IN THE

Supreme Court of the United States

October Term, 1981
No. 8, Original

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

EXCEPTIONS OF THE CALIFORNIA AGENCIES TO THE REPORT OF SPECIAL MASTER ELBERT P. TUTTLE; BRIEF OF SAID PARTIES IN SUPPORT OF EXCEPTIONS.

Names and addresses of attorneys on inside front cover.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

For Metropolitan Water District of Southern California,
CARL BORONKAY,
General Counsel,
WARREN J. ABBOTT
Assistant General Counsel
KAREN TACHIKI,
Deputy General Counsel,
P.O. Box 54153,
TerminalAnnex,
Los Angeles, California 90054
(213) 626-4282.

For the Coachella Valley County Water District,
MAURICE C. SHERRILL,
General Counsel,
JUSTIN McCARTHY,
REDWINE & SHERRILL,
Suite 1020,
3737 Main Street,
Riverside, California 92501,
(714) 684-2520.

For the City of Los Angeles,
IRA REINER,
City Attorney,
EDWARD C. FARRELL,
Chief Assistant City Attorney
for Water and Power,
KENNETH W. DOWNEY,
Assistant City Attorney,
GILBERT W. LEE,
Deputy City Attorney,
Department of Water & Power,
111 North Hope Street,
P.O. Box 111,
Los Angeles, California 90051,
(213) 481-3296,

For the City of San Diego,
JOHN W. WITT,
City Attorney,
C. M. FITZPATRICK,
Senior Chief Deputy
City Attorney,
202 C Street,
Mail Station 3A,
San Diego, California 92101,
(714) 236-6220.

For the County of San Diego,
DONALD L. CLARK,
County Counsel,
JOSEPH KASE, JR.,
Assistant County Counsel,
LLOYD M. HARMON, JR.,
Deputy County Counsel,
1600 Pacific Highway,
Room 355,
San Diego, California 92101,
(714) 236-3991.

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Impleaded Defendants.

EXCEPTIONS OF THE CALIFORNIA AGENCIES TO THE REPORT OF SPECIAL MASTER ELBERT P. TUTTLE.

The Metropolitan Water District of Southern California, the Palo Verde Irrigation District, the Imperial Irrigation District, the Coachella Valley Water District, the City of Los Angeles, the City of San Diego and the County of San Diego (hereinafter "California Agencies") hereby file these Exceptions to the Report of Special Master Elbert P. Tuttle, dated February 22, 1982, pursuant to the order of the Court, dated April 5, 1982.

These exceptions are based on the grounds, to be developed in our supporting brief, that the determinations of the Special Master are erroneous and are contrary to the evidence and the law.

STATEMENT OF EXCEPTIONS.

The California Agencies except to the Report of the Special Master, dated February 22, 1982, upon the following grounds:

I.

EXCEPTIONS RELATING TO THE SPECIAL MASTER'S CONCLUSION THAT CERTAIN DISPUTED BOUNDARIES OF THE INDIAN RESERVATIONS WERE "FINALLY DETERMINED" WITHIN THE MEANING OF ARTICLE II(D)(5) OF THE 1964 DECREE AND HIS CONSIDERATION OF LANDS SO ADDED FOR ADJUSTMENT OF THE DECREED WATER ALLOCATIONS OF THOSE RESERVATIONS. (Spec. Master's Rep. pp. 55-76.)

A. The Issue.

Whether the disputed boundaries of the respective Indian reservations have been "finally determined" within the meaning of Article II(D)(5) of the March 9, 1964 Decree, permitting adjustment by this Court of the reservation water allocations?

B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes that:

The determinations that have been made through certain orders of the Secretary of the Interior and certain trial court judgments with respect to the disputed boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the reservations.

C. The Correct Conclusions.

The Special Master should have concluded:

The orders of the Secretary of the Interior and the judgments in the federal court cases are not final determinations of reservation boundaries for purposes of establishing water rights. The Secretarial orders relied on by the Tribes are functional for Department of the Interior administrative purposes, but cannot be considered final for the purpose of establishing claims for federally reserved water rights. The federal court judgments do not have *res judicata* effect on the rights of the California Agencies who were not parties to the actions nor in privity with any party. The United States and the Tribes must first establish through adjudication with the contesting California Agencies in other litigation or in these proceedings the disputed boundaries upon which they rely for claims of additional water allocations.

WHEREFORE, the California Agencies request that the Court rule on these Exceptions to the Report of Special Master Tuttle, that the Court decide this cause in the manner indicated above, and that the Court issue such further orders as it deems proper.

Respectfully submitted,

The Metropolitan Water District of Southern California,

CARL BORONKAY,
General Counsel,

WARREN J. ABBOTT,
Assistant General Counsel,

KAREN TACHIKI,
Deputy General Counsel,

Coachella Valley Water District,

MAURICE C. SHERRILL,
General Counsel,

JUSTIN MCCARTHY,
REDWINE & SHERRILL,

City of Los Angeles,

IRA REINER,
City Attorney,

EDWARD C. FARRELL,
Chief Assistant City Attorney,
for Water and Power,

KENNETH W. DOWNEY,
Assistant City Attorney,

GILBERT W. LEE,
Deputy City Attorney,

City of San Diego,

JOHN W. WITT,
City Attorney,

C. M. FITZPATRICK,
Senior Chief Deputy City Attorney,

County of San Diego,

DONALD L. CLARK,
County Counsel,

JOSEPH KASE, JR.,
Assistant County Counsel,

LLOYD M. HARMON, JR.
Deputy County Counsel,

By CARL BORONKAY.

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STATE OF ARIZONA,

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STATE OF CALIFONRIA, *et al.*

BRIEF OF CALIFORNIA AGENCIES IN SUPPORT OF EXCEPTIONS.

Preface.

The Metropolitan Water District of Southern California, the Coachella Valley Water District, the City of Los Angeles, the City of San Diego and the County of San Diego (hereinafter "California Agencies") are the California parties most directly affected by additional water allocations to the reservations based upon claims of enlarged reservation boundaries. Hence we file this separate brief for the purposes of illustrating that the claims of those additional water allocations are premature and to describe in greater detail the nature and scope of the boundary disputes as to the Colorado River, the Fort Yuma, and the Fort Mojave Indian Reservations.

Summary of Position.

This case was commenced in 1952 by Arizona to confirm its rights to Colorado River water. It developed into an adjudication of the rights of lower basin states (Arizona, California and Nevada), and the United States. The inter-

vention of the United States was on behalf of various federal facilities, including the five Indian reservations along the lower Colorado River. The legal basis for these alleged rights was the *Winters* doctrine, or rights impliedly reserved as an incident of establishing the Indian reservations. A factual issue raised in the original proceedings was whether certain lands for which *Winters* rights were sought were situated within the proper reservation boundaries (''the boundaries issue''). This issue was tried by the parties as to the Colorado River and Fort Mojave reservations. No one objected to the propriety of raising and trying those questions. The determinations of the Special Master were generally favorable to the State Parties contesting those boundaries asserted by the United States and the Master allocated water for those two reservations, based upon his determinations of the true reservation boundaries and his findings as to ''practicably irrigable acreage'' within those reservations.

This Court, in considering the report and recommendations of that special Master, stated it was not necessary to decide the reservation boundaries, but adopted the Master's recommended water allocations for each of the reservations based in part upon his determinations of the true boundaries. The Decree entered by the Court in 1964 provided for adjustment of these water allocations should the disputed boundaries be ''finally determined.''

The current proceedings are based upon reference by this Court to a Special Master of a motion of the United States to modify the 1964 Decree to grant additional water rights to the five reservations. The United States asserted that additional practicably irrigable acreage exists within these reservations for which water rights were not allocated in the 1964 Decree. The alleged bases for the new claims of water rights for that acreage are (1) resolution of contested res-

ervation boundaries since entry of that decree and (2) failure of the United States to seek a water allocation for particular lands within the reservations as they were recognized in 1964, so called, "omitted lands."

With respect to the first category, the responding State Parties again contested the new boundaries asserted by the United States and the five Tribes who were permitted to intervene as parties. Unlike the original proceeding, the Special Master adopted the position of the United States that, because the Secretary of the Interior has the authority to survey and fix boundaries of Indian reservations, they must be recognized as binding and conclusive upon those not claiming title to such lands. Accordingly, the Master recognized no triable issue of whether lands for which a new water allocation was claimed were indeed within the respective Indian reservations.

The State Parties, then, even though their water rights would be directly and severely affected by the awarding of additional water for Indian reservations due to the latters' senior priority, were prohibited from showing that substantial acreage depicted by the United States as part of the Colorado River, Fort Mojave and Fort Yuma reservations were, in fact, not reservation lands.

In our exception and supporting arguments we will show that the United States and the Tribes have failed to meet this Court's requirement under Article II(D)(5) of the 1964 Decree that the reservations' water allocations may be adjusted only after the disputed boundaries are finally determined and that it would be appropriate and in the interests of all parties herein to determine them in these proceedings. We will also explain the very substantial nature of the State Parties' challenges of the enlarged boundaries advanced by

the United States, thereby illustrating the injustice that would be perpetrated should the Special Master's ruling, shielding the Secretary's boundary actions, be adopted by this Court.

ARGUMENT.

I.

THE BOUNDARIES OF THE RESERVATIONS HAVE NOT BEEN FINALLY DETERMINED; THUS, NO ADDITIONAL ALLOCATION OF WATER CAN BE MADE.

A. Introduction.

The United States and the Tribes have raised substantial claims of practicably irrigable acres predicated in part upon their assertion that boundary disputes as to the Colorado River, Fort Yuma and Fort Mojave Indian Reservations have been finally determined within the meaning of the Court's 1964 decree which provided:

> "... the quantities fixed in this paragraph [Fort Mojave Indian Reservation] and paragraph (4) [Colorado River Indian Reservation] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined; ..." *Arizona v. California*, 376 U.S. 340, 345 (1964).

The United States and the Tribes have asserted, and Special Master Tuttle (hereinafter "Special Master") has accepted, certain unilateral administrative actions of the Secretary of the Interior and certain district court cases involving title claims, in which the California Agencies were not parties, as final determinations of the boundaries[1] which may not be challenged in this action. By so ruling, the Special Master has accepted evidence as to the practical irrigability of the lands in dispute, while rejecting the California Agencies' contention that the claimants must first establish that disputed lands are within the reservations.

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[1]Motion of the United States for Modification of Decree and Supporting Memorandum, December 1978, pp. 8-17; 1982 Report of Special Master Tuttle, February 22, 1982, p. 63 (hereinafter 1982 Report).

The Special Master has erred in accepting such actions as final determinations of disputed boundaries and by declining to determine such boundaries in this proceeding. We shall demonstrate:

(1) The history of this proceeding indicates that the Special Master has erred in his interpretation of the Court's 1964 decree; and

(2) This Court, under the circumstances presented, is the appropriate forum to determine the boundary issues.

B. The History of This Proceeding Indicates That the Special Master Has Erroneously Interpreted This Court's 1964 Decree.

As is set forth more fully in the brief of the State Parties, the relevance of the boundary dispute arises in connection with the *Winters*[2] rights of the Tribes. *Winters* held that Congress, at the creation of the reservations, intended to reserve water for the needs of the reservations. Since no quantification standard was enunciated, this Court was faced in *Arizona v. California*, 373 U.S. 546 (1963) with establishing a quantification standard for the reservations in the lower Colorado River Basin. Thus, the Court determined that the number of practicably irrigable acres on each reservation would fairly provide for the existing and future needs of the Tribes. (*Id.* at 601.)

Thus, in this case, two elements of a *Winters* right must be established prior to a determination of water allocations — the land must be determined to be within the reservation and it must be practicably irrigable.

Therefore, in the prior proceeding, Special Master Rifkind (hereinafter "former Master") accepted evidence as

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[2]*Winters v. United States*, 207 U.S. 564 (1908).

to the extent of reservation lands, as well as their irrigability where disputes over the boundaries of two reservations arose.[3] After a full evidentiary hearing on the matters, the former Master ruled generally in favor of the California position with the exception of two avulsive changes. (Report of the former Master, pp. 269-287.)

