Nos. 11-15631, 11-15633, 11-15639, 11-15641, 11-15642
IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GILA RIVER INDIAN COMMUNITY, a federally recognized Indian Tribe; DELVIN JOHN TERRY; CELESTINO RIOS; BRANDON RIOS; DAMON RIOS; CAMERON RIOS; CITY OF GLENDALE; MICHAEL SOCACIU; GARY HIRSCH,
Plaintiffs - Appellants,
and
JOHN MCCOMISH, Arizona Legislature, Majority Leader; CHUCK GRAY, Arizona Legislature, Senate Majority Leader; STATE OF ARIZONA; KIRK ADAMS, Arizona Legislature, Speaker of the House; ANDY TOBIN, House Majority Whip,
Intervenors - Plaintiffs -
Appellants,
v.
UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE INTERIOR; KENNETH LEE SALAZAR, in his official capacity as United States Secretary of the Interior; LARRY ECHO HAWK, in his official capacity as the Assistant Secretary for Indian Affairs of the United States Department of the Interior,
Defendants - Appellees,
and
TOHONO O'ODHAM NATION,
Intervenor - Defendant -
Appellee,

On Appeal from District Court Nos. 2:10-cv-01993-DGC, 2:10-cv-02017-DGC, 2:10-cv-02138-DGC

BRIEF OF APPELLANT GILA RIVER INDIAN COMMUNITY

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1362 (jurisdiction over actions brought by Indian tribes arising under the Constitution, laws, or treaties of the United States). The plaintiffs' request for declaratory relief was authorized by 28 U.S.C. §§ 2201 and 2202. Judicial review in the district court was authorized by the Administrative Procedure Act, 5 U.S.C. §§ 701-706, because the trust decision was a final agency action made with authority delegated by the Secretary of the Interior and was not subject to further administrative review.

The district court's order of March 3, 2011, is a final decision because it granted summary judgment to defendants on all claims. This Court has jurisdiction under 28 U.S.C. § 1291. The Community timely filed its notice of appeal on March 15, 2011. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

The Gila Bend Indian Reservation Lands Replacement Act, P.L. 99-503, 100 Stat. 1798 (1986), authorizes the Secretary of the Interior to take into trust for the benefit of the Tohono O'odham Nation "any land which the Tribe acquires pursuant to" Section 6(c) of the Act. Section 6(c) provides in relevant part: "The Tribe is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate, nine thousand eight hundred and eighty acres."

The issues presented are:

1. Whether the district court erred by refusing to consider whether newly discovered evidence showed that Interior's decision to take land into trust violated the Gila Bend Act, where the evidence reveals that the Nation had intentionally concealed its use of funds received under the Act to purchase land in excess of the statutory limit of 9,880 acres.

2. Whether the district court erred by holding that administrative proceedings under the Gila Bend Act are subject to an implied issue exhaustion requirement when no statute or regulation establishes such a requirement; Interior has never asserted such a requirement even in the district court; the proceedings were *ex parte*, non-adversarial, and not publicly noticed; third parties had no procedural rights and could not obtain documents in the proceeding except through

FOIA; and the agency has never advised the parties or the public of any such requirement.[1]

[1] To avoid duplication in briefing, the Community joins the briefs of the other appellants, except for arguments under the Indian Commerce Clause and Tenth Amendment.

STATEMENT OF THE CASE

This is an appeal from a decision of the District of Arizona granting summary judgment to defendants-appellees in an action to enjoin the Department of the Interior from taking into trust a parcel of land in metropolitan Phoenix ("Parcel 2") for the benefit of the Tohono O'odham Nation (the "Nation"). The Nation intends to construct a $600 million Las Vegas-style casino on the land. ER 261.

The administrative decision reviewed by the district court is a July 23, 2010, letter from the Assistant Secretary – Indian Affairs to the Nation's Chairman, approving the Nation's request to have Parcel 2 taken into trust pursuant to the Gila Bend Act. ER 25. On August 26, 2010, Interior published notice of the decision in the Federal Register "to comply with the requirement of 25 CFR part 151.12(b) that notice be given to the public of the Secretary's decision to acquire land in trust," so as "to afford interested parties the opportunity to seek judicial review of final administrative decisions to take land in trust for Indian tribes . . . ." 75 Fed. Reg. 52550-01, 52550 (Aug. 26, 2010).

In September 2010, the City of Glendale, the Gila River Indian Community (the "Community"), individual residents of Glendale, and individual members of the Community filed complaints in the District of Arizona seeking declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, on

the ground that the trust decision violated provisions of the Gila Bend Indian Reservation Lands Replacement Act, P.L. 99-503, 100 Stat. 1798 (1986) (the "Gila Bend Act" or "Act"). Following the parties' stipulated motion, the actions were consolidated. The State of Arizona and members of the Arizona Legislature intervened as plaintiffs, and the Nation intervened as a defendant.

On November 2, 2010, the Community delivered to Interior 105 pages of newly discovered evidence showing that the Nation's trust application had deliberately concealed from Interior the use of Gila Bend Act funds in prior land purchases exceeding 9,880 acres. The cover letter included a request by the Community that Interior seek a remand of the July 23, 2010 decision so it could consider the evidence. In early November, all plaintiffs filed amended complaints in the district court adding allegations that this new evidence required a remand to Interior. The newly discovered evidence was attached to Plaintiffs' Unified Statement of Facts in support of their summary judgment motion as Exhibit 3(A). ER 79.

On March 3, 2011, the district court entered an opinion and order granting summary judgment to defendants, ruling, *inter alia*, that any argument based on the newly discovered evidence was waived because of plaintiffs' failure to raise it before issuance of the Parcel 2 decision. ER 1. The district court also denied as moot defendants' motion to strike the newly discovered evidence. ER 24. On

March 15, 2011, plaintiffs filed a notice of appeal and an emergency motion with the district court requesting a temporary stay of its order and an injunction. On May 3, 2011, the district court granted the motion in part and enjoined the United States from taking the land into trust pending this appeal subject to an appeal bond. ER 135.

