No. 8, ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF ARIZONA,

PLAINTIFF,

VS.

STATE OF CALIFORNIA, ET AL.,

DEFENDANT.

BRIEF OF AMICI CURIAE

M. Byron Lewis
John B. Weldon, Jr.
Jefferson L. Lankford
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
Tel. (602) 262-5911
Attorneys for Amici Curiae Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users' Association and Arizona Public Service Company

May 20, 1982

TABLE OF CONTENTS

INTEREST OF AMICI CURIAE

The interest of amici in this proceeding arises from their roles as major water users and major suppliers of water to municipal, agricultural, industrial and residential users throughout Central Arizona. The Salt River Project Agricultural Improvement and Power District is a political division of the State of Arizona. The Salt River Valley Water Users' Association and Arizona Public Service Company are private corporations organized under the laws of Arizona. By virtue of various contracts, the Salt River entities operate the Salt River Project, a federal reclamation project authorized and constructed under authority of the Reclamation Act of 1902. Currently, the facilities of the Salt River Project impound the waters of the Salt and Verde Rivers for storage and delivery to water users in Central Arizona where over half of the State's population resides. Arizona Public Service Company is the largest supplier of electric power in the State of Arizona and as such is a major water user.

All three amici are applicants for allocations of Colorado River water to be delivered by the Central Arizona Project, which is presently under construction. This Project, authorized by Congress and funded by the United States and the State of Arizona, will deliver the water allocated to the State of Arizona from the Colorado River.

The amici will be affected by the Court's decision because the present case involves (1) a possible reduction of the amount of water allocated to the State of Arizona and thus of the amount available to them and (2) the preclusive effect of an adjudication and decree of water rights similar to others in the Western United States which affect the rights of the amici.

The interest of amici is in sustaining objections to Master Tuttle's proposed findings. The brief of amici curiae discusses the detrimental impact of relitigating matters addressed by this Court's 1964 decree upon them as major suppliers and users of water in the State of Arizona.

PARTIES SUPPORTED

Amici Curiae support the position taken in this Court by the States of Arizona, California and Nevada, and by the Coachella Valley Water District, the cities of Los Angeles and San Diego, and the Metropolitan Water District of Southern California in their joint brief, and the position taken by the State of Arizona in its separate brief.

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

No. 8, Original

In The Supreme Court of the United States

October Term, 1981

State of Arizona,

Plaintiff,

vs.

State of California, et al.,

Defendant.

Brief Of Amici Curiae

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

This case began in 1952 when the State of Arizona filed a complaint in this Court against the State of California and several of its agencies to adjudicate the right to use water from the Colorado River. The States of Nevada, New Mexico and Utah and the United States were later joined as parties. The United States asserted claims to the waters of the Colorado on behalf of five Indian Tribes in Arizona, California and Nevada, as well as for National Forests, Recreational and Wildlife Areas and other government lands. 373 U.S. 546, 595 (1963).

The Court referred the proceeding to a Special Master to take evidence, make findings of fact, state conclusions of law and recommend a decree. A trial was conducted by Master Simon Rifkind from June 14, 1956 to August 28, 1958, during which a massive amount of evidence was presented: 340 witnesses provided testimony and thousands of exhibits were received. The transcript of proceedings filled 25,000 pages. After study, Master Rifkind filed with this Court a 433-page report dated December 5, 1960.

After lengthy oral argument, this Court issued its opinion on the Master's report in 1963. 373 U.S. 546. The Court generally adopted the findings and conclusions of Master Rifkind. As to water reserved by the United States for Indian reservations under the doctrine announced in *Winters v. United States,* 207 U.S. 564 (1908), the Court adopted both the Master's test quantifying reserved rights by practicably irrigable acreage and his findings of fact regarding the number of irrigable acres entitled to Colorado River water within undisputed reservation boundaries. 373 U.S. at 601. However, the boundaries of the Colorado River and Fort Mohave Indian Reservations were disputed, and this Court declined to accept the Master's resolution of those disputes. *Id.* Thus, all Indian water rights except those connected with lands in the disputed areas of the two reservations were decided by this Court in 1963.

These findings and conclusions were implemented in the Master's recommended decree, which this Court adopted and issued in 1964. 376 U.S. 340. This decree was comprehensive as to all but a few matters expressly left to later determination. Notable among the remaining matters were the parties' present perfected rights and their priority dates, a matter resolved by this Court's 1979 supplemental decree, 439 U.S. 419, and the number of acres within the disputed tribal boundaries, a matter left to another forum.

However, in 1977 and 1978 five Indian Tribes being represented by the United States filed motions for leave to intervene in subsequent proceedings. These Tribes not only claimed additional water rights in connection with acreage within previously disputed but now resolved reservation boundaries, but also claimed that they were entitled to additional water for acreage which, although recognized by all parties as part of the reservations during the 1956-1958 trial, were allegedly "omitted" from consideration as "practicably irrigable" in the trial and subsequent findings, opinion and decree. Subsequently, the United States joined in the Tribes' claims by filing a motion to modify the decree. This Court appointed the Honorable Elbert P. Tuttle as Special Master to consider these motions. 439 U.S. 419 (1979).

