No. 8 Original

# In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA,
*Complainant*
v.

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

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,
*Interveners*

STATE OF UTAH AND STATE OF NEW MEXICO,
*Impleaded Interveners*

## BRIEF OF THE FORT MOJAVE INDIAN TRIBE, THE CHEMEHUEVI INDIAN TRIBE, AND THE QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION IN SUPPORT OF MOTION TO INTERVENE; JOINED IN BY THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE

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STATE OF ARIZONA,
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UNITED STATES OF AMERICA,
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## BRIEF OF THE FORT MOJAVE INDIAN TRIBE, THE CHEMEHUEVI INDIAN TRIBE, AND THE QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION IN SUPPORT OF MOTION TO INTERVENE; JOINED IN BY THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE

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### PRELIMINARY STATEMENT

A quarter of a century ago, great urgency to have resolved the "present perfected rights" to the use of water in the Lower Basin of the Colorado River gave rise to the filing by the United States of America of its motion to intervene in the case initiated by the State of Arizona against the other movants who are named in the Joint

Motion.[1] Part of the urgency for the intervention of the United States was that it was an indispensable party to any litigation quieting the title of the movants to their "present perfected rights." On repeated occasions and for a variety of reasons, the State of Arizona has been unsuccessful in having determined its claimed rights in the Lower Basin of the Colorado River.[2] Acknowledging the pressing need to resolve the interstate conflicts of the State of Arizona and the other movants here, the Supreme Court granted the motion of the United States[3] and on that same date, granted leave for Arizona to file its petition.[4] Issues were joined in that historic case, a Special Master was appointed and a hearing was initiated, all pursuant to the direction of this Court. On December 5, 1960, the Special Master filed his report.

This Court, predicated upon the Special Master's Report and the applicable Congressional acts, rendered its opinion on June 3, 1963.[5] Among other things, this Court's opinion was generally favorable to the Tribes. It recognized that the Tribes held "present perfected rights" in the Lower Colorado River and entered a decree determining, adjudging and declaring those rights. Very important here is that this Court additionally decreed that:

> ". . . the only feasible and fair way by which [the Indian] reserved rights for the reservations can be measured is irrigable acreage."[6]

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[1] Motion dated December 31, 1952, filed by the United States to intervene in the case of Arizona v. California. At the time the motion was filed, there was pending the motion of the State of Arizona for leave to file its petition initiating the case of Arizona v. California.

[2] See Arizona v. California, 283 U.S. 423 (1931); 292 U.S. 341 (1934); 298 U.S. 558 (1936).

[3] Arizona v. California, 344 U.S. 919 (1952).

[4] *Id.*

[5] Arizona v. California, et al., 373 U.S. 546 (1966).

[6] 373 U.S. 546, 601 (1963).

There was thus established the criterion for determining the measure of the Tribes' "present perfected rights." Hence, without first establishing the number of irrigable acres and the water requirements for those lands—which has never been done—it is impossible finally to determine the extent of the "present perfected rights of the Tribes.

On March 9, 1964, this Court established the "present perfected rights" for the Tribes, recognizing nevertheless that there would be a need for resolution among the parties of their "present perfected rights." [7] It was likewise provided in that Final Decree, among other things, the method pursuant to which "present perfected rights" to the use of water would be determined.[8] At that time, over eleven years ago, it was agreed that the matter of the "present perfected rights" would be settled by stipulation. The Indians, however, did not participate in any of the negotiations leading up to the "Proposed Stipulation" upon which the Joint Motion is predicated relative to the "present perfected rights" of movants.

At the time that the United States filed its motion to intervene, a quarter of a century ago, it was established beyond question that there was insufficient water in the Lower Colorado River to supply all of the claims of the conflicting and contesting parties in the litigation as formulated by the State of Arizona. It was, of course, that confiict among the parties on an interstate stream that created the justiciable issues which were entertained by the Court when it granted the petition of the State of Arizona to initiate the cause and the motion of the United States to intervene. Simply stated, it is the position of the Tribes in the Lower Colorado River that the Colorado River has been and is now quite similar to a

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[7] Arizona v. California, 373 U.S. 340 (1964), Final Decree, II(D)(1)-(5).

[8] Arizona v. California, 376 U.S. 340 (1964), as amended on February 28, 1966, 383 U.S. 268 (1966).

"bankrupt estate." The conflicting claims over the short supply of water have resulted in a long and contentious struggle among those claimants who have been declared as holding title to "present perfected rights." Nevertheless, the great urgency of a quarter of a century ago, giving rise to the initiation of the cause, has been greatly mitigated insofar as the movants are concerned due to their reluctance fully to acknowledge the measure of the "present perfected rights" of the Tribes. As will be observed in the Joint Motion, the movants deny that the Tribes are entitled to substantial "present perfected rights" in connection with the lands which were involved in boundary disputes at the time of the taking of evidence in *Arizona* v. *California*.[9]

It is the firm belief of the Tribes that the overwhelming urgency of a quarter of a century ago was greatly dimmed by the recognition that the Tribes had substantial "present perfected rights." As a consequence of this Court's Decree, there has been great hesitancy on the part of the movants finally to determine the "present perfected rights" absent some method of diminishing the claims of the Tribes. It is the view of the Tribes, moreover, that the Joint Motion and the Response that was filed to it represent not only the conflicts of interest within the Interior and Justice Departments, but likewise reflect the grave concern of the joint movants that their "present perfected rights" will be diminished if the "present perfected rights" are judicially recognized and exercised by the Tribes.

