No. 8, Original

In the Supreme Court of the United States

October Term, 1978

State of Arizona,
complainant

v.

State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, 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 defendants

Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tripe,
recommended interveners

Elbert P. Tuttle, *Special Master*

MEMORANDUM AND REPORT ON PRELIMINARY ISSUES

August 28, 1979

While a motion for a determination of present perfected rights and a supplementary decree pursuant to Article VI of the Supreme Court's 1964 decree was pending,[1] five Indian tribes ("the Tribes") whose reservations are located along the lower basin of the Colorado River, and who are the beneficial owners of water diversion rights declared in the 1964 decree,[2] moved to intervene in this case. The Fort Mojave Tribe, the Chemehuevi Tribe, and the Quechan Tribe of the Fort Yuma Reservation ("the Three Tribes"), joined by the National Congress of American Indians and the Confederation of Indian Tribes of the Colorado River as amici curiae, moved to intervene as "indispensible par-

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1. *Arizona v. California*, 376 U.S. 340, 351 (1964), *carrying into effect* 373 U.S. 546 (1963). Article VI of the decree provided that

> [w]ithin two years from the date of this decree, the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each State, respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each State. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each State, and their priority dates, any party may apply to the Court for the determination of such rights by the Court.

The Court later amended this article to extend the time for cataloguing of present perfected rights. 383 U.S. 268 (1966). The States and their political subdivisions were able to reach agreement among themselves as to the scope of present perfected rights but were unable to reach agreement with the United States. On May 3, 1977, the State parties filed a joint motion for determination of present perfected rights and the entry of a supplemental decree, and a proposed supplemental decree. The United States and the State parties subsequently reached agreement on the terms of a proposed decree and all parties filed a joint motion.

2. *See* 376 U.S. at 343-45; 373 U.S. at 575-601.

ties."[3] They opposed entry of a supplemental decree, both as initially proposed by the States and the political subdivisions of California ("the State parties") and as subsequently joined by the United States. They also sought to raise claims to present perfected rights appurtenant to irrigable acreage within disputed boundaries of the reservations but outside the boundaries conceded for the purpose of the 1964 decree ("additional boundary lands"), as well as to irrigable acreage within the conceded boundaries of the reservations but not claimed by the United States in hearings before the Special Master prior to the Court's 1963 decision and 1964 decree ("omitted lands"). Three days after the Three Tribes filed their motion, the Colorado River Indian Tribe and the Cocopah Tribe ("the Two Tribes") filed a motion to intervene to present similar claims as additional claims pursuant to Articles II(D)(5)[4] and IX[5] of the decree and not in opposition

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3. The motion initially was improperly filed on February 23, 1977, without a proposed pleading, *see* Supreme Court Rule 9(3), and without the Confederation of the Indian Tribes of the Colorado River joining. The motion was refiled April 7, 1978, this time joined by the Confederation.

4. Article II(D)(5) contains the following proviso to the Court's allocation of diversion rights for the Fort Mojave and Colorado River Indian Reservations:

> the quantities fixed in this paragraph [establishing diversion rights for the Fort Mojave Reservation] and paragraph (4) [establishing diversion rights for the Colorado River Indian Reservation] shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined; . . .

376 U.S. at 345.

5. Article IX provides:

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

to entry of the supplemental decree proposed by the United States and the State parties. On December 19, 1978, while a decision as to the motion for a supplemental decree was pending, the United States filed a motion to modify the Court's decree pursuant to Articles II(D)(5) and IX, presenting on behalf of the five Indian tribes claims for diversion rights appurtenant to additional boundary lands and omitted lands on all five reservations. With one exception, the total irrigable acreage which the United States claims for each reservation in this motion differs significantly from that claimed by the Tribes on their own behalfs.[6]

On January 9, 1979, the Supreme Court adopted and issued the supplemental decree proposed by the

6. The United States claim for the Cocopah Reservation is greater than that of the Cocopah Tribe. The following tables illustrate for each reservation (columns) the irrigable acreage and total annual diversions of water claimed by the Tribes and by the United States.

I. ADDITIONAL BOUNDARY LANDS (irrigable acres)

	Ft. Mojave	Chemehuevi	Colorado River	Ft. Yuma	Cocopah
Three Tribes	4,700	150	—	13,000	—
Two Tribes	—	—	2,710	—	780
United States	3,000	150	3,110	5,500	1,112

II. OMITTED LANDS (irrigable acres)

	Ft. Mojave	Chemehuevi	Colorado River	Ft. Yuma	Cocopah
Three Tribes	7,100	2,350	—	4,800	—
Two Tribes	—	—	37,449	—	Undetermined
United States	1,250	500	15,000	500	33

III. TOTAL CLAIMS (irrigable acres/acre-feet annual diversion)

	Ft. Mojave	Chemehuevi	Colorado River	Ft. Yuma	Cocopah
Three Tribes	12,800/ 82,800	2,500/ 14,900	—	17,800/ 118,700	—
Two Tribes	—	—	40,159/ 262,861	—	780+/ 4,969+
United States	4,250/ 27,455	650/ 3,880	18,110/ 120,794	6,000/ 40,000	1,145/ 7,294

State parties and the United States. The supplemental decree renewed the determination of present perfected rights of the Indian reservations in the 1964 decree, giving them priority over all other present perfected rights in times of shortage. The declaration of present perfected rights was made subject to the following provisions:

> (2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Art. II(D)(5) of said Decree.
> (3) Article IX of said Decree is not affected by this list of present perfected rights.
>
> . . .
>
> (5) [T]he quantities in paragraphs (1) through (5) of Art. II(D) of said Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined. Additional present perfected rights so adjudicated by such adjustment shall be in annual quantities not to exceed the quantities of mainstream water necessary to supply the consumptive use[7] required for irrigation of the practicably irrigable acres which are included within any area determined to be within a reservation by such final determination of a boundary and for the satisfaction of related uses. The quantities of diversions are to be computed by determining net practicably irrigable acres within each additional area using the methods set forth by the Special Master in this case in his Report to this Court dated December 5, 1960, . . .

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7. The 1964 decree defines "consumptive use" as "diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican Treaty obligation." 376 U.S. at 340.

The Court denied the motion of the Three Tribes, et al., to intervene insofar as the motion sought to oppose entry of a supplemental decree. In all other respects that motion and the motion of the Two Tribes were referred to me as Special Master.

On March 29, 1979, following an informal conference, I presented to the parties and the movants for intervention three questions for argument in San Francisco, California, on April 17, 1979:

> (1) Have "the boundaries of the respective [Indian] reservations . . . [been] finally determined" within the meaning of Art. II(D)(5) of the March 9, 1964 Decree, 376 U.S. 340?
> (2) Does the Eleventh Amendment bar intervention in this suit by the Indian Tribes without the consent of the State parties?
> (3) Is there a procedure whereby the Indian Tribes may appear and participate as if they were parties pending a ruling on their motions to intervene?

I conducted a hearing and received both preargument and supplemental briefs on these questions. At the hearing, all the parties agreed also to submit for my determination the motions of the two groups of Indian Tribes to intervene.

I have decided to grant the Indian Tribes leave to intervene in subsequent proceedings before me. This decision necessarily encompasses the conclusion that the Eleventh Amendment does not bar such intervention, and obviates the need to consider alternatives to intervention. The role of the intervenors in these proceedings will be unconditional; the United States shall, at its discretion, continue as a party.

The scope of such subsequent proceedings will not include a de novo determination of the boundaries of the Indian reservations, but will include proof of the irrigability of omitted lands. I have concluded that, for

the purposes of the determination of reservation water rights in this litigation, boundary determinations made by the district courts and by the Secretary of the Interior are final. I have not decided whether or on what basis the January, 1979, decree may be modified to establish additional present perfected rights appurtenant to omitted lands. I have decided, however, that the full and final determination of this case can best be guaranteed by deferring that decision until after the Tribes and the United States produce evidence concerning omitted lands.

I. Motions to Intervene

A

Consideration of the motions to intervene is guided to the extent appropriate by Rule 24 of the Federal Rules of Civil Procedure. Supreme Court Rule 9(2).[8] Rule 24 provides for intervention on the following grounds:

> (a) *Intervention of Right.* Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the appli-

8. This guidance is somewhat tentative. Rule 9(2) provides that the Federal Rules are a guide in original actions in the Supreme Court only "where their application is appropriate," and the peculiarities of original proceedings may require ad hoc variations in the procedures which apply in ordinary litigation. *See Utah v. United States,* 394 U.S. 89, 95 (1969); *Rhode Island v. Massachusetts,* 39 U.S. (14 Pet.) 210, 257 (1840). Moreover, Rule 24 itself is not a comprehensive inventory of the bases on which intervention may be allowed. *Missouri-Kansas Pipeline Co. v. United States,* 312 U.S. 502, 505-08 (1941).

