No. 8, Original

In the Supreme Court of the United States

OCTOBER TERM, 1981

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE SPECIAL MASTER'S REPORT

REPLY BRIEF FOR THE UNITED STATES

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We have previously filed our own limited Exceptions to the Special Master's Report, together with a Supporting Memorandum, and do not now re-argue those points. Nor need we repeat our Statement of the case. The present brief is confined to answering the arguments advanced by the State Parties in aid of their Exceptions to the Report. [1]

Those Exceptions are many and challenge almost every major recommendation entered by the Master. One subject of complaint by the State Parties is the ruling allowing the sever-

[1] See Exceptions of the States of Arizona, California, and Nevada and the other California Defendants to the Report of Special Master Elbert P. Tuttle and Brief of Said Parties in Support of Exceptions (hereafter "State Parties' Brief"); Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception (hereafter "Arizona's Brief"); and, Exceptions of the California Agencies to the Report of Special Master Elbert P. Tuttle; Brief of Said Parties in Support of Exceptions (hereafter "California Agencies' Brief"). See, also, Brief of Amici Curiae, Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users' Association and Arizona Public Service Company.

al Tribes to intervene and to participate in the proceedings through their own counsel—a matter of practical importance because some tribal claims to diversion rights not put forward by the United States were allowed by the Master. See Report at 25-27, 109-110, 117-121, 197-277. Although we have at all times supported the right of the affected Tribes to speak for themselves and continue to do so, we deem it appropriate to leave to them the burden of responding to the present objections to the Master's acquiescence to their intervention. For our part, we restrict ourselves to defending the challenged recommendations of the Report which sustain the claims of the United States. See Report at 106-117, 125-196.

1. We address first (*infra*, at 3-22) the Exceptions contesting the Special Master's decision that Article IX of the 1964 Decree is properly invoked to allocate additional water rights in respect of practicably irrigable lands within the conceded boundaries of the Indian Reservation for which no such rights were awarded in the earlier proceedings. In the special circumstances — including the long deferred adjudication of competing non-Indian Present Perfected Rights, the absence of any serious detrimental reliance by the State Parties on the 1964 quantification of Reservation diversion rights, and the concededly substantial irrigable acreage entitled to water under the established standard — we argue that consideration of these "omitted land" claims was both permissible and appropriate.

2. Next (*infra*, at 22-31), we turn to the Exceptions challenging the Special Master's conclusion that additional diversion rights may now be adjudicated on the basis of lands determined to lie within Reservation boundaries after the 1964 Decree had been entered. The only question on this score is whether boundary adjustments declared by formal administrative decisions or final court judgments are sufficiently "finally determined" within the meaning of Article II(D)(5) of the 1964 Decree to support the water allocations now recommended. We agree with the Special Master that such "boundary lands" are presently entitled to be treated as part of the

several Reservatons, subject only to possible later challenge in appropriate proceedings in another forum.

3. Finally (*infra*, at 31-39), we briefly answer lesser Exceptions challenging certain factual determinations of the Special Master so far as they involve the successful claims of the United States. Specifically, we deal with the complaint that the Master misapplied the burden of proof and committed error by preferring, as more reliable and more convincing, the evidence of the experts of the United States who, it is said, overestimated the crop yields to be expected from certain lands and underestimated the production costs of farming those lands, as well as the cost of power where pumping or pressure irrigation was required. These Exceptions, we note, reach less than 11 percent of the acreage for which diversion rights were allowed by the Master on the claims of the United States.

I

"OMITTED LANDS": MODIFICATION OF THE ALLOCATION OF WATER FOR USE ON THE FIVE INDIAN RESERVATIONS, WITHIN CONCEDED BOUNDARIES, IS PROPER UNDER ARTICLE IX OF THE 1964 DECREE

A. Introduction

The State Parties vigorously protest the Special Master's conclusion that, boundary changes aside, Article IX of the 1964 Decree in this case, 376 U.S. 340, 353, authorizes a modification of the water allocations to the five Indian Reservations. And, even if the power exists, they argue that it should not have been exercised in the present situation. We respond to both points. But, at the outset, we stress what the State Parties ignore: that the Special Master's ruling should be judged in the particular context, especially the relative *timing* of the requested modifications. Only when the "omitted land" claims are seen in perspective, is it possible to appreciate that this is not an untimely attempt to unsettle a comprehensive adjudication concluded many years ago, upon which all in-

terested parties have relied as permanently fixing water rights in the affected States.

1. The rights to the use of water which the United States holds for the benefit of the Indian inhabitants of these five Reservations are "Present Perfected Rights" within the meaning of the Boulder Canyon Project Act. 373 U.S. 546, 600. [2] But other water users also hold Present Perfected Rights to water aggregating over three million acre-feet of diversions—almost three times the total allocated to the five Indian Reservations. See Supplemental Decree of January 9, 1979, 439 U.S. 419. The inter-relationship between those non-Indian Present Perfected Rights and the Present Perfected Rights which the United States holds on behalf of the Indian Tribes has always been recognized in this litigation. Obviously, all Present Perfected Rights must be fixed before the Secretary can finally determine the amount of water available for allocation to other users. Yet, the fact is that quantification of non-Indian Present Perfected Rights was not finally accomplished until 1979, after the Tribes and the United States had requested modification of the amounts decreed as Indian Present Perfected Rights. See Report at 20-25.

To be sure, all parties had envisioned a far quicker resolution of the problem. Special Master Rifkind's recommended decree called for the submission to the Court within two years of lists of all Present Perfected Rights claimed by the States and the Secretary of Interior. Disputes were to be resolved by application to the Court. A similar provision was submitted to this Court as an "agreed provision" [3] and was included in the 1964 Decree. Art. VI, 376 U.S. at 351-352. As it happened, however, even a listing of those rights within two years was impossible and the Decree was amended to extend the deadline.

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[2] "Present Perfected Rights" are defined in the 1964 Decree in Art. I (G) and (H), 376 U.S. at 341. Under the terms of the 1964 Decree, Present Perfected Rights, for all practical purposes, have first call on the River and are virtually guaranteed a full supply of water. See, *e.g.*, 373 U.S. at 584; Decree, Art. II (B)(3), 376 U.S. at 342.

[3] Agreed Provisions for Proposed Final Decree (December 1963).

383 U.S. 268 (1966). Not until the entry of the 1979 Decree was the issue of non-Indian Present Perfected Rights finally resolved. But, by that time, both the United States and the Tribes had raised their contentions that the allocations for the Indian Present Perfected Rights did not include sufficient water to irrigate all the practicably irrigable acreage on the five Reservations. That circumstance, quite naturally, was treated by the Special Master as critical to his determination that Article IX was timely invoked. Report at 55-56.

Nor was the entry of the 1979 Decree finally quantifying non-Indian Present Perfected Rights a mere formality, confirming what everyone knew to be the other preferred claims on the mainstream of the lower Colorado River. The fact is that, in filing their lists of Present Perfected Rights with the Court and the Secretary of the Interior in 1967, both California and Arizona claimed quantities very substantially greater than were ultimately recognized by the 1979 Decree. Thus, California then asserted Present Perfected Rights (not including those for Indian Reservations) totalling 3,039,407.7 acre-feet of consumptive use [4] and Arizona asserted like rights totalling 399,358.52 acre-feet of consumptive use. [5] Assuming a one-third return flow, these figures translate to approximately 4.5 million and 600,000 acre-feet of diversions, respectively. Yet, the 1979 Decree recognized only 2,863,051 acre-feet of mainstream diversions to satisfy non-Indian Present Perfected Rights in California and 298,003 acre-feet of diversions for non-Indian Present Perfected Rights in Arizona. 439 U.S. at 423-435. The difference—almost 2 million acre-feet of diversions—highlights the degree of uncertainty that prevailed until after the present Indian claims were asserted. And, of course, by comparison, the total recommended additional allocation to the Reservations (some 317,000 acre-feet of diversions) seems almost insignificant.

