No. 8, Original

IN THE

Supreme Court of the United States

October Term, 1981

STATE OF ARIZONA,

Complainant,

vs.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY 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 STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS TO THE REPORT OF SPECIAL MASTER ELBERT P. TUTTLE; AND BRIEF OF SAID PARTIES IN SUPPORT OF EXCEPTIONS.

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Defendants,

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Impleaded Defendants.

EXCEPTIONS OF THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS TO THE REPORT OF SPECIAL MASTER ELBERT P. TUTTLE.

The States of Arizona, California, and Nevada and the other California Defendants (hereinafter referred to as "State Parties") 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 States of Arizona, California, and Nevada and the other California Defendants except to the Report of Special Master Elbert P. Tuttle, dated February 22, 1982, upon the following grounds:

I.

EXCEPTIONS RELATING TO THE SPECIAL MASTER'S DETERMINATION TO HEAR CLAIMS AND AWARD WATER RIGHTS FOR SO-CALLED "OMITTED LANDS" WHICH WERE RECOGNIZED AS PART OF THE INDIAN RESERVATIONS IN THE PRIOR PROCEEDING BUT FOR WHICH NO WATER RIGHTS WERE ASSERTED. (Spec. Master's Rep., pp. 29-55.)

A. The Issue.

Whether Article IX of the Court's 1964 Decree in this case and the doctrines of *res judicata,* collateral estoppel, and law of the case permit the relitigation of practicably irrigable acreage within the recognized 1964 boundaries?

B. The Determination to Which Exception Is Taken.

The Special Master erroneously concludes:

Water rights may be allocated for any reservation lands which are practicably irrigable but which the United States or Indian Tribes* contend were omitted from the determination of practicably irrigable acreage within the 1964 boundaries.

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*The five Tribes are the Ft. Mojave, Chemehuevi, Colorado River, Cocopah, and Quechan Tribe of the Ft. Yuma Indian Reservation.

C. The Correct Conclusions.

The Special Master should have concluded:

1. The Court intended Article IX to reserve jurisdiction only over matters not finally determined and that it did, in Article II of the Decree, finally adjudicate irrigable acreage within the 1964 boundaries, as recommended by the previous Special Master. Such final adjudication is not subject to the Court's continuing jurisdiction under Article IX.

2. Relitigation of practicably irrigable acreage within the 1964 boundaries is precluded by the public policy considerations behind the doctrines of *res judicata* and collateral estoppel and by the doctrine of the law of the case.

II.

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 State Parties 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 State Parties in other litigation or in these proceedings the disputed boundaries upon which they rely for claims of additional water allocations.

III.

EXCEPTIONS RELATING TO THE SPECIAL MASTER'S DETERMINATIONS OF THE AMOUNT OF "PRACTICABLY IRRIGABLE ACREAGE" WITHIN THE AREAS CLAIMED FOR ADDITIONAL WATER RIGHTS BY THE UNITED STATES AND THE INDIAN TRIBES. (Spec. Master's Rep., pp. 112-277.)

A. The Issue.

Whether the lands for which water rights are claimed by the United States and by the Indian Tribes are "practicably irrigable" within the meaning of the 1964 Decree?

B. The Determination to Which Exception Is Taken.

The Special Master erroneously concludes that:

Of the land claimed as "practicably irrigable" by the United States and the Indian Tribes, there are the following amounts of net practicably irrigable acreage for which the following water rights should be decreed (Spec. Master's Rep., pp. 116, 121):

Reservation	Net Irrigable Acreage (U.S. and Tribe claims)	Diversion Amounts in Acre-Feet (U.S. and Tribe claims)
Ft. Mojave	5,616	36,280
Chemehuevi	1,621	9,677
Colorado River	27,745	185,059
Cocopah	1,170	7,453
Ft. Yuma	11,772	78,519

As a result of these errors, the Special Master's Recommended Decree (Spec. Master's Rep., pp. 281-83), which incorporates these figures, is also erroneous.

C. The Correct Conclusions.

The Special Master should have concluded that:

Of the land claimed as "practicably irrigable" by the United States and the Indian Tribes, there is *less* net practicably irrigable acreage for which *fewer* water rights should be decreed than is listed above. The amounts by which the Special Master has thus *overstated* net practicably irrigable acreage and water rights are listed below (see *infra*, Table 1.):

Reservation	Net Irrigable Acreage (U.S. and Tribe claims)	Diversion Amounts in Acre-Feet (U.S. and Tribe claims)
Ft. Mojave	2,054	13,269
Chemehuevi	919	5,486
Colorado River	7,245	48,324
Cocopah	8	51
Ft. Yuma	6,623	44,175

To correct this overstatement by the Special Master, the figures for acreage and diversions in the Recommended Decree (Spec. Master's Rep., pp. 281-83) must be accordingly decreased to the following levels:

Reservation	Acres	Diversion Amounts in Acre-Feet
Ft. Mojave	22,536	145,659
Chemehuevi	2,602	15,531
Colorado River	128,088	853,883
Cocopah	1,593	10,146
Ft. Yuma	12,892	85,960

IV.

EXCEPTIONS RELATING TO THE SPECIAL MASTER'S DETERMINATION TO ALLOW UNCONDITIONAL INTERVENTION BY THE FIVE INDIAN TRIBES IN THIS SUIT. (Spec. Master's Rep., pp. 26-27.)

A. The Issue.

Whether the Eleventh Amendment bars intervention in this suit by the Indian Tribes without the consent of the States of Arizona, California, and Nevada and whether Rule 24 of the Federal Rules of Civil Procedure permits intervention notwithstanding any such bar.

B. The Determinations to Which Exception Is Taken.

The Special Master erroneously concludes:

1. That the States' Eleventh Amendment immunity is not implicated by the Tribes' motions to intervene because their claims as intervenors are ancillary to a case or controversy between a state and sister states and between the United States and states.

2. Assuming the Eleventh Amendment immunity is implicated, 28 U.S.C. 1362 abrogated that immunity as regards suits by Indian tribes.

3. Pursuant to Rule 24, the Tribes should be permitted to unconditionally intervene because their direct pecuniary interests will be affected by this litigation and because there is a possibility that representation of the Tribes' interests by the United States may be inadequate.

C. The Correct Conclusions.

The Special Master should have concluded:

1. States of the Union are immune from suit by Indian tribes in federal court without their consent except where that immunity has been surrendered through the adoption of the Constitution of the United States as implemented by Congressional enactment. 28 U.S.C. 1362 does not constitute such a surrender, as applied to this case, because it only allows suits by Indian tribes in instances where the United States could have sued on their behalf but failed to do so.

2. By seeking to establish additional claims adverse to the three States, the intervention sought by the five Indian Tribes would constitute a suit against each State. The fact that the tribal claims have already been asserted before the Special Master by the United States does not deprive the

three States of their Eleventh Amendment right not to be sued by the Tribes also asserting those claims.

3. Rule 24 cannot be used to extend jurisdiction where, as here, it is barred by sovereign immunity.

WHEREFORE, the State Parties 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.

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STATE OF CALIFORNIA, *et al.*

BRIEF IN SUPPORT OF EXCEPTIONS.

Introduction.

When reviewing this case, one cannot help being reminded of the fundamental difficulty created in the *Winters* case. There the Court reasoned that Congress could not have intended to establish reservations as homelands for Indians without providing a water supply to make these otherwise arid lands habitable. Hence the *Winters* Doctrine, implied reservation of water rights, was born. We submit, a legally more sound conclusion, which would not have created the problems attendant with superimposing a new and superior water rights theory on existing water rights law, would have been the conclusion that Congress did merely establish the reservation with the setting aside of the land and that the responsible government agencies were expected to acquire the necessary water rights pursuant to existing law. Both appropriation, under relevant state law, and purchase or eminent domain were available means where the subject lands lacked adequate water rights.

This more reasonable conclusion was not practical in the *Winters* case for the United States had not acquired necessary rights by the time the water dispute arose and the Court was presented a situation that required the creation of a new doctrine if the purposes of the Indian reservation were to be achieved. In short, the burden of the United States in meeting its obligations to the Indians was to fall on those whose interests conflicted with the Indians rather than the nation as a whole.

We suggest that the difficulty in water rights law and policy created by the *Winters* case should not be compounded; that the sentiment shared by most for assisting the Indians should require the United States to meet its obligation rather than allow that obligation to be imposed on the few in the happenstance of particular litigation.

That this laudable sentiment is present herein is manifest. Contrary to well-established, sound judicial policy illustrated by numerous rules, the Special Master has permitted relitigation of the water rights of five reservations which rights were decided by this Court some 15 years earlier.

Equally shocking is the Special Master's decision to simply excuse the United States and the Tribes from proving that lands for which they claim a water right are in fact within the Indian reservations. The Special Master not only excuses this primary element of the claimants' cause of action, but prohibits adversary parties from proving otherwise. The actions taken by the Secretary of the Interior are not to be merely evidentiary, they are to be adjudicatory.

Similarly, the Special Master breaks new ground in granting petitions of the Indian Tribes to intervene to claim irrigable acreage and attendant water entitlements for all the acreage being claimed by the United States on their behalf, and a good deal more, so that each tribe has double rep-

resentation and the State Parties are confronted with two claims for four of the five reservations.

This sentiment of concern for the plight of the Indians goes even beyond these crucial rulings to the conduct and trial of the case itself. Thus, the Master rejected for trial, various issues advanced by the State Parties: whether the practicably irrigable acreage measure for water allocations is modified by the moderate standard of living rule; whether the practicably irrigable acreage measure may be applied to the Colorado River Indian Reservation, where that very large facility was established for several tribes who did not relocate there, but inhabit other reservations granted water rights; whether that water allocation measure is based upon irrigation technology existing at the time of trial, or at some earlier time. Indeed, the rather obvious issue of whether the State Parties relied to their detriment upon the 1964 Decree of this Court was rejected by the Special Master as an issue to be tried until the United States expressed its concurrence with the position of the State Parties. (Atlanta Tr., p. 228.)

And in the trial of evidentiary disputes, the burden of proof of the claimants was sometimes shifted to the State Parties — land would be regarded as practicably irrigable unless the State Parties convinced the Special Master otherwise; expert opinion of witnesses for the State Parties would be rejected as lacking a presentation of its evidentiary basis, but expert opinion of witnesses for the United States was not held to such a standard.

Thus, we submit the laudable sentiment with respect to Indians is badly misplaced in this judicial proceeding; that reopening of a fully tried water case after many years merely because a new generation of attorneys for the United States believes they can do better is to shift the alleged harm done the Indians to the State Parties; that treating Secretarial actions delineating from time to time reservation boundaries

as conclusive and binding upon the State Parties is to deprive them of their day in court to protect their water rights.

In our ensuing argument we will discuss move fully the errors of the Special Master's Report and the resulting injustice.

ARGUMENT.

I.

THE SPECIAL MASTER ERRED IN PERMITTING THE UNITED STATES AND THE TRIBES TO RELITIGATE THE ISSUE OF THE MAGNITUDE OF "PRACTICABLY IRRIGABLE ACREAGE" WITHIN THE FIVE INDIAN RESERVATIONS BOUNDARIES AS RECOGNIZED IN THE PRIOR PROCEEDING.

A. Introduction.

The motions of the United States and the five Indian Tribes for modification of the Court's 1964 Decree allocating water to the respective mainstream Indian reservations include claims for additional water entitlements for lands located within the uncontested boundaries of those reservations at the time of trial in the original proceedings but for which the United States made no claim that they were "practicably irrigable." These lands have been labeled by the United States and the Tribes as "omitted lands." A more accurate classification, as the State Parties show herein, is "rejected lands," since the record of the earlier proceedings clearly shows that the United States, at the time of trial in the 1950s, made a considered judgment that such lands were not "practicably irrigable" under the evidentiary standards selected by the United States in pressing its claims on behalf of the Tribes.

At the outset of the present hearings before the Special Master, the State Parties moved that the claims for the omitted lands should not be entertained because they were barred by the doctrines of *res judicata* and collateral estoppel or by the principles underlying them.

The Special Master deferred ruling on the State Parties' motion and took extensive evidence with respect to the omitted lands. In his report he concludes that the claims are not barred, relying on Article IX of the 1964 Decree. Con-

sequently, he proposes that the Court award the Tribes not only 135,681 acre-feet in diversion rights for 20,527 acres which the United States *now* claims are "practicably irrigable" and should have been claimed in the 1950s proceedings, but an additional 59,336 acre-feet of diversion rights for 8,909 acres which the Tribes, but not the United States, contend are "practicably irrigable." (Spec. Master's Rep., pp. 106-07, 109, 113-15, 118-20.) These increases of 15 and 22 percent, respectively, in the diversion rights and practicably irrigable acreage determined in the original proceedings are characterized by the Special Master as "relatively minor adjustments" to the rights established for the Indians in the 1964 Decree. (Spec. Master's Rep., p. 55.) The State Parties, who will suffer a "gallon for gallon" reduction in their available supply,[1] do not share the Special Master's view of the *de minimis* nature of the largesse which he has conferred on the Tribes.

The resulting serious impact on the non-Indian users, who have relied on the certainty with respect to the magnitude of the Tribes' *Winters* Doctrine[2] rights which the 1964 Decree was designed to achieve, was accomplished by two bold strokes of the Special Master. First, by a strained interpretation of the purpose of Article IX, he enables the current generation of Justice Department lawyers to second guess the legal interpretations, factual conclusions, evidentiary presentations, and trial strategies of their predecessors who had the difficult task of trying to quantify the scope of the Tribes' *Winters* rights in the 1950s. Second, by ignoring the States' Eleventh Amendment rights and the right and duty of the United States to exclusively represent Indian Tribes, he granted unrestricted intervention to the Tribes

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[1]*United States v. New Mexico*, 438 U.S. 696, 705 (1978).
[2]*Winters v. United States*, 207 U.S. 564 (1908).

and permitted them to second guess present counsel for the United States with respect to the proper magnitude of their *Winters* rights.

The Special Master's tour de force would make a shambles of the 1964 Decree and deal a severe blow to the economics of Southern California, Southern Nevada, and Central Arizona, whose limited water supply would be further substantially eroded. We turn now to his faulty analysis of the earlier proceedings and applicable law.

B. The Prior Litigation.

In 1952, the State of Arizona invoked the original jurisdiction of this Court for the purpose of establishing its entitlement to the waters of the Colorado River vis-a-vis the State of California and seven California public agencies. This Court determined that the complaint stated a claim cognizable under its original jurisdiction. Thereafter, the Court granted motions to intervene filed by the United States and the State of Nevada and joined the States of New Mexico and Utah to ensure complete and final adjudication of the conflicting claims to lower Colorado River Basin waters. *Arizona v. California*, 373 U.S. 546, 564 (1963). In its motion to intervene, the United States asserted federally reserved rights to the waters of the Colorado River on behalf of itself and a number of Indian Tribes, including those now parties to the present proceeding.[3] Thus, in the original proceeding the United States undertook to discharge its stat-

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[3]The Navajo Indian Tribe belatedly filed a motion to intervene and represent its own interests in the proceeding. That motion and a subsequently filed motion for reconsideration were denied by the Court on the ground that the Navajos' interests were represented adequately by the United States. 368 U.S. 950 (1962).

utory responsibility to present evidence to sustain federally reserved water rights claimed for Indian reservation lands.[4]

The Court thereafter appointed a Special Master to preside at the trial proceedings, take evidence, and make recommended findings of fact and conclusions of law which would provide the basis for entry of a decree finally adjudicating the parties' rights to lower Colorado River Basin waters.

On December 5, 1960, eight years after the filing of the complaint, Special Master Simon Rifkind (the "Former Master") submitted his report and a proposed decree adjudicating the parties' rights. As a matter of law, the Former Master determined that the United States intended to reserve unappropriated water for the lower Colorado River Indian Tribes at the time the reservations were created adequate "to provide for the future needs of the Indians." (Former Master's Report at 262.) In support of this conclusion, the Former Master relied on the implied water rights doctrine set forth in *Winters v. United States*, 207 U.S. 564 (1908), which he noted recognized federally reserved water rights for reservation lands in an amount "reasonably necessary to irrigate the lands included in the reserve. . . ." (*Id.* at 258.) Significantly, although the *Winters* case and subsequent decisions made it clear that the measure of an implied reservation of water for an Indian reservation was the quantity needed to satisfy the "reasonable needs" of the Indians, no single quantification formula had been established at the time of trial. The Former Master thus requested that the parties present evidence on the appropriate quantification standard.

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[4]The United States' representation of the Tribes is sanctioned by 25 U.S.C. § 175 (1976) and long-standing decisions of the Court, *e.g.*, *Heckman v. United States*, 224 U.S. 413 (1912); *cf*, *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 368-370 (1968); see also discussion, *infra*, on intervention by the Indian Tribes.

Several quantification procedures were proposed. For example, the State of Arizona recommended that the Tribes' water rights be measured by estimating their reasonably foreseeable needs, subject to later revision, if necessary, while California contended that the measure of Indian rights on any basis should be their maximum historic use. The United States initially supported an open-ended decree, but later advocated adoption of a fixed and final determination of the Tribes' reserved water rights "so that no need would exist to come back at a later date to seek additional rights."[5] The Former Master determined that the fixed magnitude approach advocated by the United States was preferable to the open-ended approach. In reaching this conclusion, he observed that failure to specify the totality of federally reserved rights on reservation lands would place all junior rights in jeopardy and severely hamper financing of irrigation projects.[6]

The quantification standard advocated by the United States in the prior proceeding, recommended by the Former Master and adopted by the Supreme Court in its decision and subsequent decree is the "practicably irrigable acreage" standard. 373 U.S. 600-601. Application of this standard resulted in an award of 905,498 acre-feet in diversion rights for 136,636 acres on the five mainstream reservations, although the maximum acreage ever irrigated annually up to the time of trial for the reservations did not exceed 36,000 acres. (California Proposed Findings and Conclusions, April 1, 1959, Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104, 18F:104; Former Master's Report, p. 268.)

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[5]See United States' Pre-Trial Brief (August 25, 1980) at p. 3; see also Appendix A.

[6]See Former Master's Report at 264; see also current Spec. Master's Report, p. 11.

At several times during the prior proceeding, the United States indicated that some procedure for modification of the Tribes' water rights might be necessary to take into account their unforeseeable needs or changed circumstances. The United States, however, offered no suggestions as to the type of modification procedure it felt might be appropriate. In any event, the United States made it clear that it intended to establish the maximum extent of the Tribes' reserved water rights through "detailed evidence regarding the irrigable lands." (See Prior Rep. Tr., pp. 12,461, 12,463 — Appendix A.) The Former Master emphasized that the United States would be "bound" by these expressions of intent and that the evidence offered in support of the Tribes' water rights claim would constitute a "Bill of Particulars." (Prior Rep. Tr., pp. 14,155-57 — Appendix A). Special Master Tuttle has determined that these and other statements by the Former Master indicate only that "he might be disinclined to allow the United States to use Article IX to correct an error in the Indian water determination." (Spec. Master's Rep., p. 32.) This cautious characterization is a masterpiece of understatement. We have set out in Appendix A extracts from the exchange between the Former Master and counsel for the United States on this very issue, which makes it abundantly clear that the amount of practicably irrigable acreage being claimed by the United States, if accepted, would not be subject to later modification other than for correction of technical errors of calculation.

The Former Master issued his report on December 5, 1960, accepting the United States' proof of "practicably irrigable acreage" as the measure of the Tribes' *Winters* water rights. (Former Master's Rep., p. 265.)

In 1963, this Court rendered its decision in the prior proceeding. With respect to Indian reserved rights, it upheld in every significant respect the Former Master's recom-

mended findings of fact and conclusions of law (373 U.S. at 595-601) and later embodied them in its 1964 Decree. 376 U.S. 340.

C. The Present Proceedings.

In late 1977 and early 1978, 14 years after the entry of the 1964 Decree, the Tribes moved for leave to intervene in these proceedings and asserted additional claims for water rights on lands which were within their reservations at the time of the prior proceeding, but which the United States had not classified as "practicably irrigable." (Motion for Leave to Intervene of Ft. Mojave, Chemehuevi, and Quechan (Ft. Yuma) Tribes, December 1977; Motion for Leave to Intervene of Colorado River and Cocopah Tribes, April 10, 1978.) The Tribes styled their claims as "new" claims for lands "omitted" from the prior proceeding. However, as the Special Master has recognized, the so-called "omitted lands" claims are not new claims, separate from the claims pressed in the prior proceeding. Rather, they are embraced within the prior claims, which were intended to establish water rights for the totality of practicably irrigable acreage within reservation lands. (Spec. Master's Rep., pp. 30-31.)[7] On December 21, 1978, the United States also asserted water rights claims for "omitted lands" and requested that the 1964 Decree be modified pursuant to Article IX to permit additional diversions of water from the mainstream of the Colorado River for the use of the Tribes. The State Parties collectively opposed the United States' and the Tribes' motions as they related to the omitted lands claims.

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[7]Indeed, the Special Master has gone so far as to find that the omitted lands claim does not constitute a "new issue", because the "total amount of practicably irrigable land was litigated and determined in the earlier proceeding." (Spec. Master's Rep., p. 31.)

On January 9, 1979, the Court referred the issue to the Special Master. 439 U.S. 419, 436. At a hearing held on April 17, 1979, the State Parties moved that the Special Master decide prior to the trial whether the claims were barred by the doctrines of *res judicata* or collateral estoppel. The Special Master rejected this recommendation. Instead, he deferred decision on the question and permitted the United States and the Tribes to introduce new evidence on the irrigability of the lands previously determined to be not practicably irrigable. (See order of August 28, 1979.)

This evidence, *inter alia,* consisted of soil analyses based on standards of the Soil Conservation Service of the United States Department of Agriculture (''SCS'') and irrigation analyses utilizing the so-called ''drip'' irrigation technology — all designed to show that certain lands previously classified as not ''practicably irrigable'' should be reclassified. (Ft. Mojave, Chemehuevi, Colorado River, and Cocopah Tribes' Pre-Trial Brief, pp. 22-23; United States' Pre-Trial Brief, p. 17.) There is no dispute that, in the prior proceeding, the United States did not base its claim on ''drip'' irrigation technology or SCS soil analyses. At that time the United States introduced evidence to prove which reservation lands were irrigable under then existing or proposed irrigation project works, relying on Bureau of Indian Affairs soil analyses and assuming a then current standard of economic feasibility. (Prior Rep. Tr., pp. 14,119-25.) The evidence relating to irrigation science and technology introduced in the present proceeding by the United States and the Tribes differs significantly from that offered in the prior proceeding.

On February 22, 1982, the Special Master issued his recommended findings of fact and conclusions of law. He concluded that the omitted lands claims fall within the reserved water rights claims presented by the United States

on behalf of the Tribes in the prior proceeding. (Spec. Master's Rep., p. 31.) The Special Master also found that the "1964 Decree substantially settled the water rights among the States as well as the water rights of the Indians to water from the States' allotment" (Spec. Master's Rep., p. 15) and that the State Parties substantially relied on these findings in planning for present and future water requirements. (Spec. Master's Rep., pp. 38-46.)

Despite these findings, the Special Master nonetheless has recommended that the Court consider the merits of the United States' and the Tribes' claims for lands previously deemed not "practicably irrigable." The Special Master's recommendation is based on three subsidiary findings of fact and conclusions of law namely: (1) that Article IX of the 1964 Decree provides a valid basis for reconsideration of the magnitude of the Tribes' reserved water rights; (2) that the principles of *res judicata* and the doctrine of law of the case do not preclude such reconsideration; and (3) that failure to consider the claim (and dispose of it in a manner which is favorable to the Tribes) will result in manifest injustice to the Tribes. The State Parties contend that each of these findings is in error.

D. Article IX of the 1964 Decree Does Not Provide a Valid Basis for Consideration of the Claims for Lands Previously Determined to Be Not Practicably Irrigable.

The threshold question relating to disposition of the omitted lands claims is whether this Court's 1964 Decree, implementing its 1963 decision, precludes consideration of the claims. The Special Master has determined that the Decree, taken as a whole, does not bar consideration and that Article IX, in particular, establishes a procedure for analyzing the merits of the claims. (Spec. Master's Rep., p. 31.) The

State Parties believe that both findings are in error and contrary to the fundamental objective of the Decree to establish with finality the relative rights of the parties to the waters of the lower Colorado River.

We begin with an analysis of the language of Article IX, which provides:

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

On its face, the language is expansive and provides seemingly unlimited authority for the Court to reopen, reconsider, revoke or modify previously litigated legal conclusions and factual findings. However, it cannot properly be interpreted in a vacuum without reference to the prior proceedings and the objective of the Former Master and this Court to conclusively establish the precise scope of the Tribes' reserved water rights. As the Special Master purports to recognize, "the context in which [the Former Master] wrote [Article IX] is important." (Spec. Master's Rep., p. 53.) When Article IX is viewed within this context, it it clear that the language, though broad in scope, was not intended to provide a modification "procedure" for the previously adjudicated Indian water rights.

1. In the Prior Proceeding the Former Master Rejected the United States' Recommendations for Unrestricted Modification Authority.

The United States in the prior proceeding assumed the evidentiary burden of establishing the amount of water necessary to serve the "reasonable needs" of the five mainstream Indian reservations. It persuaded the Former Master, over the strong objections of the State Parties, that the fairest

and most administratively feasible measure of those needs was the maximum amount of water adequate to irrigate all "practicably irrigable" acres on each reservation.

Statements made by counsel for the United States in the prior proceeding establish that it fully understood its evidentiary burden. For example:

> The [Former] Master: I take it from what you have just said that you are going to assert a claim for the maximum amount of water necessary for the irrigable acres in the reservation.
>
> Mr. Warner: That is correct, Your Honor.
>
> (Prior Rep. Tr. at 12,461 — Appendix A.)

