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

MOTION ON BEHALF OF NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA, NEW MEXICO AND UTAH, FOR LEAVE TO INTERVENE, BRIEF IN SUPPORT THEREOF, AND PETITION OF INTERVENTION.

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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 leave to intervene in the above-entitled cause and for leave to file a petition of intervention therein, and as reason therefor states the following:

I.

That the Navajo Indian Reservation is located within the northeast corner of Arizona, the northwest corner of

New Mexico and the southeast corner of Utah. The Reservation is in part located within the drainage basin of the Colorado River and of the Little Colorado River, a tributary of the Colorado River.

The Little Colorado River flows into the Colorado River at a point between Lake Mead and Lee Ferry. It is, therefore, a Lower Basin tributary which feeds into the Colorado River above Lake Mead.

II.

That the Navajo Indians, as a consequence of their aboriginal rights and of the establishment of their Reservation as above described, are entitled to substantial rights in and to the water of the Colorado River and the Little Colorado River, which rights are in perpetuity and are vital to the present and future well-being of the Navajo Indians.

III.

That this action was first begun in 1952 upon motion of the State of Arizona. Since that time, pleadings have been filed by the several parties and Statements of Position made. The Special Master, to whom the case was referred, has made his report. During the development of the case, there has been much dispute concerning the breadth of the controversy. The Special Master has, in his report, declined to make any apportionment of waters in the Lower Basin above Lake Mead. The Special Master states, however, at page 322 of his Report, that "The States of Nevada, New Mexico and Utah have asked for a decree confirming present uses and reserving water for

future requirements on various interstate tributaries of the Colorado River flowing within their borders . . . New Mexico asserts rights in the Little Colorado and Gila System; . . . ." In addition, California objects to the consideration solely of waters in and below Lake Mead, and would have the other waters of the Lower Basin taken into account in applying principles of equitable apportionment. The United States, for its part, argues that the uses above Lake Mead ought to be deductible in making allocations of waters from Lake Mead. In light of these various contentions concerning Colorado River and tributary waters above Lake Mead, it is altogether possible that there will be in this action an adjudication of the rights of the respective parties to water in the Colorado River above Lake Mead and in the Little Colorado River and that the interests of the Navajo Indian Tribe will thereby be affected. The Navajo Indian Tribe is now represented by the United States, inadequately however as hereinafter set forth, and will be bound by any decree that apportions the said waters, if such a decree is entered.

IV.

That it has become apparent that the representation of the Navajo Indian Tribe in this controversy by the United States has been inadequate fully to assert and protect the interests of the Navajo Indians which may be adjudicated herein.

The United States has failed vigorously to assert these interests in at least five areas of major importance:

First, the United States has failed, in its exceptions to the Report of the Special Master and in its brief in

support of its exceptions, to assert the justiciability of issues pertaining to the tributary waters above Lake Mead. In essence, it has abandoned the case so far as the adjudication of the rights of the Navajo Indians is concerned. At page 27 of its original Petition of Intervention the United States spoke of a "protracted conflict" among the parties possessing claims to water in the Lower Basin. It stated that this "protracted conflict" was to the "detriment of all parties" and asked for a decree "quieting the title of all parties to their respective rights". But later, after the Special Master in effect has sought to exclude the adjudication of the rights of the Navajo Indians and of other claimants above Lake Mead from this lawsuit, the United States has made no exceptions to such a ruling, and seems content to allow the "protracted conflict" to continue as to the rights of the Navajo Indians.

Second, the United States has adhered in this lawsuit to a doctrine inimical to the interests of the Navajo Indians, as well as of all other indians represented by it, in taking the position, as stated on page 254 of the Special Master's Report, that indian water rights are "subject. . . to the priority of appropriative rights established before (the) Reservation was created . . . ." In admitting the priority of such other rights, the United States has failed to understand and to present to this Court the aboriginal nature of indian water rights, which existed long before the present-day reservations were established. When the indians by treaty or otherwise entered into their existing reservations, they did not obtain water rights where previously they had none. Rather, they retained rights of an ancient character, which — being aboriginal in their source — cannot rightly be made subject to the priorities of much later appropriators, even if such appropriators

used water prior to the formal establishment of a reservation. In its failure to assert and defend these aboriginal indian rights, the United States has failed adequately to represent the Navajo Indians in this cause.

Third, by a combination of (1) accepting the Special Master's findings that the Boulder Canyon Project Act and associated water delivery contracts constitute an apportionment of water in and below Lake Mead and (2) having divided the said water by its water delivery contracts among states only, without separate apportionment to indian users, the United States has consented, in effect, to the thesis that there may be an apportionment to the States only, and that the indians must in turn look to the states for their share of water. The states, however, have no trustee relationship as to indians within their respective borders. Rather, their interests are adverse to those of reservation indians. History has shown that this has caused the states to be hostile to indian interests. The error of requiring the indians to look to the states for water has been reflected in this lawsuit by the United States as to Navajo Indian rights, and is manifested in the failure of the United States to insist upon an apportionment of Lower Basin water to the Navajo Indians separate and apart from apportionments made to Arizona, New Mexico, and the other parties litigant. In so failing to insist upon a separate apportionment to the Navajo Indians, the United States has inadequately represented their interests in this cause.

Fourth, as a vital corollary to the third area of inadequate representation just stated, the United States, by the position it has taken permitting the apportionment of water to states alone, would put the Navajo Indian Tribe in perpetual political conflict with the State of

Arizona, in particular, and with the States of New Mexico and Utah. It is clear that a precipitating cause of this litigation has been the proposed Central Arizona Project and the desire of Arizona for water to sustain it. One or more of the possible points of diversion of water for this Project are above Lake Mead. If the rights allocated to the Navajo Indian Tribe are to be subtracted from the apportionment ultimately made to Arizona, the consequence will be a conflict of interests which necessarily will produce many years of unnecessary, injurious and altogether avoidable political hostility between the Navajo Indians and the State of Arizona, where previously the Navajo Tribe has made substantial progress in recent years toward amicable relations with Arizona and her citizens.

Fifth, the United States apparently acquiesces in the theory of the Special Master, expressed at page 262 of his Report, that the extent of indian water rights is to be measured as being "sufficient water to irrigate all of the practicably irrigable lands in a reservation and to supply related stock and domestic uses." The United States has made no exception to this view. Nor has the United States affirmatively pressed in this litigation for a determination that the Navajo Indian Tribe is in fact entitled to legal recognition of a water right, of an open and flexible nature, which in terms of amount is co-extensive with the future needs of the Navajo Indian Tribe for all of its beneficial uses, whether for hunting, grazing, agriculture, or for other arts of civilization. In failing fully to assert the entire extent of the water right to which the Navajo Indian Tribe is entitled, the United States has certainly not adequately represented the Navajo Indians in this litigation.

V.

That this inadequacy of representation is the product of the dual and conflicting role played by the Attorney General in this litigation. At one and the same time, in the same lawsuit, he is charged with asserting and protecting, on the one hand, the proprietary rights and contract commitments of the United States and, on the other hand, the rights of the Navajo Indian Tribe and other indian tribes in conflict therewith. It is relevant to note also that, in other connections, it is his obligation to defend the United States before the Indian Claims Commission and the Court of Claims in suits brought by indian tribes seeking compensation for loss of water rights. Therefore, the position of the Attorney General both within and without this lawsuit is such that it is difficult for him vigorously to protect and assert the full rights of the Navajo Indians. This difficulty has, in practice, spond to a request of the General Counsel of the Navajo been evidenced by the Attorney General's failure to re- Indian Tribe, contained in a letter of February 2, 1961, that he diligently assert and maintain the rights of the Navajo Indians in the waters of the Colorado River and its tributaries.

VI.