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[4] See List of Present Perfected Rights in the State of California (Excluding Federal Establishments) Pursuant to Article VI of the Decree (filed March 9, 1967).

[5] See List of Present Perfected Rights Submitted by the State of Arizona (filed March 9, 1967).

The State Parties fail to comment on this aspect of the request by the United States and the Tribes to complete the Reservation allocations. They accuse the Master of establishing a "disruptive legal precedent" (State Parties' Brief at 36), without noticing the special setting in which he deemed it appropriate to invoke Article IX. That situation will not recur. Now that all Present Perfected Rights are quantified, it will be very difficult for any claimant to justify disarranging the status quo.

2. At all events, the present claims are not nearly as disruptive as the State Parties contend. As characterized by the Master, the modifications recommended are "relatively minor adjustments of the kind which might legitimately be expected in the aftermath of a much larger original case." Report at 55. Moreover, the request does not seek to change the previously adopted quantification standard of allocating sufficient water to irrigate the practicably irrigable acreage on each Reservation. All that was asked, and allowed, was a correction of omissions in applying the established standard.

B. Article IX Authorizes The Modification Of The Amount Of Water Allocated To Use On The Five Reservations

In determining the extent of the jurisdiction retained by Article IX, Special Master Tuttle found the language of the Article persuasive. [6] In his words (Report at 34-35):

> The best indicator of the scope of Article IX is thus its very language. On its face Article IX would permit very broad modifications of the 1964 Decree. Certainly it contains no limiting language. In the absence of more convincing arguments, I believe that the Court, by employing a broadly-drafted Article IX, retained the power to make virtually any modification in its 1964 Decree that it deemed proper "in relation to the subject matter in controversy."

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[6] Article IX of the 1964 Decree (376 U.S. at 353) provides:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modifica-

The State Parties acknowledge the sweeping scope of the language (Brief at 24), but contend that the otherwise expansive terms of Article IX do not apply to the provisions of the earlier Decree allocating water to the five Indian Reservations. Nothing in the wording of the Article hints at such a limitation. Nor did any of the parties at the time suggest such a one-sided construction of the Decree. Indeed, the only submission which discussed Article IX called for a broad provision which would avoid any potential problem with modifying the Decree. Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court" as Heretofore and Herewith Submitted at 11 (Dec. 1963). See Report at 33 n.5.

The State Parties nevertheless argue that Special Master Rifkind's decision to fix the allocation of water for the Reservations forecloses the subsequent application of Article IX to that portion of the litigation. To be sure, the previous Master rejected the notion of an open-ended decree for the Reservation allocations. But his adoption of a permanent standard which would quantify the amount of water to be allocated to the Reservations does not debar us from invoking Article IX to ensure that the chosen standard was applied correctly.

Special Master Tuttle persuasively disposed of the contention by the State Parties that Article IX must be so limited. After reviewing the record before his predecessor, the Master concluded that the former Master actually may have included Article IX in part precisely to permit a modification of the Indian allocation in light of the suggestion by the United States that it may have understated the Tribes' rights. Report at 53. At all events, in adopting a broadly worded Article IX, the former Master and the Court gave absolutely no indication that the allocation to the Indian Reservations were uniquely exempted from its terms. In those circumstances, it would be most unusual to now attempt to restrict the plain terms of the provision.

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tion of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

The Special Master also examined outside authority for guidance in interpreting Article IX. See Report at 33. Although the Master noted that provisions similar to Article IX are found in the decrees of this Court for other interstate water cases, he recognized that those precedents "merely illustrate that the Court may make even major modifications of decrees in cases over which it has retained jurisdiction." *Ibid.* The State Parties argue (Brief at 28-32) that reliance on these cases is inappropriate because, in some instances, the Masters' Reports allegedly qualify the scope of later modifications. However that may be, there is no similar limitation here. The contention that the language of Article IX must be read as not applying to Article II(D)(1)-(5)—which governs the allocation of the five Indian Reservations—ignores the fact that the parties, the Master, and the Court were perfectly capable of fashioning a provision which had the limited effect now urged by the State Parties. See Report at 34.

After fully considering the contentions of the Parties, the Master found that "[t]he best indicator of the scope of Article IX" was its language. Report at 34. To so read the provision is wholly consistent with an established pattern in water adjudications. As the Master notes, "water rights decrees often include a retention of jurisdiction which may be used to adjust the water rights decreed in the event an error is discovered." Report at 47. [7] We rest on the Master's conclusion that the Court had retained jurisdiction to make the modifications urged by the Tribes and the United States. See Report at 34-35.

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[7] In addition to the authorities there cited by the Master, we call the Court's attention to several decisions indicating that courts in the West do not uniformly adhere to rigid notions of finalty in water adjudications. See, *e.g.*, *Hudson* v. *West*, 47 Cal. 2d 823, 831, 306 P.2d 807, 811 (1957); *Masterson* v. *Pacific Livestock Co.*, 144 Or. 396, 403, 24 P.2d 1046, 1049 (1933); *Morgan* v. *Udy*, 58 Idaho 670, 79 P.2d 295 (1938); *Trinchera Irrigation District* v. *First Nat'l Bank*, 106 Colo. 128, 102 P.2d 909 (1940); *City of Westminster* v. *Church*, 167 Colo. 1, 445 P.2d 52 (1968).

C. The Special Master Correctly Concluded That The Court Should Modify The Allocations To The Tribes.

Of course, power to modify the 1964 Decree does not necessarily mean that it should be exercised. See Report at 35. Only after carefully weighing all relevant factors, did the Master conclude that he would recommend that the Court exercise the authority retained in Article IX to provide the Tribes with the full amount of water to which they are entitled under the standard previously adopted by the Court.

The Master did not reach this conclusion casually or hastily. He held the question in abeyance throughout the hearings, invited the State Parties to make their best showing, and only after hearing all relevant evidence, came to a final decision. The Master's Report devotes considerable discussion to determining the extent of the reliance by the State Parties on the 1964 allocations. Ultimately, however, the Master concludes that the unfairness to the Tribes of an admittedly erroneous quantification of their water rights is not outweighed by the showing of reliance by the State Parties. Report at 38-46. The record fully supports that result.

At the outset, it is important to be clear about the appropriate inquiry. The issue is *not* whether confirming the additional water rights for "omitted lands" awarded by the Master will affect water users in the three States. See *Cappaert* v. *United States*, 426 U.S. 128, 138-139 (1976). Rather, the only relevant consideration weighing against exercising discretion to now correct past mistakes is a showing by the State Parties that they would have acted differently if diversion rights for the "omitted lands" awarded by the Special Master in 1982 had been adjudicated as part of the original decree in 1964. Unless it is established that the States and their water users relied to their detriment on the 1964 Decree, they have been more advantaged than harmed by mere postponement of the final reckoning. And, of course, we must look beyond a simple belief, however firmly held, on the part of non-Indian claimants that the Reservation allocations were immutably frozen by the 1964 Decree. What matters is how, if at all, they

acted to their detriment in reliance on that premise—whether by undertaking commitments or foregoing opportunities. Only then is there something to balance against the equities in favor of amending the old Decree to afford the Tribes their full share of mainstream water.

