified by Rules 6(a) and 53(h), ARIZ. R. CIV. P. The five-day period for filing responses is specified in Rule 4(a), UNIFORM RULES OF PRACTICE. An additional five-day period is required when service has been made by mail (Rule 6(e), ARIZ. R. CIV. P.). Since the report does not cover an entire subwatershed or reservation, but only motions concerning an aspect of the case, the 180-day period prescribed by ARIZ. REV. STAT. ANN. § 45-257(A)(2) (Supp. 1999) does not apply.

However, due to the expedited schedule set by the Supreme Court on Issue No. 3, these usual dates have been extended to avoid conflict with that briefing and argument schedule.

[and] the court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions."

NOTHING FOLLOWS ON THIS PAGE

RESPECTFULLY SUBMITTED this 28th day of December 2000.

/s/ John E. Thorson

JOHN E. THORSON
Special Master

Appendix A

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

INDEX OF ALL PLEADINGS CONCERNING MOTIONS HEARD ON AUGUST 8, 2000
Docket Numbers in ( )

I. MOTION FOR PARTIAL SUMMARY JUDGMENT RE PRECLUSIVE EFFECT OF DECISION IN CLAIMS COURT DOCKET NO. 228 ON GILA RIVER INDIAN COMMUNITY'S CLAIMS (209) and SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION (210) filed by Salt River Project and City of Tempe (Oct. 4, 1999).

A. Joined by: City of Phoenix (237); Cities of Chandler, Glendale, Mesa & Scottsdale (240).

B. Responses by: Gila River Indian Community (377 & 378); United States (386 & 387).

C. Reply by: Salt River Project and City of Tempe (396 & 397).

II. MOTION FOR PARTIAL SUMMARY JUDGMENT RE PRECLUSIVE EFFECT OF *HAGGARD DECREE*, COURT OF CLAIMS DOCKET NO. 236-D, AND 1936 MARICOPA CONTRACT ON GILA RIVER INDIAN COMMUNITY'S CLAIMS TO WATER OF THE SALT RIVER (213) and SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION (214) filed by Salt River Project and City of Tempe (Oct. 4, 1999).

A. Joined by: City of Phoenix (236); Cities of Chandler, Glendale, Mesa & Scottsdale (240); Buckeye Irrigation Co. (241).

B. Responses by: Gila River Indian Community (380 & 381); United States (384 & 385).

C. Reply by: Salt River Project and City of Tempe (395 & 398).

III. MOTION FOR PARTIAL SUMMARY JUDGMENT RE PRECLUSIVE EFFECT OF 1907 SACATON AGREEMENT (211) and SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION (212) filed by Salt River Project and City of Tempe (Oct. 4, 1999).

A. Joined by: City of Phoenix (238); Cities of Chandler, Glendale, Mesa & Scottsdale (240).

B. Responses by: Gila River Indian Community (316 & 317); United States (327 & 328).

C. Reply by: Salt River Project and City of Tempe (404 & 405).

IV. MOTION FOR PARTIAL SUMMARY JUDGMENT RE: PRECLUSIVE EFFECT OF BUCKEYE-ARLINGTON AGREEMENTS AND CLAIMS COURT DOCKET NO. 236-F ON GILA RIVER INDIAN COMMUNITY'S CLAIMS (224) and SEPARATE STATEMENT OF FACTS IN SUPPORT OF MOTION (225) filed by Buckeye Irrigation Co., Arlington Canal Co., Salt River Project, and City of Tempe (Oct. 4, 1999).

A. Joined by: City of Phoenix (239); Cities of Chandler, Glendale, Mesa & Scottsdale (240).

B. Responses by: Gila River Indian Community (296 & 297); United States (312 & 313).

C. Reply by: Buckeye Irrigation Co., Arlington Canal Co., Salt River Project, and City of Tempe (388 & 389).

Appendix B

PROPOSED ORDER

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

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

THIS MATTER came before the court on (1) Motion for Partial Summary Judgment re Preclusive Effect of Decision in Claims Court Docket No. 228 on Gila River Indian Community's Claims, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket No. 209 & 210); (2) Motion for Partial Summary Judgment re Preclusive Effect of *Haggard Decree*, Court of Claims s 236-D, and 1936 Maricopa Contract on Gila River Indian Community's Claims to Waters of the Salt River, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 213 & 214); (3) Motion for Partial Summary Judgment re Preclusive Effect of 1907 Sacaton Agreement, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 211 & 212); and (4) Motion for Partial Summary Judgment re Preclusive Effect of Buckeye-Arlington Agreements and Claims Court Docket No. 236-F on Gila River Indian Community's Claims, filed by the Salt River Project, City

of Tempe, Buckeye Irrigation District, and Arlington Canal Co. (Oct. 4, 1999) (Docket Nos. 224 & 225); consideration of these motions having been referred to the Special Master on July 14, 2000; oral argument having been heard on August 8, 2000; the Master having filed a report with the Clerk of the Court and provided notice as provided by law; the Master having moved the court for an order approving the report and recommendations; and the court having considered the report, objections to the report, and being fully advised;

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

IT IS HEREBY ORDERED AND ADJUDGED as follows:

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

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

3. As to the Motion for Partial Summary Judgment re Preclusive Effect of Decision in Claims Court Docket No. 228 on Gila River Indian Community's Claims filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 209 & 210), the motion is DENIED.

4. As to the Motion for Partial Summary Judgment re Preclusive Effect of *Haggard Decree*, Court of Claims Docket No. 236-D, and 1936 Maricopa Contract on Gila River Indian Community's Claims to Waters of the Salt River, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 213 & 214), the motion is DENIED as to the alleged preclusive effect of the *Haggard Decree* and the

1936 Maricopa Contract. The motion, however, is GRANTED as to the preclusive effect of the determinations made in U.S. Court of Claims Docket No. 236-D.

5. As to the Motion for Partial Summary Judgment re Preclusive Effect of 1907 Sacaton Agreement, filed by the Salt River Project and the City of Tempe (Oct. 4, 1999) (Docket Nos. 211 & 212), the motion is GRANTED to the limited extent that the Sacaton Agreement does not provide a legal basis for the Gila River Indian Community to claim any interest or ownership in, or any right to utilize, the dams, reservoirs, canals, or other works of the Salt River Project.

6. As to the Motion for Partial Summary Judgment re Preclusive Effect of Buckeye-Arlington Agreements and Claims Court Docket No. 236-F on Gila River Indian Community's Claims, filed by the Salt River Project, City of Tempe, Buckeye Irrigation District, and Arlington Canal Co. (Oct. 4, 1999) (Docket Nos. 224 & 225), the motion is DENIED.

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

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

Dated this ____ day of _____ 2001.

_____
Eddward Ballinger, Jr.
Judge of the Superior Court

Appendix C
Court-approved Mailing List
Gila River Adjudication
W-1, W-2, W-3, W-4
(66 names; alphabetized by **last name**)
Prepared by the Office of the Special Master
December 19, 2000

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CERTIFICATE OF SERVICE

I certify that the original of the foregoing Report was delivered to the Maricopa County Superior Court this 28th day of December 2000 for filing. Also, a copy was mailed to those persons appearing on the Court-approved mailing list for Case No. W-1, W-2, W-3, W-4 dated December 19, 2000 (Appendix C). This is the same mailing list for this aspect of Case No. W1-203.

_____

Kathy Dolge