Part of the explanation for the aggressiveness displayed in the Joint Motion against the Tribes is the fact that the Central Arizona Federal Reclamation Project is now abuilding. The joint movants are fully aware that the supply of water in the Colorado River is presently vastly

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[9] Joint Motion, Memorandum in Support, pp. 22-24.

overappropriated and that there is insufficient water for the project last mentioned. Those facts, which cannot be successfully disputed, have resulted in bitter contest for every acre-foot of water in the Colorado River resulting in the present dispute, all as set forth by the Tribes in this motion.

Conflicts of interest within the Departments of Interior and Justice pervade all aspects of the case of *Arizona* v. *California*. That circumstance has prevailed since the inception of the case. At all times, the Tribes have had forced upon them counsel who invariably represented interests which were diametrically opposed to the vested "present perfected rights" of the Tribes. It is, of course, recognized that *Arizona* v. *California* is a political case. That the Nation, the Tribes, the states and their political subdivisions are all striving to participate in the availability of water in the Lower Basin of the Colorado River is evidenced by the Joint Motion and the inadequate Response filed to it. It may be correctly stated that those "present perfected rights" to the use of water are perhaps one of the most valuable property rights on the face of the earth. Hence, it is not surprising that the struggle to own, control and exercise those rights to the use of water is fraught with contentiousness.

A prime example of the conflicts of interest involved in regard to the "present perfected rights" to the Tribes is well demonstrated by the initial act in connection with the initiation of the case of *Arizona* v. *California*. In the complaint filed in intervention by the United States, this language, among other, was used: [10]

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[10] Arizona v. California, "Petition of Intervention on Behalf of the United States of America" filed November 2, 1953, para. 27, p. 23. See Joint Committee Print, 91st Congress, 1st Session, "Toward Economic Development for Native American Communities," A Compendium of Papers submitted to the Subcommittee on Economy in Government of the Joint Economic Committee, Congress of the United States, Volume 2, p. 513.

> ". . . the United States of America was the trustee for the Indians and Indian Tribes and asserted 'that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin of that stream.' "

Where action of the signatories of the Joint Motion—among others—was immediate and hostile, it was contended by the movants that the rights of Indian Tribes were not "prior and superior" to those asserted by the movants. Upshot of the assertions contrary to the claims of the Tribes had an immediate and political result upon the Interior and Justice Departments. It is, of course, a sad commentary that officials of those two departments failed properly to assert the rights but, rather, bowed to the pressures of the movants. The matter was chronicled in detail by the *New York Times.*[11] The original petition and intervention filed by the United States was withdrawn from the Office of the Clerk of the Supreme Court and substituted language was adopted. From the original petition, there was stricken reference to the prior and superior character of the Indian rights.[12] That debasing of the Indian claims by the Justice Department is representative of the history of its representation of the Tribes throughout the case of *Arizona* v. *California.* It is to be observed that the Joint Motion filed May 3, 1977,

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[11] Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, U.S. Senate, 92d Cong., 1st Sess., on S. 2035, "A Bill To Provide For The Creation Of The Indian Trust Counsel Authority, And For Other Purposes." November 22 & 23, 1971, pp. 98 *et seq.*

[12] Joint Committee Print, 91st Cong., 1st Sess., "Toward Economic Development For Native American Communities," A Compendium of Papers submitted to the Subcommittee on Economy in Government of the Joint Economic Committee, Congress of the United States, Volume 2, p. 513.

and the purported Response to it filed by the Department of Justice November 10, 1977, all as reviewed in the motion of which this memorandum is in support, reflect the lamentable inability of both the Interior and Justice Departments to represent the Tribes in light of the conflicting interests which both departments purport to represent in *Arizona* v. *California.* It is equally clear that the political nature of the case of *Arizona* v. *California* is a predominant element not only in the method pursuant to which the claims are asserted, but likewise in regard to the course of conduct in the presentation of the Tribes' rights.

The debasement of the rights of the Tribes in the Petition to Intervene, which was finally filed with the Court, presaged the conduct of the trial. An examination of the record before the Special Master discloses this anomaly from the standpoint of preservation and protection of the Indian rights as required of the trustee. An official of the Bureau of Indian Affairs swears that the attorneys for the Justice Department assigned to represent the Tribes before the Special Master abandoned the Tribes' interests and vigorously advocated the conflicting claims of the joint movants Yuma and Gila Federal Reclamation Projects.[13] That same Bureau of In-

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[13] This sworn statement from an official of the Bureau of Indian Affairs, Department of Interior, assigned to the preparation of the case of Arizona v. California, is representative of the failure properly to advocate the interests of the Tribe in the trial before the Special Master.

"AFFIDAVIT IN REGARD TO PROPOSED STIPULATION OF PRESENT PERFECTED RIGHTS," signed by Charles P. Corke, Acting Director, Irrigation, Bureau of Indian Affairs.

"21. I personally witnessed the Attorneys of the Department of Justice assigned to represent the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma, and Cocopah Tribes, totally abandon the interests of those Indian Tribes and vigorously to act against the Indian Tribes by advocating the claims of the Yuma Federal Reclamation Project and Gila Federal Reclamation Project." Page F-10.

dian Affairs official declared that the interests of the Tribes were likewise abandoned by the attorneys for the Department of Justice in regard to the claims of the joint movants Imperial Irrigation District and the Palo Verde Irrigation District.[14] It is important here that reference be made to the fact that the conflicts of interest within the Interior and Justice Departments are not limited to the conduct of the case of *Arizona* v. *California.* At a hearing before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, the issue of conflicts of interest within the Interior and Justice Departments has been reviewed in detail.[15] Secretaries of Interior have readily admitted the conflicts of interest and the impossibility of the Department of the Interior properly and fully to represent the Indian Tribes' interests when those conflicts of in-

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[14] *Ibid.*, paras. 22 and 23:

"22. I personally witnessed the Attorneys assigned by the Department of Justice to represent the Indian Tribes above named, abandon all pretense of advocating the claims of those Indian Tribes against the Imperial Irrigation District and the Palo Verde Irrigation District, or other California interests, and those Attorneys did not contest the claims of the Districts and neither attempted to challenge the claims of the Districts by cross-examination nor to attempt to refute the claims asserted by the Districts by offering rebuttal evidence.