That Paragraph 2 of Rule 9 of this Court, pertaining to Original Jurisdiction, provides that the Federal Rules of Civil Procedure may, where appropriate, "be taken as a guide to procedure in original actions". Rule 24(a) of the Federal Rules of Civil Procedure provides for intervention as a matter of right when "the representation of the applicant's interest by existing parties is or may be

inadequate and the applicant is or may be bound by a judgment in the action." Since it is apparent that the United States, an existing party, is not adequately representing the Navajo Indian Tribe, which tribe may be bound by a judgment in this action, and since it is likewise apparent that this motion for leave to intervene is timely made, in light of the fact that the full extent of the inadequacy of the representation could not have been determined until the United States filed its exceptions and brief in response to the Report of the Special Master, the Navajo Indian Tribe seeks the leave of this Court to intervene in this cause. In thus asking leave, the Navajo Indian Tribe would seek respectfully to exercise its power to intervene "as of right" under the terms of Rule 24(a), cited above.

VII.

That the intervention of the Navajo Indian Tribe will not itself make necessary the referral of the cause back to the Special Master for the taking of additional evidence. It has been noted previously here that California, Nevada, New Mexico, the United States and Utah all have raised important contentions in respect to Lower Basin waters above Lake Mead. If it should prove necessary to refer the matter back to the Special Master, it is probable that such further reference will have been required so as satisfactorily to resolve the conflicting claims of those parties, rather than merely to provide the foundation for the legal recognition of the rights of the Navajo Indians. If, however, the cause is once again referred to the Special Master, in order to adjudicate the many claims heretofore made by the said parties, it is apparent that in such an eventuality it will be necessary to take con-

siderable additional evidence as to all rights in the Lower Basin above Lake Mead. In such a case, the presence in the lawsuit of the Navajo Indian Tribe will be of considerable usefulness, since the taking of further evidence as to the needs and condition of the Navajo Reservation will then be required.

WHEREFORE, the Navajo Indian Tribe, applicant for intervention herein, respectfully moves the Court for leave to intervene in the action and to file therein its petition of intervention, exceptions to the report of the Special Master, and briefs in support thereof, which are annexed to this Motion.

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BRIEF OF THE NAVAJO INDIAN TRIBE IN SUPPORT OF MOTION TO INTERVENE

I. SOURCE OF RIGHT TO INTERVENE

This is an action within the original jurisdiction of the Court under the Constitution. The procedure in such actions is not specified by the Constitution. However, Rule 9 of the Revised Rules of the Supreme Court of the United States pertains to actions within the Court's original jurisdiction. We are particularly guided, as to matters of intervention, by Paragraph 2 of that Rule, which refers to the Federal Rules of Civil Procedure, 28 U.S. C.A., and specifies that "where their application is ap-

propriate", these rules "may be taken as a guide to procedure in original actions in this court."

There would seem to be nothing in this action which would render inappropriate the application of the Federal Rules of Civil Procedure in determining the right of the Navajo Indian Tribe to intervene. The provisions of Rule 24(a) of the Federal Rules are explicit on the question of the right of a person to intervene in certain instances, and the instances described may as readily arise in actions within the original jurisdiction of the court as in other actions.

Rule 24(a) is entitled "Intervention of Right". It states that "*Upon timely application* anyone *shall* be permitted to intervene in an action . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; . . . ." (Emphasis added). It is to be noted that the provision is mandatory in its language, giving a right to intervene, provided the three stated requisites are present. These requisites are:

1. Timely application
2. Inadequate representation
3. Binding effect of judgment

In this Brief, these requisites will be discussed in this order. If they are found to be present, the right of the Navajo Indian Tribe to intervene will have been established.

II. REQUISITES FOR RIGHT TO INTERVENE

A. **Timeliness of Motion.**

1. *The Law and Rationale of "Timeliness"*

The question of the timeliness of the Navajo Indian Tribe's motion to intervene is not a simple one. There are many things to be considered in connection with it. It is true, as it is likely to be suggested by those who do not favor the intervention, that the litigation has been long pending and has reached a certain stage of maturity. But it is also true that the lack of intervention heretofore is not the fault of the Navajo Indians. They have been represented in this action by the United States. Until the litigation reached such a point in its fruition that the inadequacy of that representation became clearly apparent, it could not have been incumbent upon the Navajo Indian Tribe to seek to break the ties of that representation through an intervention in its own behalf. Those who would say that the intervention is not timely necessarily press upon the Court an impossible hypothesis. It is that the Navajo Indians could have intervened earlier in the suit before the inadequacy of the representation given them by the United States became fully apparent and before appreciable damage was done to their interests thereby, but that the Navajo Indians may not now intervene at a point at which the failure vigorously to press their interests has become clearly manifested and at a point where serious injury to their rights may only be averted by intervention.

It seems more cogent to think of intervention as a practical sort of remedy. Surely it cannot be said that it

is to be asserted when the need for it is not apparent and that it is to be denied on the ground of "untimeliness" when the need for it is greatest. Timeliness is, instead, to be judged with common sense in light of the circumstances of the parties and of the litigation itself.

It has often been held by the federal courts and by the courts of the respective states that the question of timeliness is to be judged according to the facts and circumstances of each case. In speaking of a motion to intervene as of right under Rule 24(a), the Ninth Circuit Court of Appeals has stated that "In determining the timeliness of such a motion a court should consider not only the period of time that has passed, but also the circumstances contributing to the delay." *Pellegrino v. Nesbit,* 203 Fed. 2d 463, 465 (1953). It is interesting to note that in the Pellegrino case, which involved an intervention by a corporate stockholder after the corporation's Board of Directors decided not to appeal from the judgments of the District Court, the Circuit Court of Appeals went on to say that "Intervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected."

The law as stated in the *Pellegrino* case receives substantial support from the other authorities. The following cases state the rule as to the need to look to the circumstances of the case in determining timeliness: *Clark v. Sandusky,* 205 F. 2d 915 (7th Cir. 1953); *Pyle-National Co. v. Amos,* 172 F. 2d 425 (7th Cir. 1949); *American Brake Shoe and Foundry Co. v. Interborough Rapid Transit Co.,* 112 F. 2d 669 (2nd Cir. 1940); *In re Rumsey Manufacturing Corporation,* 9 FRD 93 (D.C.N.Y. 1949); *Woburn Decreasing Co. of New Jersey v. Spencer Kellogg & Sons, Inc.,* 3 FRD 7 (D.C.N.Y. 1943). The

rule that intervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected is stated in *Wolpe v. Poretsky,* 144 F. 2d 505 (1944), certiorari denied 323 U.S. 777, 65 Sup. Ct. 190; *United States Casualty Co. v. Taylor,* 64 F. 2d 521 (4th Cir. 1933), certiorari denied 290 U.S. 639, 54 Sup. Ct. 56.

In keeping with the view that the facts and circumstances of each case are to be considered, the courts have often said that the determination of the question of timeliness lies within the discretion of the court. Referring to the aspect of timeliness in relation to intervention, this Court stated in *Smith v. Gale,* 144 U.S. 509, 12 Sup. Ct. 674, 677 (1892) that "A limitation upon the right to intervene . . . presupposes a certain amount of discretion in the court." This view has been reiterated by the Second Circuit Court of Appeals in *Defense Plant Corporation v. United States Barge Lines,* 145 F. 2d 766, 767 (2nd Cir. 1944), where it is said:

> The mere fact that a final decree had been entered would not necessarily be a bar to intervention on the ground of tardiness. The admiralty court has wide discretion as to the time of intervention.

The discretion of the court has been recognized in such other cases as *Simms v. Andrews,* 118 F. 2d 803 (10th Cir. 1941); *Braatelien v. Burns,* 74 N. D. 29, 19 N. W. 2d 827 (1945); *Hartwig v. Harvey,* 250 Wis. 478, 27 N. W. 2d 363 (1947).

