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Erratum

Due to error, volume 1, issue 2 was originally published as volume 2, issue 1 and some articles were misnumbered or not published at all. This document reflects the correct version of volume 1, issue 2.

AN UNRESERVED ATTACK ON RESERVED WATER RIGHTS: THE STORY OF THE SAN CARLOS APACHE TRIBE'S WATER RIGHTS (OR LACK THEREOF)

Daniel Lee* and Jacob J. Stender**

INTRODUCTION

The story of the San Carlos Apache Tribe's¹ water rights begins long before white settlers came to the West and appropriated the waters of the Gila River, which runs through the San Carlos Apache Reservation. These waters were and still are sacred to the San Carlos Apache Tribe; they form a core component of the Tribe's culture, society, and belief system. They are also a source of irrigation and drinking water and a means to obtain sustenance, including fish and wildlife.

Courts have recognized and sometimes protected tribes' interests in waters that they have relied on since "time immemorial."² Thus, tribes have at times obtained court recognition of "aboriginal" water rights based on longstanding use of water before western settlement.³ Tribes may also claim reserved water rights under the *Winters* doctrine, which recognizes that an implied tribal right to the amount of water necessary to support a reservation was created when that reservation was formed by the federal government.⁴ But the San Carlos Apache Tribe did not have the opportunity to make a claim for aboriginal or reserved water rights to the Gila River because in 1935, the United States unilaterally diminished the Tribe's water rights under the Globe Equity Decree.⁵

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** Commissioner, District Court of Maryland; J.D., Seattle University School of Law, 2012; B.A., Psychology, Western Washington University, 2002. I would like to thank Daniel Lee for the opportunity to analyze an interesting and important new wrinkle in the saga of Native American water rights. I would also like to thank the American Indian Law Journal for ensuring the quality of this piece of scholarship. Any opinions expressed herein are my own, and do not necessarily reflect those of other members of the Maryland judiciary.

¹ The San Carlos Apache Tribe is hereinafter referred to as "the Tribe."

² *E.g.*, *United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

³ *See, e.g., id.*

⁴ *Winters v. United States*, 207 U.S. 564 (1908).

⁵ *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1348 (Fed. Cir. 2011). The Globe Equity Decree is hereinafter referred to as "the Decree."

The Globe Equity Decree failed to live up to its name. Equity was not served when the federal government acted as the Tribe's trustee and settled tribal water rights while simultaneously representing adverse parties that sought water rights of their own.⁶ Indeed, in 2006, the Tribe forcefully argued to the Arizona Supreme Court that it should not be bound to the Decree because the federal government's representation of the Tribe was severely inadequate.⁷ Inadequate representation prevents privity between the represented party and the representing party, keeping the represented party from being bound to the decree under the principle of *res judicata*.⁸ The Tribe argued that because the decree could not be considered binding under *res judicata*, the Tribe should be able to assert reserved water rights beyond those provided for in the Decree.⁹

The Tribe's arguments were rejected by the Arizona Supreme Court, which held that the Decree effectively precluded the Tribe from asserting any claims to the Gila River beyond those specified in the Decree.¹⁰ Ignoring the fact that the Tribe did not have the resources or legal sophistication to challenge the Decree at the time, the court nevertheless placed blame on the Tribe for not asserting its claims earlier.¹¹ Moreover, it faulted the Tribe for strategically maneuvering between federal and state jurisdictions so that it could increase the likelihood of bringing a claim for reserved water rights.¹² Even if that is true, who can blame the Tribe? Who can blame the Tribe for trying to seek the most favorable forum for its claims, especially when those claims concern water that runs through its land, near the homes of its members—water the Tribe depends on to meet its members' basic needs?

This Article argues that the Arizona Supreme Court case was wrongly decided. The Court strategically manipulated doctrine to avoid reaching the inevitable and logical conclusion—that the United States took advantage of the San Carlos Apache Tribe in 1934 when it entered into the Globe Equity Decree. This Article also contends that the Tribe should not be bound to that Decree. Part I contains a thorough critique of each portion of the Arizona Supreme Court's reasoning and shows how that

⁶ *Id.*

⁷ *In re* The Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 127 P.3d 882, 897 (Ariz. 2006) [hereinafter *Gila River Sys.*] (en banc).

⁸ *See id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 42(1)(e) (1979)).

⁹ *Id.*

¹⁰ *Id.* at 903.

¹¹ *Id.* at 901.

¹² *Id.*

court effectively denied the Tribe due process of law.¹³ Part II argues that legislators should strengthen protections on reserved tribal rights by amending the McCarren Amendment, thereby providing a neutral forum for litigation of water rights.¹⁴ Part III briefly concludes.¹⁵

I. WHAT WENT WRONG – A DENIAL OF DUE PROCESS AND THE STATUTE OF LIMITATIONS

The Arizona Supreme Court came to its wrongful conclusion in two steps. First, it determined that the scope of the Globe Equity Decree included reserved water rights. Second, it determined that the Decree prevents the assertion of reserved water rights beyond those provided for in the Decree. This Part examines each of these conclusions in turn. Further, it explains how the Arizona Supreme Court misapplied the doctrines of comity and res judicata to reach these results, as well as how those misapplications of law effectively denied the Tribe's constitutional right to due process.

A. *The Scope of the Globe Equity Decree*

The Arizona Supreme Court erred in concluding that the scope of the Decree included *Winters* reserved water rights. Supreme Court precedent indicates that plain language of the type included in the Decree is insufficient to abrogate reserved water rights. And both the parties to the Decree and the issuing District Court did not display an intent to diminish or abrogate the Tribe's reserved water rights.

Although the Tribe argued that the Decree only applied to water rights gained under state law through prior appropriation, the Arizona court concluded that the plain language of the Decree also addressed federal reserved water rights.¹⁶ The court recognized that federal law governed the scope of the Decree.¹⁷ But it failed to consider federal precedent construing the plain language of statutes, treaties, and contracts between the government and Native American tribes.

In Indian law cases, federal courts have been willing to look past

¹³ See *infra* Part I.

¹⁴ See *infra* Part II.

¹⁵ See *infra* Part III.

¹⁶ *Gila River Sys.*, 127 P.3d at 895.

¹⁷ *Id.* at 887 (“Federal law dictates the preclusive effect of a federal judgment.”).

the plain language of a given document to effectuate the purposes of the tribal rights at issue.¹⁸ In *Minnesota v. Mille Lacs Band of Chippewa*,¹⁹ the tribe signed a treaty that 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.”²⁰ Despite this broad, unequivocal language, the Court determined that the treaty failed to abrogate the tribe’s hunting, fishing, and gathering rights because it did not specifically mention those rights.²¹ Instead, the Court applied two canons of interpretation that “Indian treaties are to be interpreted liberally in favor of the Indians, and that any ambiguities are to be resolved in their favor.”²² Although the language of the treaty was clear, other sources, such as the historical context of the treaty, sufficed to create ambiguity.²³ Further, the Court emphasized that any abrogation of those rights would have likely been compensated, and the absence of compensation indicated that the treaty was not intended as an abrogation.²⁴ Lastly, the Court noted that “the United States treaty drafters had the sophistication and experience to use express language for the abrogation of treaty rights,” and would thus be expected to do so if that was their intent.²⁵

¹⁸ See, e.g., *Minnesota v. Mille Lacs Band of Chippewa*, 526 U.S. 172 (1999) (determining that the plain language of a treaty that purported to relinquish “all” right title and interest to reservation land was not controlling).

