

WEST/CRS

2010-5102

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SAN CARLOS APACHE TRIBE,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

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U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

JUN 09 2011

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APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS
IN CASE NO. 09-CV-046,
SENIOR JUDGE ROBERT H. HODGES, JR.

**PETITION OF PLAINTIFF-APPELLEE SAN CARLOS APACHE TRIBE
FOR REHEARING *EN BANC* AND ADDENDUM**

TITLA & PARSI, PLLC

Steve M. Titla
245 South Hill Street
Globe, Arizona 85502
Phone: 928-425-8137
steve@titlaparsi.com
Attorney for Plaintiff-Appellant

BIRCH, HORTON, BITTNER
AND CHEROT, P.C.

William P. Horn
1155 Connecticut Ave., NW
Suite 1200
Washington, D.C. 20036
Phone: 202-659-5800
whorn@dc.bhb.com
Attorney for Plaintiff-Appellant

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U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

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June 9, 2011

FORM 9. Certificate of Interest

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

San Carlos Apache Tribe v. United States

No. 2010-5102

CERTIFICATE OF INTEREST

Counsel for the (petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)
San Carlos Apache Tribe certifies the following (use "None" if applicable; use extra sheets
if necessary):

1. The full name of every party or amicus represented by me is:
San Carlos Apache Tribe


2. The name of the real party in interest (if the party named in the caption is not the real
party in interest) represented by me is:
N/A

3. All parent corporations and any publicly held companies that own 10 percent or more
of the stock of the party or amicus curiae represented by me are:
N/A

4. ☒ The names of all law firms and the partners or associates that appeared for the party
or amicus now represented by me in the trial court or agency or are expected to appear in this
court are:

Titla & Parsi, PLLC, Steve M. Titla; Birch, Horton, Bittner and Cherot, P.C., William P. Horn;
Titla & Parsi, PLLC, Kevin L. Parsi

JUNE 9, 2011
Date


Signature of counsel
WILLIAM P. HORN
Printed name of counsel

Please Note: All questions must be answered

cc: _____

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STATEMENT OF COUNSEL FOR *EN BANC* PETITION

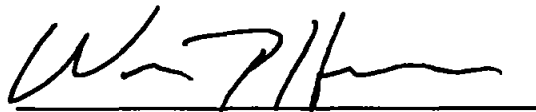
Based on my professional judgment, I am persuaded the April 25 panel decision *San Carlos Apache Tribe v. United States*, No. 2010-5102 (April 25, 2011) is contrary to the following decisions of the Supreme Court of the United States or the precedents of this Court and consideration by the full court is necessary to secure and maintain the uniformity of the Court's decisions:

- (1) *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983);
- (2) *Taylor v. Sturgell*, 553 U.S. 880 (2008);
- (3) *Hansberry v. Lee*, 311 U.S. 32 (1940);
- (4) *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005);
- (5) *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003); and
- (6) *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417 (1991), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995).

Based on my professional judgment, I am also persuaded this appeal involves two issues of exceptional importance warranting rehearing *en banc*:

- (1) The San Carlos Apache Tribe has been denied fundamental due process rights associated with the "deep rooted historic tradition that everyone should have his own day in Court." *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)).

(2) The Tribe relied for decades on the express representations of the U.S. that the 1935 Globe Equity Decree, which the U.S. negotiated and to which the Tribe was not a party, did not preclude the Tribe from securing its full complement of federal reserved water rights from the Gila River. The U.S. now takes a completely contrary position, arguing that the Globe Equity Decree foreclosed those rights in 1935 – a position affirmed by the panel decision. The U.S.'s unjust conduct is inconsistent with its trust obligations to the Tribe and should not be affirmed by this Court.



William P. Horn

*Attorney of Record for the San Carlos
Apache Tribe*

ARGUMENT

A. Introduction: The April 25 Decision Must Be Reviewed To Maintain Uniformity Of The Court's Decisions And Address Issues Of Exceptional Importance

Pursuant to Rule 35 of the Federal Rules of Appellate Procedure, the San Carlos Apache Tribe petitions the Court for rehearing *en banc* of *San Carlos Apache Tribe v. United States*, No. 2010-5102, decided April 25, 2011 (“panel decision,” “decision,” or “April 25 decision”); dissenting opinion filed by Circuit Judge Newman (the “Newman dissent”). The decision is inconsistent with established precedent and its disregard of key facts creates exceptional issues regarding principles of due process and U.S. unjust conduct worthy of *en banc* review.

The April 25 decision rejected the position of the San Carlos Apache Tribe (“San Carlos,” “Tribe,” or “Apaches”) (and the position of the U.S. prior to this case) that its Gila River water rights were only fixed (and lost) in a 2006 determination by the Arizona Supreme Court, *In Re The General Adjudication of All Rights to Use Water in The Gila River System and Source*, 127 P.3d 882 (Ariz. 2006) (“*Gila River*”), causing the Tribe’s monetary damages claim to accrue then. Instead, the decision held that San Carlos lost these water rights in 1935 upon entry of the Globe Equity Decree (“Decree” or “GE”),¹ even though the Tribe was a

¹ Globe Equity No. 59 Decree (D. Ariz. June 29, 1935).

nonparty and there have been decades of protracted federal and state litigation over the applicability, effect and scope of the Decree. Newman dissent at 6-8.

The issue in this case is, did the Tribe's claim accrue in 2006 or in 1935? As Circuit Judge Newman explained in her dissenting opinion, which San Carlos endorses, "my colleagues bar the Tribe from exploring the events surrounding the 1935 Decree, although until the Arizona Supreme Court in 2006 finally disposed of the question, the United States had itself challenged the comprehensiveness and binding effect of the Globe Equity 1935 Gila River allocation." *Id.* at 6.

The Apaches respectfully submit that the panel decision is not consistent with this Court's applicable prior decisions: *Samish Indian Nation v. United States*, 419 F.3d 1355 (Fed. Cir. 2005), *Martinez v. United States*, 333 F.3d 1295 (Fed. Cir. 2003) and *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417 (1991) *aff'd*, 64 F.3d 677 (Fed. Cir. 1995). These precedents mandate that the Tribe's monetary damages claim for lost federal reserved water rights² accrued in 2006 and the Tribe's present claim was timely filed. The panel decision is also not consistent with specifically applicable Supreme Court and U.S. Court of Appeals precedent regarding *where* the Tribe was required to pursue its water rights claims (i.e., in Arizona State court, *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983)), *when* the water claims would be resolved (i.e., when "the State court

² See *Winters v. United States*, 207 U.S. 564 (1908) (recognizing Indian Tribes' federal reserved water rights).

proceedings have been concluded,” *San Carlos Apache Tribe of Ariz. v. State of Arizona*, 721 F.2d 1187, 1189 (9th Cir. 1983)) and *what* legal events actually fixed the loss of the Tribe’s water rights. *See Taylor v. Sturgell*, 553 U.S. 880 (2008) (“*Taylor*”); *Hansberry v. Lee*, 311 U.S. 32 (1940) (“*Hansberry*”); Rule 35(a)(1).

Similarly, the decision raises questions of exceptional importance: (1) the denial of the Tribe’s due process rights, and (2) the manifest injustice to the Apaches arising from the United States’ bait and switch legal positions. *See* Rule 35(a)(2).

Regarding due process, the Tribe complied with federal court mandates to adjudicate and resolve its water claims in Arizona state proceedings. *See San Carlos Apache Tribe of Ariz.*, 463 U.S. at 557-59; *White Mountain Apache Tribe v. Hodel*, 784 F.2d 921, 924-925 (9th Cir. 1986). The State proceeding concluded in 2006 when the Arizona Supreme Court determined for the first time that the nonparty Tribe was subject to the Decree barring the Tribe’s (and U.S.’s) pending water claims. *See Gila River*, 127 P.3d at 898-900.

Until the 2006 ruling, the law and principles of due process presumed the nonparty Tribe was not bound to the 1935 Decree. *See Taylor*, 553 U.S. at 884; *Hansberry*, 311 U.S. 32; *Pelt v. Utah*, 539 F.3d 1271 (10th Cir. 2008); Restatement (Second) of Judgments § 42(1)(c) (1982). Contrary to this settled law and

disregarding key facts, the panel decision held that the Decree bound the Tribe and fixed the loss of water rights in 1935. Newman dissent at 6, 11.

