Statutes of Ill Repose and Threshold Canons of Construction: A Unified Approach to Ambiguity After San Carlos Apache Tribe v. United States

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I. INTRODUCTION

Through East-Central Arizona runs a dying river. Diversions have reduced the river's flow, and oftentimes, it is completely dry. Severe pollution has rendered the remaining water undrinkable, un-swimmable, and unsuitable for growing crops. Yet parties bitterly dispute who is entitled to this water. Copper companies use the water to operate mines, while parties situated upstream of the degradation still use the water for agriculture.

Historically, the San Carlos Apache Tribe depended on the Gila River to irrigate crops and sustain a population of around 14,000 tribe

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^{1.} GREGORY MCNAMEE, GILA: THE LIFE AND DEATH OF AN AMERICAN RIVER 17-18 (1998).

^{2.} United States v. Gila Valley Irrigation Dist., 920 F. Supp. 1444, 1451 (D. Ariz. 1996), aff'd, 117 F.3d 425 (9th Cir. 1997) (stating that upper valley water users "on occasion divert the entire flow of the stream"); Michael C. Blumm et al., The Mirage of Indian Reserved Water Rights and Western Streamflow Restoration in the McCarran Amendment Era: A Promise Unfulfilled, 36 ENVTL. L. 1157, 1183 (2006) ("due to agricultural and municipal diversions, the river is largely a trickle").

^{3.} Arizona Water Settlements Act: Joint Hearing Before the Subcomm. on Water and Power of the Comm. on Energy and Natural Resources and the Comm. on Indian Affairs, 108th Cong. 41, 53 (2003) [hereinafter Hearing] (statement of Kathleen W. Kitcheyan, Chairwoman, San Carlos Apache Tribe); see also Gila Valley Irrigation Dist., 920 F. Supp. at 1449–54 (discussing the significant degradation to the Gila River caused by low flow rate and high level of salinity); MCNAMEE, supra note 1, at 173–74 ("Manufacturing plants, airports, military installations, and sewage treatment plants have long disposed of hazardous wastes in the Gila and its tributaries.").

^{4.} See generally Joseph M. Feller, The Adjudication that Ate Arizona Water Law, 49 ARIZ. L. REV. 405 (2007).

^{5.} PHELPS DODGE CORP., LOACH MINNOW AND SPIKEDACE MANAGEMENT PLAN, UPPER GILA RIVER, NEW MEXICO 2 (2006), available at http://www.fws.gov/southwest/es/arizona/Documents/SpeciesDocs/SD LM/PD mgmt plan Gila 8 22 2006.pdf.

^{6.} United States v. Gila Valley Irrigation Dist., 31 F.3d 1428, 1431-32 (9th Cir. 1994).

members.⁷ The river is also sacred to the Tribe and central to the Tribe's culture and spirituality.⁸ Initially, the federal government had recognized the Tribe's dependence on the Gila River by reserving, under the *Winters* doctrine, water rights necessary to support the San Carlos Apache Reservation.⁹ The *Winters* doctrine provides that the federal government, when creating a reservation, impliedly reserves for the tribe an amount of water sufficient to support the reservation.¹⁰ This implied reservation of water rights is based on an assumption that the government "intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless."

The *Winters* doctrine has been described as "the government's promise, implicit in the establishment of reservations, to make them livable and to enable the tribes to become self sustaining." ¹² If the *Winters* doctrine is a promise to the tribes, this Note is about a broken promise. ¹³ In the 1920s, in connection with the construction of the Coolidge Dam, the United States initiated proceedings to clarify water rights for users of the Gila River. ¹⁴ Acting as the Tribe's trustee, the United States entered into the Globe Equity Decree (the Decree), which prevented the San Carlos Apache Tribe from claiming water rights under the *Winters* doctrine and awarded significant water rights to private parties and other Indian tribes. ¹⁵

This decree has been the subject of nearly a century of litigation, including decisions by the Arizona Supreme Court¹⁶ and the U.S. Su-

^{7.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1356 (Fed. Cir. 2011) (Newman, J., dissenting); McNamee, *supra* note 1, at 47–48.

^{8.} Hearing, supra note 3, at 41, 53 (statement of Kathleen W. Kitcheyan); MCNAMEE, supra note 1, at 12–15, 46–51.

^{9.} See generally Winters v. United States, 207 U.S. 564 (1908).

^{10.} See Nevada v. United States, 463 U.S. 110, 116 n.1 (1983).

^{11.} Arizona v. California, 373 U.S. 546, 600 (1963).

^{12.} FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 19.06 (2005 ed.).

^{13.} Sadly, a broken promise is hardly a rare occurrence in the history of Federal Indian Law. *E.g.*, McNamee, *supra* note 1, at 158 ("Indians have long been used to our trail of broken treaties—of 370 signed between the 1780s and 1880s, not a single pact between the federal government and the Indian nations has been preserved in its entirety . . . [A] great many of these broken treaties have had to do with water."). Indeed, in *Lone Wolf v. Hitchcock*, the Supreme Court explicitly recognized Congress's right to unilaterally abrogate treaties. Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903); *see also* John P. Lavelle, *Sanctioning a Tyranny: The Diminishment of Ex Parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur D'alene Tribe*, 31 ARIZ. ST. L.J. 787, 789 (1999) ("They made many promises to us, but they only kept one: they promised to take our land, and they took it." (quoting REX WEYLER, BLOOD OF THE LAND 65 (1982))).

^{14.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1348 (Fed. Cir. 2011).

^{15.} Id. at 1356 (Newman, J., dissenting).

^{16.} *In re* Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 127 P.3d 882 (Ariz. 2006) [hereinafter *Gen. Adjudication*].

preme Court.¹⁷ In particular, this Note focuses on the Federal Circuit's decision in 2011 that the San Carlos Apache Tribe could not seek damages against the United States for improperly diminishing the Tribe's reserved water rights to the Gila River under the Decree because the court determined that the statute of limitations had run. 18 This Note argues that the case was wrongly decided. It then proposes two new analytical devices to overcome the recent trend of courts denying remedies to tribes based on supposedly unambiguous language of treaties, statutes, and decrees.

Following this introduction, Part II provides historical and background information about the San Carlos Apache Tribe and the litigation leading up to the Federal Circuit case, San Carlos Apache Tribe v. United States. Part III tracks the Federal Circuit's reasoning that the statute of limitations had run because the Decree's plain language was unambiguous and put the tribe on notice of its claim. Part IV critiques that reasoning and shows that the U.S. Supreme Court has been willing to find ambiguity in similar language in the context of Indian reserved rights. Part V then argues for three more equitable approaches to ambiguity: first, courts should consider legal ambiguity, not just factual ambiguity, when determining whether legally operative language puts a tribe on notice that its claim has accrued; second, courts should take a unified approach to and treat all-encompassing terms as ambiguous when tribal reserved rights are at issue; and third, courts can apply threshold canons of construction to determine whether ambiguity is present in the first place and whether the traditional Indian canons of construction therefore apply.

II. HISTORY OF THE SAN CARLOS RESERVATION AND WATER RIGHTS LITIGATION

Established in 1872, the San Carlos Apache Reservation is located along the Gila River in Arizona. 19 The early years of the reservation were characterized by violence and abysmal health conditions.²⁰ The army,

^{17.} Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

^{18.} San Carlos Apache Tribe, 639 F.3d at 1349-50.

^{19.} Id. at 1356.

^{20.} Gen. Adjudication, 127 P.3d at 885. In creating the reservation, the government forcibly relocated several Apache bands: "[T]he army . . . ferret[ed] out Apaches from their highland camps and march[ed] them to the reservation. . . . [Those] Apaches who did not comply were gunned down, the fate of some seventy Yavapai Apache women and children at the so-called Skeleton Cave Massacre of December 1872." MCNAMEE, supra note 1, at 109. In the relocation process, a thousand Apaches died and a total of six thousand Apaches "were finally herded onto the San Carlos Reservation." Id. In the early 1900s, the Apaches "continued to die . . . [from] diseases like malaria and typhus and especially of hunger." Id. at 112-13; see also JOHN GREGORY BOURKE, ON THE BORDER

who had forcibly relocated the Apache to the Reservation, referred to it as "Hell's Forty Acres." This small amount of land contained several rival Apache bands. It was not until the Indian Reorganization Act of 1934 that these bands came together to form a government. Today, the San Carlos Apache Reservation remains one of the poorest reservations, with a majority of the residents living under the poverty line. Unemployment is extremely high—around 68% as of 2005.

