No. 8, Original

# In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF ARIZONA, COMPLAINANT

*v.*

STATE OF CALIFORNIA, ET AL.

## MOTION OF THE UNITED STATES FOR MODIFICATION OF DECREE AND SUPPORTING MEMORANDUM

WADE H. MCCREE, JR.
*Solicitor General*

JAMES W. MOORMAN
*Assistant Attorney General*

LOUIS F. CLAIBORNE
*Assistant to the Solicitor General*

MYLES E. FLINT
SCOTT B. MCELROY
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*

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## MOTION FOR MODIFICATION OF DECREE

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The United States of America, by the Solicitor General, moves the Court for entry of a supplemental decree, modifying the decree of March 9, 1964, and the injunction in Article II thereof, so as to permit additional diversions of water from the mainstream of the Colorado River for the use of the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma and Cocopah Indian Reservations, in the annual quantities hereinafter specified.

In support of this motion, the United States alleges:

1. The boundaries of the several Indian Reservations above named have been finally determined, whether by Act of Congress, by final judgment of a

court of the United States or by final action of the Department of the Interior.

2. These boundary adjustments, effected since the entry of the decree of March 9, 1964, have confirmed to the Indian Reservations additional practicably irrigable lands for which the United States reserved water rights, as follows:

(a) The Fort Mojave Reservation, 3,000 acres, all within the State of California;
(b) The Chemehuevi Reservation, 150 acres, all within the State of California;
(c) The Colorado River Reservation, 3,110 acres, all within the State of California;
(d) The Fort Yuma Reservation, 5,500 acres, of which 4,200 acres lie within the State of California and 1,300 acres within the State of Arizona;
(e) The Cocopah Reservation, 1,112 acres, all within the State of Arizona.

3. There are within the boundaries of the several Indian Reservations as defined for the purposes of the decree of March 9, 1964, practicably irrigable lands which were erroneously omitted from consideration and which are entitled to reserved water rights, as follows:

(a) The Fort Mojave Reservation, 1,250 acres, of which 100 acres lie within the State of California, 1,000 acres within the State of Arizona and 150 acres within the State of Nevada.
(b) The Chemehuevi Reservation, 500 acres, all within the State of California;

(c) The Colorado River Reservation, 15,000 acres, of which 2,000 acres lie within the State of California and 13,000 within the State of Arizona;
(d) The Fort Yuma Reservation, 500 acres, all within the State of California;
(e) The Cocopah Reservation, 33 acres, all within the State of Arizona.

4. Accordingly, the several Indian Reservations are entitled, with the priority dates recited in Article II of the decree of March 9, 1964, and in addition to the quantities there specified, to annual diversions of mainstream water from the Colorado River in quantities sufficient to irrigate the additional acreage specified in paragraphs 2 and 3 above, or in the following quantities, whichever is less:

(a) The Fort Mojave Reservation, 27,455 acre-feet, of which 20,026 acre-feet are chargeable against the allocation of the State of California, 6,460 acre-feet against the allocation of the State of Arizona and 969 acre-feet against the allocation of the State of Nevada;
(b) The Chemehuevi Reservation, 3,880 acre-feet, all chargeable against the allocation of the State of California;
(c) The Colorado River Reservation, 120,794 acre-feet, of which 30,854 acre-feet are chargeable against the allocation of the State of California and 89,940 acre-feet against the allocation of the State of Arizona;
(d) The Fort Yuma Reservation, 40,020 acre-feet, of which 31,352 acre-feet are chargeable against the allocation of the State of Cali-

fornia and 8,668 acre-feet against the allocation of the State of Arizona;

(e) The Cocopah Reservation, 7,294 acre-feet, all chargeable against the allocation of the State of Arizona.

5. The Court's jurisdiction to entertain the present motion and to enter the proposed supplemental decree was appropriately retained by Article II(D)(5) and Article IX of the decree of March 9, 1964.

WADE H. MCCREE, JR.
*Solicitor General*

DECEMBER 1978

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 8, Original

STATE OF ARIZONA, COMPLAINANT

*v.*

STATE OF CALIFORNIA, ET AL.

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## MEMORANDUM IN SUPPORT OF MOTION FOR MODIFICATION OF DECREE

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### A. INTRODUCTION

The present motion is submitted by the United States as trustee for, and guardian of, the Tribes of the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma and Cocopah Indian Reservations on the lower Colorado River. The United States has been a party in the case since 1953 (344 U.S. 919) and has, throughout the litigation, represented the interests of the five Tribes. See 373 U.S. 546, 595. We accordingly deem it appropriate, once again, to assert the rights of the several Tribes which are now ripe for adjudication. We do so, however, only after exercis-

ing our independent judgment and we do not, in all instances, advance the tribal claims to the full extent that they have previously been presented to the Court.[1]

Our motion seeks a modification of the original Decree of March 9, 1964 (376 U.S. 340) to increase, by a relatively small margin, the allocation of mainstream water for the use of the five Indian Reservations. These rights to additional diversions are asserted in respect of Reservation lands for which no allocation has thus far been made. In part, these are areas once treated as being outside the Reservations but since determined to be within their true boundaries ("boundary lands"). In other part, we claim water for lands which, although concededly part of a Reservation, were not, for one reason or another, asserted to be "practicably irrigable" during the original proceedings and which were accordingly omitted from consideration in calculating the allocation of mainstream water to the several Reservations ("omitted lands").