The U.S. position on these issues flip-flopped in this case creating another issue worthy of review. *Id.* at 1. It entered the Decree on behalf of the Tribe providing the Apaches a mere 6000 acre-feet annually of water from the Gila River.³ *Id.* at 3. However, through 2006, the U.S. maintained that the Decree did not preclude the Tribe (and the U.S. on the Tribe's behalf) from seeking a full entitlement of *Winters* water rights from the River. *Id.* at 3-4. In fact, the U.S. in 1985 filed claims for over 129,000 acre-feet of Gila River System rights for San Carlos in the Arizona adjudication. *Id.* at 4. The U.S. also argued in 2006 to the Arizona court that that Decree was presumptively not binding on the Tribe. *Id.* at 4-5, 10.

The U.S. switched its position in the present litigation. Here it argued that the Decree was binding on the Apaches as of 1935 and fixed the loss of water rights then. *Id.* at 1. This unjust conduct by the Tribe's Trustee, affirmed by the April 25 decision, "provides 'yet another instance of the manifest injustice which has assailed the Tribe at virtually every turn since their dealings with the United

³ Other non-Indian Gila River interests were provided 350,000 acre-feet. Newman dissent at 3. The U.S. also more than adequately represented the downstream Gila River Indian Community securing it 210,000 acre-feet. *Id.*

States and its citizens began.’ *United States v. Gila Valley Irrigation Dist.*, 804 F. Supp. 1, 5 (D. Ariz. 1992).” *Id.* at 2.

B. The April 25 Decision Is Inconsistent With Precedents Establishing That Claims Accrue Only Following The Resolution Of “Necessary Legal Elements” And Following The “Conclusion” Of Mandatory Review Proceedings

Applicable precedent provides that “if a necessary legal element to a claim must be established in a different forum, the claim will not accrue for § 2501 until that element is finally established in the other proceeding.” *Samish Indian Nation*, 419 F.3d at 1369. In *Samish*, the Nation was denied recognition by the Bureau of Indian Affairs (“BIA”) in 1969 and denied valuable benefits. The Nation challenged the recognition denial and succeeded – 27 years later – in establishing that BIA acted improperly. *Id.* at 1369, 73. The Nation then filed a claim for the value of the lost benefits, which was dismissed by the U.S. Court of Federal Claims on the grounds that the claim accrued in 1969. *Samish Indian Nation v. United States*, 58 Fed. Cl. 114, 123 (2003). This Court reversed, holding the Nation’s claim for lost benefits accrued in 1996 when it “obtained a final determination from the district court, through their APA challenge, that the government’s conduct underlying its refusal to accord federal recognition” was illegal. *Samish Indian Nation*, 419 F.3d at 1369, 1373. Until the “necessary legal

element” regarding recognition was resolved, no compensation claim could accrue.

Id.

In the present case, San Carlos could not bring a timely compensation claim for lost water rights until those rights were in fact lost. The timeliness of the claim turned on a threshold legal question: *when* were the water rights lost? Resolution of this necessary legal element turned on other disputed, fundamental legal issues: was the 1935 Decree purporting to restrict the Tribe’s water rights binding on the nonparty Tribe and, if so, when was it binding? These issues were not joined until 2001 and not resolved until 2006. *See Gila River*, 127 P.3d at 886, 898-900; Newman dissent at 5. As Judge Newman noted, “until the present case [the 2006 Arizona ruling] there was no monetary claim against the government and no cause of action under the Tucker Act.” *Id.* at 7.

Review of the San Carlos chronology establishes that, consistent with *Samish Indian Nation*, the San Carlos claim accrued in 2006. The Decree was entered decades ago but the Tribe was not a party. Subsequently, the U.S. maintained that the Decree did not resolve all of the Apaches’ Gila River rights and did not preclude the Tribe, or the U.S on the Tribe’s behalf, from seeking a full complement of Gila River water rights. Newman dissent at 1. The Tribe filed water claims in U.S. District Court in 1979, prompting a forum challenge from the State of Arizona. The State prevailed in 1983 when the U.S. Supreme Court

ordered the Tribe to file its claims in the Arizona state court adjudication. *San Carlos Apache Tribe of Ariz.*, 463 U.S. at 557-59. The Tribe, and the U.S., complied with this mandate and filed in 1985 Gila River claims in the Arizona forum. The U.S. represented in that litigation that the Decree did not preclude these claims. The Tribe agreed but added an additional legal element: as a nonparty to the Decree, the Tribe was presumptively not bound to the Decree until other parties carried the burden of proof to demonstrate that the U.S. had in fact adequately represented the Tribe in the negotiation of the 1935 Decree. See Restatement (Second) of Judgments § 42(1)(c); *Taylor*, 553 U.S. at 894, 900-901; *Hansberry*, 311 U.S. at 42-43; *Pelt*, 539 F.3d at 1284-89. Private parties rose to this challenge in 2001 filing claims in the Arizona proceeding that the Tribe was bound by the Decree. *Gila River*, 127 P.3d at 886; Newman dissent at 5. Only at this time was this “necessary legal element” ripe for review and resolution: was the Decree operative against the Tribe and did it preclude the Tribe’s water claims?

Only when that necessary threshold issue was resolved in 2006 – against the Tribe – were the Tribe’s Gila River rights actually lost and did the present claim accrue. Like the Samish Nation and its 35-year battle over recognition and lost benefits, no claim for monetary damages could accrue until San Carlos obtained a final determination of the effect of the Decree. *Samish*, 419 F.3d at 1373, Newman dissent at 9.

The panel decision is also inconsistent with the mandatory review features of *Martinez v. United States*, 333 F.3d 1295, 1304 (Fed. Cir. 2003) (*en banc*). It prescribes “as a general matter, if a dispute is subject to mandatory administrative proceedings, the plaintiff’s claim does not accrue until the conclusion of the proceedings.” *Id.* (citing *Crown Coat Front Co. v. United States*, 386 U.S. 503, 511 (1967); *Lins v. United States*, 231 Ct. Cl. 579, 688 F.2d 784, 786 (Ct. Cl. 1982); *Nager Elec. Co. v. United States*, 368 F.2d 847, 853 (Ct. Cl. 1966)). San Carlos was mandated to pursue its water claims in the Arizona adjudication. *San Carlos Apache Tribe of Ariz.*, 463 U.S. at 557-559. The Tribe’s claims in federal court were stayed “until the State court proceedings have been concluded.” *San Carlos Apache Tribe of Ariz. v. State of Arizona*, 721 F.2d at 1189. In a related case, the neighboring White Mountain Apache Tribe was ordered to pursue its water claims in the same Arizona adjudication and not bring any claims for lost or mismanaged water rights against the U.S. until the State proceedings were concluded and their results known. *White Mountain Apache Tribe*, 784 F.2d at 921, 925. Until the 2006 conclusion of the Arizona adjudication, any monetary claims before the U.S. Court of Federal Claims were premature and not ripe per *Martinez* as well as the more specific Supreme Court and Ninth Circuit decisions.⁴

⁴ Similarly, “precedent illustrates that monetary claims do not accrue against the United States until the claims have sufficiently ripened.” Newman dissent at 7

Lastly, the April 25 decision is inconsistent with the analogous precedent set forth in *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417 (1991), *aff'd*, 64 F.3d 677 (Fed. Cir. 1995) ("*Fort Mojave*"). *See* Newman dissent at 11. In *Fort Mojave*, the U.S. entered into a 1964 water rights consent decree on behalf of that tribe. The U.S. realized it had negotiated insufficient water rights for this tribe: "The government affirmatively acknowledged that it had erred, took the position that the plaintiffs [Fort Mojave] were entitled to the water rights in dispute, and commenced to take actions in furtherance of its trust responsibility aimed at resecuring those rights for the plaintiffs." *Id.* at 429. The U.S. argued initially that the effect of the 1964 decree was sufficiently unresolved to enable Fort Mojave to secure additional water rights. In 1983, "the Supreme Court, in *Arizona v. California*, 460 U.S. 605 (1983), finally interpreted the rights established by the 1964 decree," Newman dissent at 12, and, relying on the same kind of *res judicata* principles cited by the Arizona Supreme Court in 2006, held the decree barred Fort Mojave from securing additional water rights. *Fort Mojave*, 23 Cl. Ct. at 423.