One of the more important circumstances to be considered in exercising the discretion of the court is whether the intervention, if permitted, would be an intervention

"as of right" or merely a "permissive intervention". Where the person seeking to intervene may be bound by the decree and is not adequately represented in the cause, the courts are far more reluctant to deny the intervention on the ground of untimeliness than they are where there is no urgent need for the intervention, as in a permissive intervention. Such a reluctance to deny the intervention is a commonsense attitude based on a proper weighing of the conflicting interests involved. The rationale behind this judicial attitude has been well expressed in *Moore's Federal Practice,* Vol. 2, 1938, at page 2369:

> Intervention may . . . . be permitted at a late stage in the proceedings, depending upon the amount of administrative inconvenience this would cause, and also whether the right to intervene is unconditional or conditional. *Here the character of the right is particularly important.* Since the basis for the permissive right to intervene is largely one of trial convenience a court might properly deny a motion to intervene unless made at a very early stage, since it is required by subdivision (b) to 'consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.' On the other hand the basis for intervention as of right is chiefly the fact that the court's processes are apt to injure or prejudice the applicant unless he is permitted to intervene. Rule 24(a) does not, of course, give an absolute right to intervene unless the application is timely, but *since something more than trial convenience is here involved an application to intervene under Rule* 24(*a*) *may well be granted at a time in the suit when it would be wise to deny permissive intervention. The problem of the late intervener shades off into the problem of his status.* (Emphasis added)

The importance of looking to the character of the intervention sought was likewise emphasized in *Cameron v. President and Fellows of Harvard College,* 157 F. 2d 993 (1st Cir. 1946). In an opinion which cited favorably the above statement by Moore, the court said:

> This question of timeliness cannot be split off and considered in vacuo — as one separate and apart from the question of the paragraph of Rule 24 under which intervention is sought. The reason for this is that an assertion of a legal right to intervene might well be considered timely even when made at a relatively late stage of the main action whereas a request for leave to intervene in discretion made at the same stage in the main action might well be considered otherwise.

The motion of the Navajo Indian Tribe to intervene in the present case is a motion to intervene "as of right". It is based upon the vital interest which the Navajo Indians have in the subject matter of this suit. To the Navajo Indians, their right to water from the Colorado River and from the Little Colorado River is the *sine qua non* of their present and future prosperity, happiness and development. And, yet, although they may be bound by the decree which is ultimately handed down, the representation given them by the Attorney General of the United States has proved to be woefully inadequate, as will appear more fully in later portions of this brief. These are circumstances which must necessarily weigh heavily in favor of an exercise of the Court's discretion in granting the motion to intervene.

In this litigation the situation of the Navajo Indians has been analogous to that of a member of a class whose interests are represented by the plaintiff in a class action. It is certainly not incumbent upon the members of a class

individually to intervene at an early stage in the proceeding in order to assure the adequacy of their representation at a later stage. To hold otherwise would be to render chaotic all class litigation. Intervention is only called for when the need for it becomes apparent, and this may occur either late or early in the proceeding. The late Mr. Justice Brandeis of this Court expressed the law in this regard in *Southern Pacific Co. v. Bogert,* 250 U.S. 483, 39 Sup. Ct. 533, 536 (1919) when he said: "Where the cause of action is of such a nature that a suit to enforce it would be brought on behalf, not only of the plaintiff, but of all persons similarly situated, it is not essential that each such person should intervene in the suit brought in order that he be deemed thereafter free from the laches which bars those who sleep on their rights." The same rule is found in *Moore's Federal Practice,* Vol. 2, 1938, at page 2333:

> Where a petitioner is represented in a proceeding, he will be bound by a decree of the court, whether he can show an interest in the property or not. It, therefore, becomes even more important that the right to intervene be absolute if the representation is shown to be inadequate.

2. *Past Efforts of Navajo Tribe to Secure Adequate Representation*

There has been no delay in the efforts of the Navajo Tribe to secure effective representation of its interests in this case. It was alerted to the inadequacy of representation being given to it by the Attorney General and government counsel purporting to represent the interests of all the Indian tribes in Arizona, when in the pre-trial conference before the Special Master on April 10-13, 1956, two and one-half years after the Government's petition for intervention was filed, the United States declared that

it was not ready to define its position on indian claims either from the standpoint of law or facts (TR. April 10, 1956, pp. 18, 23-26, 34-35). The Government's attitude was clearly that of a passive bystander wishing an inactive role and not the role of advocate defending the interests of its wards. The Assistant Attorney General in charge urged:

> The United States would like to be last, and we will ask the questions we feel the States have not covered, if that will be permitted. (TR. p. 39)

This statement of a policy of general inarticulateness was followed by the failure to cross examine witnesses for the State of Arizona in respect to indian water rights and established uses of water by indians in Arizona. The Navajo Tribe promptly caused the following steps to be taken:

1. Upon examining the pleadings in the office of the clerk of the court, counsel for the Tribe discovered that when the petition of the United States to intervene was filed in this case on December 31, 1952, protection of the interests of the indians was urged as a major ground for intervention of the United States (Para. XII, Motion for Leave to Intervene; p. 32, U.S. Brief in Support of Motion). On November 2, 1953, when the Government filed its petition of intervention pursuant to the Court's order, the petition asserted clearly and unequivocally the "prior and superior" rights of indians, as follows (Para. XXVII, p. 23):

   > The United States of America asserts that the rights to the use of water claimed on behalf of the Indians and Indian Tribes as set

> forth in this Petition are prior and superior to the rights to the use of water claimed by the parties to this cause in the Colorado River and its tributaries in the Lower Basin of that stream.

Political pressure from the then Governor of the State of Arizona was brought to bear upon the Attorney General's office, with the result that the Attorney General wrongfully and in violation of the rules of this Court, which provide that "original or file copies of pleadings and papers, or briefs, may not be withdrawn by the litigant" (Rule 1, Sub. Para. 2), withdrew its petition for intervention. This was done four days after the filing of the Government's original petition and apparently before distribution of copies to members of this Court. On December 8, 1953, a revised petition for intervention was filed by the Government in which the above allegation respecting the prior and superior rights of indians was deleted — all without application by the United States to this Court for leave to amend its original petition. (TR. pp. 2448-2449, 2480-2482).

2. Counsel for the Tribe discovered that the attorney in the Department of Justice who had long been in charge of the Government's preparations in this case, and was well informed as to indian water rights and skilled in the practice of asserting such rights, had been removed from the case and new counsel had been substituted within a relatively short time before hearings were commenced in San Francisco before the Special Master (TR. p. 2450). The said new counsel did not, and in so short a time for preparation probably could not even if he

had so desired, properly question witnesses in the proceedings before the Special Master in respect to indian uses of water.

3. The General Counsel for the Tribe joined with representatives of other indian tribes in Arizona in urging Assistant Attorney General J. Lee Rankin, then in charge of this litigation in the Department of Justice, to recognize the conflict of interests which existed between the other parties or interests which the Government sought to represent and the prior and superior rights of indians which Government counsel also purported to represent. In a final conference on July 5, 1956, with the Assistant Attorney General, representatives of most of the indian tribes in Arizona requested that special counsel be appointed within the Department of Justice to represent the interests of the indians. The Assistant Attorney General refused the request, contending that representation by Government counsel was adequate (TR. pp. 2432-2435).

4. The General Counsel of the Navajo Tribe joined with other counsel of indian tribes in Arizona to present to the Special Master a motion for leave to file a representation of interests, requesting the Special Master to recommend to this Court that special counsel be appointed to represent the interests of the indians. The General Counsel of the Navajo Tribe on behalf of the Tribe and on behalf of all other indian tribes in Arizona, presented the matter to Mr. Justice Douglas (then in California during the adjournment of this Court), who referred the motion to the Special Master for appropriate action. The Motion was argued on July 6, 1956, in

San Francisco before the Special Master (TR. Vol. 15, pp. 2419-2498). The foregoing and other facts respecting the inadequacy of the Government's representation of the indian interests were set forth. Counsel for the State of California, in the course of his reply to the General Counsel of the Navajo Tribe, confirmed what the latter had said respecting deletion from the Government's original petition for intervention of the allegation asserting the prior and superior rights of indians, that deletion having been made — as the California counsel stated — under political pressure from the Governor of the State of Arizona (TR. pp. 2480-2481).