"23. I was present and joined in protestation to the Attorneys from the Department of Justice respecting their failure to advocate the interests of the Indian Tribes against the Imperial Irrigation District and the Palo Verde Irrigation District and other adverse interests and the only response made by those Attorneys [of the Department of Justice] was that such matters were 'purely issues between the States.'" Page F-11.

[15] "Federal Protection of Indian Resources," Hearings before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Sen., 92d Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources. Part 1, Oct. 19 & 20, 1971, pp. 175 *et seq.*; 220 *et seq.*; 228 *et seq.*; 233 *et seq.*

terest prevail.[16] On the subject of the conflicts of interest within the Interior and Justice Departments, it has been amply stated that

> ". . . No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute, yet the Federal government has frequently found itself in precisely that position." [17]

A movant here—the Fort Mojave Indian Tribe—petitioned this Court for leave to file a suggestion of interest in the case of *United States* v. *County of Eagle*.[18] In support of that motion, there was set forth in detail an analysis of the

> "Conflicts of Interest Before the Supreme Court of the United States * * * A Preface to Disaster for the American Indians." [19]

There the conflicts of interest, giving rise to the filing of the motion here presented, are reviewed in detail. Likewise set forth in that analysis of conflicts of interest before the Supreme Court are the elements forcing the Tribes to seek relief from the damages that necessarily ensue to them from the failure of the Department of Justice and the Department of Interior properly to represent their interests.

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[16] See testimony, Secretary of Interior Hickle, "Federal Protection of Indian Resources," pp. 228 *et seq.*; Secretary Rogers C.B. Morton and Assistant Secretary Harrison B. Loesch, Indian Trust Counsel Hearing, p. 12.

[17] "Federal Protection of Indian Resources," * * * Part 1, pp. 220, 226, Fn. 15.

[18] United States v. District Court in and for the County of Eagle, et al., 401 U.S. 520 (1971).

[19] In the Supreme Court of the United States of America, October Term 1970, No. 87, United States of America, Petitioner, v. District Court in and for Eagle County.

## THE TRIBES ARE HERE THE REAL PARTIES IN INTEREST, NOT THE SECRETARY OF INTERIOR

### A. The Tribes' "Present Perfected Rights" Are Interests In Real Property

It is elemental that the "present perfected rights" to the use of water in the Colorado River, title to which resides in the Tribes, are invaluable interests in real property. They are part and parcel of the reservation lands of each of the Tribes.[20] An action of the character of *Arizona* v. *California*, adjudicating the rights of the Tribes, it is important to observe, is an action to quiet title in and to real property.[21] Full equitable title to those "present perfected rights" in the Colorado River resides in the Tribes with the legal title to those rights being held in trust for the Tribes by the United States.[22] The Tribes, movants here, are the Tribes on whose behalf the United States of America acted.[23]

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[20] Wiel, "Water Rights in the Western States," 3d ed., vol. 1, sec. 18, pp. 20, 21; sec. 283, pp. 298-300; sec. 285, p. 301; United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 75 (1913); Ashwander v. TVA, 297 U.S. 288, 330 (1936); Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 17; 19 Pac. 836 (1898); Wright v. Best, 19 Cal.2d 368; 121 P.2d 702 (1942); Sowards v. Meagher, 37 Utah 212; 108 Pac. 1112 (1910); See also Lindsey v. McClure, 136 F.2d 65, 70 (CA 10, 1943); David v. Randall, 44 Colo. 488; 99 Pac. 322 (1908).

[21] United States v. Ahtanum Irrigation District, 236 F.2d 321, 339 (CA 9, 1956); Crippen v. X Y Irr. Co., 32 Colo. 447, 76 Pac. 794 (1904); Louden v. Handy Ditch Co., 22 Colo. 102, 43 Pac. 535 (1897); Kinney on Irrigation and Water Rights, p. 2844, sec. 1569.

[22] See also Hynes v. Grimes Packing Co., 337 U.S. 86, 106-107 *et seq.* (1949); Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 278-281 (1953); Northern Pacific R.R. Co. v. Wismer, 230 Fed. 391, 393 (CA 9, 1916); 246 U.S. 283 (1918); Gibson v. Anderson, 131 Fed. 39, 40 (CA 9, 1904); Antoine v. Washington, 420 U.S. 194 (1975); see also 25 U.S.C. 476; 34 A.G. Op. 171, 181 (1924).

[23] Arizona v. California, 373 U.S. 546, 595 (1963) from which this excerpt is taken: "The government, on behalf of five Indian reser-

### B. The Tribes' "Present Perfected Rights" Are Not "Federal Rights"

The Tribes' "present perfected rights" are not "Federal rights." They are clearly distinguishable from the rights to the use of water, title to which resides in the United States for the benefit of the public at large. Moreover, the "present perfected rights" to the use of water, title to which is in the Tribes, are private in character being held by the Tribes for their exclusive use and benefit. Hence, their nature, extent, measure and purpose of use are drastically different from the other "present perfected rights" to the use of water referred to in *Arizona* v. *California.* Title to those public rights resides in the United States for the Lake Meade National Recreational Area, the Havasu National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.[24] As this Court has recognized in *Arizona* v. *California*, the "present perfected rights" of the Tribes are ". . . essential to the life of the Indian people. . . ." [25] This Court added that the "present perfected rights," held by the Tribes, are for ". . . their future uses. . . ." and are to be measured by "irrigable acreage." [26] It was the objective of the United States of America in establishing the Indian reservations to provide for a permanent future home and abiding place for the Tribes in question.