Following this determination (and loss) of water rights, the Fort Mojave Tribe filed for monetary damages for lost water rights. The U.S. then changed its position, arguing that the claim accrued in 1964. This Court rejected the U.S. position, holding that "all of the events which fixed the liability for breach of trust

(citing *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988)).

had not occurred until the issuance of that [1983] decision.” *Fort Mojave*, 23 Cl. Ct. at 429, *aff’d*, 64 F.3d 677 (Fed. Cir. 1995); *see* Newman dissent at 12.

The elements of the San Carlos claim are nearly identical: inadequate decree entered into by the U.S. on behalf of a nonparty Tribe, decades of legal disputes over the effect of the decree on Tribal water rights, good faith efforts to secure additional water rights for the Tribe, and resolution of necessary legal elements years later fixing the loss of water rights and causing a monetary damages claim to accrue only then. The panel decision that the San Carlos water loss claims accrued in 1935 cannot be squared with the facts and precedent set forth in *Fort Mojave*.

C. The April 25 Decision And Its Disregard Of Key Legal Principles And Important Facts Creates Exceptional Issues Meriting Review

The April 25 decision denies due process to San Carlos and affirms unjust conduct by the United States. Each is an exceptional issue worthy of *en banc* review.

1. Denial of Due Process To The San Carlos Apache Tribe Should Be Reviewed

The April 25 decision that the Tribe’s claim accrued in 1935 unfairly penalizes the Tribe for playing by the rules and denies the Tribe its day in court. The crucial element of this case is the status of the Decree. Established principles of due process make it clear that (a) the Decree was presumptively not binding on San Carlos, (b) the Decree did not preclude the Tribe from seeking additional

water rights, (c) the Tribe was denied due process, and (d) this denial is exacerbated by the April 25 decision.

The Supreme Court has set forth the due process principles governing the effect of judgments (like the Decree) on nonparties:

A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim preclusion to nonparties thus runs up against the 'deep rooted historic tradition that everyone should have his day in court.' *Richards v. Jefferson County*, 517 U.S. at 798, 116 S. Ct. 1761 (internal quotation marks omitted). Indicating the strength of that tradition, we have often repeated the general rule that 'one is not bound by a judgment *in personam* in a litigation in which he is not designated a party or to which he has not been made a party by service of process.' *Hansberry*, 311 U.S. at 40.

Taylor, 553 U.S. at 892-893.

Nonparties may be bound "in certain limited circumstances" where they were "adequately represented by someone with the same interests who [wa]s a party." *Id.* at 894. But this is an exception and the rule is that a nonparty is not bound unless another party asserts claim preclusion and carries the burden of proof to demonstrate that the nonparty was in fact adequately represented in the prior proceeding. *See Id.*; Restatement (Second) of Judgments § 42(1)(c).

There are also strict standards to establish "adequate representation" sufficient to bind a nonparty. *See Taylor*, 553 U.S. at 900.

In the context of federal Indian water law in Arizona, a tribe also has the right to argue inadequate representation to assure that it will not be bound to a

judgment or decree to which it was not a party. *United States v. Truckee Carson Irrigation District*, 649 F.2d 1286, 1306-1308 (9th Cir. 1981), modified at 666 F.2d 351 (9th Cir. 1982). In that case, the U.S. District Court conducted a 43-day trial on whether or not U.S. representation of the Pyramid Lake Paiute Tribe was sufficiently adequate to bind the nonparty Paiutes to the Orr Ditch Decree. See *Truckee Carson*, 649 F.2d at 1312.

San Carlos was afforded none of these rights and protections. The Arizona Supreme Court imposed claim preclusion on the Tribe "as a matter of comity" without ever addressing the factual issues of inadequate representation surrounding the Decree or affording the Tribe an evidentiary hearing on this fundamental issue. *Gila River*, 127 P.3d at 898-900. The Arizona court never addressed or allowed San Carlos to address the legal principles set forth in *Taylor*, *Hansberry*, *Pelt*, or *Truckee Carson*.

San Carlos is not seeking to relitigate these settled issues. This history is provided to demonstrate that the Tribe pursued its Gila River water claims in the State proceedings per the direction of the U.S. Supreme Court and the Ninth Circuit. The Tribe did not bring any premature "lost water rights" claims like the neighboring White Mountain Apaches. The U.S. stood with the Tribe for years (up until this case) "pressing the position that the Globe Equity Decree did not finally determine the Tribe's water rights in the Gila River." Newman dissent at 1. In

good faith, San Carlos pursued its claims until cut off by the 2006 state court determination. Then the Tribe pursued its only remaining avenue: monetary compensation for the water rights it then, for the first time, had definitively lost.

The April 25 decision compounds this lack of due process by disregarding these principles of law and facts, and simply declaring that the Decree was binding on the Tribe as of 1935 and the Tribe should have known that fact. End of story. As Judge Newman noted, “my colleagues bar the Tribe from exploring the events surrounding the 1935 Decree.” *Id.* at 6. The unjust consequence is that the Tribe has neither its water rights nor compensation for the rights it has lost. It has not been allowed to pursue either. It did not get its day in the Arizona court to address inadequate representation, and if the panel decision stands, the Apaches will not get their day in court on their compensation claim. The Tribe has been systematically denied the due process protections articulated in seminal cases like *Hansberry*, *Richards*, and *Taylor*. That is an issue worthy of *en banc* review.

2. U.S. Unjust Conduct Should Not Be Affirmed

For decades the U.S. consistently and expressly informed the Tribe, and the federal and state courts, that the Decree, which the U.S. had negotiated, “did not finally determine the Tribe’s water rights in the Gila River.” Newman dissent at 1. The Tribe relied on those representations and spent years, as well as considerable resources, pursuing its water rights in the Gila. When the status of those rights was

finally fixed in 2006, and the Tribe heeded the Arizona court's recognition that now "the Tribe's remedy ... may lie in the Court of Claims[.]" (*Gila River*, 127 P.3d at 901 n.21 (citing *Arizona v. California*, 460 U.S. at 628 n.20); see Newman dissent at 13, the U.S. abruptly abandoned its long time position to argue that the Tribe's water losses were fixed in 1935. This Court should not countenance or affirm this kind of unjust conduct by the U.S.

This Court has previously not allowed the U.S. to benefit from turning against a tribe to which it owes trust duties. See *Fort Mojave Indian Tribe*, 23 Cl. Ct. at 429; *supra* pp. 9-10. As in *Fort Mojave Indian Tribe*, the U.S. must not be allowed to reverse course, disavow its previous legal positions, and advance a legal position that bars San Carlos from seeking compensation for the water rights it has now in fact lost. To affirm such behavior by the U.S. is to work a manifest injustice against the San Carlos Apache Tribe.

CONCLUSION

For the foregoing reasons, rehearing *en banc* is warranted pursuant to Rule 35.

Dated: June 9, 2011

Respectfully submitted,

TITLA & PARSI, PLLC

/s/ Steve M. Titla

Steve M. Titla

245 South Hill Street

Globe, Arizona 85502

Phone: 928-425-8137

steve@titlaparsi.com

Attorney for Plaintiff-Appellant

BIRCH, HORTON, BITTNER
AND CHEROT, P.C.



William P. Horn

1155 Connecticut Ave., NW

Suite 1200

Washington, D.C. 20036

Phone: 202-659-5800

whorn@dc.bhb.com

Attorney for Plaintiff-Appellant

ADDENDUM

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United States Court of Appeals
for the Federal Circuit

SAN CARLOS APACHE TRIBE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

2010-5102

Appeal from the United States Court of Federal
Claims in Case No. 09-CV-046, Senior Judge Robert H.
Hodges, Jr.

Decided: April 25, 2011

WILLIAM P. HORN, Birch Horton Bittner and Cherot,
P.C., of Washington, DC, argued for plaintiff-appellant.
Of counsel on the brief was STEVEN M. TITLA, Titla &
Parsi, PLLC, of Globe, Arizona. Of counsel was KEVIN L.
PARSI, Titla & Parsi, PLLC, of Scottsdale, Arizona.

TAMARA N. ROUNTREE, Attorney, Environment &
Natural Resources Division, United States Department of
Justice, of Washington, DC, argued defendant-appellee.
With her on the brief was IGNACIA S. MORENO, Assistant
Attorney General.

Before NEWMAN, LOURIE, and MOORE, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge LOURIE*.

Dissenting opinion filed by *Circuit Judge NEWMAN*.

LOURIE, *Circuit Judge*.