The evidence presented by the State Parties as to detrimental reliance is far from overwhelming. As the Master stated, it is "difficult to determine from the testimony exactly what significant, different action the State Parties would actually have taken if the Indian Reservations had received in 1964 the water rights now requested." Report at 46. Indeed, it can fairly be said that so far as the Master credited the State Parties' reliance argument, he did so more on the basis that they "must have" relied on the Decree to some extent, rather than on the strength of any evidence actually in the record. *Ibid.*

1. The Master's conclusion that Arizona may have relied to its detriment on the 1964 Decree seems overly generous. As the Master notes, the question of Arizona's purported reliance on the earlier allocation focuses on the Central Arizona Project, a massive federal project designed to transport Colorado River water to the central portions of Arizona. See Colorado River Basin Project Act, 82 Stat. 887 (1968); 43 U.S.C. 1521. Arizona now argues that it relied to its detriment on the allocation of Indian water rights in the 1964 Decree in connection with this Project. But the record does not sustain the claim. [8]

There is no basis whatever for supposing that the Project would have been aborted if the "omitted lands" claims sustained by the present Master had been recognized in 1964. Indeed, Arizona does not dispute the Master's express finding to the contrary. Report at 40. Nor is it suggested that the

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[8] We note that Arizona now attempts to bolster the record by gratuitous statements regarding Congressional and State reliance on the 1964 Decree in formulating the Project—material the State unsuccessfully sought to put into evidence through oral testimony. Tr. 2690-2692.

Project will be discontinued as a result of the belated recognition of Indian rights. Moreover, at the time of trial, construction of the aqueduct from the Colorado River to Central Arizona was only 60% complete and delivery of water was not expected until 1985. Tr. 2760. Prior to the initiation of the requests for modification of the 1964 allocation no water had been finally allocated from the Project. Tr. 2708. The repayment contract between the United States and the Central Arizona Water Conservancy District has never been validated and, thus, Arizona water users are under no obligation to repay any of the costs of the Project. Tr. 2760-2761; see also Tr. 2693-2694. Although Arizona asserts (Brief at 26) that Congress has appropriated over 932 million dollars for construction of the Project, only $625,000 has been advanced by the State; the remainder has been paid by the United States. Tr. 2760. The upshot is that water users in Central Arizona cannot claim to have relied on the receipt of any water from the Project. Nor are they committed to the repayment of the costs.

As the Master acknowledges, the thrust of Arizona's claim of detrimental reliance is simply that confirmation of additional rights for the Tribes will ultimately affect the quantity of water available for the Project. But this reality hardly demonstrates detrimental reliance. A host of other factors affect the availability of water for the Project. As previously mentioned, all Present Perfected Rights assume a priority over the Project. Yet, not until 1979 was the issue of non-Indian Present Perfected Rights resolved, and, until then, Arizona itself claimed 300,000 more acre-feet of Present Perfected Rights than were ultimately recognized by the 1979 Decree. See List of Present Perfected Rights Submitted by the State of Arizona (filed March 9, 1967). [9] This excess is, of course, far greater than the

[9] As we have noted, Arizona's 1967 List, claiming almost 400,000 acre-feet of Present Perfected Rights, is stated "in terms of consumptive use" (at 2). Assuming a one-third return flow, this would require diversions from the mainstream of approximately 600,000 acre-feet. The 1979 Decree, on the other hand, recognized less than 300,000 acre-feet of diversions to satisfy non-Indian Present Perfected Rights in Arizona. 439 U.S. at 423-427. We note that Arizona

aggregate of all additional diversion rights allowed by the Master in respect of Reservation lands in Arizona, and almost twice the allocation for "omitted lands." [10]

In addition, substantial disagreement exists between Arizona and the Bureau of Reclamation over the water supply available for CAP. Tr. 2765. The rate of development in the Upper Basin of the Colorado River is critical in determining the available supply. That development has been far less than expected during the planning stages of CAP and more water is available for CAP than originally anticipated. Tr. 2769-2771. In fact, Wesley Steiner, the Director of the Arizona Department of Water Resources, has stated that the recent abandonment of oil shale development in Colorado will release "more than enough" water to offset the recognition of additional rights for Tribes in this case. [11] The Arizona Republic, May 6, 1982, at B 1, 5. [12] There is also a continuing dispute over the amount of depletions from the River in Arizona, as well as over the proper techniques for operating the regulatory structures on the River. Tr. 2765-2775. The Bureau of Reclamation con-

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did not promptly revise its claim. On the contrary, as late as December 13, 1972, the State filed with the Court a Supplemental List of Present Perfected Rights, adding some 35,000 acre-feet of gross diversions—in effect, an "omitted land" claim of its own.

[10] Subject to perhaps minor correction, it appears that in respect of the "omitted land" claims sustained by the Special Master (on both the claims of the United States and the Tribes) some 169,091 acre-feet of diversion rights would be charged against Arizona's share (a minimum of 2.8 million acre-feet of consumptive use). Assuming a one-third return flow, the actual loss to CAP on account of the allowance of the "omitted lands" claims would be approximately 112,727 acre-feet. The diversion rights recommended by the Master for "boundary lands" in Arizona (on the claims of the United States and the Tribes) total about 20,255 acre-feet, or about 14,500 acre-feet of consumptive use.

[11] Mr. Steiner was the only witness who testified as to Arizona's reliance on the Decree.

[12] A copy of this Article is included as an Appendix, *infra*.

cludes that the Project has available a firm supply of 400,000 acre-feet. Tr. 2767. Arizona predicts a much larger firm supply of 550,000 acre-feet of water. Tr. 2766. Indeed, following Arizona's analysis, even after recognition of the additional rights for the Tribes, more water will be available for the Project than was anticipated by Congress during the authorization of the Project. See Report at 39-41; Tr. 2703, 2706-2707; S. Rep. No. 408, 90th Cong., 1st Sess. 18-21 (1967) (in evidence as U.S. Exh. 161).

Finally, it is clear that the increased water allocations for the Indian Reservations will have no significant financial impact on the revenues available to the State to repay Project costs. If the State attempts to make up the lost revenue through increased charges to Project agricultural water users, that would amount to an additional 34.5 cents per acre-foot. Tr. 6052-6053. If the rates charged for power obtained from the facilities at Hoover Dam were to be increased, homeowners in the Central Arizona area would only be required to pay an additional 46 cents per year. Tr. 6053-6054.

In sum, Arizona's claims of reliance are unpersuasive. There is simply nothing to indicate that Arizona would have acted differently if the diversion rights for "omitted lands" had been recognized in 1964, rather than now.

2. The only California party to argue reliance on the 1964 Decree was the Metropolitan Water District. Again, the Master was most generous in recognizing that, to some extent, MWD may have relied on the 1964 Decree.

Before the Master, MWD argued that after 1964, the District moved to acquire additional water sources to offset its losses to the Indian Tribes. Motion to Reject the Omitted Lands Claims at 31. But the record does not support that contention. Indeed, it is now admitted that the District took steps to offset its losses to Arizona, but ignored its losses of 55,000 acre-feet of consumptive use to the Tribes. State Parties' Brief at 48-50. That, we are told, is because the allocation to the Tribes was viewed as "relatively minor." *Id.* at 50.

In the circumstances, it is difficult to credit the present claim that the District's plans would have been substantially differ-

ent had it foreseen an additional allocation for "omitted lands" in California amounting to less than 16,000 acre-feet of consumptive use [13]—not even one-third the "relatively minor" amount "lost" to the Tribes in 1964. On the contrary, as the Master notes, those responsible for planning for the District even at the time of trial did not seem concerned about the possible recognition of additional tribal rights. Report at 43; Tr. 2943-2944.

3. The Master was unequivocal about the failure of Nevada to show that it had detrimentally relied on the 1964 allocation. The fact is that Nevada, in its planning process, had set aside 12,500 acre-feet of water for consumptive use by the Fort Mojave Tribe—whose Reservation alone among the five involved here includes lands within Nevada. Report at 44-45. That amount, as the Master stated, was more than sufficient to satisfy the additional rights claimed by the Tribe and the United States, as well as the rights recognized in 1964. Report at 45 and n.55.