Recently, comporting fully with the preceding statements that the Indian rights are not Federal rights, the Chairman of the Water Resources Council declared that

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vations in Arizona, California and Nevada, asserted rights to water in the mainstream of the Colorado River." Winters v. United States, 207 U.S. 546, 576 (1908).

[24] Arizona v. California, 373 U.S. 546, 601 (1963).

[25] Arizona v. California, 373 U.S. 546, 599 (1963).

[26] *Ibid.*, 373 U.S. 546, 601 (1963).

> "Indian water rights are not the same as 'Federal rights' and, therefore cannot be included in a policy statement involving 'Federal rights' . . . ." [27]

That policy declaration is not only reflective of the law, it is a clear commitment by the Secretary of the Interior as the principal agent of the trustee United States that the Tribes' "present perfected rights" to the use of water are now and will be separately categorized from "Federal rights" in the administration of them.

### C. The "Present Perfected Rights" Of The Tribes Have Not Been Taken

As reviewed in detail above, the full equitable title to the "present perfected rights" resides in the Tribes, the movants here. It is equally clear that the title to the Indian Tribes is drastically different from the title to the Federal rights and must be viewed as private rights as distinguished from the Federal rights which have been withdrawn for the benefit of the public at large. Being private rights in character, the "present perfected rights" of the Tribes are protected against seizure pursuant to the provisions of the Fifth Amendment of the Constitution. On the subject of the sanctity of the title of the Indian Tribes, reference is made to the case of *Shoshone Tribe* v. *United States.*[28] There, this Court reviewed the power and authority of the United States to:

> "control and manage the property and affairs of Indians in good faith for their benefit and welfare * * * does not extend so far as to enable the government 'to give the tribal lands to others, *or to appropriate them to its own purposes without rendering, or assuming an obligation to render, just compensation * * *; for that' would not be an exercise of*

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[27] *Federal Register,* Vol. 42, No. 145—Thursday, July 28, 1977, p. 38463.

[28] Shoshone Tribe v. United States, 299 U.S. 476, 497.

> *guardianship, but an act of confiscation.'* " [Emphasis supplied]

Titles to the "present perfected rights" vested in the Tribes continue to reside in the Tribes unless and until "taken" by an act of Congress.[29] It is equally clear that, when the rights to the use of water of the Tribes were vested in them, they came within the purview of the Boulder Canyon Project Act, all as recognized by this Court,

> ". . . that these water rights, having vested before the Act became effective on June 25, 1929, are 'present perfected rights' and as such are entitled to priority under the Act." [30]

There is nothing in the Boulder Canyon Project Act, as amended,[31] which would evidence an intention by the Congress to "take" the title of the Tribes in and to their "present perfected rights." It is elementary that the physical appropriation of private property by the Executive Branch of the Government without authority, does not result in a Fifth Amendment "taking." Congress alone has the power of eminent domain.[32]

## IRREPARABLE DAMAGE TO THE TRIBES IF THEY ARE NOT PERMITTED TO INTERVENE ON THEIR OWN BEHALF

There are agreements and proffered concessions contained in the Response of the Solicitor General to the

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[29] Mattz v. Arnett, 412 U.S. 481, 504 (1973); Seymour v. Superintendent, 368 U.S. 351 (1962); United States v. Celestine, 215 U.S. 278 (1909).

[30] Arizona v. California, 373 U.S. 546, 600 (1963).

[31] 43 U.S.C. 617 *et seq.*

[32] Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952); Shoshone v. United States, 299 U.S. 476 (1937); United States v. North American Trans. and Trading Co., 253 U.S. 330 (1920).

Joint Motion which, if consummated by the approval of this Court, will cause irreparable and continuing damage to the Tribes. Under no circumstances can the Tribes agree to the greatly inflated claims to water, acreage and priorities that have been set forth by the Imperial Irrigation District, the Palo Verde Irrigation District and the Yuma and Gila Federal Reclamation Projects. Similarly, the Tribes reject any concession or agreement in regard to those vital elements of the "present perfected rights" claimed by the joint movants unless and until all of their "present perfected rights," including all boundary disputes and all lands that were abandoned, have been finally determined. Further piecemealing of the Decree in *Arizona* v. *California* can only contribute to grave and serious threats of irreparable damage to the Tribes.

If offered an opportunity, the Tribes can and will prove that known facts contradict and expose as false the claims to "present perfected rights" as asserted by the joint movants. Even with an effective subordination fully agreed to by joint movants and the Tribes, it is highly doubtful that the Tribes could accede to the known false claims of the joint movants. That statement is predicated upon facts—which are here asserted by the Tribes—that the "present perfected rights," claimed by the defendants, do not come within the language of the Decree entered by this Court.[33]

## THE RESPONSE VIOLATES THIS NATION'S TRUST

It is elemental that the officers of the United States of America are obligated to exercise care, skill and diligence in protecting, preserving, utilizing and conserving the invaluable "present perfected rights" to the use of

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[33] Arizona v. California, 376 U.S. 340 (1964).

water of the Tribes in the Lower Colorado River.[34] Equally elemental is the precept of the law that "the trustee is under a duty to administer the trust solely in the interests of the beneficiaries." Failure of the Secretary of Interior to properly administer the trust for and on behalf of the Tribes is well known. Nevertheless, the Secretary is bound and required by the law to perform his responsibilities to the Tribes with "the most exacting fiduciary standards" even if he should desire to pursue a different course.[35] As reviewed above, the performances of the Solicitors Office of the Interior Department and the Justice Department are permeated with conflicts of interest precluding competent fulfillment of the obligations owing to the Tribes pursuant to their rights as beneficiaries of a trust. There have been catalogued, with care, the inherent violations of the Tribes' rights by the Solicitors Office.[36] Never has there been a better exemplification of violation of the trust owing to the Tribes than the Response filed by the Solicitor General to the Joint Motion in *Arizona* v. *California.* It matters not that those who prepared the Response did not know the facts that they were presenting to the Court. It is the law that they should have known those facts and have acted improperly not only as agents of this Court, but agents of the trustee United States of America for the benefit of the Tribes.