STATEMENT OF FACTS

1. In 1986 Congress enacted the Gila Bend Act in response to repeated flooding of the Nation's reservation lands ten miles upstream of Painted Rock Dam.[2] The Act gives the Nation the means to replace 9,880 flooded acres with 9,880 acres of other land. It provides that if the Nation assigns its flooded lands to the United States, it will receive in return funds to be used for the purchase of replacement land and for other related purposes. The Nation made such an assignment shortly after enactment and received the statutory funds in return.

Section 6 of the Act restricts how the statutory funds paid to the Nation are to be used. As relevant here, Section 6(c) imposes an acreage limitation on the amount of land that may be purchased by the Nation using statutory funds: "The Tribe is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate, nine thousand eight hundred and eighty acres." 100 Stat. 1799 (ER 145). Section 6(d) in turn provides that lands "which the Tribe acquires

[2] The text of the Gila Bend Act is reproduced in full in an Addendum to this brief.

pursuant to subsection (c)" may be placed into trust if they meet certain additional requirements – namely, that the land not be "outside the counties of Maricopa, Pinal, and Pima, Arizona," and that the land not be "within the corporate limits of any city or town." 100 Stat. 1799-1800 (ER 145-46). Because land taken into trust under Section 6(d) must be "acquire[d] pursuant to subsection (c)," Section 6(c) operates to cap not only the amount of land that the Nation can purchase with statutory funds, but also the amount of land that can be taken into trust.

2. Since 1986, only one parcel has been taken into trust for the Nation pursuant to Section 6(d) of the Gila Bend Act—a 3200.53-acre tract known as "San Lucy Farms," in 2004. *See* Parcel 2 Decision (ER 31). In addition, the Nation submitted an application for a parcel known as the "Painted Rock property," consisting of 3759.52 acres. *Id.* To date, no decision has been issued on that application.

3. On January 20, 2009, the Nation took title to 134.88 acres of land in a county island inside the city of Glendale (the "Glendale Parcel"). It acquired title in fee simple from its own wholly owned corporation, Rainier Resources, Inc., which it had used to purchase the property in 2003. Thus, the Nation had disguised its ownership of the land for over five years. AR 3591. The Glendale Parcel includes Parcel 2, which is 53.54 acres.

On January 28, 2009, the Nation submitted a 568-page application to the Office of Indian Gaming at the Bureau of Indian Affairs asking to have the Glendale Parcel taken into trust as the site for a planned casino. It requested not only trust acquisition of the land, but also an "Indian lands determination"—a decision regarding whether the land qualifies for gaming activities under the Indian Gaming Regulatory Act ("IGRA"). *See* 25 U.S.C. § 2719(a). The application stated, "The Nation intends to use portions of the property for gaming purposes" pursuant to IGRA. AR 3591. The Nation eventually narrowed its request to include only Parcel 2, and withdrew its request for a gaming determination.

Because Interior designated the application as one seeking a "mandatory" acquisition, Interior's process for considering the application did not include any notice to the public and did not give third parties any procedural rights. The City of Glendale and the Community nevertheless learned of the application and opposed it, by delivering correspondence to Interior and by seeking meetings with persons at Interior involved in consideration of the application. This opposition centered primarily on whether the land was eligible for gaming under IGRA, and whether the parcel was "within the corporate limits" of Glendale within the meaning of the Gila Bend Act.

On March 22, 2010, the Nation filed a mandamus action in the U.S. District Court for the District of Columbia to compel Interior to take Parcel 2 into trust. On

July 23, Interior sought to moot the mandamus litigation by issuing the Parcel 2 decision and attaching it to a status report filed with the court. The decision concluded that the legal requirements for taking Parcel 2 into trust under the Gila Bend Act had been satisfied. 75 Fed. Reg. 52550-01, 52550 (Aug. 26, 2010).

Notwithstanding that conclusion, the Parcel 2 decision contained no analysis of whether Parcel 2 was properly acquired pursuant to Section 6(c) of the Gila Bend Act or whether the tribe had already exceeded the acreage limits imposed by that provision. When it filed its request, the Nation disclosed only 6960.05 acres of prior purchases using Gila Bend Act funds: the 3200.53-acre "San Lucy Farms," taken into trust in 2004, and the "Painted Rock property," consisting of 3759.52 acres disclosed in a still-pending application. It therefore appeared that the Nation had purchased fewer than 9,880 acres with Gila Bend Act funds (something the Nation still contends to this day, despite the newly discovered evidence to the contrary). As a result, the issue of whether the Nation had acquired by purchase lands in excess of the 9,880-acre cap in Section 6(c) did not appear to be relevant and was never considered or addressed by any participant or by Interior.

4. In September 2010, the City of Glendale, the Community, and individual members of the Community separately filed actions in the District of Arizona challenging Interior's trust decision. The actions were consolidated, and

the State of Arizona and members of the Arizona Legislature intervened as plaintiffs, and the Nation intervened as a defendant. All plaintiffs sought declaratory and injunctive relief under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, arguing, among other things, that Interior's trust decision violated the Gila Bend Act.[3]

5. Because the *ex parte* process at Interior did not entitle outside parties like the Community to the documents under consideration (such as the Nation's application) or to information about the progress of the proceeding, the Community sought those materials and information by submitting multiple requests pursuant to the Freedom of Information Act during the pendency of the application. The Community used the documents received in those requests as a starting point for its own investigation of the application.

When Interior issued its decision in July 2010 to moot the mandamus action, the Community had not yet completed its investigation. But, in the fall of 2010, the investigation bore fruit. The Community discovered evidence showing irregularities in the series of transactions in 2002 by which the Nation purchased the Painted Rock property. The evidence showed that in August and September 2002, the Nation purchased 12,966 acres of Painted Rock Springs Ranch with

[3] Glendale and the State also brought constitutional claims under the Tenth Amendment and the Indian Commerce Clause, and the legislators asserted constitutional and IGRA claims.

funds from the Gila Bend Act, but had disguised its use of those funds to make it appear as though the funds were used only for a much smaller parcel. ER 82.