When the U.S. Supreme Court articulated the rationale of the *Winters* doctrine, it almost seemed to have the San Carlos Apache Reservation in mind. The Court explained that without federal reserved water rights, Indian reservation lands "would have been useless." Indeed, without water for irrigation, the arid climate of the San Carlos Apache Reservation would have made development of agriculture difficult, if not impossible. When describing the reservation, one army officer commented that "[r]ain is so infrequent that it took on the semblance of a phenomenon when it came at all. Almost continuously dry, hot, dust- and gravel-laden winds swept the plain, denuding it of every vestige of vegetation. In summer a temperature of 110 in the shade was cool weather."

In the late 1800s and early 1900s, the United States further exacerbated the impact of these conditions on the tribes located there by destroying and selling the most valuable irrigable lands on the reserva-

WITH CROOK 129 (1971) ("Our government had never been able to starve any of them until it had them placed on a reservation."). Government pollution of the Gila River has also contributed to the significant health problems on the reservation:

[T]he Bureau of Indian Affairs routinely dumped electrical transformers containing polychlorinated biphenyls (PCBs) alongside reservoirs and cattle tanks on the San Carlos Reservation, where the streamside soil had long been contaminated by previous diesel fuel dumping. It will cost taxpayers at least \$4 million to remove these carcinogenic materials from the soil. In the meanwhile, Apaches are again dying at the hands of the American government.

MCNAMEE, supra note 1, at 173-74.

- 21. Id. at 109.
- 22. CLARE VERNON MCKANNA, WHITE JUSTICE IN ARIZONA: APACHE MURDER TRIALS IN THE NINETEENTH CENTURY 105 (2005); see also THOMAS EDWIN FARISH, 7 HISTORY OF ARIZONA, 1–18 (1918), available at http://southwest.library.arizona.edu/hav7/index.html.
- 23. See Corporate Charter of the San Carlos Apache Tribe Arizona, U.S. DEPARTMENT OF THE INTERIOR, OFFICE OF INDIAN AFFAIRS (Oct. 16, 1940), http://thorpe.ou.edu/IRA/sancarchrtr.html.
- 24. U.S. Dep't of the Interior, Bureau of Indian Affairs, Office of Indian Servs., American Indian Population and Labor Force Report 36 (2005), available at http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf.
 - 25. Id.
 - 26. Arizona v. California, 373 U.S. 546, 600 (1963).
- 27. RICHARD J. PERRY, APACHE RESERVATION: INDIGENOUS PEOPLES AND THE AMERICAN STATE 120 (1993).

tion. 28 The sales decreased the reservation's size five times, and the settlers who purchased these lands then began to divert water from the Gila River. 29 Despite the Tribe's objections, 30 the United States then flooded 22,000 acres of the most valuable remaining reservation lands when the United States began construction on the Coolidge Dam on the Gila River. 31 When the dam was complete, the flooding caused a "temporary famine" throughout the Apache nation. 32

A. The Coolidge Dam and the Globe Equity Decree

In connection with the construction of the Coolidge Dam, the government filed a complaint in the U.S. District Court for the District of Arizona in 1925 to obtain a decree regarding water rights to the Gila River.³³ The Tribe did not participate in the negotiations and was not a party to the proceeding.³⁴ Instead, the United States used its power to represent the Tribe as its trustee and settle the Tribe's water rights.³⁵ Despite its fiduciary obligations as the Tribe's trustee, the United States ignored the protests of the Superintendent of the San Carlos Agency,

30. PAUL & KATHLEEN NICKENS, IMAGES OF AMERICA: OLD SAN CARLOS 117 (2008).

^{28.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1356 (Fed. Cir. 2011) (Newman, J., dissenting).

^{29.} Id.

^{31.} San Carlos Apache Tribe, 639 F.3d at 1356 (Newman, J., dissenting).

^{32.} MCNAMEE, supra note 1, at 150-51. Besides the reservation farmland, the lake also submerged "tribal cemeteries, graves, and archaeology sites that contain and protect human remains, private homes, a grain mill, and other historical sites, many of which have significant spiritual and cultural meaning to the . . . Tribe." Timothy J. Famulare, Note, Has Sandoval Doomed the Private Right of Action Under the National Historic Preservation Act?, 16 B.U. Pub. Int. L.J. 73, 77 (2006) (quoting San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 868 (D. Ariz. 2003), aff'd, 417 F.3d 1091 (9th Cir. 2005)). In response to the Tribe's protest against flooding the burial grounds, the government proposed to disinter the bodies. FED. WRITERS' PROJECT, ARIZONA, THE GRAND CANYON STATE: A STATE GUIDE 14 (1966). But the tribe vehemently objected to this as a desecration of the dead. Id. Ultimately, the Tribe assented to the government's placing a concrete slab over the burial ground. Id. Later, the government's release of water from the reservoir threatened to expose these graves and damage the burial ground. San Carlos Apache Tribe, 272 F. Supp. 2d at 889. The Tribe sued under the Native American Graves Protection and Repatriation Act (NAGPRA) and the National Historic Preservation Act (NHPA) to enjoin the government from releasing the water and exposing the graves. Id. at 867. But the district court dismissed the Tribe's case and concluded that the Tribe could not bring its NAGPRA claim until the release of water actually caused the disinterment of human remains. Id. at 889. On appeal, the Ninth Circuit split with the Third and Fifth circuits and held that the NHPA did not give the Tribe a private cause of action. San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1092-93 (9th Cir. 2005). Thus, the court denied the Tribe's claim. Id.

^{33.} San Carlos Apache Tribe, 639 F.3d at 1348.

^{34.} *Id.* at 1356 (Newman, J., dissenting); *In re* Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 127 P.3d 882, 896 (Ariz. 2006).

^{35.} San Carlos Apache Tribe, 639 F.3d at 1348.

who opposed the Decree because of the adverse impact it would have on the Tribe.³⁶ Some federal officials, including the Special Assistant to the Attorney General, even stated that the United States should not support the Tribe's superior priority to the waters of the Gila River.³⁷

In 1935, the court approved a settlement known as the Globe Equity Decree, which granted merely 6,000 acre-feet of water³⁸ from the Gila River each year to the Apache Tribe for irrigation.³⁹ The court rationalized this low award by stating that "the Apache are and always have been warlike and in no sense agrarian."⁴⁰ In contrast, the Pima Tribe, located on the nearby Gila Indian Reservation, received over 210,000 acre-feet of water per year because they "are an industrious farming race."⁴¹ Non-Indian interests received 350,000 acre-feet of annual irrigation water.⁴²

Although the reservoir and dam are located on the Apache reservation, the Tribe received no water storage rights for the impounded waters, which were instead apportioned to other water users. The Further, the Decree stated that the parties "concluded and settled all issues" regarding water rights to the Gila River and that "all of the parties . . . are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein . . . any right, title or interest in or to the waters of the Gila River . . . except the rights specified, determined and allowed by this decree."

B. The U.S. Supreme Court Determines that a State Court Could Decide the Tribe's Rights Despite Tribal Sovereign Immunity

In 1974, private water users petitioned the Arizona state courts to adjudicate the water rights to the Gila River.⁴⁶ The immense proceeding that followed, the Gila River Water Adjudication, is the largest and long-

^{36.} Id. at 1356.

^{37.} *Id*.

^{38.} One acre-foot of water is "enough to cover an acre of land with one foot of water." Arizona v. California, 373 U.S. 546, 557 n.22 (1963).

^{39.} San Carlos Apache Tribe, 639 F.3d at 1351.

^{40.} Id. at 1356 (Newman, J., dissenting).

^{41.} *Id*.

^{42.} *Id*.

^{43.} Famulare, supra note 32, at 77.

^{44.} United States v. Gila Valley Irrigation Dist., 31 F.3d 1428, 1431 (9th Cir. 1994) ("Water can be released from the Reservoir only to the GRIC [Gila River Indian Community] and the SCIDD [San Carlos Irrigation and Drainage District], not for use by the Apache Tribe."); San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860, 870 (D. Ariz. 2003), *aff'd*, 417 F.3d 1091 (9th Cir. 2005) ("[N]either the Apache Tribe, the San Carlos Apache Indian Reservation, nor any individual Apache Indians have any right to store water in the [Lake].").

^{45.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1348 (Fed. Cir. 2011).