¹⁹ See *id.*

²⁰ *Id.* at 195.

²¹ *Id.*

²² *Id.* at 200. An additional canon provides that language should be interpreted how Native Americans would have interpreted it at the time of its creation. See, e.g., *State v. Keezer*, 292 N.W.2d 714, 716 (Minn. 1980). This canon would seem not to apply to the situation facing the Tribe because it was not a party to the Globe Equity proceeding. The Tribe would not have had a chance to interpret the language of the Decree at the time of its creation. Thus, by failing to include the Tribe in proceedings regarding its own rights, the parties to the Globe Equity proceedings gained further leverage with which to deprive the Tribe of its federal water rights.

²³ *Mille Lacs Band*, 526 U.S. at 200 (“[T]he historical record refutes the State’s assertion that the 1855 Treaty ‘unambiguously’ abrogated the 1837 hunting, fishing, and gathering.”). The Court emphasized that the purpose of the treaty was to remove the tribe from Minnesota. *Id.* But because the executive did not have power to remove the tribe, that part of the treaty was void. *Id.* Thus, the Court determined that the overarching purpose of the treaty would not be served by abrogating the tribe’s rights once the removal provision was found invalid.

²⁴ See *id.*

²⁵ *Id.* at 195.

The Arizona court's failure to require specific language in order to diminish or abrogate the Tribe's reserved water rights was contrary to federal precedent. The Globe Equity Decree contained broad language similar to that of the treaty in *Mille Lacs Band*.²⁶ While the treaty in *Mille Lacs Band* purported to relinquish "all rights" and "interests,"²⁷ the Decree purported to enjoin "all" additional claims of water to the Gila River.²⁸ But neither the Decree nor the treaty specifically referred to the rights at issue; in *Mille Lacs*, the treaty failed to expressly mention the hunting and fishing rights, while the Globe Equity Decree failed to mention the Apache Tribe's *Winters* water rights.

Following the Court's reasoning in *Mille Lacs Band* would have advanced the purpose of federal reserved water rights, which is to provide water necessary for the reservation.²⁹ If hunting and fishing rights were considered important enough for the Court to require specific language abrogating those rights in *Mille Lacs Band*, then Indian water rights should receive similar protection because water is an even more fundamental need of the reservation.

The Arizona court also failed to address the Indian canons of construction, which favor the interpretation of a statute or decree that benefits the tribe.³⁰ Notably, the canons of construction were recently applied to the Decree by the Ninth Circuit Court of Appeals.³¹ Further,

²⁶ Compare *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1348 (Fed. Cir. 2011) ("[A]ll of the parties to whom rights to water are decreed in this cause . . . are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein . . . —any [additional] right, title or interest in or to the waters of the Gila River . . ."), with *Mille Lacs Band*, 526 U.S. at 195 ("[T]he 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.").

²⁷ *Mille Lacs Band*, 526 U.S. at 195.

²⁸ *San Carlos Apache Tribe*, 639 F.3d at 1348; see also *Morton v. Mancari*, 417 U.S. 535 (1974) (determining that broad, general language in a more recent statute did not abrogate a tribe's employment preference rights granted in a specific, albeit older statute).

²⁹ See, e.g., *Arizona v. California*, 373 U.S. 546, 599 (1963).

³⁰ *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1437–38 (9th Cir. 1994). Although the *Mille Lacs Band* Court applied these canons of construction to a statute, they also apply to consent decrees. *Id.* Still, even though these canons use mandatory language, the Supreme Court has, at times, inexplicably failed to apply them. See, e.g., *Montana v. United States*, 533 U.S. 262 (2001) (determining that upon attaining statehood, Montana gained title to a river bed within tribal territory).

³¹ *Gila Valley Irrigation Dist.*, 31 F.3d at 1437–38. The Ninth Circuit stated:

although canons of construction are usually only applied when resolving ambiguities,³² they were applied in *Mille Lacs Band* despite the clarity of the treaty's plain language.³³ The type of ambiguity that permits use of the canons, therefore, is not limited to linguistic ambiguity. Indeed, the *Mille Lacs Band* Court looked "beyond the written words, to the larger context that frames the treaty, including 'the history of the treaty, the negotiations, and the practical construction adopted by the parties.'"³⁴

The Arizona court did consider some contextual evidence, such as the language of the United States' amended complaint in the Globe Equity proceedings,³⁵ but that evidence failed to resolve the Decree's situational ambiguities. In the amended complaint, the federal government referred to the Tribe's rights as "reserved and appropriated,"³⁶ and the Arizona court placed heavy emphasis on the word "reserved" as indicative of an intent to settle the Tribe's reserved *Winters* water rights.³⁷ But the vague term "reserved" only exacerbates the ambiguity of the Decree. The term "reserved" is used in the context of many tribal rights, especially those based on treaties.³⁸ The parties could have easily included this language to address any rights reserved under treaties.³⁹ Thus, the term "reserved" does not unequivocally show that the *Winters* reserved water rights were specifically considered at the time the parties entered into the Decree.

Further, the Supreme Court has held that parties who are legally competent can be expected to explicitly convey their intent and not

This court has recognized certain canons for interpretation of Indian treaties. "These canons call for promoting the treaties' central purposes; construing treaties as they were originally understood by the tribal representatives, rather than according to legal technicalities; resolving ambiguities in favor of the Indians; and interpreting the treaties in the Indians' favor." . . . These canons should also be applied in appropriate situations involving contracts or consent decrees between Indians and non-Indians.

Id.

³² See *Mille Lacs Band*, 526 U.S. at 200.

³³ *Id.* at 195.

³⁴ *Id.* at 196.

³⁵ *Gila River Sys.*, 127 P.3d 882, 894 (Ariz. 2006) (en banc).

³⁶ *Id.* at 895.

³⁷ See *id.*

³⁸ See, e.g., *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 680, *modified sub nom.*, *Washington v. United States*, 444 U.S. 816 (1979) (addressing reserved fishing rights).