The San Carlos Apache Tribe ("Tribe") appeals from a decision of the United States Court of Federal Claims, which dismissed the Tribe's monetary damages claim against the United States for an alleged breach of fiduciary duty relating to water rights in the Gila River. Because the Court of Federal Claims correctly granted the government's motion to dismiss the Tribe's claim for lack of jurisdiction, we affirm.

BACKGROUND

The San Carlos Apache Reservation borders the Gila River. Compl. at 1; see also *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 127 P.3d 882, 885 (Ariz. 2006) ("*Gen. Adjudication*"). The river flows in a westerly direction across Arizona through semi-arid and desert lands requiring irrigation for successful agricultural or horticultural use. *Gen. Adjudication*, 127 P.3d at 885 n.1. In 1925, in connection with a federal project to dam the Gila River and provide water to surrounding landowners, the United States filed a complaint on behalf of the Tribe and other parties in the United States District Court for the District of Arizona to obtain a declaration of water rights to the Gila River (the "Globe Equity Litigation"). See *San Carlos Apache Tribe v. United States*, No. 09-46, at 1 (Fed. Cl. Mar. 25, 2010) ("*Op.*").

In 1935, following ten years of litigation, the district court approved a settlement among the parties; the con-

sent decree is known as the "Globe Equity Decree" ("Decree"). *Id.* The Decree grants the Tribe 6,000 acre-feet of water from the Gila River each irrigation season for irrigating 1,000 acres of land. *Id.*; Answering Br. Def.-Appellee at A36, 2010 WL 3758727 ("Appellee Br."). The Decree states that the parties have "concluded and settled all issues" pertaining to Gila River water rights. *Op.* at 1; *see also* Appellee Br. at A26. The Decree further states that the parties' settlement is "embodied in and confirmed and made effective by" the Decree, which "defin[es] and adjudicat[es] the[] claims and rights" of the parties. Appellee Br. at A26. In addition, the Decree states:

That each and all of the parties to whom rights to water are decreed in this cause (and the persons, estates, interests and ownerships represented by such thereof as are sued in a representative capacity herein), their assigns and successors in interest, servants, agents, attorneys and all persons claiming by, through or under them and their successors, are hereby forever enjoined and restrained from asserting or claiming—as against any of the parties herein, their assigns or successors, or their rights as decreed herein—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, and each and all thereof are hereby perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River or any part thereof

Id. at A51.

The government filed another water rights claim on behalf of the Tribe in 1979. *Op.* at 2; *see also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 558 (1983).

Eventually, this claim was consolidated with other parties' water rights claims in the Gila River general stream adjudication ("Arizona Adjudication") in Arizona state court. See *Gen. Adjudication*, 127 P.3d at 886. In 2001, certain parties to the Arizona Adjudication asserted that the Tribe's water rights claims were barred by the *res judicata* effect of the Decree. *Id.* In response, the Tribe argued that it is not bound by the Decree, because it was not in privity with the United States in the Globe Equity Litigation. *Id.* at 896. The Tribe also argued that, in the litigation leading to the Decree, the United States as trustee for the Tribe sought water rights only under the theory of prior appropriation; thus, the Decree does not cover the Tribe's aboriginal water rights or federal reserved ("Winters") water rights. *Id.* at 888; see also *Winters v. United States*, 207 U.S. 564, 576-77 (1908); A. Dan Carlock, *Law of Water Rights and Resources* § 9:39 (2010).

The matter was appealed to the Arizona Supreme Court, which in 2006 declined on the basis of comity to consider the Tribe's argument that the Decree is not binding on the Tribe. *Gen. Adjudication*, 127 P.3d at 901. In essence, the court held that the proper forum for challenging the interpretation and enforcement of the Decree was the United States District Court for the District of Arizona, not Arizona state court.¹ *Id.* at 900-01. The Arizona Supreme Court further held that the Decree resolved all of the Tribe's water rights, under all theories,

¹ The Arizona Supreme Court noted that the Tribe had received permission to intervene in an ongoing litigation in the United States District Court for the District of Arizona over enforcement of the Decree, but that the Tribe had "declared that it 'does not seek to litigate rights to additional Gila River water in this matter.'" *General Adjudication*, 127 P.3d at 900.

and thus precludes any further claim by the Tribe to the waters of the Gila River. *Id.* at 895. The Arizona Supreme Court noted that it "express[ed] no opinion as to what other remedies, if any, might be available to the Tribe for the Government's allegedly inadequate representation." *Id.* at 901 n.21.

On January 23, 2009, the Tribe filed a complaint in the United States Court of Federal Claims for monetary damages. The Tribe alleged that "[t]he United States' inadequate representation and failure to secure and protect the [Tribe's] aboriginal and federal reserved water rights under the Decree for a permanent Tribal homeland constitutes a serious breach of fiduciary duty which it owed to the [Tribe]." Compl. at 4. The Tribe asserted that its claim against the United States for monetary damages did not become ripe until the 2006 decision of the Arizona Supreme Court. *Id.* at 18.

The government filed a motion to dismiss for lack of jurisdiction, arguing, *inter alia*, that the Tribe's claim is barred by the six-year statute of limitations set forth in 28 U.S.C. § 2501. Def.'s Mot. to Dismiss at 1. The Court of Federal Claims granted the government's motion to dismiss. *Op.* at 3. The court held that the Tribe's claim against the government accrued in 1935 upon entry of the Decree and that it was therefore barred by the six-year statute of limitations. *Id.*

The Tribe timely appealed from the court's decision to dismiss its claim. We have jurisdiction over final judgments of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3).

DISCUSSION

The statute of limitations provided by 28 U.S.C. § 2501 is jurisdictional in the Court of Federal Claims.

John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 134 (2008); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988) ("The 6-year statute of limitations on actions against the United States is a jurisdictional requirement attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed."). Whether the Court of Federal Claims possesses jurisdiction over a claim is a question of law subject to *de novo* review. *Western Co. v. United States*, 323 F.3d 1024, 1029 (Fed. Cir. 2003). In reviewing the propriety of the court's dismissal, we accept as true the facts alleged in the Tribe's complaint. *Catawba Indian Tribe v. United States*, 982 F.2d 1564, 1568-69 (Fed. Cir. 1993).

An action brought under the Tucker Act is time-barred unless it is "filed within six years of the date that the cause of action accrued." *Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995); *see also* 28 U.S.C. § 2501 (2006) ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."). A cause of action against the government has first accrued "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." *Hopland Band*, 855 F.2d at 1577 (emphasis omitted). Moreover, "[t]he question whether the pertinent events have occurred 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 accrue." *Fallini*, 56 F.3d at 1380. This objective standard applies to the accrual of a claim for breach of fiduciary duty. *See Jones v. United States*, 801 F.2d 1334, 1335 (Fed. Cir. 1986) ("Generally, an action for breach of fidu-

ciary duty accrues when the trust beneficiary knew or should have known of the breach.").

On appeal, the Tribe argues that the Court of Federal Claims erred by dismissing its claim. The Tribe asserts that its claim against the government accrued in 2006 following the decision of the Arizona Supreme Court, and is therefore within the six-year statute of limitations under 28 U.S.C. § 2501. The Tribe contends that, due to the government's legally inadequate representation of the Tribe in the Globe Equity Litigation, it was not clear until 2006 that the Tribe was in fact bound by the Decree.

The Tribe also argues that the scope of the Decree remained unclear until the Arizona Supreme Court held that the Decree precluded any claims by the Tribe for additional water rights from the Gila River. The Tribe points out that the United States, as trustee for the Tribe, continued to support the Tribe's claims for additional water rights until 2006, and the Tribe contends that it had no notice that the Decree precluded additional water rights. The Tribe thus argues that, as a beneficiary, it was entitled to rely on the government's good faith and expertise without having to sue for money damages prior to the 2006 Decision. Further, the Tribe argues that because the government did not repudiate its role as the Tribe's trustee until 2006, the Tribe's claim for breach of fiduciary duty did not begin to accrue until then.

The government argues that the Tribe's claim is untimely and barred by the statute of limitations. The government contends that a claim against a trustee for breach of trust accrues when the beneficiary objectively knew or should have known of the breach. The government points out that the basis of the Tribe's present claim is the plain language of the Decree itself, demonstrating that the Tribe's claim was "inherently knowable" to the

Tribe in 1935. Appellee Br. at 11. The government further argues that the decision of the Arizona Supreme Court in 2006 did not fix the basis of the Tribe's claim; at most, the decision clarified the possible damages associated with the claim. Therefore, the government argues, the Arizona Supreme Court's decision did not affect whether the Tribe knew or should have known that its claim existed.