^{46.} Feller, supra note 4, at 417.

est judicial proceeding in the history of Arizona.⁴⁷ The goal of the adjudication was to "determine the quantities and relative priorities of all legal rights to the use of water from the Gila River and its tributaries within Arizona."⁴⁸ Over 849,000 parties received summons by mail, 24,000 of which became parties to the adjudication.⁴⁹ Although the San Carlos Apache Tribe was not directly served with process, the state courts still sought to bind the Tribe to the adjudication by joining the United States as the Tribe's trustee.⁵⁰

To avoid this, the Tribe sought removal of the state proceedings to the U.S. District Court and injunctive relief preventing adjudication of its rights in state court.⁵¹ But the district court dismissed the case.⁵² On review, the U.S. Supreme Court held that the "District Court[] [was] correct in deferring to the state proceedings" because the state courts had jurisdiction to decide the tribes' water rights under the McCarran Amendment.⁵⁴

The McCarran Amendment waived the sovereign immunity of the United States and permitted state courts to adjudicate water rights held by the United States when the state court engages in a comprehensive water adjudication. ⁵⁵ Although the McCarran Amendment did not refer to Indian water rights or waive tribal sovereign immunity, the Court nevertheless interpreted the Amendment to "provide[] state courts with jurisdiction to adjudicate Indian water rights held in trust by the United States." ⁵⁶ The Court acknowledged that Indian rights are usually immune from state court interference because state courts are notoriously hostile

^{47.} Id. at 406.

^{48.} *Id*.

^{49.} Id. at 407.

^{50.} Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 558 (1983).

^{51.} *Id.* Other tribes pursued these remedies as well. *Id.* The tribes also sought an independent federal determination of its water rights and a declaration that the state could not decide the tribes' rights. *Id.*

^{52.} Id.

^{53.} *Id.* at 570. The Court stated that the district court was correct in deferring to state proceedings "assuming that the state adjudications are adequate to quantify the rights at issue in the federal suits." *Id.* The Court remanded for further proceedings. *Id.* at 571.

^{54.} Id. at 570. The McCarran Amendment states, in relevant part:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.

⁴³ U.S.C. § 666 (2011).

^{55.} San Carlos Apache Tribe, 463 U.S. at 548-49.

^{56.} Id. at 549 (citing Colorado River Conservation Dist. v. United States, 424 U.S. 800 (1976)).

to Indian rights.⁵⁷ The Court also recognized that allowing state court adjudication of Indian water rights would effectively abrogate tribal sovereignty by forcing tribes to defend their rights in state court.⁵⁸ Nevertheless, the Court placed the policy of efficiency and avoidance of duplicative litigation above these concerns.⁵⁹ It concluded that the Indian water rights should be decided in state court because adjudication of these rights in federal court would duplicate some of the work in the state adjudication.⁶⁰

C. The Arizona Supreme Court Determines that the Tribe's Water Rights Were Diminished

After the U.S. Supreme Court affirmed the district court's dismissal of the case, the San Carlos Apache Tribe was forced to enter the general adjudication in state court to defend its rights.⁶¹ In the state adjudication, other tribes, copper companies, and municipalities sought to bind the Tribe to the Globe Equity Decree and prevent the Tribe from asserting its *Winters* water rights that the Decree had allegedly abrogated.⁶² The Tribe argued that it should not be bound to the Decree under the doctrine of res judicata.⁶³ Under the doctrine of res judicata, a party is only bound by an earlier decree if it was adequately represented by a party to the decree.⁶⁴

^{57.} *Id.* at 566–67. The Tribe made the following arguments:

⁽¹⁾ Indian rights have traditionally been left free of interference from the States. (2) State courts may be inhospitable to Indian rights. (3) The McCarran Amendment, although it waived United States sovereign immunity in state comprehensive water adjudications, did not waive *Indian* sovereign immunity. It is therefore unfair to force Indian claimants to choose between waiving their sovereign immunity by intervening in the state proceedings and relying on the United States to represent their interests in state court, particularly in light of the frequent conflict of interest between Indian claims and other federal interests and the right of the Indians under 28 U.S.C. § 1362 to bring suit on their own behalf in federal court. (4) Indian water rights claims are generally based on federal rather than state law. (5) Because Indian water claims are based on the doctrine of "reserved rights," and take priority over most water rights created by state law, they need not as a practical matter be adjudicated *inter sese* with other water rights, and could simply be incorporated into the comprehensive state decree at the conclusion of the state proceedings.

Id. The Court acknowledged that "[e]ach of these arguments has a good deal of force." Id. at 567.

^{58.} *Id.* at 578 n.9 (Marshall, J., dissenting) ("If federal courts defer to state court proceedings, then the Indian tribes will be unable to represent themselves without waiving tribal sovereign immunity from state court jurisdiction.").

^{59.} See id. at 567.

^{60.} *Id*.

^{61.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1357 (Fed. Cir. 2011) (Newman, J., Dissenting).

^{62.} *In re* Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 127 P.3d 882, 886 (Ariz. 2006).

^{63.} *Id*.

^{64.} See, e.g., Richards v. Jefferson Cnty., 517 U.S. 793, 798 (1996).

Thus, the Tribe argued that the United States failed to adequately represent the Tribe when it entered into the Globe Equity Decree on the Tribe's behalf. ⁶⁵ Indeed, the United States had significant conflicts of interest in representing the Tribe along with other parties that directly opposed the Tribe's rights. ⁶⁶

Nevertheless, the Arizona court determined that res judicata applied and that the Decree precluded the Tribe from asserting claims for federal reserved water rights.⁶⁷ First, the Arizona court determined that the scope of the Decree was broad enough to address the Tribe's *Winters* water rights and not just the Tribe's beneficial use water rights under state law.⁶⁸ The Arizona court reached this conclusion even though the Decree did not specifically refer to federal reserved water rights or the *Winters* doctrine, and even though the United States had only explicitly asserted water rights under the theory of prior appropriation in the proceedings to the Decree.⁶⁹

Second, the court determined that the Tribe was bound to the Decree under the doctrine of res judicata. To reach this result, the court "decline[d] to consider" the Tribe's arguments because by purporting to give comity to the federal court that issued the Decree. Although the federal court that issued the Decree had already declined jurisdiction and thus passed on deciding the issue, the Arizona court nevertheless extrapolated, based on the federal court's treatment of other opposing tribes' claims for water, how the federal court would have decided the San Carlos Apache Tribe's res judicata defense. Thus, the Arizona court bound the Tribe to the Decree, effectively diminishing the Tribe's substantial *Winters* water rights to the 6,000 gallons per day (gpd) limit in the Decree.

Although the Arizona court concluded that the Tribe could not claim federal reserved water rights under the Globe Equity Decree, the

^{65.} Gen. Adjudication, 127 P.3d at 897.

^{66.} See id. at 897.

^{67.} Id. at 903.

^{68.} Id. at 892-94.

^{69.} See id. at 888. While the *Winters* doctrine is a federal doctrine, prior appropriation is a state water law system that is used to determine the superiority of one water right vis-à-vis another. Under the prior appropriation system, water rights are prioritized based on the time when the diversion began. A senior water user therefore has a right to use water before a junior water user.

^{70.} Id. at 895-903.

^{71.} Id. at 901.

^{72.} See supra Part II.B (discussing the Supreme Court affirming the district court's refusal to hear the Tribe's case in federal court).

^{73.} Gen. Adjudication, 127 P.3d at 900-01.

^{74.} Id. at 895-903.

court also implied that the Tribe might have remedies against the United States for improperly settling the Tribe's water rights. ⁷⁵ Acting on this, the Tribe sued the United States in the Court of Federal Claims for breach of fiduciary duty. ⁷⁶ But the claims court dismissed the Tribe's case based on the statute of limitations. ⁷⁷ In the latest chapter on the Tribe's water rights, the Federal Circuit affirmed the dismissal in *San Carlos Apache Tribe v. United States*. ⁷⁸

III. THE FEDERAL CIRCUIT'S REASONING

The Federal Circuit dismissed the Tribe's claim for damages against the United States because it determined that the statute of limitations had run. ⁷⁹ Under the Tucker Act, a tribe's claim for breach of fiduciary duty is time-barred unless the claim is "filed within six years after such claim first accrues." A claim "first accrues" "when all the events which fix the government's alleged liability have occurred and the plaintiff was or should have been aware of their existence."

The court determined that the Tribe should have been aware that the events leading to the government's liability had occurred upon the issuance of the Globe Equity Decree in 1935. The court rationalized this conclusion by (1) concluding that the plain language of the Decree would have put the tribes on notice of the events giving rise to liability, thus causing the claim to accrue; and (2) analogizing the case to *Catawba*, where a tribe's claim was time-barred, while distinguishing *Samish*, where the statute of limitations did not prevent the tribe's claim.

A. Plain Language

The Federal Circuit reasoned that the Tribe's claim had in fact accrued in 1935 upon the entering of the Decree, not in 2006 upon the Arizona court's decision. 83 The Federal Circuit explained that "whether the pertinent events have occurred [for a claim to accrue] is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to ac-

^{75.} See id. at 901 n.21.