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[1] We refer to the Petitions in Intervention submitted by the several Tribes and the accompanying Motions for leave to file. Although the Court has taken no action on those motions, we are filing now in accordance with our undertaking to the Court and to the Tribes to submit the claims before the end of the year. We do not, of course, mean to preempt the tribal motions and we continue to support the Tribes in their plea for leave to intervene. See *Bryan* v. *Itasca County*, 426 U.S. 373, 388-389 n.14 (1976); *Poafpybitty* v. *Skelly Oil Company*, 390 U.S. 365, 374 (1968); cf. *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538-539 (1972). So, also, we adhere to the Joint Motion for the Entry of a Supplemental Decree which we filed together with the State parties and which two of the Tribes have endorsed.

Because different objections are interposed, we separately discuss the additional diversion rights sought on behalf of the "boundary lands" and those asserted for "omitted lands." But we stress, at the outset, that both our submissions accept—without questioning or seeking to re-open—all that has so far been decided in the case. Thus, we begin with the controlling principle established by the Court's ruling in 1964: that each of the Reservations is entitled, as a present perfected right, to "enough water * * * to irrigate all the practicably irrigable acreage on the reservations." 373 U.S. at 600. And we adhere to the formula already settled for determining the maximum annual diversion per acre in each case. See 376 U.S. at 344-345.[2] Nor is there any occasion to re-examine the allocations already made. The present motion only invites the Court to consider new areas, for which no determinations have yet been made, and to apply to them the old rules.

The propriety of this plea for additional water would be debatable if the original allocation for each

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[2] As the Decree makes clear, the established rule is that each Reservation is entitled to enough water to irrigate all practicably irrigable acreage, but not to exceed a total computed on the basis of a fixed number of acre-feet of water per acre of land. This formula varies from Reservation to Reservation. The basis of the maximum allocation in each case is as follows:

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|---|---|
| Fort Mojave | 6.46 acre-feet per acre |
| Chemehuevi | 5.97 acre-feet per acre |
| Colorado River | 6.67 acre-feet per acre |
| Fort Yuma | 6.67 acre-feet per acre |
| Cocopah | 6.37 acre-feet per acre |

Reservation had been the end-product of a complex weighing of competing considerations, which it might be both difficult to identify and inequitable to reassess two decades later.[3] But there is no such problem here. The permitted diversions were fixed in strict relation to the number of irrigable acres believed to lie within each Reservation, applying a predetermined formula. Accordingly, any correction is a mere arithmetic computation—once it is determined that additional irrigable acreage within a Reservation was erroneously omitted from the original calculation. It was no doubt with the relative simplicity of the task in mind that the Court itself provided for later adjustment of water allocations in the event Reservation boundaries were subsequently altered. 376 U.S. at 345. The present motion does no more than to invoke the same procedure for "omitted lands" as well as "boundary lands."

### B. BOUNDARY LANDS

One aspect of the present motion (as we have said) is a request for additional mainstream diversion rights attributable to the adjustment of Reservation boundaries and the inclusion within the Reservations of irrigable acreage not originally taken into account in computing entitlement. This plea, we submit, is

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[3] The evidentiary trial before the Special Master was concluded on August 28, 1958, and the Master's Report was submitted to the Court on December 5, 1960. See Report of the Special Master, No. 9, Orig., O.T. 1960, at 3, 361; 364 U.S. 940.

both appropriate and timely, now that the boundaries of all five Reservations have been finally determined.

### 1. NATURE AND RIPENESS OF THE CLAIMS

Before particularizing the claims, we stress the limited question we present to the Court in respect of the "boundary lands." It is simply how much additional water (applying a formula already settled) should be adjudicated for the use of each Reservation on account of irrigable acreage newly determined to be within the Reservation boundaries. The Court need not, in our view, redetermine the boundaries or review administrative action fixing them. Nor is it the Court's task, we suggest, to resolve any private dispute between the Tribe and alleged patentees to any part of these areas. In sum, our Motion asserts that a stated number of irrigable acres have been confirmed to a Reservation and asks the Court for additional water accordingly, at a rate-per-acre previously fixed. The only issue open here is whether the tendered acreage is in fact "practicably irrigable" and thus entitled to mainstream water.

We belabor the point because of contrary suggestions by some of the other parties in their responses to the tribal motions for leave to intervene. Thus, the California Urban Agencies contest both a final district court judgment and a Secretarial Order fixing Reservation boundaries as effective for water allocation purposes and ask this Court to redetermine the matter *ab initio*. Response of the Metropolitan Water District of Southern California, etc., filed June 1, 1978,

at 4-5, 6, 9, 11. The State of Arizona, on the other hand, opposes the additional water claims for boundary lands as premature until "lower court decisions" have resolved the "title disputes." Response of the State of Arizona, etc., filed June 5, 1978, at 3-5.[4] And an amicus curiae seems to suggest that this Court cannot make a water allocation with respect to the "boundary lands" without also adjudicating private land title claims there. Motion of Donald D. Stark for Leave to File Amicus Curiae, etc., filed September 8, 1978, at 4, 5, 6, 10.