The largest portion of Painted Rock was obtained in a transaction for 10,366 acres, of which only 1,166 acres were reported to Interior as having been acquired with Gila Bend Act funds. ER 84, 90-91. The Nation concealed the use of Gila Bend Act funds for the other 9,200 acres by using its real-estate agent as a straw man. ER 85, 90-91. Under instructions from the Nation, the real-estate agent purchased the land himself, and then on the same day sold and conveyed the property to the Nation (through tribally owned corporations) in separate parcels. *Id.* The prices assigned had no relation to the actual economic value of the parcels, and were chosen for the express purpose of avoiding the 9,880-acre limitation in the Gila Bend Act. Of the 10,366 acres, 9,200 were assigned an "arbitrary" value of $9,200 taken from unspecified "corporate funds," and the other 1,166 were assigned the rest of the $1.95 million purchase price (taken from Gila Bend Act moneys). *Id.*

The most critical new evidence was deposition testimony from subsequent litigation by the Nation against its real estate agent in the transactions, given by John Chaston, the Chief Financial Officer of one of the Nation's corporations that transacted the second stage of the purchases (Vi-Ikam Doag Industries, Inc., or "VDI"). He testified that the Nation had discussed how to avoid the Section 6(c)

limitation and colluded with its real estate agent to divide the property into multiple parcels and assign them "arbitrary" values in the ensuing transactions between the agent and the Nation. When asked how the dollar per acre price was negotiated for the 10,366 acres, he explained:

> That is when the San Lucy District [of the Tohono O'odham Nation] said, okay, in order to buy this property, we need to put this down. Again, **going back to the Gila Bend Indian Reservation Land Replacement Act, we can only take so many acres.** We used these dollars. For the other property we have to use other dollars. And so they [the San Lucy District, using Gila Bend Act funds] were essentially going to pay for the entire piece. VDI and Kimblewick [the Nation's wholly owned corporate entities] were going to put in—and they arbitrarily chose a dollar an acre so that there was some compensation paid by VDI [out of corporate funds] so that if the BIA came back later and said no, that was really paid for by these [Gila Bend Act] dollars, no, there was [other] compensation paid for this property and it can't be included [against the acreage limit]. So it was just kind of arbitrary that VDI is going to pay this amount but the bulk is really for the tribe because they want that property.
>
> Q. So it was a little shuck-and-jive for the BIA?
>
> [Objection]
>
> A. I mean, if you want to call it that.

ER 101-102 (emphasis added). This deposition is a key part of the newly discovered evidence that the district court held was insufficient to justify raising a new legal issue.

Chaston's deposition testimony alerted the Community that the Nation's Glendale Parcel was ineligible for trust acquisition because it was purchased in excess of the cap in Section 6(c). It showed that the Nation interpreted Section 6(c) as a limit on fee acquisitions and that it had deceptively avoided triggering the limit by artificially structuring the transaction for Painted Rock.

On November 2, 2010, the Community submitted a letter to Interior advising the agency of the new evidence and identifying the legal issues raised by the evidence. ER 80. The letter attached a statement of facts and numerous exhibits showing "that when the Nation purchased Parcel 2 in 2003, it had already exceeded the 9,880-acre limit on acquiring private lands pursuant to Section 6(c) of the Gila Bend Act." *Id.* The letter requested that the Assistant Secretary either seek a voluntary remand of the case from the district court or stay any trust acquisition until Interior had the opportunity to investigate the Section 6(c) issue in light of the new evidence and render a separate decision. ER 87. Thus, the Community followed the procedure outlined in *Lands Council v. Powell*, 395 F.3d 1019, 1030 n.10 (9th Cir. 2005), by "seek[ing] to supplement the record in the agency before seeking to expand the record before the district court." In addition to bringing the new evidence to the attention of Interior, the Community sought and was granted leave to amend its complaint in this case to allege a violation of Section 6(c). Interior never responded to the letter; instead, it moved in the district

court to strike the new evidence on the ground that it was outside the administrative record.

Following motions for summary judgment by all parties, the district court entered an order on March 3, 2011, granting summary judgment to defendants. ER 1. The court declined to reach the merits of plaintiffs' claim that the Nation had exceeded the acreage limit imposed by Section 6(c), finding that plaintiffs had waived that claim by failing to raise it before Interior issued its decision. Although the evidence showing that the Nation had exceeded the acreage limit was not discovered until months after the administrative proceedings had concluded, the court held that the Community was bound to assert its legal interpretation of Section 6(c) during those proceedings to preserve the right to raise newly discovered evidence later. ER 9-10. The court further held that the Community's waiver also barred other plaintiffs from asserting a Section 6(c) claim, even though they had not participated in proceedings before Interior, which were *ex parte* and not publicly noticed. ER 10. In light of that conclusion, the court held that the motion to strike the newly discovered evidence was moot. ER 24. The effect of the court's waiver ruling on summary judgment was to exclude the newly discovered evidence because it did not relate to a legal issue previously raised before the agency.

Plaintiffs timely filed notices of appeal on March 15, 2011. ER 33-39. Following an emergency motion by the plaintiffs, the district court entered an order enjoining the United States from taking Parcel 2 into trust and enjoining the City of Glendale from annexing Parcel 2 pending appeal. ER 135.

SUMMARY OF THE ARGUMENT

The district court incorrectly refused to reach the merits of plaintiffs' claim that Interior violated Section 6(c) of the Gila Bend Act by failing to calculate the total acreage of lands "acquire[d] by purchase" by the Nation. The court's conclusion that the plaintiffs waived that claim by failing to raise it before Interior is contradicted by binding precedent of the Supreme Court and of this Court. It ignores newly discovered evidence showing that the agency failed to consider a relevant factor, and it misconstrues the record and the nature of the administrative proceedings.

First, the district court incorrectly held, with no case authority, that newly discovered evidence is irrelevant unless it relates to a legal argument already raised. The correct standard is whether the evidence shows that the agency failed to address a relevant factor in its analysis. Under that standard, the evidence should have been considered because it shows that the agency conflated Section 6(d) and Section 6(c), and thus failed to address whether the Nation had already

acquired by purchase in excess of 9,880 acres under the Gila Bend Act when it purchased Parcel 2. For that reason, the evidence supports a remand.