Later, in the same discourse, the Government stated:

> [W]e think that under existing conditions on the Indian Reservations throughout the lower Basin, *the extent of the irrigable acreage is the only practicable basis*, as a general proposition, *for arriving at a reasonable judgment now of the possible needs of the Indians for the future*. It is for this reason that we propose to offer detailed evidence regarding the irrigable lands.
>
> * * *
>
> *To date none of the parties has been put to strict proof of irrigability. We anticipate that the United States*, in proving its claims on behalf of the Indians *will be*. (Prior Rep. Tr. at 12,463 — Appendix A. (Emphasis added.))
>
> * * *
>
> I think it is our duty to prove the Indian claims to the full extent we can prove them. (Prior Rep. Tr. at 12,564.)

When a question later arose about the scope of the United States' irrigable acreage evidence, the Former Master stated:

> *I shall assume* that the categories of lands indicated on the Indian reservations on *these maps constitute your*

> *Bill of Particulars* to what you regard as irrigable within the terms of the United States claim, *subject to correction* that you can bring to our attention *if there is some clerical error*, in the course of the trial; but otherwise, I shall assume that this is your Bill of Particulars. (Prior Rep. Tr. at 14,156-57 — Appendix A.) (Emphasis added.))

The United States never qualified its statements that its evidence was intended to establish the maximum extent of the Tribes' reserved water rights. (*E.g.*, Prior Rep. Tr. at 12,461 and 12,564 — Appendix A.) It did suggest on several occasions, however, that the Former Master might provide a procedure by which the United States might assert additional claims on behalf of the Tribes in the future. (Prior Rep. Tr. at 13,508 — Appendix A.) The Former Master rejected all such suggestions, which he characterized as tantamount to creating an "open-ended decree." (See Appendix A.) Against that background, it is significant, we believe, that the United States submitted no proposal for any kind of modification procedure for Indian rights in the proposed findings of fact and conclusions of law it submitted to the Former Master on April 1, 1959. Indeed, Article IX was proposed by the California Defendants,[8] who were strongly opposed to the basic concept of the United States' *Winters* claim.

In his 1960 report to the Court, the Former Master discussed the problems with an open-ended decree (p. 264):

> [S]uch a limitless claim would place all junior water ights in jeopardy of the uncertain and the unknowable. Financing of irrigation projects would be severely hampered if investors were faced with the possibility that expanding needs on an Indian Reservation might result

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[8]Findings of Fact and Conclusions of Law Proposed by the California Defendants (April 1, 1959), p. Decree — 26.

> in a reduction of the project's water supply. Moreover, it would not give the United States any certainty as to the extent of its reserved rights, which would undoubtedly hamper the United States in developing them.

The Former Master then recommended that the Court adopt the practicably irrigable acreage standard because it

> [would] preserve the full extent [of] . . . the water rights created by the United States and [*would*] *establish water rights of a fixed magnitude and priority so as to provide certainty* for both the United States and non-Indian users. (Emphasis added.) (*Id.*)

His determination to achieve finality with respect to the Indian claims was reflected in Article VIII(C) of his proposed decree, which provided that the "decree shall not affect . . . the rights or priorities, whether under state law or federal, *except as specific provision is made herein*, of any Indian reservation . . . ." (*Id.* at 360), to which the United States took no objection.[9]

The Court adopted the Former Master's recommendations with the statement that "[t]he various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable." 373 U.S. at 601. Thus, it seems clear that the Court determined that the magnitude of the *Winters* rights established under the "practicably irrigable" acreage evidence presented to the Former Master would meet the "reasonable needs" of the Tribes.

From the foregoing, it is abundantly clear that the Former Master intended that his recommended findings of fact and conclusions of law should be construed as establishing with certainty and finality the maximum quantity of the Tribes' reserved water rights.

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[9]See Transcript of Conferences on Recommended Decree in New York, N.Y. on August 19, 1960.

2. The Special Master Has Misinterpreted Article IX as Creating an Open-ended Decree.

The Special Master has grounded his decision to reopen the previously litigated and adjudicated issues of "practicably irrigable acreage" on Article IX of the 1964 Decree. He has further recognized that the history of the prior proceedings provides the appropriate factual framework for assessing the intent of Article IX. (Spec. Master's Rep., p. 32.) The Special Master then nevertheless essentially ignores the prior proceedings on the ground that the history of Article IX "before the prior Master [is] not conclusive and would support either a broad or narrow interpretation." *Id.* The preceding discussion plainly demonstrates that this statement is totally erroneous.

Having swept the prior proceedings aside, the Special Master turns to "outside authority" for guidance on the proper interpretation of Article IX. (Spec. Master's Rep., p. 33.) He finds it significant that Article IX is "virtually identical" to similar provisions in other interstate water cases adjudicated by this Court (*Id.* at 33) and, relying on the proceedings in those cases, determines that Article IX is broad enough to justify "virtually any modification in its 1964 Decree that this Court deemed proper in relation to the subject matter in controversy." (Spec. Master's Rep., p. 35.)

In reaching this determination the Special Master rejects the State Parties' claim that the similar provisions in previous interstate water dispute decrees were designed solely to deal with *unresolved* significant issues or to allow for *changing* equities in equitable apportionment cases. They are thus distinguishable from the present proceeding, which concerns the statutory apportionment effected by the Boulder Canyon Project Act and the need for a fixed quantification of Indian reserved rights in order "to provide cer-

tainty for both the United States and non-Indian users'' in the administration of that Act. (Former Master's Report, p. 265.)

For example, the Special Master in *Wisconsin v. Illinois*, 281 U.S 179 (1930), recommended the inclusion of language substantially identical to Article IX in order to deal with major problems that he had not been able to adjudicate:[10]

> It is recommended that the Court should retain jurisdiction as there are questions *which it is impossible to dispose of at this time in full justice to the parties*; as, for example, with respect to the extent to which the diversion of water from Lake Michigan by the Sanitary District may be reduced below 5,000 c.f.s., in addition to pumpage, after the installation of controlling works in the Chicago River and pending the completion of the sewage treatment works, and also with respect to any further or other provisions as to the diversion which may be found to be appropriate after the sewage treatment works have been completed and the results of their operation with respect to the effluent and the condition of the navigable waters have been observed. As construction work will be conducted on a large scale for several years, and *unforeseen contingencies may arise*, it would also seem to be important that there should be opportunity for the parties to come before the Court at any time to obtain such further directions as the facts may warrant.

Similar considerations prompted the Special Master in *New Jersey v. New York*, 283 U.S. 336 (1931), to recommend inclusion of such an article:[11]

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[10]Report of the Special Master on Re-Reference (filed December 17, 1929), p. 145. (Emphasis added.)

[11]Report of the Special Master (filed February 2, 1931), pp. 198-99. (Emphasis added.)

> In reaching the conclusions herein stated I realize that it will be necessary to retain the cause in court for the consideration of applications which may be made for the modification of the decree *in the particulars in which I have indicated that the decree should have flexibility and susceptibilty of modification*. Of course, it is desirable that all questions should be settled and that litigation should be ended, but in a case of this kind in which the future is necessarily fraught with uncertainties and in which the welfare of so many people is involved, I am of the opinion that justice requires that the cause should not be ended by a decree final and unchangeable in all its particulars.

However, it is significant that he stressed that only those matters which had not been adjudicated without prejudice would be subject to reconsideration under that article (*Id.* at 209) (emphasis added):

> The cause will be retained in court for proper applications relative to matters left open to change or modification and relative to those features as to which there has been a *decision without prejudice*. Such applications may be made by any party to the cause.

The recommendation for retention of jurisdiction by the Special Master in *Nebraska v. Wyoming*, 325 U.S. 589 (1945), was also grounded on the recognition of the need to adapt to changing equitable considerations, such as water supply:[12]

> The foregoing conclusions 6, 7, 8 and 9 assume that an apportionment now made should be based primarily upon the conditions of water supply which have prevailed since 1930. Recommendation is further made of retention by the Court of jurisdiction to amend the

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[12]Report of Michael J. Doherty, Special Master (filed October 16, 1944), pp. 10-11.

> decree upon a showing of such change of conditions as might render the operation of the decree inequitable. This recommendation contemplates particularly the possibility of the passing off the present drouth cycle and the future availability of far greater water supplies, comparable with those of former years which might justify a release of some or all of the restrictions now proposed. Many elements of uncertainty and probable impermanence in the present situation argue either for a dismissal of the suit or a decree with provision for such retention of jurisdiction. The reasons favoring a decree appear the stronger.

It is apparent from the foregoing that the language of Article IX, and the comparable provisions in earlier interstate water cases after which it was patterned, must be read against the background of the issues that had been passed on by each Special Master and the reasons advanced by them for its inclusion. The California Defendants proposed the inclusion of language substantially identical to Article IX before the Former Master because they had contended that the litigation should be decided in accordance with the principles of traditional equitable apportionment cases which had been before the Court, the most recent of which, *Nebraska v. Wyoming,* 325 U.S. 589 (1945), had provided for retention of jurisdiction in a clause substantially identical to Article IX. The Former Master ultimately rejected the applicability of the equitable apportionment doctrine to the major issues before him, concluding that they were governed solely by the Boulder Canyon Project Act, the California Limitation Act, and the water delivery contracts executed by the Secretary of the Interior with the parties under section 5 of the Project Act. (Former Master's Report, p. 138.)

Although the Former Master's report does not spell out his purpose for including Article IX in light of his decision

on the "irrelevance" of the equitable apportionment doctrine, it seems likely that it was intended as a safety-net to provide a convenient means for dealing with matters not litigated below and dealt with in the Decree, such as those expressly excluded in Article VIII or latent boundary issues like those which have surfaced on the Chemehuevi and Fort Yuma Reservations since the original proceeding. It also provided a mechanism to seek relief from or compliance with those provisions of the Decree which had been couched in injunctive terms against the parties. In any event, there is no mystery as to what Article IX was *not* to be used for, namely, the very relitigation of the "practicably irrigable acreage" on each reservation which Special Master Tuttle would permit. The record below could not make this any clearer, as the Special Master *almost* concedes, observing that "some of the remarks of the [Former] Master indicate that he might be disinclined to allow the United States to use Article IX to correct an error in the Indian water rights determination." (Spec. Master's Rep., p. 32.)

Had the Special Master accorded the strong statements of the Former Master during the trial and in his Report their appropriate weight, he would have been compelled to interpret Article IX as precluding this Court from reaching the merits of the omitted lands claims. On this basis alone, those claims should be rejected.

E. The Principles of Res Judicata Preclude Consideration of the Omitted Lands Claims.

The State Parties contended before the Special Master that consideration of the omitted lands claims was precluded by the principles of res judicata. There is no dispute between the State Parties and the Special Master over the essential elements of the doctrine of res judicata, and we see no need to restate them here. (The State Parties' res judicata argu-

ments are set out in their memoranda — cited in Spec. Master's Rep., p. 30, note 1.) With respect to those elements, the Special Master has rejected the contentions of the United States and the Tribes that the omitted lands claims are "new" claims. (*Id.* at 30-31.) Although he has also recognized that the Tribes were represented by the United States as trustee or guardian in the prior proceeding, he suggests that the Tribes' lack of status as actual parties to that proceeding provides a "compelling reason" for the Court to consider the merits of the omitted lands claim. (Spec. Master's Rep., p. 48.) The State Parties take strong exception to this conclusion. It is well established that the mere absence of the Tribes from the prior proceeding provides no legally supportable rationale for relitigating a previously adjudicated issue. For example, in *Heckman v. United States* this Court carefully considered the nature of the relationship between the United States and Indian Tribes and held:[13]

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents, whom Congress, with respect to the restricted lands, has not yet released from tutelage. *Its efficacy does not "depend upon the Indians' acquiescence.* . . . It is a representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

Commenting specifically on the effect of the United States' representation of Tribal rights, the Court determined that the United States binds not only itself "but the Indians whom it represents in the litigation," thereby recognizing

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[13]224 U.S. 413, 444-45 (1912) (Emphasis added); *cf., United States v. Emmons,* 351 F.2d 603, 604 (9th Cir. 1965).

that the United States and Indian Tribes were in privity (*Id.* at 446.)

In recent years several courts have permitted Tribes to represent themselves in judicial proceedings. For example, in *State of New Mexico v. Aamodt*[14] the Tenth Circuit granted the Pueblo Indians' motion for intervention (and independent legal representation) when the United States conceded "that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos." In such a case, the court determined that "adequate representation of both interests by the same counsel is impossible." (537 F.2d at 1106.) The *Aamodt* decision plainly does not create a sweeping new precedent for independent representation of Indian Tribes in proceedings where other federal interests also are at stake. It merely stands for the limited proposition that where the United States concedes it has a conflict of interest with those of Indian Tribes, the Tribes should have a right to concurrently assert their rights.

Similarly, the Ninth Circuit Court of Appeals recently held:[15]

> In general, representation of the United States will bind an Indian tribe and the individual Indians. See *Heckman v. United States, supra,* 224 U.S. at 445-46, 32 S.Ct. at 434-35; *United States v. Emmons,* 351 F.2d 603, 604 (9th Cir. 1965); *Oklahoma v. United States,* 155 F.2d 496, 498 (10th Cir. 1946); *Creek Indians National Council v. Sinclair Prairie Oil Co.,* 142 F.2d 842, 845 (10th Cir.), *cert. denied* 323 U.S. 78, 65

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[14]*State of New Mexico v. Aamodt,* 537 F.2d 1102 (10th Cir. 1976), *cert. denied,* 429 U.S. 1121 (1977). See also *Jicarilla Apache Tribe v. United States,* 601 F.2d 1116 (10th Cir. 1979), *cert. denied,* 444 U.S. 995.

[15]*United States v. Truckee-Carson Irrigation District,* 649 F.2d 1286, 1307 (9th Cir. 1981.)

> S.Ct. 269, 89 L.Ed. 624 (1944); *Pueblo of Picuris v. Abeyta,* 50 F.2d 12, 13 (10th Cir. 1931); *Vinson v. Graham,* 44 F.2d 772, 779 (10th Cir. 1930), *cert. denied,* 283 U.S. 819, 51 S.Ct. 344, 75 L.Ed. 1435 (1931); *Winship v. Ricketts,* 32 F.2d 476, 479 (8th Cir. 1929). When the government breaches its trust to the Tribes while openly advancing its own interest the Tribe is not necessarily bound . . .

The Court made clear that Indians do not have an inherent right to separate representation in proceedings affecting their interests, but may be permitted to intervene where there is evidence of a conflict of interest, fraud or collusion.[16]

The instant proceeding thus is factually distinguishable from the *Aamodt* and *Truckee-Carson* cases. Unlike those cases, the United States here denies and the Special Master has not found any conflict of interest between the United States and the Tribes in the prior proceeding.[17] Moreover, this Court found no merit to the Navajo Tribe's contentions in the prior proceeding that representation of their interests by the United States would be inadequate. Rather, it specifically affirmed the adequacy of the United States' representation by denying the Navajos' motion to intervene. That ruling is the "law of the case" and should have been honored by the Special Master.

For these reasons, it is clear that the Tribes, though not actual parties, were in privity with the United States during the prior proceeding.

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[16]*Id.* at n. 18. *See also Cheyenne River Sioux Indians v. United States,* 338 F.2d 906 (8th Cir. 1964), *cert. denied,* 382 U.S. 815 (1965).

[17]Memorandum for the United States on Motions for Leave to Intervene (May 1978) at 10. The Special Master states that the State Parties came close in their pretrial brief to making an admission that the United States failed to carry out its trust responsibility in the prior proceeding. Spec. Master's Rep., p. 52, note 67.

Despite the fact that the omitted lands claims are not new claims and that the United States and the Tribes were in privity, the Special Master found that res judicata does not preclude litigation of the claims. He concludes that "if these claims were presented in a proceeding separate from the original case, they would have been subject to the normal rules of preclusion," but finds a crucial distinction because the claims are made within "the same action in which the prior claims were adjudicated." (Spec. Master's Rep., pp. 30-31.)

There is a certain superficial plausibility to the Special Master's reasoning. However, the Special Master has completely overlooked the fact that the Tribe's basic *Winters* rights claims, within which their present claims are merged (*Id.* at 30), were fully adjudicated in the prior proceeding. Thus, in contrast to the other boundary issues now pending before the Court, which were never resolved, the Tribes and the United States seek a "second day" in this Court to relitigate the magnitude of the Tribes' reserved water rights claims. The Special Master's conclusion that the principles of res judicata are inapplicable solely because the present proceeding still carries the "No. 8 Original" docket designation of the original proceeding would exalt form over substance and should be rejected. Reason, fairness, and practical necessity all require an end to litigation of the same issue between the same parties, no matter what procedural mechanism is invoked in the attempt to relitigate previously adjudicated claims.

The Special Master has given no apparent consideration to the disruptive legal precedent inherent in his recommendation. Specifically, if this Court accepts the Special Master's recommendation not to invoke the doctrine of res judicata or law of the case to block the omitted lands claims, then the door is inexorably opened to continued relitigation

of the practicably irrigable acreage issue. All the United States or the Tribes would need to show in the future is some "new evidence" of technological innovation in irrigation science or crop production not previously laid before the Court that allegedly will demonstrate that reservation lands for which no water rights were previously asserted are now "practicably irrigable." Finality could never be achieved because Article IX of the Decree would provide a master key for indefinitely unlocking adjudicated issues.

Both the United States and the Special Master disclaim any attempt to so interpret Article IX. The United States has conceded that "countervailing considerations counsel a halt to indefinite reconsideration of matters already decided."[18] Similarly, the Special Master acknowledges that "obviously the decree must be considered closed on these matters at some time." (Spec. Master's Rep., p. 53). When and in what circumstances "enough is enough" is not indicated. In reality, these lofty disclaimers are meaningless. Reliance on Article IX under the present factual circumstances demonstrates that it would be difficult, if not impossible, to conjure up any factual situation under which Article IX would not provide a basis for relitigation of a previously resolved issue.

Rather than interpret Article IX in a manner which is "pregnant with further litigation," *Oklahoma v. Texas*, 256 U.S. 70, 90 (1921), the State Parties believe this Court should construe it consistent with the principles of res judicata and its prior intention to foster reliance on the 1964 Decree. See *Montana v. United States*, 440 U.S. 147, 153 (1979). For these reasons, the State Parties contend that the

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[18]Motion of the United States for Modification of Decree and Supporting Memorandum (December 1978), p. 28.

Special Master erred in refusing to apply the principles of res judicata to bar relitigation of the magnitude of "practicably irrigable acreage" on each reservation.

F. Even if Res Judicata Is Inapplicable, the Doctrine of Law of the Case Should Bar Relitigation of the Omitted Lands Claims.

Although the Special Master refused to apply the doctrine of res judicata to the omitted lands claims on the grounds that they are made within the same proceeding, he did find that the "law of the case" doctrine should be considered to determine if the claims are precluded from further relitigation. (Spec. Master's Rep., p. 36.) In his view, the Court should exercise its discretion under that doctrine to permit consideration of the omitted lands issue (*Id.* at 54.)

The State Parties believe the Special Master has incorrectly applied the law of the case doctrine. Admittedly, that doctrine, unlike the doctrine of res judicata, does not compel adherence to a prior decision. Rather, as the Special Master recognizes, it is a matter of good practice which directs the exercise of the Court's discretion. (*Id.* at 36.) However, although the law of the case is not an "inexorable command," *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967), a court's discretionary authority to recall a mandate "should be exercised sparingly." *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 585 (D.C. Cir. 1980). Cases which traditionally call for reconsideration of a previously litigated issue are those where the controlling legal authority has changed subsequent to first review of the issue or where "grave injustice" would result from failure to reconsider a previously litigated issue. (*Id.*)

The question in the instant proceeding, therefore, is whether there is a compelling basis for waiving the law of the case doctrine and permitting reconsideration of the mag-

nitude of the Tribes' reserved water rights claims. The United States and the Tribes do not contend that an intervening change in law requires waiver of the law of the case doctrine. Indeed, two subsequent decisions of this Court point to a contraction, not an expansion, of the Indian rights. *United States v. New Mexico*, 438 U.S. 696 (1978); *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979). Thus, the only basis for departing from the law of the case doctrine would be that failure to do so would result in a "grave injustice" to the Tribes. And, seemingly, it is on this basis that the Special Master has determined this Court should reconsider the extent of the reserved water rights allotted to the Tribes, which he concludes "received less than a full measure of justice before the Court."[19]

The extensive record developed before the Special Master fails to establish that the Tribes will suffer "grave injustice" of any kind if the omitted lands claims are barred, so there is no legally cognizable basis for "overriding the strong policy of repose normally accorded past decisions." *Laffey, supra,* at 585. First, the United States and the Tribes make no claim, and no evidence has been introduced which even remotely suggests, that the purposes of any of the reservations would be frustrated or that they would not be "livable" (Spec. Master's Rep., p. 90) in the event review of the claims is precluded. Second, there is no assertion or evidence that failure to consider the claims will jeopardize or in any way interfere with the ability of the Tribes to meet

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[19]Spec. Master's Rep., p. 48. The State Parties emphasize here that they dispute the Special Master's assertion that they "admit" that the Tribes were treated unjustly. We agree that many of the omitted lands are "practicably irrigable" under the evidence presented in this proceeding, but do not agree that they were improperly classified as not practicably irrigable under the evidentiary standards chosen by the United States in the prior proceeding.

their "reasonable needs," present or foreseeable. Indeed, the water rights awarded the Tribes in the prior proceeding are more than sufficient to fully accommodate their needs by any reasonable standard. Thus, the basic purpose of the *Winters* Doctrine has been fully served.

Much of the evidence submitted in the present proceeding is no more than a narrative that additional water might be useful to potential or projected future development of the reservations. (*E.g.*, Rep. Tr., pp. 1428-29, 1438, 1440-42, 1451-53.) The possible limiting of speculative future development manifestly is not the kind of hard evidence demonstrating that a "grave injustice" occurred in the prior proceeding which is essential to justify reconsideration of a previously litigated issue.[20] The best characterization that can be given to the evidence is that it is cumulative to that introduced in the prior proceeding and, in most instances, shows only that under different, new approaches, the omitted lands are irrigable.

In contrast, the Special Master's recommendation would take water from existing non-Indian users in California and from the soon to be completed Central Arizona Project, (who he concedes relied in varying degrees on the 1964 Decree [Spec. Master's Rep., p. 46]) largely to enable the Tribes to increase the revenue they receive from leasing their water rights to *other* non-Indian users. In weighing the equities in this situation, the Special Master concludes that the Tribes "received less than a full measure of justice before the Court" in the earlier proceeding because the claims presented by the United States allegedly "fell short of the maximum possible claims" under the "practicably

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[20]*Laffey, supra; Otten v. Stonewall Insurance Company*, 538 F.2d 210, 213 (8th Cir. 1976); *White v. Murtha*, 377 F.2d 428, 432 (5th Cir. 1967); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19-20 (5th Cir.), *cert. denied*, 419 U.S. 987 (1974).

irrigable'' standard — a fact which he finds ''constitutes sufficient good reason to risk upsetting whatever reliance may have been based upon the Court's prior conclusion.'' (Spec. Master's Rep., p. 48.) But this is not ''equity'' by any standard no matter how the Special Master may strain to so portray it. Rather, since the Special Master has found it necessary to balance the equities in deciding whether to depart from the law of the case, he should follow the principle that this Court has followed in weighing equities in equitable apportionment cases, namely not to countenance the substantial impairment of existing uses for the benefit of prospective future developments. *Nebraska v. Wyoming,* 325 U.S. 589 (1945); *Wyoming v. Colorado,* 259 U.S. 419 (1922).

The evidence introduced by the Tribes and the United States in support of the omitted lands claim does not show that the prior determination was ''fundamentally unfair'' to the Tribes or not adequate to meet their reasonable needs. Instead, it simply shows that through utilization of *new* approaches, some lands might now be considered ''practicably irrigable'' which previously were not so classified. For example, the Tribes stated that their new evidence would ''show that certain factors special to the Colorado River Reservations as well as *current* trends in national and international agricultural production and demand operate to make long-term agriculture development very favorable on . . . the omitted lands.'' (Ft. Mojave, Chemehuevi, Colorado River, and Cocopah Tribes' Pre-trial Brief, pp. 22-23, emphasis added.) Similarly, in its pre-trial brief, the United States stated (p. 17, emphasis added):

> ''Under [additional soil analyses], certain lands . . . previously examined pursuant to BIA standards . . . were analyzed pursuant to standards of the Soil Conservation Service of the United States Department of

> Agriculture. Under these *more modern* standards, certain areas classified as 'non-irrigable' under the older BIA standards were considered to be irrigable.''

Significantly, since much of the evidence submitted to overturn the earlier classification is different from that introduced in the prior proceeding, a decision to consider the omitted lands claims necessarily carries with it a decision to alter — not implement — the basic evidentiary criteria for ''practicable irrigability'' that formed the cornerstone of the prior proceedings.

The Special Master rejected the State Parties' assertion that the United States actually determined in the prior proceedings that the lands in question were not practicably irrigable. (Spec. Masters Rep., p. 51.) He was deprived of the best evidence available of the United States' trial strategy when he sustained a claim of privilege by the United States with respect to a detailed memorandum on that subject by a principal participant in the preparation of that case. (SP Exh. 123; Rep. Tr. 4497-4525). Instead the Special Master purports to discover certain ''mistakes'' in the prior proceeding that he finds demonstrate that the United States offered evidence sufficient to establish a ''fair'' but not the ''best'' claim for the Tribes. (Spec. Master's Rep., pp. 48-49.) According to the Special Master, a principal witness for the United States revealed that ''the United States had mistakenly failed to include all irrigable land in its claims.'' (*Id.* at 49.) However, a careful review of the transcript (See Appendix A) in the earlier proceeding demonstrates that the Special Master has fundamentally misunderstood or misconstrued the witness's testimony.