³⁹ Indeed, the *Mille Lacs* Tribe's fishing rights were also considered "reserved" rights. *Mille Lacs Band*, 526 U.S. at 195.

abrogate rights without such explicit language.⁴⁰ General language, such as the language in the Globe Equity Decree, has previously been insufficient.⁴¹ But nowhere did the parties to the Decree use explicit language to describe and include the Tribe's water rights that were, per *Winters*, reserved during the creation of the reservation. Such language could be expected of a legally sophisticated party such as the United States. Thus, specific language should have been required for the diminishment of water rights necessary to support the reservation.⁴²

A presumption of fair dealing could only have led the Arizona court to conclude that the government did not intend to diminish the Tribe's water rights. The court recognized that the "contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties."⁴³ Thus, to conclude that the Decree diminished the Tribe's water rights, the court would have had to first determine that the federal government intended to do so. But any determination that the United States actually sought to diminish the Tribe's rights would impute to the government an intent to deal unfairly with the Tribe and to deprive it of the water necessary to sustain its reservation. This conclusion would be contrary to the presumption that the government intended to deal fairly with the Indians.⁴⁴ Indeed, this presumption is the rationale behind the *Winters* doctrine: "The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless."⁴⁵

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² The Arizona court additionally concluded that the Amended Complaint asserting that the Tribe's water rights were based on theories of "occupancy and possession" necessarily indicated that federal reserved rights were specifically under consideration. *See Gila River Sys.*, 127 P.3d at 894.

⁴³ *Id.* at 890 (quoting 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4443 (1981)).

⁴⁴ *See, e.g.*, *Pittsburg & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990) (applying the presumption of fair dealings in the context of land allotments); *Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Sec'y of Commerce*, 494 F. Supp. 626, 633 (N.D. Cal. 1980) ("[I]t must always be presumed that Congress 'intended to deal fairly with the Indians.'" (quoting *Arizona v. California*, 373 U.S. 546, 600 (1963))). *But see Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) (presuming that "Congress acted in perfect good faith in the dealings with the Indians" and refusing to further scrutinize the government's allegedly fraudulent dealings with a tribe).

⁴⁵ *Arizona v. California*, 373 U.S. at 600.

Finally, the Globe Equity proceedings showed that the United States District Court for the District of Arizona,⁴⁶ the court that entered the Decree, did not intend to abrogate the Tribe's *Winters* water rights. In issuing the Decree, the District Court characterized the Tribe as "warlike and in no sense agrarian."⁴⁷ Even if this rationalization had been a permissible characterization of the entire Apache culture, it was irrelevant to the determination of federal reserved water rights under the *Winters* doctrine.⁴⁸ In the *Winters* case, the Court awarded reserved water rights even though it determined that the tribe in that case was "a nomadic and uncivilized people."⁴⁹ The *Winters* Court instead emphasized that the intent of the legislature in creating reservations was "to change those habits" and to make the tribe "a pastoral and civilized people."⁵⁰ Thus, the focus of the *Winters* doctrine is on future use, not the tribe's past. Indeed, the Supreme Court later confirmed that *Winters* water rights are "intended to satisfy future as well as the present need of the Indian Reservations."⁵¹ Even if the Apache tribe had been "warlike," their historical culture was irrelevant to the determination of reserved water rights.⁵² The District Court's focus on the culture of the Apache people indicates that the court decided the Tribe's rights in the Decree without addressing the rationale behind reserved water rights, and thus left the Tribe's *Winters* rights intact.

B. The Effect of the Decree

The second issue addressed by the Arizona court was whether the Decree had a binding effect on the Tribe under the principle of res judicata.⁵³ The Tribe was not a party to the proceedings of the Decree, and a nonparty is only bound to a judgment if the nonparty was in privity

⁴⁶ The United States District Court for the District of Arizona is hereinafter referred to as "the District Court."

⁴⁷ *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1356 (Fed. Cir. 2011) (Newman, J., dissenting).

⁴⁸ *See Winters v. United States*, 207 U.S. 564, 576 (1908).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Arizona v. California*, 373 U.S. at 600. Accordingly, the Court determined that *Winters* water rights should be determined by the irrigable acreage of the reservation. *Id.* at 600–01.

⁵² *Winters*, 207 U.S. at 576. Indeed, a tribe's "warlike" culture would only have strengthened the legislature's resolve to "change those habits" by creating a reservation for "pastoral" activities that required water. To effectuate this intent, Congress would have impliedly reserved water rights for the reservation to permit agriculture as an alternative to previous occupations.

⁵³ *Gila River Sys.*, 127 P.3d 882, 896 (Ariz. 2006) (en banc).

with a party that adequately represented its interests in the judgment.⁵⁴ This privity requirement protects a party's constitutional right to due process.⁵⁵ Without privity, a party would be bound to a past judgment without an opportunity to be heard, in violation of the Fourteenth Amendment.⁵⁶

The Tribe argued that it was not bound by the Decree because it was not in privity with the United States, who had acted as the Tribe's representative in the Globe Equity proceedings.⁵⁷ Specifically, the Tribe argued that the federal government did not adequately represent the Tribe's interest⁵⁸ because the United States had significant conflicts of interest when representing the Tribe and ultimately failing to preserve tribal water rights under the Decree.⁵⁹ Thus, the Decree would not bind the Tribe under *res judicata* because the United States did not adequately represent the Tribe's interests in the first proceeding, which prevented the element of privity from being met.⁶⁰

But the Arizona court refused to address the issue of privity and *res judicata*.⁶¹ The court stated that the doctrine of comity required that it defer to the federal court that issued the Decree.⁶² Even though the District Court that issued the Decree had not addressed whether the Tribe was bound to the Decree, the Arizona court nevertheless reasoned that the federal court would have likely determined that the Decree was binding on the Tribe.⁶³ The court concluded that it should thus defer to the federal court and decline to decide whether the United States' representation of the Tribe was so inadequate as to preclude privity.⁶⁴ In effect, the Arizona

⁵⁴ *Id.*

⁵⁵ *Richards v. Jefferson County*, 517 U.S. 793, 797–98, n.4 (1996) (“[A] State may not, consistently with the Fourteenth Amendment, enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.”).

⁵⁶ *Id.*

⁵⁷ *Gila River Sys.*, 127 P.3d at 897.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 899.

⁶² *Id.*

⁶³ *Id.* at 900.

⁶⁴ *Id.* at 901.

court only partially applied the doctrine of res judicata; it applied the elements of res judicata that were met but omitted privity, the element that was primarily in question.

The Arizona court erred for three reasons. First, its use of comity to avoid the privity requirement of res judicata violated the Tribe's constitutional right to due process. Second, the Arizona court misapplied the doctrine of comity as previously defined by the Arizona State and United States Supreme Courts. Finally, the Arizona court's approach whipsawed the Tribe by refusing to hear the Tribe's arguments while deferring to a court that had also refused to hear the Tribe's case. In result, no court ever decided whether the Tribe was actually in privity with the United States; no proceeding ever truly gave the Tribe its day in court.

1. Denial of Due Process

Binding a nonparty to a prior judgment risks depriving that party of an opportunity to be heard unless it was represented in the earlier proceeding.⁶⁵ Thus, a state violates the Due Process Clause of the Fourteenth Amendment when it gives conclusive effect to a prior judgment against one who was neither a party nor in privity with a party therein.⁶⁶ But when the Tribe argued that there was no privity between it and the United States, the Arizona court decided that "we need not resolve that issue . . . because we conclude that the doctrine of comity compels us to refrain from addressing the Tribe's arguments."⁶⁷ Thus, the Arizona court placed the doctrine of comity over the Tribe's due process rights.