Although "[m]ost of the larger questions concerning water rights on the Colorado River were resolved by the 1964 and 1979 Decrees,"[1] further lengthy proceedings were held. A second trial was held from September 2, 1980 to April 7, 1981 and involved 7,300 pages of transcript and hundreds of exhibits. The trial included claims by the United States and the Tribes for additional water for the irrigable but "omitted" acreage within the undisputed reservation boundaries. However, both the number of irrigable acres and the quantity of water reserved for them had already been litigated in the proceeding before Master Rifkind twenty years earlier. In that proceeding, Master Rifkind had repeatedly insisted, and the United States had repeatedly assured, that all of the United States' evidence and claims on behalf of the Tribes would be presented. A major portion of the more than two-year trial before Master Rifkind was devoted to that goal.

---

[1] Report of Elbert P. Tuttle, Special Master at 4 (February 22, 1982). This report is cited hereafter as "Master's Report."

Nonetheless, Master Tuttle found that this Court's 1964 decree could be changed to increase the Tribes' allotment for the undisputed but "omitted" lands. He believed that the lengthy trial of 1956-1958 and Master Rifkind's meticulously crafted findings could be disregarded because the United States committed an "error" in failing to present some evidence which might have resulted in a larger allocation to the Tribes in the earlier proceeding. Rejecting the salutary doctrine of res judicata as wholly inapplicable, Master Tuttle recommended a modification of this Court's eighteen year-old decree.

The United States' "error" was inexplicable, the Master believed. Master's Report at 52, n. 67. However, the only explanation offered for the government's ommission of evidence, and the only credible one in light of the availability of this evidence in 1958 and the government's repeated assurances to Master Rifkind that all evidence was being presented, is that the United States made a conscious tactical decision not to offer the evidence. There is no hint that the government's conduct was anything but an attempt to represent the Tribes' interest in the manner judged by the government to be the most effective. Nor is there any suggestion that the State parties are somehow responsible for the problem. No mistake of fact is involved here. The United States knew how many acres existed within the undisputed boundaries of the reservations, yet consciously decided not to present evidence which suggested that some were practically irrigable. At worst, the United States stands accused by the Tribes of an error of judgment in omitting these lands during the 1956-1958 trial.

The government's hindsight and the Tribes' second-guesses are not reasons for ignoring the res judicata effect of this Court's 1963 findings and its 1964 Decree. Nor does the Decree's provision for later modifications make it anything less than a final, binding judgment. The courts' historic power in equity to retain jurisdiction and modify a decree has never before been thought to destroy the de-

cree's *res judicata* effect. Nor has that power ever been extended beyond a means to accommodate substantially changed conditions which make the old decree inappropriate.

The reliance of the States, the Congress, government agencies and private water users on the 1964 Decree is too great to sweep aside their carefully developed plans, massive water construction projects and large expenditures in favor of permitting the government to relitigate a matter because it now thinks it might do a better job. The decision of the Tribes' water allotment by this Court in 1963 should not now be cast aside.

Otherwise, every water decree containing the typical provision for retained jurisdiction will be vulnerable. And every case brought by the government on behalf of an Indian Tribe will be open to relitigation. This result cannot be tolerated.

ARGUMENT

THE ISSUE OF THE TRIBES' PRACTICALLY IRRIGABLE ACREAGE MAY NOT BE RELITIGATED.

A. *The principle of finality protects decided matters from vexatious relitigation.*

Res judicata and collateral estoppel are the doctrines by which the judiciary enforces the principle of finality. This Court has repeatedly recognized that the finality principle is vital to the effective administration of justice by our courts. *E.g., Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394 (1981).

A recent statement by this Court of the importance and dimensions of the doctrines are contained in *Montana v. United States,* 440 U.S. 147 (1979).

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a

> subsequent suit between the same parties or their privies . . . ." *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 366 (1897). Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action . . . . Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation . . . . Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions.
>
> 440 U.S. at 153 (citations omitted).

There are several definitions of a cause of action for res judicata purposes. Among those suggested by Professor Moore are:

> [W]hether the same right is infringed by the same wrong; whether "there is such a measure of identity that a different judgment in the second [action] would destroy or impair rights or interests established by the first" judgment; identity of grounds; whether the same evidence would suffice to sustain both judgments. 1B *Moore's Federal Practice* ¶ 10.410[11] at 1158 (2d ed. 1980).

As this Court recognized in *Montana*, the doctrines of res judicata and collateral estoppel bar relitigation by either a party to the previous action, or one in privity with him. The Indian Tribes are in privity with the United States and hence are bound by its litigation of Indian claims. *Heckman v. United States,* 224 U.S. 413 (1912).

There is little if any dispute in this case that the claim now asserted by the United States and the five Tribes for the "omitted" lands is the same "claim" presented to Master Rifkind a quarter century ago. That claim is for water reserved by the United States to satisfy the requirements of the Tribes to serve all of their practicably irrigable land

within the undisputed reservation boundaries. The dispute in this case is whether that claim has been extinguished by the final adjudication embodied in this Court's 1964 Decree.