Nevada's current speculation that there will be no return flow from diversions to Reservation lands in Nevada is unsupported by the record. Every expert who testified about the impact of recognizing additional water rights for the Tribes acknowledged that the diversions would exceed the depletion or consumptive use. See FM Exh. 1; State Parties' Brief at 50 (one-third return flow in California); Tr. 2752; Report at 40 n.25, 44-45. Nevada's attempt to correct its expert's failure to understand that the amounts decreed to the Tribes in 1964 were for gross diversions, not net depletion, is most extraordinary given the nature of the parcels of land on the Fort Mojave Reservation in Nevada. One parcel, FM-1, is

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[13] The State Parties calculate the total additional allocation to Indian lands in California at 123,314 acre-feet of diversions. Brief at 50. But, of this amount, only approximately 23,000 acre-feet are attributable to "omitted lands." And, as the State Parties acknowledge *(ibid.)*, return flow is reasonably estimated at one-third. Accordingly, additional consumptive use for "omitted" Indian lands within California is less than 16,000 acre-feet.

immediately adjacent to the River and contains sandy lands. See FM Exh. 2, plate 1. The other unit, FM-3, the Master found to overlie a groundwater acquifer which is connected to the mainstream of the River. The result, of course, is that the irrigation return flows from these parcels will indeed return to the River.

The truth is that Nevada has not fully committed its share of Colorado River water. Thus, the State envisions using uncommitted diversion rights for future developments in two areas. Tr. 3001, 3004. Almost 10,000 acre-feet of uncommitted water is available for these potential developments. Report at 45; Tr. 3023. This is, of course, far more than is needed to satisfy the additional rights claimed in Nevada by the United States and the Tribes. Obviously, then, Nevada has not relied to its detriment on the 1964 Decree.

4. Although they speak of reliance on the 1964 Decree, the real concern of the State Parties is with respect to the *future impact* of the additional claims on their water allocations. Arizona specifically states that it "finds no discernable difference between the inquiry concerning 'detrimental reliance' and that of 'detrimental impact' * * *." Arizona's Brief at 30. See also State Parties' Brief at 50-52, which discusses the impact on the MWD and Nevada. The Master, of course, recognized that "What the Tribes gain someone else will lose, at least in the future." Report at 38 (footnote omitted). But the proper inquiry here, as the Master notes, is detrimental reliance. *Ibid.* The State Parties' reiteration of conclusionary statements, unsupported by the record, regarding the effect of the loss of their access to the water does not transform future impact into past reliance.

At all events, the record does not reflect that the State Parties will be detrimentally affected to any substantial extent by the present awards to the Tribes. In Arizona, for example, the testimony of Mr. Steiner, the Director of Water Resources, showed that the per capita use of water in the City of Phoenix is twice that of Tucson. The reason for the difference is the additional amount of water used to water grass, trees and shrubs in Phoenix. If Phoenix were to lower its rate to that of

Tucson, more than enough water would be released to cover the claims for the Tribes. Tr. 2793-2795; U.S. Exh. 93. The State Parties, as they did before the Special Master, argue that the award of additional rights for use on the Indian Reservations will affect the Metropolitan Water District. Although MWD holds the most junior priority of the California interests and, thus, theoretically will be affected by the recognition of any additional senior rights, the record does not show the actual amount of water which will be denied to the District. At worst, as we have noted (*supra*, at 14), it cannot exceed 16,000 acre-feet on account of the "omitted lands" claims sustained by the Master. There is no basis for supposing that the District, which currently uses 1,300,000 acre-feet of water (Tr. 2919), could not satisfy its needs out of the over 2.5 million acre-feet to which it has contractual entitlements from the State Water Project and the Colorado River. Tr. 2914, 2920-2921.

The record establishes that the impact of the recognition of these claims will be minimal. Presently, no shortage of water exists on the River and the River is full from top to bottom. See, *e.g.*, Tr. 2839-2841, 2958. In fact, the water supply imposes no limitation on the development of new lands in the Palo Verde Irrigation District in California. Tr. 4973.

5. The Special Master did not lightly conclude that the "omitted lands" claims were open to consideration. But, at the end of the day, he determined that factors on the other side of the balance made unyielding adherence to the 1964 allocation inappropriate. Report at 47.

First, of course, Article IX on its face demonstrates that the 1964 allocation was not totally immutable. Even the State Parties agree that, at least with regard to boundary lands, they could expect increased allocations to Indian Tribes. Other changes could have been expected as well, since, as the Master notes, the Parties perceived Article IX as a reservation of authority to correct any mistakes subsequently discovered. Report at 47. And, given the "number of complex issues and difficult matters of proof," at least some mistakes could be anticipated. *Ibid.*

Most compelling for the Master was the uncontested existence of substantial "omitted lands" entitled to water rights under the established standard. Concededly, a large majority of the "omitted lands" for which water rights are claimed by the United States are practicably irrigable. Report at 47. Unless the rules are changed, the Tribes are entitled to have their rights quantified on the basis of the practicably irrigable acreage on their Reservations. It would be a more radical step now to reject the established standard because of a marginally greater impact on non-Indian water users in 1982 as compared to 1964. Certainly, the need for water on these Reservations is no less today than it was in 1963 when this Court stated that "water from the river would be essential to the life of the Indian people * * * and the crops they raised." 373 U.S. at 599. Special Master Rifkind carefully articulated his reasons for settling on the practicably irrigable standard. Report of Dec. 5, 1960 at 260-266. Those reasons were previously accepted by the Court and are equally persuasive today. See 373 U.S. at 600-601. As the former Master stated, "the United States intended to reserve enough water to make the lands productive, in other words, enough to irrigate all the practicably irrigable acreage. Only by reserving water in this manner could the United States ensure that the Reservation lands would be useable to an Indian economy." Report of Dec. 5, 1960 at 262.

6. To be sure, the State Parties now assert that some, if not all, the "omitted lands" today deemed "practicably irrigable" would not have been so viewed at the time of the proceedings before Special Master Rifkind. State Parties' Brief at 40-45. It is said that the "evidentiary criteria" have been altered (*id.* at 42) because "the passage of a quarter of a century has improved soil classification science and irrigation technology" (*id.* at 43). This is a new claim, not presented, much less proved, during the trial before Master Tuttle, and only suggested after the record was closed. See Report at 51. [14] But, at all events, the point is wholly without merit.

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[14] At one point, the State Parties did offer proof seeking to establish the limited acreage that could feasibly have been irrigated under nineteenth-century techniques, known when the Reservations were

Contrary to the implication in the State Parties' Brief that a significant portion of the United States' case rested on the "more modern" Soil Conservation Service (SCS) Standards, the fact is that most of the evidence of irrigability presented by the United States in the current proceedings was based on the same BIA standards developed for this litigation a quarter century ago. Tr. 116, 117; U.S. Exh. 1 at p. 2. The SCS standards were only applied to the disputed sandy lands which the State Parties concede encompass only 1,750 acres. Tr. 127; State Parties' Opening Post Trial Brief at 11. In significant measure, the lands now awarded water rights are merely omitted portions of units declared irrigable in the earlier proceedings. See, *e.g.*, U.S. Exh. 42 at p. 45. And, in other cases, it is obvious that non-irrigability was not the reason for excluding the omitted lands before Special Master Rifkind. Report at 48-52 and n.63.