^{76.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1349 (Fed. Cir. 2011).

^{77.} Id.

^{78.} Id. at 1348.

^{79.} Id. at 1349 (citing 28 U.S.C. § 2501 (2004)).

^{80. 28} U.S.C. § 2501 (2004).

^{81.} San Carlos Apache Tribe, 639 F.3d at 1350 (citing Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1577 (Fed. Cir. 1988) (emphasis omitted)).

^{82.} Id. at 1351.

^{83.} Id.

crue."⁸⁴ According to the Federal Circuit, the Tribe should have known of all of the events leading to government's liability in 1935 by the plain language of the Decree. ⁸⁵ According to the court, the Decree's terms "plainly and objectively indicate which water rights the Tribe did and, importantly, did not receive following the settlement of the Globe Equity Litigation": ⁸⁶

The Decree does not expressly grant any aboriginal or federal reserved water rights to the Tribe, and, as the Tribe acknowledges, the Decree plainly identifies the Tribe as represented by the United States in the Globe Equity Litigation, grants the Tribe a total of 6,000 acre feet of water rights, and includes a provision in Article XIII stating that "each and all of the parties to whom rights to water are decreed in this cause . . . are hereby forever enjoined and restrained from asserting or claiming . . . any right, title or interest in or to the waters of the Gila River, or any thereof, except the rights specified, determined and allowed by this decree. ⁸⁷

Thus, the court determined that the Tribe "knew or should have known that the terms of the Decree precluded the Tribe from seeking additional Gila River water rights" and that its *Winters* water rights had been abridged. Finally, the court reasoned that because the Decree "plainly indicated that the United States represented multiple parties in the Globe Equity Litigation," the Tribe should have known of the facts showing the United States' conflict of interest at the time the Decree was issued. 90

B. Analogizing Catawba, Distinguishing Samish

The San Carlon Apache Tribe court bolstered its plain language argument by analogizing the case to Catawba Indian Tribe v. United States. ⁹¹ In that case, the Catawba Tribe sued the United States in 1990 for breach of fiduciary duty. The United States had failed to notify the Tribe as its counsel that the Tribe's land was subject to state adverse possession laws after the federal Termination Act became effective in 1962. ⁹² Just four years before Catawba, the U.S. Supreme Court had de-

88. Id.

^{84.} Id. at 1350 (citing Fallini v. United States, 56 F.3d 1378, 1380 (Fed. Cir. 1995)).

^{85.} *Id.* at 1350–51.

^{86.} Id. at 1351.

^{87.} Id.

^{89.} Id. at 1353.

^{90.} Id. at 1351.

^{91.} Id. at 1353.

^{92.} Catawba Indian Tribe v. United States, 982 F.2d 1564, 1568 (Fed. Cir. 1993).

termined that the Termination Act subjected tribal lands to state adverse possession laws. 93

The Catawba Tribe argued that its claim had not accrued until the Supreme Court's 1986 determination that state adverse possession laws applied. The *Catawba* court disagreed: it concluded that the statute of limitations began to run earlier, when the adverse possession laws were first made applicable to the tribal land in 1962, after Congress terminated the Tribe's official status as a federally recognized tribe. The court reasoned that the Catawba Tribe had notice of its claim before the Supreme Court's 1986 decision because the language of the earlier Termination Act was unambiguous in subjecting the land to adverse possession. According to the *Catawba* court, the Supreme Court's later decision merely recognized the meaning of the Act's plain language, but was not a condition precedent to the claim's accrual.

In contrast, in *Samish Indian Nation v. United States*, ⁹⁸ the Samish Tribe was not time-barred from bringing its claim for breach of fiduciary duty. In 1969, the Department of the Interior had removed the Samish Tribe from the list of federally recognized tribes. ⁹⁹ The Samish Tribe then sought recognition and obtained relief: a federal district court ruled in 1996 that the federal government's refusal to recognize the Samish violated the Tribe's due process rights. ¹⁰⁰ In 2002, the Samish sued for monetary damages resulting from the government's wrongful refusal to recognize the Tribe between 1969 and 1996. ¹⁰¹

The Federal Circuit determined that the claim was not barred by the statute of limitations. ¹⁰² The *Samish* court explained that "the district court's determination [in 1996] provides a predicate 'wrongful' element in this action." ¹⁰³ Because the district court was the only authority that could review the recognition determination, ¹⁰⁴ its decision in 1996 was a "missing element," without which the Samish's claim for damages would not have accrued. ¹⁰⁵ Because the claim in 2002 was brought within six

^{93.} Id.

^{94.} *Id*.

^{95.} Id. at 1570-71.

^{96.} Id.

^{97.} Id. at 1570.

^{98. 419} F.3d 1355 (Fed. Cir. 2005).

^{99.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1353 (Fed. Cir. 2011).

^{100.} Id.

^{101.} Id.

^{102.} Id.

^{103.} Id.

^{104.} *Id*.

^{105.} See id.

years of the claim's accrual in 1996, the complaint was timely. ¹⁰⁶ The *Samish* court stated, "If a necessary element to a claim must be established in a different forum, the claim will not accrue . . . until that element is finally established in the other proceeding." ¹⁰⁷

The San Carlos Apache Tribe relied on *Samish* to argue that its claim did not accrue until 2006, when the Arizona Supreme Court decided a "necessary element" of the claim: "that the Tribe was precluded from asserting its *Winters* and aboriginal water rights to the main stem of the Gila River." Without the Arizona court's legal determination that the Tribe was bound to the Decree and that the Decree covered the Tribe's *Winters* rights, the Tribe would have experienced no harm from the United States' inadequate representation of the Tribe during the Globe Equity proceedings. Thus, without the Arizona court's determination, a necessary element of the claim would have been lacking: the element of harm.

Because the San Carlos Apache Tribe's claim was brought within six years of the Arizona court's legal determination of the Decree's scope and effect, it should not have been time-barred. Nevertheless, the Federal Circuit distinguished *Samish*. It reasoned that the district court's determination in *Samish*—that federal recognition of the tribe was improperly withheld—was necessary for the damages claim in that case, but that the Arizona court's determination was not necessary to the San Carlos Apache Tribe's claim because "the Tribe's claim required no further legal determination beyond the Decree itself." According to the Federal Circuit, the Arizona court had not provided a missing element to the Tribe's claim because the Arizona court had "simply stated what was readily apparent from the face of the 1935 Decree."

While distinguishing *Samish*, the *San Carlos* court analogized *Catawba* by characterizing the Globe Equity Decree as "unambiguous" just like the Termination Act in *Catawba*.¹¹¹ Just as the Supreme Court had relied on the plain language of the Termination Act in the *Catawba* case, the Arizona court had relied on the supposedly unambiguous Decree in determining that the Tribe's property rights had been abridged.¹¹² Thus, the Federal Circuit determined that the San Carlos Apache Tribe's claims had accrued in 1935, when the Globe Equity Decree was issued.

^{106.} Id.

^{107.} Samish Indian Nation v. United States, 419 F.3d 1355, 1369 (Fed. Cir. 2005).

^{108.} San Carlos Apache Tribe, 639 F.3d at 1352-53 (quoting Appellant Brief at 27).

^{109.} Id. at 1353.

^{110.} *Id*.

^{111.} Id. at 1354.

^{112.} See id.

IV. THREE CRITIQUES OF THE FEDERAL CIRCUIT

The Federal Circuit erred when it affirmed the Court of Claims' dismissal of the San Carlos Apache Tribe's suit for three reasons. Section A explores the Federal Circuit's implicit, unfounded assumption that the Tribe should have been aware of the terms of the Globe Equity Decree. Section B then examines how the Federal Circuit's opinion effectively requires preemptive litigation, which in turn clogs the court system with claims that would not be considered ripe. Section C then shows how the Federal Circuit improperly deferred to the Arizona state court's determination on the plain language of the Decree.