> cant's interest is adequately represented by existing parties.
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> (b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: . . . (2) when applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

It is obvious that the Indian Tribes have interests which will be affected by any litigation which takes place in this case.[9] The only substantive issue pending in this litigation is the determination of land questions on which depend the present perfected rights of which the Tribes are the beneficial owners. As a result of the motion by the United States to modify the decree, this issue is presented even if the Tribes are unable to intervene. The Tribes' direct pecuniary interests will not be just affected but will be determined by this litigation since the United States' role as guardian of the Indian interests will bind the Tribes to any judgment concerning their rights even if they do not participate. *Heckman v. United States,* 224 U.S. 413, 444-45 (1912); *Pueblo of Picuris v. Abeyta,* 50 F.2d 12, 14 (10th Cir. 1931). The Tribes' interest in this litigation thus meets the narrowest legal predicate for intervention.[10] The Tribes' stake is palpable as well as legally cognizable; the history of this case is testimony to the precious value of water rights in the lower Colorado

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9. As counsel for the Metropolitan Water District characterized the issue in oral argument, there is little doubt as to the possibility of intervention, only as to its desirability.

10. *Cf. Sam Fox Publishing Co., Inc. v. United States,* 366 U.S. 683, 690-93 (1961)(underlying action must have res judicata affect on intervenor); *SEC v. United States Realty & Improvement Co.,* 310 U.S. 434, 458-61 (1940)(intervenor had direct pecuniary interest).

Basin. *See Arizona v. California,* 373 U.S. 546, 598-99 (1963). Common sense suggests that those most directly affected by the litigation should be able to assert their own interests.

It is also evident that their status as beneficial owners of the land and water rights to which the United States has legal title as trustee is no obstacle to the Tribes' capacity to bring court action to assert their property rights. *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 368-69 (1968) and cases cited at 370-72. The trusteeship of the United States exists "to prepare the Indians to take their place as independent qualified members of the modern body politic," *id.* at 369 (*quoting Board of County Commissioners v. Seber,* 318 U.S. 705, 715 (1943)), a goal reinforced by a federal policy which has placed increased emphasis on tribal self-government, *see Bryan v. Itasca County,* 426 U.S. 373, 388-89 n.14 (1976). It would be self-defeating if the fact of federal trusteeship were to defeat the Tribes' effort to exercise self-government and full citizenship in this case.

B

Their beneficiary status nevertheless presents the question whether the Tribes' interests are adequately represented by the United States as trustee. In *Heckman v. United States,* 224 U.S. 413 (1912), the Court spoke expansively of the role of the United States as a litigant on behalf of Indians: "[t]here can be no more complete representation. . . ." *Id.* at 444. In this case, although all the State parties with the exception of Arizona do not oppose intervention altogether, they do oppose any intervention which includes as a premise the inadequacy of the representation of

the Tribes' interests.[11] Arizona opposes any intervention at all as superfluous in light of the government's representation of the Tribes' interests.[12] The United States quite understandably upholds the adequacy of its representation of the Indians while supporting the motions to intervene.[13]

The Tribes assert that this representation is inadequate in two respects. First, the United States has a conflict of interest in its representation of the Tribes because it also has represented its own proprietary interests on behalf of non-Indian federal establishments in the Colorado Basin, and, more significantly, represents the Bureau of Reclamation, which operates projects along the river and contracts with the State parties for the delivery of river water.[14] The United

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11. Memorandum of the States of Arizona, California and Nevada, et al., Regarding Certain Preliminary Issues 11 (filed with Special Master, April 13, 1979); Response of the States of California and Nevada, et al., to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene 10, 13-14 (filed June 2, 1978).

12. Memorandum of the States of Arizona, California and Nevada, et al., *supra* note 1, at 6-11; Response of the State of Arizona to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene 3-4 (filed June 5, 1978).

13. Memorandum for the United States on Preliminary Issues 21-22 (filed with Special Master, April 13, 1979); Memorandum for the United States on Motions for Leave to Intervene 10 (filed May 31, 1978); Memorandum for the United States on Motion for Leave to Intervene 4 n.2, 11 (filed Feb. 24, 1978).

14. Concurrent representation of the Bureau of Reclamation is an especially sore point. The Bureau and Indian tribes have been frequent adversaries in administrative channels, administrative proceedings, and litigation. *See* SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE, SENATE COMM. ON THE JUDICIARY, 92d Cong., 1st Sess., HEARINGS ON FEDERAL PROTECTION OF INDIAN RESOURCES, 1629-77 (Comm. Print. 1972)(Correspondence and Materials Relating to Bureau of Reclamation Programs Affecting Indians); *see generally id. passim.* (The hearings produced an outpouring of Indian resentment against the Bureau from tribes throughout the west and southwest, leading Senator Kennedy, Chairman of the Subcommittee on Administrative Practice & Procedure, to conclude that "the Reclamation Bureau, in the Indian people's eyes, is

States also is central in the management and control of the Colorado River system.[15] Moreover, the Two Tribes assert, even the interests of the Tribes among themselves are potentially adverse[16] so that the Tribes should not be jointly represented. Second, the United States has failed to discharge its fiduciary duties by its delay in the determination of reservation boundaries, causing the Tribes to lose the enjoyment of the additional water to which an adjustment of the reservation boundaries entitles them; and by its failure in the initial proceedings before the Special Master and the Supreme Court to present claims for additional irrigable acreage within the conceded reservation boundaries.

The present posture of the case diminishes the extent to which the asserted conflict of proprietary interests might affect the outcome of the case. Simultaneous representation by the United States of its own proprietary interests and those of the Indian tribes might well entitle the Tribes to intervene.[17] Although

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the present-day institutional embodiment of General Custer." *Id.* at 398).

15. In addition to legislation of general effect, *e.g.*, the National Reclamation Act, 43 Stat. 701, *codified at various provisions of* 43 U.S.C., the following provisions directly deal with the Colorado River: The Boulder Canyon Project Act, 43 U.S.C. §§ 617 *et seq.*; The Boulder Canyon Project Adjustment Act, *id.* §§ 618 *et seq.*; The Colorado River Compact Act, *id.* § 617; The Colorado River Storage Project Act, *id.* §§ 620-620o; The Colorado River Basin Project Act, *id.* §§ 1501 *et seq.*; and The Colorado River Basin Salinity Control Act, *id.* §§ 1571 *et seq.*.

16. Though joint movants for intervention, the Two Tribes are each represented by different counsel.

17. *See New Mexico v. Aamodt,* 537 F.2d 1102, 1106-07 (10th Cir. 1976); Special Presidential Message to Congress on Indian Affairs, 1970 Pub. Papers 569, 573 (July 8, 1970); ABA CODE OF PROFESSIONAL RESPONSIBILITY, *Canon* 35, EC 5-15, 5-23, DR 5-101; *Luke* 16:13; Chambers, *Discharge of the Federal Trust Responsibility to Enforce Claims of Indian Tribes: Case Studies of Bureaucratic Conflict of Interest, in* SUBCOMM. ON ADMINISTRATIVE PRACTICE & PROCEDURE HEARINGS, *supra* note 14, at 295. *Cf.* 25 U.S.C. § 81a (providing for contracts for attorneys for Indian tribes in claims against United States). *See generally* SUBCOMM.

the United States does not abandon its status as a non-trustee, however, it is not called on to assert its own interests in this litigation, since the present proceedings concern exclusively the extent of the Indians' water rights. All other rights are fixed by the March 9, 1964, and January 9, 1979, decrees. Accordingly, the United States is not called on to advance distinct, potentially adverse interests in the course of the litigation now pending.[18]

There nevertheless remain differences between the interests of the United States and those of the Indian tribes. Most noticeable is the difference in their claims. The claim by the United States was not filed until after the Tribes had already moved to intervene and complained of delay by the United States in claiming on their behalfs. At least in their pleadings, the United States and the Tribes claim significantly different amounts of irrigable acreage. See note 6, *supra*. To the extent of these differences the Indian claims are not actually represented. These disparities are greatest in the claims for omitted lands. The effect of these differences is magnified insofar as the issue whether or on what basis omitted lands are properly the subject of a modified decree may be affected by the adequacy of the government's representation of the Tribes in prior proceedings. In this respect, the Tribes and the United States have distinctly different interests. Regardless of the past or present actual adequacy of the United

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ON ADMINISTRATIVE PRACTICE & PROCEDURE HEARINGS, *supra*. *But compare Pueblo of Picuris v. Abeyta*, 50 F.2d 12, 14 (10th Cir. 1931) *with Smuck v. Hobson*, 408 F.2d 175, 181-82 (D.C.Cir. 1969)(en banc).

