IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 8 Original

STATE OF ARIZONA, Complainant,

v.

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

UNITED STATES OF AMERICA AND STATE OF NEVADA, Interveners,

STATE OF UTAH AND STATE OF NEW MEXICO, Impleaded Defendants.

**MOTIONS BY NAVAJO INDIAN TRIBE FOR RECONSIDERATION OF ITS MOTION FOR LEAVE TO INTERVENE AND FOR ORDER TO UNITED STATES TO SHOW CAUSE WHY IT SHOULD NOT BE ORDERED TO ACCOUNT TO THE COURT AS TO THE ADEQUACY OF ITS REPRESENTATION OF NAVAJO INTERESTS; BRIEF IN SUPPORT OF MOTIONS.**

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COMES NOW the Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, and respectfully moves this Court for a reconsideration of its Motion for Leave to Intervene and for an order to the United States to show cause why it should not be ordered to account to this Court as to the adequacy of its repre-

sentation of the Navajo Indian Tribe in this litigation, and as reason therefor states the following:

I.

That after the Navajo Indian Tribe filed its Motion for Leave to Intervene and its supporting brief, responses in opposition to the motion were received by the Court from Arizona, California and the United States. These responses set forth two defenses to the motion which raised important legal issues not previously discussed in the Navajo Brief. These defenses pertained (1) to the states' alleged immunity from suit in an original jurisdiction action and (2) to the alleged exclusive control over the litigation by the United States so far as indian interests are concerned. After receiving these responses, but before a Navajo Reply Brief could be prepared, the Court denied the motion. The denial may have been founded upon the defenses so asserted. We respectfully submit that it is imperative that the Court reconsider the Motion for Leave to Intervene in light of the strong legal arguments which may be raised, and which are in fact raised in the brief which follows here, against the said defenses, which defenses are not valid as a bar to the proposed Navajo intervention.

II.

That the Navajo Indian Tribe set forth in its initial brief a detailed analysis of the inadequate representation given to its interests by the United States in this litigation. Nothing said in the responding brief filed by the United States effectively explains or mitigates the said inadequacy of representation. Such arguments as were asserted by the United States are answered in the brief

which follows here. There remains a lack of proper explanation to the Court by the United States concerning the reasons and justification for its wilful neglect in this litigation of indian interests and in particular those of the Navajo Indian Tribe. If, as the United States contends, it is the guardian of said indian interests here, it is incumbent upon it as a fiduciary to give to the Court a full accounting of the actions it has taken and the policies it has followed pursuant to that alleged capacity.

WHEREFORE, the Navajo Indian Tribe respectfully moves the Court in accordance with the motions as above stated.

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**BRIEF OF THE NAVAJO INDIAN TRIBE IN SUPPORT OF ITS MOTIONS FOR RECONSIDERATION OF ITS MOTION FOR LEAVE TO INTERVENE AND FOR ORDER TO UNITED STATES TO SHOW CAUSE WHY IT SHOULD NOT BE ORDERED TO ACCOUNT TO THE COURT AS TO THE ADEQUACY OF ITS REPRESENTATION OF NAVAJO INTERESTS.**

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This brief will not repeat the arguments made in the earlier Navajo brief, but will rather discuss the two new issues raised by Arizona and the United States in their briefs as defenses to the Navajo intervention. These issues are: (1) The contention that the Navajos cannot intervene in this action because such intervention would constitute a violation of the immunity of the states, particularly of Arizona and California, from suit, as such

immunity is provided by the Eleventh Amendment to the United States Constitution; (2) The contention that the intervention cannot be allowed because it would derogate from the "exclusive" control of the United States over the litigation insofar as indian interests are concerned. In addition, this brief will attempt to place in proper perspective the United States reply to the Navajo contention that the United States has failed adequately to represent Navajo interests in this litigation.

## I. Navajo Intervention as Not Violating States' Immunity from Suit Without Their Consent.

The California defendants have made only a brief reference, on page 8 of their Response to the earlier Navajo brief, to "immunity from suit in the original jurisdiction of this Court by the Navajo Indian Tribe," but Arizona has stated the view most elaborately that the Navajo intervention, if granted, would violate the states' immunity from suit. (Pages 5 through 8, inclusive, of Arizona's brief in opposition to the original Navajo motion.)

A careful analysis of the several authorities cited by Arizona indicates that such support as they may offer for the Arizona contention is indeed very weak.