In our view, the matter is far less complicated and there is no occasion for a further postponement. Both the "finality" of the boundary determinations and the necessity for adjudicating "land titles" are, we believe, easily resolved by looking to the Court's treatment of these questions in 1964. If we follow the indications then given, the objections now advanced are seen to be wholly artificial obstacles.

### a. *Boundaries "finally determined"*

In the original proceedings before the Special Master questions arose as to the correct western boundary of both the Fort Mojave and Colorado River Reservations, which the Master sought to decide. Report,

[4] The States of California and Nevada and the other California parties presumably also deny the conclusiveness of the present judicial or administrative boundary determinations. See Response of the States of Arizona, California and Nevada, etc., filed January 25, 1978, at 25-26. They do not, however, indicate how, in their view, the boundaries should be "finally determined."

*supra*, at 274-278, 283-287. The Court, however, disagreed, holding that it was "unnecessary to resolve those disputes here." 373 U.S. at 601. It appears the Court then contemplated that the Secretary of the Interior would be free "to deliver water to either [of the disputed] area[s]" and that the boundaries need be settled only in the event of "some future refusal" by him to permit such diversions. *Ibid.* But the Decree subsequently entered effectively enjoined the Secretary from doing so. 376 U.S. at 341, 343-345. Instead, it was provided that "the quantities fixed [by the Decree in respect of the Fort Mojave and Colorado River Reservations] 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." *Id.* at 345.

The upshot is that, absent agreement (which has not been possible), only this Court can make the necessary upward adjustment in permitted diversions for Reservations whose true boundaries have been determined to encompass irrigable areas not included in the original allocations. And, of course, the Court must be deemed to have retained jurisdiction for that purpose.[5] Moreover, while Article II(D)(5) of the original Decree (376 U.S. at 345) expressly refers only to the Fort Mojave and Colorado River Reserva-

[5] In our view, continuing jurisdiction is retained for this purpose by Article II(D)(5) of the original Decree. 376 U.S. at 345. But, at all events, the general reservation of jurisdiction in Article IX would encompass the matter. 376 U.S. at 353.

tions, fundamental equitable principles require that the same rule apply to the other Reservations whose boundaries likewise have been finally determined to include acreage not known to be encompassed in 1964.

So much appears to be agreed on all sides and is, indeed, expressly contemplated by the Supplemental Decree proposed by the State parties. As we understand, the only basis of any objection to the present motion—so far as it seeks additional water for the "boundary lands"—is the contention that none of the Reservation boundaries are yet "finally determined." The suggestion is that a decision by the Secretary of the Interior, although administratively final, is not a sufficient determination for the purpose until and unless it has survived judicial challenge in this or another Court. The point is quickly answered.

It is self-evident that in entering the quoted provision of the Decree in 1964, this Court was not undertaking itself later to resolve any Reservation boundary questions. As we have noted, the Court had just rejected the Special Master's attempt to do that and it is not to be supposed that the Court, in 1964, was contemplating that the same issues would return here at some future date after being referred to a new Master. Plainly, the final provision to Article II(D)(5) means something quite different: if the parties cannot agree, this Court will adjust the *water* allocation in respect of a Reservation whose boundaries are *elsewhere* "finally determined" to include acreage not taken into account in 1964.

The remaining question is whether the Court impliedly required judicial approval of any Reservation boundary adjustment before it would consider a request for additional water. There is no basis for supposing that was intended. On the contrary, we must assume that, except as there is an express difference, the Decree follows the Court's Opinion, and we have seen that the Opinion contemplated resolution of the boundary questions by the Secretary of the Interior. Moreover, if any party held a different view, one would expect suggestions for explicit language conditioning any adjustment upon judicial approval of boundary changes. But there was none: although all parties submitted different proposals for other provisions of the Decree, everyone accepted the wording of the proviso to Article II(D)(5) in its present form. See Agreed Provisions for Proposed Final Decree in No. 8, Orig., O.T. 1963 (Dec. 1963), at 2, 10.

At all events, any different approach would be most extraordinary. After all, the Interior Department's survey of the boundaries of Indian Reservations, typically surrounded by public domain lands of the United States, are not usually subjected to judicial challenge. And yet, for many purposes, including questions of criminal jurisdiction, one must treat those boundaries as "finally determined." So here. 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 had ever vindicated the survey—but to deny comparable affect

to subsequent dependent surveys of the boundaries because no court had approved them.

We need only ask whether the Court intended that the States involved be free to hold up indefinitely the contemplated adjustment of the water allocation for a Reservation merely by failing judicially to challenge final administrative action fixing the boundary. The question answers itself. The fact is that none of the parties to this suit has sought to challenge the Secretary's determination in district court proceedings, although, in one case, the decision was entered almost a decade ago, and in every other instance except one, the action has been promulgated for several years. The claim for additional water in respect of the restored areas of the affected Reservations is fully ripe for adjudication.