18. The potential conflicts do not vanish altogether, and were the United States a private attorney, might constitute an ethical conflict. Such conflicts are inevitable in government litigation, however, especially involving the United States Government, and unless yielding some perceptible effect, should not impeach the government's capacity as a litigant.

States' representation of the Indians, they have different capacities to raise these issues. If, as the Court observed in *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 374 (1968), "the Indian's right to sue should not depend on the good judgment or zeal of a Government attorney . . .," it is difficult to conceive why the same is not true of the scope of rights asserted in a suit on behalf of Indian tribes.

Beyond these specific differences exists a less tangible difference in legally cognizable interests. When the United States litigates in its capacity as trustee for Indian tribes, it acts not merely on behalf of the Indians' proprietary rights, but also "the governmental rights of the United States." *Heckman v. United States,* 224 U.S. 413, 438 (1912). It exercises the plenary powers of the United States to regulate Indian affairs. U.S. CONST. Art. I, § 8(3). As such, the United States answers to a different constituency than do the Tribes. In its representation of the Tribes, though it must reasonably fulfill the nation's trust obligations or face the prospect of liability for their breach,[19] the United States also acts on considerations of Indian policy or other national concerns which may yield a different litigation position than the represented Tribes themselves would reach.[20]

The presence of closely related but not identical interests in this case closely parallels *Trbovich v. United Mine Workers,* 404 U.S. 528 (1972). There, a defeated candidate for union office sought to intervene in a suit by the Secretary of Labor for enforcement of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 482 *et. seq.* Rejecting the argument

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19. *Cf. United States v. Mason,* 412 U.S. 391 (1973)(no breach of duty found).

20. *See* Special Presidential Message to Congress on Indian Affairs, 1970 Pub. Papers 564, 573 (July 8, 1970).

that the individual union member was adequately represented by the Secretary of Labor, the Court distinguished between the Secretary's role as a lawyer for the individual grievance and as agent for the public interest in free and democratic union elections. "Even if the Secretary is performing his duties, broadly conceived, the union member may have a valid complaint about the performance of 'his lawyer.' " *Id.* at 539. The same may be said for the Indian Tribes in this case. Even though the United States may be satisfying its trust obligations adequately, the Indians have a complaint about their lawyer. In general, the Tribes are probably the best judges of the adequacy of representation of their interests. *See* 3B MOORE'S FEDERAL PRACTICE ¶ 24.09-1[4] (2d ed. 1979)[21]; Shapiro, *Some Thoughts on Intervention before Courts, Agencies, and Arbitrators,* 81 HARV. L. REV. 721, 746 (1968). Here, the Tribes' direct and immediate interest in the subject of this litigation and the special sensitivity of the United States' trust obligations[22] warrant particularly attentive scrutiny of their complaint about their representation and of the differences between the tribal and federal interests. Without disparaging the zeal or empathy of the government's attorneys,[23] the Tribes can only feel more keenly than the United States government the effects of the adjudication of their present perfected rights in river water. For these reasons, I find that the Tribes satisfy the "minimal" require-

21. *Cited with approval in Trbovich, supra,* 404 U.S. at 538 n.10.

22. *See, e.g., Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 14-16 (1831).

23. Indeed, I have no basis for so treating the performance of the government attorneys who have appeared before me, and the Tribes are careful to specify that the criticism of the United States' representation does not apply to the latter. Brief of the Cocopah Tribe on Questions Propounded by the Special Master 2 n.2 (filed with Special Master, April 13, 1979). The Three Tribes and the Colorado River Indian Tribes both echoed this view in oral agrument.

ments of Rule 24 of the Federal Rules of Civil Procedure to show that representation of the intervenors' interests "may be" inadequate. *See Trbovich, supra* 404 U.S. at 538 n.10.

I conclude that it is appropriate to follow the guidance of Rule 24 in this case. Granting the motions to intervene will, as counsel for the Colorado River Indian Tribes suggests, "keep the Government's feet to the fire" and will promote the resolution of this long-standing and important national dispute. It will expand neither the dispute nor the Supreme Court's exercise of its original jurisdiction because the Indians' efforts to intervene seek not to raise new claims not already raised by the sovereigns directly concerned, *cf. Utah v. United States,* 394 U.S. 89, 96 (1969), but to quantify existing rights already presented by the United States and determined by the Court.[24]

C

The question remains whether, if the Tribes are permitted to intervene, the United States should continue to appear on their behalf. None of the State parties is willing to consent to intervention if the Tribes are concurrently represented by the United States.[25] They argue that representation of the Tribes' interests by both the Tribes themselves and the United States

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24. Intervention by a party other than a state or the United States ancillary to an original proceeding in the Supreme Court is within the Court's original jurisdiction. *Oklahoma v. Texas,* 258 U.S. 574, 581 (1922); *see Texas v. Louisiana,* 416 U.S. 965 (1974). *But cf. Utah v. United States,* 394 U.S. 89, 96 (1969)(avoiding question).

25. Supplemental Memorandum of the State of California Regarding Certain Preliminary Issues 3-5 (filed with Special Master, May 14, 1979); Memorandum of the States of Arizona, California and Nevada, et al., *supra* note 11, at 12-15; Response of the States of California and Nevada, et al., *supra* note 11, at 13-14.

will prejudice the State parties by causing duplication, delay, and confusion.

Just as the appearance by the United States on behalf of the Tribes does not preclude the Tribes' intervention, the Tribes' intervention does not rule out continued appearance by the United States. *See Wilson v. Omaha Indian Tribe,* 439 U.S. 963 (1979) (Indian tribes sued "supported by" the United States as trustee); *Poafpybitty v. Skelly Oil Co.,* 390 U.S. 365, 371 (1968) (*quoting Sadler v. Public National Bank & Trust Co.,* 172 F.2d 870, 874 (10th Cir. 1949)) (Indian may sue in own right subject only to right of government "to intervene"); *Heckman v. United States,* 224 U.S. 413, 446 (1912) (Indian allottee may bring own action and the United States may "aid" him in suit); *Tiger v. Western Investment Co.,* 221 U.S. 286 (1911) (United States joined suit on behalf of Indian plaintiff).[26] Several considerations favor the United States' participation. In those regards in which its interests as trustee differ from those of the Tribes, the United States has an independent interest in the outcome of

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26. Concurrent parallel appearances by Indian tribes and by the United States on their behalf also have been common in recent litigation in the lower federal courts, both where tribes have intervened in actions brought by the United States, *United States v. Washington,* 520 F.2d 676 (9th Cir. 1975)(semble), *cert. denied,* 423 U.S. 1086 (1976), *aff'g* 384 F. Supp. 312 (W.D.Wash. 1974); *United States v. Montana,* 457 F.Supp. 599 (D.Mont. 1978); *United States v. Atlantic Richfield Co.,* 435 F.Supp. 1009 (D.Alas. 1977); *United States v. Truckee-Carson Irrig. Dist.,* 71 F.R.D. 10 (D.Nev. 1975), where tribes have intervened in actions brought against the United States, *County of Thurston v. Andrus,* 586 F.2d 1212 (8th Cir. 1978), *cert. denied,* 441 U.S. 952 (1979); *City of Tacoma v. Andrus,* 457 F.Supp. 342 (D.D.C. 1978), and where parallel actions by the United States and Indian tribes have been consolidated, *Sac and Fox Tribe v. Licklider,* 576 F.2d 145 (8th Cir.), *cert. denied,* 439 U.S. 955 (1978); *United States v. Southern Pacific Trans. Co.,* 543 F.2d 676 (9th Cir. 1976); *Colville Confederated Tribes v. Walton,* 460 F. Supp. 1320 (E.D. Wash. 1978). *But see Pueblo of Picuris v. Abeyta,* 50 F.2d 12, 14 (10th Cir. 1931).

this litigation. Moreover the decree, insofar as it allocates the river water and provides for the present perfected rights of the Indian Reservations, operates by enjoining the United States, its officers, attorneys, agents, and employees. In addition, the United States is not bound by any adjudication obtained by Indian tribes appearing in their own right without its consent or appearance. *United States v. Candelaria,* 271 U.S. 432, 443-44 (1926); *Choctaw & Chickasaw Nations v. Seitz,* 193 F.2d 456, 458-59 (10th Cir. 1951). Accordingly, continued appearance by the United States will help secure the speedy final determination of this lawsuit.