We agree with the government that the Court of Federal Claims lacked jurisdiction over this case because the Tribe's claim is barred by the statute of limitations. The Tribe's complaint asserts jurisdiction pursuant to the Tucker Act, 28 U.S.C. § 1491(a)(1). As noted above, an action brought under the Tucker Act is time-barred unless it is filed within six years of the date that the cause of action accrued. The central question in this case is when the Tribe's claim for breach of fiduciary duty accrued. We conclude that the Tribe's claim accrued in 1935 upon entry of the Decree. As we shall explain, our conclusion is compelled by the plain terms of the Decree and is consistent with the Tribe's own concessions in its complaint and appellate brief.

It is objectively evident that all of the events that fixed the government's alleged liability and entitled the Tribe to institute an action against the government occurred upon entry of the Decree in 1935. The Tribe's claim is based on the unsatisfactory water rights to which the government stipulated in the Decree. Specifically, the Tribe asserts that it was inadequately represented because the United States failed to obtain aboriginal or federal reserved water rights. Compl. at 18-19. However, the terms of the Decree plainly and objectively indicate which water rights the Tribe did and, importantly, did not receive following the settlement of the Globe Equity Litigation. 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." Appellee Br. at A51. Accordingly, viewed under an "objective standard," *Fallini*, 56 F.3d at 1380, the Tribe knew or should have known that the terms of the Decree precluded the Tribe from seeking additional Gila River water rights.

The Tribe further contends that the government's inadequate representation and its resulting breach of fiduciary duty arose from a "severe conflict of interest" due to the government's representation of multiple parties in the Globe Equity Litigation. Compl. at 15. The facts supporting the alleged conflict of interest, however, were similarly apparent from the text of the Decree, which, viewed objectively, plainly indicated that the United States represented multiple parties in the Globe Equity Litigation. As of 1935, therefore, the Tribe was objectively on notice of the accrual of its claims against the government.²

² Even if the Tribe was unaware of its legal rights at the time the Decree was implemented, we have held that "[i]t is settled . . . that 28 U.S.C. § 2501 is not tolled by the Indians' ignorance of their legal rights." *Menominee Tribe of Indians v. United States*, 726 F.2d 718, 720-21 (Fed. Cir. 1984) (emphasis omitted).

It is also evident from the Tribe's complaint and appellate brief that the basis for its claim in this case is the language of the Decree itself. For example, the Tribe's complaint acknowledges that the government's alleged breach of fiduciary duty was apparent from the fact that the Decree provides for only 6,000 acre-feet for the Tribe:

The United States' denial of any benefits to the Apaches from the San Carlos Project was part of a consistent pattern of discrimination against the Tribe, and breach of fiduciary duty, that would be demonstrated again in the Globe Equity proceeding when the United States stipulated to only 6,000 acre feet of Gila River water for the Tribe.

Compl. at 10.³ This is further apparent from the Tribe's appellate brief, which concedes, for example, that the government's "breach of trust is also manifested in many of the terms of the Decree that provided the Tribe virtually worthless limited irrigation rights while providing substantially greater more valuable rights to others." Opening Br. San Carlos Apache Tribe at 30, 2010 WL 2603457 ("Appellant Br.").

The Tribe also asserts that its claim arises from the government's failure to stipulate to "substituted" water rights for the Tribe, despite having done so for other parties to the decree. The complaint states the following:

The U.S. also stipulated to substantial water rights to benefit the Upper Valley farmers under

³ The Tribe's complaint also acknowledges that "[t]he 6000 acre feet of water decreed to the Tribe in 1935 from the Gila River was a mere pittance of water and is truly *de minimis* compared to the amount of water stipulated to by the United States under the Decree for other parties to the Decree." Compl. at 2.

the Decree. These farmers upstream from San Carlos who had entered the Upper Valley lands starting in the early 1880's, were provided a special "substituted" storage right under Article VIII of the Decree based on the amount of water stored each year in the San Carlos Reservoir. . . .

The United States utterly failed to secure comparable water rights for the [Tribe]. It limited the Tribe to a mere 6,000 acre feet from the Gila, and made no similar effort to established [sic] "substituted" storage rights for the Tribe based upon water stored in the Reservoir, even though the Reservoir is located within the heart of the [Tribe's] Reservation, and even though the United States was legally obligated under its fiduciary duties to act as the Tribe's trustee in securing its federal reserved water rights under the Decree.

Compl. at 12. Thus, with regard to "substituted" water rights, the Tribe again concedes that the government's alleged breach of fiduciary duty is apparent from the terms of the Decree. Regarding the alleged conflict of interest, the Tribe's complaint acknowledges that the Decree itself indicates that the United States agreed to a negotiation that provided water rights for multiple parties including the Tribe. *Id.* at 15-16.

Finally, in connection with the Tribe's allegation that the government breached its duty to adequately represent the Tribe in actions to obtain sufficient water rights to fulfill the Tribe's aboriginal and federal reserved water rights, *id.* at 4, the complaint references a provision of the Decree granting the Upper Valley farmers (another party to the Decree) a limited right to purchase the Tribe's 6,000 acre-feet for a specified sum. According to the Tribe, "[t]his agreement under the Decree . . . clearly

provides evidence beyond any reasonable doubt that the government officials representing the Tribe in Globe Equity never had any intention to secure aboriginal or federal reserved water rights for the Tribe under the Decree, as required under federal law." *Id.* at 12-13. Again, consistent with our conclusion that the Tribe's claim accrued in 1935, the facts supporting the Tribe's claim arise from the terms of the Decree itself.

We are not persuaded by the Tribe's arguments to the contrary. In support of its contention that its claim against the United States accrued in 2006, the Tribe relies on *Samish Indian Nation v. United States*, in which we stated that, "[i]f a necessary element to a claim must be established in a different forum, the claim will not accrue for § 2501 until that element is finally established in the other proceeding." 419 F.3d 1355, 1369 (Fed. Cir. 2005). The Tribe contends that, in 2006, the Arizona Supreme Court decided a "necessary element" to its claim, *viz.*, "that the Tribe was precluded from asserting its *Winters* and aboriginal water rights to the main stem of the Gila River." Appellant Br. at 27.

Samish is not controlling in this case, however. In *Samish*, the Interior Department dropped the Samish in 1969 from its list of federally recognized tribes. In 1996, following a series of administrative and judicial proceedings, a federal district court ruled that the government's refusal to federally recognize the tribe violated the Samish's due process rights and the Administrative Procedure Act ("APA"). *Id.* at 1362. In 2002, the Samish filed suit in the Court of Federal Claims seeking, *inter alia*, monetary damages for lost benefits resulting from the government's wrongful refusal to accord federal recognition to the Samish during the period of 1969 to 1996. *Id.* at 1363.

In relevant part, the opinion of the Court of Federal Claims dismissed the Samish's claims as time-barred under 28 U.S.C. § 2501, reasoning that the Samish's claims accrued in 1969. *Id.* We reversed that part of the court's decision and held that the tribe's claim for retroactive benefits did not accrue until 1996, because "the district court's determination [in 1996] provides a predicate 'wrongful' element in this action." *Id.* at 1374. We pointed out that "[o]nly a district court, acting on a challenge under the APA, has authority to review the Secretary's acts concerning the executive's recognition determination." *Id.* at 1369. Because the district court's 1996 decision provided the "missing element," *id.*, to the Samish's claim for damages against the government, the Samish's claim accrued in 1996; its complaint filed in 2002, less than six years later, was timely.

Accordingly, in *Samish*, a money damages claim for improperly withheld federal recognition between 1969 and 1996 required, as a "necessary element," a district court's determination in 1996 that federal recognition was in fact improperly withheld during that period. In contrast, in the present case, the Tribe's claim required no further legal determination beyond the Decree itself. As discussed above, the government's alleged liability was objectively fixed in 1935 with the plain language of the Decree. Here, unlike in *Samish*, there was no "necessary element . . . [to] be established in a different forum," *id.*, before the Tribe's claim accrued under § 2501. The decision of the Arizona Supreme Court, rather than providing a necessary element to the Tribe's claim, simply stated what was readily apparent from the face of the 1935 Decree.

