

IN RE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

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INTRODUCTION

In *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, the Arizona Supreme Court considered whether the Globe Equity Decree of 1935 (“Decree”) precluded the San Carlos Apache Tribe (“Tribe”) and the United States on behalf of the Tribe from asserting claims to the waters of the Gila River mainstem and its tributaries. On February 9, 2006, the court entered an order, written by Justice Hurwitz, unanimously holding that the Decree prevented the Tribe from asserting claims to water from the mainstem of the Gila River beyond those rights granted in the Decree. The court held, however, that claims to the waters of the tributaries of the Gila River are not precluded. Following the Tribe’s appeal, the court entered an order on May 3, 2006 denying the Tribe’s motion for reconsideration.

I. FEBRUARY 9, 2006 ORDER

A. Factual and Procedural Background

In 1925, the United States filed a complaint (“Complaint”) that sought a determination of the rights of the San Carlos Apache Tribe, the Gila River Indian Community (“GRIC”), and itself to use the waters of the Gila River and its tributaries.¹ The Complaint named several individuals, irrigation districts, canal companies, and corporations as defendants and alleged that the defendants’ claims to the water from the Gila River were in conflict with the rights of the United States, the Tribe, and the GRIC.² Two years later, the United States filed an amended complaint (“Amended Complaint”), in which it sought only to adjudicate the parties’ rights to the waters of the Gila River, and not the waters of its tributaries.³ In 1935, the United States entered into stipulations with those

1. *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (Gila River System I)*, 127 P.3d 882, 885 (Ariz. 2006).

2. *Id.*

3. *Id.*

defendants who maintained claims only to the waters of the Gila River tributaries.⁴ Those defendants were dismissed without prejudice, while the remaining parties stipulated to the entry of the Globe Equity Decree.⁵ The district court appointed a Water Commissioner to administer the Decree and retained jurisdiction to enforce and interpret the Decree.⁶

The Gila River general stream adjudication, which involved in part additional claims to the waters of the Gila River by the Tribe and the United States on behalf of the Tribe, began in 1981.⁷ In 2001, per an order from an Arizona superior court, several parties filed summary judgment motions arguing that the Decree precluded the Tribe and the United States on behalf of the Tribe from asserting claims to water from the Gila River and its tributaries.⁸ Additionally, some of the motions argued that under *Nevada v. United States*,⁹ nonparties to the Decree could assert the claimed preclusive effect of the Decree.¹⁰ The Tribe also filed a summary judgment motion, in which it argued that the Decree did not preclude its claims to additional water from the Gila River or the San Carlos River, a tributary of the Gila.¹¹

On May 17, 2002, the Arizona superior court granted partial summary judgment and held that the Decree was limited to the Gila River mainstem and did not include its tributaries.¹² Additionally, the court held that nonparties to the Decree could assert its preclusive effect.¹³ The Tribe and the United States appealed this order, and the Arizona Supreme Court granted interlocutory review.¹⁴ The main issue raised by the Tribe and the United States was whether the Decree entered in 1935 by the United States District Court for the District of Arizona precluded their claims to additional waters of the Gila River and its tributaries.¹⁵

B. Doctrine of Claim Preclusion

The doctrine of claim preclusion, formerly referred to as *res judicata*, provides that “a final judgment on the merits bars further claims by parties or their

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 886. For a detailed discussion of the Gila River general adjudication, see generally Joseph M. Feller, *The Adjudication That Ate Arizona Water Law*, 49 ARIZ. L. REV. 403 (2007).

8. *Gila River System I*, 127 P.3d at 886. GRIC, ASARCO LLC, Phelps Dodge Corporation, the city of Safford, the Gila Valley Irrigation District, the Franklin Irrigation District, and the San Carlos Irrigation and Drainage District filed summary judgment motions. *Id.*

9. 463 U.S. 110 (1983).

10. *Gila River System I*, 127 P.3d at 886.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 884.

privies based on the same cause of action.”¹⁶ Federal law requires a party to satisfy three elements in order to prevail based on claim preclusion: (1) There must be an identity of claims in the suit in which a judgment was entered and the current litigation; (2) there must be a final judgment on the merits in the previous litigation; and (3) there must be an identity or privity between parties in the two suits.¹⁷ The parties agreed that the Decree represented a final judgment on the merits, which satisfied the second element.¹⁸ Thus, the court’s analysis addressed only the first and third elements of claim preclusion.¹⁹