A. A Catch 22 and an Unfounded Assumption

In bringing its complaint, the Tribe was in the unfortunate situation of having to choose between a strong case on the merits of its claim for damages or a strong case on the statute of limitations issue. Proof that the Tribe offered showing that the government breached its fiduciary duty would also tend to show that this breach should have been apparent to the Tribe and that the Tribe should have been on notice that the claim had already accrued. In other words, if the Tribe made a strong showing on the merits, it would undermine its defense on the statute of limitations issue by showing that the claim was strong enough that a reasonable claimant would have noticed it.¹¹³

Indeed, the Federal Circuit used several of the arguments on the merits from the Tribe's complaint against the Tribe when deciding the statute of limitations issue. ¹¹⁴ For example, because the complaint recognized that the Decree allotted only 6,000 acre-feet of water to the Tribe, the court concluded that the Tribe knew or should have known that the plain terms of the Decree diminished the Tribe's *Winters* water rights. ¹¹⁵ Similarly, in its complaint, the Tribe argued that the government's reservation of substantial water rights for other parties under the Decree, in contrast to the negligible water rights reserved to the San Carlos Apache Tribe, demonstrated that the United States' representation of the Tribe was inadequate. ¹¹⁶ But the court again countered that the contrast between the water rights reserved under the Decree also showed that the

^{113.} See, e.g., Whirlpool Fin. Corp. v. GN Holdings, Inc., 67 F.3d 605, 608 (7th Cir. 1995) ("[I]f a plaintiff pleads facts that show its suit barred by a statute of limitations, it may plead itself out of court under a Rule 12(b)(6) analysis.").

^{114.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1351–52 (Fed. Cir. 2011).

^{115.} Id.

^{116.} Id. at 1352.

Tribe should have known that the claim had accrued at the time of the Decree. 117

The Federal Circuit's clever manipulation of the Tribe's arguments all rest on the frail assumption that the Tribe would have at least known the terms of the Decree in 1935. Even if the Tribe had a strong case in 1935 based only on clear language of the Decree, it still would have had to have notice of the terms of the Decree to be held accountable for knowledge of its legal effect. But no reasonable plaintiff should be expected to bring suit over a dealing purportedly on its behalf, when it was not a party to the deal and all of the parties to the deal had an incentive to hide it from the plaintiff.

That was exactly the case for the San Carlos Apache Tribe: the Tribe was not a party to the Decree, so it did not have notice of the Decree's terms through the Globe Equity proceedings. Further, the nature of the Tribe's allegation—that the United States breached its fiduciary duty and had a conflict of interest—itself indicates that the Tribe would have been unlikely to gain knowledge of the terms of the Decree. A fiduciary that breaches its duty has an incentive to keep that breach unknown to the harmed party. Indeed, the government continually maintained to the Tribe and to courts that the Decree did not address the Tribe's federally reserved rights. 118

The court's assumption also fails to account for the actual situation of the Tribe at the time of the Globe Equity proceedings and the unlikelihood that a Tribe in such a situation would have been able to meaningfully obtain notice of the Decree's terms. At the time that the court entered into the Decree, the San Carlos Apache Tribe was a conglomerate of several different tribes that were each in tension. 119 It was not until nearly a decade after the Decree was issued that the bands nominally cre-

^{117.} *Id.* The court eagerly used the Tribe's arguments against the Tribe, but the court did not appreciate how its own arguments proved the flaws in the Arizona court's reasoning that the Decree bound the Tribe. The Federal Circuit's determination that the Decree unambiguously diminished the Tribe's water rights supports the finding that the government's representation of the Tribe was inadequate and that the Tribe should not have been bound to the Decree. If the Decree unambiguously diminished the Tribe's water rights such that the Tribe should have been on notice of its claim for breach of fiduciary duty, then the Decree also unambiguously indicated that the government's representation of the Tribe was inadequate and that the Tribe therefore should not be bound to the Decree. Because the Arizona court bound the Tribe to the Decree despite this inadequate representation, it abridged the Tribe's due process rights. Thus, the Federal Circuit could not reach its result regarding the statute of limitations without showing the flaw in the Arizona court's reasoning. Although the Federal Circuit sought to defer to the Arizona court decision, the Federal Circuit could not avoid the logical implications of its ruling—that the Arizona court was wrong.

^{118.} Id. at 1351.

^{119.} See MCKANNA, supra note 22, at 105; MCNAMEE, supra note 1, at 47 ("[T]he Apaches were loosely anarchic, bound by clan rather than political ties.").

ated a government to satisfy the terms of the Indian Reorganization Act. ¹²⁰ Before then, the Tribe had been described as a "broken nation," suffering from inter-tribal violence, oppression from the U.S. military, and rampant disease outbreaks. ¹²¹ In such a condition, it is unlikely that the Tribe could have had meaningful notice of the legal terms of the Decree when it was entered into.

Finally, holding the Tribe to objective knowledge of the United States' breach of fiduciary duty would effectively require the Tribe to constantly scrutinize the unilateral legal doings of the United States as its trustee during a time when the Tribe was politically incapable of doing so. In *Mitchell II*, the Supreme Court rejected an approach to the trust duty that would have similarly required a tribe to continually scrutinize the actions of the United States as its trustee. The Court stated that the Indians in that case were "in no position to monitor federal management of their lands on a consistent basis" because, among other reasons, "[m]any are poorly educated." The Court concluded that "it was the very recognition of the inability of the Indians to oversee their interests that led to federal management in the first place." Therefore, a "trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement."

Although *Mitchell II* did not concern a statute of limitations issue, ¹²⁶ the Court's analysis in that case suggests that a tribe should not be held accountable for knowledge of the United States' breach of its fiduciary duty if the tribe was poorly equipped to learn of the breach. In other words, *Mitchell II* suggests a more nuanced approach to the notice requirement and a contextualization of the objective standard. Under a purely objective standard, a beneficiary might always be held accountable for knowing the terms of a contract concerning the property of the beneficiary. But under a more contextualized approach that reflects the considerations in *Mitchell II*, such knowledge should not be presumed if the tribe was unable to monitor the acts of the United States as its trustee.

^{120.} See Corporate Charter of the San Carlos Apache Tribe Arizona, supra note 23.

^{121.} MCNAMEE, supra note 1, at 112.

^{122.} See United States v. Mitchell, 463 U.S. 206, 227 (1983).

^{123.} Id.

^{124.} Id.

^{125.} Id.

^{126.} *Id.* The main issue before the Court was whether a tribe who had been harmed by the U.S.'s breach of fiduciary duty was relegated to only prospective remedies, or whether the tribe could obtain monetary damages. *Id.*

B. Requiring Preemptive Litigation

Because the Federal Circuit determined that the Tribe's claim accrued in 1935 upon entering of the Globe Equity Decree, ¹²⁷ the Tribe would have had to sue the United States by 1941 to meet the statute of limitations. ¹²⁸ At that time, the Tribe had not yet been held bound to the Decree, and therefore had experienced no harm. ¹²⁹ In effect, the court required the Tribe to litigate its claim preemptively, before it was harmed.

To justify this unlikely result, the court first emphasized that a plaintiff need not have knowledge of the "full extent of the damage" for the claim to accrue. This argument distorted the Tribe's situation prior to 2006 by implying that the Tribe at least knew that some damage had occurred, but merely did not know the extent of the damage. In fact, the Tribe did not know whether any damage occurred in 1941 because no court had determined that the Tribe, as a nonparty, was bound to the Decree. It was not until the 2006 Arizona court case that the Tribe was first bound to the Decree. Therefore, the Tribe did not know whether the Decree caused any harm until 2006.

The court avoided addressing this lack of harm prior to 2006 by avoiding ripeness analysis. Although the court briefly acknowledged the Tribe's argument that the claim was not ripe, ¹³² the court did not address or refute the argument. Avoiding the issue was likely strategic: had the court determined that the claim was not ripe before the 2006 decision, it would have been forced to find that the statute of limitations had not yet

^{127.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1351 (Fed. Cir. 2011).

^{128.} *Id.* at 1356 (Newman, J., dissenting). Actually, because the Tucker Act did not allow Indian suits against the government, the Tribe could not have sued in 1941. It was not until the passage of the Indian Tucker Act in 1946 that tribes were permitted to sue the government. In recognition of this, for five years after the passage of the Indian Tucker Act, the government permitted tribes to bring claims that had accrued before the passage of the Indian Tucker Act. Steven Paul McSloy, *Revisiting the "Courts of the Conqueror": American Indian Claims Against the United States*, 44 AM. U. L. REV. 537, 547–48 (1994).

^{129.} See San Carlos Apache Tribe, 639 F.3d at 1356 (Newman, J., dissenting).

^{130.} Id. at 1354 (majority opinion).

^{131.} Although the parties generally assume that the Tribe is bound to the Decree under the Arizona judgment, and this paper generally interprets the Arizona opinion accordingly, it is arguably questionable whether the Tribe is actually bound to the Decree under the Arizona court decision because the Arizona court did not fully decide the res judicata issue. In declining to decide an element of res judicata, the court arguably declined to decide the overall issue, deferring instead to the district court.