The Arizona Supreme Court erred by placing comity above the right to due process. Courts agree that a violation of a party's due process rights precludes application of comity.⁶⁸ The Arizona court rationalized its disregard for the Tribe's due process by suggesting that the inadequate representation exception⁶⁹ would not have been available to the Tribe in federal court, rendering the issue moot. Specifically, the court stated that the United States Supreme Court "has never held that the government's

⁶⁵ Mathews v. Eldridge, 424 U.S. 319, 333 (1976); *see also* Taylor v. Sturgell, 553 U.S. 880, 892–93 (2008).

⁶⁶ *See, e.g.*, Richards v. Jefferson County, 517 U.S. 793, 797–98, n.4 (1996).

⁶⁷ *Gila River Sys.*, 127 P.3d at 898.

⁶⁸ *See, e.g.*, Bird v. Glacier Elec. Coop., Inc., 255 F.3d 1136, 1152 (9th Cir. 2001) (violation of due process in tribal court precluded application of comity doctrine to tribal court's judgment).

⁶⁹ *See* discussion *supra* Part I.B.

representation of a tribe can be so inadequate as to prevent privity.”⁷⁰ This rationalization could be interpreted in two ways.

First, the Arizona court may be arguing that the Supreme Court would not even recognize an exception to res judicata based on inadequate representation, meaning that a federal court would not apply that exception to the Tribe’s case. But the Supreme Court has already explicitly recognized such an exception on numerous occasions.⁷¹ In *Richards*, the Court articulated that a nonparty is bound to prior judgments “in certain limited circumstances” where the nonparty’s “interests [are] *adequately* represented by someone with the same interests who is a party.”⁷² Thus, any assertion by the Arizona court that the Supreme Court would not recognize a general inadequate representation exception would be incorrect.

Alternatively, the Arizona court may have meant that although the inadequate representation exception generally protects nonparties from being bound to judgments they did not participate in, the exception does not protect Native American tribes when represented by the United States as a trustee.⁷³ If so, then the court discriminatorily narrowed the issue to whether an inadequate representation exception can be applied to Native Americans, even though it would have applied to other nonparties. Framing the issue in this way suggests that federal courts would apply a lower standard of due process to tribes than to other parties, and would

⁷⁰ *Gila River Sys.*, 127 P.3d at 898.

⁷¹ *E.g.*, *Richards*, 517 U.S. at 798.

⁷² *Id.* (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)) (emphasis added). Further, in a discussion of the constitutional limitations on the privity element of res judicata, the Court favorably cited a section of the Restatement (Second) of Judgments that recognized the inadequate representation exception. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS, ch. 4 (1980)).

⁷³ Although the Arizona court identified Supreme Court precedent where tribes represented by the United States could not rely upon the inadequate representation exception, the Arizona court did not address the implication of the Court’s consideration of the inadequate representation in tribal cases: that the exception was available to tribes under the right set of facts. *See Gila River Sys.*, 127 P.3d at 898 (quoting *Arizona v. California*, 460 U.S. 605, 628 (1983)). Moreover, the Court limited the determination that the inadequate representation was not met to the facts of those cases; the Court stated “a claim of inadequate representation cannot be supported *on this record*.” *Arizona v. California*, 460 U.S. at 628 (emphasis added). Therefore, the Arizona court’s suggestion that a tribe could never establish the inadequate representation exception was inaccurate.

thus make it easier to bind tribes, as opposed to other parties, to judgments of proceedings to which they were never a party.⁷⁴

Not only was the court's analysis discriminatory against tribes, but it was also contrary to precedent from the Ninth Circuit Court of Appeals.⁷⁵ The Ninth Circuit has specifically recognized that inadequate representation may prevent a decree from binding a tribe: "When the government breaches its trust to the Tribes while openly advancing its own interest the Tribe is not necessarily bound."⁷⁶ The Ninth Circuit explained that "[w]here the representative's management of the litigation is so grossly deficient as to be apparent to the opposing party, it likewise creates no justifiable reliance interest in the adjudication on the part of the opposing party."⁷⁷ Because federal precedent recognizes an inadequate representation exception for both tribes and other nonparties, the Arizona Supreme Court could not have realistically assumed that the issuing

⁷⁴ Sadly, such differential treatment under the Constitution is not without precedent. See, e.g., Luralene D. Tapahe, *After the Religious Freedom Restoration Act: Still No Equal Protection for First American Worshippers*, 24 N.M. L. REV. 331, 348 (1994) ("Unlike a non-Indian religion claim under First Amendment analysis, there is an element of discrimination in the courts' treatment of Indian free exercise claims."). For example, unlike other racial classifications, classifications that turn on Native American status do not constitute racial bias or merit strict scrutiny under the Equal Protection Clause of the Fifth Amendment. *Morton v. Mancari*, 417 U.S. 535, 543 (1974). The Court rationalized this approach by describing "Indian" as a political status, not a racial one, even when Native American ancestry is required to establish the status. *Id.* But see *Rice v. Cayetano*, 528 U.S. 495, 511 (2000) (finding a violation of the Fifth Amendment when only native Hawaiians were given the right to vote in an election of a state political official and when the classification turned on the Hawaiian ancestry of the voter). The discriminatory treatment of Native Americans by the Supreme Court has led some scholars to conclude that "[f]ederal Indian law as practiced before the Supreme Court is in serious normative decline." Matthew L.M. Fletcher, *The Supreme Court's Indian Problem*, 59 HASTINGS L.J. 579, 580 (2008). This normative decline "most likely began to degenerate around the time of the ascension of Chief Justice Rehnquist in 1986 and the concomitant trend toward reducing the Supreme Court's docket." *Id.*

⁷⁵ The job of the Arizona Supreme Court, as it recognized, was to give the same effect to the judgment that the court entering into the decree would give it. *Gila River Sys.*, 127 P.3d at 901. The District Court, which issued the Decree, would have been bound by both Ninth Circuit and Supreme Court precedent. Thus, the Arizona court should have considered Ninth Circuit and Supreme Court precedent in determining what effect the District Court would have given the Decree.

⁷⁶ *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1307 (9th Cir. 1981), *amended sub nom.*, *United States v. Truckee-Carson Irrigation Dist.*, 666 F.2d 351 (9th Cir. 1982), *aff'd in part, rev'd in part sub nom.*, *Nevada v. United States*, 463 U.S. 110 (1983) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 86 cmt. f (1980)).

⁷⁷ *Id.*

District Court or another federal court would not have recognized such an exception to the privity element.