5. On July 18, 1956, the Special Master held that the trusteeship of the United States in behalf of the indians is a creation of a plenary legislative power and that it "is beyond the power of the Courts to disqualify this Trustee" . . . and that "The legal power of the Attorney General to represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action." The Special Master assumed "accomodation" by the Attorney General in respect to presentation of any evidence which the indian tribes might wish to have offered, and recommended that a brief amicus curiae be filed in the Supreme Court on behalf of the indians (TR. Vol. 16, pp. 2638-2641).

With deference to the outstanding ability of the Special Master, it was evident in the proceedings that the subject of indian water rights was new to him. The assistance which he was entitled to receive from counsel for the Government, and which a conscientious advocate would have offered, was not forthcoming. This inadequacy of

representation of the Navajo Indian Tribe and the other tribes similarly situated in Arizona bore fruit and became more apparent after the report of the Special Master was filed. His proposed findings are in several respects highly prejudicial to the rights and interests of the Navajos and other indians, as will appear more fully in later portions of this brief.

The General Counsel of the Navajo Tribe made a last effort to secure appropriate action by the Attorney General by requesting in a letter of February 2, 1961, that the Attorney General take exception to the Special Master's report in numerous vital respects, stating, inter alia:

> "The Special Master has made a number of proposed findings which are gravely prejudicial to the position of the Navajo Indian Tribe. This is to request that exceptions be taken to the report of the Special Master and that any other action be taken that may be necessary to protect and preserve the position of the Navajo Indian Tribe which is represented in this cause by the Department of Justice."

The Special Master had set February 27, 1961, as the date for filing exceptions to his report. However, Government counsel did not reply and the United States took no action pursuant to the letter of the General Counsel of the Navajo Indian Tribe. Indeed, the objections filed by the United States do not even bear upon the question of indian rights. The exceptions filed by the United States, and the brief in support thereof, are themselves mute testimony to the extent of the neglect of indian interests. The Navajo Tribe could not have known in advance that there would be no action taken pursuant to its letter to the Attorney General and that the exceptions filed by the

United States would utterly fail to maintain and assert the Tribe's full legal position. It was only at this point, after the Special Master's Report was filed and the exceptions of the respective parties were made, that the inadequacy of the representation was at last so conclusively established that this petition for intervention by the Navajo Tribe became a necessity.

The Navajo Tribe, through its General Counsel, took immediate steps after the filing of the exceptions of the United States to retain counsel especially experienced in water law to seek intervention in this Court. Time was required for such employment, not only for consideration by the Navajo Tribal Council, but also to secure approval by the Secretary of the Interior pursuant to Title 25 U. S. C., Sec. 82. And thereafter counsel had to analyze the position of the Tribe and prepare these documents in intervention.

It is clear, therefore, that the Navajo Tribe has not slept upon its rights. Having first sought with other tribes to secure adequate representation through the office of the Attorney General of the United States, and having failed to secure that conscientious assertion of indian rights which normally could be expected from any experienced advocate, the Navajo Tribe now respectfully seeks to fill this patent void before it is too late to protect its interests. Clearly, the question of timeliness of this motion merges into the question of inadequacy of representation thusfar given to the interests of the Navajo Tribe. The two issues, although logically separate questions, cannot possibly be considered independently in this instance and must be considered together in regard to the timeliness of this motion to intervene.

B. Inadequacy of Representation.

In its Motion for Leave to Intervene, the Navajo Indian Tribe has set forth in some detail five areas of major importance in which the United States has failed vigorously to assert the interests of the Navajo Indians. The nature of these interests, and the extent of the failure of the United States to give expression to them, has been stated in some detail in the motion itself. The following discussion here will attempt to supplement, but not repeat, what was said in the motion.[1]

1. *The Justiciability Issue*

In his Report the Special Master has excluded the determination of water rights in the Lower Basin and tributaries between Lee Ferry and Lake Mead. Such a finding would in effect exclude the interests of the Navajo Indians from this law suit. Despite the fact that at page 27 of its original Petition of Intervention it has recognized a "protracted conflict" among the parties possessing claims to water in the Lower Basin, the United States has raised no objection to the finding of the Special Master in this regard. In making its exceptions, the United States has touched upon this question only obliquely. Its first two exceptions are to the effect that in making allocations of waters from Lake Mead among Lower Colorado River Basin states, the Secretary of the Interior is authorized to make deductions to compensate for upstream consumptive use in Arizona and Nevada of water which would otherwise flow into Lake Mead. This is not, strictly speaking, an argument in favor of the justiciability of the con-

[1]Some repetition will be unavoidable in the interest of continuity.

troversy as to waters above Lake Mead. Instead of meeting the issue straight on in a diligent effort to protect the Navajo Indians in the "protracted conflict" which it has recognized, the United States has preferred to discuss the issue only peripherally as it affects the Secretary of the Interior in his technical operation of the federal water projects under the Boulder Canyon Project Act.

It ought to be apparent, however, that the justiciability of the controversy encompasses the Lower Basin as a whole. The Lower Basin waters above Lake Mead are as much involved in the controversy as those in and below it. To say, as the Special Master has said, that the controversy will be treated as involving a part of the waters of the Colorado River in the Lower Basin, is to "truncate" not merely the Colorado River, but is also to truncate the controversy itself. The controversy is, in essence, one as to the availability of water for present and proposed uses. It is great in its magnitude and importance, and is imminent in its threatened interference with those uses. The Lower Basin is entitled to a given amount of water under the Colorado River Compact and the critical problem before the Court concerns the legal availability of this water for Lower Basin uses. This is the nature of the controversy in its entire scope. When a controversy exists, courts will determine the entire controversy. They will not artificially split a part of the over-all problem off in order to say, in effect, that by considering just a part of it a solution may be worked out which will settle the more imminent problems, leaving the less imminent parts of the controversy unjusticiable. This would make justiciability depend not on the extent and imminent nature of the controversy itself, but on the particular twist or turn taken by the proposed solution. But justiciability rests on a

much sturdier foundation than such a view would have us suppose. Once a controversy is found to exist encompassing an entire subject-matter, the courts continue to treat it as a whole, do not truncate it, and seek to settle the issues involved without making necessary a multiplicity of suits. What can be settled in one justiciable lawsuit will not be so treated as to force several independent actions.

There can be little doubt but that this controversy, as framed by the contentions of the various parties themselves, has encompassed the entire Lower Basin and concerns the legal availability of water therein. In Paragraph XIX of its Bill of Complaint, Arizona recites that she "desparately needs additional water from the main stream of the Colorado River. Without such additional water . . . agricultural production will be reduced to a dangerous extent, population will decline, and the economy of the state will be destroyed in large measure. The only source of water to prevent such a catastrophe is the main stream of the Colorado River." There is to be seen in this no limitations whereby Arizona states that it "desperately needs additional water from the main stream of the Colorado River *in and below Lake Mead.*" Rather, the needs and claims giving rise to this litigation are more urgent and all-encompassing. They pertain to the available water in the Lower Basin. This breadth is also reflected in Paragraph XX of the Bill of Complaint, where Arizona complains that the Central Arizona Project has been interfered with and postponed because of the alleged "wrongful assertion by the defendants of unwarranted and unlawful claims to the use of water of the Colorado River system." The same pervasive scope of this litigation, in terms of the claims of the respective parties, is

reflected in the recital on page 322 of the Special Master's Report that "the States of Nevada, New Mexico and Utah have asked for a decree confirming present uses and reserving water for future requirements on various interstate tributaries of the Colorado River flowing within their borders . . . New Mexico asserts rights in the Little Colorado . . . ." In addition, as appears more fully from the section beginning at page 124 of the opening brief of the California defendants in support of their exceptions to the report of the Special Master, the California defendants object to the "truncation of the Colorado River at Lake Mead" and would have the other waters of the Lower Basin taken into account in applying principles of equitable apportionment. The United States, for its part, argues that the uses above Lake Mead ought to be deductible in making allocations of waters from Lake Mead. In light of these conflicting contentions, the Colorado River and its tributaries below Lee Ferry but above Lake Mead can hardly be said to be superfluous to this controversy when it is considered as a whole.