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[34] "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," in Toward Economic Development for Native American Communities, Joint Economic Comm,. 91st Cong., 1st Sess., p. 484.

[35] *Ibid.*, p. 490.

[36] "Federal Protection of Indian Resources," Hearings before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Sen., 92d Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, Part 1, Oct. 19 & 20, 1971, pp. 233 *et seq.*

## PATENT AMBIGUITIES [37] BETWEEN THE LANGUAGE OF THE FINAL DECREE, THE JOINT MOTION AND THE RESPONSE TO THE JOINT MOTION

### A. Patent Ambiguities Appear On The Face Of The "Proposed Supplemental Decree" [38]

A patent ambiguity has been defined as arising from contradictory words of the instrument or instruments themselves.[39] As set forth in the Motion, of which this memorandum is in support, the Final Decree provides that

> "In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B)(3) of said Decree, the Secretary of the Interior shall, * * * first provide for the satisfaction in full of all rights of the * * * Tribes." (Joint Motion, Pro. Supp. Decree, p. 4, [5])

It is then declared that those rights are specified in Article II(B)(3).[40] It will be observed from the Final Decree that there is no provision relating to "insufficient mainstream water to satisfy present perfected rights." Hence, there is contradictory language between the "Proposed Supplemental Decree" and the Final Decree, which supposedly is to be supplemented. Reference in that regard is made to the language of the Final Decree. There it is stated, among other things, that

> *"If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet * * * after providing for satisfaction*

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[37] Tribes' Motion to Intervene, pp. 5-6, para. 11.

[38] Joint Motion, Supplemental Decree," p. 3, para. 5.

[39] Black's Law Dictionary, Ambiguity, *Webster's Third New International Dictionary* defines a "patent ambiguity" as "an ambiguity in a legal document arising from the words themselves."

[40] Arizona v. California, 376 U.S. 340, Article II(B)(3).

> *of present perfected rights in the order of their priority dates * * * [the Secretary of the Interior] may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein * * *.*" [Emphasis supplied]

It is elemental that there is a vast difference between insufficient water to supply 7,500,000 acre-feet of consumptive use and, to use the language of the "Proposed Supplemental Decree," "insufficient water to satisfy present perfected rights." The two are entirely different elements and must be separately considered. The preferred rights are "present perfected rights" and those are provided for as being satisfied antecedent to the apportionment of any water left over after those "present perfected rights" have been satisfied.

Evidencing the failure of the Solicitor General properly to perform his obligations in regard to the Tribes, this statement is contained in the Response:

> "As stated by movants here, although the parties have now reached substantial accord on many points —including the subordination agreement incorporated in the movants' proposed supplemental decree * * *."

By approving the alleged subordination agreement, it is abundantly manifest that the Solicitor General is approving the conflict between the Final Decree and the proposed supplement to that Decree. There is, of course, the invitation for future conflict and future dispute by the failure of the Solicitor General properly to point out the patent ambiguity, to which reference is here made. Not only does the Solicitor General, in error, approve the obvious conflict between the Final Decree and the proposed supplement to it, the Solicitor General, in a proposed amend-

ment to the paragraph in question of the Joint Motion, says this among other things:

> "(5) In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B)(3) of said Decree, the Secretary of the Interior shall, before providing for the satisfaction of any of the other present perfected rights * * * first provide for the satisfaction in full of all rights of the * * *" Tribes.

It is very, very clear that the adoption of the patent contradiction between the Supplemental Decree and the Final Decree by the Solicitor General constitutes an endorsement of a contradiction that must necessarily create conflict in the future insofar as the Tribes are concerned.

It must be admitted by all that there is a disparity—a difference between—the language of the Supplemental Decree relating to insufficient water to satisfy "present perfected rights" and insufficient water to satisfy the 7,500,000 acre-feet of consumptive use awarded to the Lower Basin of the Colorado River by the Colorado River Compact.[41]

To request the Court to enter a Final Decree with provisions that require interpretation of it at the inception partakes of a frivolous approach—particularly when the Final Decree is contemplated to function in perpetuity.