The value of the continued presence of the United States in this litigation is not outweighed by the marginal duplication, delay, or confusion which may result. The same issues will be presented regardless of whether they are presented by the United States, the Indian tribes, or both. The Tribes and the United States have indicated that they will rely on substantially the same evidence and, where their claims differ, coordinate their presentations. It is my intention to have the order of proof and examination by the moving parties structured in a logical sequence which avoids duplication or accumulation, and where they are not, the State parties will be entitled to object. In short, there is no reason to anticipate that the parallel appearances by the United States and the Indian tribes should yield any less coordination and cooperation than I have seen from the more numerous State parties, erstwhile adversaries. Arizona, at least, is in a poor position to object to such concurrent representation of related interests after naming as defendants numerous political subdivisions of the State of California. All these have been represented by separate coun-

sel in this suit even though they could have been represented and bound by that State.[27]

D

A hurdle to the Tribes' participation in this case more fundamental than the considerations affecting the propriety of intervention is the sovereign immunity of the States reflected in the Eleventh Amendment.[28] The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The amendment maintains the States' immunity from suit in federal court without their consent except where their immunity has been surrendered by the adoption of the Constitution. *Principality of Monaco v. Mississippi*, 292 U.S. 313, 328-30 (1934); *Hans v. Louisiana*, 134 U.S. 1, 12-15 (1890); *see also* THE FEDERALIST No. 81 (A. Hamilton) ("unless, . . . there is a surrender of this immunity in the plan of the convention, it will remain with the state. . . .").[29] Accord-

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27. *See e.g., United States v. Nevada*, 412 U.S. 534, 538 (1973); *New Jersey v. New York*, 345 U.S. 369, 373-75 (1953).

28. The question whether the Eleventh Amendment bars intervention in an original proceeding in the Supreme Court without the consent of adverse states was presented but left open in *Utah v. United States*, 394 U.S. 89, 92 (1969)(intervention by private party); and *New Jersey v. New York*, 345 U.S. 369, 372 (1953)(intervention by city).

29. There is some uncertainty whether the States' immunity beyond the terms of the Eleventh Amendment is incorporated constitutionally into the amendment or rests solely on judicially protected sovereign immunity. *Compare Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 280 n.1 (1973), *and id.* at 290-94 (Marshall, J., concurring) *with id.* at 309-15 (Brennan, J., dissenting). *See generally* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972).

ingly, I begin from the assumption that unless the sued state consents, the Eleventh Amendment excludes from federal jurisdiction suits against a state by an Indian tribe. *United States v. Minnesota,* 270 U.S. 181, 194-95 (1926).[30]

The Eleventh Amendment issue arises here because the States do not expressly consent to suit. Arizona will not consent to any intervention by the Indian tribes.[31] California, Nevada, and Utah will consent only on certain conditions: (1) above all, that the Tribes be represented only by their own counsel and not by the United States as well; and (2) that intervention be for the limited purpose of raising claims for additional boundary lands.[32] Because I am permitting the United States to represent the Tribes concurrently

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The question does not affect this decision and the terms "Eleventh Amendment," "Eleventh Amendment immunity," and "sovereign immunity" are used interchangeably to refer to the concepts those terms embody.

30. *Skokomish Indian Tribe v. France,* 269 F.2d 555, 560-62 (9th Cir. 1959); *United States ex rel. Charley v. McGowan,* 2 F.Supp. 426, 429 (W.D.Wash. 1931); *aff'd,* 62 F.2d 955 (9th Cir.), *aff'd* 290 U.S. 592 (1933). In view of Indian tribes' own sovereign status, *Puyallup Tribe v. Washington Game Department,* 433 U.S. 165 (1977), and the plenary federal interest in the regulation of Indian affairs, U.S. Const., Art. I § 8, the United States and the Colorado River Indian Tribes question that the Eleventh Amendment bars a suit against a state by an Indian tribe. *United States v. Minnesota, supra,* the leading authority for this premise, strictly speaking does not settle the question. There, the Court merely assumed that Indians were barred by the Eleventh Amendment from suing a state in deciding that the United States as trustee for the Indians' interests is not so barred, and made that assumption about individual Indians and not tribes. Nevertheless, I consider it unlikely that anything within the constitutional or federal structure demands the inference that the States surrendered their immunity to suit by Indian tribes. *See Principality of Monaco v. Mississippi,* 292 U.S. 313, 330 (1934). Because for other, less equivocal reasons I find that the Eleventh Amendment is not implicated by the Tribes' motions to intervene, I do not need to resolve this question.

31. See note 12, *supra.*

32. See note 11, *supra.*

with their own counsel and will hear, at least conditionally, evidence concerning omitted lands, leave for the Tribes to intervene does not meet the conditions of consent for California, *et al.* All the States contend that the absence of their consent absolutely bars intervention by the Indian tribes.

I conclude that the States' Eleventh Amendment immunity is not implicated by the Tribes' motions to intervene. Their claims as intervenors are ancillary to a case or controversy between a state and sister states and between the United States and states. That case or controversy—including the States and the Indian claims—is within the federal judicial power and already before the Court, and is now the subject of decrees. The Tribes' intervention is therefore within the scope of the States' constitutional surrender of immunity.

The claims of the Indian tribes are no strangers to these proceedings. They have been present in the case since the United States intervened to present claims on behalf of the Indian reservations as well as its own proprietary interests.[33] These claims are now the subject of two decrees by the Supreme Court which provide for the Tribes' present perfected rights and control water diversions by the mandatory provisions of the 1964 decree. The claims for water for additional boundary lands are direct outgrowths of these decrees, which provided for an adjustment in the present perfected rights of the reservations "in the event that the boundaries of the respective reservations are finally

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33. 344 U.S. 919 (1953). California "join[ed] in the request of the United States that this Court declare and determine the rights of the Indians and Indian Tribes." Answer of the California Defendants to Petition of Intervention on Behalf of the United States of America and Summary of Controversy 60 (filed April 5, 1954).

determined."[34] In addition, Article IX of the decree,[35] preserved by the 1979 decree,[36] makes possible the amendment of the decree's provisions. The Tribes do not now seek to present new claims against the States which will alter the allocation of water among the States as determined by the Supreme Court in its opinion and decree, nor do they seek relief which will run against the States. Rather, they seek to make the adjustment provided for in the Court's decrees and to modify the decrees in a way which will alter the allocation of water within the States.[37]

This case is the only means by which they can do so. The Supreme Court's 1964 decree controls the distribution of water in the lower Colorado River system by enjoining the United States, its officers, attorneys, agents and employees from diverting water except in accordance with the decree's provisions. 376 U.S. at 341-46. The Court's jurisdiction is exclusive to begin with, 28 U.S.C. § 1251(a)(1), and the Court has retained jurisdiction of the case for further relief "that may at any time be deemed proper in relation to the subject matter in controversy." 376 U.S. at 353.

It is hornbook law that once an entire case or controversy is within federal jurisdiction, the federal courts may entertain claims over which there is no independent basis of federal jurisdiction but which are incidental to the underlying federal case or controversy. *See Aldinger v. Howard,* 427 U.S. 1, 6-14 (1976); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS, § 9 (3d ed. 1976). The doctrine of ancillary jurisdiction arose from the need to avoid hardship and

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34. Para. (5), 439 U.S. at 421 (1979); Art. II(D)(5), 376 U.S. at 343 (1964).

35. 376 U.S. at 353.

36. 439 U.S. at 421.

37. *See* note 33 *supra.*

permit the complete resolution of disputes where a federal court has complete and exclusive control of a controversy. It "is bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests, without regard to jurisdiction." *Aldinger, supra* 427 U.S. at 11. Thus, in *Freeman v. Howe,* 65 U.S. (24 How.) 450 (1861), the Court stated that claimants to property attached in a federal diversity action who had no remedy in state court could file an equitable action in federal court to prevent injustice in the diversity suit; such a suit would be "not an original suit, but ancillary and independent, supplementary merely to the original suit . . ." so that want of diversity of citizenship would not deprive the federal court of jurisdiction. *Id.* at 460. *Accord Phelps v. Oaks,* 117 U.S. 236, 241 (1886); *Stewart v. Dunham,* 115 U.S. 61, 64 (1885). Ancillary jurisdiction also permits a subsequent suit or intervention brought to effectuate a judgment concerning property in the control of the court. *Supreme Tribe of Ben-Hur v. Cauble,* 255 U.S. 356, 364-67 (1921).

The same principles apply in original proceedings in the Supreme Court. The Supreme Court, once it has exercised its original jurisdiction over a suit involving sister states and the United States, may entertain the ancillary claims of non-sovereign litigants even though standing by themselves these claims would not be within the Court's original jurisdiction, *Texas v. Louisiana,* 416 U.S. 965 (1974), or even within federal jurisdiction, *Oklahoma v. Texas,* 258 U.S. 574, 581 (1922).