Nor do we believe the result should be different if it could be shown that some lands are practicably irrigable today but were not twenty years ago. Presumably, technological advances alone ought not call for re-opening a complete decree. See Report at 98 n.23. But it hardly follows that when, for independent reasons, new lands are examined for irrigability, outdated tests artificially should be used. Just as Special Master Rifkind applied then current criteria of practical irrigability, so Special Master Tuttle was right to look to present technology. See Report at 98. Any other approach is impractical. [15] Moreover, since the premise of the "practicably

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established. The present Special Master, like his predecessor, firmly rejected this approach. Report at 97-98 and n.24. That suggestion now appears to have been abandoned by all the State Parties, except perhaps Arizona. See Arizona's Brief at 36-39, B-1 to B-5.

[15] Before the Master, all parties presented evidence which was based on current farming practices and technology. An investigation of irrigation feasibility in the 1950's would entail more than simple adherence to the BIA Soil Standards. A determination of crop prices, labor costs, power rates and a host of other factors for the time period would also be required. Compare U.S. Exh. 60. The State Parties introduced no evidence relative to such issues. And, as the Master

irrigable" standard is to provide for "the future as well as the present needs of the Indian Reservations" (373 U.S. at 600), it would be quite wrong to exclude lands known to be irrigable today. Indeed, to the extent that it can safely be predicted, one ought to take into account *future* improvements in technology. Certainly, actual knowledge cannot be disregarded. After all, the purpose of the exercise is to determine what lands can be irrigated for the benefit of the present and future generations, not to revive some past historical situation, as of an arbitrary date. [16]

In truth, the State Parties are urging abandonment of the "practicably irrigable" standard. Unless the Tribes can show an immediate and pressing need for water, they contend there is no basis to modify the Reservation allocations. But this ignores the very reason that the practicably irrigable standard was chosen: It was the one method by which the Tribes' present and future needs could be assured of being met and still achieve the much desired finality. [17] Our plea is only that this standard be applied correctly.

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notes, "[r]eference to past standards would introduce an additional complication in an already complex case." Report at 98. Moreover, nothing in the existing record indicates that fewer lands would be considered irrigable under the older techniques. For example, power rates, it must be conceded, would have been significantly lower at that time.

[16] Of course, the argument cuts both ways. In our view, it would be equally wrong to attempt to recreate an irrigation system that once was, but is no longer, feasible—because significant physical changes have intervened or the cost of power or necessary facilities have substantially increased.

[17] Arizona expressly asks the Court to adopt a different standard. Arizona's Brief at 31-36. According to Arizona, this Court's decision in *State of Washington* v. *Fishing Vessel Association*, 443 U.S. 658, 685-687 (1979), required the Master to consider evidence regarding Reservation income levels and other related matters designed to demonstrate the amount of water needed to provide a "moderate living." The Master refused, noting that "the prior Master rejected such arguments which would tie the quantity of water to present

7. Finally, the Special Master was influenced by the circumstance that the United States was seeking to correct its error, not for its own benefit, but on behalf of Indian Tribes who were not participants when the original allocations were made. In our view, that approach was right, even though we admit no conflict of interest embarrassing the Government's

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needs." Report at 90-91 n.5. And, indeed, this Court expressly disapproved any approach that would balance the relative needs of the Tribes and affected non-Indians. *Arizona* v. *California*, *supra*, 373 U.S. at 596-597; see, also, *Cappaert* v. *United States*, *supra*, 426 U.S. at 138-139.

At all events, there is no reason to believe that the inquiry would result in the allocation of a different quantity of water for use on the Reservations. For example, the Colorado River Reservation presently has approximately 23,000 tribal members. Tr. 1416. Thus, under the 1964 allocation, water was available to irrigate 48 acres per member. Under Special Master Tuttle's recommended allocation, the equivalent figure is 59 acres. The figures for the other Reservations are lower:

	Population	Irrigated Acres per Capita 1964 Allocation	Irrigated Acres per Capita Master's Allocation
Ft. Mojave	723 (Tr. 1383)	26	34
Chemehuevi	400 (Tr. 1433)	5	9
Fort Yuma	1,700 (Tr. 1445)	4.5	11.5
Cocopah	465 (Arizona's Brief A-2)	.9	5.9

And, of course, the population of the Reservations is expected to increase significantly in the future. The value of each irrigated acre is difficult to establish, but certainly is not as high as suggested by Arizona's offer of proof. See Tr. 1418-1423. At any rate, these amounts do not appear extravagant when the 160 acre limitation in federal reclamation law is considered. See Section 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649; 43 U.S.C. 423e. Needless to say, the Reservation allocations are very modest when compared to those enjoyed as Present Perfected Rights by the farmers of the Imperial Valley, exempted from that limitation. See *Bryant* v. *Yellen*, 447 U.S. 352 (1980).

representation of the Tribes in the earlier proceedings, much less any impropriety committed by counsel. At least if, as we believe, the Court retained jurisdiction to make the adjustments now sought, the decision whether to exercise that power properly may take into account that the victim was not responsible for the unjust result and in no position to prevent it.

After all, although the United States as guardian of the Tribes has broad powers to administer their property and to represent their interests in litigation, it has no authority to alienate their rights to others without compensation or to sacrifice them to other concerns, whether by accident or by design. *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497-498 (1937); *United States* v. *Creek Nation*, 295 U.S. 103, 110 (1935). Sometimes, to be sure, a partial remedy is afforded through a later monetary award against the United States. *E.g.*, *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980). But even such relief—never wholly satisfactory—is not available unless a "taking" in the Fifth Amendment sense has occurred or Congress has clearly so provided. See *United States* v. *Mitchell*, 445 U.S. 535 (1980). Moreover, here, we concede no breach of fiduciary duty and the accountability of the United States in damages would be strongly resisted. See *United States* v. *Mason*, 412 U.S. 391 (1973). Most likely, the Tribes must remain remediless in any other forum. [18] At all

[18] We accordingly reject the facile solution offered by the State Parties for the Tribes' predicament: "Let them sue the United States in the Court of Claims." See State Parties' Brief at 53-55. We wholly fail to understand the alternative suggestion of Amici Curiae (Brief at 26) that any "tribal deficiency" be made up by reducing "the water allocated to the United States." The only diversion rights adjudicated in the 1979 Decree in favor of "Federal Establishments" other than Indian Reservations is a single award of 500 acre-feet to the Lake Mead National Recreation Area in Nevada. 439 U.S. at 436. We are aware of no other presently quantified federal diversion rights against the mainstream of the lower Colorado, unless the several federal irrigation projects are included. We cannot suppose the beneficiaries of the Salt River Project would suggest that the Present Perfected Rights of the Imperial Valley farmers be diminished to satisfy the Indian claims. See *Bryant* v. *Yellen*, *supra*.

events, where a more direct correction of the error is not clearly foreclosed, it should be allowed for the benefit of the ward even if the guardian could not recapture its own property in like circumstances. Cf. *Cramer* v. *United States*, 261 U.S. 219, 233-234 (1923); *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 355-356, 360 (1941).

The situations in which the United States is estopped because of the default of its agents are rare enough even when its own proprietary interests are involved. Compare *United States* v. *California*, 332 U.S. 19, 39-40 (1947). Such exceptions ought be even fewer when the adversely affected rights are merely held in trust for another. That is especially so, it seems to us, in the context of Indian water rights, so essential to implementing the one consistent strand in congressional Indian policy: the attempt to encourage Indian agriculture—whether in the name of "civilizing" or "assimilating" the Indian population or in order to provide the Tribes a measure of self-sufficiency. Denying the Reservations their full quota of water because of past governmental default is more than injustice to the intended beneficiaries; it also implicates the Nation's assumed obligation toward a dependent people and impedes the achievement of long-standing public policy.

For these several reasons, we submit the Master's recommendation to utilize Article IX to correct the allocation of water to the Tribes is fully justified.