More importantly, the matter is not an academic interpretation. Assuming—for argument—that in some manner a patent ambiguity should be adopted by the Court, it is essential to emphasize that the matter is of utmost importance when considered in the light of the decision of this Court. The Boulder Canyon Project Act, as construed in the Court's opinion, says, among other things, under

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[41] Colorado River Compact, Article III, Article III(a).

the heading "APPORTIONMENT AND CONTRACTS IN TIME OF SHORTAGE," that the Secretary of the Interior is empowered to act using very broad discretion. In that connection, the Court rejected the recommendation of the Special Master which authorized the Secretary of the Interior to prorate the water during periods of shortage predicated upon a formula set forth in the opinion.[42] Having rejected the concept of proration on a fixed formula, the Court continued:

> "None of this is to say that in the case of shortage, the Secretary cannot adopt a method of proration *or that he may not lay stress upon priority of use, local laws and customs, or any others factors that might be helpful in reaching an informed judgment in harmony with the Act, the best interests of the Basin States, and the welfare of the Nation.*" [43] [Emphasis supplied]

Under no circumstances can the Tribes agree that the Secretary of the Interior may exercise, in regard to their "present perfected rights," the broad powers vested in the Secretary of the Interior in regard to the "present perfected rights" of contractors. The "present perfected rights" of the Indian Tribes differ vastly from the contractual rights of the joint movants which have entered into arrangement pursuant to the Boulder Canyon Project Act, as amended. As reviewed above and emphasized, the "present perfected rights" of the Tribes were vested long prior to the Boulder Canyon Project Act which became law on June 25, 1929. That Act did not condemn and take from the Tribes their long-vested "present perfected rights," nor did any other act. Rather, those rights in real property, title to which resides in the Tribes, have never been subjected to eminent domain and, hence, the

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[42] Arizona v. California, 373 U.S. 546, 592 *et seq.* (1963).

[43] *Id.*, 373 U.S. 546, 594 (1963).

full equitable title of the Tribes remained in them.[44] It is not for the Executive Branch of the Government to exercise the power of eminent domain in regard to the "present perfected rights" of the Tribes. Congress alone has that power of eminent domain and, absent specific intent by the Congress, those vested rights of the Indian Tribes may not be taken.[45] Let it be here reiterated that the Tribes reject out of hand any contention that their "present perfected rights" are Federal rights reserved for the public at large.[46]

### B. Another Patent Ambiguity Between The Final Decree, The "Proposed Supplemental Decree" And The Response Further Demonstrates The Need For Rejecting Both The Joint Motion And The Response

For each of the Tribes, provision is made that they shall have "present perfected rights" as provided

> "* * * in annual quantities not to exceed (i) * * * acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of * * * acres and for the satisfaction of related uses, whichever of (i) or (ii) is less * * *"[47]

Thus there is established by the Final Decree the criteria for the determination of the water entitlement each Tribe may receive in the exercise of their "present perfected

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[44] See above pp. 10 *et seq.*, particularly Shoshone v. U.S., 299 U.S., 476, 497-498 (1937), fn. 28.

[45] See Chippewa Indians v. United States, 395 U.S. 479 (1939); Mitchell v. Harmony, 13 How. 115, 133-134 (1851); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Shoshone Tribe v. United States, 299 U.S. 476 (1937); c.f. United States v. North American Trans. & Trading Co., 253 U.S. 330 (1920).

[46] See above, p. 11, "B. The Tribes' 'Present Perfected Rights' Are Not Federal Rights."

[47] Arizona v. California, 376 U.S. 340, 344, Article II(D)(1)-(5).

rights." Contrary to the express language set forth in the Decree and quoted immediately above, the Joint Motion provides, relative to the water to the "present perfected rights" that will be exercised in regard to the boundary dispute lands, as follows:

> "* * * such additional rights to diversions of mainstream water shall not exceed the quantities necessary to supply the consumptive use required for irrigation of the additional, practicably irrigable lands within the additional areas resulting from the enlarged boundaries." [Joint Motion, pp. 4-5, para. 4]

It is abundantly manifest that the Supplemental Decree and the proposed amendment to it, as contained in the Response, are sharply at variance as they pertain to the language of the Final Decree. It is respectfully submitted that human prescience falls far short of being able accurately to determine the consequences of knowingly entering a decree or a supplemental decree containing patent ambiguities of the character that are set forth above. It must be emphasized that the shortcomings of the Supplemental Decree were specifically emphasized to the Solicitor General and, in total disregard of the interests of the Tribes, that official rejected them. It is known that in years to come, the contradictory language and the variances of the language in the Decree and Supplemental Decree unquestionably will bring about controversial issues as to what the methods will be for determining entitlements of the Tribes under their "present perfected rights." Hence, it is respectfully submitted that the Tribes are entitled to have the ambiguities removed in advance of the entry of any final decree. It is likewise respectfully submitted to the Court that under no circumstances should a final decree be entered by the Court unless and until all the various disputes that are here involved are concluded. As emphasized above, it would be a clear breach of the obligation of this Nation as trustee for the

Indian Tribes to enter a decree knowing that in the future the contradictions in it would breed further controversy. Common sense dictates that to stipulate in regard to the rights of the joint movants without having a comparable stipulation in regard to the "present perfected rights" of the Tribes is to place the Tribes at a vast disadvantage in the light of the great political power of the joint movants, all as must be recognized by this Court. Reference is here made to the erroneous concepts to which the Solicitor General's Response has granted conditional approval.

### C. The Response Would Accept Known Spurious Claims To "Present Perfected Rights" Asserted By The Joint Movants

It is an undeniable fact that the claimed rights of the Imperial [48] and Palo Verde Irrigation Districts [49] and the Yuma and Gila Federal Reclamation Projects [50] are spurious. Investigations, which were being conducted for the Tribes but were stopped by the Department of Interior, had advanced to the point where it became manifest that the claimed "present perfected rights" of the joint movants did not comport with the definitions contained in the Decree. Reference in that regard is made to the specific language of the Decree that describes perfected rights and "present perfected rights." It is declared:

> "G. 'Perfected right' means a water right required in accordance with state law, which right has been exercised by (a) the actual diversion of a specific quantity of water (b) that has been applied to a defined area of land or a definite municipal or industrial works * * *." [51]

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[48] Joint Motion, p. 12, II. California.

[49] Joint Motion, p. 11, II. California.

[50] Joint Motion, pp. 6-7, I. Arizona; p. 11, II. California; p. 12.