^{132.} San Carlos Apache Tribe, 639 F.3d at 1349.

run because "a cause of action accrues for purposes of the statute of limitations 'when it is sufficiently ripe." 133

For a claim to be ripe, the damage must be "quantifiable and present," not "speculative." At least "some damage" must be shown. 135 Prior to the 2006 decision, the Tribe could not have proven any damage because no court had determined that its federal reserved water rights were lost under the Decree. Granted, the Tribe's hypothetical damage would have been "quantifiable" before 2006 because a court could have determined the value of the federal reserved water rights the Tribe *might* lose under the Decree. Nevertheless, this damage was "speculative," not "present." Indeed, the government's longstanding position, that the Tribe had retained its reserved water rights under the Decree, 136 confirms that damage was only speculative until 2006. By avoiding the issue of ripeness, the court sidestepped the Tribe's arguments that the its claim had not accrued because no damage had occurred before the 2006 decision.

C. Improper Deference to the Arizona Court

To support its conclusion that the plain language of the Decree notified the Tribe that its *Winters* rights were diminished, the Federal Circuit referenced the Arizona court's determination that the Decree's language was unambiguous. The Federal Circuit stated that the Arizona court's determination "foreshadow[ed] our present decision." But the court did not just cite the Arizona court's determination to reinforce its decision. Rather, it relied on the Arizona court's determination that the language was unambiguous to support one of its key arguments: that the case was analogous to *Catawba*. The plain language of the Decree notified the Federal Circuit referenced the Federal Circuit stated that the Arizona court's determination to reinforce its decision.

^{133.} Franks v. Ross, 313 F.3d 184, 194 (4th Cir. 2002) (quoting Whittle v. Local 641, Int'l Bhd. of Teamsters, 56 F.3d 487, 489 (3d Cir. 1995)); see also San Carlos Apache Tribe, 639 F.3d at 1361 (Newman, J., dissenting) ("'Starting the statute of limitations clock' occurs when the 'claim become[s] ripe for adjudication.'" (quoting Bayou Des Familles Dev. Corp. v. United States, 130 F.3d 1034, 1038 (Fed. Cir. 1997))).

^{134.} Nw. La. Fish & Game Pres. Comm'n v. United States, 446 F.3d 1285, 1291 (Fed. Cir. 2006).

^{135.} Casitas Mun. Water Dist. v. United States, 102 Fed. Cl. 433 (Fed. Cl. 2011), *aff'd*, 708 F.3d 1340 (Fed. Cl. 2013); Cloutier v. United States, 19 Cl. Ct. 326, 330 (1990), *aff'd*, 937 F.2d 622 (Fed. Cir. 1991) ("Without proof that some damage has already occurred, plaintiffs' claim of a taking is simply not ripe for a decision.").

^{136.} San Carlos Apache Tribe, 639 F.3d at 1350.

^{137.} Id. at 1354.

^{138.} Id.

^{139.} *Id.* ("[L]ike the Supreme Court in *Catawba*, the Arizona Supreme Court based its decision on the unambiguous language of the legal instrument fixing the alleged liability—the 1935 Decree.").

The *Catawba* court concluded that a tribe's claim for breach of fiduciary duty was time-barred. Prior to the case, the Supreme Court had determined that the language of a statute was unambiguous and that the statute permitted adverse possession claims to the Tribe's land. ¹⁴⁰ The United States, as the Tribe's trustee, had previously maintained to the Tribe, contrary to the Supreme Court's determination, that the statute did not permit adverse possession claims against the Tribe's land. ¹⁴¹ Accordingly, the Tribe sued the United States for breach of fiduciary duty. ¹⁴²

The court determined that the unambiguous language of the statute put the Tribe on notice that its lands were susceptible to adverse possession claims. Thus, the statute of limitations on the breach of fiduciary duty claim began to run when the statute became operative, not when the Supreme Court made its determination regarding the effect of the language. The *Catawba* court emphasized that the Supreme Court had determined that the statute's language was unambiguous, which showed that the language of the statute gave the Tribe notice that it had been harmed, making the claim accrue upon passage of the Act. The statute is statute.

The San Carlos Apache Tribe Court analogized the Arizona court's determination that the Globe Equity Decree was unambiguous to the Supreme Court's determination in Catawba that the statute permitting adverse possession was unambiguous. ¹⁴⁶ But the Arizona court's decrision was not worthy of the same deference as the Supreme Court's decision in Catawba. ¹⁴⁷ Not only did the Arizona court fail to consider federal court precedent in determining whether ambiguity existed, it also ignored discrepancies in the timing of the reservations of water rights and the priority dates in the Decree, which indicated that the Decree did not address the Tribe's reserved rights. ¹⁴⁸ Finally, the Arizona court de-

^{140.} Catawba Indian Tribe of S.C. v. United States, 982 F.2d 1564, 1568, 1570 (Fed. Cir. 1993).

^{141.} Id. at 1568.

^{142.} Id.

^{143.} Id. at 1570-71.

^{144.} *Id*.

^{145.} Id. at 1570.

^{146.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1354 (Fed. Cir. 2011). As the dissent pointed out, the *Catawba* case was "too remote, in fact and law, to govern this case." *Id.* at 1359 (Newman, J., dissenting). The dissent distinguished the facts in *Catawba*, noting that "[i]n *Catawba* the United States refused to recognize the lands as belonging to the Tribe, whereas for the San Carlos water rights the United States supported the Tribe's claim, and the water rights issue was acknowledged by the Supreme Court to be unresolved when the issue was consigned to the Arizona courts for resolution." *Id.*

^{147.} See discussion supra Part II.C.

^{148.} See discussion supra Part II.C.

termined that no ambiguity existed even when the Decree failed to explicitly mention federal reserved water rights. 149

Moreover, in *Catawba*, the Supreme Court's decision was not only binding on the *Catawba* court, it was also credible and authoritative because the Supreme Court had final appellate review over matters of federal law and Indian law. In contrast, the Arizona Supreme Court's interpretation of a federal decree on a matter of federal Indian law could not be seen as credible or authoritative. In the 1983 case, *Arizona v. San Carlos Apache Tribe*, where the U.S. Supreme Court had initially allowed state courts to hear the case, the Court acknowledged the bias of state courts. ¹⁵⁰ In the same case, the Court had also stated that state court cases "alleged to abridge Indian water rights protected by federal law can expect to receive . . . particularized and exacting scrutiny." ¹⁵¹ The Federal Circuit's passive acceptance of the Arizona court's determination can hardly be considered "exacting scrutiny."

V. HOW STATUTES OF LIMITATIONS CAN BE EQUITABLY REINTERPRETED

At the heart of the San Carlos Apache Tribe case is the issue of how a court should determine whether a text is ambiguous such that it fails to put a tribe on notice of its claim and thus fails to cause the statute of limitations to run. In light of the result in San Carlos Apache Tribe, this Part argues for courts to adopt two approaches to ambiguity in federal Indian law cases concerning statutes of limitations. Section A argues that legal ambiguity, not just factual ambiguity, should be considered in determining whether a tribe had notice of its claim such that the statute of limitations began to run. Section B argues for courts to apply threshold canons of construction to determine whether ambiguity is present in text such that regular canons of construction would apply. It also proposes that courts take a unified approach to ambiguity according to Supreme

^{149.} See discussion supra Part II.C.

^{150.} Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 566–67 (1983). The Court acknowledged that "Indian rights have traditionally been left free of interference from the States" and "State courts may be inhospitable to Indian rights." *Id.* at 566. The court stated that these arguments had "a good deal of force." *Id.* at 567.

^{151.} Id. at 571.

^{152.} Even if the Supreme Court's "exacting scrutiny" had only been referring to its appellate review power over state court decisions, the Federal Circuit still should have been cautious to blindly adopt the Arizona court's analysis because the Supreme Court's appellate power is hardly adequate to control such state bias considering the small number of cases the Supreme Court hears each session

Court precedent providing that broad language does not necessarily encompass specific, unmentioned, reserved rights of tribes. 153

A. Tolling Statutes of Limitations for Legal Ambiguity

The Federal Circuit concluded that the statute of limitations began to run in 1935 because it determined that the plain language of the Decree gave the Tribe notice that the settlement would diminish its federal reserved rights. The court did not address whether the Tribe should have known that the Decree was binding and enforceable probably because courts had already established that the statute of limitations is not tolled by the Indians ignorance of their *legal* rights. Rather, courts are only concerned with whether the Tribe was aware of the facts giving rise to these legal rights.