II

"BOUNDARY LANDS": THE ADJUSTED BOUNDARIES OF THE INDIAN RESERVATIONS HAVE BEEN SUFFICIENTLY "FINALLY DETERMINED" TO JUSTIFY THE ALLOCATION OF WATER FOR THE PRACTICABLY IRRIGABLE ACREAGE INCLUDED WITHIN THE RESTORED OR ADDED LANDS.

A. Introduction.

Article II(D)(5) of the 1964 Decree, 376 U.S. at 345, expressly provided that the Colorado River diversion rights of the Fort Mojave and Colorado River Indian Reservations would

be "subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." And Prefatory Paragraph (5) of the 1979 Supplemental Decree, 439 U.S. at 421-422, borrowing the same language, made clear that such an adjustment should likewise occur if the boundaries of the other Reservations are "finally determined" to include additional areas. The same provision of the 1979 decree expressly specified the method by which supplemental diversion rights shall be computed: by multiplying the number of "net practicably irrigable acres" by the previously established "unit diversion quantities" (the required acre-feet of water for each acre) for each Reservation. *Id.* at 422. Thus, the only question presented here is whether the Special Master was correct, as we believe, in concluding that the several boundary adjustments considered were sufficiently "finally determined" for present purposes. [19]

We address primarily the issue of the Court's intent in adopting the cited provisions of the 1964 and 1979 Decrees. We then briefly respond to the apparent suggestion that, whatever those Decrees contemplated, the Court ought now to reconsider and require further judicial proceedings before allocating water for the boundary lands.

B. The 1964 And 1979 Decrees Contemplated That Boundary Adjustments Would Be Treated As Final For Water Allocation Purposes When Settled By Formal Administrative Decisions Or Court Judgments Binding On The Interior Department.

1. After some vacillation, all the State Parties joined in urging the Court to direct its Special Master to himself review all disputed boundary questions and recommend a resolution to

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[19] Although the State Parties as a whole (Brief at 60-66), and certain California Agencies in particular (Brief at 18-65), discuss the merits of the boundary determinations at some length, they apparently recognize that this Court ought not, at this stage, review those decisions. See State Parties' Brief at 4, 128; California Agencies Brief at 67.

this Court. See Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree at 22-26 (Feb. 1979). Since the Court's Order referring our Motion for Modification included no instruction on this score (see 440 U.S. 942), the State Parties renewed their plea directly to the Master. Report at 57. In light of what occurred in the prior proceedings, it is hardly surprising that the Master declined the invitation.

a. At the time of the proceedings before Special Master Rifkind, most of the boundaries of the several Indian Reservations had been administratively defined by the Department of the Interior. Although no court, much less this Court, had reviewed the administrative action, the State Parties accepted these boundaries for water allocation purposes. Indeed, it presumably did not occur to them to say that, absent judicial approval in this Court—or any court—the boundaries were not "final."

The boundary question arose because the United States, speaking through the Department of Justice, asserted wider boundaries for two of the Reservations than the Department of the Interior had yet officially approved. As Special Master Rifkind fully understood, the stance of the Government's advocates in litigation is hardly equivalent to a formal ruling of the Interior Solicitor, endorsed by the Secretary, or to a land survey entered and approved by the Department with statutory authority in the premises. Such was the posture when the former Master heard and determined the Government's boundary arguments.

Presumably, Master Rifkind should have declined to look beyond the Interior Department's public decisions and simply rejected our claims as not yet officially recognized. Instead, the Master undertook to decide the boundary questions *ab initio*. That was the mistake which led the Court to state in its opinion (373 U.S. at 601):

> We disagree with the Master's decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation. We

> hold that it is unnecessary to resolve those disputes here. [20]

Very clearly, it seems to us, the Court was saying that its Master ought not have attempted to do the job of the Secretary of the Interior. Although the Master had obviously given extended consideration to the matter and recommended a "final" resolution, the Court would not endorse his proposed answer. On the contrary, when the Decree was entered, it expressly left the matter open for a later "final determination."

In this setting, it is not really possible to read the Decree as postponing the issue for later decision by the Court itself. Why not seize the opportunity to approve or disapprove the Master's detailed opinion if, sooner or later, the Court must face the question? As we understand the Court, it was saying that boundary determinations were not for this Court, then or later.

b. At all events, the text of the 1964 Decree, repeated in the 1979 Supplemental Decree, forecloses the idea that the Court would itself finally determine Reservation boundaries. The relevant provision refers to the *water* adjustment being accomplished by a "decree *of this Court,*" but it does not go on to say that this would occur after the boundaries have been finally determined "by this Court." And, indeed, it would have been wholly superfluous to provide that, absent agreement, the Court would adjust the water allocation in the event the Court itself determined a change in boundary. That would go without saying.

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[20] The Court added *(ibid.):*

> Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

This statement is at odds with the Decree subsequently entered and, we must assume, was superseded by the injunction effectively prohibiting the Secretary from delivering water to the disputed boundary areas *until* their status as Reservation lands was "finally determined." See Report 66-67 n.89. But the opinion does emphasize the Court's view that boundary determinations were primarily an adminstrative matter, for decision by the Interior Department.

Moreover, the Decree adverts to the possibility that the parties will adjust the diversion rights "*by agreement*" in the event a new boundary is fixed. But if the Court itself is to finally determine such boundaries (as well as the number of irrigable acres within the "restored" boundary area), why speak of agreeing the consequences? One does not agree to carry out a Supreme Court decision, at least when the implementing formula is fully recited in the original Decree. Presumably, the reference to an agreed adjustment in the water allocation contemplates the situation in which the Court might be spared *any* occasion to act, because a new boundary has elsewhere been fixed and the parties have stipulated the additional irrigable acreage involved and, therefore, the appropriate water allocation adjustment.

2. The question remains how a Reservation boundary becomes "finally determined," if not by this Court. The case of the lands added by Congress to the Cocopah Reservation in June 1974 is plain enough. See Report at 63. But what of the other adjustments, resulting from administrative action or final district court judgments? See Report at 57-63.

a. Although they took a different stance before the Master, the State Parties now seem to be reviving the suggestion that the Reservation boundary questions ought to be adjudicated in adversary proceedings involving the States in the federal district courts, if not here. Indeed, very belatedly, one such action has been filed. California Agencies' Brief at 17 and n.12. But whatever the availability of such a forum, we deem it plain no such proceedings are necessary to vindicate the effectiveness of final administrative determinations.

There is no basis for requiring judicial review of administrative boundary determinations before they may be deemed "final." The actions now sought to be challenged implement the traditional authority of the Interior Department with respect to the public lands. See, *e.g.*, *United States* v. *Schurz*, 102 U.S. 378, 395 (1880); *Cragin* v. *Powell*, 128 U.S. 691, 697-699 (1888); *Knight* v. *United States Land Association*, 142 U.S. 161, 177-178 (1891); *Johanson* v. *Washington*, 190 U.S. 179, 185 (1903); *Lane* v. *Darlington*, 249 U.S. 331, 333 (1919). For more than a

century, the Executive Branch has created, added to, defined, and surveyed Indian Reservations, and no one has suggested that these actions were not effective until judicially approved. See Report at 68-71. Indeed, as already noted, no party here questioned the "finality" of the Reservation boundaries as they were understood when the case was first filed merely because no court had reviewed them.

b. There is no precedent for requiring the United States to initiate an action to quiet its title or to vindicate the correctness of its determination whenever the boundary of an Indian Reservation is defined or redefined. And, on the other hand, it is obviously impossible to deny effective finality to a boundary determination indefinitely because the affected State has not chosen to challenge it judicially. At the least, as the State Parties themselves once told the Court, if resolution of the boundary controversies "must occur piecemeal in lower courts, [y]ears could pass before every dispute is finally determined through the appellate process." Response of the States of Arizona, California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree at 23 (Feb. 1979). The Court cannot be supposed to have created such an impasse to the allocation of the additional water to the Reservations whose boundaries were corrected.