Second, even if the evidence had been available to the Community at the time of Interior's review, the district court's waiver ruling would still be incorrect in light of the informal, *ex parte*, non-adversarial nature of the proceedings. No statute or regulation places an issue-exhaustion requirement on third parties lobbying Interior during its *ex parte* consideration of an application under the Gila Bend Act. Supreme Court and Ninth Circuit precedent hold that in the absence of such statutory or regulatory authority, a court may imply such a requirement only if the agency proceedings are analogous to the formal, adversarial processes of litigation. Interior's informal trust application process bore none of the hallmarks of such proceedings. The review process was an *ex parte* proceeding that was not publicly noticed, did not require the Nation to face an adversary, did not require formal briefing, did not entitle participants to view the record contemporaneously, and provided no mechanism for challenge or reconsideration other than APA judicial review. Moreover, Interior never advised the Community that it would be subject to an issue-exhaustion requirement. Nor did the other plaintiffs—most of whom did not participate before Interior—receive any such notice. Accordingly, the district court's decision to read an issue-exhaustion requirement into the proceedings by implication is foreclosed by binding precedent.

The district court's waiver determination is incorrect as a matter of law. Because the newly discovered evidence shows that the agency failed to determine whether the Nation had purchased lands in excess of the 9,880-acre cap in Section 6(c), the district court's grant of summary judgment should be reversed. The case should be remanded to Interior for consideration of whether the Nation had purchased more than 9,880 acres when it acquired Parcel 2.

ARGUMENT

I. STANDARD OF REVIEW

"A grant of summary judgment is reviewed de novo." *Chudacoff v. Univ. Med. Ctr. of S. Nevada*, — F.3d —, 2011 WL 2276774, at *3 (9th Cir. June 9, 2011). "Viewing the evidence in the light most favorable to the nonmoving party, [the Court] must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* A district court's determination that a claim has been waived is a legal conclusion that is reviewed de novo. *See Kode v. Carlson*, 596 F.3d 608, 611 (9th Cir. 2010). A district court's decision whether to consider extra-record evidence on APA review is reviewed for abuse of discretion. *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1447 (9th Cir. 1996). Likewise, an agency's failure to reconsider an administrative decision and reopen the record for newly discovered evidence is reviewable for abuse of discretion. *Nance v. E.P.A.*, 645 F.2d 701, 717 (9th Cir. 1981).

II. THE DISTRICT COURT ERRED IN REFUSING TO ADDRESS EVIDENCE SHOWING THAT THE AGENCY FAILED TO CONSIDER A RELEVANT STATUTORY FACTOR

A. The District Court Applied the Wrong Standard When It Excluded Extra-Record Evidence from Consideration of the Section 6(c) Issue

The district court granted summary judgment to Interior and the Nation while failing to consider newly discovered, extra-record evidence. It justified that

failure by reasoning that the evidence related to an argument that was not raised before the agency. Its decision was incorrect as a matter of law, because it failed to apply the controlling standard regarding extra-record evidence.

The test for the consideration of extra-record evidence is not whether it relates to a legal argument previously raised before the agency. Rather, under the extra-record evidence exception relevant here and asserted below, a "reviewing court should go outside [the] administrative record to consider evidence relevant to the substantive merits of the agency action 'for the limited purposes of ascertaining *whether the agency considered all the relevant factors* or fully explicated its course of conduct or grounds for decision.'" *Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (emphasis added) (quoting *Asarco, Inc. v. E.P.A.*, 616 F.2d 1153, 1160 (9th Cir. 1980)). "The court may consider . . . substantive evidence going to the merits of the agency's action where such evidence is necessary as background to determine the sufficiency of the agency's consideration." *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988)). Extra-record materials are especially appropriate for judicial consideration when they address issues that the agency should have but failed to address. *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1451 (citing *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986)); *see also South Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp. 2d 1247, 1274 (E.D. Cal. 2010).

This standard stems from the bedrock principle that agency decision-making must include consideration of all factual and legal matters relevant to the question at issue. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("[I]f the agency has not considered all relevant factors . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *accord Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Contrary to these authorities, the district court made no determination regarding whether the newly discovered evidence showed that a relevant factor had been missed.

That the district court applied the wrong standard when it required that newly discovered evidence relate to a previously raised legal argument, is evident as well from more general legal principles governing newly discovered evidence—principles that apply to the final judgments of courts as well as the final actions of administrative agencies. Even after a court has rendered a final judgment, newly discovered evidence is a proper basis not only for reopening the record under Rule 60(b)(2) but also for amending the complaint to add entirely new legal theories. "[O]nce judgment has been entered in a case, a motion to amend the complaint can . . . be entertained if the judgment is first reopened under a motion brought under Rule 59 or 60." *Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996). And the Supreme Court has held that agency actions on timely review under the APA are

no more impervious to newly discovered evidence than the final judgment of an Article III court. *See I.N.S. v. Abudu*, 485 U.S. 94, 107 (1988) (applying an abuse of discretion standard to a motion to reopen administrative deportation proceedings, citing use of that standard in reviewing "motions for new trials on the basis of newly discovered evidence"). Therefore, the court was manifestly incorrect to require that newly discovered evidence relate to a previously raised legal argument.

The district court's rule would have the effect of requiring petitioners in the Community's position to burden agencies with irrelevant statutory arguments even when, as here, the only evidence available during agency proceedings indicated that the statute would be satisfied under *any* interpretation. The adoption of the district court's reasoning would establish an unprecedented, impractical, and highly inefficient rule in which petitioners must burden agencies with a full complement of purely hypothetical legal arguments based on the possibility that they might later uncover evidence relevant to those arguments.

Because the district court categorically refused to consider the extra-record evidence without deciding whether it demonstrated a gap in the agency's analysis of relevant factors, and because, as shown in the next part, that failure was not harmless, its decision must be reversed.

B. The Newly Discovered Evidence Shows that the Agency Failed to Consider a Required Statutory Factor in its Decision

Evidence that the Nation interpreted Section 6(c) as limiting not only trust acquisitions but also fee acquisitions, and that it deceptively manipulated its transactions to skirt this limit, shows unequivocally that the Parcel 2 decision failed to consider a relevant statutory factor—the total acreage purchased by the Nation pursuant to Section 6(c).