2. Creatively Distorting the Doctrine of Comity

In addition to denying the Tribe its right to due process, the Arizona Supreme Court also misapplied the doctrine of comity. The court stated that “the principle [of comity] is that a court should not assume to disturb another court’s disposition of a controversy unless there are good reasons for doing so.”⁷⁸ But this statement of the doctrine of comity departed from the Arizona court’s longstanding definition of comity, which provided that “the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction.”⁷⁹ While the traditional definition of comity focused on the decisions of a jurisdiction, the Arizona court’s new definition of comity focused on the disposition of a specific court.

The Arizona court’s new definition of comity allowed it to give effect to only the decisions of the District Court while avoiding precedent that would have required application of an inadequate representation exception. By applying a doctrine of comity that focused narrowly on a specific court, the Arizona court was able to disregard Ninth Circuit precedent that, if applied, would not bind the Tribe to a judgment from a proceeding in which it had been inadequately represented.⁸⁰ In contrast, the traditional definition of comity would have required that the court give effect to the Ninth Circuit’s application of the exception to *res judicata*.

Although the Arizona court purported “to accord the Decree the same preclusive effect as would the issuing federal court,”⁸¹ the court in actuality used the doctrine of comity to give the Decree greater effect than it could have been given by the issuing District Court under federal law. The District Court would have been bound to the federal doctrine of *res*

⁷⁸ *Gila River Sys.*, 127 P.3d at 899 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 78 cmt. a (1980)) (alterations in original).

⁷⁹ *Tracy v. Super. Ct. of Maricopa County*, 810 P.2d 1030, 1041 (Ariz. 1991) (giving effect to law of Navajo Nation compelling attendance of a witness in the District Court of Navajo Nation); *Application of Macartney*, 786 P.2d 967, 970 (Ariz. 1990) (giving effect to the detailed findings in a Nevada Supreme Court case that an unaccredited ABA school provided a substantially equivalent education to an accredited school, thus allowing petitioners from the unaccredited school to sit for the Arizona state bar examination).

⁸⁰ *Truckee-Carson Irrigation Dist.*, 649 F.2d at 1303–06.

⁸¹ *Gila River Sys.*, 127 P.3d at 901.

judicata, which includes an exception for inadequate representation.⁸² Unlike the Arizona court, the District Court could not have avoided the inadequate representation analysis.

The Arizona court's narrow formulation of comity was inconsistent with the intent of the District Court that issued the Decree. The District Court intended for the Tribe's "federal rights . . . to be determined under federal law."⁸³ But the court's new formulation of the doctrine of comity essentially applied only federal law from the issuing jurisdiction. In effect, the Arizona court purported to defer to the District Court while simultaneously avoiding the very law that the District Court intended to apply.

The Arizona court also inconsistently applied its new formulation of the doctrine of comity. The court's new definition of comity only allowed it to respect the "dispositions" of another court.⁸⁴ The legal definition of "disposition" is "the final settlement of a matter" or the "judge's ruling . . . regardless of [the] level of resolution."⁸⁵ Although the Globe

⁸² *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *Truckee-Carson Irrigation Dist.*, 649 F.2d at 1303–06.

⁸³ *In re Matter of Determination of Conflicting Rights to Use of Water from Salt River Above Granite Reef Dam*, 484 F. Supp. 778, 779 (D. Ariz. 1980), *rev'd sub nom.*, *San Carlos Apache Tribe of Ariz. v. Arizona*, 668 F.2d 1093 (9th Cir. 1982), *rev'd sub nom.*, *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983).

⁸⁴ *Gila River Sys.*, 127 P.3d at 899 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 78 cmt. a (1980)).

⁸⁵ BLACK'S LAW DICTIONARY 471 (6th ed. 1991) (citing *W. Line Consol. Sch. Dist. v. Cont'l Cas. Co.*, 632 F. Supp. 295, 303 (N.D. Miss. 1986)). This definition applies "to decisions announced by [a] court." *Id.* But when used "[w]ith respect to a mental state," the term "disposition" may also mean "'prevailing tendency, mood, or inclination.'" *Id.* Thus, the Arizona court may have used this latter definition from the comments of the Restatement because the term "disposition" was more malleable than the terms "laws or decisions." Indeed, the terms "laws or decisions" had been narrowly interpreted to mean the specific holdings of a court. John Arai Mitchell, *A World Without Tribes? Tribal Rights of Self-Government and the Enforcement of State Court Orders in Indian Country*, 61 U. CHI. L. REV. 707, 719–20 (1994) (citing *Brown v. Babbitt Ford, Inc.*, 571 P.2d 689, 695 (Ariz. Ct. App. 1977)). Because the Arizona court had not made any "decision" or holding about the binding effect of the Decree on the Tribe, the traditional definition of comity would not have supported the Arizona court's analysis. But the ambiguity of the term "disposition" may have allowed the Arizona court to give effect to any "mood" of the District Court or "tendency" to uphold the Decree. Even though the District Court judge would have had to follow Ninth Circuit precedent regarding the inadequate representation exception, the Arizona court avoided it by giving deference not to how the District Court judge actually would decide the issue, but instead to the judge's "attitude" toward the issue. It is doubtful

Equity Decree was a “final settlement” and “ruling,” the District Court had made no such final ruling regarding the Decree’s application or binding effect on the San Carlos Apache Tribe. The Arizona court only pointed out that the District Court had “intimated its view of a tribe’s ability to challenge both the validity of the Decree and the adequacy of the United States’ representation in the Globe Equity Decree.”⁸⁶ But intimating a view can hardly constitute a “final settlement” or “ruling” for the purposes of comity under the Arizona court’s formulation.

Further, even if these intimated views could be considered a court’s “disposition,” such a view was still never applied to the Tribe’s rights specifically.⁸⁷ Rather, the District Court had prevented a different tribe, the Gila River Indian Community (GRIC), from vacating the Decree in full.⁸⁸ But the GRIC was only an intervenor, not an original party, in the previous litigation,⁸⁹ and so the court had broad discretion to limit the GRIC’s intervention to particular issues or for limited purposes.⁹⁰ Indeed, the court may have limited the GRIC’s intervention out of deference to the interests of the main parties in that litigation who might have been prejudiced by a costly broadening of the scope of the litigation.⁹¹ Thus, the court’s discretionary denial of the GRIC’s arguments did not reflect how the court would have determined the merits of the Tribe’s argument that it was not bound by the Decree.

The issue addressed by the District Court with regard to the GRIC was not only procedurally different, but also substantively different from the arguments made by the San Carlos Apache Tribe before the Arizona Supreme Court. Unlike the GRIC, the Tribe did not try to vacate the entire Decree.⁹² The Tribe merely sought to avoid the binding effect of the

that the doctrine of comity can be stretched this far to give legal effect to the whims of judges, unbounded by precedent or law, without violating due process.

⁸⁶ *Gila River Sys.*, 127 P.3d at 900.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1130 (N.D. Cal. 2007); MARY K. KANE, *CONDITIONS ON INTERVENTION*, 7C FED. PRAC. & PROC. CIV. § 1922 (3d ed. 2011) (noting that courts have discretion to limit permissive intervention and that some courts have even limited interventions as of right).