The United States Constitution grants original jurisdiction to this Court in instances in which suit is brought by one state against another or by the United States against a state. To the extent of this grant of jurisdiction, the state sued possesses no immunity. It is equally clear, however, particularly in light of the Eleventh Amendment to the Constitution, that the judicial power of the United

States does not extend to suits against one of the states by citizens of another or of a foreign state. In addition, it is axiomatic that a state cannot be sued in its own courts without its consent.

This doctrine of immunity was the major premise upon which Arizona relied. Its minor premise, stated on page 7 of its answering brief, was that "intervention by the Navajo Tribe in this litigation would constitute a suit against the State of Arizona." An additional implicit element in its support of its minor premise must necessarily have been that Arizona has not consented to the "suit" by the Navajo Tribe and has not waived its immunity as to the tribe.

Would the intervention in fact constitute a suit against Arizona or any other state involved in this action? In support of its affirmative view, Arizona quoted from Felix S. Cohen, Handbook of Federal Indian Law, page 372, where it is said that "consequently, an Indian tribe as such cannot sue, be sued, or intervene in any case where the original jurisdiction of the Supreme Court is invoked."

The Navajo Indian Tribe has already demonstrated its respect for Mr. Cohen in its earlier brief, where favorable reference was made to his Handbook. It is respectfully submitted, however, that the statement quoted above is of somewhat greater breadth than logic or supporting cases cited would justify. Clearly the Navajo Indian Tribe, or any other tribe, could not initiate an action against a state and thereby invoke the original jurisdiction of this Court. Indeed, even if a state were to sue the Indian tribe itself, that would not, standing alone, satisfy the constitutional prerequisites for original jurisdiction.

But this does not compel a conclusion that where one state has in fact created original jurisdiction by suing another in the Supreme Court, an indian tribe cannot intervene in such an action to protect its own vital interests which may be profoundly affected and prejudiced by the lawsuit. It is difficult to see how the Supreme Court would be ousted from its already existing jurisdiction by such an intervention, or in what manner the constitutional provision as to original jurisdiction limits the right to intervene. The statement quoted by Arizona states that an indian tribe may not intervene in such a case. The logic of the law does not demand or support such a conclusion.

Indeed, logic supports just the opposite conclusion. The Constitution provides for an action within the original jurisdiction of the Supreme Court. It is not lightly to be supposed that the Constitution itself contemplates an original jurisdiction proceeding conducted in a manner which would otherwise violate the Due Process Clause of the Fifth Amendment. This could easily result if it were held that an action within the original jurisdiction of the Court, once begun, could not involve parties other than states or the United States. Perhaps nothing could be more determinative of the property rights and future development of the indians of Arizona than the judgment of the Court in this case. To proceed and to bind the petitioner by the ultimate judgment without permitting participation in the suit would be to use the original jurisdiction of this Court to impair legal rights without proper legal process.

In analogous cases, it has sometimes been contended by a state, after beginning an action against a private party, that its sovereign immunity from suit creates a bar

against counterclaims by the defendant pertaining to the subject-matter of the suit. The West Virginia Supreme Court, in *State v. Ruthbell Coal Co.*, 56 S.E. 2d 549 (1949), forcefully answered this contention with the following language:

> "We think it would be unconscionable and contrary to the due process clauses contained in the Fourteenth Amendment to the Constitution of the United States, and Article III, Section 10, of the West Virginia Constitution, to permit the State, as a plaintiff, to bring a citizen into court for the purpose of asserting liability against such citizen, and then strip that citizen of all the procedural rights and defenses which he would have if the state had not been a party plaintiff. We, therefore, are of the opinion that the counterclaim set up in the amended special plea is not a suit against the state within the meaning of the . . . Constitution of this State . . . ."

The same unconscionable result violative of the principles of due process would result if it were to be held that a person vitally affected by an action within the original jurisdiction of the Supreme Court could not in any case intervene in the action because the person so affected is neither a state nor the United States. Instead, the Constitution is properly to be read as establishing the parties which are necessary to create jurisdiction for such a suit and as leaving other procedural matters, such as intervention, to be conducted according to ordinary and proper legal processes. The logic of the Constitution compels this conclusion.