This Court then accepted for purposes of water allocations the acreages as determined by the former Master, but rejected his boundary determinations for other purposes:[4]

> ". . . the various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.
>
> "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave [sic] Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." (*Arizona v. California*, *supra*, 373 U.S. at 601.)

The Court, however, recognized that these boundary disputes might be finally determined at a later time, and thus provided for modification in that event.

The Special Master here reasons that this Court's rejection of the boundary determinations contradicts the State Parties position that "finally determined" means decided through trial proceedings with those parties.

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[3]Colorado River Indian Reservation and the Fort Mojave Reservation.

[4]Such a rejection may have been predicated upon the concern of the California Parties, that private land claimants were not parties to the action. (See, Opening Brief of the California Defendants in Support of Their Exceptions to the Report of the Special Master, May 22, 1961, pp. 279-282.)

> "The model of the previous treatment of the boundary determinations by the Court itself much weakens the contention of the State Parties." (1982 Report, p. 65.)

Thus, he treats unilateral orders of the Secretary of the Interior,[5] which basically encompass the positions of the United States which were rejected in the prior proceedings, as final boundary determinations. But as demonstrated above, the Court was well aware of the disputed boundaries of the Colorado River and Fort Mojave Reservations and accepted the former Master's determinations as to those boundaries for water allocation purposes. Thus, the model of the prior proceeding clearly indicates that boundaries of the reservations were determined in an adversarial proceeding involving the interested parties.

The acceptance by this Court of the boundaries of the reservations as determined by the former Master for water allocation purposes, makes clear that the Court's provisions for modification of the decree in the event of final determination of boundaries did not intend to encompass the unilateral administrative actions accepted by the Special Master here.

Can it be reasonably believed that this Court, with full knowledge of the disputed boundaries as to the Colorado River and Fort Mojave Indian Reservations and with full knowledge of the determination of the former Master generally in favor of the California positions, would then deem a disputed boundary is finally determined, when the losing

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[5]The Special Master has accepted as final a January 17, 1969 Order of the Secretary of the Interior relating to the Colorado Indian Reservation, a December 20, 1978 Order of the Secretary of the Interior relating to the Fort Yuma Reservation, and a June 3, 1974 Order of the Secretary relating to the Fort Mojave Reservation. The merits of those orders are discussed in detail *infra*.

claimant in the prior adversary proceeding issues a unilateral administrative order? This is the effect of the ruling of the Special Master.

Moreover, the Special Master relies not only upon these unilateral administrative decisions, but also upon district court cases[6] in which the California Agencies were not represented. Such reliance is clearly unjustified as the California Agencies may not be required to rely upon the litigation efforts of third parties. The Special Master would appear to recognize such a principle when he finds that these acts are not *res judicata* on those not parties to such proceedings. (1982 Report. pp. 63-64.) The California Agencies, not having been parties to these private cases, have had no opportunity to protect their rights which depend in part upon whether the land is within or without the reservation. Moreover, this is a water case, not a land case (1982 Report, p. 64); thus the interests sought to be protected in this case are significantly different than those in land suits. Indeed, it would be especially unjust in this instance to allow reliance upon cases where many were not subject to searching judicial scrutiny, but were resolved instead by stipulations.[7] The California Agencies have direct and substantial interests in the water which is derived from the status of the land — interests which they are entitled to protect. It cannot be accepted that this Court contemplated that the California Agencies' invaluable water rights could

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[6]1982 Report, p. 63. See also, Motion of the United States for Modification of Decree and Supporting Memorandum, December 1978, pp. 17-23.

[7]Stipulated judgments were entered in the following cases: *United States v. Denham*, 73-495-ALS (U.S.D.C. 1975); *United States v. Curtis*, 72-1624-DWW (U.S.D.C. 1977); *Cocapah Tribe of Indians v. Morton*, 70-573-PHX-WEC (D. Ariz. 1975); *United States v. Brigham Young University*, 73-3058-DWW (U.S.D.C. 1976).

be diminished on the basis of third party litigation without the participation of the California Agencies.

Finally, it must be noted that this Court's language in its 1979 Supplemental Decree in this case supports the California Agencies' claims that this Court did not intend, nor will it accept, these unilateral actions as final determinations of boundary disputes. The Court wrote:

> ". . . provided that the quantities fixed in paragraphs (1) through (5) of Article II(D) of said [1964] Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona v. California*, *supra*, 439 U.S. at 421.

Thus, it is clear that the parties in requesting entry of this Order and this Court in making the Order regarded the boundaries as still in dispute. Otherwise, it would make no sense to so word the provision for most of the actions upon which the Special Master relies occurred prior to the entry of the Order.

It is clear that the Special Master has erroneously interpreted this Court's 1964 decree in accepting as final certain unilateral administrative actions, as well as district court cases to which the California Agencies were not parties.

Therefore, if the claims of the United States and the Tribes are to go forward, there must first be a final boundary determination of the disputed boundaries.

C. This Court, Under the Circumstances Presented in This Case, Is an Appropriate Forum to Determine the Boundary Issues, Through Proceedings Before a Special Master.

As has been clearly demonstrated above and in the Exceptions' Brief filed by the State Parties, the boundaries of the reservations have not been finally determined. Thus, the

motion by the United States and the Tribes for modification of the decree is premature for a crucial element of their claim has not been met.

Recognizing then that such claims are premature, the State Parties have nevertheless urged that the Tribes' *Winters* rights be finally determined here.[8]

The Special Master, however, erroneously reasons that this Court is an inappropriate forum in which to try the boundary issues premised upon two assumptions — that the Court in its 1964 decree contemplated that such a determination would be made elsewhere, and that this is a collateral proceeding in which surveys conducted by the Department of the Interior are conclusive. (1982 Report, pp. 66; 68-69.) That both assertions are incorrect will be demonstrated below.

The Special Master first reasons that the Court's rejection of the former Master's boundary determinations as "unnecessary" to be determined "here" ". . . indicates that it was adequate to do so elsewhere." (1982 Report, p. 66.) The California Agencies agree that the Court contemplated that such a determination could indeed have been made elsewhere, but the language of the Court does not preclude the possibility that such an action might also be brought in the Supreme Court.[9] Moreover, the difficulty in the prior proceeding with the failure to join interested land claimants would be ameliorated here if the Agencies' suggestion to join such parties is accepted.[10] Even if such private indi-

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[8]Response of the States of Arizona, California, and Nevada and the other California Defendants to the Motion of the United States for Modification of Decree, February 14, 1979, pp. 22-25.

[9]The Special Master concedes this possibility as to title disputes. (1982 Report, p. 66.)

[10]Memorandum of the Urban Agencies re the Indian Reservation Boundary Question, April 12, 1979, p. 2.

viduals are not joined, it is clear that a determination as to the boundaries for water allocation purposes could be made, as that is what occurred in the prior proceeding. *Arizona v. California, supra,* 373 U.S. 601.

If no determination of the boundary issues is made by this Court now, no additional water allocations may be made, for a crucial element of the claimants' claim will not have been established.

Additionally, it should be noted that the California Agencies do not quarrel with the proposition that a party claiming title to land, but refused water, might bring an action encompassing the boundary question. (1982 Report, pp. 66-67.) However, the California Agencies would still not be bound by such a determination unless they were parties to those actions; thus there would still be no final determinations of the boundaries and the provision for such actions does not preclude the determination of the issues by the Supreme Court.

Moreover, the assertion by the Special Master that no boundary determination may be made because boundaries fixed by surveys of public lands by the Secretary of the Interior are conclusive in collateral proceedings is erroneous.

First, it must be noted that such a rule, even if viable in this case, could not apply to the Fort Yuma Reservation, since what was involved there was not a survey question, but the authority of the Secretary of the Interior to in effect determine that an agreement, ratified by Congress, is null and void.

Secondly, the cases[11] relied upon by the Special Master did not involve the validity of boundaries upon which in-

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[11]*Borax Consolidated, Ltd. v. City of Los Angeles,* 296 U.S. 10, 16-17 (1935); *Stoneroad v. Stoneroad,* 158 U.S. 240, 250-252 (1895); *Russell v. Maxwell Land Grant Co.,* 158 U.S. 253 (1895); *Knight v. United States Land Association,* 142 U.S. 161, 176-178 (1891); *Cragin v. Powell,* 128 U.S. 691, 698-699 (1888).

valuable water rights turned. Rather, those cases involved claims between parties to lands dependent in part upon federal surveys. Thus, to allow the United States to insulate such orders from review would be contrary to due process principles. Indeed, the unilateral determination by the United States of the very issue in the case was disapproved in *United States v. State of Louisiana,* 229 F.Supp. 14 (Lafayette Division 1964).

Finally, the Special Master attempts to answer the California Agencies' arguments that they have been denied their day in court by suggesting they might bring an action challenging Secretarial orders pursuant to the Administrative Procedure Act. (1982 Report, pp. 72-73.) Such a suggestion does not eliminate elements of the plaintiffs' claims which must be proved. That boundaries might be the subject of an action elsewhere does not mean that they need not be first established before an additional water allocation may be made.

Moreover, it is uncertain that such a determination could in fact be made elsewhere, since the United States and the Secretary have taken the position in a motion to dismiss, filed in an action brought by The Metropolitan Water District of Southern California and the Coachella Valley Water District[12] to determine these boundary disputes, that the plaintiffs do not have standing, and that the United States is immune.

Thus, if this Court is not an appropriate forum, there may be no forum available. Invaluable water rights could never then be fully and fairly adjudicated.

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[12]Civ. Action No. 81-0678-GT(M) filed in the Federal District Court for the Southern District of California. Copies of the Amended Complaint, United States' Motion to Dismiss, and the Order of the District Court are being lodged with the Court. We request this Court take judicial notice of these pleadings pursuant to Federal Rule of Evidence 201.

In light of the foregoing, it is apparent that in order to establish their *Winters* rights, the claimants here must establish that the lands are within the reservations; absent such a determination, no modification can be made. Further, it is clear that this Court is an appropriate, indeed, perhaps the only forum in which such claims might be resolved.

Finally, it should be noted that the Special Master's assertion that:

> "The various Secretarial Orders have defined the ambiguities or removed the inconsistencies which earlier caused uncertainty.
>
> . . . The disputes presented to the prior Master and the Court no longer exist." (1982 Report, p. 67.)

is clearly erroneous. Basic errors and inconsistencies respecting the disputed boundries remain and will be demonstrated below.

II.

THE PORTION OF THE WESTERLY BOUNDARY OF THE COLORADO RIVER INDIAN RESERVATION DESCRIBED AS "DOWN THE WEST BANK" OF THE COLORADO RIVER, IS THE BANK OF THAT RIVER AS IT NOW EXISTS SUBJECT TO THE USUAL RULES OF EROSION, ACCRETION AND AVULSION.

In the prior proceedings of this case before Special Master Rifkind (hereinafter the "Former Master"), the United States claimed that that portion of the westerly boundary of the Colorado River Indian Reservation which was described in the Executive Order amending the boundaries of the reservation as ". . . thence in a direct line toward the place of beginning to the west bank of the Colorado River; *thence down said west bank to a point opposite the place of beginning* . . ." meant the actual location of that west bank on the date of the Executive Order (May 15, 1876), and that the best evidence of that location was a survey of 1879 of the northerly portion and a survey of 1874 of the

southerly portion. The California Parties insisted that this description, under the usual legal rules applicable to river boundaries, meant the west bank *as it moved from time to time* subject to the rules of accretion, erosion and avulsion.

The former Master agreed with the California Parties and made findings and conclusions to this effect.[13] This Court ruled, however:

> "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve these disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." *Arizona v. California*, 373 U.S. at 601 (1963).