⁹¹ *See, e.g., Ionian Shipping Co. v. British Law Ins. Co.*, 426 F.2d 186, 191–92 (2d Cir. 1970) (permitting court to impose on intervenors any conditions “necessary to efficient conduct of the proceedings” (internal quotation marks omitted)).

⁹² *United States v. Williams*, 904 F.2d 7, 8 (7th Cir. 1990). The effect of vacating a judgment “is to nullify the judgment entirely and place the parties in the position of no trial

Decree on it as a nonparty to the judgment.⁹³ Granting the Tribe's argument would not have had the far-reaching implications sought by the GRIC;⁹⁴ it would not have precluded enforcement of the Decree against other parties that were adequately represented in that litigation. Parties to a judgment are still bound by the judgment, even if the judgment has no *res judicata* effects on a nonparty.⁹⁵ Accordingly, the District Court would not have had to vacate the Decree in full to determine that the Tribe was not bound by it. The District Court's prior rejection of a sweeping argument to vacate the Decree does not demonstrate that it would deny a nonparty relief from the Decree upon a showing that all elements of *res judicata* were not met.

Additionally, the District Court's rejection of claims by the GRIC of inadequate representation is not applicable to the same arguments made by the San Carlos Apache Tribe before the Arizona Supreme Court. In refusing to hear the GRIC's argument that it had been inadequately represented by the United States,⁹⁶ the District Court merely expressed its views regarding the inadequate representation arguments made by the GRIC, not the San Carlos Apache Tribe.⁹⁷ The court's view of a different tribe's ability to avail itself of the inadequate representation exception can hardly be considered dispositive of whether the federal government's representation of the Tribe was adequate. While the GRIC obtained 210,000 acre-feet of water under the Decree, the San Carlos Apache Tribe obtained only 6,000.⁹⁸ Any court would have been understandably

having taken place at all; thus, a vacated judgment is of no further force or effect." *Id.* (citations omitted).

⁹³ The logical result of this argument would seem to require a constructive vacating of the Decree after application of the exception to the other tribal parties to the Decree. But the representation given the Tribe by the federal government was qualitatively different than representation received by other tribal parties, rendering such applications difficult. See *infra* II.B.2.

⁹⁴ See, e.g., *Jones v. Mendocino County Narcotic Task Force*, 895 F.2d 1417 (9th Cir. 1990).

⁹⁵ See *id.*; see also CHARLES ALAN WRIGHT ET AL., *PARTIES BOUND—BASIC PRINCIPLES*, 18A FED. PRAC. & PROC. JURIS. § 4449 (2d ed. 2011) ("The basic premise of preclusion is that parties to a prior action are bound and nonparties are not bound.").

⁹⁶ *Gila River Sys.*, 127 P.3d 882, 900 (Ariz. 2006) (en banc). The District Court had stated that "it was 'too late in the day for GRIC now to complain of its representation back in 1935.'" *Id.* But this rationale for denying the GRIC's argument focuses on the timing of the complaint, and is specific to the GRIC, not the San Carlos Apache Tribe.

⁹⁷ *Id.*

⁹⁸ *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1357 (Fed. Cir. 2011) (Newman, J., dissenting).

less receptive to an inadequate representation claim from the GRIC, whose substantial water rights dwarf those received by the San Carlos Apache Tribe under the same Decree. A claim by the GRIC that it had received inadequate representation would have been seen as opportunistic because the tribe already received significant water rights. In contrast, the United States' reservation of only 6,000 acre–feet for the San Carlos Apache Tribe would have made it much more likely for the Tribe to succeed on its claim that it had indeed been inadequately represented.

The historical relationships between the United States and different tribes increased the likelihood that the government represented the GRIC more vigorously than the San Carlos Apache Tribe during the Globe Equity proceedings. The unequal treatment of the two tribes in the Decree was based in part on historical differences between the tribes' relations with the United States. Namely, the GRIC were viewed as “an industrious farming race[, while] the Apache are and always have been warlike and in no sense agrarian.”⁹⁹ The GRIC also did not have any military conflicts with the United States, while the Apache tribe clashed with the United States Army several times.¹⁰⁰ Indeed, the San Carlos Reservation was seen as “an alternative to genocide as a method of getting rid of the Apache.”¹⁰¹ And even after the violence between the Apache and settlers ended, locals still “had a vital interest in the Apache's remaining a threat” in order limit the Tribe's ability to compete with local merchants.¹⁰²

The differential treatment of the GRIC and the San Carlos Apache Tribe under the Decree supports the conclusion that the tribes received differential representation during its creation. The San Carlos Apache Tribe received no water storage rights from the San Carlos Project, even though the reservoir created by the project was located on the San Carlos

⁹⁹ *Id.* at 1356.

¹⁰⁰ See generally KARL JACOBY, SHADOWS AT DAWN: AN APACHE MASSACRE AND THE VIOLENCE OF HISTORY (2009). See also JOHN GREGORY BOURKE, ON THE BORDER WITH CROOK 127 (1971) (“The Apache was a hard foe to subdue, not because he was full of wiles and tricks and experienced in all that pertains to the arts of way, but because he had so few artificial wants and depended almost absolutely upon what his great mother—Nature—stood ready to supply.”); GREGORY MCNAMEE, GILA: THE LIFE AND DEATH OF AN AMERICAN RIVER 104–05 (1998).

¹⁰¹ RICHARD J. PERRY, APACHE RESERVATION: INDIGENOUS PEOPLES AND THE AMERICAN STATE 121 (1993).

¹⁰² The military “bought supplies from [the Apaches] rather than from Anglo-American contractors, who in the past often had struck comfortable deals with purchasing agents.” *Id.*

Apache Reservation.¹⁰³ In contrast, the GRIC was one of the main beneficiaries of the project and received substantial water storage rights under the Decree.¹⁰⁴ This differential treatment distinguishes the inadequate representation arguments of the two tribes, which undercuts the parallels drawn between the arguments by the Arizona Supreme Court.

Ultimately, the Arizona Supreme Court erred by redefining the traditional doctrine of comity and ignoring federal caselaw relevant to how the District Court would have treated the Tribe's claims. The Arizona court also erred in giving undue weight to the District Court's treatment of a differently situated tribe that raised different procedural issues. This legal analysis wrongfully bound the San Carlos Apache Tribe to the failed arguments of other tribes and therefore deprived the Tribe of its day in court.

3. The Federal–State Whipsaw and Wasteful Litigation

Regardless of the accuracy of the Arizona Supreme Court's comity analysis, the court's reliance on the doctrine of comity to defer to the federal courts was itself inappropriate. The federal courts had already deferred to the states by dismissing the Tribe's case in *Arizona v. San Carlos Apache Tribe*.¹⁰⁵ The doctrine of comity "teaches that one court should defer action . . . until the courts of another sovereignty with concurrent powers . . . have had an opportunity to pass upon the matter."¹⁰⁶ The District Court already had an opportunity to decide the Tribe's water rights under the Decree, but instead chose to dismiss the case and defer to the state court.¹⁰⁷ Had the District Court determined that

¹⁰³ *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860 (D. Ariz. 2003), *aff'd*, *San Carlos Apache Tribe v. United States*, 639 F.3d 1346 (Fed. Cir. 2011).