3. We suggest the 1964 Decree was distinguishing between a mere *claim* advanced by the United States in litigation and a formal Interior Department ruling purporting finally to resolve an open question. Admittedly, the Secretarial orders now before the Court are administratively final. They amount to adjudications. An appropriate district court may perhaps entertain a complaint that the decision reached was arbitrary or capricious. But, short of that, the administrative determinations are binding and final, so far as they go. [21] We submit they fully qualify as "final determinations" for the purposes of this case.

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[21] We have no occasion to consider the effect of the Secretarial orders on claims of *title*, whether advanced by a State or private parties. Before the Special Master, no State property claim was

A fortiori, we believe, the judgments affecting the Fort Mojave and Cocopah Reservations must be treated as final determinations. They are final judgments, accepted by the Department of the Interior. Until and unless another court reaches a different result, the boundaries now established must be treated as "finally determined."

C. Independently Of The 1964 And 1979 Decree Provisions, The Boundary Adjustments Should Be Treated As Sufficiently Determined For Water Allocation Purposes.

We submit the relevant provisions of the Decrees entered in 1964 and 1979 plainly require the present allocation of water rights to the areas now determined, by formal administrative decisions or final court judgments, to lie within the boundaries of the several Indian Reservations. Having so concluded, the Special Master was bound to act accordingly and to decline the invitation to review the merits of the boundary determinations. But the Court itself is, of course, free to change its mind. The vehemence of the epithets hurled at the Master on this score may amount to such a suggestion on the part of the State Parties. If so, we urge the Court to adhere to its previous ruling.

1. We note, first, the inconsistent stance of the State Parties. They urged the Master to examine and disallow the boundary adjustments. But, having failed to pursuade him to undertake that task, they now seem content to postpone the issue to other litigation—which, with one exception, they are in no haste to initiate—provided the boundary adjustments are deemed ineffective for water allocation purposes in the interim. This submission comes, we stress, from the same parties who so vigorously insist that certainty and stability are essential to their own water distribution plans. Obviously, the

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advanced within the "boundary lands." See Report at 74. The very belated objection now made—not by the State of California itself—is impossible to assess on the existing record. See California Agencies Brief at 66. But, in any event, all title questions remain open under the Master's Recommended Decree. See Report at 282-283.

safer path to avoiding difficult retrenchments at some later date, predictably accompanied by renewed pleas of detrimental reliance, is *now* to allocate the appropriate diversion rights to the Reservation "boundary lands," subject to being set aside if and when the boundary adjustments are successfully impeached.

That course is especially appropriate in light of the presumption of correctness attaching to formal decisions of the Interior Department in relation to the public land and Indian affairs, and, of course, the presumptive validity of final court judgments. What is more, it is far from clear that standing and jurisdictional obstacles will not insulate the boundary determinations from collateral attack. And, finally, because the Indian Tribes have not yet been able to put to actual use their full allocations, any retrenchment of their rights, if not unduly delayed, will be less disruptive to them than to the State Parties. [22]

2. More fundamentally, we submit the Court was wise to leave the question of boundary determinations to the Department of the Interior and ought not now adopt a different solution.

In 1963, the Court evidently believed it need not exercise its unusual original jurisdiction—always to be invoked "sparingly"—to resolve subsidiary questions as to the true boundaries of each Indian Reservation. Cf. *Utah* v. *United States*, 394 U.S. 89, 95 (1969); *California* v. *Nevada*, 447 U.S. 125, 133 (1980). For like reasons, we assume, the Court followed the same approach with respect to private title claims within the Reservations which derived from pre-Reservation land grants. See Art. II(D)(5), 376 U.S. at 345. It need hardly be said that this concern not to overburden the Court with peripheral matters is all the more important today, when both

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[22] Of course, the State Parties presently enjoy, and will continue to enjoy, any surplus the Tribes do not put to beneficial use. But no claim of reliance can be made with respect to this interim "borrowing" of Indian water rights.

the original and appellate dockets of the Court have swollen substantially.

3. We do not say that, in 1964 or 1979, the Court ruled out the possibility of judicial proceedings in some other forum. But, as we have sought to show, there is no basis whatever for supposing the Court believed judicial vindication of decisions normally left to the Interior Department would be a prerequisite to treating boundary adjustments as "finally determined." To be sure, as foreign observers noted long ago, the litigious habits of this Nation tend to bring every question before a court sooner or later, and that trend has increased in our day. Yet, it has never been the American rule that no formal decision by other branches of the Government is binding until it wins a judicial imprimatur. Indeed, although there are a number of court decisions dealing with the boundaries of Indian Reservations, the overwhelming majority of such boundaries are effective for all purposes without judicial approval—including, of course, those accepted in the prior proceedings in this very case. At the least, once a formal administrative decision has been entered, it must be treated as final until and unless it is upset in appropriate proceedings. It will not do simply to declare, as the State Parties do: "We do not accept that ruling until you obtain judicial confirmation."

If that was the understanding in 1964, there is all the more reason to adhere to it today. In one case (the so-called "Benson Line" decision affecting the Colorado River Reservation, see Report at 61, 295-296), the Secretary of the Interior entered his formal decision more than thirteen years ago. Like Secretarial orders or approved resurveys were entered in respect of other boundary adjustments in 1974 and 1978. See Report at 58-59, 61-62, 286-287, 297-303. And two district court judgments affecting boundaries were rendered in 1975 and 1977. See Report at 59, 62-63, 288-291, 292-294. Each of these decisions is final and has been fully implemented. The lands affected have been treated for all purposes as part of the respective Reservations. It is an anomaly that appurtenant

water rights have not been recognized. [23] But there is surely no justification for delaying still longer the necessary modification to the Decree defining the Reservation's water rights to reflect the normal consequence of Reservation status. [24]

III

"SANDY AND GRAVELLY/COBBLY LANDS" AND "WATER POWER LANDS": PROPERLY APPLYING THE BURDEN OF PROOF TO THE CLAIMANTS, THE SPECIAL MASTER CORRECTLY RESOLVED THE FACTUAL DISPUTES RELATING TO YIELDS, PRODUCTION COSTS AND POWER COSTS IN DETERMINING THE PRACTICAL IRRIGABILITY OF THESE LANDS

A. Introduction.

With remarkable boldness, the State Parties ask this Court to review the Special Master's particularized findings with respect to certain categories of land which he held practicably irrigable, to disallow those awards, and to revise the result

[23] Under the Court's 1964 Decree, the Secretary of the Interior remains enjoined from delivering water to the Reservations in respect of those boundary lands, even though "finally determined," except "by agreement or decree of this Court." Art. II(D)(5), 376 U.S. at 345; see, also, 1979 Supplemental Decree, Prefatory Paragraph (5), 439 U.S. at 421. Since no agreement has been possible, we have sought an appropriate Decree from this Court to implement the boundary adjustments for water allocation purposes. No one disputes the necessity for such action by the Court.

[24] We dismiss as obviously frivolous the argument that the 1979 Decree treated the earlier administrative decisions and court judgments as not having "finally determined" the boundary adjustments already made. See State Parties' Brief at 63; California Agencies' Brief at 14. The language of that Decree, copied from the 1964 Decree, merely carried forward, without purporting to resolve, the disagreement of the parties as to what constitutes a "final determination." It is disingenuous to argue from the Court's entry of the 1979 consent decree, which deliberately left the issue in suspense, that the Court was construing or revising its earlier Decree in this respect.

accordingly. State Parties' Brief at 78-116 and Table I. This is suggested in the face of an exceptionally thorough Report, reflecting careful consideration of all the issues now complained of, and after what must be judged a very full and fair evidentiary hearing. What is more, the end-product of the laborious re-evaluation the Court is invited to undertake, even if wholly successful for the State Parties, would be relatively minor: on their own figures, the sustained claims of the United States would be reduced only by some 22,000 acre-feet. *Id.*, Table I, facing page 116. Nevertheless, we address the objections briefly, so far as they relate to the awards recommended by the Master on the claims advanced by the United States.