The witness was questioned on cross-examination about the reliability of the United States' evidence on the practicably irrigable acreage asserted for the various reservations. The stated purpose of the examination was to deter-

mine whether the United States was asserting the maximum claim for the Tribes, *i.e.*, "to find out . . . whether we [the States] may rely upon these lands on these maps as limiting that claim or not." (Prior Rep. Tr. at 14153.) The witness's responses to those questions make clear that under the practicably irrigable acreage standard, defined by the United States as "those lands which could be served by the existing or proposed project" (Prior Rep. Tr. at 14152), the witness "did not make a mistake" (Prior Rep. Tr. at 14154). The witness's statements that other lands on the reservations may have been "irrigable" but not included in the reserved water rights claim provides no basis for concluding, as the Special Master has, that the United States failed to assert water rights for all "practicably irrigable" acreage. At most, they demonstrate, contrary to Special Master's conclusion, that the witness was trying to explain "that irrigable is not necessarily the same as practicably irrigable." (Spec. Master's Rep., p. 49.) Even today, certain other reservation lands could be considered "practicably irrigable" under an *evidentiary* standard different from the standard advanced by the United States and adopted by the Former Master and the Court in the prior proceeding, particularly where, as here, the passage of a quarter of a century has improved soil classification science and irrigation technology.

The Special Master purports not to understand what the State Parties mean by their assertion that the United States' judgment as to the proper scope of "practicably irrigable acreage" was a "reasoned tactical decision." (Spec. Master's Rep., p. 51.) He also criticizes counsel for the United States in the prior proceeding for presenting claims on behalf of the Indians "that were 'fair' to the Indians and 'fair' to everyone else." In the Special Master's view this was wrong, since "as trustee the United States was obligated to assert maximum claims, not merely claims that it believed

were 'fair'." (Spec. Master's Rep., p. 49.) But the Special Master's criticism is presumptuous and inappropriate. At the time of the prior trial in the 1950's, the contours of the *Winters* Doctrine were even murkier than they are today. Only two Indian water rights cases had previously reached the Supreme Court.[21] The proper measure of an impliedly reserved *Winters* right was obscure, and one Ninth Circuit decision had rejected the irrigable acreage test as a measure of the "reasonable needs" of the Indians in favor of historical experience.[22] Thus it is clear that the United States was breaking new ground in a difficult area, particularly since it was attempting to secure relatively large quantities of water for some 26 Indian reservations scattered throughout the entire lower Colorado River basin. In that context it was obviously essential to measure "reasonable needs" by a standard that was itself "reasonable." Recognizing that even the irrigable acreage standard is only a rough, though liberal approximation of "reasonable needs," it was essential to employ a rule of practicality with respect to the physical and economic basis for such a classification.

In such an uncertain situation there was obviously some risk that the Special Master would not accept an unreasonably broad claim for the Indians and might be persuaded by the quantification formulas being urged by Arizona and California, which would have awarded substantially less water to three of the mainstream reservations and none to two of them.[23] In that context, being "fair" was obviously

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[21]*Winters v. United States*, 207 U.S. 564 (1908); *United States v. Powers*, 305 U.S. 527 (1939).

[22]*United States v. Walker River Irr. Dist.*, 104 F.2d 334, 340 (9th Cir. 1939).

[23]Counsel for the United States clearly advised the Former Master that the voluminous evidence of past irrigation on each reservation that the United States offered was prompted by a recognition that the Former Master might not adopt the United States' "practicably irrigable acreage" test. (Prior Rep. Tr., pp. 12,560-64 - Appendix A.)

consistent with the Indians "best" interests. The kind of overreaching displayed by the United States and the Tribes in the present proceeding was not yet in vogue.

Elsewhere the Special Master is more charitable and seems to recognize the high judgmental element involved in trying a case to implement the "practicably irrigable acreage" standard. In discussing the several reservation boundary disputes, he recognizes that the Former Master adopted that standard only as "a *rough* measuring stick, a tool toward an informed equitable *estimate* of the Indians' needs." (Spec. Master's Rep., pp. 64-65.) (emphasis added.)

In bluntest terms, the present generation of Justice Department lawyers and the current Special Master are simply engaging in "Monday morning quarterbacking" a quarter of a century after the former United States' trial counsel had to make the difficult litigation decisions that ultimately led to an award for the Tribes that was unprecedented in Indian water rights litigation. It would offend all sense of fair play and procedure to permit that to be done under the guise of avoiding a purported "grave injustice" to the Tribes.

It is clear from the foregoing that there is no basis for departing from the law of the case to permit consideration of the omitted lands claim.

G. The Prior Findings on Practicably Irrigable Acreage Should Not Be Reopened Because the State Parties Have Relied on the 1964 Water Allocations and the Tribes Have Another Avenue of Relief if the United States' Prior Representation Was Legally Inadequate.

The Special Master has made clear that the primary reason he recommends that the Court consider the merits of the omitted lands claim is that failure to do so would result in

unfairness to the Tribes. (Spec. Master's Rep., p. 48.) Evidence of this unfairness, he states, is manifested by the fact that the Tribes were not actual parties to the prior proceeding and that all parties to the present proceeding concede that under the *new* evidence and economic assumptions, all or some of the omitted lands may be "practicably irrigable."

The State Parties have demonstrated that the absence of the Tribes as actual parties to the prior proceeding in no way establishes that they were not fairly treated or adequately represented. Further, the fact that some of the lands previously considered to be not practicably irrigable might be reclassified under the new evidence is not tantamount to an admission necessitating relitigation of the magnitude of the Tribes' reserved rights. At most, it establishes only that under different, more modern evidence and assumptions than those utilized by the United States and adopted by the Court in the prior proceeding, some lands not classified as "practicably irrigable" at that time might be today. If anything, recognition of this fact points to the inherent defect of reopening this previously litigated issue, namely, providing legal precedent for unlimited future relitigation of Indian reserved water rights each time "new" soil science and irrigation technology evidence is brought to the attention of the Court, not only in this case but in the host of cases where the *Winters* Doctrine has been or is being litigated. The Court ought not to enter lightly upon such a precedential action.

Significantly, although the Special Master evidences great concern that the Tribes be treated fairly, he shows little concern that the State Parties be treated fairly. While he did not dispute that the State Parties relied on the 1964 Decree and will bear the loss of water rights if the omitted lands

claims are sanctioned, he determined that "this reliance . . . might not be sufficient to foreclose the present claims." (Spec. Master's Rep., pp. 38, 46.)

1. Reliance by the State Parties on the 1964 Water Allocations.

An examination of the relevant facts discloses that the State Parties did rely on the prior Decree and will suffer substantial harm if the omitted lands claims are decided in favor of the Tribes. Those claims were not asserted until 14 years after entry of the Decree. During that period, the State Parties developed water supply plans which reflected the terms and conditions of the 1964 Decree. (Spec. Master's Rep., pp. 38-46.) Any increase in the Tribes' water rights will be borne gallon for gallon by the State Parties. (Spec. Master's Rep., p. 38.) Thus, review of the omitted lands claims will require this Court to disrupt the integrity of the 1964 Decree to cure an arguable, potential "unfairness" to the Tribes and, in so doing, produce an immediate and substantial adverse impact to the State Parties, who properly viewed the prior adjudication as establishing a final determination of the Tribes' water rights.

The record is replete with evidence that the factual findings quantifying the Tribes' reserved rights served as the foundation of the State Parties' efforts in developing projects to exercise their rights and in planning for other projects to supplement those rights.

Donald C. Brooks, Director of the Planning of the Metropolitan Water District of Southern California ("MWD"), testified that the District provides about 45 percent of the water supply for the 12 million residents of the Southern California coastal plain from two sources — the Colorado River and the State Water Project. (Rep. Tr., pp. 2909, 2914.) In 1960, MWD contracted for a supply of water from the State Water Project to supplement its Colorado River

supply. After the Supreme Court's decision and Decree in *Arizona v. California*, MWD amended its State contract in 1965 to provide for additional water to replace the quantity it had lost under the Court's Decree. (Rep. Tr., pp. 2925-2926.) At that time, there was additional capacity available in the State Water Project which MWD could have contracted for. (Rep. Tr., p. 2941.) If the "omitted lands" claims now asserted by the United States and the Tribes are sustained, MWD could not obtain an additional long term, firm water supply from the State Water Project to replace that quantity unless a second, costly aqueduct were built from the Sacramento-San Joaquin Delta to Southern California. (Rep. Tr., pp. 2929-30, 2942-43.) Moreoever, even if aqueduct capacity were to be available, the State has not yet developed the full supply necessary to meet its presently contracted commitments, much less additional supplies. (Rep. Tr., p. 2942.)

The Special Master indulges in curious reasoning regarding MWD's reliance on the 1964 Decree of the Court by referring to unresolved boundary questions. He states that the District's replacement of water lost by the 1963 decision and 1964 Decree in this case only took into account the water lost to Arizona and not to the Indian Tribes and that it failed to make plans for increased awards to the Tribes should they prevail on the unresolved reservation boundary questions. "From this evidence one could find that the District simply ignores the Indian water rights in its planning process and thus does not rely on an award at a specific level." (Spec. Master's Rep., p. 43.)

But the Special Master does indicate his understanding that MWD acted to make up its huge loss of 662,000 acre-feet to Arizona by increasing its state contract entitlement (Spec. Master's Rep., p. 42), and nowhere does he refer to evidence of what impact the Indian Tribe awards in the

1964 Decree would have on MWD. (In fact, the overwhelming impact is upon Arizona.)

As for MWD not making plans for any additional awards being made to Indian reservations based upon resolution of disputed boundaries of the reservations referred to in Article II(D)(5) of the 1964 Decree, the Special Master overlooks or ignores the results of trial of the boundaries issue before the Former Master. The determinations were generally in favor of the State Parties. Could MWD be reasonably expected to bear the great expense of obtaining an alternative water supply of an unknown quantity on the contingency that someday the boundaries issue would be retried and with a different result than in the original proceedings or that this Court's adjudication of water rights for each reservation would relitigated?

No less puzzling than the above comments of the Special Master is his adoption of the United States' statement that "the record does not indicate the decrease in [the District's] supply if the additional claims are upheld." (Spec. Master's Rep., p. 42.) The Special Master notes that MWD's priority to Colorado River water accords with the Seven Party Agreement. Pursuant to that agreement (Prior Ariz. Exh. 27; Wilbur and Ely, *The Hoover Dam Documents* (1948 Ed.), A 479, A 507, A 535.), MWD's contracts for 1,212,000 acre-feet are fourth and fifth priorities, junior to rights of 3,850,000 acre-feet held by other California agencies. Therefore, when California agencies are limited to the State's annual entitlement of 4.4 million acre-feet, MWD's supply will be reduced to 550,000 acre-feet. Similarly, any additional award to Indian reservations, since they have the highest priority [*Arizona v. California, supra,* 439 U.S. at 421 (1979)] will reduce the District's supply, *pro tanto.*

MWD, of course, does not take Indian water claims and awards so lightly as the Special Master would have the

Court believe. While the effect of the 1964 award on MWD, some 55,000 acre-feet in consumptive use terms, was regarded as relatively minor when it was confronted with the huge loss of 662,000 acre-feet to Arizona, such is not the case today. The Special Master's additional allocation to the Indian reservations in California is 123,314 acre-feet per year. Allowing for one-third return flow, this amounts to approximately 82,200 acre-feet of consumptive use. Thus, MWD could lose about 137,000 (55,000 + 82,200) acre-feet annually. On its face, this is not an insubstantial supply, but considered in context of the State of California having developed only about half of the supply it is committed to on the water project relied upon by MWD (Rep. Tr., p. 2942), and the water supply of the City of Los Angeles, and particularly its rights of some 150,000 acre-feet annually from the Owens Valley being subject to pending litigation which could result to its turning to MWD to make up any losses (Rep. Tr., p. 2940), it can only be regarded as a serious threat to MWD's meeting its obligations.

Unfortunately, the impact upon MWD of any additional award of water to Indian reservations situated in California is unmistakable and manifest.

The Special Master has characterized [m]uch of the discussion regarding reliance [as] ''superfluous'' in evaluating the evidence offered by the State Parties on this issue yet it is this evidence which demonstrates Nevada's reliance on the 1964 Decree and the detrimental impact to be incurred if the present claims are granted. The Special Master makes two egregious errors by not considering all the evidence: he fails to consider the impact of all existing contract rights for diversions of Colorado River water held within Nevada, and he assumes that a specific return flow percentage should be applied to all diversions of Colorado River water within

the State. Consideration of the following evidence answers the uncertainty expressed by the Special Master (Spec. Master's Rep., p. 46) and sufficiently forecloses consideration of the present claims.

The statement of Mr. Duane Sudweeks, director of the Colorado River Commission of Nevada (Division of Colorado River Commission at time of trial), that Nevada has relied on the 1964 Decree, is in fact accepted by the Special Master. (Spec. Master's Rep., p. 44.) This reliance led to the construction of the Southern Nevada Water Project (Project) enabling the State to divert 299,000 acre-feet annually from the Colorado River for use in the Las Vegas Valley. The total capital investment by the State in the Project is expected to exceed $215,000,000. Sudweeks further testified that present contract diversion rights to the Colorado River approach 400,000 acre-feet annually, yet the Special Master only considers the Project's diversion figure in concluding the Project would not be impacted if the "omitted lands" claims in Nevada were granted. (Rep. Tr., p. 3060.) These other contract diversion rights must be considered in determining what, if any, of the State's 300,000 acre-feet annual allocation is available and the impact of these additional claims. (*See*, U.S. Exh. 96.) Some of these diversion rights "have basically no or very little return flow to the river system." (Rep. Tr., p. 3060.) Therefore, the Special Master's conclusion that sufficient water is available to satisfy the present claims is speculative at best.

Any additional water rights granted the Fort Mojave Tribe in Nevada may have a detrimental impact on existing water users and the future ability of the State to meet the water needs of a rapidly expanding population. The Project's diversion right to 299,000 acre-feet would be decreased if all existing superior water rights are exercised. Such decreases

may occur in a normal water year and would certainly occur in a water short year. The inability of the Project to divert its contract amount would severely affect the several municipalities in the Las Vegas Valley and render useless its portion of the Project which the State is committed to repay.

The Special Master determined "Nevada has presently set aside for the Indians a total consumptive use figure of 12,500 acre-feet of water per year" and therefore the State can satisfy the present claims. (Spec. Master's Rep., p. 45.) This conclusion misconstrues the facts and assumes some return flows to the Colorado River will occur. It must be pointed out that no undisputed methodology has been identified for measuring or quantifying return flows on the Colorado River. Furthermore, the Special Master's use of the 35 percent return flow reflects a much higher percentage than is experienced by other contract diversions in the State. As previously explained, some diversion rights "have basically no or very little return flow to the river's system." (Rep. Tr., p. 3060.) The higher percentage used by the Special Master is only applicable to the Project, a modern water conveyance system and is inappropriate as a measure of return flows in this case. Therefore, the State is clearly justified in holding the decreed amount of 12,500 acre-feet as a consumptive use against the State's 300,000 acre-feet allocation. Any additional water rights granted the Fort Mojave Tribe would then further reduce the State's total allocation and directly impact existing water users.

Similarly, Wesley E. Steiner, Director of the Arizona Department of Water Resources, testified that Arizona relied on quantities allocated to the mainstream Indian reservations in the 1964 Decree in seeking Congressional authorization of the Central Arizona Project in 1968 to serve the Phoenix and Tucson metropolitan areas and in making the related contractual water allocations and financial commitments

required by the Colorado River Basin Project of 1968. (Rep. Tr., pp. 2689-95.) (Arizona's reliance upon the 1964 Decree is more fully set forth in its brief being filed separately.)

Despite protestations of uncertainty, the Special Master does grudgingly concede that the State Parties did rely upon the 1964 Decree as a basis of future planning. (Spec. Master's Rep., p. 46.)

The State Parties' reliance on the 1964 Decree was completely justified. As noted earlier, the central objective of the former Master was to fashion a decree which would resolve with certainty and finality the conflicting claims to water of the Colorado River. One such major claim which the former Master and the Court quantified with finality was the Tribes' reserved rights claim. Against this background, it is not surprising that the State Parties relied on those portions of the 1964 Decree which quantified the Tribes' rights. Those findings served as the cornerstone of the decision. Failure to rely on them would have shown a remarkable disregard for an exacting, specific and tailored mandate with which the parties were directed to comply.

2. Alternative Relief for the Tribes: the Court of Claims.

The drastic action of reopening the 1964 Decree plainly should not be taken if another remedy exists to remedy what the Special Master characterizes as the United States' "inadequacy of representation" in failing to dedicate "its efforts to maximizing the Tribes' welfare." (Spec. Master's Rep., pp. 49, 52, note 67.) Without agreeing with the Special Master's characterization, if such allegations could be proved, the State Parties believe that alternative relief is available to the Tribes that would keep them whole while not visiting the cost of any proved misfeasance by the United States as trustee solely on certain water users in the several states.

The essence of the omitted lands claim is that the United States, for whatever reason, in the prior proceeding did not make a claim for all lands capable of meeting the practicably irrigable standard and thus failed to adequately represent the Tribes' interests. The State Parties believe that the most appropriate procedure to test that theory would be a suit against the United States for monetary damages in the United States Court of Claims. In *Mitchell v. United States,* 445 U.S. 535, *reh. denied,* 446 U.S. 992 (1980), this Court ruled that 28 U.S.C. § 1505 confers jurisdiction on the Court of Claims to hear a suit by an Indian tribe against the United States whenever the tribe has a substantive right to sue, that is, whenever there has been a waiver of the United States' sovereign immunity as to the particular claim or claims involved.

In *Mitchell,* money damages were sought by individual Indians and by the tribe for alleged mismanagement by the United States of timber resources on certain allotted lands. The Court ruled that the General Allotment Act of 1887[24] does not impose a fiduciary duty on the United States to manage timber resources and therefore no actions could lie. It then stated (*id.* at 542):

> We need not consider whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity. We conclude that the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources.

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[24]24 Stat. 388, as amended, 25 U.S.C. §§ 331 et seq.

On remand, the Court of Claims determined that other statutes under which the Indian claimants asserted damages did create a fiduciary duty on the part of the United States to manage forest lands. Upon proof of breach of these responsibilities, the Court ruled that the Indians would have a claim for money damages under 28 U.S.C. § 1505. *Mitchell v. United States,* 664 F.2d 265 (Ct. Cl. 1981).

The present case differs somewhat from *Mitchell.* Here, any tribal claim for damages would be based, *inter alia,* on the general fiduciary duty of the United States to represent Indian tribes in litigation. See 25 U.S.C. § 175 (1976); Spec. Master's Rep., p. 48. Unlike *Mitchell,* it is beyond question that such a general duty exists. *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 369-70 (1968); *Heckman v. United States, supra.* The motions of the United States which in part triggered this lawsuit are predicated upon such a duty. *Heckman* establishes that the United States' representation of the Tribes is complete and does not depend on the Tribes' acquiescence. Since the Tribes are bound by the United States' representation, it seems only fair that the United States, as trustee, should be held accountable for any breach of its fiduciary duty due to inadequate representation.

Monetary damages for the Tribes are an adquate remedy. Most of the lands have historically been farmed not by tribal members but by non-Indian lessees. (*E.g.,* Rep. Tr., pp. 1346-68, 1396, 1401, 1413-21.) Thus, the loss to the Tribes if the United States failed to adequately represent their interests in the prior proceeding, is solely monetary, i.e. lost revenue from leases. Under these circumstances, a Court of Claims recovery for monetary damages is completely sufficient and preferable to the drastic avenue of relief chosen by the Special Master, namely, destruction of the integrity of the 1964 Decree.

II.

THE SPECIAL MASTER, IN ACCEPTING AS CONCLUSIVE THE DISPUTED RESERVATION BOUNDARIES ESTABLISHED BY THE UNITED STATES AND PROCEEDING TO TRY THE ISSUE OF PRACTICABLY IRRIGABLE ACREAGE WITHIN ADDED LANDS FOR PURPOSES OF INCREASING THE WATER ALLOCATIONS OF THE RESERVATIONS, HAS ACTED CONTRARY TO THE COURT'S 1964 DECREE ALLOWING ADJUSTMENT OF WATER ALLOCATIONS ONLY WHEN THE DISPUTED BOUNDARIES HAVE BEEN FINALLY DETERMINED.

A. Introduction.

The motions of the United States and the five Indian Tribes for modification of the Court's 1964 Decree allocating water to the respective Indian reservations include claims of additional water entitlements based upon asserted restoration of Indian lands through "final" resolution of certain boundary disputes.[25]

Stated briefly, under the *Winters* Doctrine,[26] the claims of the Indian Tribes and the United States to additional water based upon additional reservation lands are dependent upon two factors: first, a determination that the land for which additional water is claimed is, in fact, within the reservation; and second, a determination that such added land is practicably irrigable (*Arizona v. California, supra*, 373 U.S. at 601). The Special Master by order of August 28, 1979, confirmed in his report of February 22, 1982, has precluded the State Parties from challenging the enlarged reservation boundaries advanced by the United States and the Tribes and has proceeded to hear evidence on practicably irrigable acreage within the added lands and to propose substantial

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[25]Motion of the United States for Modification of Decree and Supporting Memorandum, December 1978, pp. 8-17.

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

water allocations based upon findings of practicably irrigable acreage. He has accepted certain administrative orders of the Secretary of the Interior and court decrees of cases in which the State Parties were not represented, as constituting final determinations of disputed reservation boundaries.

In the following argument we will demonstrate that while this Court in its 1964 Decree in this case provided for the possibility of adjustment of the water allocations decreed for the Fort Mojave and Colorado River Indian Reservations "in the event that the boundaries of the respective reservations are finally determined" (*Arizona v. California*, 376 U.S. 340, 345 (1964)), it did not intend that the disputed boundaries issue could be resolved by unilateral action of only one of the sides of the water entitlement controversy.

B. Significance of the Disputed Reservation Boundaries Issue.

In order to fully appreciate the significance of the erroneous ruling of the Special Master in accepting as binding upon the State Parties, for purposes of revising the water allocations, the disputed boundaries advanced by the United States and the Tribes, it is necessary to consider the litigation context in which this question originated.

The instant case arose in 1952 essentially to apportion the waters of the Colorado River among the lower basin states of Arizona, California, and Nevada. The United States intervened to assert its various interests. With respect to claims of the United States, the issues included allocations of water to a number of Indian reservations including the five Tribes in the present proceedings based upon their *Winters* Doctrine rights, although that part of the case was secondary compared with the other issues. Nevertheless, the issues relating to water entitlements of the Indian res-

ervations were fully tried before Special Master Rifkind (''the Former Master''). These issues involved disputed boundaries of two reservations and the amount of practicably irrigable acreage on each of the reservations. *Arizona v. California*, 373 U.S. 546, 600-601 (1963). Following trial, the former Master made rulings in favor of the California position on the disputed boundaries, except for two instances involving avulsive changes of the river, and determined the practicably irrigable acreage within the determined reservations and allocated water accordingly. His determinations were incorporated in his report to the Court. (Former Master's Rep., December 1960, pp. 254-266.)

In these earlier proceedings, it was readily seen by all parties that rulings on water entitlements for the reservations necessarily involved boundary adjudications where the boundaries were in dispute, for the water entitlements are dependent in part upon the extent of the reservations.[27] Unfortunately, it was not realized until the proceedings before the Former Master were completed that private individuals not parties in the case had independent interests in the adjudication of reservation boundaries. For this reason, the California parties in their brief to the Court urged rejection of the Former Master's boundary determinations, or else addition of a disclaimer with respect to any boundary determination's effect on land titles.[28] The Court was essentially faced with the dilemma of a water rights adjudication that necessarily involved boundary adjudications but which lacked possibly affected parties. Rather than remand the

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[27]None of the parties questioned the authority or propriety of the Former Master trying the disputed boundaries. The order appointing Special Master Tuttle is no different that appointing the Former Master.

[28]*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.

case for new proceedings, the Court rejected the boundary adjudications but adopted the former Master's water allocations based upon his boundary determinations.

> ". . . 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.

In short, we believe the Court made the best of an unfortunate situation but recognized by way of Article II(D)(5) of its Decree that the matter was not being fully laid to rest:

> ". . . 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, supra*, 376 U.S. at 345.

The instant argument concerns the meaning to be given to the above statement of the Court and, particularly, the words "finally determined."

C. Interpretation of the Court's Intent in Providing for Adjustment of Reservation Water Allocations Under Article II(D)(5).

The Special Master has ruled that certain orders of the Secretary of the Interior and judgments in actions in which the State Parties were not represented, meet the Court's test of final determination of disputed reservation boundaries:

> "I conclude that the determinations that have been made with respect to the stated boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the Reservations." (Spec. Master's Rep., p. 63.)

In so ruling, the Special Master has grievously prejudiced the parties contesting the additional water claims for the Indian Reservations. As we have pointed out, the claims based on lands allegedly restored to the reservations depend on a two-step process. First, the United States must establish that the added lands are, in fact, part of the reservations; secondly, it must establish that such lands contain practicably irrigable acreage. The Special Master has relieved the United States from meeting the first requisite of these claims.

A number of considerations will show that the Special Master is in error in so interpreting the Court's 1964 Decree providing for adjustment of water allocations upon final determination of disputed reservation boundaries.