The 1964 decree (376 U.S. at 345) contained this reservation:

> ". . . provided that the quantities fixed in this paragraph and paragraph (4) [dealing with the Colorado River Indian Reservation] shall be subject to appropriate adjustment by agreement or decree of this court in the event that the boundaries of the respective reservations are finally determined"

The 1979 Supplemental Decree contained a similar reservation. (439 U.S. at 421.) As a consequence, with two exceptions, no water was allocated to the Colorado River Indian Reservation for lands claimed by the United States to be within the reservation westerly of the present location of the Colorado River in the area covered by the description in question.[14]

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[13]Report of the former Master, pp. 269-278.

[14]The two exceptions to this were an area of 2058 irrigable acres in the Olive Lake cutoff area and an area of 222 acres in the 9th Avenue cutoff area. (See Article IIA, Supplemental Decree, *Arizona v. California*, 439 U.S. 419, 428 (1979).) These two areas lie westerly of the present Colorado River and westerly of the 1874 meander survey, and were areas claimed to have been left stranded as a result of avulsive changes in the river in 1920 and 1942, respectively.

Subsequent to the Court's opinion, the Secretary of Interior, relying on an opinion of the Solicitor, on January 17, 1969, three days before he went out of office, issued an order directing that along approximately the northerly two-thirds of the disputed boundary, the meander surveys of 1879 and 1874 were to be considered the actual westerly boundary of the reservation.

In the present proceeding before the Special Master, the United States and the Indian Tribes have insisted that the westerly boundary in the area in dispute is the 1879-1874 survey location for the northerly two-thirds of the relevant boundary and the moving river boundary for the lower one-third, subject to the rules of accretion, erosion and avulsion.[15] The State Parties contended that this revised boundary claim was erroneous and demanded an opportunity to litigate the matter. The United States and the Indian Tribes contend the Secretary's orders are unassailable. The Special Master ruled that the Secretary's determination as to boundaries was sufficient for purposes of this case, accepting the boundary changes put forth in the motion of the United States filed on December 22, 1978 (1982 Report, p. 76), which included the Secretary's order of January 17, 1969, as to the Colorado River Indian Reservation.

We have elsewhere discussed the question of whether the State Parties are entitled to litigate the various unilateral boundary changes made by the different Secretaries of the Interior. (See, (Briefs in support of exceptions).) It is our intention here to argue that as a matter of law, the Secretary's order of January 17, 1969, relating to the westerly boundary

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[15]We have been, and continue to be baffled as to how the phrase "thence down said west bank" can mean one thing for the northerly twenty miles, and something else for the southerly ten miles of an undivided description or call. We shall discuss this further herein.

of the Colorado River Indian Reservation is wrong, and that the Court ultimately should decide and enter an order that in the relevant portion of the reservation, the westerly boundary is the west bank of the Colorado River subject to the usual rules of accretion, erosion and avulsion, and not the location of the west bank on May 15, 1876.

A. Background.

The following facts are taken from exhibits presented to the former Master by the United States in the prior proceedings, and are undisputed:

1. The Colorado River Indian Reservation was created by the Act of March 3, 1865 (13 Stat. 541, 559), which set apart approximately 75,000 acres in the then territory of Arizona for an Indian reservation. (Prior U.S. Exhibit 501.)

2. An Executive Order of November 27, 1873, added adjoining bottom lands in the territory of Arizona to the reservation, thereby bounding the reservation by the Colorado River on the west. (Prior U.S. Exhibit 503.)

3. An Executive Order of November 16, 1874, extended and redescribed the reservation to include lands on the westerly or California side of the Colorado River. (Prior U.S. Exhibit 504.) This order had a final call in California of ". . . thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a southeasterly direction to the point of beginning . . . ."

4. This straight line from the top of Riverside Mountain, California, to the point of beginning (where La Paz Arroyo enters the Colorado River, four miles above Ehrenberg, Territory of Arizona) resulted in leaving some land between the reservation boundary and the Colorado River on the Arizona side. The Indian agent for the Colorado River Indians called this to the attention of the Commissioner of Indian Affairs, noting that a direct line call ". . . cuts off

a large tract of very valuable land upon the east side of the River, and gives a very strong foothold to a certain class of men that desire to be in close proximity to the Indians, for unlawful and improper purposes.'' (Prior U.S. Exhibit 505a.) The Commissioner of Indian Affairs and the Secretary of Interior approved the recommendation for a boundary change. (Prior U.S. Exhibit 505b, 505c.)

5. An Executive Order of May 15, 1876, made the requested correction, and the pertinent description read as follows, as it does today:[16]

> ''. . thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning [still at a point where La Paz Arroyo enters the Colorado River, four miles above Ehrenberg].''

6. No direct survey was made of the west bank of the Colorado River in the 30 miles in question at any time near 1876. In 1873, a contract had been entered into between the Surveyor-General and one Oliver P. Callaway, to survey four townships on the California side of the Colorado River. (Prior U.S. Exhibit 576.) This was done in 1874 (Prior U.S. Exhibit 576a) and resulted in part in the depiction of the west bank of the Colorado River as it bounded the four surveyed townships. Roughly one-half of that meandered line of 1874 (known as the ''Callaway Line'') is in the area of the Colorado River Indian Reservation and the other half lies southerly thereof. (See, Prior U.S. Exhibits 579b and 579c.)

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[16]An additional change made by Executive Order of November 22, 1915, (Prior U.S. Exhibit 506) affected lands in Arizona only.

7. In 1878, the Surveyor-General of the United States entered into a contract with one W. E. Benson, to survey some 18 townships in California. (Prior U.S. Exhibit 578.) This was accomplished in 1879 (Prior U.S. Exhibit 578a), and in part Benson meandered the west bank of the Colorado River northerly of the Callaway line. A portion of the "Benson line" is in the area of that portion of the Colorado River Indian Reservation in dispute here. (See, Prior U.S. Exhibits 579a and 579b.)

8. The United States Bureau of Land Management in 1958 made a dependent resurvey of the meander lines of that portion of the Callaway and Benson surveys relating to the 1876 call in question. (Prior Tr. pp. 20,010-20,022; Prior U.S. Exhibits 593a-f.) That portion of both those meander lines which affects this boundary dispute, is depicted on Prior U.S. Exhibits 579a, 579b and 579c. At two places (Section 18, T.5S, R.24E, S.B.M.; and S.13, T.6S, R.23E. S.B.M.) that line crosses the present location of the Colorado River and traverses land located in Arizona. (Prior U.S. Exhibit 579c; See also depiction of meander surveys on Prior U.S. Exhibit 562a.)

B. The Call "Down the West Bank" Designated a Moving Boundary.

The question of what is the meaning of the call "thence down said west bank [of the Colorado River]" is easy of resolution. This Court on numerous occasions has answered the question, holding that barring special circumstances, when a river is made a boundary, that boundary moves as the river moves, subject to the rules of accretion, erosion and avulsion.

> "The states are not in dispute about the applicable law. They agree that when changes take place by the slow and gradual process of accretion the boundary

> moves with the shifting in the main channel's course. Likewise, they agree that a sudden or avulsive change in that course does not move the boundary but leaves it where the channel formerly had run." *Kansas v. Missouri,* 322 U.S. 213, 215 (1944). See also *Arkansas v. Tennessee,* 397 U.S. 88 (1970); *Arkansas v. Tennessee,* 246 U.S. 158, 171 (1918); *Missouri v. Nebraska,* 196 U.S. 23, 35 (1904); *Nebraska v. Iowa,* 143 U.S. 359, 361-67 (1892); *County of St. Clair v. Lovingston,* 90 U.S. (23 Wall.) 46, 68 (1874).

This rule applies whether the boundary is the "thalweg" or middle of the main channel, as in most of the cases cited above, or is one side or the other of the river, such as the low-water mark on the north side of the Ohio River. (*Indiana v. Kentucky,* 136 U.S. 479, 508 (1890)[17] And indeed, this rule obtains when the boundary is a particular bank of a river. In *Howard v. Ingersoll,* 54 U.S. (13 How.) 380 (1851), this court ruled that the boundary between Georgia and Alabama along the Chattahoochee River was, by the language of a territorial cession by Georgia, the western bank of the River. Nine years later in *Alabama v. Georgia,* 64 U.S. (23 How.) 505, 515 (1860), the court again dealt with the western boundary of Georgia along the Chattahoochee River, and described it thusly:

> "We also agree and decide that this language implies that there is ownership of soil and jurisdiction in Georgia in the bed of the river Chattahoochee, and that the bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an

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[17]In *Ohio v. Kentucky,* 444 U.S. 335, 337-38 (1980), this Court held that because of the historical factors and special circumstances connected with the cession by Virginia of the land north of the Ohio River in 1783, the low-water mark as it existed on June 1, 1792, when Kentucky became a state, was the permanent boundary irrespective of future changes in the course of the river.

> increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn."
>
> See also *Packer v. Bird,* 137 U.S. 661, 663, 671-73 (1891).

The court undoubtedly contemplated a moving boundary, not the bank as it existed at the time of the act of cession by Georgia in 1802, or the date of statehood of Alabama in 1817, where otherwise the river would neither always remain in Georgia as intended, nor constitute its western boundary.

The court also dealt with a bank of a river, the southern bank of the Red River in *Oklahoma v. Texas,* 260 U.S. 606, 636 (1923), and here unequivocally held that the boundary is a moving one, subject to the rule of accretion, erosion and avulsion. (This particular boundary was first described in the treaty of 1819 between Spain and the United States.)

> "Our conclusion is that the cut bank along the southerly side of the sand bed constitutes the south bank of the river, and that the boundary is on and along that bank at the mean level of the water when it washes the bank without overflowing it.
>
> The boundary as it was in 1821, when the treaty became effective, is the boundary of to-day, subject to the right application of the doctrines of erosion and accretion and of avulsion to any intervening changes. Of those doctrines this court recently said:
>
> 'It is settled beyond the possibility of dispute that where running streams are the boundaries between states, the same rule applies as between private proprietors; namely, that when the bed and channel are changed by the natural and gradual processes known

> as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel.' *Arkansas v. Tennessee,* 246 U.S. 158, 173, 62 L. ed. 638, 647, L.R.A. 1918D, 258, 38 Sup. Ct. Rep. 301.''

It must be concluded that the call to the west bank of the Colorado River in the Executive Order of May 15, 1876, was intended to delineate the western side of the river on the bank with the same meaning as defined by this court in *Oklahoma v. Texas, supra.* Indeed, the Solicitor in his 1969 opinion supporting the Secretary' order, concedes this:

> ''From the point where the line from Riverside Mountain intersects the bank of the river, as described above, the second segment of the boundary should follow downstream along the bank of the river at the line of ordinary high water as it existed at the time of the issuance of the Executive Order of May 15, 1876, to the south boundary of section 12, T. 5 S., R. 23 E., S.B.M., subject to the application of the doctrine of erosion and accretion and avulsion to any intervening changes. *Oklahoma v. Texas, supra.*
>
> With regard to such intervening changes, when the banks of a river change gradually and imperceptibly, the process is called erosion and accretion and a riparian owner's boundary will remain the stream. In cases where a river suddenly abandons its old bed and seeks a new course, the change is termed an avulsion and a riparian owner's boundary will become fixed and permanent along the line of the former channel. *Ne-*

braska v. Iowa, 143 U.S. 359 (1892)." Opinion of Solicitor, January 17, 1969, p. 5.[18]

There are no special circumstances or historical factors that would lead to a different result such as the court found in *Ohio v. Kentucky, supra,* (444 U.S. 335). Indeed, the record shows to the contrary. The purpose of the 1876 Executive Order was to make the river the boundary and exclude settlers on the Arizona side, or as the Indian agent described them, ". . . a certain class of men that desire to be in close proximity to the Indians, for unlawful and improper reasons [read: liquor traders]." The 1873 amendment to the boundary had made the river the boundary, adding the bottom lands to the Reservation. The 1874 change had inadvertently cut off some of this area, leaving non-reservation lands between the Reservation and the river. The 1876 Executive Order was intended to correct this. This of necessity contemplated a moving boundary.