The San Carlos Apache Tribe's situation exposes the inadequacy of a rule that fails to account for tribes' objective knowledge of their legal rights. First, the long history of litigation surrounding the Tribe's rights shows that the current rule is incorrectly framed. In an almost accusatory manner, the courts frame the rule in terms of tribes' "ignorance" of the law. 157 But courts have used this justification even after cases have gone

^{153.} Although not fully explored here, at least two other prescriptive elements could be used to prevent a result like that in San Carlos Apache Tribe from recurring. First, courts could place the burden of proving that text is unambiguous on the party asserting a diminishment or abrogation of tribal rights. Second, courts could reinterpret statutes of limitation in order to analyze the policies behind those statutes. Generally, statutes of limitation provide some measure of repose for all parties because litigation can no longer be threatened. Arguably, the policy of repose is nothing more than a recognition of the growing expectation interests of parties that have continued to assume that the status quo will remain. Thus, even when a party initially gained a certain advantage through wrongdoing, that party's expectation interests may eventually become strong enough to outweigh the interest of the plaintiff in reversing the wrongdoer's actions. Recently, however, Professor Ann Tweedy has questioned whether reliance interests should be invoked when the interests are based on unjustified expectations. See Ann Tweedy, Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers, 36 SEATTLE U. L. REV. 129 (2012). For example, a settler that encouraged the unlawful seizure of tribal lands should not be able to assert that he has an expectation interest in maintaining the lands after longstanding investments in the seized lands. This is so regardless of however far into the future the claim is brought. Although Professor Tweedy makes this argument in the context of allotments, the argument applies to statutes of limitation as well. If the original party has no justifiable claim to repose because of willing complicity in the deprivation of a tribe's property, why should that party's reliance interests then be protected in a later proceeding even when the statute of limitations has run? Further, if the status quo prevents the wronged party's repose because of a continuing harm, is the wrongdoer nevertheless entitled to repose? These musings end up in a philosophical debate on the value of statutes of limitations in general. Thus, this Note merely asks these questions, not rhetorically, but perhaps to inspire future analysis.

^{154.} San Carlos Apache Tribe v. United States, 639 F.3d 1346, 1353 (Fed. Cir. 2011).

^{155.} Menominee Tribe of Indians v. United States, 726 F.2d 718, 720-21 (Fed. Cir. 1984).

^{156.} See id.

^{157.} See, e.g., id.

all the way to the Supreme Court for a definitive interpretation of law that is widely disputed. Is Indeed, the San Carlos Apache Tribe's case reached the Arizona Supreme Court, which used the doctrine of comity to avoid the Tribe's arguments under the inadequate representation exception as articulated by the Ninth Circuit. Is Thus, to say that the San Carlos Apache Tribe was ignorant of the law would in effect place blame on the Tribe for its failure to foresee the Arizona court's use of the doctrine of comity to avoid its arguments that were grounded in federal precedent.

But comity is a discretionary doctrine—courts are not required to use the doctrine in any given situation. Thus, it is unrealistic to charge the Tribe with ignorance of its legal rights because those rights depended on the court's discretion. The Tribe could not have been held responsible for knowledge of how the court would exercise its discretion. Indeed, the Arizona court did not even decide the most contested issue—the issue of inadequate representation.

Further, even if the Arizona court had not applied the doctrine of comity, the "considerable disparity in federal Indian law has made . . . judicial interpretation unpredictable." The Supreme Court's inexplicable failure at times to apply the Indian canons of construction is an ex-

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^{158.} See Catawba Indian Tribe of S.C. v. United States, 982 F.2d 1564, 1570 (Fed. Cir. 1993).

^{159.} Generally, under the doctrine of comity, a court may defer to and respect the law or disposition of another jurisdiction, or it may decline to exercise jurisdiction over a case until the court of the other jurisdiction has an opportunity to decide the matter. *See, e.g.*, Rhines v. Weber, 544 U.S. 269, 274 (2005).

^{160.} Hilton v. Guyot, 159 U.S. 113, 163–64 (1895) ("'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.").

^{161.} The only way that the tribe could have known that the state court would decline to decide the issue based on comity is if the tribe first anticipated that the federal courts would decline to decide the tribe's water rights and dismiss the tribe's case, forcing the tribe into state court. But prior to the 1983 Supreme Court case, tribes were permitted to bring water rights claims in federal court. The Supreme Court's 5–4 decision could hardly have been anticipated considering that the Court based its decision on policy, not on the plain language of the McCarran amendment, which did not indicate that federal courts could decline jurisdiction over tribes' cases. Despite the plain language of the statute, the Supreme Court determined that federal courts should decline jurisdiction over native water rights claims. This faulty reasoning was compounded by the longstanding belief that state courts could not be trusted to decide these claims because state courts were oftentimes hostile to tribes due to historical differences between locals and the tribes. Thus, the tribe could not have known that the case would be in state court. Therefore, the tribe could not have known that the court would then use comity to decline to decide the inadequate representation exception but nevertheless apply res judicata.

^{162.} Carol Tebben, An American Trifederalism Based Upon the Constitutional Status of Tribal Nations, 5 U. PA. J. CONST. L. 318, 354 (2003); see also Matthew L.M. Fletcher, The Supreme Court's Indian Problem, 59 HASTINGS L.J. 579, 580 (2008) (describing Federal Indian Law as "an area of law that is often confusing, unpredictable, and prone to obfuscation").

ample of this lack of predictability. 163 Indeed, the Arizona court also failed, without explanation, to apply the Indian canons of construction. Tribes should not be held responsible for knowledge of an unpredictable judicial interpretation prior to a court's decision.

The San Carlos Apache Tribe case shows that the current rule, which focuses solely on factual ambiguity, is detached from reality. The rule does not account for the inherent unpredictability of the law, especially when the outcome of a case depends on a judge's discretion. This rigid approach might at first seem to be a necessary expedient that reduces litigation. However, holding parties accountable for knowledge of unpredictable legal outcomes will ultimately increase litigation. Under this rule, tribes must bring their suits for breach of fiduciary duty before it is apparent from a court's determination that any harm occurred. Parties would sue their lawyers or trustees just to prevent the loss of a claim in case a future decision showed that the representation was inadequate.

Courts should therefore permit equitable tolling of the statute of limitations when a tribe cannot fairly be held accountable for knowledge of the law. A statute of limitations should be tolled when the fiduciary's liability turns on an issue of first impression, when the language of a statute or decree is reasonably susceptible to more than one interpretation, or when the case is decided under a discretionary doctrine. Although a tribe might fairly be held to have knowledge of the law when an area of the law is settled, the complexity and unpredictability of federal Indian law would oftentimes favor tolling the statute of limitations.

B. Developing a Unified Approach to Ambiguity and Applying Threshold Canons of Construction

Central to the *San Carlos Apache Tribe* court's determination was its reliance on the supposedly unambiguous terms in the Globe Equity Decree, which the court compared to the unambiguous terms in the Termination Act in *Catawba*. In contrast, the U.S. Supreme Court has sometimes found broad, all-encompassing terms such as those in the Decree to be ambiguous. ¹⁶⁵ The first subsection in this Part explores one case where the Supreme Court found ambiguity in such a situation. It then argues for courts to follow this approach in the interests of predictability

^{163.} E.g., Idaho v. United States, 533 U.S. 262 (2001).

^{164.} Alternatively, a court could look to a party's legal sophistication to determine whether the party would have the ability to predict legal outcomes. Such an approach, however, penalizes parties that do gain knowledge of the law and encourages ignorance of the law because ignorance would help the party toll the statute of limitations.

^{165.} See, e.g., Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999).

and for courts to determine that broad, all-encompassing terms are ambiguous as to whether they address specific, unmentioned, reserved rights of tribes. The second subsection provides a framework for analyzing ambiguity not just in the limited instances of broad terms applying to specific reserved rights, but in all cases of ambiguity. This latter subsection proposes several threshold canons of construction to analyze whether ambiguity is present such that regular canons of construction apply.

1. A Unified Approach to Ambiguity of Broad Terms

Mille Lacs Band provides one example of the U.S. Supreme Court's willingness to find broad terms ambiguous. ¹⁶⁶ In that case, a treaty between the Mille Lacs Tribe and the federal government provided that "the said Indians do fully and entirely relinquish and convey to the United States, any and all right, title, and interest, of whatsoever nature the same may be, which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." ¹⁶⁷ Although this broad language appeared unequivocal, the Supreme Court nevertheless emphasized that the treaty did not refer to hunting and fishing rights specifically. ¹⁶⁸ Accordingly, the Court concluded that the treaty did not abrogate the Tribe's rights to hunt or fish. ¹⁶⁹

The Court found ambiguity in the treaty's plain language based on the historical context of the treaty. The Court then applied the Indian canons of construction: Indian treaties are to be interpreted liberally in favor of the Indians, and . . . any ambiguities are to be resolved in their favor. Therefore, the Court interpret[s] Indian treaties to give effect to the terms as the Indians themselves would have understood them. Although "Congress may abrogate Indian treaty rights, . . . it must clearly express its intent to do so." The Court provided a rationale for the canons: "the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights."