Concerning the first element, the United States Supreme Court has never expressly defined the test for determining whether an identity of claims exists between two actions.²⁰ Prior to the adoption of the Federal Rules of Civil Procedure, courts analyzed the “causes of action” asserted in the two suits.²¹ After the adoption of the Federal Rules of Civil Procedure in 1938, the test analyzed the “transaction” or the “common nucleus of operative facts” making up the plaintiff’s claims.²² Seven of the thirteen federal circuit courts have adopted the Second Restatement’s transactional approach, and although the United States Supreme Court has never adopted it, the Court has applied the transactional analysis in various contexts.²³ Courts consider several factors, such as the facts’ relatedness in time, space, origin, or motivation and whether the facts form a convenient unit for trial purposes, when determining whether a common nucleus of operative facts exists.²⁴

Additionally, in analyzing whether an identity of claims exists, courts recognize that parties to a consent decree can agree to limit the preclusive effects of the decree.²⁵ Though the general rule states that a judgment precludes later litigation of “all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose,”²⁶ the Restatement (Second) of Judgments provides an exception.²⁷ According to the Restatement, the general rule does not apply when the parties have agreed that the plaintiff may reserve a portion of his claim.²⁸ Many

16. *Montana v. United States*, 440 U.S. 147, 153 (1979).

17. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323–24 (1971). The court applied federal law because federal law dictates the preclusive effect of a federal judgment. *See Sentek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507 (2001). Thus, the court gave the Decree the same preclusive effect as a federal court would give it. *Gila River System I*, 127 P.3d at 887.

18. *Gila River System I*, 127 P.3d at 888.

19. *Id.*

20. *Id.*

21. *See, e.g., United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67–68 (1933).

22. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmts. a & b (1982).

23. *Gila River System I*, 127 P.3d at 888; *see, e.g., United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *Reeves v. Beardall*, 316 U.S. 283, 285–86 (1942).

24. RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. b.

25. *Gila River System I*, 127 P.3d at 890.

26. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1).

27. *See id.* § 26(1)(a).

28. *Id.*

federal courts apply section 26(1)(a) of the Restatement to consent decrees because, according to Charles Wright and Arthur Miller, “[t]he basically contractual nature of consent judgments has led to general agreement that preclusive effects should be measured by the intent of the parties.”²⁹

Not only can parties limit the preclusive effects of their judgments, but courts, in a plaintiff’s first action, can reserve the plaintiff’s right to maintain a second action on part of a claim.³⁰ As Wright and Miller have stated, “[a] judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion.”³¹

Even if a second case involves an identical claim as one that has gone to judgment or even if the parties did not limit the preclusive effect of the initial judgment, claim preclusion requires that each party to the suit be the same or in privity with a litigant in the prior case.³² Generally, courts focus on the relationship between the litigant and the nonparty to be bound by the judgment in order to determine privity.³³ If a nonparty had its interests adequately represented by someone with the same interests who was a party to the previous suit, privity exists.³⁴ Not only do courts generally require that the party against whom claim preclusion is asserted be a party or in privity with a party to the prior litigation, but they also require that the party asserting the preclusive effect of a prior judgment be a party to the prior litigation.³⁵ Courts refer to this principle as the mutuality requirement.³⁶ In certain circumstances, however, “exceptions to the *res judicata* mutuality requirement have been found necessary . . .”³⁷ The United States Supreme Court, in *Nevada v. United States*, established such an exception.³⁸ The Court stated that when water rights have been comprehensively adjudicated, later appropriators, who have relied on the decree adjudicating those water rights, can assert the preclusive effect of the decree against parties to it.³⁹

29. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4443 (1981); see *Satsky v. Paramount Commc’ns, Inc.*, 7 F.3d 1464, 1468 (10th Cir. 1993); *May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1010 (10th Cir. 1990). Because courts tend to treat consent decrees like contracts, they look to the four corners of a consent decree and construe it as written. See *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

30. See *Dodd v. Hood River County*, 59 F.3d 852, 861–62 (9th Cir. 1995).

31. 18 WRIGHT, MILLER & COOPER, *supra* note 29, § 4413.

32. See *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 323–24 (1971).

33. See *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996).

34. *Id.* at 798–99.

35. See *Nevada v. United States*, 463 U.S. 110, 143 (1983).

36. See *id.*

37. *Id.*

38. See *id.*

39. *Id.* at 144.