More germane to the present case is *Catawba Indian Tribe v. United States*, 982 F.2d 1564 (Fed. Cir. 1993). That case involved a dispute stemming from the enact-

ment of the Termination Act in 1962. *Catawba*, 982 F.2d at 1567. As the Supreme Court of the United States ruled in 1986, the Act rendered the ancestral lands of the Catawba subject to South Carolina's adverse possession laws. *Id.* at 1568 (citing *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498 (1986)). The Catawba sued the United States in 1990, claiming, among other things, that the government, as trustee for the Catawba, breached its fiduciary duty to the Catawba. *Id.* Specifically, the Catawba alleged that the government failed to protect its land claim by breaching a duty to notify it of the legal effect of the Act. *Id.* The Catawba also asserted that its claim did not accrue upon enactment of the Act because, allegedly, the government incorrectly assured the tribe that nothing in the Act would affect the tribe's claim to its ancestral lands. *Id.* at 1568.

The Court of Federal Claims dismissed the Catawba's claim as time-barred, and we affirmed. We held that the Catawba's claim accrued in 1962 when the Act was adopted. *Id.* at 1570-71. We rejected the Catawba's argument that its claim did not accrue until the Supreme Court's ruling in 1986:

While the Supreme Court's pronouncement in 1986 might be relevant to fixing the time when the Tribe *subjectively* first knew what the Act meant, it is fundamental jurisprudence that the Act's *objective* meaning and effect were fixed when the Act was adopted. Any later judicial pronouncements simply explain, but do not create, the operative effect.

Id. at 1570. We further explained that the Supreme Court's holding in 1986 that the Act was unambiguous on its face merely reinforced the conclusion that the Ca-

tawba's claim accrued in 1962 upon enactment of the Act. *Id.*

Here, as the Tribe correctly asserts, the Arizona Supreme Court held in 2006 that the Tribe was bound by the terms of the Decree. However, like 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. For example, in reviewing the language of the Decree and determining that the Tribe was bound by its terms, the Arizona Supreme Court, foreshadowing our present decision, 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.” *Gen. Adjudication*, 127 P.3d at 895. As in *Catawba*, where we held that “the ‘damage’ was done when the Act became effective in 1962,” 982 F.2d at 1571, we hold here that the government’s liability was fixed upon entry of the Decree in 1935. Also, like the alleged incorrect assurances by the government in *Catawba*, the government’s continued support of the Tribe’s water rights claims following entry of the Decree does not alter the fact that the terms of the Decree objectively fixed the Tribe’s claim in 1935.

The Tribe further argues that its claim did not accrue until 2006 because, “[u]ntil the full extent and permanency of harm is objectively known, a claim does not accrue.” Appellant Br. at 28. The Tribe thus contends that the decision in 2006 of the Arizona Supreme Court clarified for the first time the extent of the damages associated with the Tribe’s claim against the government for inadequate representation in the Globe Equity Litigation.

We disagree. We have “soundly rejected” the notion “that the filing of a lawsuit can be postponed until the full extent of the damage is known.” *Boling v. United States*, 220 F.3d 1365, 1371 (Fed. Cir. 2000) (discussing *United States v. Dickinson*, 331 U.S. 745 (1947)). We recently confirmed this legal principle in *Navajo Nation v. United States*, where we stated that, “for purposes of determining when the statute of limitations begins to run, the ‘proper focus’ must be ‘upon the time of the [defendant’s] acts, not upon the time at which the consequences of the acts [become] most painful.’” 631 F.3d 1268, 1277 (Fed. Cir. 2011) (quoting *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258 (1980)). Even if, as the Tribe contends, the full extent of the damages associated with the government’s alleged breach of trust was not certain until 2006, all of the facts relevant to the Tribe’s claim were known as of 1935. See *Catawba*, 982 F.2d at 1572. We therefore disagree with the Tribe’s assertion that its claim accrued in 2006.

As a final matter, the Tribe argues that its claim is timely because it was not until 2006 that the United States “definitively repudiated its role of trustee” for the Tribe. Appellant Br. at 37. Because the Tribe did not raise this argument before the Court of Federal Claims, it is waived on appeal. See *Corus Staal BV v. United States*, 502 F.3d 1370, 1378 n.4 (Fed. Cir. 2007) (treating as waived an argument made for the first time on appeal); *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997) (“[T]his court does not ‘review’ that which was not presented to the district court.”).

However, even if this argument were timely presented, we do not find it persuasive. The Tribe refers us only to *Shoshone Indian Tribe v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004), a case concerning the alleged

mismanagement of trust funds by the United States as trustee for the Shoshone. In that case, we explained:

The beneficiary, of course, may bring his action as soon as he learns that the trustee has failed to fulfill his responsibilities. It is often the case, however, that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred. It is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust.

Shoshone, 364 F.3d at 1348 (citation omitted).

Relying on *Shoshone*, the Tribe argues that not until a trustee repudiates the trust and the beneficiary is aware of that repudiation does a claim for breach of fiduciary duty accrue. However, *Shoshone* involved a situation where the trustee allegedly breached its duty by mismanaging trust funds "without placing the beneficiary on notice that a breach has occurred." *Id.* In such cases, a "final accounting" is necessary to put the Tribe on notice of the breach. *Id.* In the present case, in contrast, a "final accounting" was unnecessary to put the Tribe on notice of the accrual of its claim: the plain terms of the Decree were objectively sufficient to notify the Tribe of the alleged breach, as we have explained above.

We conclude that the government's alleged liability for breaching its fiduciary duty to the Tribe was objectively fixed upon entry of the Decree in 1935, and that the Tribe "knew or should have known," *Jones*, 801 F.2d at 1335, upon entry of the Decree that the government's breach occurred. As we explained *supra*, our conclusion is compelled by the plain language of the Decree, which states in part:

"[t]hat each and all of the parties to whom rights to water are decreed in this cause (and the persons, estates, interests and ownerships represented by such thereof as are sued in a representative capacity herein) . . . 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."

Appellee Br. at A51. Therefore, the Tribe's claim is barred by the six-year statute of limitations set forth in 28 U.S.C. § 2501. Because the Tribe's claim is time-barred, the Court of Federal Claims did not legally err by granting the government's motion to dismiss the Tribe's claim for lack of subject matter jurisdiction.

CONCLUSION

For the foregoing reasons, we affirm the decision of the United States Court of Federal Claims granting the government's motion to dismiss the Tribe's complaint.

AFFIRMED

United States Court of Appeals for the Federal Circuit

SAN CARLOS APACHE TRIBE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee,

2010-5102

Appeal from the United States Court of Federal Claims
in Case No. 09-CV-046, Senior Judge Robert H. Hodges, Jr.

NEWMAN, *Circuit Judge*, dissenting.

For decades the United States stood together with the San Carlos Apache Tribe, in federal and state court, pressing the position that the 1935 Globe Equity Decree did not finally determine the Tribe's water rights in the Gila River. When the issue was resolved in 2006 in the Arizona Supreme Court, and the Tribe's water rights were finally lost, the Tribe filed a claim for monetary damages in the Court of Federal Claims. In that court, for the first time, the United States took the position that the claim became time-barred six years after the Globe Equity Decree of 1935. The government now argues, and my colleagues now agree, that the Tribe was required to file this suit for the value of the lost water rights, before the water rights had been finally lost

and before any claim for damages arose. The court holds that this Tucker Act claim became time-barred in 1941, although its premises did not arise until the Arizona Supreme Court finally resolved the water rights issue in 2006.

Thus this court provides "yet another instance of the manifest injustice which has assailed the Tribe at virtually every turn since their dealings with the United States and its citizens began." *United States v. Gila Valley Irrigation Dist.*, 804 F. Supp. 1, 5 (D. Ariz. 1992). I respectfully dissent.

DISCUSSION

The history of the Gila River water allocation supports the position that the 1935 Decree did not represent the interests of the Tribe.

The San Carlos Apache Indian Reservation, established in 1872 in east central Arizona, is the remnant homeland of approximately 14,000 Tribal members. The Gila River provides Tribal members with water to grow crops and sustain themselves. In 1873, 1874, 1876, 1877, and 1902, the United States stripped out of the Reservation major parcels of land including valuable bottomlands along the Gila River, transferring these lands to settlers who began diverting water from the River. In 1924 construction began of the Coolidge Dam on the Gila River, flooding nearly 22,000 acres of the most valuable remaining Reservation bottomlands. No storage water rights in the impoundment were provided to the San Carlos Tribe; all such rights were dedicated to other water users.