1. Orders of the Secretary of the Interior.

The Special Master adopted completely the position urged by the United States that various administrative actions of the Secretary of the Interior, and particularly the June 3, 1974 Order of the Secretary pertaining to the Fort Mojave Reservation, the January 17, 1969 Order of the Secretary pertaining to the Colorado River Reservation, and the December 20, 1978 Order of the Secretary pertaining to the Fort Yuma Reservation, are the "final determinations" of the disputed reservation boundaries intended by the Supreme Court in Article II(D)(5) of its 1964 Decree.[29] (Spec.

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[29]Although Article II(D)(5) of the 1964 Decree refers to the disputed boundaries of only two reservations, the State Parties have not objected to its application to the other reservations as well. Accordingly, the stipulated Decree of 1979 contains the proviso respecting possible adjustment of water allocations for all five reservations. *Arizona v. California*, 439 U.S. 419 (1979).

Master's Rep., pp. 57-63.) This conclusion cannot withstand analysis.

First, the Court was well aware that the boundaries of the Fort Mojave and Colorado River Indian Reservations were disputed and that when subjected to the truth-seeking procedures of trial, the essential position of the United States was defeated. While the Court did not consider the boundary adjudications appropriate in the water rights suit, it nevertheless adopted the Former Master's allocations of water for the reservations based upon his boundary determinations. Hardly, then, is it reasonable to infer that the Supreme Court's reference to "final determination" of the disputed boundaries merely contemplated unilateral pronouncements by only one of the adversary parties to the those disputes, the United States. Yet that is the interpretation placed on the Supreme Court's language by the current Special Master in his accepting Secretarial orders as binding determinations of disputed boundaries. We submit, it is totally unreasonable to conclude that the Court intended invaluable water rights to turn upon administrative actions of one party to a legal dispute, especially where that party, with two minor exceptions, had not succeeded after full trial of its position.

Moreover, if administrative action of the United States was all that was required to resolve the boundary disputes on the different reservations, did not the Court already have that, in substance, by way of the pleadings and position put forth by the United States in the original proceedings in 1956? To argue that what was lacking for "final determination" of each reservation boundary dispute was merely an appropriate order of the Secretary of the Interior is to accuse the Supreme Court of putting form over substance. Clearly, it was not administrative action of the Secretary that was intended by the Court when it provided for adjustment of water allocations should the disputed reservation

boundaries be "finally determined," but, rather, determinations of the adversary positions of the United States and the affected State Parties, by an impartial tribunal.

Nor should we overlook what has become the essentially transitory nature of the administrative actions that the United States would have us believe are the "final determinations" of reservation boundaries as intended by the Court to allow water allocation changes. The unilateral action taken by the Secretary of the Interior is almost shocking in the case of the December 20, 1978 Secretarial order relating to the Fort Yuma Reservation. In this case, three previous Department of the Interior Solicitor opinions over a forty-one year period (Margold-1936, Weinberg-1968, Austin-1977)[30] had found invalid the Indian claim to enlarged reservation boundaries. The last of the three was issued only after representatives of the State Parties and representatives of the Indians' position had been afforded opportunity to submit briefs and argue the matter before, then, Solicitor Austin. Shortly thereafter, Solicitor Krulitz summarily reversed Solicitor Austin's opinion, finding the Indian claim to be valid, and the Secretary of the Interior quickly made an Order to that effect. The Krulitz opinion (Sol. Ops. 86I.D.3) was issued without any prior notice or opportunity to be heard by the State Parties. The Fort Yuma Secretarial order was issued the same day as the opinion, followed the next day by the filing in this case of the United States' motion to modify the water allocations. One wonders how any Secretarial order could ever be considered "final", even for administrative purposes within the Department, when the under-

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[30]The State Parties request that pursuant to Federal Rule of Evidence 201 that this Court take judicial notice of these opinions. Copies of the Margold and Weinberg opinions are being lodged with the Court. The Austin opinion is found at Solicitor's Opinions 84 I.D. 1.

lying Solicitors' opinions may vary in conclusion from one occupant of that office to the next.

Finally, it should be observed that this Court's recent order of January 9, 1979, granting a joint motion of the parties for entry of a supplemental decree determining miscellaneous present perfected rights in this case, after directing satisfaction of all rights of the five Indian reservations in time of shortage, states:

> "... 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. (Emphasis added.)

There can be little doubt, in view of the language italicized above, that the parties in requesting entry of this order and the Court in making the order regarded the reservation boundary questions still unresolved. If the disputed boundaries had already been "finally determined," it would not make sense to so word the proviso. Yet the administrative actions and the judicial rulings relied upon by the United States and adopted by the Special Master as final determinations of the reservation boundary disputes occurred prior to entry of the above order, several years before, in most instances.[31]

In treating these orders of the Secretary of the Interior as final determinations of the disputed boundaries, thereby adding reservation lands which in turn became a basis for senior priority claims to additional water, the Special Master

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[31]The Secretarial order regarding Ft. Yuma was issued prior to entry of the Supplemental Decree although the matter of said Decree had been argued and submitted prior to issuance of that order.

is permitting the United States to accomplish what it could not achieve through trial — establishing the validity of the reservation boundaries it asserts.[32] The inequity to those whose water supply will be reduced, in denying them the opportunity to protect their interests, is all too plain. We should not ascribe such an intention to this Court in interpreting the 1964 Decree.

2. Federal Court Cases Involving Reservation Boundaries.

In addition to Secretarial orders, the United States relies upon and the Special Master has accepted certain federal court adjudications involving ownership or possession of land claimed to be part of an Indian reservation. (Motion of the United States for Modification of Decree and Supporting Memorandum, December 1978, pp. 17-23; Spec. Master's Rep., pp. 59, 61, 63.) Again, in accepting the position of the United States that the effect of these cases is to "finally determine" disputed reservation boundaries for purposes of water allocation adjustment, the Special Master is depriving the parties who will be affected by the water allocation adjustments of the opportunity to protect their interests. The State Parties did not claim title to any of the boundary lands in dispute in the original proceedings in 1956; yet in 1956 they were able to challenge the reservation boundary claims of the United States in order to protect their water entitlements. We agree with the United States and the Special Master that this is a water rights case, not a land title suit. We do not seek to challenge title determined in any of the cases relied upon by the United States. On the other hand, not having been parties to those

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[32]To allow the United States to unilaterally determine, without opportunity for judicial review, the very issue involved in the case was disapproved of in *United States v. State of Louisiana*, 229 F.Supp. 14 (Lafayette Division 1964).

actions, we should not be bound by those adjudications. And, particularly, we should not be bound by those boundary determinations insofar as they affect consequential water rights.

The Special Master correctly concludes that these quiet title actions are not ". . . res judicata of the boundaries as to litigants who were not parties to such proceedings." (Spec. Master's Rep., pp. 63-64.)[33] The logical conclusion of such a holding should be to allow such parties to litigate these issues in this case. The Special Master, however, accepts as final for purposes of additional water allocations these changes in the boundaries (Spec. Master's Rep., p. 63), thus circumventing the ruling which he has made as to the applicability of res judicata. Such a contradictory conclusion cannot be accepted by this Court.

Moreover, the interest of the individual defendants in the actions regarding ownership of property upon which the Master relies are so different from those of the State Parties that manifest injustice would result to the State Parties if reliance is placed upon these actions. As the Special Master states, this is a water rights case and not a land case. The interests of the State Parties are both direct and substantial and will derive, in part, from the status of the lands involved in this action. Thus, it is unreasonable and unfair to force these water right holders to rely on the litigation efforts of title claimants with regard to reduction of their irreplaceable water rights. Indeed, it would be unreasonable to force the State Parties to rely upon these actions, where many of the cases were not subject to searching judicial scrutiny, but

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[33]Such a holding is consistent with the principles that only parties and privies are bound by a prior judgment. (See, *Bruszewski v. United States*, 181 F.2d 419, 422 (3d Cir. 1950), *cert. denied* 340 U.S. 865 (1950).

were resolved by stipulated judgments.[34] In contrast to these stipulated judgments, it is noteworthy that in the adversary proceeding before the Former Master, the major boundary claims asserted by the United States were defeated. (Former Master's Rep., pp. 269-287.)

For the Special Master to accept these judgments as final within the context of this case is to circumvent the rules of res judicata and apply it here, contrary to the principles of justice, fairness, and the requirements of due process of law.

D. Reasoning of the Special Master in Support of His Ruling.

In rejecting the position of the State Parties, that evidence of the correct boundary lines and perhaps the claims of private individuals should be received so that a final determination of the correct boundaries could be made in this litigation, the Special Master assertedly relies on "The model of the previous treatment of the boundary determinations by the Court itself. . . ." (Spec. Master's Rep., p. 65.)

The Special Master misreads the Court's 1963 decision. It did not reject the action taken by Special Master Rifkind in hearing and deciding the disputed boundaries. As we have noted, such a resolution is a prerequisite to allocating water for a reservation — the land claimed must be part of the reservation or it cannot be allocated the water under the *Winters* Doctrine. Rather, the Court accepted his water allocations based on his resolution of the boundary disputes.

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[34]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); *Cocopah Tribe of Indians v. Morton*, 70-573-PHX-WEC (1975); *United States v. Brigham Young University*, 73-358-DWW (U.S. D.C., 1976).

Arizona v. California, supra, 373 U.S. at 600. What the Court disapproved was the Former Master's recommendation findings and decision as to titles.[35] It is most likely that this was done, not as the current Special Master believes, because it is a water rights case, but because of the possibility that interested parties could be affected by a court determination of title who were not before the court.[36]

In the instant proceeding, the State Parties suggested that this problem could be eliminated by joining all parties who could be affected by a determination of title so as to obtain a truly final adjudication of water rights which all parties recognized are dependent on valid reservation boundaries.[37]

Although we readily acknowledge that the Special Master could decline to accept our proposal to join such land claim-

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[35]Ironically, it was the United States that then insisted that boundary determinations be binding adjudications for title as well as water allocation purposes:

"In the process of determining the irrigable acreage of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation and the consequent quantity of the water rights to be decreed for these Reservations, the Special Master had to resolve disputes between the United States and California concerning the proper location of the western boundary of each of these Reservations.

. . .

The determination of the boundary of each Reservation is an essential prerequisite to the determination of the quantum of the water rights for that Reservation. There is no question of the Court's jurisdiction to resolve boundary questions nor of the authority of California to act as *parens patriae* for its citizens in such matters. *Rhode Island v. Massachusetts,* 37 U.S. 657. We oppose the disclaimer proposed by California because of its possible derogative effect upon the water rights herein decreed by the United States." (Answering Brief of the United States, August 1961, pp. 94-95.)

The California parties' 1961 Opening Brief specifically urged the Court to refrain from adjudicating title, pointing out that individual land claimants who would be affected were not parties to the proceeding.

[36]Opening Brief of the California Defendants in Support of Their Exceptions to the Report of the Special Master, May 22, 1961, pp. 279-282.

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

ants, we fail to understand his legal justification for dispensing with the determination, for purposes of deciding water right entitlements, of the boundary disputes raised by the State Parties as to various of the reservations. The model of the first case the Special Master relies upon illustrates the very opposite of what he has done. As we have noted, the boundary disputes were actually tried and the water allocations of the Court were based on the determinations resulting from that trial. *Arizona v. California, supra,* 373 U.S. at 600.

The Special Master observes that the Court's provision for adjustment of water rights in the event the boundary disputes are resolved indicates it would be adequate to resolve them elsewhere than in proceeding before the Court. (Spec. Master's Rep., p. 66.) We do not quarrel with that conclusion. Rather, it is our position that there is no indication that it would be less adequate to resolve them in this case if necessary parties were joined. But in any case, that resolution must precede any adjustment of reservation water rights, whether it be in other litigation or as part of the instant proceedings.

The Special Master would support his conclusion, that one whose water rights only are at stake cannot expect to have boundary disputes resolved as a necessary element in protecting his water rights, by focusing on yet another sentence of the 1963 decision. Thus at pages 65-66 of his report he notes that after the Court rejected the recommended boundary determinations, it stated: "Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area [Colorado River Indian Reservation, Fort Mojave Indian Reservation], then the dispute can be settled at that time." *Arizona v. California, supra,* 373 U.S. at 601. The Special Master concludes that this merely recognizes that a party claiming title to land who

has been refused water by the Secretary could institute the action to settle the dispute over the Secretary's action "not one seeking a collateral determination of title." (Spec. Master's Rep., p. 66.)

While we agree that the Secretary's refusal to deliver water could trigger a proceeding testing his action, which would encompass the boundary question on which his action turned, it does not follow such a situation is the only one in which Secretarial action may be contested. As the Special Master has pointed out, this is a water rights case. Since water allocation to Indian reservations turns in the first instance on whether the practicably irrigable land claimed is in fact part of the reservation, it follows that any adjustment of the 1964 Decree must rest on a showing that disputed boundaries have been resolved. But the Special Master here would relieve the United States and the Indian claimants of this burden and instead hold the Secretary's action to be conclusive on non-Indian water rights holders. Something is very much amiss in this conclusion, for it stands for the proposition that action by the Secretary adversely affecting Indian water rights may be challenged before this Court, but that action of the Secretary adversely affecting others may not similarly be challenged. We do not believe the sentence of the 1963 decision quoted above supports that result.

The Special Master would further justify his foreclosing the State Parties from challenging the Secretarial orders by characterizing the boundary disputes presented in the original proceeding as being merely conflicts within the Interior Department or ambiguities in boundary descriptions, all of which have been removed by the Secretarial orders. "The disputes presented to the prior Master and the Court no longer exist." (Spec. Master's Rep., p. 67.) This is simply not true. The basic errors and inconsistencies of the United

States regarding the boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation are no less blatant today than when Special Master Rifkind so determined after trial in the original case. In addition, there are presented in this case the enlarged boundaries of the Fort Yuma Reservation produced by the Secretary just one day before the United States moved to reopen this case, which new boundaries were rejected by several former Secretaries over some 41 years. Hardly can these substantial disputes[38] be attributed merely to "conflicting positions within the Interior Department or ambiguities in the description of boundaries." (Spec. Master's Rep., p. 67.)

Next, the Special Master urges that the Secretarial determinations, through surveys, of Indian reservation boundaries are conclusive in collateral proceedings and are appropriate for adoption in this litigation as a measure for determining additional irrigable acreage. (Spec. Master's Rep., pp. 68-72.) Thus, he cites legal authority for the function of the Secretary to determine or correct boundary lines in public lands (p. 68) and for his right to even resurvey and redetermine the boundaries (p. 70), and declares, "Because the issue of boundaries arises as a collateral matter in this lawsuit the boundaries drawn by the Interior Department should be accepted as conclusively showing that fact at this time." (pp. 71-72.)[39]

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[38]The nature of the very substantial disputes as to the three reservations' enlarged boundaries is discussed in greater detail in the separate brief of the California Agencies.

[39]The Special Master suggests that if the Bureau of Land Management ". . . prepared a survey which the court must regard as conclusive, a dissatisfied litigant might still appeal to the Secretary of the Interior as has happened in this case." (Spec. Master's Rep., p. 69.) Such reasoning ignores the letter dated January 3, 1979, from the Department of the Interior, Office of the Solicitor, informing The Metropolitan Water District of Southern California that the Department of the Interior considers the Secretarial Orders to be final for its purposes. The letter further states that there are no administrative procedures available to challenge Secretarial Orders and that review of such matters must take place in a judicial forum. A copy of said letter is attached hereto as Appendix B. The State Parties request that pursuant to Federal Rule of Evidence 201 that this Court take judicial notice hereof.

We believe the Special Master's proposition that the State Parties' challenge to the boundaries of the three reservations is an impermissible collateral attack on Secretarial actions is both unsound and inapplicable.

The State Parties, or course, have never contested the *administrative* authority of the Secretary to survey public lands and to delineate Indian reservation boundaries. It does not follow, however, that such delineation is conclusive in litigation with the United States where the issue is the validity of federal water rights which turn on the accuracy of such administrative action. None of the cases cited by the Special Master involve that issue.[40] Rather, those cases involved private parties' claims to land which derived, in part, from federal surveys. In contrast, allowing the United States by administrative fiat to conclusively resolve one crucial element of its own case offends all concepts of due process.

Moreover, the principle espoused by the Special Master, even if valid, could not apply to the Fort Yuma Indian Reservation inasmuch as that Secretarial Order purports not to correct an allegedly erroneous survey, but to declare null and void an agreement entered into by the United States and the Tribe and ratified by Congress. Clearly, the powers of the Secretary, whatever they may be, do not extend to the power to modify or invalidate what is in essence a treaty between the United States and the Quechan (Fort Yuma) Tribe.

But our disagreement with the Special Master's characterization of our position as a collateral attack on Secretarial Orders is far more fundamental. The Court's 1964 Decree

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[40]*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).

does not relieve claimants of water rights under the *Winters* Doctrine from the burden of proving that reservation land is practicably irrigable. It merely declares that the boundary dispute may be resolved elsewhere. Similarly, that ruling does not provide for "resolution" of that issue by one party to the controversy — a concept foreign to Anglo-American jurisprudence. Thus, in order for the United States and the Tribes to take advantage of the water rights adjustment provision of Article II(D)(5) of the 1964 Decree, reiterated in the Supplemental Decree of 1979, there must first be a final adjudication or agreement involving the parties as to the issue of the location of the lands for which water is being claimed. The parties to this controversy now, as in the original case, include the State Parties and the United States. The Tribes are additional parties to the instant proceeding. The State Parties were not involved in any final adjudication of the boundary questions, nor have they agreed with the United States or the Tribes to settlement of that issue. For that reason, the United States and the Tribes are not in a position to avail themselves of Article II(D)(5). Their motions and petitions with respect to "boundary lands" are premature. Recognizing this, but wishing to have those issues resolved, the State Parties sought adjudication of the boundary questions before the Special Master. The Special Master, however, has simply relieved the claimants of proving an essential part of their cause of action and foreclosed the State Parties' showing that substantial acreage for which water rights are claimed is not so entitled because it is not within true reservation boundaries.

The Special Master would attempt to ameliorate this strange and unfair result by suggesting "inclusion in the final decree of the Court of a provision that would reduce the allotment now sought on behalf of the Tribes *pro tanto* for lands found to be practicably irrigable which subsequent

litigation determines not to be Indian land.'' (Spec. Master's Rep., pp. 74-75.) This is manifestly unjust, for the certainty of the State Parties' water supply is being affected by the proposed augmented award to the Tribes yet the State Parties would be dependent for relief on the supposition that some day someone claiming adverse title to the boundary lands may institute and succeed in litigation.

The Special Master suggests that the boundary issues raised by the State Parties are more properly raised in a direct proceeding under the Administrative Procedure Act. (Spec. Master's Rep., pp. 72-73.) But this possibility does not logically eliminate herein the issues presently raised as to the location of land for which a *Winters* Doctrine water right is sought. The burden is on a claimant to prove all elements of its case. It is no answer to say that such a primary element may be excused here and be the subject of litigation to be brought by the State Parties elsewhere.

Moreover, there is substantial uncertainty as to whether any such forum would be available to the State Parties. The Metropolitan Water District and the Coachella Valley Water District did in fact institute a suit in the United States District Court specifically to challenge the boundaries which the Special Master refused to hear in the instant proceeding.[41] The United States lost no time in moving to dismiss that action on various grounds, including that the plaintiffs had no standing, that the United States was immune from such

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[41]This action, *The Metropolitan Water District of Southern California and the Coachella Valley Water District v. The United States of America and James Watt, as Secretary, United States Department of the Interior* is on file in the United States District Court for the Southern District of California, Civ. No. 81-0678 GT(M).

The State Parties request that pursuant to Federal Rule of Evidence 201 that this Court take judicial notice of these pleadings. Copies of the Amended Complaint and the Motion of the United States and the Secretary of the Interior are being lodged with the Court.

action, and that the action as to the Fort Mojave and Colorado River Indian Reservations were barred by a six-year statute of limitations.[42] Thus, the United States makes clear its position that there is no forum to test the secretarial determinations of reservation boundaries.[43] The State Parties will simply have to accept the current determinations of the Secretary of the Interior, even though they are adversely affected and successfully challenged several of the same determinations before Special Master Rifkind. This uncertainty of having our day in court on this question is alone ample reason to reject the novel approach recommended by the present Special Master — granting water rights on the assumption the land in question is within Indian reservations subject to adjustment of such rights should there be a determination some day that the assumption is erroneous.

The Special Master would justify this anomaly by the remark "If the boundaries are not accorded finality for purposes of this litigation, the Tribes might be required to wait indefinitely, as one Secretarial Order has now stood un-

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[42]The court in that case has ordered that the case be stayed pending the Supreme Court's final ruling on the Special Master's Report in the present proceeding and on the additional basis that the case is not ripe for review because the plaintiffs complain of the impact of events which are yet uncertain.

[43]This action removes any uncertainty presented by United States' representative arguing before this court on October 10, 1978, on the Joint Motion for Entry of Proposed Supplemental Decree:

> "Mr. Justice White: 'Are those boundaries subject to attack in the district court now or not?'
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> "Mr. Claiborne: 'A difficult question, Mr. Justice White . . . we would wonder who had standing to challenge them — that is, the boundaries. . . . The states — this is all public domain land, it is not state land — in principle have no standing. They may say that because it affects their water allocation, therefore they are a party aggrieved and therefore they have standing. That would be a matter for debate, as to which I do not want to make binding concession. But it is a close question.' (Transcript, pp. 61-62)."

challenged for over ten years." (Spec. Master's Rep., pp. 73-74.) This overlooks the possibility that the United States might have brought actions for declaratory relief to validate the Secretarial orders determining the disputed boundaries.[44]

But more important, there is no sound reason that such issues could not be tried in this proceeding, not to determine title if joining necessary parties is regarded as impractical or undesirable, but to determine water rights based upon the true reservation boundaries. Once again the Court would not be called upon to establish finality of title, but would award water rights based upon trial of the complete case of the claimants — location of disputed acreage as well as whether it is practicably irrigable. While this would add triable issues to what the Special Master contemplated, it certainly is more just than to award such rights adverse to the interests of the State Parties who may or may not have an opportunity to contest that vital issue.

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[44]Pursuant to 28 U.S.C.A. § 2201, the United States need only fulfill three prerequisites in order to bring an action for declaratory relief. It must show that the court has jurisdiction, that there is an actual case or controversy, and that the United States is an interested party.

Jurisdiction of actions commenced by the United States is provided by 28 U.S.C.A. § 1345. Moreover, that a case or controversy exists here cannot be doubted, for the history of the conflict between the parties, having once already litigated the boundary issues as to the Fort Mojave and Colorado River Indian Reservations in the original proceedings, makes it impossible to believe that this does not:

> ". . . show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." (*Maryland & Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273 (1941).

Moreover, the United States is an "interested party" for no additional water allocation can be made until these reservation boundaries have been "finally determined."

Thus, the United States might have brought an action for declaratory relief.

Finally, we shall comment on a closing statement of the Special Master:

> "In sum, I agree with the position put forward by the United States that:
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> > 'It would be wholly arbitrary to consider the Reservation boundaries as they were understood in 1964 to be sufficiently 'determined' to support a specific water allocation calculated on acreage — albeit no court judgment has ever vindicated the survey — but to deny comparable effect [*sic*] to subsequent dependent surveys of the boundaries because no court had approved them.' " (Spec. Master's Rep., p. 75.)

We believe this statement reflects another serious misunderstanding of the nature of the claimants' legal burden in this litigation. In essence, the Special Master is saying that since there was no adjudication of the boundaries as recognized in 1964 and they were, nevertheless, adequate to be utilized in the process of determining reservation water rights, the presently claimed boundaries, also unadjudicated, must be regarded equally satisfactory for that purpose. This overlooks completely the nature and consequences of contesting essential elements of a claimant's cause of action. Because certain boundaries claimed by the United States and the Tribes were challenged by the State Parties in the original proceedings in this case, a triable issue was created as to those boundaries. Water rights which are dependent upon those boundaries could not be determined until those boundaries were determined. Other reservation boundaries which were not challenged were not subject to this adjudicatory process because no issue for trial

was raised as to them.[45] This is the reason that the Court in its 1964 Decree required final determination of contested boundaries before a water allocation could be made for the involved acreage. It is not a question of equal dignity of all reservation boundaries drawn by the Secretary of the Interior, as the United States and the Special Master imply, but of fundamental pleading and trial practice.

Therefore, it is hardly "arbitrary," as the United States and the Special Master assert, to regard uncontested boundaries as a proper basis for supporting a specific water allocation but requiring contested boundaries to first undergo the normal scrutiny of trial before they can serve to support a water allocation. Indeed, it would be wholly unreasonable and contrary to fundamental legal precepts were it otherwise.

E. Conclusion.

What the boundaries issue comes down to is the rather self-serving argument of the United States, adopted by the Special Master, that although the *Winters* Doctrine makes clear that land entitled to a water right must be on the reservation, this essential element of the claimant's case need not be proven because this Court did not contemplate it being determined in these proceedings and the State Parties are barred from litigating that issue with the United States in a separate action. The answer to this, we submit, is that our system of justice insures a party his day in court. These are the proceedings most certain of jurisdiction and most

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[45]Perhaps this would have been more clear had the parties been required to file normal trial pleadings. Although this was requested by the State Parties at the pretrial conference, the Special Master refused to order such pleadings, but relied instead upon motions and petitions and responses filed with this court in connection with the reopening of this case. (Transcript, Atlanta, Georgia, July 1980, pp. 28-67.)

convenient for that boundary issues to be determined as a prerequisite element to any new water allocation for the reservations. Without so proceeding in this case, the motion of the United States and the petitions of the Tribes for modification of the 1964 Decree of this Court are premature and must be denied.