C. Holdings and Analysis of the Arizona Supreme Court

The court began its analysis by assuming that federal courts would use the Second Restatement's transactional analysis in order to determine whether an identity of claims exists.⁴⁰ Using this test, the court stated that the Tribe's claims to the Gila River mainstem adjudicated under the Decree form a different "transaction" than its claims to the tributaries.⁴¹ The facts needed to establish a claim to the Gila River mainstem are spatially distinct from those needed to establish a claim to the tributaries because a claim to water depends on the location of the party asserting the claim.⁴² Additionally, based on the dismissal from the Globe Equity litigation of all defendants with claims to the tributaries, the most convenient trial unit for claims to the Gila River mainstem excluded claims to the tributaries.⁴³ Furthermore, the dismissal provides evidence that the parties expected the claims to waters of the tributaries to be resolved later.⁴⁴

Despite using the Second Restatement's transactional test, the court declined to decide which test governs the preclusive effect of the Decree.⁴⁵ Instead, the court recognized that regardless of the test used, parties and the courts can limit the preclusive effects of their judgments.⁴⁶ Thus, the court went on to consider the intent of the parties concerning the preclusive effect of the Decree.⁴⁷

The court began by analyzing whether the Decree adjudicated claims to the tributaries of the Gila River.⁴⁸ Looking to the language of the Complaint and the Amended Complaint, the court determined that though the Complaint referred to the Gila River and its tributaries, the Amended Complaint specifically excluded the tributaries of the Gila River because it referred to the portion of the mainstem of the Gila River after four tributaries had joined it.⁴⁹ Additionally, the court noted that the procedural history of the Decree reinforced this conclusion.⁵⁰ The defendants with claims solely to the tributaries of the Gila River were dismissed after the United States filed its Amended Complaint.⁵¹ The Decree expressly recognized the dismissal of these defendants in its language stating that the dismissed defendants' claims were outside the scope of the suit and that their claims were dismissed "without prejudice."⁵² The court inferred that because the Decree did not resolve the claims of the dismissed defendants to water of the tributaries, it did not adjudicate the Tribe's claims to the tributaries, as any

40. *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (Gila River System I)*, 127 P.3d 882, 889 (Ariz. 2006).

41. *Id.*

42. *Id.* at 889–90.

43. *Id.* at 890.

44. *Id.*

45. *Id.* The court noted that the district court entered the Decree in 1935, and thus it was unclear which test would apply. *Id.* at 890 n.10.

46. *Id.* at 890.

47. *Id.* at 890–91.

48. *Id.* at 891.

49. *Id.* at 891–92.

50. *Id.* at 892.

51. *Id.*

52. *Id.*

adjudication would necessarily involve the dismissed defendants.⁵³ The Decree's schedule of rights and priorities further supported the court's conclusion because the Decree repeatedly refers to the "waters of the Gila River," rather than the waters of the Gila River and its tributaries.⁵⁴

The court rejected the argument of various defendants who, in arguing that the Decree did adjudicate the rights to the tributaries, pointed to language in the Decree regarding the proper method for measuring the amount of water to be diverted from the Gila River by "upper valley defendants."⁵⁵ The court stated that this language, although it did refer to the San Francisco River tributary, merely established a method for measuring flows in the Gila River based on readings at certain gauging stations, rather than defining any right to the waters of tributaries.⁵⁶ Using similar reasoning, the court rejected the argument of ASARCO, who suggested that the Decree awarded its predecessor, Kennecott, water from a tributary of the Gila River, the San Carlos River.⁵⁷ The court stated that instead of awarding Kennecott any water from the San Carlos River, the Decree merely enabled the Water Commissioner to measure the flow of water in the Gila River to which Kennecott was entitled.⁵⁸

After concluding that the Decree had no preclusive effect as to the tributaries of the Gila River, the court turned to the Decree's preclusive effect on the Tribe's claims to the mainstem.⁵⁹ While the Tribe argued that the Decree adjudicated only its appropriative rights and not its aboriginal or *Winters* rights,⁶⁰ other parties claimed that the Decree adjudicated all claims of the Tribe to the mainstem.⁶¹ The court again looked to the language of the Amended Complaint and concluded that the United States, on behalf of the Tribe, asserted rights in addition to those based on prior appropriation.⁶² Because the Amended Complaint referred to the Tribe's rights to water both "reserved and appropriated" and because it asserted claims to water with two different priority dates, the court concluded that the United States must have asserted claims under theories in addition to prior appropriation.⁶³ The language of the Decree also supports the conclusion that the Globe Equity litigation adjudicated more than just the Tribe's appropriative rights to waters of the Gila River.⁶⁴ The Decree's introduction states that it concludes and settles "all issues in this cause."⁶⁵ Additionally, Article XIII

53. *Id.*

54. *Id.*

55. *Id.* at 893.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 894.