The statement which Arizona has quoted to the con-

trary finds no support in the cases. In its footnote to the statement, the Handbook cites only *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351, 47 S. Ct. 142 (1926). The Yankton case, however, does not in any way pertain to the question of whether an indian tribe, or any other private party, can intervene in an original action in the Supreme Court. It merely states, by way of a dictum, that the United States could not invoke the original jurisdiction of the Supreme Court by a suit not involving a state, a proposition which the Navajo Indians readily admit. No question of intervention was present in the Yankton case, nor did the Court even discuss such an issue.

Arizona's brief does not itself supply the cases that are necessary to fill the void underlying its contention. It states that intervention would constitute a suit against Arizona, but then relies on several cases which merely affirm the doctrine that "the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding." In this connection, Arizona cites *Ex parte Ayers*, 123 U.S. 443, 8 S. Ct. 164 (1887); *Ex parte New York*, 256 U.S. 490, 41 S. Ct. 588 (1921); *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 58 S. Ct. 185 (1937); and *Ford Motor Co. v. Treasury Department*, 323 U.S. 459, 65 S. Ct. 347 (1945).

But *Ex parte Ayers, supra*, had nothing to do with intervention or with indian rights. The question was, rather, whether a suit against state officers would have in law constituted a suit against the state, an issue very much unlike that which we face here.

*Ex parte New York* centered around a similar issue

to that raised in *Ex parte Ayers,* the issue being whether a libel in admiralty against the Superintendent of Public Works in New York would constitute a suit against the State of New York. *Worcester County Trust Co. v. Riley,* involved an identical question as to a suit against the tax officers of two states. This is true, also, of *Ford Motor Co. v. Treasury Department.* All of the cases cited by Arizona to support its contention bear on a question which is not even analogous to that raised in the present instance, and none involve a statement, or even lend themselves to the inference, that intervention would constitute a "suit" for immunity purposes.

The issue of whether intervention is to be considered a "suit" under the sovereign immunity doctrine seems seldom to have been discussed by the authorities. Considerable discussion has been made, however, of a closely related type of problem, the question there being whether, after a state has itself begun a suit against a private party, the private party can counterclaim or cross-claim against the state as to matters involved in the subject-matter of the state's own suit. Would such a counterclaim or cross-complaint be a "suit" against the state and subject to sovereign immunity?

This question is analogous to the present one because in both the counterclaim and the intervention situations it is the state itself which has initiated the litigation, as has Arizona in the present instance, and placed before the court the rights of the respective parties for judicial determination. It is certainly to be conceded that even here a counterclaim, cross-complaint or intervention going beyond the subject-matter of the state's own suit might legitimately be considered a "suit" subject to immunity. But

where the private party seeks merely to assert rights integrally involved in the very matters raised by the state itself, can it be said to be within the contemplation of the historic immunity doctrine or of the Constitution to bar the making of such assertion? Surely a negative answer to this question is called for, either because the counterclaim, cross-complaint or intervention is not to be considered a "suit" in the technical language of the doctrine, or because the state is to be taken to have waived its immunity to this extent by its having started the action in the first place.

We have already quoted from *State v. Ruthbell Coal Co.*, 56 S.E. 2d 549 (W. Va. 1949), in which it is stated by the West Virginia Supreme Court that it would be "unconscionable" and "contrary to due process" to deny a counterclaim in such a case because of a misconceived notion of sovereign immunity. It is also important to note certain further language in that court's opinion which bears on the fact that the state, by initiating the action in the first place, has waived its immunity. The court stated: "This Court, however, has indicated that where, in the first instance, the State has instituted a suit or action against a citizen, *it thereby lays aside its sovereignty* and is subject to all procedural rules which govern any other party litigant." (Emphasis added)

The same view as to the inapplicability of sovereign immunity to counterclaims or cross-complaints germane to the matter in controversy is to be found in *State v. Hartford Accident & Indemnity Co.*, 136 Conn. 157, 70 A. 2d 109 (1949); *Reilly v. State*, 175 A. 582 (Conn. 1934); *Commonwealth of Massachusetts v. Davis*, 160 S.W. 2d 543 (Tex. Civ. App. 1942); *Anderson, Clayton & Co. v.*

*State,* 62 S.W. 2d 107 (Tex. Comm. App. 1933); and *State v. King,* 84 S.E. 902 (W. Va. 1915). The law has been succinctly stated in *State v. Hartford Accident & Indemnity Co., supra,* as follows:

> "If the state itself invokes the jurisdiction of the court to secure affirmative relief, it subjects itself to any proper cross-demand involved in the subject-matter of the action." 70 A. 2d at 110.