The Eleventh Amendment's jurisdictional barrier, at least in certain circumstances, yields to this extension of federal jurisdiction. The presentation of claims which are ancillary to an underlying suit is not an orig-

inal suit and does not change the character of the underlying case or controversy. *Freeman, supra* at 460 (1861). In its original form this case was a suit brought by one State against another. It was later joined by other States and by the United States. In either form, it is within federal jurisdiction, and the Court may exercise power over the party States. *United States v. Mississippi,* 380 U.S. 128, 140-41 (1965); *Rhode Island v. Massachusetts,* 37 U.S. (12 Pet.) 657, 720-31 (1838). The Supreme Court's jurisdiction over cases against a state brought by the individual state or by the United States stems from the States' consent and delegation of authority in the Constitution, "a necessary feature of the formation of a more perfect Union . . . [and] inherent in the constitutional plan." *Principality of Monaco v. Mississippi,* 292 U.S. 313, 329 (1934). It is logical that if the "plan of the convention"[38] contemplates that suits between the States are within the judicial power of the United States, it contemplates that such suits are subject to the necessary adjuncts of that power.[39]

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38. THE FEDERALIST No. 81 (A. Hamilton).

39. As Mr. Justice Iredell, dissenting in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419 (1793), the decision which provoked passage of the Eleventh Amendment, *see Hans v. Louisiana,* 134 U.S. 1 (1890); C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 46-74 (1972), wrote:

> So far as States under the Constitution can be made legally liable to [federal judicial] authority, so far to be sure they are subordinate to the authority of the *United States,* and their individual sovereignty is in this respect limited. But it is limited no further than the necessary execution of such authority requires.

Id. at 436 (emphasis in original). The corollary of the latter negative limit is that the States' subordination to federal judicial authority *extends* to "the necessary execution of such authority."

In *United States v. United States Fidelity & Guaranty Co.,* 309 U.S. 506 (1940), the United States, on behalf of Indian tribes, filed a claim in bankruptcy; the debtor filed a cross-claim against the United States. The Court held that the cross-claim was barred by sovereign immunity, rea-

Thus, once a state is brought properly within federal jurisdiction—in this case by the bringing of suit by another State—the Court may hear at least certain claims against the state.[40] *Compare Department of Employment v. United States,* 385 U.S. 355, 358 (1966) (United States joined Red Cross as coplaintiff in suit for refund of state taxes on federal instrumentality; Eleventh Amendment not implicated) *with Principality of Monaco v. Mississippi,* 292 U.S. 313, 329-30 (1934)(suit against state by federal corporation barred by Eleventh Amendment) *and Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 464 (1945)(taxpaper suit for refund from state officials barred by Eleventh Amendment); *cf. Fairmont Creamery Co. v. Minnesota,* 275 U.S. 70, 73 (1927)("Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such.") "[T]he proposition that the Eleventh Amendment, . . . control[s] a court of the United States in administering relief, although the court was acting in a

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soning that "[t]he desirability for complete settlement of all issues between parties must, we think, yield to the principle of immunity." *Id.* at 513. Since a cross-claim is ordinarily ancillary to the underlying suit, *see Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 375 n.18 (1978), the case casts some doubt on the conclusion that the federal courts may exercise ancillary jurisdiction over claims barred by sovereign immunity. But *United States Fidelity* concerned the United States' immunity governed solely by the legal rights accorded by the sovereign. *See Kawananakoa v. Polyblank,* 205 U.S. 349, 353 (1907). The Eleventh Amendment deals with the interaction of the States' immunity with the power of a higher sovereign. *See* C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY, 150-74 (1972); Baker, *Federalism and the Eleventh Amendment,* 48 COLO. L. REV. 139, 147-75 (1977).

40. That the States are already brought within jurisdiction distinguishes *Missouri v. Fiske,* 290 U.S. 18 (1933), in which the Court held that the Eleventh Amendment prohibited bringing against a state an "ancillary and supplemental bill" to a proceeding already adjudicated in federal court. *Cf. Aldinger v. Howard,* 427 U.S. 1 (1976)(party cannot be joined solely on basis of pendent nonfederal claim).

matter ancillary to a decree rendered in a cause over which it had jurisdiction is not open for discussion." *Gunter v. Atlantic Coast Line Railroad*, 200 U.S. 273, 292 (1906). The Court has demonstrated a willingness to tolerate judgments which operate in some measure against states, but which to the extent they do so are incidental to cases not barred by the Eleventh Amendment. *See Hutto v. Finney*, 437 U.S. 678, 695-97 (1978)(attorney's fees paid by state); *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)("ancillary" effect on state treasury of prospective injunction against state official).

The sensitivity to the sovereignty of the States which the Eleventh Amendment reflects undoubtedly places limits on the reach of ancillary jurisdiction across the barrier of the amendment. Whatever those limits, this case—in which the Tribes' claims stem from those originally presented, parallel those now presented by the United States, and grow directly out of the Court's decrees—is within them. Where the Eleventh Amendment is raised as a bar to federal jurisdiction "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding." *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464 (1945). Here, where the claims which the Tribes seek to raise as intervenors are irrevocably entwined with the existing lawsuit, the "essential nature and effect of the proceeding" remains a suit between a state and sister states, and not a suit "commenced or prosecuted against one of the United States" by a party whose suit is barred by the Eleventh Amendment.

The moving parties raise similar considerations in arguing that Arizona, by bringing this suit in which the Indian claims are intimately bound up; Nevada, by intervening; and California, by consenting to the

United States' intervention on behalf of the Indians, have waived the protection of the Eleventh Amendment. A state may waive the Eleventh Amendment by voluntarily entering into litigation otherwise barred by the amendment. *Missouri v. Fiske*, 290 U.S. 18, 24-25 (1933); *Gunter v. Atlantic Coast Line Railroad*, 200 U.S. 273, 284 (1906); *Clark v. Barnard*, 108 U.S. 436, 447-48 (1883). But where such a waiver has been found, it has been in litigation against parties who under the Eleventh Amendment could not themselves commence litigation against a state. This is not true of the acts which the moving parties suggest amounted to such a waiver in this case; because suits against a state by another state or the United States are not barred by Eleventh Amendment immunity, neither the original filing of suit or intervention against another state nor the intervention of the United States necessarily implicated the States' sovereign immunity. Assuming that this immunity is implicated by the Tribes' motions to intervene, it is difficult to infer that the States have consented to such intervention by voluntarily entering into litigation where their sovereign immunity was not implicated. To the extent that such an inference can be drawn, it is because the issues presented by the Tribes are ancillary to the underlying case.[41]

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41. The moving parties also argue that, because the Tribes seek no money or property judgment against the States but only a prospective equitable decree which, by its terms, would not run against the States and which would not require direct federal court interference in state interests, the suit in substance is not one brought "against" a state. Supplemental Memorandum for the United States on Preliminary Issues 16-23; Memorandum for the United States, *supra* note 13, at 11-14; Memorandum on Behalf of Colorado River Indian Tribes for the Special Master 18-19 (filed with Special Master, April 17, 1979); Brief of the Cocopah Indian Tribes, *supra* note 23, at 10-13. *Cf., e.g., Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 462-64 (1945); Ex Parte Young, 209 U.S. 123,

Eleventh Amendment immunity may also be set aside where Congress authorizes suit against a state pursuant to the States' surrender of sovereignty in delegating to Congress its constitutional powers. *Fitzpatrick v. Bitzer,* 427 U.S. 445, 451-56 (1976); *Employees v. Department of Public Health and Welfare,* 411 U.S. 279, 282-285 (1973); *Parden v. Terminal Railway,* 377 U.S. 184, 190-92 (1964). This case presents the contention that 28 U.S.C. § 1362 is such a congressional abrogation of the States' immunity. Section 1362 provides:

> The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

In *Moe v. Confederated Salish & Kootenai Tribes of the Flathead Reservation,* 425 U.S. 463 (1976), the Supreme Court considered whether section 1362 confers jurisdiction over a suit by Indian tribes to enjoin collection of a state tax in the face of 28 U.S.C. § 1341, which prohibits district courts from enjoining the assessment, levy, or collection of a state tax where a plain, speedy, and efficient remedy is available in the

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150-56 (1908). This line of argument is inapposite. Analysis whether the relief sought makes a suit one against a state "in fact, though not in form, *In Re Ayers,* 123 U.S. 443, 489 (1887), stems from cases ostensibly brought against a state official, which may or may not be barred by the Eleventh Amendment depending on the substance of the suit, *see Ford Motor Co., supra,* 323 U.S. at 464. A suit against a state *eo nomine* is a suit "against" a state for Eleventh Amendment purposes, and, at least so long as a judgment will have some effect on the state named, is barred by the Eleventh Amendment. *See Alabama v. Pugh,* 438 U.S. 781, 782 (1978)(per curiam); *Osborn v. Bank of United States,* 22 U.S. (9 Wheat.) 737, 846-59 (1824).