III.

THE SPECIAL MASTER ERRED IN HIS DETERMINATION OF THE AMOUNT OF PRACTICABLY IRRIGABLE ACREAGE WITHIN THE OMITTED AND BOUNDARY LANDS, WITH THE RESULTS THAT HE AWARDED THE INDIAN TRIBES WATER RIGHTS FAR IN EXCESS OF WHAT THE EVIDENCE SUPPORTS.

A. Introduction.

The central issue in the factual determinations made by the Special Master is how much of the acreage claimed for water rights by the United States and the five Indian Tribes is ''practicably irrigable,'' pursuant to this Court's 1964 Decree in this matter. The Master has essentially equated ''practicably irrigable'' with economic feasibility (Spec. Master's Rep., pp. 89-98) such that acreage is ''practicably irrigable'' if projected annual benefits exceed projected annual costs (Spec. Master's Rep., pp. 99-100). Benefits are the gross revenues generated by growing certain crops or combination of crops on the land and selling them. They are calculated by multiplying annual crop *yields* by the *price* attainable in the market. Costs include both *production costs* of preparing the land and growing a crop and water costs to construct facilities and bring enough irrigation water to the land as is needed for particular crops to grow. A major element in water costs is the *power rate*, the cost of power needed to pump water from the source to the land to be farmed. The State Parties take exception to certain determinations of the Master relating to each of these elements

— yields and production costs as to the United States' claims, prices as to the Indian Tribes' claims, and power rates as to both.

In taking exception to certain factual determinations of the Special Master, the State Parties are well aware of the volume of evidence before this Court. So while we disagree with many of the Master's findings and know that the Court is not bound by those findings, we recognize that it is unlikely that the Court will wish to reweigh all the evidence where there are simply disputes of fact or expert opinion. We therefore limit ourselves to challenging only those factual determinations in which the Master has resolved conflicts in the evidence by applying an incorrect standard or by applying the correct standard in a discriminatory or otherwise incorrect manner. In other words, we are challenging factual determinations so tainted by errors in the premises upon which they were made that they should be rejected by this Court, which should in turn make its own, independent evaluation of the evidence.

In presenting these exceptions, we shall follow the organization used in the Special Master's Report, enumerating exceptions relating to the United States' claims and the Indian Tribes' claims, in that order. First, however, we will generally outline two basic categories of error that occur throughout the Report: 1) shifting of the burden of proof from the claimants to the State Parties and use of a double standard in assessing expert testimony; and 2) application of a theoretical, best case standard of practicable irrigability in disregard of the practical realities of placing and maintaining lands under irrigated agriculture.

1. Shifting the Burden of Proof — Double Standard.

The Special Master has often failed to apply the burden of proof to the United States and Tribal claimants and has instead erroneously shifted it onto the State Parties. A hint

of such error appears in the Master's characterization of the State Parties' statement that their dispute over United States' claims involves "land clearly subject to reasonable dispute." The Master gratuitously, and unnecessarily, states that this statement

> "almost constitutes an admission that a finding sustaining all the United States factual claims would not be erroneous even if the State Parties dispute these claims." (Spec. Master's Rep., pp. 125-26.)

Of course, the Master could just as easily have said the converse, that the statement supports a finding that *all* disputed United States claims *are* erroneous. But he did not, and the fact that he says what he does indicates a predisposition to view the claims as presumptively valid unless proven otherwise.

This predisposition to presume practicable irrigability is revealed subtly in the language by which the Master resolves certain disputes:

> "Thus, I am convinced that the gravelly character of this land should not result in a striking of the water rights claims . . . ." (Spec. Master's Rep., pp. 156.)
>
> "Under these circumstances, I should not find these lands to be non-practicably irrigable . . . ." (Spec. Master's Rep. p. 158.)
>
> ". . . . the gravelly land should not be excluded from being practicably irrigable" (Spec. Master's Rep. p. 160.)

Implicit in all these statements is the assumption that lands are practicably irrigable unless the Master finds a reason to *exclude* them; yet the burden of proof should be on the claimants to justify *inclusion* by a preponderance of the evidence.

Less subtle signs of the Master's predisposition are shown in his tendency to resolve his own confusion over the evi-

dence in favor of the claiming parties. In discussing the State Parties' projected increase in production costs for farming sandy lands, the Master states:

> ". . . . I simply cannot tell precisely to what extent the State Parties' 25% increase in costs is already accounted for in the United States' figures." (Spec. Master's Rep., p. 145.)

And yet the Master then totally disregards *any* cost increase projected by the States. In discussing whether the United States included in contingency costs for construction of irrigation systems an allowance for interest during construction, the Master states:

> ". . . . I am unable to discover which approach is theoretically correct or whether the United States in some manner accounted for this factor elsewhere in its calculations." (Spec. Master's Rep., p. 169.)

And yet, again, the Master adopts the United States' figures. On the subject of sprinkler pressure, the Master writes:

> "This state of the evidence leaves the factfinder in something of a dilemma . . . . neither side has directed my attention to any evidence showing the method for translating pressure at the pivot into pressure at the end of the arm." (Spec. Master's Rept., p. 178.)

And yet once again, the Master adopts the United States' numbers.

The Master rationalizes the above determinations on his generally greater confidence in the testimony of the United States' experts (Spec. Master's Rep., pp. 144-45, 169-170, 178-79.) It is certainly proper for the Master to decide that one side's experts are generally more convincing, but this cannot substitute for specific, explicatory evidence in the

resolution of particular points of factual confusion.[46] If the evidence is unclear and the burden of proof is on the claimants, the Master cannot remove that burden simply by saying that one side generally applies the better theoretical approach and therefore can be assumed to be correct in the particular instance even though confusion and conflict in the specific evidence is not susceptible of resolution. However much one may sympathize with the finder of fact in such a technical dilemma, one must conclude that in such case the party with the burden of proof has failed.

An interrelated error made by the Master is his application of a double standard in several significant areas, requiring unreasonably specific and quantifiable support for the opinions of the State Parties' experts while accepting and adopting broad, unsupported judgments made by experts for the claimants. In analyzing United States claims to sandy and gravelly/cobbly lands, the Master relies on the general "judgment" of the United States' economist as to crop yields (Spec. Master's Rep., p. 140) but rejects the judgment of the State Parties' experts as to production costs on the same lands, faulting the latter experts for lack of "itemized estimates" and for being "vague and unconvincing" (Spec. Master's Rep., p. 142). As we shall develop later, the Master is not only requiring more from the State Parties' experts, but is doing so regarding questionable lands for which even the United States' experts project only very small margins of revenue (in which crop yields are a key element) over costs. Therefore this application of a double

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[46]This illustrates that the Master on these occasions did not even apply the preponderance of the evidence test which he selected, much less a higher standard, such as clear and convincing evidence, which might well be appropriate in this case where the public interest is so great and the nature of the evidence so conjectural. *See Addington v. Texas*, 441 U.S. 418, 424 (1979.).

standard or shifting the burden of proof to the State Parties can cause prejudicial error and affect a major portion of the United States claims in dispute.

In analyzing power rates necessary to pump irrigation water to the various lands claimed as practicably irrigable, the State Parties criticized the United States for failing to show whether the cost of wheeling or transporting power from the source to the area of use was included in its proposed rate of 30 mills. (State Parties Post-Trial Open. Brief, p. 72.) Instead of requiring the United States to meet its burden of proof, the Master simply criticizes the State Parties' experts for the same omission and faults them for not directing "my attention to evidence demonstrating that the United States' expert erred in such particulars. . . ." (Spec. Master's Rep., pp. 173-74.) The Master then removes *all* burden of specificity from the claimant United States by saying:

> "Finally, the availability of a certain power rate at one location does not lose its generally useful value as proof simply because it is not demonstrated to exist at all relevant locations. The goal of the United States' study was to determine a general rate for the lower Colorado River area. The several sources considered by the United States were combined to form an estimate which seems a fair and accurate figure for general use on any of the five Reservations." (Spec. Master's Rep., p. 174.)

In other words, a general judgment, generally applicable will suffice if it comes from the United States' experts, and the State Parties can prove them wrong only by specific evidence. And, again, this double standard prejudiced the State Parties since higher power rates could easily increase water costs enough to make farming some claimed parcels noneconomic.

The Master does not hold the United States' experts to *any* standard of specificity as to costs on several Ft. Yuma Reservation parcels:

> "I find that with respect to these parcels the United States' engineering expert correctly stated that this issue is essentially a matter of judgment where a specific cost per acre cannot definitely be estimated." (Spec. Master's Rep., p. 189.)

As to parcel *CH-4* on the Chemehuevi Reservation where there was a dispute as to the effect of economies of scale on pumping costs, the Master faults the State Parties' expert for making

> ". . . no attempt to determine the economies of scale for the entire cost structure of serving this area." (Spec. Master's Rep., p. 191.)

The Master then states, as if by contrast:

> "The United States' expert, on the other hand, acknowledged that pumping costs would be greater for CH-4, but stated that the overall effect of economies of scale on other costs would offset the increase in pumping costs. I find that the State Parties' criticism is unwarranted and should not be considered in an analysis of practicable irrigability." (Spec. Master's Rep., p. 191.)

The United States' evidence is just as conclusionary and no more supported by detail than that of the State Parties, and yet the Master adopts the one and rejects the other. This is a double standard because the Master first requires support for the proposition that economies of scale would *not* have the offsetting effect alleged by the United States' expert, but then accepts the unsupported conclusion of that expert as to such effect.

Perhaps the most egregious and certainly most prejudicial example of the double standard is in the Master's analysis

of the Tribal claims regarding table grapes. His determination that grapes can be grown economically on the Indian Reservations is based primarily on the assumption of a very high price of $867 per ton, derived from the Arizona market in the period of 1977-79. The State Parties raised the issue of how the thousands of acres of increased grape plantings proposed on the claimed reservation lands would affect the Arizona market price, but the Master answers,

> "The State Parties' experts did no formal market studies to prove this point. . . ." (Spec. Master's Rep., p. 237.)

The import of this statement is that somehow all the claimants need to show is a historical basis for the assumed price but need pay no heed to the basic law of supply and demand and thus make no showing whatsoever that the price would be maintained irrespective of a large influx of new supply onto the market necessarily contemplated by their claims. Rather, the Master would place the burden on the State Parties to prove the opposite, namely, that the historic price would fall. The claimants need make no market study, only the State Parties. The double standard is employed and the burden of proof erroneously shifted. As we shall develop in greater detail later, the Master's finding as to grape price is grossly inflated, resulting in thousands of acres erroneously being declared practicably irrigable.

2. Conceptual Errors.

The second major category of error made by the Master is conceptual and has major prejudicial effect on his analysis of both United States and Tribal claims. That error is the application of a theoretical, best case standard of practicable irrigability in which he looks at each claimed acre as if it were in a vacuum and decides whether a profitable crop could be grown on that land by *any* farmer, and if the answer

is yes, that acre and all others like it are practicably irrigable. This approach has a superficial appeal, but it totally overlooks the practical realities of placing and maintaining lands under irrigated agriculture.

First, and most fundamentally, the Master cannot examine each claimed acre as if it alone were to be farmed. As an example, if the grapes are claimed for 10,000 acres, the Master cannot look at each acre, one by one, and then conclude that if *each* acre, considered individually, could show a profit, that therefore *all* 10,000 acres are practicably irrigable. This is known in economics as the fallacy of composition and is a fallacy because of its implicit assumption about price. One more acre of grapes would have no effect on the assumed market price, but 10,000 acres could well have a devastatingly negative effect, especially on a small, regional market such as the Arizona grape market. Therefore, the total number of acres projected for a particular crop must be considered in analyzing the economic feasibility of that crop. As we shall develop, *infra*, the Master's total failure to account for this factor has allowed him to award water rights, based on growing almonds and/or grapes, to thousands of acres in excess of the amount of acreage projected for those same crops by the Indian Tribes' own experts. (Spec. Master's Rep., p. 237.) The Indian Tribes have been awarded thousands of acre-feet of additional water on the glib assumption that if almonds and/or grapes will show a profit on any one acre of land, that they can be projected as profitable on as many acres of similar land as are available. This has not and cannot be substantiated.

Second, the Master cannot assume that *all* acreage claimed will be farmed by the *best* farmers, and yet that is exactly what he has done in analyzing yields with regard to the United States' claims. (Spec. Master's Rep., p. 141.)

This assumes the best case for *every* acre claimed and ignores the reality that land is farmed by average and poor as well as good farmers. Some acres will naturally get the high, best-farmer yields, but to base an award of water rights to *all* acreage based on such yields is to assume an average yield for all the acreage that would not occur in the real world. The inflated yields that result make large areas of sandy and gravelly/cobbly lands *appear* to be practicably irrigable which could not be farmed profitably by a cross-section of ordinary mortals.

A related error discussed earlier, *supra,* is the Master's assumption of a power rate. He clearly indicates that the assumed power rate need not be shown applicable on all the reservations and that a general figure can be used for all five reservations. (Spec. Master's Rep., p. 174.) He assumes a 30 mill power rate without even determining whether that figure does or does not include the cost of wheeling or transporting the power from the source to the land where it will actually be used to pump water. To excuse this omission on the grounds that a general rate is good enough is indefensible. The possibility that there is claimed acreage next to the source that can get power without wheeling costs is no basis for applying the economic analysis of that land to *all* the land claimed, and yet that is precisely the effect of the Master's ruling.

Although it has no significant, practical effect, another illustration of the Master's conceptual error is in his excluding *all* land classified as nonarable from irrigation parcels. Again, this is based on his error in looking at the land theoretically rather than in terms of how it will actually be farmed in the real world. The Master states his view precisely (Spec. Master's Rep., p. 163), but as noted before, it is wrong to look at the land acre by acre without regard to how the acreage as a whole would be farmed or what

prices would be obtained under real world conditions. This last error would appear to benefit the State Parites by excluding all nonarable land instead of just that amount unreasonably included in irrigation parcels. In fact, however, it has almost no effect since the amount of acreage excluded by the Master on this basis (1199 gross acres) (Spec. Master's Rep., p. 164) is nearly identical to that urged for exclusion by the State Parties (1192 gross acres). (SP Exh. 110, Tables B-1, B-3, B-4, B-5.) The explanation is that the State Parties would have allowed for some inclusion of nonarable acreage in irrigation unit configurations but would have also expected an offsetting number of arable acres inconveniently situated to be excluded. (SP Exh. 26, p. II-9.)

B. United States Claims.

1. Sandy and Gravelly/Cobbly Lands: Yields and Production Costs.

The State Parties disputed the practicable irrigability of some lands claimed by the United States on the ground that they were either too sandy or too gravelly/cobbly to be profitably farmed. (State Parties Post-Trial Open. Brief, pp. 11-54.) Economic analyses performed by the State Parties' experts confirmed that crop yields projected by the United States' economist for these lands were too high and production costs were too low, and that adjustment of either or both of these factors demonstrated that the lands were not practicably irrigable. In fact, the profit margins projected for most of these lands by the United States' economist were so narrow that even partial, minor downward adjustments in yield or upward adjustments in production costs would prove them noneconomic. (State Parties Post-Trial Open. Brief, pp. 25-37, 47-54.)

The Special Master has rejected the State Parties' analysis of yields and costs, but in so doing has made two fundamental errors discussed earlier: 1) he has assumed yields based on today's best farmers; and 2) he has applied a double standard, accepting general judgments of the United States' economist as to yields but rejecting similar judgments of the State Parties' experts as to production costs (Spec. Master's Rep., pp. 134-45, 159-60.)[47]

The United States' economist derived his yields for these poorer lands by taking his own yields for average (valley) lands and then reducing them. (Rep. Tr., pp. 905, 5997-98; U.S. Exh. 60, p. 2.) Since he based his valley land yields on today's *best* farmers (U.S. Exh. 60, pp. ii, 2, 9, 11-12), his base figure is unrealistically high (see *supra*); and yet the Master accepts this approach. (Spec. Master's Rep., p. 141.) The United States' economist then used the Palo Verde Soils Survey to develop a percentage reduction by which to reduce his valley land yields to sandy or gravelly land yields. (Rep. Tr., pp. 5997-98; Spec. Master's Rep., p. 140.) However, he never explained precisely how he derived that percentage reduction or what it is. Nevertheless, the Master does not require an explanation and simply accepts the economist's general conclusion, stating:

> "The ultimate figure adopted was quite properly a matter within his judgment, in which he considered such factors as yields actually achieved on sandy lands in the area." (Spec. Master's Rep., p. 140.)

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[47]There was no real dispute over the sandiness of the sandy lands, only as to its effect on farming and profitability. On gravelly/cobbly lands, the Master agreed with the United States that the lands were less gravelly/cobbly than claimed by the State Parties. (Spec. Master's Rep., pp. 147-48.) Nevertheless, no one has claimed these are average lands, and the United States' economist agreed that yields would be lower than on average lands. (Rep. Tr., pp. 782, 899-901; U.S. Exh. 60, pp. 10, 18.)

Thus, the Master accepts United States yields, which are based on excessively high average land yields and then reduced in an unspecified, quantified manner.

By contrast, when the State Parties' experts try to apply a 25% increase factor to costs of production on the same lands, the Master rejects *that* exercise of judgment:

> "The overall figure of 25% began as a representative number for all production costs based upon the experts' judgment without itemized estimates. When pressed to identify the magnitude of the increases attributable to individual items of production costs, the State Parties' expert was less than clear about the magnitude associated with any particular item among those listed above. Although this expert very confidently stated that he verified the overall figure by an item-by-item analysis, the vast majority of the cost items were never quantified in any reasonable form that would allow anyone to check his analysis." (Spec. Master's Rep., p. 142.)

Of course, one reason the State Parties' expert was "less than clear about the magnitude" of each item is the difficulty in quantifying increased costs for lands so sandy that there has been little past farming experience from which to draw. (Rep. Tr., pp. 3904-05.) Moreover, the statement that "the vast majority of items were never quantified" is misleading since the United States' crop budgets contained many cost items, and only a few would be affected, although significantly. The State Parties' expert listed these factors and estimated percentage changes for each, and then compared how production cost increases on sandy lands would be of a different nature than on gravelly/cobbly lands although the total percentage increase would be the same. (Rep. Tr., pp. 3706, 3721-22, 3878, 3896-3904, 4342-43, 4408-09, 4411-15.)

It certainly may be said that the State Parties' expert did not do an item-by-item quantification of each production cost element attendant to farming sandy or gravelly/cobbly lands. Nevertheless, he was quite specific as to which items would change and in approximately what magnitude. This certainly presented the Master with as much, and probably more, to analyze than the United States' economist's yield adjustments based on a totally unquantified and unexplained percentage reduction in the Palo Verde Soils Survey yields. The Master's rejection of the former and acceptance of the latter constitutes the imposition of a double standard.

Moreover, the Master's decisions are summary. He *totally* accepts the United States' yields (Spec. Master's Rep., pp. 141, 159) even though only a very small decrease in those yields, considerably less of a decrease than the State Parties projected, would reduce projected revenues on several parcels of major size enough to make them uneconomic, simply because they are highly marginal even under the best case analysis of the United States' own expert. The Master also *totally* rejects *any* increase in production costs (Spec. Master's Rep., pp. 145, 159), much less the 25% proposed by the State Parties, over those projected by the United States' economist. And, as we noted, *supra,* he does this even after admitting that he cannot tell whether or not that 25% increase may already be included in the United States' estimates. (Spec. Master's Rep., p. 145.) Again, even small increases could tip the balance on major areas of lands against a finding of practicable irrigability. (State Parties Post-Trial Open. Brief, pp. 25-37, 47-54.)

What we have, therefore, are two errors that must be corrected. The valley land yields used by the United States' economist as a base must be reduced to reflect the reality of poor and average as well as good farmers. And then the same standard must be aplied to both sides' experts. If the

Court is to accept the United States' economist's judgment as to how he reduced yields, then it should also accept the State Parties' expert's judgment on increased production costs. And if lack of precise and thorough quantification is to render one judgment unacceptable, then both judgments must be rejected. The conclusion is that United States' yields must be reduced in either case to reflect average farmers and then yields must either be reduced further to reflect the poor lands or production costs increased. Either way, the small profit margins projected by the United States' economist on the major sandy and gravelly/cobbly parcels will be wiped out, as we have shown in argument before the Master. (State Parties Post-Trial Open. Brief, pp. 25-37, 47-54.) The United States' claims should therefore be appropriately reduced.

2. Water Cost Lands: Power Rates.

The State Parties disputed the practicable irrigability of some lands claimed by the United States on the ground that even though they could generate enough revenue to generate a surplus over production costs, this surplus would not cover water costs. (State Parties Post-Trial Open. Brief, pp. 58-59.) A major reason for this dispute was the United States' assumption of a 30 mill power rate for all lands, an assumption accepted by the Special Master in total disregard of any attempt to account for wheeling costs. (Spec. Master's Rep., pp. 173-74; see *supra*.)

The Master's error is prejudicial as to his findings of irrigability of major acreage on the Ft. Mojave Reservation. On units *FM-3* and *FM-5*, the United States' own projections show only a $19 per acre surplus of total revenue over total costs (149 to 130 - U.S. Exh. 60, p. 18) with a cost of $26 per acre allocated to power. (U.S. Exh. 42, Tables 7 and C-3.) On the *Calada Unit*, the United States shows only

a $9 per acre surplus (149 to 140 - U.S. Exh. 42, Table C-7; U.S. Exh. 60, p. 18) with a cost of $34 per acre for power. (U.S. Exh. 42, Table C-7.) Power costs vary directly with power rates, and thus an increase of as little as 33% (40 mills instead of 30 mills) would raise the power costs on the *Calada Unit* over $11 per acre and wipe out the surplus, thus making the unit nonirrigable. On *FM-3* and *FM-5*, a 75% increase (52.5 mills instead of 30 mills) would raise the power costs over $19 per acre and render these units also nonirrigable.

The 30 mill power rate is for power available from the Bureau of Indian Affairs (BIA) power company on the Colorado River Reservation. (Rep. Tr., pp. 587, 7057-58.) Both the United States' engineer and an expert for the Indian Tribes profess to believe that power will be available at approximately the same rate on the other reservations once wheeling (delivery) charges are figured in, although no contracts for such power presently exist. (Rep. Tr., pp. 587-590, 648-49, 7057-7060.) However, this belief hardly squares with the United States' engineer's own statement that wheeling charges *alone* for power on the Ft. Mojave Reservation may vary from 11.6 mills to 25 mills. How can power available at 30 mills from the BIA at one location be transported for a cost of anywhere from 11.6 to 25 mills and still cost only 30 mills? Whatever the correct power rates are, including wheeling charges, for each reservation, they simply cannot be the same at all locations without some showing of a power source *at each location* that charges as little as 30 mills.

If the Ft. Mojave wheeling charges were added to the 30 mill rate, the total costs would be anywhere from 41.6 mills (30 + 11.6) to 55 mills (30 + 25), surely making the *Calada Unit* nonirrigable even under the United States' projections and very possibly making units *FM-3* and *FM-5*

also nonirrigable. The record does not disclose whether or not this is an appropriate computation, though the resulting power rate range compares to the range used by the State Parties' expert of 36 to 53 mills, which was based on commercial power rates actually available in the various areas. (Rep. Tr., p. 3731.) The correct power rates would likely exclude from water rights major areas of the Ft. Mojave Reservation awarded rights by the Master. But since the United States did not meet its burden of proof on this issue, and since the Master simply ignored its import, there is no way to make a definitive finding. At the very least, however, the acreage must be excluded since the United States failed to meet its burden of proof.

The experts from the Ft. Mojave, Chemehuevi, and Colorado River Tribes used the same 30 mill power figure. (Rep. Tr., pp. 7057-60; FM Exh. 1, Table 11.) To the extent that figure erroneously fails to consider wheeling charges to the various locations of use, it must be revised. Moreover, a corrected calculation of almond and grape prices (see *infra*) will show most of these lands claimed by the Tribes to be not practicably irrigable in any case, even without an adjustment to reflect correct power rates.

C. Indian Tribes Claims.

1. Introduction.

The most singular fact about the Indian Tribes' claims is that the Special Master has found 15,403 net acres practicably irrigable (and has awarded 102,072 acre-feet of diversion rights) (Spec. Master's Rep., pp. 254, 266, 274, 277) not even claimed by the United States. For years, the United States has been criticized by these five lower Colorado River Indian Tribes for its alleged failure to represent them adequately at the original trial of this matter before Special Master Rifkind in the late 1950's. Faced with this

criticism, the United States initiated the current proceedings in late 1978 in order to assert additional water rights claims on behalf of the Tribes and was undoubtedly motivated to assert the maximum claims reasonably possible in order to justify its conduct as trustee. Under such circumstances, it is incredible to imagine that the United States and its experts could have been so unprincipled or so incompetent as to fail to assert the practicable irrigability of these 15,403 net acres recommended for water rights by the Master. And yet the Master's finding necessarily implies exactly that since it recognizes almost 50% more acreage as practicably irrigable than was claimed by the United States. (Spec. Master's Rep., pp. 196, 254, 266, 274, 277.)

This conclusion is even more astounding when one considers the extent to which the Master goes in praising the United States' experts' work in analyzing the United States' claims. This is particularly true regarding the United States' economist, whom the Master refers to as "the only professional economist to testify in this case" (Spec. Master's Rep., p. 174) and "the only true economist to testify" (Spec. Master's Rep., p. 141), and about whom, the Master says:

> "His lengthy and impressive experience as an agricultural economist active in economic analysis in the lower Colorado River region was simply unmatched by any other witness in this case." (Spec. Master's Rep., p. 135.)