As to a state involved as a defendant in an action within the original jurisdiction of the Supreme Court, the concept of "waiver of immunity" present in the counterclaim cases does not apply. In regard to such states, rather, there is no proper immunity in an original jurisdiction case precisely because the Constitution, in providing for such a case, must be taken to contemplate that doctrines, even though applicable elsewhere, cannot carry over which would warp the litigation into an instrument of injustice by denying participation to persons whose interests have been brought up for judicial appraisal. Thus, even those states that are defendants in a case within the original jurisdiction of the Court cannot complain under sovereign immunity when legitimate parties seek to participate in the litigation.

It is the view of the Navajo Indian Tribe, therefore, that since the vitally significant issue of water rights in the Lower Basin of the Colorado River has been raised by Arizona and made subject by it to judicial determination in an action within the original jurisdiction of this Court, sovereign immunity does not bar the Navajo Indians from asserting their interests respecting those water rights which Arizona has thus placed in legal jeopardy.

## II. The United States as Not Having Such "Control" Over the Litigation as to Bar Intervention by the Navajo Indian Tribe if the Representation is Inadequate.

The briefs of both Arizona and the United States have argued that the Attorney General is vested with "exclusive control" in a case in which indian interests are represented and that, therefore, the Navajo Indians cannot derogate from this control by becoming a party to this action.

It would seem from an analysis of the cases and other authorities that this broad and pervasive doctrine of "exclusive control" is the "mighty oak" which has grown out of the proverbial "little acorn". The doctrine is attractive in its breadth and simplicity, and in its exclusive effect, to those who would prefer to hear the indian voice subordinated, but it is a doctrine which in the form set forth by Arizona and the United States is the product of an oversimplified extension of a much narrower doctrine.

Those who assert the "exclusive control" rule rely almost entirely upon *Heckman v. United States*, 224 U.S. 413, 32 S. Ct. 424 (1912) and the small complex of cases which have since applied its doctrine. Both Arizona and the United States have quoted sizable portions from the Heckman case.

Certainly there is no dispute as to the validity of the principles set forth in the Heckman case. The real question pertains to precisely what those principles are and how broadly they may be taken to exclude indian partici-

pation in suits of every kind, especially where the representation given the indians is shown, as here, to have been inadequate. The United States interprets the Heckman doctrine to mean that "when the United States has elected to prosecute or intervene in a suit in behalf of . . . an indian tribe, it is entitled to exercise complete and exclusive control over the litigation to the exclusion of the Indians themselves." (United States Response, page 9) A close reading of the decision, however, does not bear out so broad a generalization.

In the Heckman case the United States filed a bill in equity to cancel certain conveyances made by members of the Cherokee Nation. A statute had placed restrictions upon the alienability of indian lands. The argument was raised that the indians, whose conveyances were to be set aside, should have been made parties to the suit. The Court considered this position untenable. It considered that the United States was representing the very indian grantors whose conveyances it sought to cancel. It held that they "were precluded from taking any position in the legal proceedings instituted by the government to enforce the restrictions which would render the proceedings ineffectual or give support to the prohibited acts."

The Heckman case involves, then, an action under a protective statute the very purpose of which was to protect the indians from their own indiscretion so far as the alienation of lands was concerned. The suit was to overturn something the indians themselves had done and, in doing so, to protect them against themselves. Surely in such a case, under such a statute, the indians who had committed the indiscretion and whose conveyances were to be canceled could not have been given charge of the

litigation, since to give them such charge as parties or otherwise would have been to defeat the purposes of the statute. If the statute, being protective in its nature, declares them incompetent to alienate land in the first instance, it would seem strange to permit them to take over any litigation designed to assert their statutory incompetence.

After saying that in such a case the indians were "precluded from taking any position in the legal proceedings," the Supreme Court went on to say that "This is involved necessarily . . . *in the nature and purpose of the suit.*" (Emphasis added) It is to be thought, then, that the Heckman opinion did not intend to formulate a broad, spacious rule applying to all indian litigation, but intended to state a rule governing the type of protective-statute situation that was then before the Court. If the rule is to go beyond the circumstances of the Heckman case itself, the broadening should in any event be accomplished through a sophisticated extension and certainly not through an oversimplified blanket exclusion.