The Secretary's order would defeat that purpose. As the river meandered easterly, it would, as it has done, leave accretion lands in California, and under the Secretary's Order, leave no river barrier between the Indians and the undesirable settlers on this land, which could only be reached by crossing the river. Similarly, as the river mean-

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[18]We do not wish to be understood by agreeing that the western boundary of the Colorado River Indian Reservation in this particular area is the western bank of the river, that the bed of the river itself is within the Reservation. This stretch of the Colorado River is navigable (*Arizona v. California,* 283 U.S. 423 (1931)), and thus ownership of the bed of the western half has been in the State of California since its admission in 1850, well before the creation of the Colorado River Indian Reservation. (*Pollard v. Hagen,* 44 U.S. (3 How.) 212 (1845); *Mumford v. Wardwell,* 73 U.S. (6 Wall.) 423 (1867). Arizona became a state (1912) after the creation of the Reservation. It is our contention, however, that under the doctrine of *Montana v. United States,* 450 U.S. 544 (1981), ownership of the bed of the eastern half of the Colorado River also passed to Arizona. This issue is being litigated before the 9th Circuit currently. (*United States v. Aranson,* 9th Cir. No. 77-2295.)

ders westward, as it has done in the southern portion of the area in question, there would be non-reservation lands between the river and the reservation on the Arizona side, the very circumstance which led to the 1876 Executive Order in the first place. Thus, it must be concluded that the only circumstance surrounding this Order support the application of the usual rules as to river boundaries, and the 1876 Executive Order created a moving boundary.

C. The Solicitor's Reasoning as to Why the Line Was Fixed Permanently as of 1876 Has No Legal Support.

The Solicitor's opinion of January 17, 1969 on which the Secretary based his boundary order of the same date, contains two parts. The first deals with the call from the top of Riverside Mountain, California, to the west bank of the Colorado River.[19] The opinion concludes that the west bank ". . . must be taken to mean the line of ordinary high water as it existed in 1876;" citing *Oklahoma v. Texas, supra.* We agree that the "west bank" call in the Executive Order is to the ordinary high water line, and that case is ample support of that proposition.

It is the second part of the opinion with which we take exception, that the intent of President Grant on May 15, 1876, was to freeze that west bank line as of that date. The Solicitor's Opinion correctly cites *Nebraska v. Iowa, supra* (143 U.S. 259), for the proposition that river boundaries move as the river gradually and imperceptibly adds accretion to one side and erodes the other, while in the event of an

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[19]The Department of Interior, was, as of 1969, concerned that the point which everyone previously thought was the highest point on Riverside Mountain was, in fact, not so, and that the actual highest point was located approximately 500 feet to the west. We are not challenging this change of location of the top of Riverside Mountain.

avulsion, the boundary line will become fixed along the line of the former channel. The Solicitor's Opinion also correctly recognizes that the west half of the bed of the Colorado River, being navigable at the point in question, is owned by the state of California in its sovereign capacity. (*Pollard's Lessee v. Hagan, supra* (44 U.S. 3 How. 212); *Mumford v. Wardwell, supra* (73 U.S. (6 Wall.) 423, 436.)

The Opinion then points out that each state, as owner of the land beneath navigable waters, may choose by its own law whether to claim the high water line, the ordinary low water line, or the center of the stream. (*Barney v. Keokuk*, 94 U.S. 324, 338 (1877); *Packer v. Bird, supra.*) California has chosen by Section 830 of the Civil Code, to claim only to the low-water mark. On the surface, this would appear to leave the adjoining upland owner owning down to the low water line along navigable waters in California. Since, the Opinion concludes, the United States was the only owner of lands abutting the west bank of the Colorado River in the area in question, the United States in 1876 owned to the low water mark. The Opinion then concludes with this astounding and unsupported statement:

> "In issuing the Executive Order of May 15, 1876, the United States effectively severed that portion of the lands between the high and low-water marks by including them in the reservation, thus, effectively segregating these lands from public lands lying to the west thereof. It must be concluded that the Executive Order was effective to reserve any lands within the river then

owned by the United States as such order clearly intended that the river be included in the reservation.''[20]

The conclusion that the 1876 line was a fixed, permanent boundary, has many flaws. First, it is directly contrary to the purpose for which the river was chosen as boundary, as shown by the evidence produced by the United States. The river was to be a buffer between the Reservation and the undesirable white settlers. If this boundary is fixed by the bank as of a particular time, as soon as the river moves, and it did with regularity before being controlled by the dams in this century, this purpose would be thwarted each time the river moves. Only a moving boundary would keep the desired barrier in being.

Secondly, this severance theory would prevent future purchasers or settlers of the adjoining uplands on the west bank, which were part of the public domain, from obtaining the benefits of the rules of accretion and erosion. There is no evidence that the President intended this in 1876. Moreover, the theory requires a conclusion, belied by physics and hydrology, that as the low water line moves, the high

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[20]This theory of a severing of the area between high and low water along the west bank of the Colorado River resulting in the freezing of the reservation boundary along the high water line was not advanced in the proceedings before the former Master. There the United States advanced the theory that the call of ''down said west bank'' fixed the ''reservation boundary on the relatively permanent acclivity separating the bed of the river from the adjacent upland.'' (Brief in Support of Findings of Fact and Conclusions of Law Proposed by the United States of America, April-June 1959, pp. 31-35.) The Government cited and quoted *Oklahoma v. Texas, supra*, but failed to recognize the rule in that case that a boundary described as a bank denotes a moving boundary. (260 U.S. at 636.) At least the Solicitor's Opinion recognizes this rule, but attempts to evade it by creating a new high-low water zone severance theory. Further, before special Master Rifkind, the United States claimed that the boundary was fixed along the 1876 line (as evidenced by the 1879 and 1874 surveys) throughout its entire length from the interception of the west bank by a line from the top of Riverside Mountain to a point opposite the point of beginning. Here, the Solicitor decided to stop two-thirds of the way down.

water line remains intact where it was in 1876. This is simply not so. As the process of accretion and erosion takes place, both the high water line, that is the line which ". . . confines the water . . . when they reach and wash the bank without overflowing it" (*Oklahoma v. Texas, supra,* 260 U.S. at 632), and the low water line, that is the line which is always under water (*Alabama v. Georgia, supra,* 64 U.S. at 515), also moves, not necessarily in parallel, depending on the topography. The new accretion is to the uplands and belongs to the uplands. (*County of St. Clair v. Lovingston, supra,* 90 U.S. (23 Wall.) 46, 69.)

The Solicitor's Opinion also misreads California law on its low water claim. While it is true that California Civil Code section 830 constitutes a grant by the state to the adjoining upland owner of the land to the beds of navigable non-title bodies to the low water mark, that grant is not absolute. As the California Supreme Court recently held in *California v. Superior Court (Lyon)*, 29 Cal.3d 210 (1981), and *California v. Superior Court (Fogerty)*, 29 Cal.3d 240 (1981), that grant is subject to the public trust reserved in the state to use the lands between low and high water, and this trust includes the use of such lands by the public for commerce, navigation, and fishing, as well as recreation uses and the right to preserve the tidelands in their natural state. (29 Cal.3d at 230-32.) The existence of this public trust, and its possible exercise by the state or its citizens, is inconsistent with any exclusive use of Indian reservations, and belies any intent to sever the zone from the adjoining uplands.

Finally, we must comment on the hypocrisy of the United States claiming this fixed boundary for only two-thirds of the call. The call itself is undivided, being "thence down said west bank to the point opposite the place of beginning." Yet the United States, before Special Master Tuttle, now

claims that this call means that the west bank is fixed in 1876 from the beginning of the call (at the point the line from Riverside Mountain intercepts the River) southerly through Section 12, T.5S, R.23E S.B.M. At that point the line goes due east to the present river and follows the west bank of the present river to the southerly boundary, subject to the rules of accretion, erosion and avulsion. No legal theory is advanced anywhere by the United States as to why the line is fixed along the northerly two-thirds of the call, but is a moving boundary along the southerly one-third. It is readily apparent as to why the United States would want to make this claim, legally supportable or not. A glance at Prior U.S. Exhibit 579C, shows that the 1876 line, as evidenced by the 1879 and 1874 surveys, crosses the Colorado River as it exists today in the southerly third, and if that were the boundary, the Indian Reservation would lose thousands of acres of land, much of it practicably irrigable. Thus, the United States is attempting a classic case of having one's cake and eating it at the same time. The law, however, does not support the United States in this endeavor, and no amount of wishful thinking will change the undivided call of the Executive Order, nor alter its original purpose.

The United States has attempted to avoid having a judicial determination made of the westerly boundary of the Colorado River Indian Reservation. It is unconscionable for the United States to set a boundary arbitrarily and unilaterally and then demand water rights based on those boundaries at the expense of parties who have contracts for water from that very government.

The foregoing discussion clearly indicates that no final determination of the boundary has yet been made. The California Agencies respectfully urge this Court to remand this boundary dispute for a final determination with the partic-

ipation of the California Agencies or indeed, given the clear legal authority presented, this Court might rule on the boundary of the Colorado River Indian Reservation as a matter of law. The Court should decline to award any additional water, until the reservation boundaries have been finally determined.

III.

THE 1978 SOLICITOR'S OPINION PURPORTING TO VOID AN 1893 AGREEMENT BETWEEN THE UNITED STATES AND THE QUECHAN TRIBE AND TO RESTORE SOME 25,000 ACRES OF LAND TO THE FORT YUMA INDIAN RESERVATION IS IN ERROR.

This dispute involves the question of whether some 25,000 acres of land in the vicinity of the Fort Yuma Indian Reservation in California (''disputed lands'') should be deemed to be part of the Fort Yuma Indian Reservation and the diversion rights of those acres.[21] No claim was made for those lands in the original proceeding, presumably because a 1936 Solicitor's Opinion (the ''Margold Opinion'')[22] had determined that such lands were *not* part of the reservation.

Subsequent to this Court's 1963 decision, the boundary issue came before the Solicitor again in 1968 and was later raised by the Fort Yuma Tribes before the Secretary in 1975. In each instance Solicitor Weinberg[23] and Austin[24] affirmed the Margold Opinion. On December 20, 1978, with no prior notice to interested parties,[25] the Solicitor issued a new opinion (the ''Krulitz Opinion'') overruling the three earlier Solicitors' opinions and ignoring two district court decisions. (86 I.D. 3.) It is that opinion which the United States, the Tribes and the Special Master contend constitutes a ''final determination'' of the Fort Yuma boundary insulated

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[21]1982 Report, p. 254.

[22]Solicitor's Opinion M-28198 (January 8, 1936). A copy of this Opinion is being lodged with the Court. We request this Court take judicial notice of said opinion pursuant to Federal Rule of Evidence 201.

[23]Memorandum from the Solicitor to the Secretary of the Interior dated June 12, 1968. A copy of this opinion is being lodged with the Court. We request this Court take judicial notice of said opinion pursuant to Federal Rule of Evidence 201.

[24]Solicitor's Opinion M-36886 (January 18, 1977), 84 I.D. 1 (1977).

[25]The interested officials of California and Arizona, along with representatives of the Quechan Tribe, participated fully in the proceedings leading to the Austin Opinion.

from review by the States California Agencies in this proceeding. (1982 Report, pp. 56-57, 62-63.)

A. Background.[26]

By executive order of January 9, 1884,[27] President Arthur established the Fort Yuma Indian Reservation in California for the Yuma (now called Quechan) Indians. The reservation had two distinct areas — a harsh desert mesa and a relatively fertile area along the flood plain of the Colorado River. In the early 1890s non-Indian farmers moved into the region adjacent to the reservation and began practicing irrigated farming. Several companies planned to construct irrigation canals in the area and were granted rights-of-way across federal lands by legislation enacted in 1893 which required the companies to serve the occupants of the Yuma Reservation.[28] In that same year the Quechans petitioned the President and Congress to have their lands irrigated and offered to cede their rights in the reservation to the United States for settlement by non-Indians in return for individual allotments of irrigable land.[29]

By the Act of March 3, 1893, Congress had authorized the Secretary of the Interior "to negotiate with any Indians for the surrender of portions of their respective reservations, any agreement thus negotiated being subject to subsequent ratification by Congress."[30] Pursuant to that authority, and in response to the Tribe's petition, the Secretary appointed a three-man Commission which negotiated an agreement

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[26]Most of this background material is summarized from the Austin Opinion.