The district court held that whether Section 6(c) "limits the total number of acres the Tohono O'odham Nation can purchase" is a "legal question" and that the newly discovered evidence is not necessary to answer that legal question. ER 9. This reasoning incorrectly assumes that the new materials do not shed any light on the correct legal interpretation of Section 6(c). Yet those materials include prior sworn statements of the Nation's agents regarding how the Nation itself interpreted Section 6(c) and what it did to disguise its violation of the section thus interpreted. They show that Interior's interpretation of Section 6(c) is contrary not only to its plain language, but also to the Nation's own interpretation. The court was required to take that prior interpretation into account in reviewing arguments by Interior and the Nation regarding the correct interpretation of Section 6(c).

Consideration of this evidence was required all the more because the Parcel 2 decision and the administrative record as a whole lack any analysis of Section 6(c) of the Gila Bend Act. In considering whether evidence shows that a relevant

factor has been missed, this Court has asked whether the extra-record documents "'address issues not already there'" in the administrative record. *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1451 (quoting *Friends of the Earth*, 800 F.2d at 829). The documents at issue here plainly do address an issue that does not appear in the administrative record—yet the district court held that this was reason to *ignore* the new evidence rather than consider it. "It will often be impossible . . . for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).

Purchase of lands pursuant to Section 6(c) is a requirement for trust acquisition under Section 6(d). Section 6(c) is by its terms a ceiling on the number of acres that may be *purchased* using Gila Bend Act funds: "The Tribe is authorized to *acquire by purchase* private lands in an amount not to exceed, in the aggregate, nine thousand eight hundred and eighty acres." 100 Stat. 1799 (ER 145) (emphasis added). The congressional findings in Section 2 of the Act explain that the authority to purchase private lands was intended as an alternative to the original legislative proposal, which would have simply transferred 9,880 acres of federal public lands to the Nation. Because the public lands within a 100-mile radius of the Nation's reservation were found to be unsuitable for economic

development absent "substantial Federal outlays," Congress instead opted to "facilitate replacement of reservation lands" by giving the Nation funds to purchase land on the private market. 100 Stat. 1799 (ER 144). Thus, the Act was intended to effect an acre-for-acre replacement of the 9,880 acres of flooded tribal lands, not give the Nation a windfall opportunity to nearly double that acreage. In light of that manifest legislative purpose, the evidence that the Nation had exceeded the acreage ceiling before purchasing Parcel 2 is critical to the assessment of whether Parcel 2 was properly "acquire[d] pursuant to subsection (c)." The Nation implicitly acknowledged as much through its efforts to conceal its prior land purchases.

Interior's decision to take Parcel 2 into trust concludes that "the legal requirements under the Gila Bend Act for acquiring Parcel 2 in trust have been satisfied" (ER 32), but it is completely silent as to the acreage limitation under Section 6(c) of the Gila Bend Act. Interior did not address Section 6(c) at all in the Parcel 2 decision, and it has never determined the total acreage of lands "acquire[d] by purchase" by the Nation under Section 6(c). Its Answer to the Amended Complaint all but admits this. The United States "lacks sufficient knowledge or information" (Answer ¶ 41) to respond to the allegation that "the Nation acquired multiple parcels of land totaling over 16,000 acres using funds provided by the Act."

Interior has never investigated the matter and apparently has never even requested information from the Nation. *See* Answer ¶¶ 43, 45, 46, 48, 49. The administrative record contains no mention of any consideration of the issue by Interior. Interior's failure to address Section 6(c)'s acreage cap is a gaping hole in the Parcel 2 decision, and requires that the decision be set aside because it failed to consider a relevant factor.

In these circumstances, a remand is required so that Interior can determine whether the Nation had previously purchased more than 9,880 acres under Section 6(c) when it acquired Parcel 2. "When an agency's inquiry is inadequate, [courts] generally 'remand the matter to the agency for further consideration.'" *Ctr. for Biological Diversity*, 450 F.3d at 943 (quoting *Asarco, Inc.*, 616 F.2d at 1160). Such a remand is called for here.

Had Interior properly considered all the "relevant factors" as required by the APA, it would have discovered that the Nation's purchase of Parcel 2 was not in compliance with the Gila Bend Act, as demonstrated by the newly discovered evidence (Exhibit 3(A) to Plaintiffs' Unified Statement of Facts in support of their summary judgment motion) (ER 79). That Interior failed to do so and to explain its actions reveals that its evaluation of the Act's requirements was less than complete. Thus, because Exhibit 3(A) "show[s] that [Interior] overlooked factors relevant to" the trust decision, the district court's decision should be reversed and

the case remanded to Interior to remedy the lack of an analysis of the total acres acquired in fee pursuant to Section 6(c). *Inland Empire Public Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 760 n.5 (9th Cir. 1996).

C. Because the Newly Discovered Evidence Shows that the Nation Deceptively Shielded Its Conduct from Review During the Agency Proceeding, Remand Is Required

The newly discovered evidence should also have been considered under this Court's cases allowing re-opening of administrative proceedings to address new allegations of fraud on the proceeding. In *Doria Mining & Engineering Corp. v. Morton*, 608 F.2d 1255 (9th Cir. 1979), the district court had denied leave to amend a complaint to raise a new challenge to an IBLA decision, even though the challenge was based on evidence of fraud discovered after completion of the administrative proceeding. This Court reversed, holding that the district court was required to rule on the merits of the motion to amend because otherwise "the party seeking review [would be] left without any forum" in which to raise the new evidence. *Id.* at 1259.

The same situation is presented here. The district court incorrectly refused to consider the newly discovered evidence of the Nation's deceptive manipulation of its land purchases, which successfully shielded the Nation's conduct from scrutiny by the agency. The ruling would entirely deprive plaintiffs of the opportunity to obtain review of that evidence. And the evidence goes to the heart

of Interior's authority to take Parcel 2 into trust. As in *Doria*, "the importance of preventing the prejudice to [appellants] and similarly situated parties which arises out of circumstances such as those before us outweighs any countervailing interests which administrative agencies and other parties which appear before them may have in the finality of agency decisions." *Id.*

Doria was followed in *Home Products International, Inc. v. United States*, 633 F.3d 1369 (Fed. Cir. 2011), where the court held that cases granting voluntary remand to agencies are equally applicable to a remand motion brought by a private litigant: "[W]e see no reason why parties other than the administrative agency cannot also request reopening or a remand for the consideration of new and material evidence." *Id.* at 1378. That conclusion followed from the "well established" rule that an agency's refusal to reopen a case on the basis of new evidence or changed circumstances is reviewable on appeal for abuse of discretion. *Id.* (citing *Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987)). The court reasoned that because the plaintiff could have petitioned the agency to reopen proceedings and then seek review if the petition were denied, the trial court's refusal to consider the newly discovered evidence was likewise subject to review on appeal. *Accord Home Prods. Int'l, Inc. v. United States*, 2011 WL 2490997, *1 (Fed. Cir. June 22, 2011). This reasoning applies with even greater force here, because the Community *did* bring the newly

discovered evidence to the attention of Interior and requested a remand, but the agency *never responded* and instead moved to strike the evidence from this case.