[51] Arizona v. California, 376 U.S. 340, 341, I., para. G.

In the definition which immediately follows, it is provided:

> "H. 'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." [52]

As commented upon immediately above, the Tribes have conducted investigations sufficient to warrant a statement to this Court that the joint movants cannot prove the inflated claims that have been conditionally agreed to by the Solicitor General. Hence, it is an invitation to disaster for the Tribes to enter into any subordination when they know that the claims asserted by the joint movants are predicated upon the false and fabricated claims. The joint movants' claimed "present perfected rights" must fail as to the defined quantities of water and the defined acreage upon which water has been applied. Most assuredly, they cannot prove the vast quantities of water or the vast acreages together with priorities to which the Solicitor General has given his agreement. Under those circumstances, there is a clear violation of the obligation owing by this Nation to the Tribes by proceeding to stipulate to the "present perfected rights" of the joint movants, all as contemplated by the Response of the Solicitor General. It undoubtedly is a product of the conflicting interests within the Interior and Justice Departments that the Solicitor General would even contemplate acceptance of known false claims asserted by the joint movants.

### D. Failure Of The Solicitor General Properly To Advise The Court Of The Status Of Boundary Disputes

As stated in the Motion, of which this memorandum is in support, the Response filed by the Solicitor General is deficient in all respects and gravely in error in other respects. It is inexplicable that the Court was not advised

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[52] Arizona v. California, 376 U.S. 340, 341, I., para. H.

of the Secretarial orders determining the status of disputes that were brought to the attention of the Special Master. That information is available and is part of the official records of the Secretary of the Interior.

It was gravely in error not to advise the Court that two boundary disputes, which were presented to the Special Master, have been resolved by Secretarial orders.[53]

As reviewed below, it will be observed that the Court refused to dispose of the boundary disputes stating, however, that should a controversy arise over the titles because "of some future refusal by the Secretary to deliver water to either area, the dispute can be settled. . . ." Let this fact be respectfully submitted to the Court: Because the Tribes are not parties to the litigation, they are totally at the mercy of the Secretary of the Interior who purports to represent them. There is no stronger argument that the Indians must be separately represented than the fact that, if there is a dispute with the Secretary of the Interior, the Indian Tribes have no remedy because at this time they are not parties. They cannot be heard by the Court, absent a granting of this motion and the opportunity of the Tribes to be heard on their own behalf. It is abundantly manifest by reason of the conflicts of interest within the Interior and Justice Departments that the Tribes are and have been subjected to clear abuses of discretion on the part of the officials of both the Interior and Justice Departments in the case of *Arizona* v.

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[53] Arizona v. California, Report dated December 5, 1960, p. 274, Boundary Dispute—Opinion, pp. 274 *et seq.*; Colorado River Indian Reservation; Boundary Dispute—Opinion, pp. 283 *et seq.*; Fort Mojave Indian Reservation, Hay and Wood Reserve. Relative to these boundary disputes, the Court said this: "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve 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."

*California.* There is a pressing need to have the boundary disputes resolved by reason of the fact that on the Fort Mojave Reservation Hay and Wood Reserve, the lands have been cleared at great cost; an irrigation system has been constructed and placed in operation; those lands are now fully developed; and any question concerning their "present perfected rights" can constitute a most serious blow, financially and economically, to the Fort Mojave Indian Tribe. Similarly, in regard to the lands of the Colorado River Tribes (not parties to the motion), water is presently being used on them and there is a pressing need for a determination of the "present perfected rights" for those properties. Similarly, on both of the Cocopah (not a party to this motion), and the Chemehuevi Indian Reservations, the development and use of water are ongoing. Further delay can only have adverse consequences to those areas. Action by the Court, therefore, is a pressing necessity.

Additionally, reference is made to an extremely important phase of the law to which the Response to the Joint Motion does not refer. That principle of law relates to the plenary power of the Secretary of the Interior to issue orders relative to boundaries. In that connection, reference is made to the fact that in regard to the western boundary of the Fort Mojave Indian Reservation Hay and Wood Reserve, all of the lands there involved are public in character. Hence, the Secretary of the Interior has exclusive and plenary power to make that resolution which has been issued, all as reviewed above. The Court has declared as elemental the principle that the Secretary of the Interior, until title has passed from the United States to a private owner, may survey, resurvey and correct errors of the nature that were corrected by the Secretarial order of June 3, 1974, in connection with the Hay and Wood Reserve of the Fort

Mojave Indian Reservation.[54] Earlier, this statement was made by the Court on the subject of correcting errors in previous boundaries where the title resides in the United States:

> "That the power to make and correct surveys of the public lands belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by direct proceedings; and that the latter have no concurrent or original jurisdiction to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient." [55]

Hence, it is not an issue that should properly be raised before this Court. Rather, it is a matter that has already been resolved by the Secretary of the Interior and the matter, as stated, should have been brought to this Court's attention by the Solicitor General and in the Response that was filed to the Joint Motion.

The same facts and concepts of law are, of course, applicable to the boundary disputes, to which reference has been made, relative to the Colorado River Indian Reservation (not a party to this motion).[56] In regard

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[54] United States v. State Investment Company, 264 U.S. 206 (1924). See Motion, Appendix B.

[55] Cragin v. Powell, 128 U.S. 691, 698 (1888).

[56] MOTION FOR LEAVE TO INTERVENE AS INDISPENSABLE PARTIES BY THE FORT MOJAVE INDIAN TRIBE, THE CHEMEHUEVI INDIAN TRIBE, AND THE QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION; JOINED IN BY THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE, p. 11, "B. *Colorado River Indian Reservation—Colorado River Tribes Not A Party To This Motion* 1. *State of California Benson Line Area*

to the latter boundary line, litigation was brought as to certain lands which were school sections occupied by non-Indians. However, those boundaries are but a small portion of the area from the top of Riverside Mountain, throughout which the Benson Line extends.