[27]Kappler, *Indian Affairs — Laws and Treaties* (1904), p. 832.

[28]Act of January 20, 1893, 27 Stat. 420; Act of February 15, 1893, 27 Stat. 456.

[29]S. Exec. Doc. No. 68, 53rd Cong., 2d Sess. 14-16 (1894).

[30]27 Stat. 612, 633.

with the Tribe on December 4, 1893 (hereafter the "1893 Agreement").[31]

The 1893 Agreement can be summarized as follows. By Article I the Quechans, "upon the conditions hereinafter expressed," relinquished all their right, title, claim or interest in the Yuma Reservation. Article II provided for the allotment of five acres to each individual Indian. Article III provided for the selection of allotments and the disposition of the residue of the reservation which was subject to irrigation. The unalloted irrigable lands were to be surveyed and subdivided into 10-acre tracts. The tracts were to be appraised subject to the approval of the Secretary of the Interior and sold at public sale for not less than the appraised value. After a second public offering, the Secretary of the Interior was empowered to sell the tracts at private sale for not less than the appraised value. Article IV provided that the proceeds from such sales would be placed in the Treasury to the credit of the Quechans with interest at five percent per annum, subject to appropriation by Congress or application by the President for the payment of water rents, the building of levees, irrigation ditches and laterals, the construction and repair of buildings, the purchase of tools, farm implements and seeds, and the education of the Quechans. Article V authorized the Secretary to issue 25-year trust patents to the allottees. Article VI provided that all lands not subject to irrigation were to be opened to settlement under the general land laws. Article VII excepted from the operation of the agreement a tract of land, with buildings, to be used as an Indian school.

The 1893 Agreement was "accepted, ratified and confirmed" by Congress in Section 17 of the Act of August

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[31]S. Exec. Doc. No. 68, *supra*, n. 9 at 3, 19-22.

15, 1894, 28 Stat. 286, 335 (1894) (the "1894 Act"). It also required the Colorado River Irrigation Company, to which a right-of-way had been granted the previous year, to begin construction of a canal within three years or forfeit the right-of-way. It is clear that this canal was intended to be the vehicle by which water would be brought to the irrigable Indian lands. The Act also provided that "all of the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws."

The private canal company never constructed the proposed canal. However, with the enactment of the Reclamation Act of 1902,[32] the Secretary proposed that the benefits of that Act be extended to the Quechan lands. Congress responded in the Indian Appropriations Act of 1904, 33 Stat. 189, 224 (the "1904 Act"), which authorized the Secretary to serve the Quechan irrigable lands in connection with any reclamation project for that area and revised the financial terms under which the Quechans were to receive water and under which unallocated irrigable lands were to be sold. While the earlier financial terms were more favorable to the Quechans, it is uncertain whether the 1904 Act, as actually administered, may have been to their advantage. In 1911, Congress increased the allotment to individual Indians from 5 to 10 acres. 36 Stat. 1059, 1063.

Initial diversion and distribution works were completed by 1904 and water delivered to the unallotted irrigable lands in 1910. Disposal of those lands began in that year. In 1912, 8,110 acres in the western part of the irrigable area were

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[32]32 Stat. 388, as amended, 43 U.S.C. § 371 et seq.

allotted to the Quechans. The distribution system for that area was substantially completed by 1915 and water deliveries began a few years later. The non-irrigable lands have never been opened to settlement and sale as provided in the 1894 Act.

The administrative treatment of the lands within the Department of the Interior from 1894 until the early 1930s evidenced uncertainty and confusion over whether the non-irrigable lands were Indian lands or public domain lands. As a result of a dispute over their status between the Bureau of Reclamation and the Bureau of Indian Affairs in 1935 in connection with construction of the All-American Canal across those lands, the Secretary of the Interior requested an opinion on the matter from Solicitor Nathan Margold. On January 8, 1936, Solicitor Margold held that the 1893 Agreement, as ratified by the 1894 Act, extinguished the Quechan's title to the non-irrigable lands of the 1884 reservation.

In the earlier proceedings in *Arizona v. California,* 373 U.S. 546 (1963), no issue was raised as to the proper boundary of the Fort Yuma Indian Reservation, and the United States asserted no water rights claim for the dispute area. In 1968, Solicitor Weinberg reaffirmed the Margold Opinion in approving a lease of some of the lands by the Bureau of Land Management.

In the early 1950s, the Quechans presented a number of claims before the Indian Claims Commission and the Court of Claims for compensation or other relief in connection with the disputed cession. The Tribe filed a motion to dismiss their claim without prejudice in 1972, but the United States objected to the dismissal being granted without prejudice. The motion has not been pursued and the matter is still pending before the Court of Claims. (Indian Claims Commission Docket No. 320.)

In 1973 review of the matter was undertaken by the Secretary of the Interior at the request of the Tribe. A draft opinion favorable to the Quechans was prepared by the Indian Affairs Division of the Solicitor's office and subjected to extensive review, briefing and oral argument by both Indian and non-Indian interests. On the basis of that review, Solicitor Austin concluded that he could not accept the draft opinion and reaffirmed the Margold Opinion on January 30, 1976. A lengthy formal opinion to that effect was later issued. 84 I.D. 1 (1977).

When the Carter Administration took office in January 1977, Secretary Andrus agreed to have Solicitor Krulitz review the matter. Contrary to Solicitor Krulitz's assurances that he would involve interested parties in his review, they were neither apprised of the progress of that review nor invited to participate. On December 20, 1978, Solicitor Krulitz issued an opinion overruling the earlier Margold, Weinberg and Austin opinions. He concluded that the 1893 agreement was a conditional cession of the Quechans' non-irrigable acreage which was never effected because the specific conditions of the agreement had not been complied with. 86 I.D. at 4-5. The following day the United States filed its present claims for additional water for the Fort Yuma disputed lands in this proceeding.[33]

B. The Issues.

The basic issues in the controversy are:

1. Whether the 1893 Agreement effected an immediate cession of the Quechans' lands to the United States in return for a promise by the United States to perform certain acts,

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[33]Motion of the United States for Modification of Decree (December 21, 1978).

or whether the obligations assumed by the United States were conditions precedent to the cession;

2. If the cession is construed as conditional, whether the reclamation and other benefits provided the Quechans under the 1904 Act were designed to implement the 1893 Agreement and substantially satisfied those conditions, or whether the 1904 program completely superseded the 1893 Agreement and left the non-irrigable lands in Tribal ownership.

C. Argument.

The Krulitz Opinion justifies overruling the three previous Solicitors' opinions and ignores two relevant district court decisions primarily on the following rationale (86 I.D. at 6).

> The conclusions of this opinion flow from premises which differ from those in the 1936 and 1977 opinions in two fundamental respects: (a) a finding that the documents, rather than being clear, contain ambiguities in critical areas; and (b) canons of construction applied here with are uniquely applicable to controversies involving Indian rights as opposed to those which may apply to controversies generally.

The California Agencies contend that the Austin Opinion properly found no ambiguities in the relevant documents and appropriately recognized the canons of construction applicable to Indian disputes in construing them. The Krulitz Opinion, on the other hand, unfortunately failed to heed this Court's explanation in *Shoshone Indians v. United States*[34] that the decisions on this point:

> "... meant no more than that the language should be construed in accordance with the tenor of the treaty.

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[34]324 U.S. 335, 353 (1945).

> That, we think, is the rule which this Court has applied consistently to Indian treaties. We attempt to determine what the parties ment [*sic*] by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

1. The Basic Premise of the Krulitz Opinion Is Erroneous.

The 1893 Agreement reflected basic national Indian policy of that period. That policy was designed to reduce the size of Indian reservations, break down the pattern of communal tribal ownership and direct individual Indians into agricultural pursuits in the manner of the non-Indian community. To that end it embodied a basic approach involving "allotments" of subsistence-size parcels of tribal reservation lands to individual tribal members. Unallotted lands were to be opened to settlement and for sale and the proceeds devoted to the Indians' benefit. The integration of non-Indian settlers with the Indian allottees was intended not only to promote western development but to foster a "civilizing" process among the Indians.[35]

The 1893 Agreement generally followed the basic pattern described above. On its face it is a simple unilateral contract under which the Quechans' carry out the proposed arrangement, *i.e.*, immediate cession of all their tribal reservation lands to the United States, in return for a promise by the United States to allot five-acre parcels to individual members of the tribe and to sell surplus irrigable acres to non-Indian settlers and devote the proceeds to the Indians' benefit. The remaining nonirrigable portion of the reservation ceded to the United States was to be opened to settlement and entry under the general public land laws.

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[35]See generally, Price, *Law and the American Indian*, 531-51 (1973).

Given the water supply situation on the reservation and the desires of the Quechans as reflected in the negotiations leading up to the 1893 Agreement, the California Agencies concede that it may reasonably be concluded that, in addition to the express "terms and conditions" of the agreement, a promise on the part of the United States to provide irrigation for the allotted lands may properly be implied. That implied promise is strengthened by the provisions of the 1894 Act ratifying the 1893 agreement, which contemplated irrigation of the ceded lands from a proposed canal planned for construction across the reservation by the Colorado River Irrigating Company.

The fatal defect in the Krulitz Opinion, however, and which is the keystone of its argument, is that, relying on nothing more than its own *ipse dixit*, it converts the United States' implied promise of irrigation into a "condition precedent" to the effectiveness of the otherwise unqualified present cession of the Quechan lands to the United States. Although the United States did eventually provide irrigation to the Quechan lands as promised, it did so as part of the Federal reclamation program rather than by means of the private canal company. The Krulitz Opinion refuses to recognize this as substantial performance of the United States' obligation and transforms a possible Quechan claim for damages against the United States for failing to provide irrigation precisely in the manner and within the time frame contemplated by the 1893 Agreement into a strained, legalistic argument that completely voids that agreement. That construction of the agreement flies in the face of its plain language, its basic purpose and the then prevailing national Indian policy. Moreover, its Procrustean interpretation not only only escaped the Department of the Interior for three-quarters of a century but would overrule three prior carefully considered Solicitor's opinions on the same point, which

relied in part on prior judicial interpretation of the effect of the 1893 Agreement which is contrary to the Krulitz conclusions. Finally, it is in direct conflict with the representations made by the United States to this Court in the prior proceedings in this case with respect to the effect of that agreement as a basis for the decreed water rights of the Yuma Indian Reservation.

2. The 1893 Agreement, as Ratified by Congress in 1894, Embodied a Present Cession of All Quechan Lands to the United States in Return for a Promise by the United States to Make Allotments to Individual Indians, Provide Irrigation for Those Lands, Sell the Remaining Irrigable Acreage for the Quechans' Benefit, and Open the Ceded Non-irrigable Lands to Settlement.

Article I of the 1893 Agreement provides that the "Yuma Indians, upon the conditions hereinafter expressed, do *hereby surrender and relinquish* to the United States *all* their right, title, claim, and interest in and to and over" their tribal lands within their reservation (emphasis added). The language is clearly that of *present* cession of the tribal lands. The conditions "hereinafter expressed" are found in Articles II through V, providing for the allotment of five-acre parcels to individual Indians and the sale of surplus irrigable lands for the Indians' benefit, and Article VI, providing that all ceded lands that could not be irrigated were to be open to settlement under the general land laws of the United States. Although Article I refers to the obligations undertaken by the United States in return for the present cession as "conditions," it is clear that they are promises to perform certain acts in the future. In short, the 1893 agreement is a classic textbook example of a contract formed by the performance of an *act* by one party, here the Quechans' cession of their lands, in return for a *promise* by the other, here the United States' promise to make allotments, provide

irrigation for them, and sell surplus irrigable lands for the Indians' benefit.