III. INTERIOR'S INFORMAL *EX PARTE* PROCEDURE TO REVIEW THE NATION'S APPLICATION WAS NOT DESIGNED TO REQUIRE EXHAUSTION AND DOES NOT SUPPORT WAIVER

Even if the evidence concerning the Nation's prior land purchases had been available to the Community at the time of the administrative proceedings, the district court's ruling would fail for the independent reason that it misapplies binding precedent governing waiver. Interior itself has set up a process where the only full opportunity to challenge the agency's decision is *after* the decision is rendered, through judicial review under the APA. In disregard of Interior's deliberate exclusion of the Gila Bend Act from notice-and-comment requirements, as well as Interior's refusal to fully endorse a waiver rule below, the district court implied an issue exhaustion requirement into the agency's proceedings. *See Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 630 (9th Cir. 2008) (defining issue exhaustion requirement as one in which claimant "must . . . 'specify [each] issue in his request for review' by the agency") (quoting *Sims v. Apfel*, 530 U.S. 103, 107 (2000)).

As Interior explained in the Parcel 2 decision itself, its decision was made outside the public view and without any opportunity for public comment before the decision was issued. It explained that although "the Secretary's authority,

procedures, and policy for accepting land into trust are set forth at 25 C.F.R. Part 151," the Gila Bend Act was "determined to be 'mandatory,'" and therefore "[t]he notice and comment provisions of 25 C.F.R. §§ 151.10 and 151.11(d), requiring that the BIA notify state and local governments of the land-into-trust application, are not applicable . . . ." ER 28. The first public notice of the proceedings was issued *after* the decision was rendered, and was issued only for the purpose of permitting immediate APA challenges. Interior thus has itself determined that the only right to be heard on such a "mandatory" acquisition is by filing an APA action such as this one. It was therefore plainly erroneous for the district court to hold that only arguments raised *before* Interior issues its public notice can be raised in an APA challenge. Although the Community and others sought to be heard on their most salient arguments before the decision was rendered, they did not have the procedural rights of a party. Before the agency, the Community did not have a procedural right even to copies of the Nation's submissions or to contemporaneous access to the administrative record, while it was being developed, such as a party to an adjudication or a notice-and-comment proceeding would have. Rather, it had to learn of the progress of the proceeding through multiple FOIA requests.

Consistent with its adoption of an *ex parte* process for reviewing "mandatory" trust acquisitions, Interior did not in the district court argue that its

process required issue exhaustion. Its briefs were silent on the matter, urging the district court to uphold the agency's Section 6(c) position on the merits, even after the Nation argued for such an exhaustion requirement. And at oral argument, Interior deflected questions from the court about waiver, emphasizing the merits of the United States' interpretation of Section 6(c), and never directly endorsing an implied waiver requirement when the court indicated interest in implying such a requirement. *See* ER 131 ("[I]t's really a legal argument."). That the agency itself did not view the proceedings as sufficiently formal to require issue exhaustion illustrates the incorrectness of the district court's decision to imply such a requirement.

The court's implication of issue exhaustion in a mandatory trust acquisition proceeding contravenes binding precedents governing the judicial implication of such a requirement. Judicial implication is the exception; issue exhaustion in administrative proceedings "is typically a creature of statute or agency regulation." *Vaught*, 546 F.3d at 630; *see Sims*, 530 U.S. at 107 ("[R]equirements of administrative issue exhaustion are largely creatures of statute."). While courts sometimes imply an issue exhaustion requirement in the absence of a statute or regulation, "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Sims*, 530 U.S. at 109. "In a non-

adversarial proceeding, 'the reasons for a court to require issue exhaustion are much weaker.'" *Vaught*, 546 F.3d at 631 (quoting *Sims*, 530 U.S. at 110). Accordingly, while an issue exhaustion requirement might be properly implied in an on-the-record agency adjudication governed by formal procedural rules, *see* 5 U.S.C. § 554, there is commensurately less justification for such a requirement the less the agency process resembles an adversarial judicial proceeding.

Thus, in *Sims*, a plurality of the Supreme Court held that a Social Security claimant was not subject to an issue exhaustion requirement because the agency proceedings were "inquisitorial rather than adversarial." 530 U.S. at 111. Among other considerations, the Court noted that the proceedings did not require the claimant to face an adversary and "[did] not require . . . the filing of a brief." *Id.* This Court cited the same factors in declining to imply an issue exhaustion requirement in an ERISA proceeding, as well as the decision-maker's "failure to notify claimants of any issue exhaustion requirement." *Vaught*, 546 F.3d at 631-32.

Like the proceedings in *Sims* and *Vaught*, the administrative process before Interior cannot support waiver on the basis of issue exhaustion. First, no statute or regulation provides such a requirement in the context of trust decisions under the Gila Bend Act. Nor did the proceedings bear any hallmarks of a formal, adversarial proceeding analogous to litigation. The Parcel 2 decision was rendered

after an *ex parte*, informal inquisitorial process that never was publicly noticed. Participation of outside parties was not as of right and did not follow traditional adversarial processes. Indeed, Interior's trust decision expressly disclaimed any obligation to follow notice and comment procedures such as would give rise to an implied issue exhaustion requirement. *See* ER 28 (explaining that the notice and comment provisions of 25 C.F.R. §§ 151.10 and 151.11(d) do not apply to trust decisions under the Gila Bend Act). While certain of the plaintiffs and other persons contacted Interior to express their views, the Secretary did not require the Nation to "face an adversary . . . in the review process" or "require[] . . . formal briefing." *Vaught*, 546 F.3d at 631-32. The proceedings thus did not remotely resemble the type of formalized, adversarial process that could give rise to an issue exhaustion requirement.