B. *The amount of the Tribes' practically irrigable acreage within their undisputed reservation boundaries was actually litigated in prior proceedings.*

The Tribes claim additional water appurtenant to both lands within previously disputed but now decided reservation boundaries and lands within the reservation boundaries undisputed at the time of this Court's decree in 1964. This brief is concerned only with the Tribes' claim regarding lands within the boundaries which have been certain and undisputed at all stages of this proceeding. These lands have been characterized as the "omitted lands" because the United States decided not to contend in the trial conducted by Master Rifkind that they were practically irrigable. But this terminology should not obscure the fact that the entire claim for irrigable acreage within the known reservation boundaries was presented to and decided by Special Master Rifkind, whose findings on the matter were adopted by this Court, 376 U.S. 546 (1963), and implemented in its decree. 376 U.S. 340 (1964). Moreover, the fact that the United States knew that such lands existed during the 1956-1958 trial, and consciously decided not to present evidence regarding them, should not be confused by Master Tuttle's use of such terms as "omitted lands," "error" and "mistake." The water rights attached to all of the undisputed boundary lands were thus actually litigated in the proceedings before Special Master Rifkind.

The record of proceedings before Master Rifkind is replete with references by him, the United States and the other parties to the comprehensive nature of the adjudication of not only tribal water rights, but also the rights of

the States and United States.[2]

This Court recognized in its 1963 opinion that the matter of tribal water was adjudicated:

> [The Master] ruled that enough water was reserved to irrigate all the practically irrigable acreage on the reservations .... The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable. 373 U.S. at 600-601.

---

[2] Even as it urged relitigation of the matter of tribal rights, the United States admitted:

> The second possibility [in the 1956-1958 trial] was to attempt a complete listing of all potential uses on the reservation so that *no need would exist to come back at a later date to seek additional rights.* As the matter progressed, Special Master Rifkind intimated a preference for the latter and *the proof of the United States was primarily directed toward that goal.*
>
> *Accordingly, the United States' evidence was intended to show the amount of irrigable lands on the reservations.* Pretrial Brief of the United States of America at 3-4 (August 25, 1980) (emphasis added).

In its post-trial brief in support of the findings it proposed to Master Rifkind, the government characterized its proof as comprehensive:

> [W]hen an Indian reservation is set aside, the water right thereby reserved is large enough to irrigate the entire irrigable acreage of the reservation. *This rule has been translated into definite quantity by the proof of the United States* with respect to the Indian Reservations of the Lower Colorado River Basin. Quoted *id.* at 4-5 (emphasis added).

The following exchange between Master Rifkind and United States Attorney Warner during the first trial shows that all Indian claims were to be presented by the government or else waived:

> THE MASTER: And although there may be other irrigable lands within those reservations, those you do not lay claim for the service of water upon?
>
> MR. WARNER: That is correct.
>
> THE MASTER: Alright. *That is ... the way we are going to be bound.* This is a statement that I will take very seriously. (Tr. at 14155; emphasis added).

The Tribes do not contend that their claims (except for the disputed boundary lands) were not actually litigated. They contend only that, because of "inadequate representation" by the United States, Master's Report at 21, the decision and decree of this Court was not final and binding. The inadequacy alleged is that the evidence presented on their behalf in the first trial did not support the "maximum possible" claim. *Id.* at 48. However, the established rule is that if some evidence in support of a claim is omitted, relitigation will nonetheless be precluded if the claim is decided. *Commissioner v. Sunnen,* 333 U.S. 591 (1947); *Cromwell v. County of Sac,* 94 U.S. 351 (1876).

C. *The issue of the Tribes' practically irrigable acreage was finally decided by this Court's opinion and decree.*

Master Tuttle's decision to relitigate the issue of "omitted lands" is based primarily on Article IX of this Court's 1964 decree. He believed that inclusion of this Article in the decree meant that the decree was not final and hence, res judicata was inapplicable. See Master's Report at 31-32. Article IX provides:

> IX. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

The Master believed that this provision broadly permits modification of the decree and thereby authorizes relitigation of the number of irrigable acres within the undisputed reservation boundaries. But in the same breath Master Tuttle acknowledged that other issues decided by the Court's prior opinion and decree are not open to relitigation: "[T]he 1964 Decree would have no meaning if it is not accorded some degree of finality." Master's Report at 35.

Which issues may be reopened and which may not? The Master's report offers no principled or reasoned basis for his distinction between the Tribes' allocation as a non-final decision among a myriad of other final decisions equally comprising the 1964 Decree.[3]

If the Master's theory is that the decree authorized its modification by language which, while not expressly addressing the matter, was broad enough to permit correction of a lawyer's tactical decision, no part of the decree is protected from renewed attack at any time. Under such circumstances, the decree which the parties labored years to obtain indeed has no meaning.

Neither the record of proceedings before Master Rifkind nor this Court's 1963 opinion suggests that the retention of jurisdiction in Article IX permits a decided issued of fact,

[3] Article IX of the decree affords no basis for selecting "final" and "non-final" decided issues. The Article does not address the matter of finality. It only acknowledges the continuing jurisdiction of the Court and its power to enter additional orders which are "proper in relation to the subject matter in controversy."

incorporated in a cornerstone provision of the decree, to be relitigated.[4]

Had this Court desired to defer finality to subsequent proceedings twenty years later, it could have excluded specific matters from the decree. In fact, this Court did so with respect to several other issues. 376 U.S. 351 (Article VIII). The express exclusion of particular undecided issues from final decision is one of several reasons for continued jurisdiction; but this does not justify reconsidering a decided issue.

---

[4] The source of Article IX is the Report of the Special Master dated December 5, 1960.

Master Rifkind recognized the need for a reliable, final decision and did not envision that Article IX would be cited to undercut finality. His 1960 report states:

> [T]he claims of the United States to water from the Colorado River for the benefit of Indian Reservations are of such great magnitude that failure to adjudicate them would leave a cloud on the legal availability of substantial amounts of mainstream water for use by non-Indian projects. . . . . [S]ince this controversy has been properly presented in this case, it is appropriate to adjudicate it here. *Id.* at 256-257.