Not only is the nature of the agreement clear from its terms, but to construe the United States' promise to perform *in the future* as a condition precedent to the clearly stated *present* cession renders the contemplated program impossible of performance. How could the United States make allotments to individual Indians, sell surplus irrigable lands to non-Indians, and open the non-irrigable lands to settlement by non-Indians under the public land laws unless it had *first* obtained full title to the Quechan tribal lands as Article I clearly contemplates? The Krulitz Opinion nowhere resolves this self-generated paradox.

The 1893 Agreement and related legislation must be viewed in the context of Federal Indian policy at that time. Throughout most of the 19th Century the United States had followed a policy of working out accommodations with the Indian Tribes on the basis of treaties by which the various Indian nations ceded to the United States vast expanses of their territory in return for settlement upon designated reservations. In the late 1800's, however, Congress decided to abandon its policy of segregating Indians from the mainstream of American life and instituted a policy designed to break up the tribal holdings by reducing the size of existing reservations and parcelling out sufficient land to individual Indians to make them self-supporting. Surplus lands were to be sold or opened for entry to non-Indian settlers to foster development.

The United States has executed numerous agreements with Indian tribes similar to that executed with the Quechans. However, the California Agencies have found no judicial decisions (and the Krulitz Opinion cites none) in which the promises made by the United States in return for the Indian land cessions necessary to carry out the national

program have been interpreted as "conditions precedent" to the effectiveness of those cessions. On the contrary, in *United States v. Myers*, 206 F. 387 (8th Cir. 1913), the court construed a similar agreement, executed only about a year earlier than the Quechan agreement, squarely consistent with the Austin Opinion. There the court had before it the act of June 6, 1900 ratifying an agreement between the United States and the Kiowa, Comanche and Apache tribes in Oklahoma. At issue was the effect of a tribal land cession to the United States in return for allotments of land to individual tribal members, the setting aside of certain grazing lands for the tribe's use, and the payment of $2 million. The effect of this agreement and the ratifying legislation was described as follows (206 F. at 389, 391-392, emphasis added):

> "The act of June 6, 1900, c. 813, 31 Stat. 676, was passed in ratification of an agreement between the United States and the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma entered into October 21, 1892, whereby, in return for the allotment of land in severalty to the individual members of these tribes, and other good and valuable considerations specified, all these tribal lands, including that in question, were relinquished to the United States. The comprehensiveness of the grant made is disclosed by the following quotations from the act:
>
> '*Subject to* the allotment of land, in severalty to the individual members of the Comanche, Kiowa, and Apache tribes of Indians in the Indian Territory, as hereinafter provided for, and *subject to* the setting apart as grazing lands for said Indians, four hundred and eighty thousand acres of land as hereinafter provided for, and *subject to the conditions hereinafter imposed*, and for the considerations hereinafter mentioned, the said Comanche, Kiowa, and Apache Indians *hereby*

cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following described tract of country in the Indian Territory, to wit: [Here follows the specific description.]

* * *

'As a further and only additional consideration for the cession of territory and relinquishment of title, claim, and interest in and to the lands as aforesaid, the United States agrees to pay to the Comanche, Kiowa, and Apache tribes of Indians, in the Indian Territory, the sum of two million (2,000,000) dollars. * * *'

* * *

When the Kiowa, Comanche, and Apache tribes ceded this land to the United States, it ceased to be Indian country, unless by the treaty by which the Indians parted with their title, or by some act of authority, a different rule was made applicable to the case.

Was there any reservation, express or implied, incidental to the cession and relinquishment by these Indians by which their title to the lands in question was extinguished, that this or any other land conveyed should be devoted to these purposes? We can find none. The treaty of October 31, 1892, confirmed by act of Congress of June 6, 1900, specifies explicitly the *conditions* and considerations *subject to which* the conveyance and cession was made. They are the allotment of land in severalty, the setting apart of 480,000 acres of grazing land, and the payment of $2,000,000 in the manner provided. For these considerations the Indians 'ceded, conveyed, transferred, relinquished and surrendered forever and absolutely, without any reservation whatever, express or implied all their claim,

> title and interest of every kind and character.' It would be impossible to select words operating more completely to extinguish every vestige of Indian title, and releasing the government more absolutely from every obligation, moral as well as legal."

In accord with the foregoing is *Kickapoo Tribe of Kansas v. United States*, 372 F.2d 980 (1967), in which the Court of Claims construed a similar agreement with the Kickapoo Indians as effecting a cession of tribal lands in return for the United States' "contractual promise" to perform certain acts. *Id.* at 987.

The statutory agreement with the Quechans is from the same mold as the agreement with the tribes involved in the cited cases and should be similarly construed to have effected a cession of the tribal lands in 1894 in return for the United States' promise to perform the specified acts.

In cases where the "conditions" specifying the United States' obligations assumed in return for Indian cessions were not fully performed, or were performed (as here) in a manner somewhat different than originally agreed upon, this Court has viewed such actions by the United States as breaches of its obligations for which a claim for damages might lie.[36] We have found no cases in the vast body of Indian law (and the Krulitz Opinion again cites none) where a breach of a contract or trust obligation by the United States has been construed to void the initial cession of lands by the Indians, which is the extreme result the Krulitz Opinion purports to accomplish.

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[36]See, *e.g.*, *Peoria Tribe of Indians v. United States*,, 390 U.S. 468 (1968); *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); *United States v. Blackfeather*, 155 U.S. 180 (1894).

3. The Irrrigation Program Under the 1904 Act Was Intended to Fulfill the United States' Obligations Under the 1893 Agreement.

The principal alleged "failure of consideration" on which the Krulitz Opinion relies to nullify the 1893 agreement is that the United States' implied promise to irrigate the Quechan lands incorporated a specific means of irrigation, namely through a canal proposed to be built by the Colorado River Irrigating Company. That project never materialized. Hence, Solicitor Krulitz argues that the later provision of the promised irrigation by means of the Reclamation Service formed in 1902 will not do. Just why this substituted performance is not adequate satisfaction of the Quechans' expectation is nowhere explained. Rather, the Krulitz Opinion concludes that the 1904 Act was "intended to create an entirely new scheme for the irrigation of the area under which there was no cession of "non-irrigable lands." " (86 I.D. 18-19.) However, the background of the 1904 Act and its legislative history detailed in the Austin Opinion conclusively refutes that thesis. (84 I.D. 41-44.) The Austin view is that the 1904 Act did not wholly repeal the 1894 ratifying act, but only substituted a new method of performing the United States' obligation to irrigate. Indeed, the limited objective of the 1904 legislation, namely, to modify the manner in which the United States was to carry out its obligations assumed in the 1894 Act, is the most plausible explanation as to why no mention is made in the 1904 Act of the non-irrigable lands within the reservation boundary — Congress obviously assumed that the cession of all Quechan lands had already been effected 10 years earlier. Moreover the Reclamation Act of 1902, to which it related, was only concerned with irrigable lands.

The Margold-Weinberg-Austin opinions are more consistent with the judicial rule that treaties and other agree-

ments with the Indians should be construed in the simple fashion by which they were probably understood by them.[37] It is highly improbable that the Indians understood the 1893 Agreement in the hyper-legalistic fashion of the Krulitz Opinion. The Quechans wanted water for their lands, and the United States simply promised, by implication, to provide irrigation and it did so, although a few years later and in a fashion other than originally contemplated. Nevertheless, it is clear that the United States has substantially performed its agreement, and any deviation from the 1893 Agreement which may have damaged the Quechans in any way may be remedied by the Court of Claims, which is the appropriate, if not the only proper forum for this dispute.[38] Indeed the Quechans' claim was initially filed there and is still pending. The California Agencies believe that the Court should leave this matter to the tribunal provided by Congress for such disputes.

4. The Administrative Treatment of the Disputed Area Prior to 1936 Is Inconclusive and, in Any Event, Cannot Vary the Plain Language of the 1893 Agreement.

The Austin and Krulitz opinions differ over the significance to be given to administrative treatment of the disputed area by Departmental officials prior to the Margold Opinion

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[37]In *Gila River Pima-Maricopa Indian Community v. United States*, 467 F.2d 1351, 1355 (1972), the Court of Claims stated the long-standing rule as follows:

> "Possibly the vague and overblown language . . . could be interpreted in this fashion if the compact were between sophisticated commercial firms, but Indian agreements are to be read as the Indians understood and would naturally understand them."

[38]We express no opinion as to whether the performance of the United States under the 1904 and 1911 legislation was less or more advantageous to the Quechans than the terms of the 1893 Agreement. However, by accepting the benefits of the 1904 and 1911 acts, it is arguable that the Quechans should be viewed as having agreed to the United States' modification of its obligations under the 1893 Agreement. See *Chippewa Indians of Minnesota v. United States*, 90 Ct. Cls. 140 (1940).

in 1936. Solicitor Krulitz placed great emphasis on what he characterizes as "a clear and basically consistent history of administration of the non-irrigable lands by the Bureau of Indian affairs" during that period. (86 I.D. at 10.) Solicitor Austin, on the other hand, concluded that "there were substantial inconsistencies in the administrative treatment of ownership of the Yuma Reservation lands, and substantial defects in land title records that were maintained." (84 I.D. at 20.) However, he found that, in accordance with customary Departmental practice, the Secretary directed Solicitor Margold to resolve "the conflicting views and uncertainty" in 1936 (*Id.* at 28, 30). Solicitor Margold properly concluded that the pre-1936 administrative practice, even if viewed most favorably to the Quechans, could not alter the plain language of the 1893 Agreement. The California Agencies believe that Solicitor Austin's analysis is correct.

5. The Krulitz Opinion Is Contrary to Two Judicial Opinions Interpreting the 1893 Agreement.

The Margold Opinion relied in part on two decided cases by the United States District Court for the Southern District of California which, while not addressing the present issue, did have occasion to interpret the 1893 Agreement.[39] In *United States v. Johnson,* the court squarely held that the United States "obtained title to the land in issue by virtue of a contract entered into with the Yuma Indians and the plaintiff December 4, 1893, approved and adopted by the Congress August 15, 1894 (28 Stat. 322, Sec. 17)."[40] If, as the Court held, the 1893 cession carried title to the ir-

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[39]*United States v. Johnson,* Civil No. 118-C (S.D. Cal., August 2, 1935); *United States v. Walker,* Civil No. 126-J (S.D. Cal., October 10, 1933).

[40]*United States v. Johnson,* Findings of Fact and Conclusions of Law, p. 3 (August 2, 1935).

rigable lands, to the United States it must have conveyed title to the non-irrigable lands, since it relinquished "all" tribal lands without distinction as to irrigability.[41] The Krulitz Opinion does not mention either decision.

The California Agencies contend that the Krulitz Opinion is in error and should be rejected, particularly since the lands were administered for almost 43 years consistent with the Margold Opinion. Indeed, in similar situations involving boundary disputes in which the United States has been involved, this Court has held that important policy reasons dictate that assumptions as to boundaries which have long been acquiesced in by the United States and affected parties should not be disturbed.[42] That principle is particularly appropriate to the Quechan situation, for not only has there been long acquiescence in the Margold Opinion which the Krulitz Opinion would upset, but important water rights have subsequently intervened which it threatens to infringe. In particular, the Court's 1964 Decree in this case established a water right for the Yuma Indian Reservation based on representations by the United States embodying the same construction of the 1893 Agreement reflected in the *Johnson* and *Walker* cases and the Margold, Weinberg and Austin opinions. In the proposed findings and conclusions submitted to the Special Master in that case the United States interpreted the 1893 Agreement as follows:[43]

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[41]In another connection Solicitor Krulitz asserts that he "can find no legal or factual basis for separating the non-irrigable lands from the irrigable lands" under the agreement. 86 I.D. at 17.

[42]*New Mexico v. Colorado*, 267 U.S. 30, 40-41 (1925); *United States v. Texas*, 162 U.S. 1, 60-61 (1896); *Stone v. United States*, 69 U.S. (2 Wall. 525 (1865) (semble); *Missouri v. Iowa*, 48 U.S. 7 How.) 660 (1849).

[43]Findings of Fact and Conclusions of Law Proposed by the United States of America (April 1, 1959), Finding 4.8.3, p. 83.