This controversy, taken as a whole and considered in its entirety, constitutes a justiciable controversy under the law as heretofore stated by this Court and other courts in the United States. The test for justiciability was set down by this Court in *New York v. Illinois,* 274 U.S. 488, 47 Sup. Ct. 661 (1927), where reference was made to the need for "an actual or presently threatened interference with the rights of another", and in *Colorado v. Kansas,* 320 U.S. 383, 64 Sup. Ct. 176, 181 (1944), where the court posed the need to determine "whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream." In *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 57 Sup. Ct. 461, 464 (1937) this Court

recognized that the "controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." The Court went on to say that "it must be a real and substantial controversy admitting of specific relief . . ." Another court has said, in *Mayor, Etc. of Savannah v. Bay Realty Co.,* 90 Ga. App. 261, 82 S.E. 2d 710, 711 (1954) that "a controversy is 'justiciable' when there are interested parties asserting adverse claims upon an accrued state of facts." Certainly all of these criteria, as stated in the cases referred to, are met by the Colorado River controversy as it appears in this litigation.

Once an entire controversy is before a court, the court will decide it without a truncation of its various aspects. "It is the policy of the court to determine the whole controversy." *Hoskins v. Hotel Randolph Co.,* 203 Iowa 1152, 211 N.W. 423, 429 (1926). It has been said that "the . . . court, having first acquired jurisdiction, may exercise it to dispose of the whole subject-matter of the litigation and adjust all of the equities between the parties, and is entitled to do so." *Cleveland v. Ward,* 116 Texas 1, 285 S.W. 1063, 1070 (1926). "The courts, having jurisdiction . . ., have the right and authority to hear and determine all questions that occur in the case and are essential to a decision of the merits of the issues." *Taylor v. Hulett,* 15 Ida. 265, 97 Pac. 37, 39 (1908). To like effect are *Pittsburgh, C., C. & St. L. Ry. Co. v. Peck,* 44 Ind. App. 62, 88 N.E. 627 (1909); *Lenderink v. Sawyer,* 92 Neb. 587, 138 N.W. 744 (1912); *Heidenheimer v. Johnston,* 76 Texas 200, 13 S.W. 46 (1890).

In addition to the policy of deciding entire controversies, it has long been the policy of the law to avoid, where

possible, a multiplicity of litigation. "One of the functions and duties of this court is to exercise its powers so as to avoid future litigation." *Mallonee v. Fahey,* 117 F. Supp. 259, 275 (1953). "It is one of the favorite objects of a court of equity to do full and complete justice between the parties by avoiding the delays and hardships incident to a multiplicity of suits." *Weininger v. Metropolitan Fire Insurance Co.,* 359 Ill. 584, 195 N.E. 420 (1935).

Taken together, these principles require that the rights in and to waters in the Lower Basin above Lake Mead be adjudicated as a part of the over-all controversy, which is itself justiciable.

In its failure to press for a complete determination of the matters involved in the controversy, the United States has, for its part, abandoned any attempt to have the rights of the Navajo Indian Tribe adjudicated in this cause. This means that it has acquiesced in a continuation of the "protracted conflict" so far as their rights are concerned. If — as we have seen — their rights may be determined in this litigation, and if the United States is willing itself to acquiesce in a failure to determine them, leaving them a subject of future controversy, it is manifest that the United States is inadequately representing the Navajo Indian Tribe, and is preoccupied by its other interests in this litigation.

2. *The Extent of Indian Priority.*

The brief of the United States in support of its exceptions to the Special Master's Report makes no mention of the relative priority of indian water rights as against other claimants.

Its Answer Brief, however, emerges from the former silence sufficiently to remark, without apparent objection, that "Rights reserved for reservations established subsequent to the Project Act are recognized as having priorities, intrastate, as of the respective dates of establishment of the reservations." (United States Answer Brief, p. 56).

It would seem incredible that the United States, who in this litigation has stood in the relation of trustee to the Navajo and other indian tribes of the Lower Basin, could with such ease and facility ignore well-established law as to the nature of Indian rights. The law ignored is law which the United States itself has asserted previously in this Court. It is law which this Court has forcefully expressed on two important occasions and which has been reiterated as recently as 1956 by the Ninth Circuit Court of Appeals in a case instituted by the United States.

The water rights of indian tribes, we submit, are not subordinate to the claims of appropriators who were using water before the present reservations were established. The indian rights are ancient and aboriginal in their character. As such, they are prior to all appropriative rights of a later origin, whether those later appropriations occurred before or after existing reservations were created.

In order fully to appreciate this fact, and the basis for its assertion, it is necessary to be fully cognizant of the fact that the creation of an indian reservation has historically and legally involved a *grant by the indians* as to their larger claims and a *reservation by them* of certain important rights which pre-existed the making of the treaty or agreement and which continued to exist thereafter. It is a mistake to consider that when an indian reservation is created water is "reserved for its benefit"

in the different sense that a previously non-existent right is called into being and is now present as a "reserved right". Rather, the reservation of the right to water is made by the indians themselves and is the reservation of a much older, pre-existing right.

This stands out starkly in the great landmark cases heretofore decided by this Court. These are the cases of *United States v. Winans,* 198 U.S. 371, 25 Sup. Ct. 662 (1905) and *Winters v. United States,* 207 U.S. 564, 28 Sup. Ct. 207 (1908). The recent case reiterating their principles is *United States v. Ahtanum Irrigation District,* 236 F. 2d 321 (9th Cir. 1956).

United States v. Winans was a suit brought by the United States to enjoin certain respondents from obstructing Indians of the Yakima Nation, in the State of Washington, in their exercise of fishing rights and privileges on the Columbia River. While the subject under discussion was fishing rights, rather than water rights, the law expressed by the Court is altogether relevant to the question of priority of water rights. The Court gave explicit recognition to the fact that "the right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians." It is stated that these rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed." Referring to the treaty made between the United States and the Indians in 1859, the court made the following significant observation: "*The treaty was not a grant of rights to the Indians, but a grant of right from them, — a reservation of those not granted.*" (Emphasis added). It is to be seen, then, that in the view of the Court the fishing rights which the United States sought to protect in the lawsuit were not the product of the treaty, but were rather pre-

existing rights which survived the treaty. Although it is true that the case dealt with fishing rights rather than water rights, so far as the law is concerned that is a mere distinction without a difference. There is nothing in logic which can distinguish the applicability of the central concept involved so far as the two separate types of rights are concerned. If the concept that the rights pre-existed the treaty is applicable to the fishing rights, there would seem to be no cogent reason why it would not with equal force apply to water rights.

Three years later, in 1908, this Court did in fact express the same rationale in a case involving water rights. This is the famous case of *Winters v. United States, supra,* which gave rise to the so-called Winters Doctrine.