The Master rejected the idea of a non-final decree:

> One possibility would be to adopt an open-end decree, . . . However, such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs of an Indian Reservation might result in a reduction of the project's water supply. *Id.* at 263-264.

Instead, he intended the decree, with its provision for retained jurisdiction, to be final and certain:

> Therefore, the most feasible decree that could be adopted in this case, . . . would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation. . . . *This will* preserve the full extent of the water rights created by the United States and will *establish water rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users.* *Id.* at 265 (emphasis added).

Only "proper" supplemental orders will be entered, Article IX instructs, and there are many situations in which additional orders would be proper. For example, additional orders may be required to enforce and implement the 1964 Decree. The Decree enjoined the State parties to perform certain tasks and to avoid interfering with other provisions of the Decree. *E.g.*, 376 U.S. at 346-347 (Article III); 376 U.S. at 352 (Article VII). In prior water cases in this Court's original jurisdiction, provisions similar to Article IX allowed further orders to a party to do acts necessary to implement the decree. For example, the decree in *Wisconsin v. Illinois*, 281 U.S. 696 (1930), *decree supplemented* 289 U.S. 395 (1933), was later supplemented to require state financing of a wastewater treatment plant which was ordered to be constructed in the original decree.

This Court has recognized that the power to modify a water decree is retained because conditions may change. For example, a drought might create navigation problems and reduce the available water to flows less than the total amounts allocated by the decree, requiring adjustments. In *Wisconsin v. Illinois*, the decree was temporarily modified for this reason. 352 U.S. 945 (1956). And in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), the Court entered its decree during a drought. The power to modify the decree allowed the Court to decide the matter and enter a decree even though the adjudicated water was dramatically below its historic level:

> No one knows whether [the drought] has run its course or whether it represents a new norm. There is no reliable basis for prediction. But a controversy exists; and the decree which is entered must deal with conditions as they obtain today. If they substantially change, the decree can be adjusted to meet the new conditions. 325 U.S. at 620.

Although the system of priorities decreed in 1979 in this case might allocate water in times of shortage, a dispute may arise as to implementation of present perfected rights set forth in the 1979 supplemental decree. In times of shortage, too, the Secretary of Interior may not apportion water to the States in a manner which the States agree is consistent with the Boulder Canyon Project Act, as required by the 1964 decree. 376 U.S. at 342-343 (Article II(B) (3)).[5]

Such circumstances might require additional orders or modifications of the existing decree. In fact, water decrees entered both by this Court and state courts generally contain a provision which retains jurisdiction to enter further orders modifying, enforcing or implementing the basic decree. *E.g., Wisconsin v. Illinois*, 281 U.S. 696 (1930); *New Jersey v. New York*, 283 U.S. 805 (1931); *Williams v. Rankin*, 245 C.A.2d 803, 54 Cal. Rptr. 184 (1966). But in no case known to amici has such a provision been used to reopen a decided matter where the only "changed circumstance" is a party's belief he can do a better job of presenting his case if given a second chance.

A decree adjudicating rights in unpredictable river flows cannot be inflexible, for it may work hardship if the flow of water or its uses change. But the fact that "[p]rovision will be made for [the decree's] adjustment to meet substantially changed conditions," 325 U.S. at 623, does not deprive it of finality. If conditions in the supply and use of the water *do not* substantially change, the parties to the decree are entitled to rely upon it as binding and final. Under unchanged conditions, the rights originally decreed are unaltered. The retention of jurisdiction by Article IX thus does not warrant reconsidering the number of irrigable acres on the

[5] "It will be time enough for the courts to intervene when and if the Secretary, in making apportionments or contracts, deviates from the standards Congress has set for him to follow, including this obligation to respect 'present perfected rights' as of the date the Act was passed." 373 U.S. at 594.

basis that one of the litigants believes he might get more of the apple if permitted a second bite. There are no changed conditions in the Tribes' acreage. The only changes have occurred in the government's attitude, brought about by the Tribes' second-guessing and twenty-five years of hindsight.

And, contrary to Master Tuttle's belief, state courts do not permit modification of water decrees to correct the kind of error asserted in this case. See Master's Report at 47. None of the three cases cited by the Master support modification to correct a party's tactical mistake in presenting his case. In *Taylor v. Tempe Irrigating Canal Co.*, 21 Ariz. 574, 193 P. 12 (1920), the plaintiff brought his action not to modify the decree, but to receive the allocation he claimed under it. The court found that, unlike this case, the court entering the decree expressly intended that it would *not* be final on the amounts allocated. The court had retained jurisdiction, *inter alia*, because a dam under construction would substantially alter the amount of water ultimately available downstream. Unlike the present case, the court had declined to allocate precise amounts of water to the various claimants. 193 P. at 14.

Nor was *City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 142 P.2d 289 (1943), an application for modification as the Master's Report implies. Rather, it was a direct appeal in an action to declare water rights which attacked, *inter alia*, a retained jurisdiction provision in the decree. The court held that the judgment properly retained jurisdiction "to meet future problems," not that a tactical mistake warranted modification. 142 P.2d at 297.