> On December 4, 1893, an agreement was entered into between the United States and the Yuma Indians by which said Indians surrendered to the United States all their right, title, claim and interest in the Reservation established by Executive Order of January 9, 1884, for them and such other Indians as the Secretary might see fit to settle thereon. The agreement was subject to the condition that each Yuma Indian was to be allowed to select a five-acre tract on the Reservation, or in the adjoining area, which was to be allotted in severalty. The agreement provided that after allotments were made, the residue of the Reservation which was subject to irrigation should be sold by the Secretary of the Interior with the money to be used for the benefit of the Yuma Indians. This agreement was approved by Act of Congress August 15, 1894 (28 Stat. 332). The area of each allotment was increased to ten acres of irrigable land by the Act of March 3, 1911 (36 Stat. 1063).

The foregoing demonstrates that there is a serious dispute as to the proper boundary of the Fort Yuma Indian Reservation in California which has not yet been "finally determined" in an appropriate adversarial proceeding. The Court should remand the matter to the Special Master with directions (1) to conduct further proceedings on the disputed boundary with full participation by the California Agencies (2) to make a "final determination" of the proper boundary for the limited purpose of providing the necessary basis for any adjustment of the water rights awarded to the Quechan Tribe in the Court's 1964 Decree.

In the alternative, the Court should decline to award water rights to the disputed boundary lands until the boundaries have been finally determined.

IV.

THE WESTERLY BOUNDARY OF THE HAY AND WOOD RESERVE OF THE FORT MOJAVE INDIAN RESERVATION IS THE EAST BANK OF THE COLORADO RIVER IN ITS LAST NATURAL POSITION.

The second boundary dispute ruled on by Special Master Rifkind (hereinafter the "Former Master") in the prior proceedings was the westerly boundary of the Hay and Wood Reserve portion of the Fort Mojave Indian Reservation. This area, which initially was an adjunct to and part of the Camp Mojave Military Reservation before being turned over to Indian uses in 1890, has always been described in pertinent part as:

> Camp Mojave Reservation for Hay and Wood—commencing at a post marked "U.S." in mound of earth situated south 10° 43′ 41″ E. 347.52 chains distant from the flagstaff at Camp Mojave and about 20 chains southwest from the point where the road crosses the top of the mesa; thence variation 14° 08′ 28″ east, south 1° 04′ 28″ W., 272.50 chains to a post marked "U.S." in a mound of earth near the quartermaster's corrall; *thence south 76° 17′ 28″ W. 228.50 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River; thence north 23° 01′ 32″ W. 362.70 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River;* thence south 88° 45′ 32″ E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9,114.81 acres, more or less. (Emphasis added; Prior U.S. Exh. 1324.)

In those proceedings, California took the position that the underlined portion of this description defined the Colorado River as the westerly boundary, and in accordance with usual rules, that the river, wherever it moved naturally, constituted the boundary.

The United States contended that there was an internal inconsistency in the description predicated upon their assumption that if the courses, distances and acreage delineated in the description were followed, the call to the posts in a mound near the west bank of the river could not be correct. Therein they contended that the acreage mentioned and the courses and distances prevailed over the monuments (post marked "U.S." in a mound of earth near the left bank of the Colorado River) in the description, and the only way to locate the Hay and Wood Reserve on the ground was to put the westerly boundary on the California side of the Colorado River, even though it would be located on a mesa there. The former Master found, however, that an official survey by the Field Surveying Service in 1928, and adopted by the General Land Office in 1931, was binding on the United States and thus, the westerly boundary of the Hay and Wood Reserve depicted thereon (an attempted relocation of the east or Arizona Bank as it existed in 1869) was the proper boundary. He awarded water accordingly. (Report of the former Master, pp. 281-282.)

This Court, as it did in the Colorado River Indian Reservation boundary dispute, set aside the boundary determination (*Arizona v. California, supra,* 373 U.S. at 601), but the 1964 decree (376 U.S. at 345) and the 1979 Supplemental Decree (439 U.S. at 421) contained a provision for an appropriate adjustment of water rights when the boundaries are finally determined.[44]

Subsequently, the Secretary of the Interior by order of June 3, 1974, declared null and void the 1928 survey as approved January 23, 1931, and directed a new survey

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[44]The former Master's award of water rights to the Fort Mojave Indian Reservation for the Hay and Wood Reserve was based on the 1928 survey. This award was upheld by the 1964 and 1979 decrees.

". . . to conform the acreage description of 9114.81 acres." The order refers to a Solicitor's opinion of the same date.

In the present proceedings before the Special Master, the United States and the Fort Mojave Indian Tribe insisted that the western boundary is the one established pursuant to the Secretary's order of June 3, 1974, which, in turn, was the same boundary contended for before the former Master, a line drawn on the mesa in California west of the Colorado River. The Special Master accepted the Secretarial order, ruling that the Secretary's determination as to boundaries was sufficient for purposes of this case, accepting the boundary changes put forth in the motion of the United States filed on December 22, 1978. (1982 Report, p. 76.) His findings award water rights for the area in dispute. (1982 Report, pp. 192-193, 264.)

It is our intention here to point out to the Court that there is a genuine dispute as to the location of the westerly boundary of the Hay and Wood Reserve, and that when litigated, that dispute should and will be resolved in favor of the position of the California agencies. Accordingly, this matter should be resolved before any water rights are awarded.

A. Background.

The following facts are taken from exhibits and testimony received by the former Master, with the exception of paragraph 11 relating to expert testimony which we would expect to produce at a trial of this matter on the proper method to locate the Hay and Wood Reserve on the ground today.

1. Camp Mojave was first established as a military post in 1858 to protect an immigration route which crossed the Colorado River at the north end of the Mojave Valley. (Prior U.S. Exh. 1315, p. 2.)

2. In 1869, Lieutenant George Wheeler of the Corps of Engineers was directed to, and did, survey some eight

military reservations in the territory of Arizona. In January 1869, he surveyed the Camp Mojave Military Reservation and the Reservation for Hay and Wood. In February 1870, a map of the Hay and Wood Reserve was prepared under his direction. (Prior Calif. Exh. 3501.) This map and Wheeler's notes of survey clearly show the following:

a. The Camp Mojave Military Reservation itself was located on both the Arizona and Nevada sides of the Colorado River.

b. The Flag Staff at Camp Mojave, which is the beginning monument contained in the description of the Hay and Wood Reserve, is located on the mesa on the Arizona side of the river, in the location of the living quarters and post headquarters.

c. Corners III and IV of the Hay and Wood Reserve, as designated in the description, clearly appear to be on the east or Arizona side of the river, adjoining the river, and below the mesa on the Arizona side (near Corner I).

d. The map contains this note:

> "The banks of the Colorado River between Stations III and IV of this reservation are continually changing."

3. The plats of the eight reservations surveyed in Arizona and descriptions of them were forwarded on March 12, 1870, from Maj. Gen. George Thomas of the Military Division of the Pacific, to the Adjutant General with the request that they ". . . be declared in accordance with the limits herein given." (Prior U.S. Exh. 1323.) The description of the Hay and Wood Reserve added to it the intermediate area between Camp Mojave and the Hay and Wood Reserve.

4. General Order No. 19, August 14, 1870, of the Military Division of the Pacific, proclaimed:

> "The following Military Reservations in the territory of Arizona, having been declared by the President of the United States, are hereby announced for the information of all concerned:. . ."

There followed a description of the reservations, including the same ones forwarded in March 1870 for Camp Mojave and the Hay and Wood Reservations. It also included in the latter the intermediate area between the two on the east side of the river:

> "And the intermediate tract lying between the Hay and Post Reservations, bounded on the west by the Colorado River and on the east by a line running from Station 1 of the Hay and Wood Reserve to Station 1 of the Post Reserve."

5. All parties to this proceeding at all times have agreed that the description of the Hay and Wood Reserve contained in General Order No. 19 and Wheeler's Survey, are the keys to the location of that Reserve.

6. In 1882, Congress enacted a statute (22 Stat. 181) which authorized the Secretary of War to set aside for Indian schools any vacant military posts. Pursuant to that act, President Harrison, on September 19, 1890, approved the recommendation of the Secretary of War and set aside the military reservation at Fort Mojave to be transferred to the Secretary of Interior for Indian school purposes. (Prior U.S. Exh. 1303.) All parties seem to agree that this also included turning over the Hay and Wood Reserve for these purposes, and in 1903 the Secretary of the Interior held that the intermediate tract was also included.[45]

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[45]By Executive Orders of December 1, 1910, and February 2, 1911, various alternate sections of land east and southerly of the Hay and Wood Reserve in Arizona were added to the Fort Mojave Indian Reservation. (Prior U.S. Exhs. 1304, 1305.)

7. Between 1869 and 1928 (and today), the Colorado River in the vicinity of Camp Mojave and parts of the Hay and Wood Reserve, moved several miles to the east. (Prior U.S. Exh. 1328.)

8. Pursuant to a request of the Office of Indian Affairs (Prior U.S. Exh. 1328), the General Land Office undertook a ". . . survey of the boundaries of the Fort Mojave Indian Reservation in Arizona, California and Nevada." (Prior Calif. Exh. 3502.) The instructions to the surveyor noted that in 1906 a Deputy Fisher had ". . . surveyed all of that part of the boundaries of the Fort Mojave Indian Reservation that lay east of the Colorado River. . . ." The surveyor was instructed to retrace the Fisher line, to attempt to complete the survey of the Camp Mojave Military Reservation, and then survey the reservation for Hay and Wood. As to that, the instructions read:

> *"Reservation for Hay and Wood:*
>
> "Accompanying these instructions is a blue-print of the 1869 military survey of the reservation for hay and wood. It will be observed that corners III and IV were both established on the E. side of the river. As the river has since moved a mile or more to the east these two corners are doubtless irrecoverably lost. On the small topographic map accompanying these instructions the reservation for hay and wood has been platted in accordance with the calls of the original military survey. It will be observed that corners III and IV fall on ground so high as to preclude any possibility of the river having flowed to the west thereof in 1869. This condition can only be explained by assuming serious errors in the lengths of the north and south boundaries of the reservation for hay and wood. You will, therefore, run said boundaries on their record courses but only so far to the west as will place the west boundary in a position that conditions on the ground indicate as

> its probable position in 1869. In this you will, of course, be guided by the topography, the available evidences of river action and the line of demarcation where the soil loses its alluvial character. Having determined the western limit of the river, it will be necessary to make due allowance for its width in 1869. If no evidences are available on the ground, you will be obliged to follow the map of the original military survey, which indicates Corner IV about 22.00 chains E., and Corner III, 30.00 chains east of the west bank of the river.'' (Prior Calif. Exh. 3502.)

He was thus directed to restore Corners III and IV of the Hay and Wood Reservation, that is the Corners bordering the Colorado River.

9. Surveyor Blout followed his instructions, and completed his survey which was approved by the General Land Office in 1931. (See prior Calif. Exh. 2611.) Blout's survey notes (Prior Calif. Exh. 2616) set forth in detail what he did. Of significance here are several steps.

a. He attempted, from old maps and witnesses, to locate the west bank of the Colorado River as it existed in 1869 when Wheeler made his survey. He did so to his satisfaction, finding it near but below the mesa on the California side of the river.

b. He was unable to locate any traces of the east bank of the river as it existed in 1869, so, pursuant to his instructions, he backed off or retreated to the east a certain amount along the north and south lines of the Hay and Wood Reserve to retrace the width of the river at that time and tentatively set Corners III and IV. A line drawn between those Corners, however, deviated significantly from the bearing or call of this line in Wheeler's survey. He therefore moved Corner III further to the east, and then drew the III-IV line at a bearing closer to Wheeler's.

c. The acreage contained in Blout's resurvey is significantly less than the 9114.81 acres more or less listed in Wheeler's survey.

d. Blout's survey was dependent on Fisher's 1906 survey, and was keyed to Fisher's relocation of Corner I of the Camp Mojave Reservation and the Flag Staff on it.