60. The *Winters* doctrine states that federal reservations implicitly reserve unappropriated water to the extent necessary to accomplish the reservation's purpose. *See Winters v. United States*, 207 U.S. 564, 577 (1908). Further, such water is reserved regardless of the reservation's actual use. *Id.*

61. *Gila River System I*, 127 P.3d at 894.

62. *Id.* at 894–95.

63. *Id.* at 895.

64. *Id.*

65. *See id.*

of the Decree prohibits parties, to whom rights to water were decreed, from asserting any right to the waters of the Gila River, with the exception of the rights specified in the Decree.⁶⁶ The court stated that “[i]t is difficult to imagine more explicit language indicating that the Decree was intended to resolve all of the parties’ claims to the Gila River mainstem.”⁶⁷ Thus, the court held that the Decree addressed the Tribe’s claims to the Gila River mainstem based on all theories and that the first element of claim preclusion was satisfied.⁶⁸

Then the court analyzed privity, the third element of claim preclusion.⁶⁹ Since the Tribe itself did not participate in the Globe Equity litigation, the question centered on whether the Tribe was in privity with the United States.⁷⁰ The court began with the premise that “the United States’ representation, as trustee, of a tribe in litigation that results in a judgment or decree ordinarily binds that tribe to the decree.”⁷¹ The court then rejected all arguments set forth by the Tribe attempting to rebut this premise.⁷² First, the Tribe argued that the United States did not have authority to represent it in the Globe Equity litigation.⁷³ This argument failed, however, based on congressional legislation passed in 1893 that gave the United States District Attorney the power to represent the tribes in all suits at law and in equity.⁷⁴

Second, the Tribe argued that privity was not present because the Nonintercourse Act⁷⁵ requires congressional authorization to extinguish Apache Tribal water rights.⁷⁶ The court rejected this argument because the Decree determined, rather than extinguished, the Tribe’s water rights.⁷⁷ Thus, the United States “possessed the power to ‘represent [the Tribe’s] interests in [the] litigation’ in order to ‘quantify [the Tribe’s] reserved water rights.’”⁷⁸

Third, the Tribe asserted lack of privity based on the alleged inadequate representation provided by the United States in the Globe Equity litigation.⁷⁹ The court declined to resolve the issue and deferred to the federal courts under the doctrine of comity.⁸⁰ Under Federal Rule of Civil Procedure Rule 60(b),⁸¹ the court

66. *See id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* (citing *Heckman v. United States*, 224 U.S. 413, 444 (1912), and *Arizona v. California*, 460 U.S. 605, 615 (1983)).

72. *Id.* at 896–98.

73. *Id.* at 896.

74. *Id.*

75. 25 U.S.C. § 177 (2000).

76. *Gila River System I*, 127 P.3d at 896.

77. *Id.* at 896–97.

78. *Id.* at 897 (quoting *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1300 (9th Cir. 1981)).

79. *Id.*

80. *Id.* at 898. The court did note that the United States Supreme Court has never held that the Government’s representation can be so inadequate as to remove privity, although the high court has rejected that argument in two cases. *Id.*; *see Arizona v. California*, 460 U.S. 605, 626 (1983); *Nevada v. United States*, 463 U.S. 110, 135 (1983).

has the power to consider the Tribe's privity arguments in an "independent" attack on the Decree.⁸² The doctrine of comity, however, warns that the court should hesitate to entertain such an independent attack.⁸³ "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."⁸⁴ If a non-issuing court were to entertain a separate action for relief, it would substantially usurp the inherent power of the issuing court.⁸⁵ The court found that comity to the federal courts is "particularly appropriate" in this case because the issuing federal court retained jurisdiction over the interpretation and enforcement of the Decree.⁸⁶ In addition, the Tribe could have sought to attack the Decree in its 1990 motion to intervene in the federal litigation.⁸⁷ Further, allowing the Tribe to attack the Decree based on privity would in effect reward the Tribe's strategic choice not to make its arguments in the district court in order to seek a more favorable forum in state court.⁸⁸

Finally, the court addressed whether Phelps Dodge, the Salt River Project, and Safford, none of whom were parties to the Decree, could assert the preclusive effect of the Decree against the Tribe and the United States.⁸⁹ Though the court acknowledged that the application of claim preclusion usually requires mutuality, it applied the *Nevada* mutuality exception.⁹⁰ Because the court concluded that the parties to the Decree intended to resolve all claims to the Gila River mainstem, the Decree comprehensively defined rights to the mainstem of the Gila River.⁹¹ Additionally, the court found that nonparties had in fact relied upon it.⁹² Thus, the court held that those not party to the Decree could assert its preclusive effect against parties to the Decree.⁹³ The court stated, however, that any assertion of preclusive effect by the nonparties with respect to the waters of the tributaries must fail due to its determination that the Decree precludes only additional claims to the mainstem.⁹⁴

81. FED R. CIV. P. 60(b). Rule 60(b) states that a court may "entertain an independent action to relieve a party from judgment . . ." *Id.*

82. *Gila River System I*, 127 P.3d at 899.