Only one case cited by the Master even involved a modification. *Benson v. Burgess*, 192 Colo. 556, 561 P.2d 11 (1977). However, the *Benson* court permitted correction of a substantive error in a decree *only* because of a fundamental procedural defect in the proceeding. The published notice of commencement of the proceeding named the source of the water to be adjudicated, but the decree af-

fected water from another source. 561 P.2d at 13. Thus, the plaintiff was not even aware that his water rights were at stake until after the decree had been entered. In contrast to the plaintiff in *Benson,* the United States knew precisely the extent of the proceeding, indeed insisted that all tribal claims for irrigable acreage be adjudicated, and then represented to Master Rifkind and the other parties that it had asserted all such tribal claims. See note 1, *supra.*

More representative of the state cases is *Williams v. Rankin,* 246 C.A.2d 803, 54 Cal. Rptr. 184 (1966), which explained that jurisdiction is retained in water cases to meet changing conditions, such as "a wet or dry cycle." 54 Cal. Rptr. at 194. In water cases, such a provision is not only "wise and just" but in most cases "essential." *Id.* If this provision is used as a basis for reopening decided matters in this case, all state and federal water decrees containing this typical language could be reopened. No water rights would ever be safe from renewed challenge by any disgruntled party.

In this case, the parties, Master Rifkind and this Court clearly regarded the proceedings leading to the 1964 decree as comprehensive and final with limited and explicit exceptions.[6] The matter of tribal acreage was repeatedly recognized as a matter to be finally determined by Master Rifkind. For example, the United States admitted that both Master Rifkind and this Court understood that the Tribes' allotment was finally determined:

---

[6] The reservation of a final decision on a few matters does not deprive the decision on other issues of its final character. "To be final a judgment does not have to dispose of all matters involved in a proceeding." 1B *Moore's Federal Practice* ¶0.409, p. 1002 (2d ed. 1980). *See also In Re Roney,* 139 F.2d 175 (7th Cir. 1943) (order regarding debtor's redemption held conclusive even though other matters in bankruptcy proceeding were undecided); *Leupe v. Leupe,* 21 C.A.2d 145, 130 P.2d 697 (1942) (disposition of property in interlocutory divorce decree is *res judicata).*

> The Master thought that his allocations—which except for the boundary areas reflected the entire claim of the United States for these Five Reservations—included "all the practicably irrigable" acreage on the Five Reservations. Special Master's Report at p. 262. His conclusion in that regard is not surprising since the United States had described its claim in similarly extensive terms. Thus, the Supreme Court reached its conclusions regarding the Indian rights laboring under the same notion; that the allocation of water for the Five Reservations was based on the claims presented by the United States which reflected all lands on the Five Reservations which were economically feasible to irrigate.
>
> Pretrial Brief of the United States of America at 10 (August 25, 1980).

Master Rifkind and the U.S. Attorney also agreed during the first trial that the decree would be *res judicata* with respect to the Indians' claims:

THE MASTER: Will it [the decree] be *res judicata?*

MR. WARNER: It will at least serve that purpose, *yes; res judicata as establishing what is the maximum quantity of water that may be used with respect to the reservation* . . . (Tr. at 12935; emphasis added).

Continuing jurisdiction in water cases is simply an example of retained jurisdiction in equity. This Court has considered the scope of retained jurisdiction in a number of equity cases not involving water rights. For instance, in *System Federation No. 91 v. Wright,* 364 U.S. 642 (1961), the Court considered a proposed modification of a consent decree in which the trial court had expressly retained jurisdiction. This Court held that modification is proper when the circumstances underlying the decree have changed, but that this power does not undermine the res judicata effect of the decree.

> A balance must thus be struck between the policies of *res judicata* and the right of the court to apply modified measures to changed circumstances. . . . Firmness and stability must no doubt be attributed to continuing injunctive relief based on adjudicated facts and law, and neither the plaintiff nor the court should be subjected to the unnecessary burden of re-establishing what has once been decided. 364 U.S. at 647-48.

In *United States v. Swift & Co.*, 286 U.S. 106 (1932), this Court refused to permit modification of an injunction in an antitrust case, even though the decree expressly retained jurisdiction. Writing for the Court, Justice Cardozo repeatedly emphasized that only substantially changed circumstances could justify modification. In view of "prejudice" to the beneficiaries of the decree, 286 U.S. at 118, "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation . . ." 286 U.S. at 119.

The same philosophy applies to continued equity jurisdiction in water cases. "In the ordinary case a decree allocating the waters of a stream is based upon many factual circumstances. . . . Since these factual circumstances are subject to change, the allocations based upon them are subject to change accordingly." *United States v. Fallbrook Public Utility District*, 347 F.2d 48, 58 (9th Cir. 1965).

Conversely, in the absence of changed circumstances, a decree has final and binding effect even though jurisdiction is retained:

> The injunction, whether right or wrong, is not subject to impeachment in its application to the conditions that existed at its making. We are not at liberty to reverse under the guise of readjusting. *United States v. Swift & Co.*, 286 U.S. at 119.

Here, the intervenors and the United States seek to do no more than impeach the decree. No circumstances have changed regarding the "omitted lands."[7] These parties therefore may not use the power to modify the decree as an excuse to relitigate a decided issue.