^{166.} See id.

^{167.} Id. at 195.

^{168.} *Id*.

^{169.} Id.

^{170.} Id. at 200.

^{171.} *Id*.

^{172.} Id. at 196.

^{173.} *Id.* at 202; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (Neil Jessup Newton et al. eds., LexisNexis 2012) ("[T]ribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999))).

^{174.} *Mille Lacs*, 526 U.S. at 195.

In contrast to the *Mille Lacs* court, the *Catawba* and *San Carlos* courts were unwilling to find ambiguity despite the complex legal issues that prevented certainty regarding the effect of the terms of the Termination Act and Globe Equity Decree. These disparate approaches create unpredictability in the law and cannot be reconciled based on the nature of the rights at issue. Had the hunting and fishing rights at issue in *Mille Lacs* been more important than aboriginal water rights of San Carlos Apache Tribe or rights to tribal land in *Catawba*, then one might argue that *Mille Lacs* merely reduced the threshold for ambiguity for rights that were deserving of greater protection. But the courts suggested no hierarchy of tribal rights. Indeed, the aboriginal rights and land rights in *San Carlos Apache Tribe* and *Catawba*, respectively, are vital to tribes' survival and sovereignty, just as much as fishing and hunting rights. If anything, water provides for a more basic need than hunting and, therefore, should receive greater protection.

Without a hierarchy of protected rights, the cases cannot be reconciled. Either these broad, all-encompassing terms are ambiguous in their application to specific protected rights of tribes, or they are unambiguous in their plain meaning and encompass all rights of tribes including reserved or aboriginal rights. The more compelling approach is that of *Mille Lacs* not only because it is the most recent Supreme Court case on the matter.

The *Mille Lacs* Court's approach of finding ambiguity in broad, vague terms is more compelling for linguistic, intent-based reasons as well. An author or speaker may use broad language even while assuming that some topics are outside the scope of the discussion. The only way to clarify the status of a speaker's assumptions is for the speaker himself to make them explicit. Thus, broad language should be considered ambiguous in its application to specific reserved rights. This effectively places the burden to clarify such assumptions on the speaker, author, or drafter, who is in the best position to clarify them. As the *Mille Lacs* court recognized, "the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights." 175

In San Carlos Apache Tribe, recognition of the Decree's ambiguity would have likely allowed the Tribe to pursue its claim for breach of fiduciary duty. Because the effect of the Decree would not have been considered plain from its terms, the Arizona Supreme Court's ruling would have been necessary to clarify the meaning of the Decree. Thus, the Tribe would not have had notice of its claim and the Tribe's claim for

damages would not have accrued until the Arizona court's decision in 2006.

Not only would a recognition of ambiguity have provided the Tribe a remedy for the deprivation of its water rights, it would also have made applicable the Indian canons of construction. These canons, in turn, would have favored interpreting the ambiguous Decree so that it did not cover the Tribe's reserved water rights. Accordingly, the Tribe may have been permitted to claim reserved water rights to the Gila River. A finding of ambiguity could have very well prevented the deprivation of the Tribe's water rights in the first place.

2. Determining Ambiguity with Threshold Canons of Construction

San Carlos Apache Tribe and Mille Lacs specifically concern the construction of broad, vague terms encompassing reserved rights, and this narrow situation can be addressed with certainty and predictability under the unified approach from Mille Lacs. But courts must determine ambiguity in many other instances. A broader framework for determining this ambiguity is necessary.

The current framework—applying canons of construction only after a determination of ambiguity—needs reworking. Granted, through the Indian canons of construction, courts have sometimes been willing to view language from the perspective of tribes after a determination of ambiguity has been made. But these canons become useless when they are rendered inapplicable upon a finding that the controlling language is unambiguous: "When a statute is clear on its face . . . the canons of construction will not come into play." As shown in *San Carlos Apache Tribe*, courts have been more than willing to deny ambiguity in the first place, preventing application of the canons of construction to textual interpretation in Indian law cases. Thus, not only must courts be given standards on how to interpret ambiguous language, they also must be given standards with which they can determine ambiguity in the first place: threshold canons of construction.

If, under the canons of construction described in *Mille Lacs*, ambiguous statutes should be interpreted as Indians would have interpreted them, then why shouldn't the determination of ambiguity itself be made

^{176.} See infra note 184 and accompanying text.

^{177.} COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] (Neil Jessup Newton et al. eds., LexisNexis 2012) (citing Carcieri v. Salazar, 555 U.S. 379, 387 (2009)); South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 506 (1986) ("The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.").

from the perspective of tribes as well? If ambiguities should be resolved in favor of the tribes, then why should a close call regarding whether ambiguity is present not also be resolved in favor of tribes? A formalist would argue that ambiguity is an objective quality that can be determined without reference to the perspective of the reader. But the differing results over similar language in *Mille Lacs* and *San Carlos Apache Tribe* show that even courts will differ as to what is ambiguous. In other words, ambiguity of language is itself ambiguous.

To determine whether language is ambiguous and whether the regular canons therefore apply, courts should use threshold canons of construction. The threshold canons of construction proposed below track current Indian canons of construction as delineated in *Mille Lacs* and other Supreme Court precedent. First, doubt regarding whether a provision is ambiguous should be resolved in the favor of tribes. Second, treaties, agreements, statutes, and executive orders should be construed liberally in favor of finding ambiguity when tribal reserved rights would otherwise be diminished. Third, a doubtful determination on ambiguity should be resolved such that "tribal property rights and sovereignty are preserved" absent clear congressional intent. Finally, courts should initially view text from the perspective of tribes to determine whether language is ambiguous.

Because the distinction between ambiguous and unambiguous language is often elusive, as shown in the conflict between *Mille Lacs*, *Catawba*, and *San Carlos Apache Tribe*, a difference in perspective could very well change a court's decision on whether text is ambiguous. Indeed, applying any of these threshold canons could have made the difference in *San Carlos Apache Tribe* and could, in future cases, prevent the deprivation of tribes' federal reserved rights. Although it is too early to

^{178.} This threshold canon is based on a canon found in a number of Supreme Court cases: Any "doubtful expressions . . . should be resolved in favor of the [Indians]." *E.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 174 (1973); *see also* sources cited at COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] n.3 (Neil Jessup Newton et al. eds., LexisNexis 2012).

^{179.} This second threshold canon is modeled on the Supreme Court's statement that "treaties should be construed liberally in favor of the Indians with ambiguous provisions interpreted for their benefit." Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985); *see also* sources cited at COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] n.2 (Neil Jessup Newton et al. eds., LexisNexis 2012).

^{180.} COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] n.5 (Neil Jessup Newton et al. eds., LexisNexis 2012) (citing Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999)).

^{181.} The final threshold canon is based on the *Mille Lacs* court's statement, "We interpret Indian treaties to give effect to the terms as the Indians themselves would have understood them." *Mille Lacs*, 526 U.S. at 196; *see also* sources cited at COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] n.5 (Neil Jessup Newton et al. eds., LexisNexis 2012).

say exactly how each of these threshold canons would function in a given case, the starting point should be how the regular canons of construction on which they are based would function. Thus, to determine how the third and fourth canon should be interpreted, *Mille Lacs* is relevant precedent. ¹⁸²

VI. CONCLUSION

Over decades of litigation, the San Carlos Apache Tribe has seen its rights adjudicated by the U.S. Supreme Court, the Arizona Supreme Court, and finally the Federal Circuit. Each of these courts left the Tribe with fewer rights. They interpreted statutory language and the Globe Equity Decree against the Tribe, ultimately leaving the Tribe without a remedy against the United States for diminishing its rights to water that runs, or should run, through its reservation.

This Note has exposed the flaws in the Federal Circuit's reasoning in dismissing the Tribe's breach of fiduciary duty claim against the United States. More importantly, it has offered three approaches for future courts to take in reserved-rights cases: (1) considering both legal and factual ambiguity in determining whether a tribe is on notice of its claim such that the statute of limitations begins to run; (2) finding ambiguity in overarching language alleged to affect reserved rights consistent with the Supreme Court's approach in *Mille Lacs Band*; and (3) applying threshold canons of construction to determine when ambiguity is present in Indian law cases. With these tools in hand, courts need not reach the unjust result of the *San Carlos Apache Tribe* line of cases. Instead, they can interpret statutes in a way that protects tribes' reserved rights while taking a realistic approach to the pervasive ambiguity of federal Indian law.

^{182.} Relevant precedent also would include the sources cited at COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 2.02[1] nn.4–5 (Neil Jessup Newton et al. eds., LexisNexis 2012).