**b.** ***Adjudication of "private land title"***

It is suggested in some quarters that the Court cannot act on the present motion—so far as it relates to "boundary lands"—until this, or another Court, adjudicates every claim of private title within the restored Reservation boundaries. But that problem was faced and resolved in the original proceedings and the same solution can conveniently be followed now.

During the hearings before the Special Master it was alleged that certain lands within the boundaries of the Fort Mojave Reservation were held by private patentees from the State of California, which obtained the tracts under the Swamp Lands Act of 1850

before the Reservation was established, and that others were held under grants to the Southern Pacific Railroad pursuant to the Act of July 27, 1866, also before the creation of the Reservation. Such claimants, if they proved their allegations, would hold good title, regardless of the date patents actually issued. See *United States* v. *Minnesota*, 270 U.S. 181, 204-212 (1926); *St. Paul & Pacific R. R. Co.* v. *Northern Pacific R. R.*, 139 U.S. 1, 5 (1891). Believing that, in those circumstances, the *Winters* reserved water doctrine would not be applicable to such lands, the Master concluded that he should exclude any validly patented acreage within the Reservation when calculating its mainstream diversion rights. But he did not deem himself obliged to decide the several private claims and contented himself with suggesting a proviso in the Decree. Report, *supra*, at 280, 282, 283, 351-352.[6]

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[6] The Special Master's Report is internally inconsistent in minor respects. Thus, although he found that there were both Swamp Lands Act and Southern Pacific Railroad grants within the Fort Mojave Reservation (Findings 6 and 7, Report, *supra*, at 280), the Master, in his Findings of Fact, himself deducts only the former acreage and provides only for future deduction of accretions thereto, when ascertained (Findings 14 and 16, *id.* at 281-282)—and makes no provision with respect to the railroad grant acreage. Yet, in his Conclusions of Law, and in his Recommended Decree, he provides for future deduction of *both* Swamp Lands Act and Southern Pacific grants, as well as accretions thereto (Conclusions 6, *id.* at 283; Proposed Decree, Art. II(C)(2)(e), *id.* at 351-352). The parties accepted the Master's proposed provision and the Court adopted it, without noticing that, in one respect at least, there is a double deduction. The matter would be resolved by the proposed Supplemental Decree pending before the Court, which eliminates the requirement of any deduction.

The Court evidently agreed that this was the appropriate course and adopted the Master's proposal. Decree, Art. II(D)(5), 376 U.S. at 345.

A like proviso in a modified decree would equally protect any private rights, as well as preserve State objections that "reserved" water ought not be allocated for land never held by an Indian Tribe. The pendency of such claims—some of them not yet judicially asserted[7]—should not delay adjudication of additional water for the "boundary lands." At best, the patented areas represent a very small fraction of the restored acreage,[8] and to await resolution of those claims would be to let the tail wag the dog.[9] Moreover, if every such claim, meritorious or not, must be

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[7] Mr. Stark's *amicus* brief refers to Swamp Land Act patentees in "boundary lands" of the Fort Mojave Reservation (at 7). Although these landowners objected to the dependent re-survey affecting that Reservation—an objection finally overruled October 10, 1978—they have not asserted their title in judicial proceedings.

[8] Here and elsewhere we use the term "restored" in a non-technical sense to identify lands which were at all times part of a Reservation but which were mistakenly treated as outside Reservation boundaries by the Special Master in the original proceedings and have since been confirmed as within those boundaries.

[9] Thus, the only relevant claims of which we are aware affect some 244 acres, plus accretions, out of a total of approximately 3,500 in the "Hay and Wood Reserve" recently restored to the Fort Mojave Reservation. The judicial proceedings affecting the Olive Lake and Ninth Street Cut-Offs in the Colorado River Reservation (*amicus* brief at 8-10) are not involved here, since the Court has already adjudicated water with respect to those areas.

finally settled before the boundary water adjustment is made, implementation of the tribal right could be held up indefinitely. We submit the old formula will serve once again to preserve all rights while assuring that justice to the Tribes is not longer delayed.

### 2. PARTICULARS OF THE CLAIMS

Having canvassed the applicable principles governing the allocation of additional water for lands restored to the Reservations, we now descend to particulars. We briefly outline the boundary adjustments affecting each Reservation and indicate the acreage within each area for which water is claimed on the ground that it is "practicably irrigable." The acreage figures recited are, at this stage, only approximate, albeit we believe them to be substantially correct.

#### a. *Fort Mojave Reservation*

There are two boundary adjustments affecting this Reservation: (i) the restoration of that portion of the Hay and Wood Reserve west of the Blout survey of 1928; and (ii) the adjudication of a tract formerly claimed by the LaFollettes as properly part of the Reservation. We deal with these in sequence.

(i) *Hay and Wood Reserve.* The so-called Hay and Wood Reserve—once attached to the Camp Mojave Military Reservation and transferred with it in 1890 to the Department of the Interior for the benefit of the Tribe—constitutes the central-western portion of the Fort Mojave Indian Reservation. The western boundary of this tract, the whole of which was de-

scribed as containing some 9,000 acres, was surveyed by Sidney Blout in 1928. The correctness of that survey was long disputed and was challenged by the United States in the original proceedings in this case. As already noted, however, the Court disapproved the Special Master's attempt to resolve the matter and the question remained for administrative determination. Ultimately, on June 3, 1974, the Secretary of the Interior, acting on the advice of the Solicitor, issued an Order annulling the 1928 survey and restoring the old boundary for the Hay and Wood Reserve a little more than a mile westward. A new plat was prepared; it was protested by alleged patentees; these objections were overruled and the final plat was approved and filed on November 6, 1978.