D. *The policies supporting finality preclude relitigation in this case.*

Finality in judicial proceedings provides salutary benefit to litigants, courts and the public at large. The doctrine of finality "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown v. Felsen,* 442 U.S. 127, 131 (1979). The principle of finality "encourage[s] reliance on adjudication," *Allen v. McCurry,* 449 U.S. 90, 94 (1980), not merely by the parties but also by third persons. In cases involving property rights, for example, third parties to whom the property may be transferred have an obvious interest in the finality of disputes concerning the property.[8]

In this case, the reliance by the litigants and others on the 1964 decree is clear. As the Master acknowledged: "Not a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications. . . .

---

[7] Master Tuttle did not find any changed circumstances. In fact, he implicitly found there were no changed circumstances by deciding that the United States could and should have presented evidence of the irrigable nature of the omitted lands at the 1956-1958 trial. Moreover, the Tribes and the United States should not be permitted to cloak the government's conscious decision not to present some of the evidence with the theory that changed economic feasibility has increased the number of practically irrigable acres. Under this theory, the Tribes' allocation could be reduced as well as increased. If the costs of production or the market for the products which could be produced on irrigated land changed markedly, this theory could require a substantial reduction of the Tribes' allotments. But such changes are not the extraordinary changes in the fundamental conditions underlying a decree which justify its modification.

[8] *See United States v. Truckee-Carson Irr. Dist.,* 649 F.2d 1286, 1308 (9th Cir. 1981): "[T]he policies served by *res judicata* . . . apply with special force when titles to real property are involved."

[I]t would be unrealistic to conclude that those parties would not have used the 1964 Decree as a basis of future plans." Master's Report at 46. In 1968, four years after the decree was issued, Congress authorized construction of the Central Arizona Project, a system of water delivery from the Colorado River to central Arizona water users, including twelve Indian Tribes.[9] The Congress and Arizona relied upon the water available to Arizona under the 1964 decree in planning the Project. *S. Rep.* No. 408, 90th Cong., 1st Sess. (1967).[10] To date, Congress has appropriated nearly a

---

[9] 43 U.S.C. §1521.

[10] Master Tuttle argued that even if Arizona's supply of water is reduced by diverting some of it to the Tribes, the Central Arizona Project is still economically viable because the Senate found that even conservative estimates of long-term flow made the project feasible. See Master's Report at 39-40. But this misses the point. The undisputed fact is that Congress relied on this Court's opinion and decree as a final adjudication of Arizona's right to Colorado River water. In 1951, the House Committee on Interior and Insular Affairs adopted a resolution deferring consideration of the Project until the use of Colorado River water was either adjudicated or agreed upon by the States. See H. Rep. No. 1312, 90th Cong., 1st Sess. (1968), reprinted in 1968 U.S. Code Cong. and Adm. News 3666, 3678 (quoting resolution). The legislative process was suspended until this Court's opinion issued in 1963. At that time, the Congress regarded Arizona's water rights to Colorado River water as having been decided:

> By this [1963] opinion and [1964] decree, Arizona finally secured an adjudication of its entitlement to 2.8 million acre-feet of main stream water from the Colorado River.

Id. at 3679.

Moreover, the Master apparently assumed that the only concern of Congress and Arizona was economic feasibility. On the contrary, the primary concern of both Congress and Arizona was closing a "water gap," *id.* at 3670, of "desperate" proportions. *Id.* at 3671. The Committee found that "the Central Arizona Project is needed to—(1) Reduce a dangerous overdraft upon ground water reserves; (2) Maintain as much as possible of the area's irrigated farm land; and (3) Provide a source of additional water for municipal and industrial use that will be required during the next 30 years." *Id.* at 3703. Thus, the intent of Congress to meet Arizona's water needs in agricultural, municipal and industrial uses would be frustrated by the severe reduction proposed by Master Tuttle.

billion dollars for the construction of the Central Arizona Project.

Arizona has undertaken its own preparations for the Project, including the collection of property taxes during the past six years[11] and the creation of a new government agency to collect the taxes and implement the project.[12] Substantial efforts have already been made to allocate Project water within Arizona.[13] Amici curiae are applicants for allocations from the Central Arizona Project and have looked upon this Court's 1964 decree as a final determination of Arizona's Colorado River allotment. Among other things, amici have expended considerable sums in siting power plants based on the availability of Project water.

Notwithstanding the extensive planning and the commitment of a billion dollars, relitigation of the acreage matter now threatens the life of the Central Arizona Project. If the omitted lands issue is reopened, and intervenors are successful, the water available to Arizona via the Project would be decreased by 115,000 acre-feet per year, a reduction of more than twenty percent of the expected dependable flow

---

[11] The tax assessment has resulted in a fund of $9,500,000.00 to help pay for the project. Tr. 2695.

[12] Tr. 2694.

[13] Tr. 2693-94. In 1980, Arizona adopted a comprehensive groundwater statute. A.R.S. Title 45, Ch. 2. Arizona's groundwater policy, which includes conservation by reductions in use, is based in part upon the assumption that water from the Central Arizona Project will be available to take the place of groundwater. A vivid illustration of this interdependence between Arizona's groundwater policy and Project water is found in the Master Contract between the United States and Arizona's water agency for delivery of Project water: paragraph 8.8(b)(ii) requires that agricultural groundwater pumping be reduced in the same amount as Project water received.

from the Project. See Master's Report at 40. It is difficult to imagine more compelling evidence of reliance upon the finality of the 1964 decree and its award of water to Arizona.