Arizona and the United States have together cited six cases applying the Heckman doctrine. (Arizona brief, page 10; U.S. Response, page 5) In terms of their facts, all of these cases lie within the area legitimately within the scope of the Heckman case. Although one of them arose under a statute providing for the quieting of title, the other cases all pertained either to leasing or other land alienation problems. The first case, *Connor v. Cornell*, 32 F. 2d 581 (8th Cir. 1929), involved, as in the Heckman case, a suit by the United States to set aside a warranty deed executed in violation of the inalienability of land provisions of the federal statute. The result in the

case was considered res judicata as to a later suit brought by the indian himself. This case was certainly within the limited area covered by the Heckman case. The next case was *Pueblo of Picuris v. Abeyta,* 50 F. 2d 12 (10th Cir. 1931), which arose under a statute giving the Attorney General the power to sue in behalf of the indians in quieting title to certain land. Here again, the case involved a specific statute of a protective nature pertaining to real property. *McGugin v. United States,* 109 F. 2d 94 (10th Cir. 1940) pertained to restrictions on the alienation of land by an indian and had to do with the recovery of certain United States bonds which had been transferred by the indian after having been purchased with the royalties from an oil and gas lease. *United States v. Adamic,* 54 F. Supp. 221 (D.C.W.D.N.Y. 1943) was a suit by the United States to have certain indian leases declared null and void. The next case to arise was *White v. Sinclair Prairie Oil Co.,* 139 F. 2d 103 (10th Cir. 1944). This case involved a suit by the United States on behalf of an indian to obtain an accounting for royalties under certain leases. The decision in the case brought by the United States was considered res judicata in a later suit brought by the indian. The most recent case cited by either Arizona or the United States is *Sadler v. Public National Bank & Trust Co. of New York,* 172 F. 2d 870 (10th Cir. 1949). The Sadler case involved an action for cancellation of an oil and gas lease.

Each of these cases, then, was closely analogous to the Heckman case in its factual situation. There can be seen in these cases no extension of the doctrine of "exclusive control of the litigation" beyond the area covered by protective statutes dealing with indian leasing, convey-

ancing and real property situations. A broader generalization dealing with litigation in other areas is certainly not justified on the basis of these cases.

As to the many other areas of litigation which might arise, two propositions seem clear. They are that (1) an indian tribe constitutes a sufficient legal entity to conduct litigation in its own behalf, and (2) the duty placed on the Department of Justice by federal statute to represent the indians in their litigation is solely for the purpose of securing them adequate representation and is not intended to be of such a mandatory nature as to preempt the indians from any participation in their litigation, particularly where the purpose of the statute providing for the representation is not satisfied because the indians are not being adequately represented.

The capacity of indian tribes to conduct litigation has been discussed in Cohen, Handbook of Federal Indian Law, pages 283-285. After referring to various statutes which themselves allow suits by or against indian tribes, Mr. Cohen stated the following as to the capacity of an indian tribe to sue in the absence of a statute:

> "Although a tribe, as a municipality, is not subject to suit without its consent, it may be argued that a tribe has legal capacity to consent to such a suit. The power to consent to such suit must be regarded as cognate with the power to bring suit.
>
> Some support for the view that an indian tribe is capable of appearing in litigation as a plaintiff or voluntary defendant is found in the statement of the Supreme Court in *United States v. Candelaria*:

'It was settled in *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, that under territorial laws enacted with Congressional sanction each pueblo in New Mexico — meaning the Indians comprising the community — became a juristic person and enabled to sue and defend in respect of its lands.'

This statement, standing by itself, could be given a limited scope on the grounds that the Pueblos are statutory corporations. The fact remains, however, that the Supreme Court has entertained suits in which Indian tribes were parties litigant, without any question of legal capacity being raised. An outstanding case in point is the case of *Cherokee Nation v. Hitchcock*. This was a suit brought by an Indian tribe against the Secretary of the Interior. Although judgment was rendered for the defendant, no question was raised, apparently, as to the capacity of the principal plaintiff (individual members were joined as parties plaintiff) to bring the suit.''

The capacity of an indian tribe to sue is readily inferable from the principles stated by this Court in *United Mine Workers of America v. Coronado Coal Co.*, 259 U.S. 344 (1922), in which the Court held that labor unions constitute such an entity as may be sued in view of the legislative recognition given to them as subjects of rights and duties. As with labor unions, indian tribes have extensively been made subject to legal rights and duties. Both upon the logic set forth in the quotation above and upon the doctrine of the Coronado case, then, it would seem clear that an indian tribe constitutes such a legal entity as may sue in its own name. This conclusion finds further support in *Makah Indian Tribe v. McCauly*, 39 F.