In 1925 the United States initiated the Globe Equity proceeding in the United States District Court for the District of Arizona, to allocate Gila River water rights for the San Carlos Apache Tribe, the Pima Indian Tribe, and

others including settlers and farmers. The San Carlos Tribe was not a party to the proceeding and did not participate in the negotiations, while the United States ostensibly represented the San Carlos Tribe as "trustee." The Superintendent of the San Carlos Agency expressed strong opposition to the terms of the Decree and its adverse impact on the San Carlos Tribe, but his protests were ignored. *San Carlos Apache Tribe v. United States*, No. 09-46 (Fed. Cl. Jan. 23, 2009) ("Complaint"), ¶ 36. Other United States officials, such as the Special Assistant to the Attorney General, pressed the position that the United States should not support the San Carlos Tribe's superior priority to Gila River water. *Id.* ¶ 38. The resultant 1935 Globe Equity Decree allocated 6,000 acre feet of annual irrigation water to the San Carlos Tribe, amounting to less than two percent of the water allocated in the Decree. In contrast, the Pima Indians Gila River Community was allocated 210,000 acre feet of Gila River annual irrigation water. The record states that this differential treatment was rationalized because "the Pimas are an industrious farming race [while] the Apache are and always have been warlike and in no sense agrarian." *Id.* ¶ 39. Non-Indian interests were allocated over 350,000 acre feet of annual irrigation water. As a result, the Gila River in the San Carlos Reservation is frequently reduced to a trickle and consists mostly of salt-laden irrigation return flows unsuitable for use. *Id.* ¶ 33.

In 1979 the San Carlos Apache Tribe filed suit in the United States District Court in Arizona, asserting federal reserved water rights (called *Winters* rights) in the Gila River and tributaries, based on the ruling in *Winters v. United States*, 207 U.S. 564 (1908), that when the federal government creates an Indian reservation, it "impliedly reserve[s] a right to the amount of river water necessary to effectuate the purpose" of the reservation. *Nevada v. United States*, 463 U.S. 110, 116 n.1 (1983); see also *Arizona v.*

California, 373 U.S. 546, 600 (1963) ("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.").

The Tribe's suit reached the Supreme Court, which held that the Tribe should pursue its *Winters* claims in Arizona state court, stating that:

The McCarran Amendment, as interpreted in *Colorado River*, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. Although adjudication of those rights in federal court instead might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights.

Arizona v. San Carlos Apache Tribe of Ariz., 463 U.S. 545, 569 (1983). Thus in 1985 the Tribe filed federal reserved water rights claims in Arizona state court, asserting that the Tribe was entitled to 129,710 annual acre feet of water from the Gila River system, based on *Winters* rights. The United States filed a separate claim in the Arizona state court "on behalf of the San Carlos Apache Indian Tribe," asserting "Federal reserved water rights" as the basis of the claim. Statement of Claimant Form, *In re: The General Adjudication of all Rights to use Water in the Gila River Sys. and Source*, File No. 39-64259 (Ariz. Super. Ct. 1985). The United States further stated that "Until the federal court with jurisdiction over the Gila decree of 1935 finally deter-

mines the scope of that decree and the *res judicata* effect of that decree, the United States considers this claim to be an appropriate part of the Tribe's reserved water rights claim." *Id.*

In 2001 various parties, apparently served by Gila River water, moved the Arizona state court for dismissal on the ground that the Tribe's claims, and the federal government's claims on behalf of the Tribe, were *res judicata* based on the 1935 Globe Equity Decree. In response the United States stood with the Tribe, and argued that the Tribe is entitled to a trial on the adequacy of United States representation in the Globe Equity Decree, based on due process considerations. See U.S. Br. 80-81, *In re: The General Adjudication of all Rights to use Water in the Gila River Sys. and Source*, No. WC-02-0003-IR (Ariz. 2005) ("[W]e agree with the Apaches that a remand for further proceedings would be appropriate. Among other things, to determine whether the United States exercised 'due diligence and reasonable prudence' in prosecuting the Globe Equity Decree on behalf of the Apaches."). The United States and the Tribe argued that the Globe Equity Decree did not extinguish the Tribe's *Winters* rights. *Id.* at 31.

The Arizona Supreme Court held that the Globe Equity Decree of 1935 "precluded" the continuing existence of preserved aboriginal or *Winters* rights for the Tribe. The Arizona court explained that the claim was precluded although the issue was not litigated and the Globe Equity Decree did not mention federal reserved or aboriginal water rights. *In re: The General Adjudication of all Rights to use Water in the Gila River Sys. & Source*, 127 P.3d 882, 888-95 (Ariz. 2006) (holding the San Carlos claim precluded as to the mainstem waters but not the tributaries of the Gila River). The Arizona Supreme Court declined to inquire into the questions of privity and the adequacy of the United

States' representation of the Tribe in connection with the Globe Equity Decree, holding that such an inquiry was barred by "the doctrine of comity." *Id.* at 898.

The Arizona court declined to review the challenges to the Decree by both the Tribe and the United States, stating that the issue of inadequate representation should be brought "in the forum responsible for issuing, interpreting, and enforcing the Decree," *id.* at 900, and that its merits could not be explored in state court – ignoring the ruling of the United States Supreme Court that the Tribe and the federal government should pursue in state court the claims that they had raised in federal court. In declining to consider the Tribe's arguments based on inadequate representation, the Arizona Supreme Court "express[ed] no opinion as to what other remedies, if any, might be available to the Tribe for the Government's allegedly inadequate representation." *Id.* at 901 n.21 (citing *Arizona v. California*, 460 U.S. 605, 628 n.20 (1983) ("noting that 'in an appropriate case the Tribes' remedy for inadequate representation by the government may lie in the Court of Claims'")).

Nonetheless, this court today holds that all of the Tribe's rights were fully, definitively, and finally resolved in 1935, and that the claim for damages under the Tucker Act, although it could not have been brought in 1935, nonetheless expired six years thereafter. My colleagues bar the Tribe from exploring the events surrounding the 1935 Decree, although until the Arizona Supreme Court in 2006 finally disposed of the question, the United States had itself challenged the comprehensiveness and binding effect of the Globe Equity 1935 Gila River allocation.

The Arizona Supreme Court decision finally ended the Tribe's claims to historic and adequate (*Winters*) water rights, rights that had been the subject of decades of dispute

and litigation. No monetary claims were extant, for the Tribe's concern was access to Gila River water. Until the present case, there was no monetary claim against the government, and thus no cause of action under the Tucker Act.

Precedent illustrates that monetary claims do not accrue against the United States until the claims have sufficiently ripened. In *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988), this court held that "a cause of action against the government has 'first accrued' only 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," in that case a Tucker Act claim for breach of trust with respect to an Indian tribe. In *Samish Indian Nation v. United States*, 419 F.3d 1355, 1369 (Fed. Cir. 2005), this court held that "the Samish claims did not accrue until the Samish, through their administrative challenges, obtained a final ruling by a district court under the APA," the court explaining that: "A claim accrues under [Tucker Act] § 2501 'when all events have occurred to fix the Government's alleged liability, entitling the claimant to demand payment and sue here for his money.'" (quoting *Martinez v. United States*, 333 F.3d 1295, 1303 (Fed. Cir. 2003) (en banc)).

The San Carlos Tribe's claim for water rights was not resolved until the Arizona Court held in 2006 that the Tribe's rights in the main stem of the Gila River were controlled by the Globe Equity Decree but that the Decree did not govern the tributaries. The United States had argued in Arizona that the Globe Equity Decree did not extinguish the Tribe's *Winters* rights. See U.S. Br. 31 (Ariz. 2005) ("In the present adjudication, the United States filed a statement of claimant on behalf of the Apaches asserting rights in the upper Gila River watershed beyond the rights

(just noted) that are recognized in the Globe Equity Decree . . . In asserting these claims, the United States relies on the doctrine of federally reserved water rights. See *Winters v. United States*, 207 U.S. 564 (1908). The United States pointed out that the Decree states a priority date of 1846, which does not match the date of the founding of the San Carlos Reservation (1872), as it would if the Decree were based on *Winters* rights. *Id.* at 30; *Arizona v. California*, 373 U.S. at 600 (*Winters* rights are effective "as of the time the Indian Reservations were created.").