Winters v. United States involved a suit by the United States to enjoin the building of certain dams which would prevent water from flowing to the Ft. Belknap Indian Reservation. The Court pointed out that the reservation created by the agreement of May, 1888, "was a part of a much larger tract which the indians had the right to occupy and use." The rationale of the *Winans* case is readily apparent in the following statement made by the Court: "The Indians had command of the lands and the waters, — command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization. Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?" The questions raised in this quoted language were rhetorical. The Court considered that they answered themselves. The indians, the Court held, did not "give up" their water rights when they entered into the Reser-

vation. But if they did not "give them up", then it must be concluded that they retained their rights. And if they retained them, the retention was from an earlier period, a period which preceded the establishment of the Reservation. In other words, they retained their ancient and aboriginal rights, not "giving them up" when they entered into the reservation.

How, then, can it conceivably be said that relative latecomers arriving on the scene and using water within a few short years before the establishment of a formal indian reservation can have a legally cognizable right prior to that of the rights adhering in the indians themselves? To grant such persons priority is to deny the pre-existing character of the indian rights and is to fly in the face of both the Winans and the Winters decisions.

It cannot be said, in contradiction to this, that the *Winans* and *Winters* cases are no longer virile as modern statements of the law. The doctrine which they so soundly proclaimed has found renewed expression, as recently as 1956, in *United States v. Ahtanum Irrigation District, supra.*

The *Ahtanum* case involved a suit by the United States to quiet title to the right of indians to use water from Ahtanum Creek. The Ninth Circuit Court of Appeals, following in the footsteps of the *Winans* and *Winters* cases, stated:

> "As in the *Winters* case, we must answer in the negative the question there posed: 'Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?' As was said in the *Winters* case: 'The res-

ervation was a part of a very much larger tract which the indians had the right to occupy and use, and which was adequate for the habits and wants of a nomadic and uncivilized people.' When the indians agreed to change their nomadic habits and to become a pastoral and civilized people, using the smaller reservation area, it must be borne in mind, as the Supreme Court said of this very treaty, that 'The treaty was not a grant of right to the indians, but a grant of right from them — a reservation of those not granted.' *Before the treaty the indians had the right to the use of not only Ahtanum Creek but of all other streams in a vast area. The indians did not surrender any part of their right* to the use of Ahtanum Creek . . . ." 236 F. 2d at 336. (Emphasis added).[2]

Thus, what we might call the "aboriginal rights" doctrine expressed by the *Winans* and *Winters* cases (although they did not use the term) has not been buried by the passage of time. And there are important reasons, so far as the legitimate interests of the Navajo Indian Tribe are concerned, why it should be vigorously reasserted in the present litigation. As the trustee for the indians, it has been the duty of the United States to see to it that such established law favorable to indian rights not

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[2]Indian reservations have been established in the past by several methods: treaty, executive order, Interior Department action, or agreement. The law as to the indians' water rights is the same in each case, not being affected by the manner of establishment of the reservation. See **Winters v. United States,** 207 U.S. 564 (1908) (reservation established by agreement); **United States v. Ahtanum Irrigation District,** 236 F. 2d 321 (9th Cir. 1956) (reservation established by treaty); **United States v. Walker River Irrigation District,** 104 F. 2d 334 (9th Cir. 1939) (reservation established by Interior Department Action); **Conrad Inv. Co. v. United States,** 161 Fed. 829 (9th Cir. 1908) (reservation established by agreement).

become obfuscated and supplanted. The United States has thusfar failed in this duty. In light of this failure, it would seem that the only manner by which the law as heretofore developed may be fully presented to this Court is through intervention by the indians in their own behalf.

3. *The Right of the Navajo Indians to an Apportionment of Water Separate from the Apportionments Made to the States*

The United States has not pressed in this action for a separate apportionment of water to the Navajo Indian Tribe, or to the other indian tribes located within the Lower Basin. Its policy seems to be one of contentment with seeing water apportioned to states, from which indian tribes must then draw their share. This view has been manifested in this litigation by the failure by the United States to assert affirmatively the need for a separate apportionment to the Navajo Indian Tribe, or other indian tribes, and in its acceptance of the Special Master's findings that the water delivery contracts entered upon under the Boulder Canyon Project Act, which would provide for delivery of water to non-indian users only, constitute an apportionment of water in and below Lake Mead.

There is, however, nothing more inappropriate, both practically and legally, than for the waters of the Lower Basin to be so apportioned that the Navajo Indian Tribe and other indians must look to the States of Arizona, New Mexico and Utah for their water.

It is to be remembered that — as a matter of law — the indians are under the trusteeship of the United States, not of individual states. Arizona, New Mexico and Utah, separately or in combination, are not now, nor have

they ever been, trustees charged with an affirmative duty of looking after the interests of the indians.

The relationship of the indian tribes to the United States and to the several states has been made clear in a number of cases. In *United States v. Ahtanum Irrigation District, supra,* the court referred to the role of the federal "government as trustee for the Indians." The position of the indians was made particularly clear in *United States v. Kagama,* 118 U.S. 375, 6 S. Ct. 1109, 1114 (1886), where it was said that "These Indian tribes are the wards of the nation. They are communities *dependent* on the United States — dependent largely for their daily food; dependent for their political rights." (Emphasis by Court). In addition to recognizing explicitly the fact of federal trusteeship, the Court went further and explained the lack of trusteeship on the part of the states in which the indian reservations are located. The Court said: "They (the indians) owe no allegiance to the states, and receive from them no protection." Not only is there a lack of trustee-ward relation, the Court said, but also "because of the local ill feeling, the people of the states where they are found are often their deadliest enemies."

A rather complete discussion of "The Scope of State Power over Indian Affairs," in which it is made abundantly clear that the primary relation of indian tribes is with the United States, and not with the states individually, is to be found in Felix S. Cohen, Handbook of Federal Indian Law 116-122 (1941) and in United States Department of the Interior, Federal Indian Law 501-514 (1958).

While this observation by the Court was made in 1886, so that there are sure to have been certain changes

in attitude between then and now, it is well known that such attitudes often change only slowly. During recent years, for example, there has been a gradual amelioration of relations between the Navajo Indian Tribe and the states in which the Reservation is located. But this amelioration has not so changed the basic circumstance that it would now be practical or wise to create an important new dependency by the indians upon the states. Nor is there any basis in law — as we have seen — for charging the states with a duty to look after the interests of the indians. This function has historically and legally been that of the United States.

On page 56 of its Answering Brief the United States has stated that it now acquiesces in the Special Master's making of apportionments to the states alone. The acquiescence stated there finds further expression in the failure of the United States to except to the Special Master's Report and recommended decree as to such combined apportionment. This has not always been the view taken by the United States, however. It formerly held, as it points out in its Answering Brief, to the sound contention that there should be a separate apportionment. Strangely enough, the United States is now willing not to "press the point here" in favor of a separate apportionment and is willing to acquiesce in the Special Master's view, even though the United States admits that "the logic" of the matter does in fact demand separate allocations. In other words, the United States is willing to acquiesce in the making of apportionments to the states alone even though it has held, and still holds today, the view that there ought really to be a separate allocation. We would submit, of course, that the United States is right in its logic, but wrong in its acquiescence.

The reason the United States has surrendered the point is that it has concluded that "the recommended decree appears sufficient for all practical purposes to protect the federal establishments." But does the recommended decree in fact contain such practical assurances? The answer can only be that it does not. One of the grounds for the United States' satisfaction is that "Rights reserved for reservations established subsequent to the Project Act are recognized as having priorities, intrastate, as of the respective dates of establishment of the reservations." (United States Answering Brief, page 56) In essence, then, the United States is willing to abandon the "logic" of the matter because it has accepted the equally fallacious premise, which we have already examined here, that indian priority dates, intrastate, are based upon the dates the indian reservations were created. But surely one fallacy cannot justify another. The fact is that the "practical" means by which the recommended decree "appears to protect the federal establishments" is not well founded. Moreover, the muddled position in which the Navajo Indian Tribe would find itself if an apportionment of water were made only to the states is further testified to by the United States' Answer Brief itself on page 91 where it is pointed out that "Arizona argues that the rights of the United States to use water on its Indian reservations should be determined, as against potential uses in Arizona, by application of principles of equitable apportionment." Referring to "the novelty of Arizona's suggestion", the United States proceeds in its Answering Brief to point out its unsoundness.