Supp. 75 (D.C.N.D. 1941), where an indian tribe was the plaintiff and the court stated that "They may . . . institute and prosecute an action to enforce their rights under the Constitution, laws and treaties of the United States." In *United States v. United States Fidelity & Guaranty Company,* 106 F. 2d 804 (10th Cir. 1939) the court referred to an indian tribe as a "sovereign" and expressed the view that indian tribes are themselves immune from civil suit except where they consent. Certainly the doctrine of "sovereign immunity" would not need to be extended to indian tribes if they were not legal entities capable of being sued.

An argument that an indian tribe lacked capacity to sue would be difficult to sustain. Indeed, the parties to this litigation, in their responses, have not contended that the intervention should be denied on the ground of such a lack of capacity.

It has been important to stress the legal capacity of an indian tribe to conduct litigation, because it would seem most reasonable to suppose that this capacity is the general rule, except where limitations have been placed upon it in an area such as that covered by the Heckman doctrine, which itself actually springs from a statutory limitation. There is nothing upon which a general inhibition of the indian right to protect itself in the courts can be founded, unless such an inhibition is to be found in federal statutes or treaties.

In this connection, see *Siniscal v. United States,* 208 F. 2d 406 (9th Cir. 1953). The Ninth Circuit Court of Appeals referred to the statutory provisions appearing at 25 U.S.C.A. §175, which provides that "In all states

and territories where there are reservations or allotted indians the United States District Attorney shall represent them in all suits at law and in equity." The court stated:

> "*We think* 25 *U.S.C.A.*, §175, *is not mandatory and that its purpose is no more than to insure the indians adequate representation in suits to which they might be parties.*" (Emphasis added)

This language indicates strongly that the statute does not establish an invariable rule requiring Justice Department representation, and that the representation, even where given, is for the purpose of insuring adequate representation. Further, with reference to the indian appellants, the court stated that "They are sued as persons acting individually and not with reference to any right in which the United States or any officer thereof is in the position of trustee or guardian. They were ably represented by counsel. It is not a situation requiring for them a guardian ad litem." We find in this statement a recognition of the distinction between an ordinary situation and a protective, guardian type of circumstance, such as was present in the Heckman case and other inalienability of land cases.

If, then, the general rule is one of indian capacity to sue and the representation by the Justice Department, except in peculiarly protective situations defined by statute, is not mandatory and is only to insure adequate representation, it is reasonable to conclude that in the general situation Rule 24(a) of the Federal Rules of Civil Procedure would apply. This rule pertains to "intervention as of right" in cases where "the representation of the

applicant's interest by existing parties is or may be inadequate . . . ."

Justice Department representation having been provided solely for the purpose of securing adequate representation to the indians, intervention by an indian tribe in its own right would be proper where it is shown that the representation given has in fact been extremely inadequate. If the statute providing for Justice Department representation were construed to exclude intervention in such a case, such a construction would militate against the very purpose of the statute itself. It would, in addition, make the representation mandatory so far as the indians are concerned, something which the Ninth Circuit Court of Appeals has said the statute does not do.

By an oversimplified extension of a doctrine of exclusion which is actually proper only in the area in which it was intended, the briefs of Arizona and the United States have argued that the Navajo Indian Tribe must as a matter of law be denied intervention. The result would be a paternalism which, like so may paternalisms where unduly extended beyond the needs or natural relations of the parties, would cease to be truly paternalistic and would be no more than an excuse for restrictive limitation and oppression.

The intervention is lawful precisely because the "paternalism" does not extend so far.

## III. Response to the Argument that the Navajo Motion is Untimely and that the United States Representation Has Been Adequate.

The Navajo Indian Tribe reviewed the question of timeliness extensively in its original brief precisely because it anticipated that a contention as to its untimeliness would be raised. The earlier Navajo brief set out at length the past efforts of the Navajo Indian Tribe to secure adequate representation. (See Brief in support of original Navajo motion, pp. 18 to 25.) It was to be expected that those who sought to minimize the ultimate legal recognition of indian water rights in the Colorado River would oppose the motion for intervention and would seek to disparge the past efforts of the Navajo Tribe to be heard in this case. We doubt whether a continued and protracted discourse among the parties as to letters written, telephone calls made, and the like, will be of significant assistance to the Court beyond what has been said by the parties thusfar. Such a discourse could only serve to obscure the larger issues in a mass of minutia.