Nor has Interior provided any formal mechanism for affected parties like the Community to challenge a trust decision once it is rendered. The regulation governing the announcement of trust decisions requires only that the Secretary publish a notice in the Federal Register or a local newspaper stating that title to the land will be acquired no sooner than 30 days later. 25 C.F.R. § 151.12(b). No regulation gives parties the right to seek a reopening of proceedings or provides any procedures for doing so. That is the reason the Community was left to bring its newly discovered evidence to the attention of Interior by means of a letter.

Even in that circumstance, no regulation requires Interior to take any action, or indeed even to respond—as this case again illustrates. The complete absence of a regulatory framework stands in marked contrast to regulations governing formal agency actions, which set forth specific standards and procedures for reopening proceedings based on new evidence or changed circumstances. *See*, *e.g.*, 8 C.F.R. § 1003.2(c)(1) (Board of Immigration Appeals may reopen proceedings where the "evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing"); 47 C.F.R. § 1.106(b)(2), (c) (Federal Communications Commission may entertain petition for reconsideration relying on facts or arguments relating to subsequent events or changed circumstances); 49 C.F.R. § 1152.25(e)(2)(ii) (Surface Transportation Board may reopen proceedings "upon a showing that the action would be affected materially because of new evidence, changed circumstances, or material error").

The cases relied on by the district court do not alter that conclusion. The agency proceedings in those cases involved either a statutory exhaustion requirement, notice-and-comment proceedings, or an adversarial proceeding. *See* *Woodford v. Ngo*, 548 U.S. 81, 87-88 (2006) (statutory exhaustion requirement); *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 n.15 (1946) (same); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004) (notice-and-comment proceeding); *Portland General Elec. Co. v. Bonneville*

Power Admin., 501 F.3d 1009, 1023-24 (9th Cir. 2007) (same); *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251,1297 (D.C. Cir. 2004) (same); *S. Pac. Transp. Co. v. ICC*, 69 F.3d 583, 585 (D.C. Cir. 1995) (same); *Natural Res. Defense Council, Inc. v. EPA*, 824 F.2d 1146, 1150 (D.C. Cir. 1987) (same); *Choate v. U.S. Army Corps of Eng'rs*, No. 4:07-CV-01170-WRW, 2008 WL 4833113, at *1 (E.D. Ark. Nov. 5, 2008) (same); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 34 (1952) (adversarial proceeding); *Commonwealth of Mass., Dep't of Pub. Welfare v. Sec'y of Agric.*, 984 F.2d 514, 517 (1st Cir. 1993) (same); *Maine v. Shalala*, 81 F. Supp. 2d 91, 92-93, 96, 98 (D. Me. 1999) (same). Accordingly, those cases provide no support for implying an issue exhaustion requirement into the *ex parte* agency proceeding that occurred here.[4]

Further undermining the district court's waiver ruling is Interior's failure to notify the parties of an issue exhaustion requirement. *See Sims*, 530 U.S. at 113 (O'Connor, J., concurring) (opining that "the agency's failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision"); *Vaught*, 546 F.3d at 632 ("The Plan's failure to notify claimants of any

[4] In the district court, the Nation cited *City & County of San Francisco v. United States*, 615 F.2d 498 (9th Cir. 1980), for the proposition that this Court has held a claim waived in the absence of formal agency procedures. That case, however, is inapposite, as it involved a proceeding under the National Environmental Policy Act (NEPA), which has been interpreted to require issue exhaustion. *See id.* at 502; *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004). Moreover, the decision in *City & County of San Francisco* was rendered without the benefit of the Supreme Court's clarification of issue exhaustion in *Sims*.

issue-exhaustion requirement . . . weighs against imposing one."). The district court's *post hoc* imposition of such a requirement is particularly inequitable as applied to the plaintiffs other than the Community and Glendale, none of whom even participated in the proceedings before Interior, much less receive notice that they risked forfeiting all opportunity for judicial review of any claim not raised before the agency.

In sum, because no statute or regulation establishes an issue exhaustion requirement within Interior's review of trust applications under the Gila Bend Act, because the agency review involved an inquisitorial, rather than an adversarial, process, and because Interior never notified the parties of an issue exhaustion requirement, no such requirement can be implied on judicial review. The district court's waiver determination was therefore erroneous as a matter of law.

CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment to defendants-appellees on plaintiffs-appellants' claim under Section 6(c) of the Gila Bend Act should be vacated, and this case remanded to the district court with instructions to remand to the agency for consideration of the Section 6(c) requirements in light of the newly discovered evidence.

Respectfully submitted,

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July 15, 2011

ADDENDUM

Public Law 99-503
99th Congress

An Act

Oct. 20, 1986
[H.R. 4216]

To provide for the replacement of certain lands within the Gila Bend Indian Reservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Gila Bend Indian Reservation Lands Replacement Act.
Public lands.
Agriculture and agricultural commodities.
Arizona.

SHORT TITLE

SECTION 1. This Act may be cited as the "Gila Bend Indian Reservation Lands Replacement Act".

CONGRESSIONAL FINDINGS

96 Stat. 1282.

SEC. 2. The Congress finds that:

(1) Section 308 of Public Law 97-293 authorizes the Secretary of the Interior to exchange certain agricultural lands of the Gila Bend Indian Reservation, Arizona, for public lands suitable for farming.

(2) An examination of public lands within a one-hundred-mile radius of the reservation disclosed that those which might be suitable for agriculture would require substantial Federal outlays for construction of irrigation systems, roads, education and health facilities.

(3) The lack of an appropriate land base severely retards the economic self-sufficiency of the O'odham people of the Gila Bend Indian Reservation, contributes to their high unemployment and acute health problems, and results in chronic high costs for Federal services and transfer payments.

(4) This Act will facilitate replacement of reservation lands with lands suitable for sustained economic use which is not principally farming and do not require Federal outlays for construction, and promote the economic self-sufficiency of the O'odham Indian people.

DEFINITIONS

SEC. 3. For the purposes of this Act, the term:

(1) "Central Arizona Project" means the project authorized under title III of the Colorado River Basin Project Act (82 Stat. 887; 43 U.S.C. 1521, et seq.).