In light of this, it would have been far better for the United States to have adhered to the much sounder position that there should be a separate apportionment of

water to the indian tribes, or to the United States for purposes of satisfying the indian rights, and that this apportionment should be independent of that given to any state. Such a conclusion is based upon both practicality and logic. It is based upon a recognition that (1) the United States, and not the states, is the Trustee in relation to the indians; (2) the indian rights are not derived from state law, but rather find their source elsewhere, being of an aboriginal nature and having been reserved by the indians at the time of the establishment of formal reservations; and (3) a separate apportionment will, as a practical matter, lend itself far less to continued rivalry and hostility during the years to come.

In failing to "press the point here" the United States has inadequately represented the Navajo Indian Tribe in this litigation.

4. *Dependence of the Navajo Indian Tribe upon the States for Water Would Lead to Continuing Political Conflict Detrimental to Navajo Interests.*

It is a vital corollary to the third area of inadequate representation just stated that the United States, by the position it has taken permitting the apportionment of water to states alone, would thus place the Navajo Indian Tribe in continuing political conflict with the State of Arizona, in particular, and with the States of New Mexico and Utah. With the indian right included within the state apportionment, the indian and the white populations are placed in inevitable competition for the water to which the state is entitled and, expressly here, the indians must compete with the Central Arizona Project, the desire for

which by the white population spawned this litigation. Even if, in depending on the states for its water, the Navajo Indian Tribe were to prove altogether successful over the years in having its rights fully upheld, both as to extent and priority, the effect of the dependency would be injurious to the mutual relations of the parties. The Navajo Indian Tribe and the states in which its reservation is located must necessarily deal together in many connections. It is to be appreciated that each will benefit if their relations can grow increasingly amicable with the passage of time. But such progress will be impeded in these other aspects if a significant area of dispute is left open to fester between them. So far as the political and general human relations involved are concerned, there is much to be gained by giving "unto Caesar that which is Caesar's" in the sense that each is apportioned its own lawful share.

The legal foundation for a separate apportionment has been more fully discussed above. Reference is made at this point to the over-all non-legal consequences of a combined allocation because they must enter strongly into any true understanding of the extent of the prejudice which will befall Navajo interests if the inadequate representation thusfar afforded them in this cause is permitted to continue.

5. *The Extent, in Terms of Quantity, of the Navajo Indian Water Right*

The failure of the United States adequately to represent the Navajo Indian Tribe is nowhere more apparent than in connection with the question of the extent of indian water rights as to their quantities.

For its part, the United States is willing vaguely to assert, as it does on page 79 of its Answer Brief, that "In

the case of an Indian reservation, the measure is the quantity required to satisfy the ultimate needs of the Indians of the reservations." Although such a statement is certainly broad enough to include the full extent of indian rights, it is in no way specific. And it is in the specific application of such a concept that the really important issues arise. It is important, so far as the effective assertion of full indian rights is concerned, to make it clear that these indian needs include not merely the "ultimate needs" of a people living an existence of marginal subsistence, but also sufficient water to permit the indians to take their rightful place in the advance of civilization, as through industrial use.

The danger in a failure specifically to point this out lies in the fact that the Special Master and the Court may, as a result of the lack of proper advocacy in behalf of indian claims, overlook the full extent and ramifications of the existing rights.

Unfortunately, this danger is by no means spurious or academic. It has already been realized, and — so far as the Special Master's Report and even the position of the United States in respect thereto is concerned — the danger may be pointed to not as potential in character, but as an accomplished fact. The Special Master and the United States have indeed fallen into the very error of omission and oversight to which we have just referred. At page 262 of his Report, the Special Master concluded "that the United States effectuated the intention to provide for the future needs of the Indians by reserving sufficient water to irrigate all of the practicably irrigable land in a Reservation and to supply related stock and domestic uses." The United States has shown its willing-

ness, at page 80 of its Answer Brief, to accept this conclusion. After quoting from the Special Master, the United States says "This conclusion is amply supported by decisions of this Court . . . ." It is only in a footnote at the bottom of page 80 that the United States suggests that the indian rights may in fact be far more extensive. It states that "Whether the reservation of water rights is limited to the needs of the Indians for irrigation and related stock and domestic uses is a question which need not be considered insofar as the reservations for which the Master recommends that rights be decreed are concerned." One is led to ask the question why the United States, which is charged with a positive duty to assert fully the rights of the indians, is willing to acquiesce in a patent understatement of the extent of indian water rights. Even if it is conceded, for the purposes of argument, that such an understatement is sufficient for the limited purposes which the Special Master has in mind, there can be no doubt but that the eventual incorporation of this understatement into the opinion of this Court, if such were to occur, could do irreparable injury to the legal position of the indians in any later attempt to assert the full extent of their rights as heretofore recognized. The failure of the United States to press for a proper statement of the law in this litigation could easily lead to an inadventent restriction of indian rights in all future cases because of language emanting from the Court at this time.

It is not merely in future litigation that the present shortcomings may have their effect. It is by no means certain that the rights of the Navajo Indians will not be litigated in this controversy. In this brief it has already been stated at some length why those rights should, as a matter of law, be litigated here. And if the Navajo In-

dian Tribe's rights are in fact to be determined, the full extent of their right ought to be decreed, and ought not to be left in doubt for future statement of a more precise nature.

As examination of past cases indicates that it has not been the intention of this Court, or of other courts, to limit the water right of the indian tribe merely to uses for irrigation. The reservation of the rights by the indians was more extensive, including water for other useful purposes, as those purposes might arise in the development of the indian tribe. This is apparent from the language of the Court in *Winters v. United States, supra,* 28 S. Ct. at 211, where the Court said that "The indians had command of the lands and the waters, — command of all their beneficial use, whether kept for hunting, 'and grazing the roving herds of stock,' or turned to agriculture *and the arts of civilization.*" (Emphasis added) The Court then asked rhetorically: "Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?" It is important to note that the court specifically made reference to uses other than agricultural uses when it referred to "the arts of civilization". Not only the language, but also the rationale, of the Court in the *Winters* case sustains the view that the indians retained more than merely what is sufficient for purposes of irrigation. There can be no doubt but that they retained, when they entered into their Reservation, enough water to progress normally toward an advanced civilization.

Two cases from the Ninth Circuit Court of Appeals, one decided in 1908 and the other decided in 1956, have augmented the view expressed in the *Winters* case. The most recent of these cases is *United States v. Ahtanum*

Irrigation District, 236 F.2d 321 (1956). The court there observed that "As we have said, the implied reservation of the waters of this stream extended to so much thereof as was required to provide for the reasonable needs of the indians . . . ." By what stretch of the imagination can "reasonable needs" be limited merely to agricultural and domestic needs in an age where industrial uses are becoming more and more important to the economy and welfare of a people? The language of the court contained no such restriction.

The earlier of these cases is *Conrad Investment Co. v. United States,* 161 Fed. 829 (1908). The court proclaimed "the paramount right of the indians of the Black Feet Indian Reservation to the use of the waters of Birch Creek to the extent reasonably necessary for the purposes of irrigation and stock raising, and domestic *and other useful purposes.*" (Emphasis added) Again, the language of the court reflects an intention not to delimit the right of the indians to the mere accomodation of a type of economy based solely on agriculture. The court has clearly left open the door for future changes in the indian economy which will call into existence the need for water to satisfy "other useful purposes".