In analyzing the United States' claims the Master agrees with the United States' economist on *every* disputed point in which he, among the three United States' experts, developed the United States' position. It is therefore most curious that the Master totally ignores the fact that this same economist participated in the formulation of United States' claims which did not include the *additional* 15,403 net acres

asserted by the Tribes and found practicably irrigable by the Master. It is even more curious that the Master *totally ignores* the fact that this economist, whom he praised so lavishly, specifically explained as a witness why he would not project such lands as being practicably irrigable. Not only was this evidence in the record, but the State Parties argued the point in their post-trial brief. (State Parties' Post-Trial Open. Brief, pp. 96-97.)

The simple fact is that none of the crops with any commercial history in the lower Colorado River Valley can be projected as economically feasible on these lands claimed by the Tribes. Only by projecting four, high revenue, permanent crops grown only in *other,* distant areas can the Tribes' experts attempt to justify a claim for these lands, and the Master has agreed as to two of these crops, almonds and table grapes. The United States' economist defines an exotic crop as one promising a large return in relation to the area but which has not normally been planted in the area and is unproven. (Rep. Tr., pp. 897-98.) Because such a crop may look promising at one time but may not work out in *actual* experience, as an agricultural economist he would tend to discount it. (Rep. Tr., p. 966.) He agrees with the State Parties' expert that it is generally accepted planning practice to use crops that are established in the area because they are proven. (Rep. Tr., pp. 769, 3737.) He has only projected crops grown in the area in his cropping patterns (for lands claimed by the United States) because he has experience or *firm* data on those crops. (Rep. Tr., pp. 730, 856.) He considers other crops to be speculative. (Rep. Tr., pp. 856-57.) This does not necessarily mean they cannot be economically grown, but lack of present crop history does raise serious questions about economic viability. (Rep. Tr., p. 769.)

The Master makes no attempt whatsoever to rationalize his implicit rejection of the United States' so highly regarded economist on this central issue. Moreover, he dismisses the State Parties' argument about the inappropriateness of basing water rights claims solely on unproven crops (State Parties' Post-Trial Open. Brief, pp. 77-80, 95-102) by stating:

> "Contrary to the State Parties' argument, I believe that I should not strike the possibility of successful production of permanent crops on the Reservations simply because of a lack of historical production of such crops in the area. In many regions new and untested crops have been introduced upon the advice of experts of the sort who counsel the parties in this case. The proper course, I believe, is to weigh the various opinions regarding the positive and negative factors with respect to each particular crop." (Spec. Master's Rep., p. 198.)

But no one denies that new and untested crops have been introduced on the advice of experts, or even that some have succeeded. The point is that a speculative decision on the part of a farmer to try something new should not be so elevated as to become the basis for assigning a water right, especially on an oversubscribed river where every new acre-foot given to Tribes will be taken away from needed municipal and industrial uses in the three Lower Basin states. It is simply inappropriate to base a permanent water right on wholly speculative data which might convince a daring farmer to invest in a crop which could do well, but which could also fail miserably, leaving no profitable alternative use of the land for agriculture.

We do not say that the Master's decision to analyze the positive and negative factors as to each crop was wrong *per se*. Faced with the inappropriate claims of the Tribes' ex-

perts, the State Parties' experts nevertheless did a suitability and economic analysis of each crop. But such an analysis must be coupled with the knowledge that *no* data is firm, that *all* data is speculative, and that great care must be taken in reaching any conclusion regarding profitability. This is where the Master has erred, and has done so in a most egregious and prejudicial manner. He has selectively ignored the testimony of the very witness whom he had previously found to be the most experienced and qualified agricultural economist in the lower Colorado region to have testified. Instead, he has done his own analysis, specifically in the crucial area of crop prices (see *infra*), that goes beyond even what the Tribes' own experts had projected, in what turns out to be the only way to justify a finding of practicable irrigability for the additional 15,403 net acres. By so doing, the Master has only underscored the conviction of the State Parties that they have not been dealt with in an evenhanded manner. The Master has not only allowed the Indian Tribes two shots at the State Parties by allowing them to be represented by *both* the United States *and* their own counsel, over objection; he has praised the United States' experts when to do so supported a determination of more water rights for the Tribes; he has then turned around and ignored the decision of those same experts to not assert additional claims and has instead not merely entertained those Tribal claims, but has largely substituted his own best case analysis of crop prices for that of the Tribes' own experts, with the result that vast additional lands are awarded water rights. In an apparent attempt to provide social justice to the Indian Tribes, the Master has done legal injustice to the State Parties.

2. Crop Prices.

With the exception of small areas on the Ft. Mojave and Ft. Yuma Reservations, almost all the 15,403 net acres claimed only by the Tribes and awarded water rights by the

Special Master were given such rights on the basis of permanent crops. Of the permanent crops projected for those areas by the Tribes' experts, the Master has found only two — almonds and table grapes — to be economically feasible. (Spec. Master's Rep., pp. 197-239.) The Ft. Mojave, Chemehuevi, and Colorado River Tribes have been awarded water for over 9,000 net acres (out of the 15,403) based on projecting both crops in their cropping patterns. (Spec. Master's Rep., pp. 266, 274, 277; FM Exh. 1, Table 9; CH Exh. 1, Table 8; CR Exh. 1, Table 8.) The Ft. Yuma (Quechan) Tribe has been awarded water for over 6,000 net acres (out of the 15,403) based on projecting only one of the two crops, table grapes. (Spec. Master's Rep., p. 254; FY Exh. 18, pp. 48, 52-53.) That so much water can be awarded on the basis of the speculative feasibility of only one, or at best two, crops commercially unproven in the area is even more amazing when one realizes that the Master's findings depend entirely on his own inappropriate calculations of respective crop prices. His entire analysis of the Indian Tribe claims comes down to prices, and he has committed highly prejudicial error in such determinations.

(a) *Almonds.*

The Special Master computed a payment capacity for almonds of $347 per acre per year, more than enough to cover water costs on all three reservations where almonds are projected. (Spec. Master's Rep., pp. 216-18.) In so doing, the Master correctly assumed the 2,000 lb. per acre yield projected by the State Parties and the nondisputed production costs proposed by the Tribes. He also used the State Parties' method of computing payment capacity. But he erred in assuming a price of 76 cents per lb. in shell. (Spec. Master's Rep., pp. 216-17, footnote 100.) This excessive price made the Chemehuevi and Colorado River

reservations appear economically feasible for almonds when, in fact, they are not if a correct price for almonds is assumed.

The Indian Tribes' experts originally assumed a price of 50 cents per lb. in shell, a figure accepted by the State Parties. (FM Exh. 1, Table C-1; CH Exh. 1, Table B-1; CR Exh. 1, Table B-1; SP Exh. 119.) Only during their rebuttal case did the Tribes' experts decide that the 50 cent price, which was based on a 5-year average of 1974-1978 prices, should be updated using 1979 and 1980 prices. (Rep. Tr., pp. 7093-99.) The Master has agreed that an update is necessary but has decided to use an average that includes "as the last price of the average the year in which costs are pegged." He has therefore used 1979 as the last year price. (Spec. Master's Rep., pp. 214-16.) The State Parties do not agree that the 50 cent price need be revised (State Parties Post-Trial Open. Brief, pp. 203-06; State Parties Post-Trial Closing Brief, pp. 27-29), but are not raising that issue in these exceptions. We do not take exception to the mere revision of price to include 1979; but we strenuously object to the *method* used by the Master to calculate a new price, namely, his use of a three-year average instead of a five-year average.

The longer, five-year average is generally preferred to the three-year average, the shorter average obviously more subject to being distorted by an unusually high or low price in a particular year. The State Parties' expert testified that he generally looks at price history over the past five to ten years, and if particular year prices appear out of line or off trend, he inquires as to the reason, as to whether there may have been a freeze or a rain that would account for the difference. If there has been a continual increase in price over the five-year period, he might take the last two or three years, depending on price fluctuation. In the end, he uses

his judgment to determine a price, attempting to arrive at a reasonable price, not necessarily just an arithmetic average. (Rep. Tr., pp. 4007-08, 4079-4083.) The Indian Tribes' own expert testified that the Bureau of Reclamation uses a five-year average, then drops out the two years farthest from the average and reaverages the remaining three years. (Rep. Tr., pp. 7132-33).[48] Speaking of his own work, the Tribes' expert states:

> "Well, I would, the standard — Normally you would use about five years for payment capacity calculations unless there was a trend of increasing cost or unless the cost had — I shouldn't use the word 'cost' there, I should use prices — unless the prices were exhibiting an increasing trend or had plateaued, made a jump, in which event you might be justified in using maybe the last three prices.
>
> "We, I think, would tend to use the five-year prices as a starting point, and then we would analyze whether or not there is evidence that would suggest a shorter period by looking at the price trends." (Rep. Tr., p. 7101.)

Looking at the almond prices relied upon by the Tribes' expert and by the Master, we see the following:

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[48]This method is quite different from the three-year average used by the Master even though the final average is based on only three years. Rather than averaging three consecutive years, the Bureau method averages the three years out of five that are closest to the five-year average. If the Bureau method is applied to the 1975-1979 prices relied upon by the Tribes' expert and the Master (see *infra* and CR Exh. 56), the result is a 52 cent price, very close to the original price assumed by the Tribes and accepted by the State Parties, but far less than the inflated price of 76 cents calculated by the Master.

Year	price per lb. in shell
1974	$ 0.45
1975	$ 0.37
1976	$ 0.41
1977	$ 0.53
1978	$ 0.89
1979	$ 0.85
1980	$ 0.83

(CR Exh., p. 56)

There was certainly an upward trend in prices from 1974 through 1978, the period used by the Tribes' expert in his original calculation of a 50 cent price. (Rep. Tr., p. 7096.) Yet this very same expert, who said that an upward trend or plateau "might" justify using only the last three year prices, nevertheless employed the "normal" five-year average. Moreover, even on rebuttal, this expert stood by his original projections without change (Rep. Tr., pp. 7147-49); and even though he presented graphs showing the effect of both three-year and five-year average prices on payment capacity (Rep. Tr., pp. 7095-97; CR Exh. 52), neither he nor any other expert at any time advocated the use of a three-year average instead of a five-year average for projecting a price for almonds.

This lack of support from *any* expert, even the Tribes' own, has not deferred the Special Master. He has looked at the 1975 through 1979 prices and has decided:

> "Because the almond prices have experienced a rapid rise in recent years, I find that a three-year average price should be adopted from the data for the years 1977-79" (Spec. Master's Rep., p. 216).[49]

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[49]It might be argued that the 1980 price could give rise to the conclusion of a price plateau and hence a three-year average; but the Master is not considering the 1980 price because he does not have actual 1980 costs. (Spec. Master's Rep., p. 216.) Therefore, the 1980 price should not be a factor. If it were, the State Parties could just as easily argue that the 1981 price of only 40 cents per lb. in shell should be considered as a counterbalance.

What the Master has done is to look at a group of almond prices and make his own judgment that the normal five-year average should be discarded in favor of the three-year average used only in special circumstances. The Tribes' own expert looked at a very similar group of almond prices (including 1974 instead of 1979), which also showed an upward trend, but still elected to use the normal, five-year average. In a case where the Tribes' experts can hardly be accused of restraint or conservatism generally, the Tribes' expert nevertheless used discretion in this instance. And while he subsequently advocated a revision of the price to include later years, he never advocated changing the *method* of calculating that price; he never advocated using the method employed by the Master instead of the normal five-year average.

That no expert advocated use of a three-year average is no mere accident. An exhibit presented by the State Parties' expert on surrebuttal (Rep. Tr., pp. 7189-94; SP Exh. 184) shows that gross revenues for almonds for the 1975 to 1979 period are far more in line with the gross revenue resulting from use of the State Parties' price (and original Tribes' price) of 50 cents than from use of either the 1975-79 five-year average price of 61 cents (calculated from CR Exh. 56) or the much higher 1977-79 three-year average price of 76 cents assumed by the Master:

(all figures are per acre per year)

	Price	Yield	gross revenue
1974-78			
5 yr. average	$ .50	2000 lbs.	$1000.00
1975-79			
5-yr. average	$ .61	2000 lbs.	$1220.00
1977-79			
3-yr. average	$ .76	2000 lbs.	$1520.00

year	gross revenue actually received
1975	$ 610.
1976	$ 708.
1977	$1036.
1978	$ 857.
1979	$2197.

(SP Exh. 184)

As is apparent, *actual* revenue received was at or below gross revenue projected by the State Parties in four of the five years. Even using the 1979 price in the five-year average, the 61 cent price gives a gross revenue considerably in excess of that *actually* received in every year but 1979; but using the three-year average of the Master results anywhere from 50% to 125% more gross revenue than was *actually* received in every year but 1979. The Indian Tribes' experts' discretion in not advocating a three-year average seems well supported, as does the State Parties' adoption of the 50 cent price.

The Special Master has made a very convoluted analysis in order to justify ignoring SP Exh. 184 insofar as it also relates to the table grape revenues. (Spec. Master's Rep., pp. 225-29.) However, he says absolutely nothing about its obvious relevance and probative value as to almonds. None of his reasons for ignoring it as to grapes have any applicability as to almonds, yet he never even mentions it.[50]

It is the opinion of the State Parties that the Master has selectively ignored the import of SP Exh. 184 as to almonds

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[50]Evidence at trial showed that there may be a slight *downward* distortion in per acre gross revenues for almonds in SP Exh. 184 due to inclusion of some acres with immature trees (Rep. Tr., pp. 7246-50, 7258); but there would also be a slight *upward* distortion in per acre gross revenue due to inclusion of revenue from acreage regarding as non-bearing. (Rep. Tr., p. 7258.) In any case, the Master discusses none of this or anything else relating to SP Exh. 184 as it applies to almond revenues.

and has arrogated to himself the exercise of expert economic judgment that none of the real experts in the case were willing to make. In our opinion, the Master has done this fully aware that by using a three-year average and a 76 cent price rather than a five-year average and a 61 cent price, he would be finding huge areas of land on the Chemehuevi and Colorado River Reservations to be practicably irrigable for almonds which would not otherwise be. By a letter of December 18, 1981 to the State Parties and Tribes (attached hereto as Appendix C), the Master performed a correct payment capacity calculation for almonds based on a 61 cent price, which is the exact 1975-79 five-year average price (CR Exh. 56) that should be applied assuming that the original 50 cent price need be revised. That calculation shows a payment capacity of only $150 per acre per year, far less than the grossly inflated $347 figure actually adopted by the Master based on his three-year, 76 cent average. At only $150 payment capacity, none of the Chemehuevi and Colorado River Reservation lands are practicably irrigable for almonds, since the water cost on the Chemehuevi Reservation is $171 (Spec. Master's Rep., pp. 276-77) and on the four Colorado River Reservation units ranges from $179 to $320. (Spec. Master's Rep., p. 273.) Needless to say, the same units all appear to be practicably irrigable based on the $347 payment capacity, as the Master found.

Thus, the Master has committed prejudicial error in his selection of a three-year average price for almonds; that instead of taking the utmost care in the highly speculative area of unproven crops, he has gone to lengths exceeding even those of the Tribes' own experts to select a method of price determination that happens to be the only way to make a finding as to the practicable irrigability of almonds on vast acreages of two reservations. We believe his findings must be rejected by the Court.

As a final matter on almond prices, we note that even were the Master correct on price, *arguendo*, his award of water rights on the Colorado River Reservation implies almost twice as much acreage in almonds as was projected by the Tribes' experts in their cropping patterns. The Tribes' experts claimed 8662 gross acres as practicably irrigable (Spec. Master's Rep., p. 267), of which one-half would be almonds and table grapes in a 1 to 2 ratio. (Spec. Master's Rep., p. 273; CR Exh. 1, Table 9.) The Master found 7801 gross acres practicably irrigable, but with almonds and grapes making up the entire cropping pattern, presumably in the same 1 to 2 ratio (Spec. Master's Rep., pp. 273-74). Instead of approximately 1400 acres in almonds, there would be about 2600 acres, nearly double. This may not be as major a problem as it is with grapes, because almond prices assumed by all parties come from the San Joaquin Valley market, which is a large enough market to absorb some increases in almond acreage without a major effect on price. However, the three Tribes projecting almonds did so for about 2200 gross acres of the additional lands claimed (State Parties Post-Trial Open. Brief, p. 207), a not insubstantial increase in almond plantings, and the 1200 additional acres anticipated by the Master (2600-1400) only compounds this problem (State Parties Post-Trial Open. Brief, pp. 210-11). At the very least, the Master should have considered the possible effect on price.

(b) *Grapes.*

The Special Master computed a payment capacity for table grapes of $535 per acre per year more than the $58 computed by the State Parties. The total payment capacity would be more than enough to cover water costs on all four reservations where grapes are projected. In so doing, the Master made the same assumptions as the State Parties'

experts, except that he applied a much higher price, $867 per ton instead of $680. (Spec. Master's Rep., pp. 238, 248.)

The assumption of such a price ($867) is totally indefensible since it is based on the small Arizona grape market which will be overwhelmed by the massive amount of new grape acreage proposed by the Tribes and awarded water rights by the Master. The State Parties' price ($680) is the appropriate price since it is based on the huge San Joaquin Balley market, and with it none of the reservation lands are economically feasible for grapes, assuming a yield of 4.4 tons (400 lugs) per acre. The Master has also assumed this yield in his calculations but has not actually decided that it is the correct figure. By footnote, he states his belief that the correct yield is at least 450 lugs per acre. Using that yield (450 lugs) (with an appropriate adjustment for increased harvesting costs due to higher yield) and the payment capacity analysis method relied upon by the Master (State Parties Exh. 121), the State Parties have calculated a payment capacity of $226 per acre per year based on the $680/ton price. (See Appendix D.) This amount is in excess of water costs assumed by the Master for the Ft. Mojave and Chemehuevi Reservations and for the smallest of four areas on the Colorado River Reservation; but it is not sufficient to meet water costs on the three large Colorado River Reservation parcels (*CH-103, CH-107, CH-108*) with water costs of $262, $227, and $320, respectively, totaling 7,626 gross acres (Spec. Master's Rep., pp. 273-74) nor is it sufficient to meet water costs of $344 for any of the 6,785 gross acres of "*Northern Lands*" found practicably irrigable on the Ft. Yuma Reservation. (Spec. Master's Rep., pp. 248, 253-54.) All of this acreage, and the water rights appurtenant thereto, should be stricken.

The Master's lengthy analysis of grapes is based on his reliance on a note from the files of the State Parties' experts indicating they were told by an extension agent in Arizona that a 3.85 ton (350 lug) grape yield had been sufficient to be profitable throughout the State of Arizona. Using this one scrap of unexplained information from a person who never testified, the Master concludes that the State Parties' analysis, showing grapes to be unprofitable with a *larger* yield of 4.4 tons (400 lugs), *must* necessarily be erroneous. The Master further concludes that the reason for this error must be an incorrect price. To buttress this last conclusion, he attacks a State Parties exhibit (State Parties Exh. 184) which purports to show that actual San Joaquin Valley grape revenues are in line with the State Parties' yields and prices. He also analyzes a State Parties' claim about the timing of the grape harvest on the reservations and concludes that the harvest will occur early enough to take advantage of the higher prices in the Arizona grape market. He therefore decides to assume a higher, Arizona price such that grapes appear economically feasible on all the reservations. (Spec. Master's Rep., pp. 221-239.)

We disagree with the Master's dismissal of State Parties Exhibit 184 and with his determination as to the timing of the grape harvest and availability of the Arizona market; but we need not take specific exception to these decisions because the Master's far more egregious error renders them relatively unimportant. The very reason that the Master attaches too much importance to the profitability of a 3.85 ton yield is the same reason why his use of an Arizona price is wrong. Certainly a small planting of grapes in the Colorado River area might be able to take advantage of the high prices in the Arizona market, and Arizona prices are so high that even a low yield of 3.85 tons might show a profit. But we are speaking of an Arizona grape market

based on only 3,200 acres of grapes (Rep. Tr., pp. 7192, 7243), and the four Tribes have made acreage claims based on cropping patterns that would put about 9,700 *additional* gross acres in grapes (see *infra*; see also State Parties Post-Trial Open. Brief, p. 207). This represents over a *three-fold* increase in the amount of grape acreage coming onto the Arizona market, and yet the Master still thinks he can assume a price based on that market consisting of only 3,200 acreas. And as we shall see, *infra*, the Master's award of water rights necessarily implies an even larger increase in grape acreage in disregard of the effect that would have on market price.

The State Parties' expert testified that he did not think an Arizona grape price was reliable in this case since you could not expect to get the historic Arizona price that is based on 3,200 acres of grapes if 4,000 new acres came onto the market. (Rep. Tr., pp. 7192, 7238-43.) In speaking of 4,000 new acres, he was not even including the more than 5,000 additional grape acres projected by the Ft. Yuma (Quechan) Tribe. The State Parties' expert relied on Kern County (San Joaquin Valley) data since it represents a much larger market and is thus more reliable. Kern County prices were substantially lower than Arizona prices, by as much as $200 per ton in 1977. (CR Exhs. 56, 61.) The 1977 Kern price for table grapes was $724 per ton while in 1978 the preliminary Kern price was $729. (Rep. Tr., pp. 7239-40.) Using the same .92 conversion factor for a marketing charge as employed by the Master (Spec. Master's Rep., p. 226), the resulting grape price is almost exactly the $680 assumed by the State Parties' experts. This $680 figure was the grape price originally assumed by the experts for the Ft. Mojave, Chemehuevi, and Colorado River Tribes (FM Exh. 1, Table C-6; CH Exh. 1, Table B-6; CR Exh. 1, Table B-6), and was adopted by the State Parties' experts because it seemed

a reasonable price.[51] Since it is the only price presented which approximates historic Kern County prices, it should be adopted.

The Master's rationalization for using an Arizona price in face of the State Parties' argument is weak at best:

> "This consideration does not persuade me to discard the Arizona price. The evidence shows that the grapes for these lands will compete with the Arizona *and* Coachella harvests, as well as with San Joaquin in the later stages of harvest. The Arizona price is the most relevant price to consider in this analysis. In addition, the inclusion of the Coachella production increases the size of the existing market beyond that which the State Parties consider. This argument fails first because it lacks any support other than a casual observation. The State Parties' experts did no formal market studies to prove this point and even if they had, I am not certain they were sufficiently qualified to do so. Moreover, I do not feel that this market inquiry is appropriate in the present context. The Tribes may not plant such extensive vineyards as their claims indicate; they might turn to other crops as their experience grows. The limit of the scope of fact-finding in this case must occur at some point, and I draw that line at this issue." (Spec. Master's Rep., p. 237.)

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[51]As confirmed during rebuttal, the $680 price assumed by these Tribes was calculated from an eight-year (1971-78) average of Arizona grape prices, not from any San Joaquin Valley prices. (CR Exh. 56.) Nevertheless, this does not change the conclusion of the State Parties' experts that Kern County (San Joaquin) prices are the appropriate ones to use or the conclusion that $680 accurately reflects Kern County prices, as shown in CR Exhibit 61. Furthermore, the Master's statement that the State Parties' experts believed Arizona prices to be relevant because they were listed on notes from the experts' file is a meaningless observation. (Spec. Master's Rep., p. 236; FY Exh. 44.) Just because our experts thoroughly investigated Arizona prices hardly implies that they ever considered them to be correct or appropriate for this case.

First, the Coachella harvest and market is irrelevant because there is no evidence as to Coachella prices, and the Master has assumed an Arizona price. There is nothing in the record to establish any identity or interchangeability of these two markets and prices. On the contrary, the same Tribes' expert who based the original grape price on the 1971-78 Arizona average (Rep. Tr., pp. 7100-01; CR Exh. 56) testified that he expects a grape harvest on the reservations to occur at the same time as Coachella and before San Joaquin so that a higher market price might be achieved, but that

> ". . . we really didn't take that prior consideration into our calculations." (Rep. Tr., pp. 1069-70.)

So he used Arizona prices but not Coachella prices; therefore they cannot be identical nor the two markets considered as one. It is thus incorrect for the Master to assume that the larger Coachella market could cushion the shock of all the new grape acreage coming into the Arizona market. If an Arizona price is assumed, the Arizona market alone must be considered.

Second, as we discussed *supra,* the Master transfers the burden to the State Parties to prove that Arizona prices would be affected. The most elementary consideration of the law of supply and demand should have raised such serious questions as to the validity of assuming historic Arizona prices as to force the Master to utterly discard these prices absent a strong showing by the claimants as to why he should not. Instead, he ignores the obvious and then actually tries to blame the State Parties for not providing him enough evidence by way of a formal market study. It is the Tribes who claim the land and who propose the Arizona prices upon which the Master bases his $867 finding; it is they who plan to triple the grape acreage coming onto the Arizona market; and it is they who should have

made the market study or whatever else was needed to show how their glut of new grapes would not affect the prices they assume. In relieving the claimant Tribes of *all* burden of proof, the Master has made a mockery of even his own preponderance of the evidence standard.

The Master's final statements only further weaken his position. To say that a market inquiry is not even appropriate because the Tribes may not plant so many grapes and may instead turn to other crops is either totally irrelevant or an admission that grapes cannot project as economically feasible for any, or as much, of the acreage for which they are projected. To award water now, there must be a crop which can now project as economic for each and every acre. That you may fill in later with some other crop that is not now projected as economic cannot be considered as a proper basis for an award of a water right.