Therefore the Navajo Indian Tribe wishes merely to reiterate that those who allege untimeliness must implicitly assume that the inadequacy of the United States representation was sufficiently manifest at an earlier stage in the proceeding as to render necessary the raising of the serious charge of inadequate representation by an earlier motion to intervene. But such a charge cannot lightly be made, and so long as it appeared that the representation might prove to be satisfactory, the Navajo Indian Tribe could not have thought it wise to seek intervention. Its dissatisfaction at one earlier point caused it, together with other indian tribes, to apply to the Special Master for the

appointment of special counsel to represent indian interests, but when this was denied by the Special Master it was to be hoped that the dissatisfaction theretofore manifested by the several indian tribes would provide an incentive to the Department of Justice to press with greater vigor the legal position of the indians. Whatever may have been the conduct of the Department of Justice in the past, it was not to be assumed that after the Special Master's decision it would turn a deaf ear to the remonstrances theretofore made. The full inadequacy of the representation given did not and could not, as has been pointed out in the original Navajo brief, become apparent until after the exceptions to the Special Master's report were filed by the United States.

When those exceptions were filed, it became apparent that the United States had, in the five significant areas referred to in the earlier Navajo brief, taken so accomodating and "reasonable" a position as to fail to represent Navajo interests at all. In its response to the Navajo brief, the United States has argued that the positions it has taken have been "reasonable". They have not been reasonable. They have been worse than neglectful, passive and supine; they have affirmatively downgraded and depressed the position of the client which the Department of Justice is supposed to defend by deleting from the original petition for intervention by the United States the basic allegation based upon the doctrine of *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207 (1908), although this allegation or its equivalent had for many years been included in every pleading filed by the Department of Justice in which it acted for indian interests where indian water rights were involved.

Advocacy and an impotent "reasonableness" are not to be confused. A good advocate must, of course, assume a reasonable position, but it must also be a virile position, fully asserting the rights of those whom he presumes to represent. It is submitted that from such a perspective the representation given the Navajo Indian Tribe has been grossly inadequate. It is strained indeed to suggest that the Navajo Indian Tribe is somehow at fault for not having realized this before the exceptions to the Special Master's report were filed.

## IV. Reconsideration of Earlier Motion is Justified by Presence of Issues Not Previously Briefed; Order to Show Cause is Both Desirable and Legally Appropriate.

The courts have often stated that a motion may be reconsidered, or re-argued, where there are decisions or principles of law which the court has not considered and which might exercise a controlling effect. *Fawcett Publications, Inc. v. New World Club, Inc.*, 72 N.Y.S. 2d 768 (1947); *People v. Dellamura*, 28 N.Y.S. 2d 584 (1941); *In re Hooker's Estate*, 18 N.Y.S. 2d 107, 173 Misc. 515 (1940); *J. I. Case Company v. McDonald*, 76 Idaho 223, 280 P. 2d 1070, 1073 (1955). In the present instance, at the time it decided the original Navajo Motion for Leave to Intervene, the Court had not yet had opportunity to consider the authorities and legal principles set out above in this brief pertaining to the two new issues raised by the brief of Arizona and the United States. Only through the consideration, and consequent legal recognition, of these principles may a correct decision be made upon the motion.

The motion for the order to show cause is both desirable and legally appropriate. It has often been stated by this Court that the indians are wards of the United States and that the United States has a duty to them as a guardian. *Seminole Nation v. United States,* 316 U.S. 286; *United States v. Klamath & Moadoc Tribes,* 304 U.S. 119; *United States v. Ramsey,* 271 U.S. 467; *Jaybird Mining Co. v. Weir,* 271 U.S. 609; *United States v. Minnesota,* 270 U.S. 181; *Cramer v. United States,* 261 U.S. 219; *Barker v. Harvey,* 181 U.S. 481.

That a court of equity has inherent power to obtain from a fiduciary, such as a guardian, an accounting of the action taken under the fiduciary relation has often been stated by the courts. "Courts of equity have inherent jurisdiction to require accountings and settlement by guardians. (21 Cyc. 155) . . . ." *Schindler v. Spackman,* 16 F. 2d 45, 48 (8th Cir. 1926). See also *In re Deming's Guardianship,* 192 Wash. 190, 73 P. 2d 764 (1937); *Haudenschilt v. Haudenschilt,* 129 W. Va. 92, 39 S.E. 2d 328 (1946).

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