83. *Id.*

84. RESTATEMENT (SECOND) OF JUDGMENTS § 78 cmt. a (1982).

85. *Gila River System I*, 127 P.3d at 899-900.

86. *Id.* at 900.

87. *Id.* at 901.

88. *Id.*

89. *Id.*

90. *Id.* at 902.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

II. MAY 3, 2006 ORDER

A. Factual and Procedural Background

After the Arizona Supreme Court entered the February 9, 2006 order, the Tribe filed a motion for reconsideration.⁹⁵ The motion alleged that the court erred in invoking the doctrine of comity and refusing to consider the Tribe's claims of inadequate representation by the United States.⁹⁶ The Tribe argued that the court should not have applied the doctrine of comity because the Globe Equity court lacked jurisdiction, under the McCarran Amendment ("Amendment"),⁹⁷ to consider a challenge to the Decree based on inadequate representation by the United States.⁹⁸ Though the motion was untimely, the court proceeded to consider the merits of the motion.⁹⁹

B. McCarran Amendment

The McCarran Amendment provides that the United States may be joined in any suit in state court for the adjudication of water rights and may be bound by the state court judgments.¹⁰⁰ The United States Supreme Court has expressly stated that the Amendment gives "consent to jurisdiction in the state courts concurrent with jurisdiction in the federal courts over controversies involving federal rights to the of use water," and "in no way diminishe[s] federal-district-court jurisdiction . . ."¹⁰¹ Additionally, the Amendment does not require the dismissal or stay of a federal water suit in deference to a concurrent and adequate comprehensive state adjudication, especially when the federal litigation is longstanding.¹⁰²

C. Arizona Supreme Court's Holding and Analysis

The Arizona Supreme Court held that the McCarran Amendment did not deprive the Globe Equity court of jurisdiction to enforce and interpret the Decree.¹⁰³ First, the court emphasized that Ninth Circuit case law stresses that the Amendment confers, rather than withdraws, federal jurisdiction.¹⁰⁴ Additionally, the court acknowledged that the Globe Equity court clearly has jurisdiction to enforce the Decree because it has repeatedly reviewed the actions of the Water Commissioner, even as recently as 2005.¹⁰⁵ Furthermore, the Globe Equity

95. *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (*Gila River System II*), 134 P.3d 375, 375 (Ariz. 2006).

96. *Id.*

97. 43 U.S.C. § 666 (2007).

98. *Gila River System II*, 134 P.3d at 375.

99. *Id.*

100. 43 U.S.C. § 666.

101. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 809 (1976).

102. *See Gila River System II*, 134 P.3d at 376–77 (discussing *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983)).

103. *Id.* at 377.

104. *Id.*

105. *Id.*

litigation has been underway for about seventy years; thus, it is considered longstanding litigation, as opposed to the embryonic litigation that was previously stayed by the Ninth Circuit.¹⁰⁶ Because the Globe Equity court in fact retained the ability to consider the Tribe's attacks on the Decree, the court found no merit to the Tribe's argument that the doctrine of comity is inapplicable.¹⁰⁷ Thus, the court denied the Tribe's motion for reconsideration.¹⁰⁸

III. CONCLUSION

In *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, the Arizona Supreme Court held that the Globe Equity Decree precludes the Tribe and the United States on behalf of the Tribe from asserting claims to water from the mainstem of the Gila River beyond those rights granted in the Decree. The Decree does not preclude, however, claims as to the tributaries of the Gila River. Additionally, because the Globe Equity court retained jurisdiction to consider the Tribe's attacks on the Decree, the court denied the Tribe's motion for reconsideration. The *Gila River* decision makes clear that parties whose rights were adjudicated in the Decree have no rights to the waters of the Gila River beyond those rights defined in the Decree. Parties' rights to the tributaries, however, remain to be determined due to the Decree's lack of preclusive effect as to those tributaries.

106. *Id.*

107. *Id.*

108. *Id.*