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IN THE  
SUPREME COURT OF THE  
UNITED STATES

October Term, 1961

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No. 8. Original

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STATE OF ARIZONA,  
Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT,  
IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY  
COUNTY WATER DISTRICT, METROPOLITAN WATER DIS-  
TRICT 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

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EXCEPTIONS OF THE NAVAJO INDIAN TRIBE TO  
THE REPORT OF THE SPECIAL MASTER, AND  
BRIEF IN SUPPORT THEREOF.

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**EXCEPTIONS OF THE NAVAJO INDIAN TRIBE TO  
THE REPORT OF THE SPECIAL MASTER**

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The Navajo Indian Tribe excepts to the Report of the Special Master, dated December 5, 1960, and to the Recommended Decree contained therein, upon the following grounds:

**I.**

**EXCEPTION RELATING TO THE FINDING OF  
NON-JUSTICIABILITY AS TO WATERS IN THE  
LOWER BASIN OF THE COLORADO RIVER  
ABOVE LAKE MEAD**

The Navajo Indian Tribe excepts to the following provision contained in the Recommended Decree (Report, page 360):



“VIII. This Decree shall not affect: . . . (B) The rights or priorities to water in any of the Lower Basin tributaries of the Colorado River in the States of Arizona, California, Nevada, New Mexico and Utah except the Gila River System; . . . .”

Further exception is made by the Navajo Indian Tribe to the following statements of the Special Master which underlie and support the exclusion set forth immediately above:

Report, page 255: “I agree with Arizona that there is no need in this litigation to adjudicate the rights or priorities of Indian Reservations diverting water from the Lower Basin tributaries, except for the Gila River.”

Report, page 318: “There is, however, no occasion at this time to apportion water of the tributaries of the Colorado River in the Lower Basin between mainstream and tributary states.”

Report, page 323: “Thus Nevada, New Mexico (except as to the Gila) and Utah are, in effect, asking for a declaratory decree confirming their respective existing tributary uses despite the fact that such uses are unchallenged. Such a decree would be wholly without precedent.”

Report, page 323: “It is equally clear that rights of tributary users *inter sese* to make increased uses of tributary water in the future ought not to be adjudicated.”

It is the contention of the Navajo Indian Tribe that the Special Master should have concluded that the entire

controversy pertaining to the rights of the respective parties to use water in the Lower Basin is justiciable, that no part of this overall controversy may be artificially separated from the remainder and declared non-justiciable, and that therefore the rights of the respective parties, including the Navajo Indian Tribe, to the use of water in the Colorado River or its tributaries anywhere in the Lower Basin are to be adjudicated in this action.

## II.

### EXCEPTION RELATING TO SPECIAL MASTER'S VIEW THAT PRIORITY DATE OF INDIAN WATER RIGHTS IS THE DATE OF ESTABLISH- MENT OF THE RESERVATION

It is inferential that the Special Master erroneously accepts the position of the United States as stated on page 254 of the Report:

“Thus the United States claims that each Indian Reservation has the right to divert and consume the amount of water necessary to irrigate all irrigable acreage on the Reservation and to satisfy related needs, *subject only to the priority of appropriative rights established before a particular Reservation was created and water reserved for its benefit.*”

The acceptance by the Special Master of this view may be inferred from his Findings of Fact and Conclusions of Law as to the Chemehuevi, Cocopah, Yuma and Colorado River Indian Reservations, which findings and conclusions appear at pages 267-274 of his Report. As to each of these Reservations, the Special Master recites in his Findings of Fact the date the Reservation was estab-

lished and declares in his Conclusion of Law pertaining to the respective Reservation the date of priority of the water right pertaining thereto, which date is in each case identical with the date the Reservation was established.

It is the position of the Navajo Indian Tribe that the Special Master should conclude that the right of the Navajo Indian Tribe in and to water of the Colorado River and the Little Colorado River is a right of an ancient and aboriginal character existing long prior to the establishment of the Navajo Reservation, and that the Navajo Indian Tribe water right is prior to that 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.

### III.

#### EXCEPTION RELATING TO SPECIAL MASTER'S VIEW THAT WATER APPORTIONMENT IS TO BE MADE ONLY TO THE STATES, TO WHICH THE INDIAN TRIBES MUST THEN LOOK FOR THEIR WATER

The Special Master states at page 247 of his Report the following conclusion, which if applied to the Navajo Indian Tribe in respect to its rights to Lower Basin waters would be highly erroneous and prejudicial:

“All consumption of mainstream water within a state is to be charged to that state, regardless of who the user may be. Thus, consumption of mainstream water on United States Indian Reservations



is chargeable to the state within which the use is made.”

It is the position of the Navajo Indian Tribe that the Special Master should conclude, with respect to the water rights of the Navajo Indian Tribe in the Colorado River and the Little Colorado River, that such rights exist separate and apart from any hierarchy of rights established according to the law of any given state; that the rights of the Navajo Indian Tribe do not depend upon state law for their priority, duration or extent; that, 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 be apart from the apportionment made to any given state.