The upshot is that some 3,500 acres, not treated as part of the Fort Mojave Reservation when the water allocations were decreed in 1964, have been confirmed to the Reservation. Within this tract (the whole lying within the State of California) preliminary investigations indicate approximately 2,500 practicably irrigable acres. Applying the now settled formula of 6.46 acre-feet of water per acre, the additional annual mainstream diversion for the use of the Reservation resulting from this boundary adjustment would be 16,150 acre-feet, all of it chargeable against California's allocation.

As we have noted, there are claimants who assert valid patents under the Swamp Lands Act or grants to the Southern Pacific Railroad within this restored area—aggregating about 250 acres. Unless those

claims are amicably settled, it will be appropriate, now as before, to include a proviso specifying that the new allocation must be reduced by 6.46 times the number of acres ultimately determined to be held by Swamp Lands Act and railroad grant patentees.

(ii) *LaFollette tract.* A relatively minor adjustment of the Fort Mojave Reservation boundary has occurred on the western side, south of the Hay and Wood Reserve. Here, in an area where the Reservation is defined by sections laid out in checkerboard fashion, the Tribe obtained a stipulated judgment in its favor against the assignees of a railroad grant, effectively adding most of a section to the Reservation. *Fort Mojave Tribe* v. *LaFollette,* Civ. No. 69-324MR (D. Ariz. Feb. 7, 1977). It is estimated that the tract in question comprises some 500 irrigable acres (all in Arizona), which would entitle the Reservation to an additional annual diversion of 3,230 acre-feet.

**b. *Chemehuevi Reservation***

There is a single boundary change in the case of this Reservation. In 1941 certain lands were taken from the Reservation in connection with the construction of Parker Dam, which created a large reservoir known as Havesu Lake, encroaching upon the shoreline of the Reservation. It was ultimately determined, however, that more land than needed had been appropriated and some 2,430 acres along Lake Havesu were restored to the Chemehuevi Reservation by Secretarial Order of August 15, 1974. Although most of this land cannot be irrigated, our preliminary inves-

tigations indicate that the restored area comprises some 150 practicably irrigable acres. This would entitle the Reservation to an additional annual diversion of 895.5 acre-feet, chargeable against California's allocation.

*c. Colorado River Reservation*

There are two boundary adjustments affecting this Reservation, the first in the so-called "Benson line" area, the other along the northwest boundary.

(i) *Benson line.* For many years, a doubt has existed whether the central western boundary was properly viewed as the fluctuating channel of the Colorado River or, rather, the line meandered by W. F. Benson in 1879, now on the California side of the river. In the proceedings before the Special Master, the United States asserted the Benson line as the true boundary, but, once again, the Court disapproved the Master's attempt to decide the question and the matter was left to administrative resolution. After full consideration, on January 17, 1969, the Secretary of the Interior formally adopted the Benson line as the western boundary of the Reservation for the entire segment covered by that survey. The United States subsequently obtained final judgments quieting its title as trustee for the Tribes to separate parcels within the restored area. See, *e.g.*, *United States* v. *Samuel Curtis, et ux.*, No. 72-1624-DWW (C.D. Cal. Jan. 7, 1977); *United States* v. *Brigham Young, et al.*, No. 72-3058-DWW (C.D. Cal. Dec. 12-13, 1976, Apr. 6, 1977); *United States* v. *Robert H. Clark, et al.*, No. 72-1625-RJK (C.D. Cal. Apr. 22, 1977).

The Benson line decision restored some 4,400 acres to the Reservation, of which approximately 3,010 are practicably irrigable. Thus, an additional annual diversion of 20,077 acre-feet is appropriate in respect of this boundary adjustment, the whole charged against California's allocation.

(ii) *Northwest boundary.* The Benson line investigation disclosed another surveying error, affecting the northwest boundary of the Reservation. The survey line, it transpired, had been run to the easternmost, rather than the westernmost, of the peaks constituting Riverside Mountain at the southwest end of the line. A corrected plat was approved on December 18, 1978. The restored "sliver" contains approximately 450 acres, of which some 100 appear to be practicably irrigable. This would entitle the Reservation to an additional annual diversion of 667 acre-feet, again to be charged against California's allocation.

### d. *Fort Yuma Reservation*

At the time of the original proceedings before the Special Master and the Court, the Reservation was believed to comprise only those areas allotted to tribal members, for which trust patents were issued in 1914. This represented only a fraction of the original Reservation as established in 1884 and the propriety of treating the Reservation as so diminished has been questioned over the years. After due consideration, the Secretary of the Interior, by Order of December

20, 1978, has now determined that the original boundaries remain effective.