¹⁰⁴ *Id.*

¹⁰⁵ *See generally* *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). *See also* discussion *supra* Part I.B.2.

¹⁰⁶ *Rhines v. Weber*, 544 U.S. 269, 274 (2005).

¹⁰⁷ *Arizona v. San Carlos Apache*, 463 U.S. at 550. The district court had discretion to defer to the state court or decide the case itself. *See id.* at 569–70; Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 273 ("[The McCarran Amendment] does not eliminate federal court jurisdiction over water right claims, nor does McCarran's policy (as interpreted by the Court) necessarily require federal courts to abstain in favor of state court proceedings."). *But see* *Arizona v. San Carlos Apache*, 463 U.S. at 578 (Stevens, J., dissenting) ("[T]he Court holds that considerations of 'wise judicial administration'

a federal forum was more appropriate than adjudication in state court, it would not have deferred.¹⁰⁸

The Arizona court's application of comity was actually contrary to the will of the court to which it deferred. The District Court had already concluded that the state court was better equipped to determine the Tribe's water rights.¹⁰⁹ Although the District Court did not specifically pass on the issue of whether the Tribe was bound by the Decree, the purpose of its deference was to permit the state to adjudicate all water-rights claims, including those claims based on federal reserved rights.¹¹⁰ Litigation regarding those water rights required a determination of whether the Decree was binding. By deferring to state courts with regard to "all water rights," the federal court necessarily deferred with regard to the issue of *res judicata*, as well. In effect, the courts whipsawed the Tribe by deferring to each other, each refusing to hear the Tribe's arguments.

Although the Arizona court purported to defer to the federal court, it nevertheless decided whether the Tribe was bound by the Decree without addressing the issue of privity. But if the doctrine of comity militated against addressing the privity element, it also militated against the court deciding the entire issue of *res judicata*.¹¹¹ Indeed, in all of the cases that the Arizona court cited to support its application of comity, the deferring

require that Indian claims, governed by federal law, must be relegated to the state courts.").

¹⁰⁸ The District Court determines whether to defer to the state-court proceedings based on concerns of "wise judicial administration." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 818 (1976); *see also* WRIGHT & MILLER, *AVOIDING DUPLICATIVE LITIGATION*, 17A FED. PRAC. & PROC. JURIS. § 4247 (3d ed.) ("The teaching of the Colorado River case was that only 'exceptional' circumstances will permit a federal court to refrain from exercising its jurisdiction for reasons of wise judicial administration due to the presence of a concurrent state proceeding.").

¹⁰⁹ *Matter of Determination of Conflicting Rights to Use of Water from Salt River Above Granite Reef Dam*, 484 F. Supp. 778, 784 (D. Ariz. 1980), *rev'd sub nom.*, *San Carlos Apache Tribe of Ariz. v. Arizona*, 668 F.2d 1093 (9th Cir. 1982), *rev'd sub nom.*, *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983) (emphasizing "the intense local concern in proceedings for the determination of State water rights" and dismissing the case "for a more effective and complete determination of water rights in the State courts").

¹¹⁰ *Id.* at 784. ("[T]he State proceedings will determine federal reserved water rights. . . . The only rights excluded from the State proceeding are those rights to percolating groundwater arising solely under Arizona case law.").

¹¹¹ *Cf. Administaff, Inc. v. Kaster*, 799 F. Supp. 685, 690 (W.D. Tex. 1992) (determining, for purposes of pendent jurisdiction, that remanding an entire case is preferable to dividing it or to dismissing some of a plaintiff's claims).

courts had either refused to consider the entire action or completely declined jurisdiction and remanded the parties to pursue relief in the rendering court.¹¹² In those cases, each deferring court's refusal to decide the overall action protected the parties' due process rights by ensuring the parties could obtain relief in the issuing court. But the Arizona court did not respect the Tribe's due process rights by remanding the issue; it instead retained jurisdiction and decided the overall issue without applying the requirement of privity. In effect, the court abandoned the federal doctrine of *res judicata* and replaced it with a new doctrine that only included elements unfavorable to the Tribe.

The Arizona court also improperly faulted the Tribe for not engaging in unnecessary and wasteful litigation. The Arizona court justified its refusal to address the Tribe's inadequate representation arguments by accusing the Tribe of making a "strategic choice to withhold making those arguments in the court that issued the Decree in order to seek a more favorable forum here."¹¹³ Specifically, the court criticized the Tribe for failing to make the arguments in a 1992 federal court case.¹¹⁴ The Tribe was forced to intervene to protect its water rights under the Decree when the water commissioner for Arizona impermissibly over-calculated water other users were entitled to divert from the Gila River.¹¹⁵ But arguments against the enforceability of the Decree would have been wasteful and unnecessary during the 1992 litigation. No party had attacked the Tribe's ability to assert its *Winters* water rights in that litigation, nor had any court determined that the Decree diminished or abrogated the Tribe's water rights. Thus, the Tribe had no reason to assert defenses against or otherwise attempt to vacate the Decree. Further, the Tribe did not necessarily have standing to attack the Decree at that time because it was merely an intervenor in the case.¹¹⁶ A preemptive attack on the Decree might have even jeopardized the Tribe's ability to intervene and protect its water rights at all.

¹¹² *Gila River Sys.*, 127 P.3d 882, 899–901 (2006) (en banc) (discussing *Lapin v. Shulton, Inc.*, 333 F.2d 169 (9th Cir.1964). See generally *Treadaway v. Academy of Motion Picture Arts & Sciences*, 783 F.2d 1418 (9th Cir.1986).

¹¹³ *Gila River Sys.*, 127 P.3d at 901.

¹¹⁴ *Id.* at 901–02.

¹¹⁵ See generally *United States v. Gila Valley Irrigation Dist.*, 961 F.2d 1432 (9th Cir. 1992).

¹¹⁶ *Gila River Sys.*, 127 P.3d at 882, 900.

II. LEARNING FROM THE MISTAKES OF THE ARIZONA COURT

In a general sense, the story of the San Carlos Apache Tribe is not unique. The antagonism between states and tribes is a recurring theme in the history of Federal Indian Law.¹¹⁷ The Arizona Supreme Court's refusal to afford the San Carlos Apache Tribe due process, as well as its unprecedented use of the doctrine of comity to deprive the Tribe of its water rights, merely echo this theme. And they validate the fear of tribes who are forced to defend their rights in state-court proceedings. Thus, perhaps the most obvious solution to the problems faced by the San Carlos Apache Tribe is one that has been frequently advocated by Indian law scholars:¹¹⁸ Congress should reinstate federal oversight over claims concerning Indian reserved water rights by amending the McCarran Amendment.¹¹⁹

State courts are essentially interested parties in litigation between states and tribes, and often find ways to bend the law to meet state interests.¹²⁰ The Arizona court creatively failed to recognize the exception to res judicata based on inadequate representation even though it has been applied by the Ninth Circuit and the Supreme Court.¹²¹ And the threat of appellate review by the Supreme Court has not been sufficient to check state aggression against Indian rights under federal law.¹²² For instance, while the Court previously promised in *Arizona v. San Carlos Apache Tribe* to meet alleged state discrimination with "exacting scrutiny,"¹²³ it predictably denied certiorari when the Tribe sought review of the Arizona court's decision.¹²⁴ Relying on the Supreme Court's appellate

¹¹⁷ See, e.g., *Worcester v. Georgia*, 31 U.S. 515 (1832); 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, 902 (1999) (recognizing the "ignominious history of state encroachments on the sovereign rights, jurisdiction and resources of Indian Tribes").