#### IV.

EXCEPTION RELATING TO THE SPECIAL MASTER'S VIEW THAT THE AMOUNT OF INDIAN WATER RIGHTS IS PRESENTLY DETERMINABLE AND IS LIMITED TO SUFFICIENT WATER TO IRRIGATE ALL OF THE PRACTICABLY IRRIGABLE LANDS IN THE RESERVATION AND TO SUPPLY RELATED STOCK AND DOMESTIC USES

The Special Master erroneously concludes:

Report, page 262: “I have 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 lands in a Reservation and to supply related stock and domestic uses. The magnitude of the water rights

created by the United States is measured by the amount of irrigable land set aside within a Reservation, not by the number of Indians inhabiting it.”

Report, page 263: “Arizona seems to envisage that the United States intended to create water rights in gross which would fluctuate in magnitude as the Indian population and needs fluctuated, the water rights being measured by the amount of water needed at any particular time by the Indians actually inhabiting a particular Reservation. As pointed out above, the more sensible conclusion is that the United States intended to reserve enough water to irrigate all of the practicably irrigable lands on a Reservation and that the water rights thereby created would run to defined land, as is generally true of water rights.”

Report, page 265: “The most feasible decree that could be adopted in this case . . . would be to establish a water right . . . in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation and to satisfy related stock and domestic uses. This will preserve the full extent of the water rights created by the United States and will establish water rights of fixed magnitude and priority . . . .”

It is the position of the Navajo Indian Tribe that the Special Master should have concluded, with respect to the Navajo Indian Tribe, that 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; that the reservation of existing rights was 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; that such rights cannot, by their nature, be permanently fixed and limited at a given amount; that, rather, they are rights of an open and flexible nature, and depend as to their amount upon the needs of the Tribe as aforesaid.

WHEREFORE, the Navajo Indian Tribe requests that the Court reject the Report of the Special Master and the Recommended Decree contained therein to the extent indicated by these Exceptions, and that the Court decide this cause in the manner indicated by the modifications of the Special Master's Report and Recommended Decree as described above.

Respectfully submitted,

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**BRIEF IN SUPPORT OF EXCEPTIONS OF NAVAJO  
INDIAN TRIBE TO THE REPORT OF THE  
SPECIAL MASTER**

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The Navajo Indian Tribe has simultaneously filed several documents with the Court. In order of logical priority, the first of these has been a Motion for Leave to Intervene. An extensive brief discussing in detail the grounds for intervention has been submitted in support of this Motion. These documents have been followed by the Petition in Intervention, Exceptions to the Special Master's Report, and this Brief in support of the exceptions.

Necessarily, the latter three documents are contingent upon the granting by the Court of the Motion for Leave to

Intervene. Their purpose is to complete the requisite procedural steps which would follow a granting of the Motion. They are submitted with the Motion in order that there will be no unnecessary delay in the event the Motion is granted.

\* \* \*

The contentions set forth by the Navajo Indian Tribe in its Exceptions to the Special Master's Report are the same as those set forth in the Motion for Leave to Intervene, where it has been necessary to specify the various areas in which the Tribe has been inadequately represented by the United States.

There is, then, a correspondence, or parallelism, between the issues discussed in the brief supporting the Motion for Leave to Intervene and the issues raised by the Exceptions to the Special Master's Report. The first Exception, for example, pertains to the issue of the justiciability of the controversy as to Lower Basin waters above Lake Mead, and this corresponds with the first ground set forth under "Inadequacy of Representation" in Part II.B. of the brief in support of the Motion. In like manner, the second Exception, dealing with the question of Indian water priority, corresponds with the second ground discussed under "Inadequacy of Representation" in the earlier brief. The third Exception corresponds with the third *and fourth* grounds pertaining to inadequate representation, since the fourth ground listed there was a corollary to the third. Finally, the fourth Exception corresponds with the fifth point discussed in Part II.B. of the earlier brief. It will be seen that they both deal with the question of the extent, in terms of quantity, of the Navajo Indian water right.

Extensive argument has been advanced in the earlier brief in support of each contention. There would seem to be no need unnecessarily to lengthen the record by repeating the arguments made in that brief, since they apply with equal force to the respective Exceptions. For convenient cross-reference, however, the following table is submitted to indicate the pages of the earlier brief in which the argument corresponding to each Exception may be found:

Exception	Pages where argument appears in Brief in Support of Motion for Leave to Intervene
I. (Pertaining to Justiciability).....	25-30
II. (Pertaining to Indian Priority) .....	30-36
III. (Pertaining to need for separate Apportionment to Indians) .....	36-41
IV. (Pertaining to the Extent, in terms of Quantity, of the Navajo Indian water right).....	41-48

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