The consequence of this decision for water allocation is very limited, however. We advance no claim for the approximately 7,700 acres in the eastern portion of the Reservation which have been patented to non-Indians (the so-called "Bard" area). Nor do we request any allocation of water in respect of the substantial acreage to the north and west of the All American Canal because it is not, in our view, practicably irrigable. Our claim is confined to unallotted and unpatented lands south of the Canal, primarily accretions along the river. Within this restored area, there appear to be approximately 5,500 irrigable acres, some 4,200 in California, the balance in Arizona. Accordingly, the Reservation would be entitled to additional annual diversions of 36,685 acre-feet (28,017 chargeable against California's allocation, 8,668 against Arizona's).

#### e. *Cocopah Reservation*

Here, also, there are two boundary adjustments, both to the Western Reservation: (i) an area of accretion to the west of the old boundary; and (ii) an added tract just to the south of the accreted lands.

(i) *Accreted lands.* Because of the gradual western movement of the Colorado River at this point, substantial lands accreted to the Reservation on its western side. This was confirmed by a final judgment entered May 12, 1975. *Cocopah Tribe* v. *Morton,* No. CIV-70-573-PHX-WEC (D. Ariz.). The total

acreage added amounts to 883.53, of which 780 acres has been preliminarily determined to be practicably irrigable. The Reservation is, on this account, entitled to additional annual diversions of 4,969 acre-feet.

(ii) *Added lands.* By Act of June 24, 1974 (88 Stat. 266) Congress effectively extended the boundaries of the West Cocopah Reservation by adding a strip immediately below the accretions. This comprises 357.46 acres, of which approximately 332 are practicably irrigable. This justifies a further annual diversion of 2,115 acre-feet. Both additional diversions should be charged against Arizona's allocation.

### C. OMITTED LANDS

The second aspect of our motion is a request for additional mainstream diversion rights for lands which were conceded to be within the several Reservations at the time of the original proceedings, but which were not asserted to be "practicably irrigable" and accordingly were omitted from consideration in calculating the allocation of water for the several Reservations. Here, also, procedural objections are interposed and we address these before turning to the detailed claims.

#### 1. NATURE AND VIABILITY OF THE CLAIMS

In responding to the tribal motions for leave to intervene, the State parties have indicated their view that any plea for additional water in respect of "omitted lands" is foreclosed by the Decree entered

in 1964. *E.g.*, Response filed by all State parties dated January 25, 1978, at 24-25. We disagree. In our submission, neither the doctrine of res judicata nor any other principle bars consideration of these claims, and the balance of equities favors entertaining them.

Res judicata is relied upon. But that doctrine "operates only to bar 'repetitious suits involving the same cause of action.'" *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 578 (1974), quoting *Commissioner* v. *Sunnen*, 333 U.S. 591, 597 (1948). Accordingly, res judicata can have no application to the present motion, filed in the original case. Nor can it be objected that we have improperly sought to avoid res judicata by moving in the old suit. The Court's decree expressly authorizes that procedure in Article IX, which we invoke (376 U.S. at 353):

> 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.

Indeed, the unqualified language of Article IX removes any jurisdictional or other technical obstacle to our motion. The only question is whether, in all the circumstances, the Court deems it appropriate to exercise its undoubted authority to entertain the omitted lands claims. We suggest the balance of considerations argues in favor of so doing.

It is, of course, desirable in every case that exact justice be done. And, to that end, all courts are empowered, within limits, to correct their judgments. See Rule 60(b), Fed. R. Civ. P. On the other hand, countervailing considerations counsel a halt to indefinite reconsideration of matters already decided. Thus, here, although the Reservations are entitled to more water than was adjudicated, the omission might be beyond remedy if to repair it placed an undue burden on the Court or unfairly prejudiced other parties who justifiably relied on the allocations of the original decree. But no such obstacles are present here.

*a.* First, the task is relatively simple, and it involves no re-examination of anything actually decided, nor any re-weighing of evidence. As we have said, our motion fully accepts the ground rules announced by the Court's opinion of 1963. The only issue is whether certain areas, not before considered, are in fact "practicably irrigable" and accordingly entitled to mainstream water. Because, in the original proceedings, the United States submitted no evidence as to these areas—simply omitting them from the claim—neither the Special Master nor the Court had occasion to determine whether or not they qualified as irrigable. We urge no re-examination, no reconsideration, no rehearing, of an earlier finding. Strictly speaking, we seek leave to advance additional claims, premised on new evidence, bearing on lands never yet put in issue.

There is thus no wasteful relitigation. Nor are the further proceedings we evisage unduly burden-

some. At all events, a hearing is necessary to determine the irrigability of the "boundary lands." We merely suggest that the occasion also be utilized to consider the "omitted lands," applying the same standards. That will add little to the task of the Court and of the parties.

*b.* Nor can the State parties rightly cry "foul," on the ground that the claims now advanced seek to unsettle a decree understood to be carved in stone. Article IX, quoted above, gave full warning that any party might later seek modification of the judgment. And that is familiar practice in cases of this kind. See, *e.g.*, *New Jersey* v. *New York*, 347 U.S. 995 (1954), modifying 283 U.S. 805 (1931); *Wisconsin* v. *Illinois*, 388 U.S. 426 (1967), modifying 281 U.S. 696 (1930), and pending Petition for Modification of decree. See also, 6 R. Clark, *Water and Water Rights* 552 (1972).