In the letter written by the General Counsel of the Navajo Indian Tribe to the Attorney General of the United States on February 2, 1961, to which a reply has never been received by the Navajo Indians, request was made to the Attorney General to make absolutely clear in this litigation the extent of the indian water rights as expressed by these cases. The importance of these cases, and the doctrine expressed in them, is underscored by the following remarks contained in that letter:

"I respectfully request that you take exception to this interpretation on the grounds that the so-called Winters doctrine is not so limited. It is true that water was reserved for Indian tribes for agricultural, stock, and domestic uses, but it was also reserved for any other use that Indian tribes might make for the reservations set aside for them by the United States Government. For example, on the Navajo Reservation there has been industrial development and we contemplate greatly expanded industrial development in the near future. This development will require water in substantial quantities and no recognition of such use is given in the Special Master's Report. While the tribes allocated water by the Master may not have contemplated industrial development on their reservations, this construction of the Winters doctrine could be fatal to many tribes who depend on industrial development."

For the reasons stated in the letter, it is imperative that the full extent of indian water rights not be obfuscated in this litigation. They must be expressed forthrightly on behalf of the respective indian tribes, including the Navajo Indian Tribe, and properly determined to their full lawful extent. The United States has not done this, and its failure to do so can hardly be characterized less forcefully than "as inadequate representation."

C. Binding Effect of Judgment

One of the pre-conditions for intervention "as of right" under Rule 24(a) of the Federal Rules of Civil Procedure is, as we have stated above, that "the applicant is or may be bound by a judgment in the action".

The Special Master would himself cut the controversy into two fragments and has proposed a solution which he contends renders one of the fragments unjusticiable. This latter fragment pertains to claims to water in the Lower Basin above Lake Mead. Earlier in this brief we have shown the invalidity of this proposed fragmentation.

In light of the controversy which has raged among the parties for many years as to this water and especially in light of the specific contentions of California, Nevada, New Mexico, Utah and the United States in respect thereto, it is likely that this Court will not acquiesce in the proposed truncation of this controversy. In such an eventuality, the Navajo Indian Tribe, whose claims pertain to the waters of the Colorado River and the Little Colorado River above Lake Mead, will be bound by the terms of any decree that may be forthcoming in this action. Certainly there is no assurance at this stage in the litigation that the Navajo Indian Tribe will not be bound. Nor is such an assurance requested, in light of the need for a complete adjudication of the controversy.

Few legal authorities need be cited in support of the elementary proposition that the Special Master's Report and his findings are not determinative of the issues of this cause, including the issue having to do with its breadth and with the scope of the decree ultimately to be rendered. The Special Master's report can do no more than to present the case to the Court for the Court's own determination. This is clearly set forth in the order entered June 1, 1954, by the Court appointing the Special Master. The order states that "the findings, conclusions, and recommended decree of the master shall be subject to consideration, revision, or approval by the court." This

order is in keeping with the traditional practice of the Court. See *North Carolina R. Co. v. Swasey,* 23 Wall. 405, 23 L.Ed. 136.

No other conclusion can intelligently be reached but that the Navajo Indian Tribe "may be bound by a judgment in the action". As in all other respects, the terms of Rule 24(a) are fully satisfied.

III. CONCLUSION

The Navajo Indian Tribe is making timely application to intervene "as of right" in a matter of the greatest importance to it. The intervention is based upon the inadequacy of the representation given to the Navajo Indian Tribe by the United States, which is itself already a party to this action. The decree ultimately handed down may be one which will bind the Navajo Indian Tribe itself. It is imperative that, in all of the connections discussed above, the lawful rights of the Navajo Indian Tribe be fully protected and asserted, so that they may not become atrophied through neglect and inattention.

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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

PETITION OF INTERVENTION ON BEHALF OF NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA, NEW MEXICO AND UTAH

COMES NOW the Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, and by leave of Court first had and obtained, files this Petition of Intervention in the above-entitled cause, and alleges and states as follows:

I.

The Navajo Indian Tribe has, for many generations and long prior to the acquisition of the territory by the

United States under the Treaty of Guadalupe Hidalgo in July, 1848, lived in, used and occupied the area directly to the east of the Grand Canyon. Part of the area occupied by the Tribe during the said period now constitutes the Navajo Reservation which is located within the northeast corner of Arizona, the northwest corner of New Mexico and the southeast corner of Utah.

During these centuries of occupancy, the Tribe has made beneficial use of the waters of the Lower Basin of the Colorado River, and in particular of the waters of the Colorado River and the Little Colorado River. The present Reservation is bordered on the west by the Colorado River and is in part within the drainage basin of the Little Colorado River, a Lower Basin tributary of the Colorado River which flows through the Reservation and into the Colorado River at a point between Lake Mead and Lee Ferry.

II.

The Navajo Indian Tribe claims as a matter of ancient and aboriginal right extensive water rights in and to the Colorado River and the Little Colorado River, which rights existed long prior to the establishment of the Navajo Reservation, but which rights are now appurtenant to the land contained within the Reservation.

III.

The Navajo Indian Tribe asserts the priority of these water rights over those of all other claimants, whether such claimants appropriated water before the establishment of the Navajo Reservation or not, insofar as such other claimants do not themselves possess a still more

ancient and aboriginal claim upon the waters of the Colorado River and the Little Colorado River.

IV.

Upon the establishment of the Navajo Indian Reservation by the United States, the United States reserved unto the Navajo Indian Tribe its previously existing water rights, which rights remained in the said Tribe and were not given up by it. The reservation of existing rights was coextensive with the future needs of the Navajo Indian Tribe for all of its beneficial uses, whether for hunting, grazing, agriculture, or for other arts of civilization. Such rights cannot, by their nature, be permanently fixed and limited at a given amount. Rather, they are rights of an open and flexible nature, and depend as to their amount upon the needs of the Tribe as aforesaid.

V.

Said rights in and to water of the Colorado River and of the Little Colorado River existing in the Navajo Indian Tribe are rights existing separate and apart from any hierarchy of rights established according to the law of any given state. The rights of the Navajo Indian Tribe do not depend upon state law for their priority, duration or extent. Therefore, it is most appropriate that in this cause the Court give separate recognition to the right of the Navajo Indian Tribe to the use of water in the Lower Basin, such recognition to be apart from the apportionment made to any given state.

VI.

For many years, there has been a protracted conflict among the several users of water in the Lower Basin of the Colorado River as to their respective and conflicting claims in and to the water of the said Basin. This conflict has cast a cloud upon all rights and uses within the Lower Basin. This controversy is justiciable in its nature, and involves claimants as to waters in the Lower Basin above Lake Mead, whose claims, not being severable from the controversy as it exists as to all Lower Basin waters, are themselves justiciable as among themselves and as against claimants to waters in and below Lake Mead.

VII.

The Navajo Indian Tribe denies all the allegations, arguments, conclusions or averments in the respective pleadings of the parties which are at variance with the facts and allegations of this petition of intervention or in contravention of the rights of the Navajo Indian Tribe as hereinabove set forth.

WHEREFORE, the Navajo Indian Tribe respectfully prays:

1. That the rights of the Navajo Indian Tribe in and to the waters of the Lower Basin of the Colorado River, and in particular in and to the waters of the Colorado River and of the Little Colorado River, be adjudicated in this action.

2. That these rights be declared to be of an ancient and aboriginal nature, and prior to all other rights,

whether such other rights were established before the creation of the Navajo Reservation or not, insofar as such other claimants do not themselves possess a still more ancient and aboriginal claim.

3. That these rights be determined by this Court as to their present amount, but that this Court recognize their open and flexible nature, subject to such future changes in amount as may result from changes in the future needs of the Navajo Indian Tribe for hunting, grazing, agriculture or for other arts of civilization.

4. That the apportionment of water to the Navajo Indians be to the Navajo Indian Tribe itself, and not to one or more of the states.

5. That the Navajo Indian Tribe have such other and further relief as the Court may deem proper.

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