Finally, the Master's statement that he is cutting off fact finding at this point is a most damning admission. A thorough inquiry into the effect of large new acreage on market price is absolutely essential if the small Arizona market price is to be assumed. The assumption of this price is determinative of the whole issue of the economic feasibility of table grapes on thousands of acres for which water rights are claimed. Without this assumption of price, none of the Ft. Yuma "Northern Lands" would be practicably irrigable, even assuming a 450 lug yield favored by the Master; without this assumption, almost none of the tribally claimed land on the Colorado River Reservation would be practicably irrigable. The decision of the Master to cut off fact finding at the very point at which the majority of the Indian Tribes' claims should be thrown out for utter failure of the Tribes to meet their burden of proof has raised in the State Parties the profound conviction that they have not been dealt with fairly.

Even were it somehow appropriate to use Arizona prices, *arguendo,* the Master has made a further error in that he has gone beyond the cropping patterns projected by the Tribes' experts.[52] As discussed *supra,* this results from the Master's looking at each claimed acre in a vacuum, assessing its asserted irrigability without regard to the reality that thousands of other similar acres would be farmed in the same crop. Not only does he choose a grape price without regard to the effect of new acreage on the market, he assumes that *any* amount of new acreage can come onto that market. He does not adhere to the amount of acreage necessarily projected by the Tribes' experts by virtue of their acreage claims and their cropping patterns. When there are too many acres and too few feasible crops, he simply assumes that a crop feasible for one acre can be projected to cover *all* acres and qualify *all* for water rights.

With regard to the Colorado River Reservation, the Tribes' experts projected grapes and almonds as only half the cropping pattern for 8,662 gross acres. (Spec. Master's Rep., pp. 267, 273.) The Master has found that these are the only two feasible crops, but has recognized 7,801 gross acres for water rights. (Spec. Master's Rep., pp. 273-74.) With grapes projected for twice as many acres as almonds, this means that instead of having grapes on one-third the acres claimed by the Tribes, or 2,887 gross acres, they must now be assumed for two-thirds the acres recognized by the Master, or 5,200 gross acres. On the Ft. Yuma Reservation,

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[52]The Master has also erred in again taking a three-year average price instead of the usual five-year average, and in this case the Tribes' own expert has used an *eight*-year average in his original calculation. (Spec. Master's Rep., p. 236; CR Exh. 56.) The three-year average (1977-79) as adjusted for marketing charge shows the $867 price assumed by the Master. The five-year (1975-79) average as adjusted is only $762 per ton. (CR Exh. 56.) However, assuming a 450 lug crop yield, grapes would still project as profitable, so this error is not prejudicial.

the Tribes' experts projected no cropping pattern, but did claim only grapes and pistachios. (FY Exh. 18, pp. 52-53.) Assuming half the cropping pattern for each, you get grapes on one-half of the 10,755 gross acres of "Northern Lands" claimed by the Tribes, or 5,378 gross acres. (Spec. Master's Rep., p. 249.) Since the Master has thrown out pistachios, but recognized 6,785 gross acres (Spec. Master's Rep., p. 254), the entire amount must be assumed to be grapes. Thus on the Colorado River Reservation, you have 2,300 additional acres (5,200-2,887) and on Ft. Yuma 1,400 (6,785-5,378), or 3,700 additional gross acres total in grapes over what the Tribes' experts contemplated.

Speaking of this problem as to the Colorado River Reservation, the Master says:

> "The Tribes anticipated this possibility and argued in their brief that they would concentrate plantings in crops found to be economically viable. For present purposes, I believe that response is sufficient. The State Parties responded to a similar argument by the Quechan Tribe by arguing that large plantings of any one crop would ruin the market for the crop. As I indicated earlier, no evidence of any study reaching this conclusion was presented even if the issue is relevant to present proceedings. The lands may be proved to be practicably irrigable on the basis of their ability to support any crop, but the Tribes might ultimately cultivate on these lands a variety of crops or none at all. Therefore, I must now consider the number of acres which may be found to be practicably irrigable on this basis." (Spec. Master's Rep., pp. 273-74.)

Apart from his repeated error of shifting the burden to the State Parties, the Master simply accepts the unsupported statement that the Tribes would concentrate on the economically viable crops. We believe this is no answer at all, because it does not take any account of the market. Just as

he erred in using the Arizona prices in the first place, the Master compounds that error by assuming that a limitless supply of grapes could enter that market without affecting prices. Even if his Arizona price were correct, *arguendo*, his findings of practicable irrigability in grapes for acreage in excess of that projected for grapes by the Tribes' experts should be stricken.

In conclusion, neither grapes nor almonds can be projected as practicably irrigable on units *CH-103*, *CH-107*, *CH-108* on the Colorado River Reservation nor on the *Northern Lands* unit on the Ft. Yuma Reservation. Therefore, all water rights awarded for these lands should be stricken.

D. Conclusion.

Even assuming that the Court awards permanent water rights to the omitted lands and/or to lands whose boundaries have not yet been finally determined, the amounts of practicable irrigable acreage and derivative water rights determined by the Special Master (Spec. Master's Rep., pp. 116, 121) must be corrected because of the Master's prejudicial errors regarding crop yields, production costs, power rates, and almond and grape prices. As shown in the following table (Table 1), such downward adjustments are as follows:

Reservation	Net Irrigable Acreage	Total Acre-Feet to be Excluded
Ft. Mojave	2,054	13,269
Chemehuevi	919	5,486
Colorado River	7,245	48,324
Cocopah	8	51
Ft. Yuma	6,623	44,175

TABLE 1

ACREAGE and WATER RIGHTS TO BE EXCLUDED TO CORRECT SPECIAL MASTER'S ERRONEOUS DETERMINATIONS AS TO THE AMOUNT OF "PRACTICABLY IRRIGABLE ACREAGE"

					Reason for Exclusion							
Reservation	Unit	State	Type	Claimant	Yields/ Costs on Sandy or Gravelly Lands[A]	Power Rates[B]	Almond/ Grape Prices[C]	Total Gross Acres	Net Factor[G]	Total Net Acreage	Diversion Duty[14]	Total Acre-Ft. to be Excluded
Ft. Mojave	FM-2	Arizona	omitted	US	370[D]			370	.95	352		
	FM-3	Nevada	omitted	US		120[E]		120	.95	114		
	FM-5	Arizona	omitted	US	358[E]	106[EF]		464	.95	441		
	FM-7	Arizona	omitted	US	469[E]			469	.95	446		
	FM-11	Arizona	boundary	US	24			24	.95	22		
	Calada	Arizona	omitted	US	484[E]	231[EF]		715	.95	679		
	FORT MOJAVE TOTAL				1705	457		2162		2054	6.46	13,269
Chemehuevi	CH-3	California	omitted	US	31[E]			31	.95	29		
	CH-4	California	omitted	US	937[E]			937	.95	890		
	CHEMEHUEVI TOTAL				968			968		919	5.97	5,486
Colorado River	CR-103	Arizona	omitted	Tribe			3585	3585	.95	3406		
	CR-107	Arizona	omitted	Tribe			3124	3124	.95	2968		
	CR-108	Arizona	omitted	Tribe			917	917	.95	871		
	COLORADO RIVER TOTAL						7626	7626		7245	6.67	48,324
Cocopah	EC-1	Arizona	omitted	US	9[E]			9	.95	8		
	COCOPAH TOTAL				9			9		8	6.37	51
Ft. Yuma	FY-2	California	boundary	US	75			75	.95	71		
	FY-7	California	boundary	US	16			16	.95	15		
		California	omitted	US	4[E]			4	.95	4		
	FY-8	Arizona	boundary	US	438			438	.95	416		
		California	boundary	US	11			11	.95	10		
	Northern Lands	California	boundary	Tribe			6785	6785	.90	6107		
	FT. YUMA TOTAL				544		6785	7329		6623	6.67	44,175

[A]Based on economic analysis of United States' experts (cropping patterns, prices, yields, production costs, water costs), as adjusted only to eliminate double standard used by Special Master so as to reflect either 1) State Parties yields or 2) State Parties Increased Production Costs.

[B]Based on United States' experts projected revenues and costs, as adjusted only to reflect inclusion of potential wheeling costs in power rates.

[C]Based on crop yields, production costs, and water costs as determined by the Special Master, and adjusted only for price.

[D]Figure does not include acreage on unit *FM-2* already excluded by the Special Master as part of the 1075 gross acres with indefinite boundaries. That portion of *FM-2* (118 gross acres) would also be excludable under the "yields/costs sandy lands" category. Similarly, unit *FM-6* is not listed herein because all 200 gross acres of its sandy portion were already excluded for indefinite boundaries but could also be excluded under this category. (Spec. Master's Rep., pp. 84-85, 193.)

[E]Figures do not include amount of acreage already excluded by Special Master as non-arable. (Spec. Master's Rep., pp. 161-64.)

[F]There are an additional 358 acres excluded in *FM-5* and 484 acres excluded on *Calada* for "yields/costs gravelly lands" that could also be excluded for power rates.

[G]As determined by the Special Master. (Spec. Master's Rep., pp. 100-03.)

[H]As determined by the Special Master (Spec. Master's Rep., pp. 91-92.)

IV.
THE SPECIAL MASTER ERRED IN GRANTING UNCONDITIONAL INTERVENTION TO THE INDIAN TRIBES.

A. Introduction.

The Special Master granted the Tribes leave to intervene unconditionally in this proceeding while allowing the United States continued participation in its capacity as trustee for the Tribes. In so doing, the Special Master fails to recognize the right of the three States to withhold consent under the Eleventh Amendment to suit by the Tribes.

Arizona, California and Nevada have the right to withhold consent to suit through intervention by the Tribes in these proceedings. Arizona has not consented while California and Nevada gave conditional consent predicated on representation of the Tribes' interests by the Tribe itself to the exclusion of the United States. This condition has not been met since dual representation has been permitted by the Special Master and, therefore, California and Nevada have not consented to suit by the Tribes.

Lacking consent by the three States to suit, the Tribes are barred from participating in these proceedings by the doctrine of sovereign immunity and the Eleventh Amendment. The concept of ancillary jurisdiction relied on by the Special Master fails to provide a separate and distinct basis for this Court to permit intervention by the Tribes in contravention of the sovereign immunity of a State and the mandate of the Eleventh Amendment. The Special Master's alternative reliance on 28 U.S.C. § 1362 as a jurisdictional basis for the Tribes' intervention in this proceeding is also misplaced. Congress never intended to abrogate the sovereign immunity of the three States to allow dual representation of the Tribes' interests.

Without a separate jurisdictional basis for allowing intervention of the Tribes, Rule 24 of the Federal Rules of Civil Procedure is inapplicable. The Federal Rules do not expand the jurisdiction of federal courts. Assuming Rule 24 is applicable, the conditions for mandatory intervention under Rule 24(a) have not been satisfied. There has been no showing that the United States cannot adequately represent the Tribes' interest in these proceedings.

A previous motion to intervene in the original proceedings was filed by the Navajo Tribe on grounds similar to the arguments advanced by the Tribes. This Court rejected those arguments. Moreover, the United States itself has conceded that intervention of the Tribes in this lawsuit may be barred by the sovereign immunity of the States. (Memorandum of United States in Opposition to Intervention, February, 1978, at p. 12; see also Response of United States to Motion for Leave to File Representation, July, 1956.)

B. Applicability of the Eleventh Amendment.

1. Intervention by the Five Tribes Constitutes Suit Against the Three States.

Previous pleadings filed in this case by the three States advanced the argument that, as States, Arizona, California and Nevada are immune from suit in federal courts without their consent by any or all of the five Indian Tribes irrespective of whether each Tribe is deemed a citizen of any one state, several states, or no state.[53] Granting intervention to the five Tribes constitutes suit against the States without their consent in violation of the Eleventh Amendment sovereign immunity notwithstanding the fact that claims of the

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[53]*See* Motion of the States of Arizona, California and Nevada and the Other California Defendants for Leave to File Exceptions to the Memorandum and Report of Special Master Elbert P. Tuttle, dated November, 1979.

five Tribes to Colorado River water are already before this Court through the United States as trustee.

Whether or not a suit is one against a state is not to be determined by formalities of the law of parties but by the actual effect of a judgment in favor of the applicants would have against a state. "(T)he nature of a suit as one against a state is to be determined by the essential nature and effect of the proceeding. *Ex Parte Ayers*, 123 U.S. 443, 490-99; *Ex Parte New York,* 256 U.S. 490, 500; *Worcester County Trust Co. v. Riley,* 302 U.S. 292, 296-98." (*Ford Motor Co. v. Treasury Department,* 232 U.S. 459, 464 (1945)); *see also, Confederated Tribes of the Colville Indian Reservation v. State of Washington,* 446 F.Supp. 1339, 1349 (E.D.C. Wash. 1978).

The five Tribes claim additional present perfected rights above those quantified in the 1964 Decree in this matter. In so doing, the Tribes seek a judgment that is contrary to the interests of all three States. There are claims for additional rights to Colorado River water in each State. Any claim for use of water in one State is adverse to the interests of the other two States since in time of shortage, these claims would have a higher priority to be satisfied irrespective of state lines or the overall apportionment of the Colorado River among the three States. (*Arizona v. California,* 376 U.S. 340 (1964), Article II(B)(3).)

The relief sought by the five Tribes is not merely in the nature of an injunction prospectively directing the Secretary of the Interior to allocate Colorado River water in a different manner than previously decreed by this Court. The actual effect of these claims is to directly impact existing water right priorities by moving rights in each State downward and interposing new rights in the other States which would be satisfied first in times of shortage. The essential nature and effect of intervention, therefore, seeks to take away

existing water right priorities in which each State has an interest *parens patriae*. By seeking to establish additional claims adverse to each of the three States, the intervention permitted by the Special Master constitutes suits against the States by the five Tribes.

2. Ancillary Jurisdiction Does Not Provide a Jurisdictional Basis Overcoming the Sovereign Immunity of the State.

The Special Master holds that the States' sovereign immunity is not implicated by the Tribes' motions to intervene since "the intervenors' claims are ancillary to a case or controversy already within the Supreme Court's jurisdiction, they are within the scope of the States' constitutional surrender of immunity." (Spec. Master's Rep., p. 27; *see also* Spec. Master's Memorandum and Report on Preliminary Issues, August 28, 1979, pp. 16-24.) The States disagree with this conclusion.

The Special Master reasons that this Court provides the only forum for assertion of claims of the five Tribes to additional Colorado River rights. However, he then erroneously concludes that the Tribes themselves are entitled to intervene as parties to assert these claims disregarding the fact that the United States, as trustee for the Tribes, is a party and "[T]here can be no more complete representation . . ." *Heckman v. United States,* 224 U.S. 413 at 444 (1912).

Ancillary jurisdiction applies to claims and is not concerned per se with what parties assert those claims. *See Owen Equipment and Erection Company v. Kroger,* 437 U.S. 365, 372-373 (1978); *Aldinger v. Howard,* 427 U.S. 1, 16-17 (1976). In this case, ancillary jurisdiction does not provide an independent jurisdictional basis permitting intervention by the Tribes.[54]

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[54]*But cf. Oklahoma v. Texas,* 258 U.S. 574, 581 (1922) (private land owners allowed to intervene where no independent jurisdictional basis because interests not otherwise represented).

3. State Immunity Is Not Abrogated by 28 U.S.C. § 1362.

The Special Master has ruled that even if state immunity is implicated by the attempts of the Tribes to intervene, that immunity, as against Tribes, has been abrogated by Congress through 28 U.S.C. § 1362. (Spec. Master's Memorandum and Report on Preliminary Issues, pp. 25-30; Spec. Master's Rep., p. 27.)

Eleventh Amendment immunity may be abrogated by Congress authorizing suit against a state pursuant to the state's surrender of sovereign immunity in delegating to Congress its constitutional powers. However, such authorization must "explicitly and by clear language . . . [evidence] an intent to sweep away the immunity of the States." *Quern v. Jordan*, 440 U.S. 332, at 345 (1979). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 451-56 (1976); *Edelman v. Jordan*, 415 U.S. 651, 672-73 (1974); *Employees v. Department of Public Health and Welfare*, 411 U.S. 279, 282-85 (1973); *Parden v. Terminal Railroad Co.*, 377 U.S. 184, 190-92 (1964). Congress has not abrogated the sovereign immunity of a State in favor of Indian tribes in enacting 28 U.S.C. § 1362 where the United States participates in their behalf. 1 Moore's Federal Practice ¶0.62 [18-3], at 700.70 (1982).

In *Moe v. Confederated Salish and Kootenai Tribes, etc.*, 425 U.S. 463 (1976), this Court determined that 28 U.S.C. § 1362 allowed Indian tribes to sue states in federal courts under limited circumstances without regard to a state's sovereign immunity. The Court indicated that the ability of tribes to bring suit was not intended to entirely abolish a state's sovereign immunity since the intent of Congress was to "open the federal courts to the kind of claims that could have been brought by the United States as trustee, *but* for whatever reason *were not* so brought." *Id.* at 472 (emphasis

added).[55] Where the United States has acted in its capacity as trustee for the Tribes and filed suit against a State, § 1362 does not provide the jurisdictional basis for intervention by the five Tribes. The State Parties contend that the failure of the United States to bring suit is a condition precedent to suit by the five Tribes against the States without their consent and, that such a condition has not been met in this case.

The Special Master concludes that consent of the States to suit is no longer the prevailing interpretation of § 1362. Citing two pre-*Moe* circuit court decisions for the proposition that Congress authorized suits by Indian Tribes only when the United States had declined to act, *Standing Rock Sioux Indian Tribe v. Dorgan*, 505 F.2d 1135 (8th Cir. 1974); *Fort Mojave Tribe v. LaFollette*, 478 F.2d 1016 (9th Cir. 1973), the Special Master interprets *Moe* as a decision by this Court extending the ability of Indian tribes to file suit under § 1362 even when the United States is a party. His ruling ignores this Court's language in *Moe, supra*, while noting that the Court did not actually make a holding on this point. The Special Master argues that Congress could not possibly have intended to limit a Tribe's access to federal courts in view of *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370 (1978), and other cases. However, *Poafpybitty* only holds that the United States' right to sue does not preclude a tribe's right to sue. It does not address the issue of whether the United States' exercise of its right to bring on action on behalf of a tribe precludes a tribe from suing. The Special Master's use of *Poafpybitty* is misplaced and his interpretation of *Moe* is overly broad. The language in *Moe* is totally consistent with this Court's previous state-

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[55]See Discussion at 1 Moore's Federal Practice, ¶0.62 [18-3], 700.69 Fn.7 (1982).

ments regarding Congressional abrogation of sovereign immunity in *Quern* and *Edelman*, and supports our view as to the Congressional intent in enacting § 1362.[56]

The two post-*Moe* cases cited by the Special Master are also consistent with our view. In *Aguilar v. Kleppe*, 424 F.Supp. 433 (D.C. Alaska, 1976) the court noted with approval the language of *Edelman*:

> In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most overwhelming implications from the text as [will] leave no room for any other reasonable construction.' (citations). *Id.* at 435.

Further, in applying this Court's decision in *Moe* to § 1362, *Aguilar* found that where the United States breaches its trust obligations by failing to file an action, a tribe may sue. *Id.* at 436. In *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339 (E.D.C. Wash., 1978), aff'd in part and rev'd in part on other grounds, 447 U.S. 834 (1980), reh. denied 448 U.S. 911 (1980), the Court relies on *Moe* and *Aguilar* in permitting intervention by tribes where, again, the United States failed to act. Neither *Aguilar* nor *Colville* discuss Congressional

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[56]H.R. Rep. No. 2040, 89th Congr., reprinted in [1966] U.S. Code Cong. & Ad. News 3145. The House Report on the bill which became § 1362 makes clear that Congress only intended to establish jurisdiction on behalf of the Tribes in U.S. district courts in two situations. First, Congress intended to eliminate the then existing $10,000 minimum amount in controversy required for federal question cases under 28 U.S.C. § 1381. Second, Congress intended to "provide U.S. district court jurisdiction in those cases *where the U.S. attorney declines to bring an action* and the tribe elects to bring the action." *Id.* at 3147.

intent or a condition precedent to suit by tribes under § 1362.[57]

In this case, that condition is not satisfied. The United States intervened as trustee to fully represent the interests of the five Tribes permitted intervention by the Special Master. The United States represented the Tribes as to their original claims and continues to do so as to their additional claims. Despite the five Tribes having claimed larger amounts of alleged "practicably irrigable" acreage, the crucial point is that the United States and the five Tribes both asserted claims based on the same legal theories. Therefore, it cannot be said that the United States has declined to assert tribal claims. To conclude that § 1362 was intended so broadly as to allow a tribe to sue every time a difference in the extent of the claim exists carries Congressional intent too far. If as we contend Tribes may sue a State only where the United States fails to bring such action, this Congressional limitation is wholly eliminated if it is deemed met by the Tribes merely going the United States one better in the scope of the claim. § 1362 does not allow suit by the five Tribes under the circumstances of this case.

C. Rule 24 Does Not Permit Intervention by the Tribes in the Present Proceeding.

1. Rule 24 Cannot Circumvent the Jurisdictional Bar Created in Granting the Tribes Leave to Intervene by the Doctrine of Sovereign Immunity.

In granting the Tribes leave to intervene, the Special Master followed the guidance of Rule 24 of the Federal Rules of Civil Procedure. (Spec. Master's Rep., p. 26.)

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[57]*But cf. Oneida Indian Nation v. State of New York*, 520 F.Supp. 1278 (1981) where the court erroneously concludes that Congress intended to abrogate the State's immunity from suit in enacting § 1362 despite finding "[T]he statutory language of § 1362 is inconclusive with respect to Congressional intent." *Id.* at 1305. The court does limit its holding to Indian land claim actions and refers to the *Moe* decision which it finds "strongly suggests that since the United States could have brought these actions on plaintiff's behalf, that these Indian tribes should also be allowed to bring them." *Id.* at 1306.

Although the Special Master concluded that the Tribes should be *permitted* to intervene, his conclusions that government representation "may be" inadequate suggests intervention of right pursuant to Rule 24(a) of the Federal Rules of Civil Procedure.

The applicability of the Federal Rules of Civil Procedure to original actions before the Supreme Court is suggested by Supreme Court Rule 9. However, the Federal Rules of Civil Procedure also make clear that *the rules shall not* be construed to *extend jurisdiction*. Rule 82 of the Federal Rules of Civil Procedure. Rule 24 only "states under what circumstances intervention is proper as a matter of procedure but intervention still must be denied, though all the requirements of Rule 24 are met, if the federal court cannot take jurisdiction with regard to the intervenor." C. Wright and A. Miller, 7A Federal Courts, § 1917, at 587 (1972 ed.). The Special Master is in error to rely on Rule 24 to overcome the jurisdictional bar to litigation by Tribes against the States in federal court where consent has not been given by the States.

2. Intervention by the Navajo Tribe Was Previously Denied.

The Special Master has ignored this Court's previous denial of the motion of the Navajo Tribe for leave to intervene in the earlier proceedings. This previous attempt by an Indian Tribe to intervene also alleged inadequate representation by the United States.[58] The Court denied the Navajo Tribe's motion without comment on November 20, 1961. (368 U.S. 917.) A motion for reconsideration was also denied without comment on January 8, 1962. (368 U.S. 950.)

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[58]Motion on Behalf of Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah for Leave to Intervene, Brief in Support thereof, and Petition of Intervention, September 25, 1961.

The previous denial of the Navajo Tribe's motion is consistent with this Court's holding in *New Jersey v. New York*, 345 U.S. 369 (1953).[59] Although the Special Master contends that "common sense suggests that those most directly affected by the litigation should be able to assert their own interests" (Spec. Master's Memorandum and Report on Preliminary Issues, p. 7), this Court has rejected that rationale in original actions where the United States and States act in their representative capacities. In *New Jersey v. New York* this Court applied the principle of *parens patriae* in denying the City of Philadelphia's request to intervene in an original action before this Court involving an interstate water dispute. Just as Philadelphia was denied intervention on the ground that their interests were adequately represented by the Commonwealth of Pennsylvania which had previously intervened, the Tribes' intervention here should be denied when the United States intervened solely to represent their interests. (Spec. Master's Memorandum and Report on Preliminary Issues, p. 10.) This is especially true where "there can be no more complete representation than that . . . of the United States in acting on behalf of [Indian Tribes] . . .". *Heckman v. U.S.*, 224 U.S. 413, 444 (1912).

Conclusion.

For the reasons stated herein, the State Parties request that the Court do the following:

1) Reject the Special Master's award of any water rights for the so-called "omitted lands" and declare that any additional claims for water for such lands are barred.

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[59]*See generally, Environmental Defense Fund v. Higginson*, 631 F.2d 738; and Hart and Wechsler's The Federal Courts and the Federal System, p. 250 (2d ed. 1973).

2) Reject the Special Master's award of any water rights for the boundary lands until the disputed boundaries are "finally determined," either on remand in these proceedings or through adjudication in which the State Parties are allowed to participate as parties.

3) Assuming, *arguendo,* that any rights are properly awarded for omitted lands and/or boundary lands, reduce the award determined by the Master to correct erroneous determinations as to practicably irrigable acreage.

4) Reject the Special Master's decision to grant the Indian Tribes unconditional intervention and rule that the intervention as granted was improper; and assuming, *arguendo,* that any water rights are properly awarded for omitted lands and/or boundary lands, strike all such rights made pursuant to claims asserted only by the Indian Tribes.

Respectfully submitted,

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APPENDIX A.

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MR. WARNER: If Your Honor please, before I continue with my statement I should like to introduce Mr. Geraint Humphreys, Assistant Regional Solicitor in the Los Angeles Region for the Department of the Interior. Mr. Humphreys has been in charge of the tremendous job of assembling the evidence in connection with the Indian claims, and he will be with us during the time that we are presenting the evidence on the Indian claims.