What is more, although the inclusion of such a provision is customary in decrees entered by this Court in original cases, Article IX was not here treated merely as a traditional appendage. At least some of the State parties now pleading res judicata were, in 1964, most insistent on unqualified language permitting reopening of the decree. Thus, the Imperial Irrigation District of California discussed the relative virtues of particularly specifying the matters left open, as compared to framing a general provision like Article IX, in order to avoid "the possible claim that this Court may not alter or modify its rulings herein on the basis that the Decree is res

adjudicata of the issues sought to be considered or reconsidered." It was argued that the Court "should not desire to find itself embarrassed by a provision in the Decree or ruling if the United States or parties can later convince this Court that this Court's determination has been erroneous or unworkable." Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court," etc., filed December 1963, at 11. In the end, the District urged both courses. See Decree of Court as Submitted by Imperial Irrigation District, filed November 1963, at 60-62. And the other parties obviously shared this view, all joining in recommending inclusion of Article IX, despite the specific caveats of Article VIII. See Agreed Provisions for Proposed Final Decree, *supra*, at 18.

We do not suggest that Article IX was intended to create a fully open-ended decree. On the contrary, as we discuss in a moment, that solution was considered and rejected by the Special Master. But it does appear everyone understood that, for a time at least, "mistakes" in the original decree could, when discovered, be corrected by amendment. That is all we seek to do here. It can hardly come as a total surprise that, 20 years later, closer study has disclosed that we committed errors in failing to appreciate the irrigable character of certain acreage. Although we deny any deliberate failure faithfully to advocate the rights of the Tribe—whether on account of a conflict of interest or any other reason—the complexity of the issues before the Special Mas-

ter contributed to inadvertent omissions, as well as erroneous judgments, in identifying irrigable acreage within the several Reservations. In some instances, a more careful investigation has revealed our oversight. In others, actual experience in irrigating excluded acreage has demonstrated our mistake. This was always likely, if not inevitable. We submit such omissions were meant to be reparable, at least until such time as the parties would be taking substantial action in reliance on the allocations specified in the decree.

*c.* We come then to the critical inquiry: whether permitting additional diversions in respect of "omitted lands" would unfairly prejudice parties who justifiably relied to their detriment on the original allocations. One might suppose this would be the case after the lapse of 14 years. But, as it happens, there is no such impediment.

The relevance of the question we now consider is highlighted by the Special Master's approach. He fully accepted the principle that, in establishing the several Reservations, the United States reserved a sufficient amount of water to satisfy their "future as well as the[ir] present needs." 373 U.S. at 600. See *Winters* v. *United States*, 207 U.S. 564 (1908); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976). And he recognized that accurately predicting the amount necessary to satisfy these needs indefinitely was a difficult, if not impossible, task. Nevertheless, the Special Master ultimately rejected our submission that there should be an open-ended decree, per-

mitting the tribes to receive additional mainstream diversions as their requirements increased.[10] He was concerned that "such a limitless claim would place all junior water rights in jeopardy of the uncertain and the unknowable," since the "expanding needs on an Indian Reservation might result in a reduction of the project's water supply." Report at 264. Moreover, an open-ended decree "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." *Ibid.* On both sides, he believed, planning and financing would be embarrassed if the allocations were left subject to unrestricted modification. And so, the Master suggested a ceiling on the tribal water rights, which this Court approved as "reasonable." 373 U.S. at 600.

But the rationale of this solution does not inhibit relatively minor adjustments before *all* rights have been quantified. Only when the amount and priority date of all present perfected rights—not simply those the United States holds in trust—are determined, is any claimant secure in his expectations. Until then, the holders of non-Indian perfected rights remain "in jeopardy of the uncertain and the unknowable," since none knows his own allocation, much less the sum of the rights senior to his. And even the United States is unsure what rights may be senior to those it holds in trust for the tribes.

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[10] See, *e.g.*, *United States* v. *Ahtanum Irrigation District*, 236 F.2d 321 (9th Cir. 1956); *Conrad Investment Co.* v. *United States*, 161 F. 829 (9th Cir. 1908).

These uncertainties have prevented any party from acting in reliance on the 1964 Decree. To be sure, the original expectation was that all rights would be finally quantified within two years, or little more. But, in fact, the non-Indian perfected rights were not agreed or otherwise adjudicated—and will not be—until the entry of the Supplemental Decree now pending before the Court. The upshot is that no one has been in a position to rely on any prior allocation. Since no estoppel prevents it and no unfairness can result, past errors ought now be corrected.

### 2. PARTICULARS OF THE CLAIMS

We detail the claims for "omitted lands" in the same order as before. Again, however, we stress that the figures given for "practicably irrigable" acreage are only approximate.