¹¹⁸ Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RESOURCES J. 375, 389–90 (2006).

¹¹⁹ 43 U.S.C. § 666 (1952).

¹²⁰ See Royster, *supra* note 118, at 390 ("State courts are obligated to determine tribal rights to water according to federal law. Not all state courts, however, have been scrupulous about this duty.").

¹²¹ See discussion *supra* Part I.B.2.

¹²² See *id.*

¹²³ *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983).

¹²⁴ *San Carlos Apache Tribe v. Arizona*, 549 U.S. 1156 (2007). See also Royster, *supra* note 118, at 389–91 ("Although the Supreme Court has indicated its willingness to correct abuses through a petition for certiorari, it denied review of the questions presented by the

jurisdiction to protect tribes from state discrimination is simply infeasible considering the small number of cases for which it grants certiorari.¹²⁵

If legal precedent and appellate review are insufficient to curb state-court aggression, then tribes will turn to the lower federal courts for protection; however, this is not an option under current interpretation of the McCarran Amendment. In *Arizona v. San Carlos Apache Tribe*, the Court interpreted the McCarran Amendment to permit federal courts to dismiss actions brought by tribes and instead defer the proceedings to state courts.¹²⁶ Therefore, the current interpretation of the McCarran Amendment forces tribes to defend their rights in state courts that have traditionally been inhospitable to their rights.¹²⁷

Some have argued that the McCarran Amendment does not constitute a major threat to tribes' federal rights.¹²⁸ Its implications are somewhat narrow, as federal courts are only able to defer to state courts under the McCarran Amendment during general adjudications of water rights in that state.¹²⁹ Thus, tribes will still have access to federal courts in many other water law cases.¹³⁰

But there has been an increase in major water rights adjudications, so tribes have had to defend their rights in state courts with greater frequency.¹³¹ Tribes may still be able to avoid the disadvantages of having a state court interpret their water rights by bringing declaratory actions to quantify and settle *Winters* water rights in federal court before state-court adjudications occur. But even if a tribe takes preemptive action, the McCarran Amendment still gives states the opportunity to influence, reinterpret, and redefine water rights even after a federal determination. If

tribal party in the only state court water rights adjudication that it has considered.”).

¹²⁵ *Newdow v. U.S. Cong.*, 328 F.3d 466, 470 (9th Cir. 2003), *rev'd sub nom.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (“While the Supreme Court unquestionably has the authority to review any or all of the decisions of the Court of Appeals, the Court has elected to hear a remarkably small number of cases in recent years.”).

¹²⁶ *Arizona v. San Carlos Apache*, 463 U.S. at 571.

¹²⁷ *Id.*

¹²⁸ See Benson, *supra* note 107, at 274.

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See, e.g., Steven J. Shupe, *Water in Indian Country: From Paper Rights to A Managed Resource*, 57 U. COLO. L. REV. 561, 592 (1986) (“A ‘general stream adjudication’ is a common tool used by many western states in their water administration schemes.”).

a state court is willing to ignore an element of *res judicata*, then it is hard to imagine any obstacle, even a prior federal-court determination, that would sufficiently prevent a state from abridging tribal rights.

Accordingly, because the Supreme Court's current interpretation of the McCarran Amendment fails to protect tribes' reserved water rights, Congress should amend it to guarantee tribes a federal forum for claims based on federal water rights.¹³² The statute is currently silent regarding tribal rights. The Supreme Court has nevertheless interpreted this silence to permit state courts to adjudicate tribal water rights. Thus, nothing short of an express guarantee of federal jurisdiction over tribal water rights claims will suffice to protect tribal interests from state biases and encroachment.

CONCLUSION

It is somewhat questionable whether *Winters* water rights would have actually protected the Tribe's ability to obtain water from the Gila River.¹³³ Indeed, courts have largely failed to enforce *Winters* water rights.¹³⁴ Perhaps the significance of the San Carlos Apache Tribe cases is not that the Tribe was deprived of its access to water—this result was likely even if the tribe was awarded *Winters* water rights because water rights are difficult to enforce against upstream users.¹³⁵ Instead, the cases serve to demonstrate the government's complicity in depriving the Tribe of water from a river that runs through its reservation. Even without government sanction, private parties would have likely accomplished this result despite the ostensible protection of legal doctrine.¹³⁶ Therefore, the

¹³² Such an amendment would also harmonize the McCarran Amendment with 28 U.S.C. § 1362, which "embodies a federal promise that Indian tribes will be able to invoke the jurisdiction of federal courts to resolve matters in controversy arising under federal law." *Arizona v. San Carlos Apache*, 463 U.S. at 570–71.

¹³³ MCNAMEE, *supra* note 100, at 159 ("The *Winters* Doctrine was often cited but rarely enforced, and Indian water continued to nourish Anglo fields and sweep aside the mountains that shielded ore from miners eyes.").

¹³⁴ *Id.*

¹³⁵ Joseph M. Feller, *The Adjudication That Ate Arizona Water Law*, 49 ARIZ. L. REV. 405, 440 (2007) ("The greatest problem in surface water rights administration in Arizona today is not the lack of certainty and finality in those rights, but rather the lack of an effective mechanism to enforce them.").

¹³⁶ *See id.*

unfortunate aspect of these cases is not that they deprived the Tribe of their water rights, but rather the court's willingness to endorse a historical injustice with contemporary legal doctrine.

It is our democratic faith that is at stake in our treatment of Native Americans.¹³⁷ But the problem in the San Carlos Apache Tribe cases may simply be that our democratic faith was not tested. Rather, the courts' treatment of the San Carlos Apache Tribe bears on our faith in the judicial system, which is in many ways not subject to democratic checks. Then again, perhaps it is the democratic element present in state-court elections that threatens tribes by creating bias toward local interests. Under this interpretation, our democratic faith is indeed at stake. Tribes must be insulated from those detrimental democratic elements in states that have tempestuous and sometimes adversarial histories with tribes, which is precisely the reason that Congress gave tribes a neutral forum in the federal courts. And Congress should again support neutrality in legal proceedings by unequivocally reinstating that federal forum.

¹³⁷ "Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith." Lavelle, *supra* note 117, at 795.