THE MASTER: You are very welcome, Mr. Humphreys.

MR. WARNER: Yesterday, at the point at which I stopped, Your Honor had inquired about quantum of the reserved waters, and that was exactly the point at which I was ready to go into that subject.

Page 12,455

MR. WARNER: I do not think *Winters* was actually an open end decree.

THE MASTER: I understood you to say a few minutes ago that 20 years after the *Winters* decree, if it turned out they needed more water, they could then prevent the other people from taking it.

MR. WARNER: I think that was implicit in the—

THE MASTER: That is what I meant by an open end decree.

MR. WARNER: The *Winters* case; but I do not believe the decree was actually in terms of an open end decree, but in Conrad Investment—

THE MASTER: It surely was not.

Pages 12,456-7

MR. WARNER: I was going on from that to explain to Your Honor that the decree in Conrad Investment did provide that, if in the future it should appear that that quantity was insufficient for the needs of the Indians on the reservation, then the United States might come back and apply for modification of the decree.

THE MASTER: For an increase.

MR. WARNER: For an increased amount.

THE MASTER: That meant that nobody else, to all intents and purposes, could rationally develop the utilization of the surplus water. You certainly would not want to spend a lot of money for the development.

MR. WARNER: It would have that implication, except for, I suppose, the fact that any modification that was to be granted would be dependent upon the Court's determination. I suppose there is at least that element of protection for others who might be attempting to put the waters to use.

However,—

THE MASTER: You would not want to give an opinion of counsel to an underwriting house selling a bond issue?

Page 12,461

THE MASTER: I take it from what you have just said that you are going to assert a claim for the maximum amount of water necessary for the irrigable acres in the reservation.

MR. WARNER: That is correct, Your Honor.

Pages 12,463-4

MR. WARNER: . . . Aside from the problems which we may have with respect to the Walker River decision we think that under existing conditions on the Indian reservations throughout the Lower Basin, the extent of the irrigable acreage is the only practical basis, as a general proposition, for arriving at a reasonable judgment now of the possible

needs of the Indians for the future. It is for this reason that we propose to offer detailed evidence regarding the irrigable lands.

At the conference here some three weeks ago Your Honor suggested that we might have difficulty with our proof of irrigability. We think that proof must be offered, and that it must be received if the Court is to have before it the information necessary to permit any kind of a determination of the quantities of water which may be available on a firm basis in the Lower Basis for non-Indian use.

To date none of the parties has been put to strict proof of irrigability. We anticipate that the United States, in proving its claims in behalf of the Indians, will be. We think that the irrigability of a tract of land cannot be established without a showing of the land's suitability for irrigation even though it be assumed that water can be gotten, onto the ground.

For that reason the irrigable lands on the reservations have been classified, and some evidence at least of those classifications will be offered. We do have confidence that Your Honor will not exclude this evidence which we think is the very basis of the measure of the quantity of water reserved for the future needs of the Indians.

Pages 12,466-7

MR. WARNER: The problem of reconciling our duty to assert and protect fully the rights of the United States in behalf of their Indian wards with the need for a reasonably firm determination of the unreserved waters available for other uses in order that the maximum utilization of those waters can be provided for is one for which we presently find a proposed solution extremely difficult.

We do invite Your Honor's attention to the open-end decree in the Conrad Investment Company to which I re-

ferred a few minutes ago. We also invite your attention to the fact that the Ninth Circuit in the Ahtanum case, as late as 1956, quoted with approval that Court's language in the earlier case, recognizing the propriety of such a decree.

Pages 12,468-9

MR. WARNER: Going back to the possibility of an open-end decree which might permit modification upon a change of circumstances I would say that we understand the California Courts do follow a similar procedure with respect to the adjudication of riparian rights where there is always the possibility of new developments or different uses under different circumstances in the future.

A nonconclusive decree was proposed in the Walker River case, but was rejected by the Ninth Circuit there. It would have allowed for reservation purposes such amount, not exceeding a maximum amount, as the Government might, from year to year demand at the beginning of the season.

The Court observed that such a decree would be conducive to waste and was not a practical device. We think that a decree which is subject to modification upon a change of circumstances upon application to and consideration by the Court would have built into it protection against the abuses which such an arrangement as that proposed in Walker River might have encouraged. On the other hand, we also have this possible suggestion. If the decree herein does determine the full quantity of the rights reserved for the Indian reservations on the basis of all presently foreseeable needs, including full development of the irrigable lands for which water is claimed, it is perhaps true that any additional quantity which might be required in the future for presently unforeseeable needs would be so unlikely to involve a significant quantity that that possibility can, as a practical matter, properly be excluded from consideration.

Pages 12,471-2

MR. WARNER: . . . We think that the calculations which have been made and which will be proved are fair, not only to the Indians, but fair also to the conflicting users. Although our testimony as to the future requirements will disclose that some improvement in crop yields on the reservations has been anticipated for the future in order to compare with non-Indian agriculture in comparable areas, it will disclose also that efficiency in irrigation practices by Indian farmers at least equal to that achieved on non-Indian projects is anticipated and will of necessity have to be accomplished in order to permit the anticipated production with the water requirements which we will submit as being proper.

Pages 12,560-4

THE MASTER: . . . Haven't you actually relied on the fact that you have sent some people out from the Bureau of Indian Affairs who have looked over the ground, and who are going to come in and swear that in their judgment as experts, 5,000 acres or 30,000 acres, or whatever the number may be are irrigable and capable of irrigation and will profit from irrigation, and that in their judgment over the period of the next few years, or two decades, or three decades that land will come into irrigation and that the crop pattern that they foresee for this land is one that will require so much and so much water? Isn't that what you intend to do?

MR. WARNER: May I answer that, Your Honor?

THE MASTER: Yes.

MR. WARNER: It is the fact that the experts who will testify with respect to the water requirements will demon-

strate that they have analyzed this type of material—the irrigation practices, the cropping practices, which have existed in the past in determining, or at least in aid of their calculations as to the future requirements, and in aid of their calculation as to what to anticipate in the way of possible cropping patterns, and possible practices upon the Indian reservations.

THE MASTER: In effect, you are going to offer all the material upon which the expert relied in anticipation of his opinion. That is an unusual approach.

MR. WARNER: To some extent that is true, but this type of evidence, we think, goes beyond that.

As Mr. Kiechel has explained, and I think it would be merely repetitious for me to go back over it, but we have got this problem of what is the history? What is the history of irrigation on these reservations?

THE MASTER: Why is that a problem?

MR. WARNER: Your Honor referred here a moment ago to the Walker River case.

THE MASTER: Yes. Is that the only reason?

MR. WARNER: I did point out in my opening statement that we assert that what has happened in the past is not the criterion for determining what future requirements are.

THE MASTER: That is why you want to prove the past?

MR. WARNER: But we don't know for sure what Your Honor is going to decide in the end. Whether you feel as other parties have felt as they go along, that they must offer some evidence in anticipation of possibly adverse rulings on their basic contentions.

THE MASTER: Let me give you my understanding of that decision, which is tentative and perhaps it will change

the course of your proof. My notion is that there is nothing incompatible between that decision and the *Winters* case, say, or some of the other decisions. As I read that case, the Court there found that on the basis of an analysis of history, the declining population—that is, the declining Indian population—the very long period during which there has been only minimal use of the land, and so forth and so on, that he could tell the future from the past, and that the future was not going to be any bigger than the past, and therefore he kept the allocation down; and he made a finding on the basis of an 85-year long period of history, if I remember correctly in reading the case. Am I wrong?

MR. WARNER: 70.

THE MASTER: 70; a very long period. That in all human limitations upon capacity to foresee the future, this was a project which just was not going to grow. It had reached its maximum and was, if anything, declining, and that consequently he could make a firm award on the basis of the past; not in defiance of the principle of future use, but in an apparent compliance with it.

Now, if that is so, then it is not up to you to put this proof in. You should proceed on your general hypothesis that the future is the future and that is what you are concerned with. Then, if somebody wants to demonstrate that the future is smaller than the past or that the past is capable of limiting the future, let them offer this proof. Why are you concerned about putting that in as part of your case is what disturbs me.

MR. WARNER: If we could have the confidence that Your Honor would adhere to the analysis you have just stated, I think we would be all for that.

THE MASTER: The alternative is even more favorable. The alternative is what? The alternative is to say that the

rule is different from the *Winters* case, but that we should take proof of the present conditions.

MR. WARNER: It is an attractive invitation.

THE MASTER: All morning I have been troubled—

MR. WARNER: We have not gotten that far in our analysis of it to feel that we could safely proceed on that basis.

THE MASTER: Let me say to you that all morning I have been troubled that perhaps I was missing the point of the presentation because I could not understand why the United States should want to offer this limiting proof. I could understand New Mexico offering it. I could possibly understand Arizona offering it, in an attempt to curtail the allocation to these Indian uses by demonstrating how long and how tedious, how slow has been their rate of development. That would indicate a long and slow rate of development for the future, and that therefore a modest allocation would be in order. I could understand proof of that kind coming in from the contending parties in an effort to limit and restrict the amount of the award that should go to the United States; but I was not able to understand why the United States wanted to put in that kind of data, other possibly than a notion that it was its duty to bring to the attention of the Court all the relevant information.

Well, that is not a duty which I understand is imposed on anybody just to prove your case.

MR. WARNER: No. I do not think that duty exists, at least as far as the claims in behalf of the Indians are concerned. I think it is our duty to prove the Indian claims to the full extent we can prove them.

Page 13,508

THE MASTER: In other words, you are not asking for a decree which would say, "So much water with a ceiling for the future, presently visible requirements" plus the right to come in whenever that expands to ask for more water.

MR. WARNER: We have made that suggestion. I think we made the suggestion of that as a possibility in our opening statement; but I think the United States, just the same as Your Honor and the Court are interested in getting out of this litigation a reasonably stable determination of what the relative rights of all the conflicting users are.

THE MASTER: All right.

Pages 14,150-7

Q (MR. ELY): With respect to all of these reservations on which you testified yesterday, did you in fact attempt to show within your green area or your yellow area all of the land which is in fact irrigable on the basis of soil classification; or did you draw the line short of the total of the irrigable area?

A (MR. RUPKEY, United States' witness): In some cases I would say we drew the line short of the total irrigable area.

Q Why is that?

A Well, the Colorado River, for instance, next to the hills, we used the drain location for the limit of the area and used the spoil bank of the drain as a dike to prevent flood waters from the hills coming out on the irrigated lands; so there were some irrigable lands along the fringe of the hills there that we did not include.

Q Just for example, let us take the one that is illustrated by the display map on the wall, the display map accompanying Exhibit 615; and there has been distributed to us on the same piece of paper temporary exhibits 1 and 1a, 1a

being the land classification map that also is shown on the display map on the wall.

Surely the boundaries of those lands so classified do not have those sharp edges as determined by the land classification. Why did you draw those lines to cut off land that is apparently classified as irrigable?

A Well, we did not propose to enlarge that project any beyond taking in that small area within it which is within the project area.

Q Why not?

A Well, probably the water supply.

Q Then is it fair to say that with respect to your maps generally, they do not show all of the irrigable land on the reservation?

A In general perhaps that is so. I think Fort Mohave—well, on the mesa there would be some irrigable lands that are not shown. I think we have all the bottom lands shown.

Q Fort Mohave you say?

A Fort Mohave.

Q Why didn't you take in all of the mesa lands that were irrigable?

That is shown on Exhibit 1317. Do you have those maps available, Mr. Rupkey; 1317?

A Fort Mohave?

Q Yes.

A Well, I guess we overlooked something there. We probably should have included that.

THE MASTER: I do not quite follow that. You mean you should have included that?

THE WITNESS: Probably we should have included them.

MR. ELY: Q Well, the claim is made here in general terms for the future use of all of the water for all of the irrigable lands. Now, can we rely upon these maps as showing the full extent of the irrigable lands? I take it from your last answer that we cannot.

A I believe that is right. I think we could have included the mesa lands there at Fort Mohave.

Q Are there lands that are irrigable but not shown as such upon your maps with respect to the Colorado River Indian Reservation?

MR. WARNER: If Your Honor please, Mr. Ely might define what he conceives "irrigable" to mean.

THE MASTER: I assume he is using the witness's definition.

MR. ELY: Exactly.

MR. WARNER: The witness has defined "irrigable" as used on these maps as being those lands which could be served by the existing or proposed project.

Now, is Mr. Ely only asking whether there are additional lands in the area which could be served by the existing or proposed works, or is he asking for something else?

THE MASTER: Is that your definition of "irrigable;" those that can be served by existing or those presently proposed on the map? I did not gather that, but maybe that is your definition.

THE WITNESS: That was what we intended; yes. That is our intention. Possibly we should have added some lands that we did not add.

MR. ELY: I am using "irrigable," Your Honor, in whatever sense Mr. Warner used it in his opening, in stating that the irrigable lands constitute the only criterion for the claim for Indian water. What I am now trying to find out

is whether we may rely upon these lands on these maps as limiting that claim or not.

THE MASTER: Is this a Bill of Particulars of that claim, is what you want to know?

MR. ELY: Yes, sir.

THE MASTER: You take this Mohave thing—

MR. WARNER: Mr. Ely might better ask me than the witness.

THE MASTER: No. On this Fort Mohave, this mesa land that you call attention to, could that have been served by existing or proposed works that are shown on the map?

THE WITNESS: No, sir. We would have to put in an additional pumping plant.

THE MASTER: So by the definition that Mr. Warner has applied, you did not make a mistake; is that right?

THE WITNESS: Conforming to these maps, I did not make a mistake.

THE MASTER: All right. Now you want a concession from Mr. Warner as to whether this is a Bill of Particulars?

MR. ELY: Yes.

THE MASTER: Is it, Mr. Warner?

MR. WARNER: The testimony—

THE MASTER: No; the maps.

MR. WARNER: —as reflected by these maps and by the other testimony will define the maximum claim which the United States is asserting in this case.

THE MASTER: No. The question is whether the maps illustrate and define the term "irrigable" as used in your claim.

MR. WARNER: I might say that I am probably not authorized to give anything away that we ought to claim. On the other hand, I can give this assurance: that we do not

propose to ask a decree allowing water in favor of the—for use on the Indian reservations in excess of the proof that we are offering in this matter.

THE MASTER: I understand that. The question is whether these maps constitute the definition of what you regard as irrigable. I think it is a fair question.

MR. WARNER: Well, Your Honor, that is how we are defining "irrigable" for the purpose of proving the claim that is being asserted.

THE MASTER: It is those maps that are shown in yellow and green and crosshatched on these maps?

MR. WARNER: That is correct.

THE MASTER: And although there may be other irrigable lands within those reservations, those you do not lay any claim for the service of water upon?

MR. WARNER: That is correct.

THE MASTER: All right. That is what we know, and that is the way we are going to be bound. This is a statement that I will take seriously.

MR. WARNER: It may be that a mistake such as Mr. Rupkey has just suggested may have been made. In that case we would have to ask leave to correct it.

THE MASTER: He just stated that he did not make a mistake.

MR. WARNER: All right.

THE MASTER: Because he has limited himself; and I take it now by what you say, you are limiting yourself by lands which are irrigable from works presently existing or which are shown as proposed on these maps.

The Mohave lands to which he has referred on the mesas are not capable of being so serviced. Now, I want you to realize that you are now limiting your claim to those lands

as irrigable within that definition; namely, those capable of being served by existing works or proposed works as shown on these maps and as defined in color on these maps in green, yellow and green crosshatching.

MR. WARNER: If Your Honor should make a report recommending a decree allowing all of the water that is necessary for those purposes, we will be satisfied.

THE MASTER: That is not a condition I will accept. I shall assume that the categories of lands indicated on the Indian reservations on these maps constitute your Bill of Particulars to what you regard as irrigable within the terms of the United States claim, subject to correction that you can bring to our attention if there is some clerical error, in the course of the trial; but otherwise, I shall assume that that is your Bill of Particulars.

MR. WARNER: I might say that I think—

THE MASTER: That is your intention.

MR. WARNER: —that I think is correct. It should perhaps be modified that it is the definition of our claim for the right to use waters of the Colorado River or of the Colorado River system.

THE MASTER: Yes; on the Indian reservations.

MR. WARNER: On the Indian reservations.

APPENDIX B.

United States
Deparment of the Interior
Office of the Solicitor
Washington, D.C. 20240

JAN 3 1979

Mr. Robert P. Will
General Counsel
The Metropolitan Water District
of Southern California
Box 54153
Los Angeles, CA 90054

Dear Mr. Will:

Secretary Andrus has asked me to respond to your letter of December 11, 1978, concerning the resolution of Indian boundary disputes for reservations along the Lower Colorado River. In December 1978, the Solicitor General of the United States filed a petition in the Supreme Court in which additional water is sought for each of the five reservations. The petition, a copy of which is enclosed, sets forth with specificity the position of the United States with respect to each of the boundary determinations and the legal effect of the various determinations made by this Department.

None of the five tribes have made application for further boundary changes so far as I am aware. Our office does not plan to recommend the initiation of any district court litigation to adjudicate reservation boundaries. For our purposes, we consider the administrative determinations to be final.

You asked us to advise you as to any administrative procedures available to challenge this Department's administrative determinations in settling the reservation boundary questions. While decisions of subordinate officials are sub-

ject to an elaborate review procedure within the Department, there are no comparable procedures available for the review of Secretarial decisions. Review of such matters must take place in a judicial forum.

In the event this letter and the enclosure does not fully answer your questions, please feel free to contact Mr. Dan Rosenfelt of my staff who will be pleased to provide you with such additional information as you may need. Mr. Rosenfelt can be reached at (202) 343-6967.

Sincerely,

/s/ Frederick N. Ferguson
Deputy Solicitor

APPENDIX C.

United States Court of Appeals
Eleventh Judicial Circuit

December 18, 1981

TO: COUNSEL FOR STATE PARTIES AND TRIBES:

Re: Original No. 8
Arizona v. California

I enclose copies of some of the computations I have performed in this case. In order that I may be sure that I understand the payment capacity analysis employed by the State Parties, I have altered some of the data, which serve as input into the formula which is evidenced in S.P. Exhs. 119, 120, and made the enclosed computations. I realize that the Tribes object to the method of "computing interest on water cost" and that the State Parties favor the data which was actually used in the exhibits such as S.P. Exhs. 119, 120, but I merely wish to ask you if from the enclosed computations I evidence a correct understanding of the interest on water cost theory and have correctly made computations based on revised input data.

I would appreciate receiving your comments within twenty days.

Sincerely,

/s/ Elbert P. Tuttle
Elbert P. Tuttle
Special Master

EPT:bk
Enc.
cc: All Parties

TABLE I

ALMONDS

Yield = 2000 lbs/acre (in shell)

Price = 61¢ lb. (in shell) (1975-1979 Average)

Pre-Harvest and Harvest Costs reduced to 1979 level

Interest = 10%

Year	1	2	3	4	5	6	7	8	9	10
Yield - lbs. per acre	—	—	—	800	1310	1600	1850	2000	2000	2000
Gross Income at 61¢/lb.	—	—	—	488	799	976	1129	1220	1220	1220
Pre-Harvest Cost	745	173	261	374	392	392	392	392	392	392
Depreciation	76	76	76	76	76	76	76	76	76	76
Interest on Investment at 10%										
Irrigation System	57	57	57	57	57	57	57	57	57	57
Building, Equipment & Tractor	10	10	10	10	10	10	10	10	10	10
Interest on Accumulated Net Cost	—	104	161	232	281	311	328	332	328	323
Total Interest	67	171	228	299	348	378	395	399	395	390
Harvest Cost	—	—	—	79	130	151	157	160	160	160
Payment Capacity	150	150	150	150	150	150	150	150	150	150
Total Annual Cost	1038	570	715	978	1096	1147	1170	1177	1173	1168
Net Annual Cost or (Profit)	1038	570	715	490	297	171	41	(43)	(47)	(52)
Accumulated Net Cost or (Profit)	1038	1608	2323	2813	3110	3281	3322	3279	3232	3180

11	12	13	14	15	16	17	18	19	20
2000	2000	2000	2000	2000	2000	2000	2000	1000	2000
1220	1220	1220	1220	1220	1220	1220	1220	1220	1220
392	392	392	392	392	392	392	392	392	392
76	76	76	76	76	76	76	76	76	76
57	57	57	57	57	57	57	57	57	57
10	10	10	10	10	10	10	10	10	10
318	312	306	299	292	283	274	264	253	241
385	379	373	366	359	350	341	331	320	308
160	160	160	160	160	160	160	160	160	160
150	150	150	150	150	150	150	150	150	150
1163	1157	1151	1144	1137	1128	1119	1109	1098	1086
(57)	(63)	(69)	(76)	(83)	(92)	(101)	(111)	(122)	(134)
3123	3060	2991	2915	2832	2740	2639	2528	2406	2272

21	22	23	24	25	26	27	28	29	30
2000	2000	2000	2000	2000	2000	2000	2000	2000	2000
1220	1220	1220	1220	1220	1220	1220	1220	1220	1220
392	392	392	392	392	392	392	392	392	392
76	76	76	76	76	76	76	76	76	76
57	57	57	57	57	57	57	57	57	57
10	10	10	10	10	10	10	10	10	10
227	212	196	178	159	137	113	87	58	26
294	279	263	245	226	204	180	154	125	93
160	160	160	160	160	160	160	160	160	160
150	150	150	150	150	150	150	150	150	150
1072	1057	1041	1023	1004	982	958	932	903	871
(148)	(163)	(179)	(197)	(216)	(238)	(262)	(288)	(317)	(349)
2124	1961	1782	1585	1369	1131	869	581	264	(85)

TABLE 2

ALMONDS

Different method of computation.
Reaches same payment capacity as
in Table 1

Year	1	2	3	4	5	6	7	8	9	10
Yield - lbs. per acre	—	—	—	800	1310	1600	1850	2000	2000	2000
Gross Income at 61¢/lb.	—	—	—	488	799	976	1129	1220	1220	1220
Pre-Harvest Cost	745	173	261	374	392	392	392	392	392	392
Depreciation	76	76	76	76	76	76	76	76	76	76
Increase on investment at 10%										
Irrigation System	57	57	57	57	57	57	57	57	57	57
Building, Equipment & Tractor	10	10	10	10	10	10	10	10	10	10
Interest on Accumulated Net Cost	—	89	129	183	212	220	212	190	157	120
Total Interest	67	156	196	250	279	287	279	257	224	187
Harvest Cost	—	—	—	79	130	151	157	160	160	160
Total Annual Cost	888	405	533	779	877	906	904	885	852	815
Net Annual Cost or (Profit)	888	405	553	291	78	(70)	(225)	(335)	(368)	(405)
Accumulated Net Cost or (Profit)	888	1293	1826	2117	2195	2125	1900	1565	1197	792

ALMONDS -5

11	12	13		30
2000	2000	2000	. . .	2000
1220	1220	1220	. . .	1220
392	392	392	. . .	392
76	76	76	. . .	76
57	57	57	. . .	57
10	10	10	. . .	10
79	35	—	. . .	—
146	102	67		67
160	160	160	. . .	160
774	730	695		695
(446)	(490)	(525)	. . .	(525)
346	(144)	(669)	. . .	(9594)

ALMONDS - 6

Net Cash Flows:

Year 12 = $ 144

Years 13-30 = $ 525/yr

Present Value of $525 received in years 13-30 is:

$ 525 × 8.2014 × .3186 = $1372

Present Value of $144 received in year 12 is:

$ 144 × .3186 = $45.88

Present Value of All Cash Flows is:

$1372 + $46 = $1418

Annualized Amount over 30 years $1418

9.4269 = $ 150

Annaul Payment Capacity

$ 150

APPENDIX D.

FOR TABLE GRAPES
USING YIELD OF 450 LUGS PER ACRE [a]

Year	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Yield — tons per acre	—	—	2.7	3.6	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95	4.95
Gross Income @ $680/ton	—	—	1,836	2,448	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366	3,366
Pre-Harvest Cost [b]	1,300	1,086	951	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077	1,077
Depreciation [b]	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113	113
Interest on Investment @ 10%																									
Irrigation System [b]	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57	57
Building, Equip. & Tractor [b]	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28	28
Interest on Accumulated Net Cost	—	172	341	402	446	439	431	423	414	404	392	380	367	352	336	318	298	276	252	226	197	165	130	92	50
Total Interest	85	256	426	487	531	524	516	508	499	489	477	465	452	437	421	403	383	361	337	311	282	250	215	177	135
Harvest Cost [c]	—	—	737	979	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350
Payment Capacity	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226	226
Total Annual Cost	1,724	1,682	2,453	2,882	3,297	3,290	3,282	3,274	3,265	3,255	3,243	3,231	3,218	3,203	3,187	3,169	3,149	3,127	3,103	3,077	3,048	3,016	2,981	2,943	2,901
Net Annual Cost or (Profit)	1,724	1,682	617	434	(69)	(76)	(84)	(92)	(101)	(111)	(123)	(135)	(148)	(163)	(179)	(197)	(217)	(239)	(263)	(289)	(318)	(350)	(385)	(423)	(465)
Accumulated Net Cost or (Profit)	1,724	3,406	4,023	4,457	4,388	4,312	4,228	4,136	4,035	3,924	3,801	3,666	3,518	3,355	3,176	2,979	2,762	2,523	2,260	1,971	1,653	1,303	918	495	30

(a) Based on Exhibit SP 121 revised to show effects of changing yield to 450 lugs per acre (4.95 tons per acre).
(b) Values from Table C-6 in Boyle report. [FM Exh. 1; CR Exh. 1]
(c) Values represent Boyle harvest cost prorated based on yield.

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