The United States also stated in the Arizona litigation that "the provisions in the Globe Equity Decree relating to the Apaches' rights are unconventional" and "have been subject to continuing controversy from their inception." U.S. Br. 29 (Ariz. 2005). The arguments by the United States in the Arizona litigation demonstrate that the controversy was continuing, and was generally understood to be continuing. Only after the water rights claim was finally lost in 2006, did a cause of action for monetary damages start to accrue. Until then, there was no ripened Tucker Act claim. The statute of limitations as to a claim in the Court of Federal Claims could not have started to run in 1935.

The case of *Catawba Indian Tribe of South Carolina v. United States*, 982 F.2d 1564 (Fed. Cir. 1993), relied on by the panel majority, is too remote, in fact and law, to govern this case. In *Catawba* this court held that the statute of limitations barred suit to recover certain lands or the value thereof, lands that had been removed from the Tribe by a 1959 statute (effective in 1962) that the Supreme Court ruled to be unambiguous on its face and "unmistakably clear" in *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 505 (1986). This court held that the statute of limitations accrued from the date of the 1959/1962 statute, or, at the latest, from 1972 when the ten-year period of

adverse possession of the lands had run. *Catawba*, 982 F.2d. at 1571. In *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.

Only after the highest court of Arizona ruled in 2006 that the Decree would be held operative against the Tribe to the preclusion of *Winters* rights, were the federal reserved and aboriginal water rights resolved. This is not a "tangential legal question," as the government now argues, U.S. Br. 27, but the core determinant of a claim for damages, a claim that accrued only after Arizona ruled that the water was finally lost. The 2006 Arizona ruling is akin to the threshold determination in *Samish Indian Nation*, 419 F.3d at 1373, where this court held that until wrongful action was shown to exist, the statute of limitations could not start to run against a Tucker Act suit for compensation for such wrongful act. The Samish Nation was required to obtain a determination of wrongfulness in the district court. In both cases, the statute of limitations could not start to run until an essential premise of the claim was resolved. *See id.* at 1369 ("If a necessary element to a claim must be established in a different forum, the claim will not accrue for § 2501 until that element is finally established in the other proceeding."). *Cf. White Mountain Apache Tribe v. Clark*, 604 F. Supp. 185, 190 (D. Ariz. 1984) (dismissing the Tribe's federal claims as premature until the Tribe's water rights were determined in the Arizona state forum).

The San Carlos Tribe has persistently argued that it was not adequately represented in connection with the 1935 Decree, and in the Arizona courts the United States urged

that the Tribe was entitled to a hearing on this issue, stating:

[W]e support the Apaches' request for a remand to the Superior Court for further proceedings on the Apaches' argument under Section 42(1)(e) of the Restatement (Second) of Judgments. . . . As we explained, under controlling precedent of the Ninth Circuit, the inadequate representation exception to res judicata, as set out in Section 42(1)(e) of the Restatement (Second) of Judgments is available to the Apaches. The Apaches clearly raised this exception in the proceedings below and the Superior Court clearly failed to address it, either on the law or facts . . . there is no denying that the Superior Court gave the Apaches' arguments short shrift.

U.S. Reply Br. 62, 70, *In re: The General Adjudication of all Rights to use Water in the Gila River Sys. and Source*, No. WC-02-0003-IR (Ariz. 2006). Until the Arizona Supreme Court declined to decide this issue, the binding effect of the Global Equity Decree remained in contention, for precedent supports the Tribe's argument that since it was not a party, and since it was inadequately represented, it was not bound. *See United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1307 (9th Cir. 1981) ("When the government breaches its trust to the Tribes while openly advancing its own interest the Tribe is not necessarily bound . . . such a limitation to preclusion based on due process is proper.").

"Because of its treaty and statutory obligations to tribal nations, the United States must be held to the most exacting fiduciary standards in its relationship with the Indian beneficiaries." *The Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1348 (Fed. Cir. 2004); *see generally Nevada v. United States*, 463 U.S. at

127 ("This Court has long recognized the distinctive obligation of trust incumbent upon the Government in its dealings with Indian tribes."). Basic principles of due process and fiduciary obligations establish that inadequate representation by a trustee renders the action non-binding on the purported beneficiary. See Restatement Second of Judgments §42(1)(e) (1982) ("A person is not bound by a judgment for or against a party who purports to represent him if . . . The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent."). Cf. *Pelt v. Utah*, 539 F.3d 1271, 1284-89 (10th Cir. 2008) (Navajo beneficiaries of oil and gas royalty fund administered by the state, requesting an accounting, were not bound by previous class actions to which these beneficiaries were not parties, since their interests were not adequately represented as required by due process, for the absent beneficiaries' interests were not "vigorously pursued and protected"). These principles further impugn the finality of the 1935 Decree as to the Tribe, for, as stated in *Hopland Band of Pomo Indians*, "[t]he general rule is that the statute of limitations 'does not run against a beneficiary in favor of a trustee until the trust is repudiated and the fiduciary relationship is terminated.'" 855 F.2d at 1578 (quoting *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1249 (N.D. Cal. 1973)).

In the analogous case of *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417 (1991), aff'd, No. 95-5014, 1995 U.S. App. LEXIS 23960 (Fed. Cir. 1995), the Fort Mojave Tribe sought damages for loss of water rights due to allegedly inadequate representation by the United States as trustee in litigation leading to a 1964 consent decree. The government argued that the Tribe's claim for damages accrued with the 1964 decree and thus was barred by the statute of limitations. The Court of Federal Claims held,

and this court affirmed, that the Tribe's claim did not accrue until 1983, when the Supreme Court, in *Arizona v. California*, 460 U.S. 605 (1983), finally interpreted the rights established by the 1964 decree.

In *Fort Mojave*, as in this case, the United States had stood together with the Tribe in litigation attempting to secure additional water rights for the Tribe, and the United States had acted as trustee for the Tribe in entering the earlier consent decree. The Claims Court reasoned: "Since the ultimate outcome of the United States' continuing trust actions (both pre- and post-1963) remained very much in doubt until the Supreme Court's 1983 decision, 'all the events' which fixed liability for a breach of trust had not occurred until the issuance of that decision." *Fort Mojave*, 23 Cl. Ct. at 429. The court pointed out that the government's position "would demand that plaintiffs file their breach of trust action at a time when, rather than assuming a position adverse to plaintiffs' interests, the United States had acknowledged its error and was working hand in hand with plaintiffs in an effort to redress that error." *Id.* at 431.¹ This reasoning remains apt, along with the court's observation that no precedent supported the government's position that the action for damages was time barred under such circumstances. *Id.* As this court explained in *Bayou Des Familles Dev. Corp. v. United States*, 130 F.3d 1034,

¹The panel majority states that the Tribe waived this line of argument in the Court of Federal Claims. Maj. Op. at 16. That is contrary to the record. See Pl.'s Resp. to Def.'s Mot. to Dismiss at 26, *San Carlos Apache Tribe v. United States*, 09-46 (Fed. Cl. Jun. 23, 2009) ("[I]f the Tribe had brought the present monetary damages claim before 2006, the U.S. would no doubt have argued that the claim was not ripe as the Tribe and the U.S. were both seeking to obtain additional water rights for the Tribe in the Gila Adjudication, [and] claims for these additional water rights were unresolved.").

1038 (Fed. Cir. 1997), "Starting the statute of limitations clock" occurs when the "claim become[s] ripe for adjudication." See also Corman, *Limitation of Actions*, § 6.1, p. 374 (1991) (a claim does not accrue until all events necessary to fix the liability of the defendant have occurred).


The path of precedent is clear. The San Carlos Apache claim for damages did not ripen until 2006, when the water rights were finally adjudicated. As observed *ante*, in *Arizona v. California*, 460 U.S. at 628 n.20, the Court noted that "in an appropriate case the Tribes' remedy for inadequate representation by the Government may lie in the Court of Claims." That is the present situation: the issue of water rights was finally resolved by the Arizona Supreme Court in 2006, thereby ripening the claim for monetary damages. From my colleagues' ruling that this claim arose in 1935 and became barred six years later, I must, respectfully, dissent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of June, 2010, I served the below-listed parties by placing the foregoing in the U.S. first class mail, postage prepaid, addressed as follows:

Tamara N. Rountree
U.S. Department of Justice
Environment and Natural Resources Division
P.O. Box 23795, L'Enfant Station
Washington, D.C. 20044

Attorneys for Defendant-Appellees



William P. Horn