(2) "Tribe" means the Tohono O'odham Nation, formerly known as the Papago Tribe of Arizona, organized under section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476).

(3) "Secretary" means the Secretary of the Interior.

(4) "San Lucy District" means the political subdivision of the Tohono O'odham Nation exercising governmental functions on the Gila Bend Indian Reservation.

ASSIGNMENT OF TRIBAL LANDS; RETAINED RIGHTS

SEC. 4. (a) If the tribe assigns to the United States all right, title, and interest of the Tribe in nine thousand eight hundred and eighty acres of land within the Gila Bend Indian Reservation, the Secretary of the Interior shall pay to the authorized governing body of the Tribe the sum of $30,000,000—$10,000,000 in fiscal year 1988, $10,000,000 in fiscal year 1989 and $10,000,000 in fiscal year 1990—together with interest accruing from the date of enactment of this Act at a rate determined by the Secretary of the Treasury taking into consideration the average market yield on outstanding Federal obligations of comparable maturity, to be used for the benefit of the San Lucy District. The Secretary shall accept any assignment under this subsection.

(b) The Tribe shall be permitted to continue to hunt, fish, and gather on any lands assigned to the United States under subsection (a) of this section so long as such lands remain in Federal ownership. Hunting. Fish and fishing.

(c) With respect to any lands of the Gila Bend Indian Reservation which the Tribe does not assign to the United States, the Tribe shall have the right to withdraw ground water therefrom from wells having a capacity of less than thirty-five gallons per minute and which are used only for domestic purposes. Water.

AUTHORIZATION OF APPROPRIATIONS

SEC. 5. Effective October 1, 1987 there is authorized to be appropriated such sums as may be necessary to carry out the purposes of section 4. Effective date.

USE OF SETTLEMENT FUNDS; ACQUISITION OF LANDS

SEC. 6. (a) The Tribe shall invest sums received under section 4 in interest bearing deposits and securities until expended. The authorized governing body of the Tribe may spend the principal and the interest and dividends accruing on such sums on behalf of the San Lucy District for land and water rights acquisition, economic and community development, and relocation costs. Such income may be used by the Tribe for planning and administration related to land and water rights acquisition, economic and community development and relocation for the San Lucy District. Securities. Water. Community development.

(b) The Secretary shall not be responsible for the review, approval or audit of the use and expenditure of the moneys referred to in this section, nor shall the Secretary be subject to liability for any claim or cause of action arising from the Tribe's use and expenditure of such moneys. No portion of such moneys shall be used for per capita payments to any members of the Tribe. Claims.

(c) The Tribe is authorized to acquire by purchase private lands in an amount not to exceed, in the aggregate, nine thousand eight hundred and eighty acres. The Tribe and the United States shall be forever barred from asserting any and all claims for reserved water rights with respect to any land acquired pursuant to this subsection. Claims.

(d) The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the

corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.

State and local governments.

(e) The Secretary shall establish a water management plan for any land which is held in trust under subsection (c) which, except as is necessary to be consistent with the provisions of this Act, will have the same effect as any management plan developed under Arizona law.

REAL PROPERTY TAXES

SEC. 7. (a) With respect to any private land acquired by the Tribe under section 6 and held in trust by the Secretary, the Secretary shall make payments to the State of Arizona and its political subdivisions in lieu of real property taxes.

Contracts.

(b) The Secretary is authorized to enter into agreements with the State of Arizona and its political subdivisions pursuant to which the Secretary may satisfy the obligation under subsection (a), in whole or in part, through the transfer of public land under his jurisdiction or interests therein, including land within the Gila Bend Indian Reservation or interests therein.

WATER DELIVERY

Contracts.

SEC. 8. If the tribe acquires rights to the use of any water by purchase, rental, or exchange within the State of Arizona, the Secretary, at the request of the Tribe, shall deliver such water, at no cost to the United States, through the main project works of the Central Arizona Project to any land acquired under section 5(c), if, in the judgment of the Secretary, sufficient canal capacity exists to convey such water: *Provided*, That deliveries of such water shall not displace deliveries of Central Arizona Project water. The rate charged to the tribe for water delivery shall be the same as that charged by the Central Arizona Water Conservation District pursuant to contracts entered into pursuant to the Colorado River Basin Project Act (43 U.S.C. 1521, et seq.). Nothing in this section shall be deemed to obligate the Secretary to construct any water delivery system.

WAIVER AND RELEASE OF CLAIMS; EFFECTIVE DATE

Water.

SEC. 9. (a) The Secretary shall be required to carry out the obligations of this Act only if within one year after the enactment of this Act the Tribe executes a waiver and release in a manner satisfactory to the Secretary of any and all claims of water rights or injuries to land or water rights (including rights to both surface and ground water) with respect to the lands of the Gila Bend Indian Reservation from time immemorial to the date of the execution by the Tribe of such a waiver.

(b) Nothing in this section shall be construed as a waiver or release by the Tribe of any claim where such claim arises under this Act.

(c) The assignment referred to in section 4 and the waiver and release referred to in this section shall not take effect until such time as the full amount authorized to be appropriated in section 4 has been appropriated by the Congress and paid to the Tribe.

COMPLIANCE WITH BUDGET ACT

SEC. 10. No authority under this Act to enter into contracts or to make payments shall be effective except to the extent and in such amounts as provided in advance in appropriations Acts. Any provision of this Act which, directly or indirectly, authorizes the enactment of new budget authority shall be effective only for fiscal years beginning after September 30, 1987.

Contracts.
Effective date.

Approved October 20, 1986.

LEGISLATIVE HISTORY—H.R. 4216:

HOUSE REPORTS: No. 99-851 (Comm. on Interior and Insular Affairs).
CONGRESSIONAL RECORD, Vol. 132 (1986):
Sept. 23, considered and passed House.
Oct. 1, considered and passed Senate.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,014 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

/s/ James P. Tuite
James P. Tuite

Attorney for the Gila River Indian Community

July 15, 2011

STATEMENT OF RELATED CASES

Appellant Gila River Indian Community is not aware of any related cases pending in this Court within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 15, 2011. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ James P. Tuite
James P. Tuite