#### a. *Fort Mojave Reservation*

Practicably irrigable land overlooked in the case of this Reservation lies in three main areas: (i) approximately 150 acres on the western side of the "Camp Mohave Reserve" in Nevada; (ii) approximately 100 "omitted" acres on the California bank of the Colorado River in the "Hay and Wood Reserve," the river having been channelized in this reach after the evidence was prepared for the Special Master proceedings; and (iii) approximately 1,000 acres in the vicinity of the original Fort Mojave site in Arizona. This results in an additional annual entitlement of 8,075 acre-feet, of which 969 acre-feet would be chargeable to Nevada, 646 to California, and 6,460 to Arizona.

b. *Chemehuevi Reservation*

Further investigation has disclosed some 500 irrigable acres omitted from consideration in the original proceedings. These lie in California and would entitle the Reservation to some 2,985 acre-feet of additional diversions annually, chargeable against that State's allocation.

c. *Colorado River Reservation*

The most substantial omissions occurred in the case of this Reservation, which is by far the largest of the five. Three separate areas of "omitted lands" are involved: (i) some 9,000 acres on the east bank of the Colorado, between the river and the levee (all in Arizona); (ii) some 2,000 acres in the northwest part of the Reservation, across the river in California; and (iii) some 4,000 acres on the east side of the planned gravity irrigation system, but below the mesa (all in Arizona). Recognition of these lands as "practicably irrigable" would entitle the Reservation, in the aggregate, to 100,050 acre-feet of additional diversions annually, 13,340 acre-feet to be charged to California and 86,710 acre-feet to Arizona.

d. *Fort Yuma Reservation*

Closer study has revealed that some 500 irrigable acres within the diminished boundaries of the Reservation as it was conceived in 1964 were then erroneously omitted from consideration. Accordingly, 3,335 additional acre-feet of diversions should be permitted annually, to be charged against California's allocation.

### e. *Cocopah Reservation*

In the East Cocopah Reservation approximately 33 acres of practicably irrigable land were omitted from consideration. They would add 210 acre-feet of annual mainstream diversions, chargeable against Arizona's allocation.

## D. RECAPITULATION

On the basis of the estimates recited in the preceding paragraphs, the total claim on behalf of the five Reservations is for 199,443 acre-feet of water in respect of 30,155 acres. This is, in the aggregate, an increase over present entitlement of about 20%. Something less than half of the increment (84,788 acre-feet) reflects boundary adjustments; the remainder, "omitted" lands.

The charge against each of the States would be as follows:

| | |
|---|---|
| Arizona | 112,362 acre-feet |
| California | 86,112 acre-feet |
| Nevada | 969 acre-feet |

By Reservation, the breakdown is the following:

| | Land (acres) | Water (acre-feet) |
|---|---|---|
| FT. MOJAVE | | |
| Boundary lands | 3,000 | 19,380 |
| Omitted lands | 1,250 | 8,075 |
| Total | 4,250 | 27,455 |
| CHEMEHUEVI | | |
| Boundary lands | 150 | 895 |
| Omitted lands | 500 | 2,985 |
| Total | 650 | 3,880 |

| | Land (acres) | Water (acre-feet) |
|---|---|---|
| COLORADO RIVER | | |
| Boundary lands | 3,110 | 20,744 |
| Omitted lands | 15,000 | 100,050 |
| Total | 18,110 | 120,794 |
| FT. YUMA | | |
| Boundary lands | 5,500 | 36,685 |
| Omitted lands | 500 | 3,335 |
| Total | 6,000 | 40,020 |
| COCOPAH | | |
| Boundary lands | 1,112 | 7,084 |
| Omitted lands | 33 | 210 |
| Total | 1,145 | 7,294 |

## E. CONCLUSION

The present motion, it seems plain, must be referred to a Special Master. But we urge the Court not to leave the matter entirely at large in making such a reference. To do so would, we believe, both invite unnecessarily protracted hearings and diminish any prospect of an amicable settlement.

Specifically, we suggest the Court ought now lay down the following governing principles:

(1) That the claims advanced in respect of "boundary lands" are now ripe for adjudication, and that this Court (and therefore its Master) will not undertake to review in these proceedings the correctness of the boundary adjustments which have been settled or accepted by the Secretary of the Interior, nor to decide any title disputes affecting particular parcels within a Reservation;

(2) That the entitlement of any Reservation to additional mainstream diversions on account of boundary adjustments is determined in accordance with the standard and the formulae utilized by the Court in its original decision;

(3) That, accordingly, the only task of the Special Master in relation to the claims made for "boundary lands" is to make findings as to the "practicably irrigable" acreage comprised within the restored areas and to recommend additional mainstream diversions by applying the acre-feet per acre ratios already established for each Reservation;

(4) That the claims in respect of "omitted lands" are not foreclosed and must be determined on their merits;

(5) That additional diversions on account of areas not before considered should be determined in accordance with the standard and the formulae previously established;

(6) That, accordingly, the only task of the Special Master in relation to the claims made for "omitted lands" is to make findings as to the "practicably irrigable" acreage comprised within the areas omitted from consideration during the original proceedings and to recommend additional mainstream diversions

by applying the acre-feet per acre ratios already established for each Reservation.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JAMES W. MOORMAN
*Assistant Attorney General*

LOUIS F. CLAIBORNE
*Assistant to the Solicitor General*

MYLES E. FLINT
SCOTT B. MCELROY
*Attorneys*

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