I do treat these factors as affecting the reach of ancillary jurisdiction in the context of the Eleventh Amendment, however.

state courts but excepts cases in which the United States is a plaintiff. The Court concluded that it does. Referring to language in the legislative history of section 1362 which characterizes the section as providing "the means whereby the tribes are assured of the same judicial determination where the action is brought in their behalf by the Government or by their own attorneys,"[42] the Court concluded "that Congress contemplated that a tribe's access to the federal courts to litigate a matter arising 'under the Constitution, laws, or treaties' would be at least in some respects as broad as that of the United States suing as the tribe's trustee." 425 U.S. at 473.

Since *Moe* was decided, two federal district courts have found that the congressional intention to provide Indian tribes with a capacity to sue as broad as that of the United States indicates intent to remove the States' Eleventh Amendment immunity in suits brought by the Indian tribes. *Confederated Tribes of the Colville Indian Reservation v. Washington,* 446 F. Supp. 1339, 1350 (E.D. Wash. 1978)(three judge court); *Aquilar v. Kleppe,* 424 F. Supp. 433, 436 (D.Alas. 1976)(dictum). Echoing and citing these cases, the moving parties urge the same conclusion in this case.[43] Prior to *Moe,* the prevailing interpretation of section 1362 was that it gave Indian tribes status equal to that of the United States as a litigant only where the United States might have brought suit as trustee for the Tribes, but declined to do so. *Standing Rock*

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42. H.R. REP. No. 2040, 89th Cong. 2d Sess. 2-3 (1966), 1966 U.S. CODE CONG. & AD. NEWS 3143, 3147.

43. Memorandum for the United States, *supra* note 13, at 14-16. Response of the Fort Mojave Tribe, *et al.,* to Issues Requested by the Master for San Francisco Hearing 6-7 (filed with Special Master April 13, 1979); Memorandum on Behalf of Colorado River Indian Tribes, *supra* note 41, at 17; Brief of the Cocopah Indian Tribe, *supra* note 23, at 8-9.

Sioux Indian Tribes v. Dorgan, 505 F.2d 1135, 1139-40 (8th Cir. 1974); *Fort Mojave Tribe v. LaFollette,* 478 F.2d 1016, 1018 (9th Cir. 1973); *Oneida Indian Nation v. County of Oneida,* 464 F.2d 916, 924 (Lumbard, J., dissenting), *rev'd on other grounds,* 414 U.S. 66 (1974); *Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Co.,* 353 F. Supp. 1098, 1100 (D. Ariz. 1972). The States, while they apparently do not contest that section 1362 allows Indian tribes to sue states in some cases, advance the formerly prevailing view and argue that this waiver of immunity applies only where the United States has failed to bring suit on behalf of the Indians. In addition, following the literal language of section 1362, they argue that the section applies only the actions originating in the district courts.[44]

If section 1362 abrogates the States' Eleventh Amendment immunity, it does so without requiring the United States' failure to sue as a predicate. Nowhere did the *Moe* Court or the three judge court below consider whether any action on the part of the United States had been sought or awaited before the Tribes in that case brought suit, nor does anything in the reported facts of the case indicate that any such effort was made. The report of the House Judiciary Committee on section 1362 does indicate that the section "would provide for U.S. District Court jurisdiction in those cases where the U.S. attorney declines to bring an action and the tribe elects to bring the action." H.R. REP. No. 2040, 89th Cong., 2d Sess. 2, 1966 U.S. CODE CONG. & AD. NEWS 3143, 3147. But in enacting section 1362, Congress acted against the background of the long line of authority which recognizes that the right of the United States to sue as trustee for

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44. Memorandum of the States of Arizona, California and Nevada, et al., *supra* note 11, at 4-5.

Indian tribes does not diminish the Indians' right to sue on their own behalf, *see Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365, 370 and cases cited at 370-374 (1968). It goes against this background to construe a provision enacted to provide Indian tribes with access to the federal courts through their own attorneys as conditioning this access. Such a construction is all the more strained in view of Congress' concomitant intent to permit tribal suits without regard to amount in controversy.[45] It is unlikely that Congress intended that every case, no matter the amount involved, await action by the United States before Indian tribes could take advantage of their expanded access. The language of the Judiciary Committee quoted above, then, appears to refer to the scope of the section and not its conditions.

There remains the question whether the congressional intent to provide Indian tribes with status as a litigant equal to that of the United States extends to waiving the States' immunity from suit and giving Indian tribes that status in suits against states. I conclude that it does.

Congressional abrogation of the States' Eleventh Amendment immunity depends on Congressional intent: "exercise of such power [will] not be presumed without clear evidence of congressional purpose." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 135 (1978). *See, e.g., Hutto v. Finney*, 437 U.S. 678, 698 n.31 (1978); *Employees v. Missouri Department of Public Health*, 411 U.S. 279, 283-85 (1973). Section 1362 itself does not expressly waive the States' immunity, and the legislative history does not directly address the issue. The conclusion that section 1362 abrogates the States' immunity flows logically from that much of the congres-

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45. *See* H.R. REP. No. 2040, *supra*, at 1-2, 1966 U.S. CODE CONG. & AD. NEWS at 3146-47.

sional intent as is clear, however. The House Judiciary Report refers to litigation which the United States may initiate as trustee for Indian tribes as "involving issues *identical* to those which will be presented in cases brought under the new section," and refers to the section as "the means whereby the tribes are *assured* of the same judicial determination . . ." as in cases brought by the United States as trustee. H.R.REP. No. 2040, *supra* at 2-3, 1966 U.S. CODE CONG. & AD. NEWS at 3147 (emphasis added). Nevertheless, intent to abrogate the Eleventh Amendment may be more easily inferred with respect to suits by Indian tribes than suits by individuals. Indian tribes historically have had a unique legal status and a "special relationship" with the United States which permits preferences granted to no other group. *See Morton v. Mancari,* 417 U.S. 535, 552-55 (1974); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 14-16 (1831). These factors in turn underlie a canon of construction which resolves the interpretation of federal statutes dealing with Indians in favor of the Indians. *See McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 174-75 (1973); *Menominee Tribe v. United States,* 391 U.S. 404, 412-13 (1968). Indian tribes also occupy a sovereign status comparable to that of the States, *Puyallup Tribe v. Washington Game Department,* 433 U.S. 165, 172-75 (1977); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 16-17 (1831), and which exists in partial contraposition to that of the States, *Puyallup Tribe, supra,* 433 U.S. at 172; *McClanahan, supra,* 411 U.S. at 168-73; *Williams v. Lee,* 358 U.S. 217, 218-23 (1959). The surrender of sovereignty imposed on the States by permitting suits by Indian tribes is thus less than by permitting individual suits. In general, the requirement of a clear congressional abrogation of the States' Eleventh Amendment immu-

nity insures that Congress has intended to impose on the States the burdens which result. *See Hutto, supra* 437 U.S. at 697 n.27. By comparison to suits by individuals, the impact authorizing suits by Indian tribes would have on the States, fiscal or otherwise, is slight. For these reasons, I conclude that Congress intended section 1362 to permit suits against the States by Indian tribes.

The contention that section 1362 authorizes such suits only when they originate in the federal district courts is disposed of by *Arizona v. California,* 439 U.S. 419 (1979). Rather than construe section 1362 as withdrawing the Supreme Court's original jurisdiction over cases in which a state is a party, I interpret the section as confining federal question claims by Indian tribes to the federal courts, but not to the federal district courts in particular. *See id.* at 436-37; *see also* H.R. REP. NO. 2040, *supra* at 2-3, 1966 U.S. CODE CONG. & AD. NEWS at 1347.[46]

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46. The Two Tribes argue that the Colorado River Compact and the Boulder Canyon Project Act, 43 U.S.C. §§ 617 *et seq.*, also amount to a waiver of the States' immunity, because the Compact and the Act contemplate pervasive federal regulation of the Colorado River system, and because both were approved by the United States as well as the States involved in this litigation. Section 13 of the Act, 43 U.S.C. § 617 *l*(d) provides:

> The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and users of water therein and thereunder, by way of suit, defense, or otherwise, *in any litigation respecting the waters of the Colorado River or its tributaries* (emphasis added).