It is equally clear that resolution of the Chemehuevi boundary by Secretarial order is also binding and probably is not subject to court review based on the percepts of *Cragin* v. *Powell*, to which reference has been made.

## RESOLUTION OF LONG-PENDING ISSUES ESSENTIAL TO PROTECTION OF THE "PRESENT PERFECTED RIGHTS" OF THE TRIBES AND TO BRING STABILITY TO THE LOWER COLORADO RIVER

### A. The Quechan Title Issue

A most serious violation of obligations owing to the Tribes is the failure of the Solicitor General to bring to the Court's attention the fact that the title of the Quechan Tribe of Indians occupying the Fort Yuma Reservation is directly involved in any resolution of the "present perfected rights" in the Lower Colorado. In the motion (p. 14) reference is made to that substantial but unresolved issue. Yet, it is an issue well known to the Interior's Solicitor. On May 24, 1977, a resolution of the tribal problem was promised to the Quechan Tribe by the Solicitor.

The Quechan title dispute arose from the seizure for the benefit of the Bureau of Reclamation and the Imperial Irrigation District of the lands which constitute the Fort Yuma Reservation. The land seized and taken from the Tribe was used for the right-of-way for the All American Canal constructed as a principal unit of the Boulder Canyon Project. To accomplish the seizure, the Solicitor, by a 1936 Opinion, relied upon an 1893, forgotten, unenforced, fraudulantly obtained "alleged cession by the

Quechans of their reservation."[57] The matter was fully investigated, the total invalidity of the "agreement" established, and the Solicitor prepared an opinion based on that investigation.[58] The proposed opinion was incredibly sent to the Imperial Irrigation District and others, inviting a political onslaught that came to pass.

Because of the political pressure, the final act of the out-going Solicitor under the last Administration was to reaffirm the 1936 "Margold" Opinion. It was promised, as stated, by the present Solicitor that the last Opinion would be reviewed. Hence, there is need for time to allow the Quechans to obtain the relief which they so desparately need. It is, therefore, manifest that when the Solicitor General makes a filing with the Response to the Joint Motion and ignores the Quechan issue, he is, at the same time, bolting the door forever against the Quechans of having honesty and integrity invoked on their behalf as is required of the trustee United States. From the Congressional hearing, it is abundantly clear that the issue of the Quechan title has not been resolved and unless the Court refuses to act upon the Joint Motion, the Quechans, as stated, will suffer irreparable and continuing damage.

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[57] Sol. Op. M 28198, dated January 8, 1936: "Quechan Tribe of Fort Yuma Reservation, California," Hearings before the Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs, U.S. Sen., 94th Cong., 2d Sess., on Oversight on Quechan Land Issue, May 3 & June 24, 1976, p. 69, "SO-CALLED 'MARGOLD OPINION.'" See Motion, p. 14, para. 24.

[58] *Ibid.*, pp. 89 *et seq.*; 55 *et seq.*; 135 *et seq.*

### B. Failure Of The Justice Department To Offer Evidence To Special Master Relative To "Present Perfected Rights" Of The Tribes [59]

An official of the Bureau of Indian Affairs [60] and others intimately and immediately involved in the preparation and presentation of the case of *Arizona* v. *California* prepared a memorandum which proved beyond a question that the conflicts of interest precluded the Tribes from having their day in court. That memorandum demonstrates that valid Indian claims were knowingly, arbitrarily and capriciously abandoned by the Department of Justice in the presentation of evidence to the Special Master in *Arizona* v. *California*.[61] The memorandum, chronicled with care, with full documentation and affidavits in support, together with a request by the Commissioner of Indian Affairs to review the trust violations in the presentation of evidence in *Arizona* v. *California*, remains today without an official response from the Solicitor. Failure of the Solicitor General to refer to these facts in the Response to the Joint Motion partakes of the long-term pattern of violation of Indian rights to the use of water in the Lower Colorado River. Those violations have been under the direction of the various Secretaries of Interior who have very frequently acted in conjunction with the Attorney General of the United

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[59] Joint Motion, p. 15, para. 27, "Indian Irrigable Acres And Title To 'Present Perfected Rights' For Which No Claim Has Been Made In Arizona v. California."

[60] See above, pp. 7 *et seq.*, fn. 13.

[61] See Memorandum dated August 14, 1975, from the Commission of Indian Affairs to the Solicitor, Department of Interior, transmitting an August 13, 1975 "Memorandum Of Points And Authorities Supported By Affidavits Disclosing That Conflcts Of Interest In The Department Of Justice Resulted In The Fort Mojave, Colorado River, Fort Yuma, Chemehuevi, And Cocopah Indian Tribes I Being Denied Their Day In Court, And That II There Must Be Rejected The Proposed 'Stipulation Of Present Perfected Rights' In Arizona v. California."

States of America causing irreparable damage to the Tribes.[62]

## CONCLUSION

Representation by the Solicitor General has been forced upon the Tribes against their will. They have been effectively denied their day in court. Their right to be represented by counsel of their own choosing has been denied in clear violation of their constitutional, civil and human rights. Accordingly, the Tribes respectfully move the Court to allow them to be heard individually and collectively on their own behalf as intervening parties represented by counsel of their own choosing.

Respectfully submitted,

(DATE)

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[62] "Federal Protection of Indian Resources," Hearings before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Sen., 92d Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, Part 1, October 19 & 20, 1971, p. 175 *et seq.*; 235 *et seq.*