10. The attempts by the United States to relocate the Wheeler Survey by courses, distances and acreage, places Corners III and IV and the westerly boundary well up on the mesa of the California side of the river in a place where the Colorado River never was in 1869 or any other time. (See testimony of witness Rupkey, Prior Tr. pp. 14,159-161; 14,167-172; Prior Calif. Exh. 2616.)

11. The California Agencies are prepared to present competent and expert testimony to show that a proper location of Corner I of the Camp Mojave Reservation and the Flag Staff and a proper resurvey of Wheeler's survey of the Hay and Wood Reserve reveal:

a. All courses and distances set forth in the Wheeler survey of the Hay and Wood Reserve and the acreage calculation of 9114.81 acres more or less, can be located entirely on the East side of the Colorado River in 1869;

b. Lieutenant Wheeler's monuments for Corners II and III of the Hay and Wood Reserve were set on the east bank of the river in 1869.

c. The westerly boundary of the Hay and Wood Reserve was intended to be the Colorado River.

B. The Colorado River Was Intended to Be the Westerly Boundary of the Hay and Wood Reserve.

The question presented is what was intended by this language in the Wheeler description of the Hay and Wood Reserve:

> ". . . thence south 76° 17′ 28″ west 228.50 chains to a post marked 'U.S.' in a mound of earth near the left bank of the Colorado River; thence north 23° 01′ 32″ W. 362.70 chains to a post marked 'U.S.' in a mound of earth near the left bank of the Colorado River; . . . ."

This court answered this question over a hundred years ago in *County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46 (1874). Among the boundaries under consideration by the Court in that case was a survey 579, which was described in part:

> " 'Beginning on the bank of the Mississippi River opposite to St. Louis, from which the lower window of the United States storehouse in St. Louis bears N. 70¾ W.; thence S. 5 west 160 poles to a point in the river from which a sycamore 20 inches in diameter bears S. 85E. 250 links. . . ." 90 U.S. at 65.

The court first reviewed the law on the subject and then concluded:

> "It may be considered a canon in American jurisprudence, that where the calls in a conveyance of land, are for two corners at, in or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise." (*Id.* at 62.)

Thus, the description in the Hay and Wood Reserve making calls to monuments near the bank of the Colorado River with a straight line drawn between those points designates the river as the boundary.[46]

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[46]The use of the term "near" the bank instead of "on" or "at" the bank, is immaterial. In *Burkett v. Chestnutt*, 212 S.W. 271 S.W. (Tex. Civ. App., 1919) the Court cited the *County of St. Clair* case for this proposition:

> "In fact, the trial court could have so construed the wording of the patent to mean 'on' the river bank, for 'near the river bank', as expressed in the original field notes, means the same thing. . . ."

Moreover, there is nothing to show any contrary intent.[47] Indeed, the circumstantial evidence only supports the conclusion that the Colorado River was to be the westerly boundary of the Reserve. The Hay and Wood Reserve was created to be precisely that — a reserve for growing and gathering of hay and wood for use at Camp Mojave. The center of life at the camp was on the mesa on the Arizona side of the Colorado River. It would have made no sense to put part of the Reserve on the California side, thereby requiring difficult crossings of the then untamed river. Further, Wheeler's map indicates the banks of the river in the area of the two Corners in question were constantly changing, thereby indicating an intent that the river be the boundary. Finally, apparently for many years the Indian services considered the river to be the boundary of the Hay and Wood Reserve, just as it was for the intermediate tract. See, for example, the 1913 Indian Service Map of July 1913 (Prior Calif. Exh. 3500-A), which clearly shows the Camp Mojave Military Reservation on both sides of the river, but the Hay and Wood Reserve stopping at the River.

Once concluding that the Colorado River was intended to be the boundary, then the usual rule that ". . . when changes take place by the slow and gradual process of accretion, the boundary moves with the shifting in the main channel's course . . . [A] sudden or avulsive change in that course does not move the boundary but leaves it where the channel formerly had run." (*Kansas v. Missouri*, 322 U.S. 213, 215, (1944). See also *County of St. Clair v. Loving-*

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[47]The memorandum of the Associate Solicitor of Indian Affairs dated April 12, 1974 suggested, on p. 18, that the ambiguities should be construed in favor of the Indians. This, however, overlooks the fact that the description involved, when created, was designed to delineate a military reservation, not an Indian Reservation. A copy of the memorandum is being lodged with the Court. We request that this Court take judicial notice of said memorandum pursuant to Federal Rule of Evidence 201.

ston, supra, 90 U.S. at 68; *Arkansas v. Tennessee*, 397 U.S. 88, (1970), *Missouri v. Nebraska*, 196 U.S. 23, 35, (1904) and see discussion concerning Colorado River Indian Reservation boundary, *supra*. In the instant matter, the Colorado River has, over the years, moved to the east over most of the area in question, thereby reducing the size of the Hay and Wood Reserve. More importantly, that Reserve is located, now, as it always has been since 1870, on the east side of the River.

C. A Correct Resurvey Demonstrates That There Are No Ambiguities in the Description of the Hay and Wood Reserve.

The 1928 Blout Survey by the General Land Office for the Indian Service, was premised, falsely we believe, on an unstated determination that the westerly boundary of the Hay and Wood Reserve was on a line fixed as of the time of Wheeler's survey in 1869, that is, not the river and not a moving boundary. The Blout survey was, secondly, based on the 1906 Fisher survey which purported to relocate the northeast corner, (Corner I) of the Camp Mojave Military Reservation and the Flag Staff at the camp. From those points, a resurvey of the Wheeler survey runs into serious difficulties, unless done correctly, in that the courses and distances for the north and south lines (Corner IV to Corner I, and Corner II to Corner III, respectively) will result in Corners III and IV of the Hay and Wood Reserve being located high on the mesa on the California side of the River.

Given the starting premises, the Blout Survey was directed to proceed on at least one proper premise: to honor the long standing rule that monuments prevail over courses and distances or acreage. Turning again to this Court's decision in *County of St. Clair v. Lovingston, supra*, it was said:

> "It is a universal rule that courses and distances yield to natural and ascertained objects . . . a call for a natural object, as a river, a spring, or even a marked line, will control both courses and distances. . .
>
> "Artificial and natural objects called for, have the same effect. . . ." 90 U.S. at 62, (citations omitted.)

The rules of construction call for a priority, — 1. Natural monuments or objects; 2. Artificial monuments or objects; 3. Courses and distances; 4. Quantity. *United States v. Redondo Development Co.* 254 F. 656, 658 (8th Cir. 1918). See, 11 C.J.S. *Boundaries* § 47. In accordance with these rules, Surveyor Blout in 1928 was instructed to try to find the artificial monuments for Corners III and IV of the Hay and Wood Reserve, and lacking that, to reestablish them. *United States v. Reimann*, 504 F.2d 135, 140; (10th Cir. 1974); *Hiltscher v. Wagner*, 96 Cal.App. 66, 68; (1928). By doing this, Blout reestablished the Corners and noted that under the rules of priority, the courses and distances and quantity gave way.

In contrast, the United States seeks to reverse this priority list and make quantity the key, and thereby totally ignore the monuments and the calls to the east bank of the Colorado River. The result is to place Corners III and IV high on the mesa on the California side of the river in positions where the river never has been and never could have been. Such, of course, is directly contrary to the law. The Associate Solicitor claims that cases such as *White v. Luning*, 93 U.S. 514, 524 (1876), allow the rules to be applied flexibly in order to carry out the intent of the grantor or surveyor. We do not quarrel with that principle. The Government's attempted application of it to this case, however, is ludicrous. Lieutenant Wheeler was not attempting to survey a tract of precisely 9114.81 acres. That figure is obviously a mathematical calculation arrived at after the tract was surveyed.

Lieutenant Wheeler was laying out a reserve for Hay and Wood for the military post on the east side of the Colorado River below the mesa. There is absolutely no basis for not applying the usual rules of priority for calls, and recognize the calls to monuments for Corners III and IV.

More importantly, the California Agencies desire to present evidence through expert testimony that will conclusively show that there are no conflicting calls. A proper retracing of Lieutenant Wheeler's notes of survey starting with Corner I, and the Flag Staff of the Camp Mojave Military Reservation properly relocated, will fit *in toto* as to courses and distances on the east side of the Colorado River as it existed in 1869 and contained 9114.81 acres more or less.[48] This evidence will also strongly support the conclusion that the westerly boundary of the Hay and Wood Reserve is the Colorado River.

The above amply demonstrates that there is a genuine dispute as to the location of the westerly boundary of the Hay and Wood Reserve. The Special Master has accepted, without reservation or inquiry, the unilateral decision of the Secretary of the Interior to determine that boundary in a way that is contrary to law and in total avoidance of the facts or reality. The Special Master proposes to award substantial water rights based on that decision, to the immediate detriment of the California Agencies. That boundary should be litigated in full and fairly before any such rights are awarded or affirmed.

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[48]Surveyor Blout was unable to find any traces of the monuments set by Lieutenant Wheeler in 1869, primarily, according to him, because the river had moved to the east, and by flooding had undoubtedly washed them out. Although we contend that Mr. Blout was looking in the wrong place for these monuments, we do agree that the likelihood of finding any traces of them is minimal. They can, however, be reestablished with proper surveying techniques.

V.

THE SPECIAL MASTER HAS ERRED IN AWARDING WATER TO RIVER BED LANDS SINCE THOSE LANDS BELONG TO CALIFORNIA AND ARIZONA, RESPECTIVELY.

The Special Master, by acceptance of unilateral administrative actions and orders of the Secretary of the Interior, has acted erroneously with regard to river bed lands of the Colorado River with regard to the Fort Mojave, Fort Yuma and Colorado River Indian Reservations. Pursuant to *Montana v. United States,* 450 U.S. 544, 551 (1981), the United States generally reserves lands under navigable waters for states upon their admission to the Union. It is clear that California having been admitted as a state in 1850, prior to the creation of the reservations in question, received title to the western half of the river bed in its last natural position immediately, and no substantial evidence exists which would indicate any intent other than to convey the eastern half of the river bed in its last natural position to the state of Arizona, which was admitted to the Union in 1912.

Therefore, the actions of the Secretary with regard to these river bed lands are totally void and without merit, since the lands belong to the States of California and Arizona, respectively.

VI.

CONCLUSION.

In reviewing this matter, we are simply appalled by the position urged by the United States and acceded to by the Special Master. That position is that by government fiat, Secretarial orders and legal proceedings to which we were not parties, our vital water rights, the supply for some 12 million people, can be reduced; that despite the experience of the original case, where the United States' boundaries position were rejected, that there is no forum and no opportunity to challenge the altered reservation boundaries;

that no matter how egregious the United States' error, it is conclusive.

We submit, so repugnant a contention does not find support in our system of justice. We respectfully urge that this Court reject the findings and water allocation recommendations of the Special Master based upon the so-called "boundary lands" or, in the alternative, remand the claims of additional water allocations for "boundary lands" with instructions to try all issues resulting from the State Parties' challenge of the reservation boundaries asserted by the United States and the Tribes.

Respectfully submitted,

The Metropolitan Water District of Southern California,
CARL BORONKAY,
General Counsel,
WARREN J. ABBOTT,
Assistant General Counsel
KAREN TACHIKI,
Deputy General Counsel,
Coachella Valley Water District,
MAURICE C. SHERRILL,
General Counsel,
JUSTIN MCCARTHY,
REDWINE & SHERRILL,
General Counsel,
City of Los Angeles,
IRA REINER,
City Attorney,
EDWARD C. FARRELL,
Chief Assistant City Attorney,
for Water and Power,

KENNETH W. DOWNEY,
Assistant City Attorney,
GILBERT W. LEE,
Deputy City Attorney,
City of San Diego,
JOHN W. WITT,
City Attorney,
C. M. FITZPATRICK,
Senior Chief Deputy City Attorney,
County of San Diego,
DONALD L. CLARK,
County Counsel,
JOSEPH KASE, JR.,
Assistant County Counsel,
LLOYD M. HARMON, JR.,
Deputy County Counsel,

By CARL BORONKAY.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of May, A.D. 1982