These circumstances amply illustrate the importance of finality as a principle. But finality does not attach only when it can be shown to be necessary in a given case. There is no requirement that the State parties prove their reliance on the 1964 decree; rather, finality is a principle of general application. "The doctrine of *res judicata* serves vital public interests beyond any individual judge's *ad hoc* determination of the equities in a particular case." *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401 (1981).

E. *No exceptions to the principle of finality preclude its application in this case.*

The Master found that the United States failed to assert "the maximum possible claims" on behalf of the Tribes and thereby caused them to suffer an injustice. Master's Report at 48. Discounting the evidence of the final character of the earlier proceeding and of the States' obvious reliance on that finality, the Master believed it would "begin to offend the appearance of justice" if relitigation were not permitted. *Id.* The fact that the Tribes were represented by the United States instead of chosen counsel was "a compelling reason" for modifying the decree. *Id.*

The Master did not attempt to reconcile this situation with the recognized exceptions to the finality rule. He apparently believed that since he viewed this Court's prior determination as not final, the threshhold for reopening the matter did not rise to the level required when the decision is final. Indeed, the Master's reasons do not justify reopening a finally adjudicated matter. Assuming *arguendo* that the original determination was "mistaken" because of omitted evidence, this still does not warrant relitigation.

> Nor are the *res judicata* consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong ... [A]n "erroneous conclusion" reached by the court ... does not deprive the defendants "of their right to rely upon the plea of *res judicata* ..." *Federated Dept. Stores, Inc., v. Moitie,* 452 U.S. at 398 (quoting *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 325 (1977)).

That "simple justice" is no warrant for refusing to apply the principle of finality has already been decided by this Court in *Federated Dept. Stores*:

> The Court of Appeals also rested its opinion in part on what it viewed as "simple justice." But we do not see the grave injustice which would be done by the application of accepted principles of res judicata. "Simple justice" is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case. There is simply "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata.*" 452 U.S. at 394.

Nor does the bare fact of government representation of tribal interests provide a "compelling reason" to regard an otherwise final decision as vulnerable. On the contrary, this Court has regarded tribal rights as particularly well-protected by the United States. In *Heckman v. United States*, 224 U.S. 413 (1912), the Court decided that a decree relating to rights in real property, including Indian interests, bound "not only the United States but the Indians whom it represents in the litigation." 224 U.S. at 446. The Court rejected the notion that the Indians were necessary parties when the United States, as their trustee, was a party:

> The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. *There can be no more complete representation than that on the part of the United States* in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.
>
> When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the government was in court on their behalf. *Their presence as parties could not add to, or detract from, the effect of the proceedings* to determine the violation of the restrictions and the consequent invalidity of the conveyances. 224 U.S. at 444-45 (emphasis added).

This Court also held that the other parties would not risk relitigation because the Indians could not challenge the result of the government's litigation:

> And it could not, consistently with any principle, be tolerated that, after the United States, on behalf of its wards, had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question. . . .
>
> [*T*]*here is no room for the vexation of repeated litigation of the same controversy.* And when the United States itself undertakes to represent the allottees of lands under restriction, and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose, relating to the same property. 224 U.S. at 446 (emphasis added.)

The argument that this is a special case because the United States failed to assert every conceivable tribal claim is unavailing. A similar argument was rejected by the Court in *United States v. California & Oregon Land Co.*, 192 U.S. 355 (1904). The United States first initiated an unsuccessful action to declare that certain land patents were void. A second action was brought by the government, alleging that the lands were within the Klamath Indian Reservation and reserved to the United States, and therefore that the patents were void on this ground. This Court held that the second action was barred by the first, even though the United States omitted evidence of the Indian claim in the first action.

> It is said, to be sure, that the United States now is suing in a different character from that in which it brought the former suit. There it sued for itself,—here it sues on behalf of the Indians. But that is not true in any sense having legal significance. . . . The best that can be said . . ., to distinguish the two suits, is that now the United States puts forward a new ground for its prayer. Formerly it sought to avoid the patents by way

> of forfeiture. Now it seeks the same conclusion by a different means,—that is to say, by evidence that the lands originally were excepted from the grant. 192 U.S. at 358.

An attack on a final water decree as non-binding because of the government's allegedly inadequate representation of its Indian Wards was recently rejected in *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286 (9th Cir. 1981).[14] The question presented was whether a 1944 water decree could be adjusted because of government representation of the Pyramid Lake Paiute Tribe by the United States in litigation which had commenced in 1913. The Court of Appeals held that the decree was final and binding.

In *Truckee-Carson* the Ninth Circuit first assumed, without deciding, that the government's representation of the tribe was "improper and inadequate." 649 F.2d at 1307. Nonetheless, it held that the water decree was binding. As in this case, there was no evidence that the other parties were aware of "any impropriety in the government's representation." 649 F.2d at 1308. The importance of a final, reliable adjudication required that res judicata bar the current action by the United States and the Tribe to obtain increased water:

> The purpose of the proceeding was to obtain a decree upon which all parties could rely. This purpose would have been defeated if the government's action did not include important claims that could upset the decreed rights of the parties.
> 649 F.2d at 1302.

The Ninth Circuit thus decided that even if the United States had not adequately represented the Tribe, innocent third parties entitled to rely on the result could not be penalized for this wrong. Similarly, any losses necessary to rectify the United States' wrong should not be borne by the

---

[14] Master Tuttle sat by designation in the case and joined in the Ninth Circuit's opinion.

innocent state parties in this case. Upon whom should the consequences fall? If the allocation made by the 1964 decree is a finally adjudicated matter, must the Tribes suffer in silence? Certainly not. The wrongdoer should bear the consequences of his own wrong, not his victim or an innocent third party.