Neither entry by a state into an interstate compact nor into an area of plenary federal regulation by itself amounts to a waiver by either Con-

II. Final Determination of Reservation Boundaries

A

The 1964 decree in paragraph II(D)(4) provided for the allocation of water for the benefit of the Colorado River Indian Reservation. Similarly, paragraph (5) provided for the allocation for the Fort Mojave Indian Reservation. The last clause of paragraph (5) contained the following language:

> [P]rovided that the quantities fixed in this paragraph and paragraph (4) shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

The 1979 degree specified that the latter provision is unaffected by the Court's determination of present perfected rights. 439 U.S. 419, 421. In addition, the January decree contained the following language similar to paragraph II(D)(5):

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gress or the state of Eleventh Amendment immunity. *See Parden v. Terminal Railway*, 377 U.S. 184, 192 (1964); *cf. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979)(some bistate agencies created by interstate compact have Eleventh Amendment immunity). The crucial question remains whether Congress or the States have intentionally waived that immunity.

Analysis of section 13(d) of the Boulder Canyon Project Act in light of the other provisions of section 13 indicates that the reference in the former to "any litigation respecting the waters of the Colorado River . . .," does not contemplate wide-open litigation involving all the parties mentioned, thus contemplating the possibility of suits by users of Colorado River water against the States mentioned. The purpose of section 13(d) is to give the States and state users of water the benefit of covenants which in the preceding subsections incorporate by reference the Colorado River Compact and are created between the United States and its privies. Without section 13(d), the covenants incorporating the Compact would be available only to the latter.

> the quantities fixed in paragraphs (1) through (5) of Art. II(D) of [the 1964] Decree shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

Now, not only the Fort Mojave and Colorado River, but the other three Tribes as well, and the United States on behalf of all of them, seek an adjustment providing additional present perfected rights. They contend that boundary line changes since 1964 have increased the practicably irrigable acreage of their reservations. The Tribes and the United States rely on the present boundaries as fixed by orders of the Secretary of the Interior, certain court decisions and an act of Congress as satisfying the condition "in the event that the boundaries of the respective reservations are finally determined."

All the parties agree that the Court should now determine any additional present perfected rights. Although the 1964 decree acknowledged and expressly provided for boundary disputes only with respect to the Fort Mojave and Colorado River Indian Reservations, the additional proviso of the 1979 decree, issued after the Court was apprised of boundary disputes concerning the reservation, indicates that the amounts determined for all five reservations "shall continue" to be subject to adjustment. Thus, adjustments for boundary determinations affecting any of the reservations were explicitly provided for in the 1979 decree and impliedly contemplated in the 1964 decree "in the event that the boundaries of the respective reservations are finally determined."[47]

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47. In any event, Article IX, even most narrowly construed, would recognize the propriety of entertaining claims as to the Chemehuevi, Fort Yuma, and Cocopah Reservations paralleling those that can be raised as

The State parties concede that when the boundary lines have been finally determined, the Court should allot the water rights in proportion to the practicably irrigable acreage of additional boundary lands, and urge that the Court should now consider such an allotment.[48] They contend, however, that the boundaries have not been finally determined and that I should make a de novo determination of the boundaries for recommendation to the Court. The issue, then, is whether the Secretarial orders, court judgments, and Act of Congress relied on by the Tribes and the United States, are the sort of final determinations contemplated by the Court's decrees.

B

The parties are not in disagreement over the land areas involved in the boundary determinations at issue. They are here outlined as presented by the motion of the United States, and not disputed by the State parties,[49] or by the Indian Tribes.

(1) *Fort Mojave Reservation.*

Two boundary adjustments affect this reservation: (1) the restoration of that portion of the so-called Hay and Wood Reserve west of the Blout survey of 1928; and (2) the adjudication of a tract formerly claimed by the LaFollettes as properly part of the reservation.

(a) *The Hay and Wood Reserve.*

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to the Fort Mojave and Colorado River Reservations under Article II(D)(5). *See Wisconsin v. Illinois,* 388 U.S. 426 (1967), *modifying* 281 U.S. 696 (1939); *New Jersey v. New York,* 345 U.S. 369 (1953), modifying 283 U.S. 805 (1931). *Cf. Winters v. United States,* 207 U.S. 564 (1908).

48. Motion of the United States for Modification of Decree and Supporting Memorandum 17-23 (filed December 22, 1978).

49. Response of the States of Arizona, California, and Nevada, and Other California Defendants to the Motion of the United States for Modification of Decree 20-25 (filed February 14, 1979).

The Hay and Wood Reserve—once attached to the Camp Mojave Military Reservation for supplies of hay and wood and transferred with the camp 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 described as containing some 9,000 acres,[50] 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. The Special Master made findings and conclusions of law accepting the Blout survey as determinative but the Court disapproved the Special Master's effort to determine disputed reservation boundaries, 373 U.S. at 601, and the question remained open. On June 3, 1974, the Secretary of the Interior, acting on the advice of the Solicitor of Interior reversing prior Solicitors, issued an order annulling the 1928 survey and restoring the former boundary for the Hay and Wood Reserve a little more than a mile westward. A new plat was prepared reflecting the order; it was protested by alleged patentees of land in the disputed area; these objections were overruled and the final plat was approved and filed on November 6, 1978. This plat added to the reservation some 3,500 acres not treated as part of the Fort Mojave Reservation when the water allocations were decreed in 1964. The United States alleges that this tract contains approximately 2,500 practicably irrigable acres; the Tribes allege 3,580 such acres, of which 1500 are presently being irrigated.

(b) *The LaFollette Tract.*

This tract is on the west side of the Fort Mojave Reservation, south of the Hay and Wood Reserve.

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50. The Special Master's Report of 1963 found it contained 9,114.81 acres, more or less.

Here the Tribe obtained a stipulated judgment in its favor against the assignees of a railroad patent grant, which had the effect of adding most of a section to the Reservation.[51] The United States estimates that the tract in question places an additional 500 irrigable acres within the adjusted reservation boundary.

(2) *Chemehuevi Reservation.*

The boundary change at this reservation adds some 2,430 acres along Lake Havasu. These were restored to the Chemehuevi Reservation by Secretarial Order of August 5, 1974, the result of a determination that part of the land taken from the reservation for the construction of Parker Dam was not needed. Although most of this land cannot be irrigated, both the government and the Tribe assert that some 150 practicably irrigable acres are included.

(3) *Colorado River Reservation.*

There are two boundary adjustments affecting this reservation. The first is the so-called "Benson Line" area, the other along the northwest boundary.

(a) *The Benson Line.*

At the time of the original hearings before the Special Master, doubt existed whether the central western boundary was the fluctuating channel of the Colorado River, or, a line meandered by W.F. Benson in 1879, now on the California side of the river. The Special Master undertook to resolve the question also, but the Court disapproved his attempt to fix the boundary, and the matter was left open. Subsequently, on January 17, 1969, the Secretary of the Interior formally adopted the Benson Line as the western boundary of the reservation along the entire segment covered by the Benson survey. The United States subsequently obtained final judgments in title disputes with private

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51. *Fort Mojave Tribe v. LaFollette,* Civ. No. 69-324MR (D.Ariz., February 7, 1977).

parties in the United States District Court for the Central District of California,[52] partially stipulated, quieting its title as trustee for the Tribes to separate parcels within this additional area. This Secretarial Order added some 4,439 acres to the reservation, of which approximately 3,010 the United States claims are practicably irrigable. The Colorado River Indian Tribe claims that 2,710 of these acres are irrigable.

(b) *The Northwest Boundary.*

During the investigation of the Benson Line problem, the Secretary discovered what he considered to be another surveying error. As a result of this discovery, the Secretary approved a corrected plat on December 18, 1978. This new plat moved one end of the northwest boundary to a point westward and added approximately 450 acres to the reservation from public lands of the United States. The United States claims 100 of these are practicably irrigable.

(4) *Fort Yuma Reservation.*

By order of December 20, 1978, the Secretary of the Interior resolved a long-standing dispute and determined that the original boundaries of this reservation as established in 1884 are the true boundaries. At the time of the original proceedings in this case, the boundaries were considered to contain only the area alloted by trust patents to members of the Tribe. This change added some 12,00 acres to the reservation. The United States claims 5,500 acres of irrigable lands within this added area.

(5) *Cocopah Reservation.*

The boundary of the West Cocopah Reservation has been adjusted by two occurrences since the 1964 court decree: (1) an area of accretion to the west of the old boundary; and (2) a tract added by an act of Congress to the south of the accreted lands.

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52. The opinions are unpublished.

(a) Substantial lands accreted to the western side of the reservation because of the gradual western movement of the Colorado River. The government relies on a final judgment entered May 12, 1975, for its claim that 883.53 acres have thus been added to the Reservation.[53] The United States and the Cocopah contend 780 acres of this are practicably irrigable.

(b) By Act of June 24, 1974, 88 Stat. 266, Congress extended the boundaries of the West Cocopah Reservation by adding a strip immediately below the accretions. This addition comprises 357.46 acres, of which approximately 332 are claimed by the United States to be practicably irrigable.