Yet, the Master proposes to reopen the matter and allocate additional water to the Tribes from the States' allocations. The United States, the party responsible for the omission of evidence, would lose not a drop of the water reserved to it. The Master thus proposes to remedy one "injustice" by inflicting another.

There is no reason to punish the States for the alleged misconduct of their opponent. If the alleged tribal deficit is to be cured, the water allocated to the United States, not that of the State parties, should be reduced. In *Truckee-Carson, supra,* the Court of Appeals found that the interests of a party represented by the United States were not protected by the finality principle if the United States had inadequately represented tribal interests in the proceeding. In the present case, the remedy need not involve third parties, since the United States has been awarded enough water to satisfy the Tribes' demands. Alternatively, the Tribes may be entitled to an award of compensatory damages. The Tribes may assert their claim against the United States in a proceeding authorized by 28 U.S.C. §1505; *see also Mitchell v. United States,* 591 F.2d 1300 (Ct. Cl. 1979) (tribe's claim against government for breach of fiduciary duty is cognizable under 28 U.S.C. § 1505).

Of course, the matter of a remedy need not be reached if the United States committed no wrong. The stringent standard of representation imposed upon the United States by the Master was that the government is obligated to present "the maximum possible" claims on behalf of Indian Tribes. Master's Report at 48. The Master also described the government's duty as trustee for the Tribes as one to present "the *best* case" for the Indian claim. *Id.* at 49. The Master

did not hold that the government's representation of its own interests as well as the Tribes' is inherently a denial of due process. Indeed, such a rule would destroy the finality of many longstanding property and water decrees heretofore thought final.

Assuming *arguendo* that a breach of some duty by the government prevents a judgment from becoming final and binding, the government did not breach its obligations. First, the facts at worst show a tactical error by the United States during the 1956-1958 trial. Although the Master found that the reason for the government's omission of facts in this case "seems unimportant and perhaps unknowable," Master's Report at 52, n. 67, he rejected the only explanation offered by any party. The sole explanation is that the United States made a tactical decision to present only the evidence it felt was fairly persuasive and only the claims it believed to be reasonable. See Master's Report at 51. The government concededly made "substantial" claims on behalf of the Tribes. *Id.* at 48. The Master's fallacy is that because the government did not present every conceivable claim, it did not present "the best case."

Every lawyer knows that it is often inadvisable to present "the maximum possible" claim. Greed is readily recognized by judge and jury. If the fact-finder senses that a party seeks more than is reasonable or fairly supported by persuasive evidence, the entire claim is jeopardized and the result is often much less favorable than if a more credible claim had been presented. As a practical matter, the United States must have some degree of discretion to make such

tactical decisions if it is to represent tribal interests at all.[15]

CONCLUSION

If the provision of this Court's Decree is employed to disregard the final adjudication of the Tribes' rights which the parties labored so long to obtain, no water decree containing the ordinary provision for retained jurisdiction can be regarded as final and binding. State and federal courts will look to the decision in this case to interpret the meaning of similar provisions. Renewed attacks on even ancient decrees could cause incalculable industrial and agricultural disruptions throughout the West. If the Court reopens a decided matter here, even its own original jurisdiction water cases, long thought resolved, may come back to life.

Nor will any judgment obtained by the United States for Indian Tribes be reliable. If a final determination can be upset simply because of a tactical decision by the government, property and other rights long in repose will at once become uncertain.

---

[15] Measured by a trustee's obligations at common law, the government's decision to omit some evidence is unassailable unless demonstrably incompetent. A trustee must exercise only reasonable care and skill in dealing with the beneficiary's interest. *Restatement (2d) of Trusts* §174 (1959). In fact, the Master found it not at all surprising that some evidence would be inadvertently omitted in a case of this size and complexity. Master's Report at 47. If the trustee reasonably believes that a claim for the beneficiary is doubtful, valid only in part, or wholly uncollectible, the trustee is not bound to pursue the whole claim. Restatement (2d) of Trusts at §177. The United States therefore was not obligated to make a doubtful, invalid or unreasonable claim on behalf of the Tribes. Since there is no explanation for the government's decision other than as a tactical decision, it cannot be said that the government breached its fiduciary duty to the Tribes.

Instead, the doctrine of finality should be applied to bar relitigation of water claims already decided after years of trial. And the Court's historic power in equity to revise a decree should be reserved for truly meritorious instances of extraordinary changes.

For the foregoing reasons, amici curiae believe that the exceptions should be sustained to Master Tuttle's proposed findings that the doctrine of finality does not prevent relitigation of the allotment for Indian lands already embodied in the 1964 Decree; that Article IX of that Decree permits a modification of its provisions if a party commits "error" by consciously omitting evidence in support of its claim; and that the allocations to the State parties may be reduced to increase the allotment to the Indian Tribes.

Respectfully submitted,

M. Byron Lewis
John B. Weldon, Jr.
Jefferson L. Lankford
JENNINGS, STROUSS & SALMON
111 West Monroe
Phoenix, Arizona 85003
(602) 262-5911
Attorneys for Amici Curiae Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users' Association and Arizona Public Service Company