There is no dispute as to the total number of acres of land that would be added to the several reservations if the boundaries, outlined above, are accepted as finally determined for the purposes of the motion to adjust the Court's decree.

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I conclude that the determinations that have been made with respect to the stated boundary changes may be accepted as final for the purpose of considering additional allocations of water rights to the reservations. The conclusion is limited to that specific purpose. I make no findings with respect to titles to the land involved, either as to private claimants or as to any other contestant over the correctness of the boundary lines. Nor do I consider that the acts of the Secretary or of the courts in private litigation are res judicata of the boundaries as to present litigants who were not parties to such proceedings. I consider only whether the acts of the Secretary, and the acts of the courts in

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53. *Cocopah Tribe v. Morton*, No. Civ-70-573-PHX-WEC (D.Ariz. May 12, 1975).

private litigation accepted by the Secretary fall within the sphere of finality to permit the parties to act on them until some interested party succeeds by a plenary action in vacating or setting aside such determinations. For present purposes, I believe that these acts provide the sort of finality contemplated by the Court when it left the boundary dispute concerning the reservations for later determination.

At the outset, it is important to bear in mind the role which the boundary determinations play in this case. This is a water rights case, not a land case. The acreage of the reservations is an issue because practicably irrigable acreage is made the measure of the reservations' water rights. In *Winters v. United States,* 207 U.S. 564 (1908), the Court established that the United States, when it creates an Indian reservation, impliedly reserves water for needs of the reservation, and that water rights established subsequent to those of the reservation give way to that of the reservation as its needs expand. The Court applied the *Winters* doctrine in its original opinion in this case, holding that at the time it created the five reservations at issue here, the United States reserved enough water "to satisfy the future as well as the present needs of the Indian Reservations." 373 U.S. at 600. The Court concluded, agreeing with the Special Master, "that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.* at 601. The Master's choice of irrigable acreage as a measure was based on the conclusion that it provided an estimate of the amount eventually needed to make the otherwise arid lands productive. The Indians' actual use of the water remains unrestricted. Practicably irrigable acreage, then, is a rough measuring stick, a tool toward an informed equitable estimate of the Indians' needs. To measure this device, in turn, it is nec-

essary to know the extent of the reservations, and to measure the latter, the boundaries. The boundaries are a reference point for an issue itself secondary to central concern of this case, water rights.

The model of the previous treatment of the boundary determinations by the Court itself much weakens the contention of the State parties. They say that I should now receive de novo evidence of the correct boundary lines and the claims of private individuals for a recommendation to the Court so that it would make a determination of the correct boundaries in this litigation. In the original litigation of this case, the Special Master received evidence touching on the boundaries of two of the reservations drawn in question before him. Upon its later adoption of most of his report, the Court disapproved of his attempt to adjudicate the boundary lines. The Court said:

> 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, then the dispute can be settled at that time.

373 U.S. at 601. Rather than resolve the boundary dispute then and there, the Court provided for an adjustment in water rights "in the event that the boundaries . . . are finally determined." 376 U.S. at 345. Except for the boundary disputes mentioned in the Court's opinion, all parties in the original litigation were dealing with boundaries set either by acts of Congress or by executive order. Whatever challenge might have been raised to these, no State party contested the right of the Court to accept as final and binding *for the pur-*

pose of that litigation such established boundaries. These all were deemed to be final for the purpose of the water allotments then presented to the Court.

The treatment of the boundary disputes suggests an intention similarly to adopt by reference determinations of the disputed boundaries. That it was "unnecessary" to determine those disputes "here" indicates that it was adequate to do so elsewhere. And rather than making some specific provision for the determination of the boundary disputes, *cf. Oklahoma v. Texas,* 256 U.S. 602, 605 (1921), the Court merely left its decree open to adjustment "in the event" the disputes were resolved. This conditional language belies any intent to settle the disputes. The language the Court used with respect to a potential dispute, while it concedes the possibility that the Court might be required to settle title disputes, seems clearly to indicate that any disputes with respect to secretarial action would be instituted by a party which was refused water, in other words, a party claiming title to the land, not one seeking a collateral determination of title.[54]

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54. This reference to the Secretary's "refusal" to deliver water to the disputed areas appears to have contemplated that the Secretary would have discretion to determine whether water should be delivered to the disputed lands. Such discretion is inconsistent with the ultimate decree, which based rights for the reservations based on irrigable acres without involving the disputed lands and enjoined the Secretary from delivering water except in accordance with these provisions. Instead the decree provided for an adjustment by agreement or decree.

While awarding the Secretary discretion to deliver additional water to the dipsuted areas would affirm the conclusion that boundary determinations by the Secretary should be accepted as final, limiting that discretion to instances where there is agreement among the parties does not affect the conclusion that the Court preferred that the boundaries of the reservations be settled elsewhere.

It is evident that the Court, in the sparing exercise of its original jurisdiction, contemplated that the boundaries of the reservations would be

Secretarial orders and judicial adjudications of title are appropriate determinations for adoption by reference in this litigation as a measuring stick for determining additional irrigable acreage. In large part, we are concerned with actions by the Secretary of Interior[55] concerning lines surveyed between the public lands of the United States and Indian reservations whose concern is a matter of the highest priority to the United States. The United States, in the exercise of its plenary power to regulate Indian affairs,[56] may establish Indian reservations by executive order. *Arizona v. California,* 373 U.S. 546, 598 (1963).[57] In the administration of public lands, the United States may survey, resurvey, and adjust its surveys. *Borax Consolidated, Ltd. v. Los Angeles,* 296 U.S. 10, 16-17 (1935); *Cragin v. Powell,* 128 U.S. 691, 698-700 (1888). Where such adjustment and resurveys affect private rights, they may be challenged and corrected by court action to quiet title. *United States v. State Investment Co.,* 264 U.S. 206, 212 (1924). These are precisely the sorts of determinations and proceedings which have occurred in this case.

Neither the power of the Secretary or of the courts to make boundary determinations nor the Court's intent to have these determinations made by such decisionmakers, if possible, is diminished by the State parties' contention that they did not have their "day in

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determined elsewhere, and such determinations relied on for the purposes of allocating water rights.

55. No contention is raised that the Act of Congress, 88 Stat. 266, extending the boundary of the Cocopah reservation, is subject to redetermination.

56. *See, e.g., McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 168-69 (1973); *United States v. Kagama,* 118 U.S. 375, 381-82 (1886).

57. In *Arizona v. California,* the Court counted the creation of the Chemehuevi reservation by the Secretary of the Interior as the creation of a reservation by Executive Order. 373 U.S. at 596 n.100.

court" before these decisionmakers. I am aware of no claim to land in any of the disputed areas by any of the State parties. Their interest lies only to the extent that if some other party—or they themselves as aggrieved persons or intervenors in proceedings elsewhere now pending or commenced—should successfully contest the boundaries as now fixed by Secretarial Order, the allotments of water now sought on behalf of the Tribes would be reduced. This concern can be met by the inclusion in the final decree of the Court of a provision that would reduce the allotment now sought on behalf of the Tribes *pro tanto* for lands found to be practicably irrigable which subsequent litigation determined not to be within the boundaries of the respective reservations. This is the same procedure which the Court adopted to provide for land adjacent to the Fort Yuma Reservation and determined to have been conveyed to California and to the Southern Pacific Railroad. *See* 376 U.S. at 345.

In sum, I agree with the position put forward by the United States:

> It would be wholly arbitrary to consider the Reservation boundaries as they were understood in 1964 to be sufficiently "determined" to support a specific water allocation calculated on acreage—albeit no court judgment has ever vindicated the survey—but to deny comparable affect [sic] to subsequent dependent surveys of the boundaries because no court had approved them.

Motion of the United States, *supra* note 48, at 137-41. I also agree with the State parties that adjustments in tribal water rights should be considered now rather than await piecemeal litigation, so that some stability and predictability in the allocation of water rights can

be reached. *See* Response of the States, *supra* note 49, at 20-21.

Subject, therefore, to a proviso which would reduce the allocations which I eventually recommend on account of the enlarged boundaries on the basis of any valid court decisions withdrawing any lands from the reservations as now defined, I shall accept the boundary changes set forth in the motion by the United States filed on December 22, 1978 as having been finally determined within the meaning of the Court's 1964 decree and supplement.

III. Omitted Lands.

As I have already noted above, I shall permit the introduction of evidence by the United States and the Tribes as to any lands which they contend were omitted from the practicably irrigable lands within the 1964 boundaries. I shall thereafter decide whether and to what extent it is appropriate for me to consider such claims.

Respectfully submitted,

Elbert P. Tuttle
Special Master

Atlanta, Georgia
August 28, 1979

Elbert P. Tuttle