The major thrust of the State Parties' complaint as to the successful claims of the United States is that the Master overestimated the crop yields from sandy and gravelly or cobbly lands and underestimated the production costs of farming those lands. State Parties' Brief at 88-92. A second alleged error relates to three units of "marginal" lands on the Fort Mojave Reservation, as to which the Master is accused of underestimating power costs by failing to include a charge for "wheeling." *Id.* at 92-94. We will deal with those questions in a moment. But, at the outset, we respond to the more general charge, said to underlie these mistaken awards: that the Master failed to hold the United States and the Tribes to their burden of proof (*id.* at 79-85); and that he was guilty of "conceptual error" in positing a theoretical "best farmer" in assessing the practical irrigability of the lands claimed (*id.* at 85-87, 89).

1. The first obstacle to the State Parties' argument as to the burden of proof is that the Master expressly endorsed the standard which the State Parties suggested. At the very beginning of his discussion of the factual issues (Report at 88), he states:

> The United States and the five Tribes have sought to prove that certain lands are practicably irrigable. They bear the burden of persuasion. The State Parties have noted that the claimants must establish their asserted

> points by a preponderance of the evidence. This is the standard of proof which I believe to be clearly appropriate and which I shall use to judge all claims.

Thus, the complaint must be that the Master did not faithfully follow the rule he announced. On this score, we submit, it is the State Parties who bear the burden of persuasion. They have not come close to meeting it.

At bottom, the State Parties are quarreling with the Master's conclusion that, on most issues, the experts for the United States were more convincing. Quite naturally, the United States' case in chief focused on the investigations conducted by experts in the fields of soil science and land classification, agricultural engineering and agricultural economics. Each expert testified about the scope of his study and written reports containing the conclusions of his investigations were produced in evidence. U.S. Exhs. 1, 42, and 60. In addition, various other exhibits were introduced which supported the conclusions reached by the three experts. And, predictably, the State Parties countered with like expert testimony relative to the characteristics of the soils on the Reservations, the cost of developing them for irrigated agriculture, the returns available from farming the parcels identified, and, ultimately, the economic feasibility of irrigating the land in question. The task which confronted the Master was to sort through the lengthy record and to determine which of the conflicting opinions he found most persuasive. It is no ground for complaint that the Master credited one set of experts more than another.

Nor was this an arbitrary choice. The Master patiently heard and considered a mass of expert evidence. Inevitably, at some point, he was required to rely on the opinion of the expert witnesses. And, of course, in some instances, the Master found himself satisfied that the United States, through its experts, had met its initial burden of proof, subject to more persuasive evidence from our opponents. He cannot be faulted for failing

to prefer vague or misleading, or simply less convincing, expert opinion from the State Parties. There is in this nothing justifying the charge that the Master applied a "dual standard."

One example sufficiently illustrates the point. The State Parties quarrel with the Master's rejection of their claim that the United States' expert erred in his choice of sprinkler pressures. State Parties' Brief at 81. But the Master sufficiently explained his resolution of this issue. His Report discusses this minor topic for more than three pages (Report at 176-179). Finally, he concludes (Report at 179):

> Under these circumstances, I find the United States' expert to be more credible. The United States has the burden of proof on this issue and introduced competent evidence supporting its position. Some of the links in the rationale behind its position do not appear in my review of the testimony. But the conclusions were offered by an expert witness whose testimony was never revealed to be seriously in error or misleading. His opinion appears to be the more sound.

In contrast, the Master found that the testimony of the expert for the States Parties was "incorrect and misleading." Report at 178. [25] Under these circumstances, the Master cannot be faulted for accepting the United States' evidence.

2. We need not tarry over the charge of "conceptual error" against the Master insofar as he accepted yield estimates based on the experience of "best" farmers, rather than "average" farmers. As the Master points out, he accepted the economic analysis of the United States' expert, who was "unusually qualified," who had actual experience as a farmer, who had undertaken "a comprehensive and detailed analysis," including

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[25] As the Master outlines, on direct examination, the expert for the State Parties testified that his research had revealed that 30 PSI was the *minimum* sprinkler pressure at the pivot which could be considered acceptable. His notes, produced during cross-examination, showed that his research demonstrated that 30 PSI was the *typical* pressure, not the minimum. Report at 178.

interviews with farmers in the area and a personal visit to each parcel under consideration. Report at 135-136. In the Master's view, "the lengthy and impressive experience" of this agricultural economist "was simply unmatched by any other witness in this case." *Id.* at 135.

It is in this context that we must judge the alleged "conceptual error." We note that the State Parties overstate (Brief at 86) when they attribute to the Master acceptance of "*best*" farmer yields: in fact, he found the United States' expert to have relied on the experience of "*better*" farmers. Report at 141. For the rest, we invoke the Master's final observation in agreeing with the agricultural economist tendered by the United States *(ibid.)*:

> I am also convinced that his overall theoretical approach is the most sound as well. His decision to emphasize the yields of the better farmers was consistent with economic theory. As the only true economist to testify, this expert provided the most convincing evidence upon which I can base a judgment regarding whether his use of the better yields and high-level management is consistent with a proper economic inquiry. I should note, however, that his conclusions accord with what I consider to be the sensible approach, because the present inquiry concerns the ability of the lands to produce crops profitably, not the likelihood of any particular person, average or otherwise, to succeed in such an operation. If the land can profitably be farmed by anyone, considering *all* relevant cost and benefits, the land might beneficially be irrigated.

There is, moreover, another justification for looking to the yields obtained by better farmers today. As the United States' economist stated, they are representative of the yields which the average farmer will obtain in ten years. U.S. Exh. 60 at 9; Tr. 866. Thus, the current yields of better farmers represent the returns available to average farmers over the life of the proposed project. *Ibid.;* Tr. 788-789, 5990-5995.

B. The Special Master Correctly Resolved The Factual Issues Relating To Yields And Production Costs For Sandy, Gravelly And Cobbly Lands.

The State Parties' complaint that the Master overstated the yields to be expected from sandy and gravelly or cobbly lands, and underestimated the costs of farming these lands (Brief at 88-92) is largely an elaboration of the accusation that the agricultural economist for the United States was too easily credited. We need not repeat what has already been said in answer to that charge. Only a few additional comments are appropriate.

The topic of "gravelly" and "cobbly" lands was hotly debated and a considerable amount of evidence was directed toward the resolution of the issue of the irrigability of such lands. They were classified as irrigable under the land classification standards used by the United States' expert. See U.S. Exhs. 1, 3, 6. After those lands were questioned by the State Parties, the United States' soils expert rechecked his classification. Report at 147; Tr. 128-129, 138-156; U.S. Exhs. 23, 25-32, 22 DD, 22 EE, 22 GG, 22 HH, 22 KK, 22 AAA, 22 BBB, 22 CCC. The other experts for the United States also considered the soil characteristics of the disputed parcels in connection with the development of their analysis as to the irrigability of these lands. [26] The Master expressly found the land to contain less gravel than claimed by the State Parties. Report at 147. He then discussed in considerable detail the evidence relating to the soil characteristics of each of the disputed units containing gravelly land. *Id.* at 148-157. Ultimately, the Master reached his conclusion in these words (*id.* at 157-158):

> This issue eventually turns upon the soils classification of the two competing experts. The United States' soils experts classified these lands as irrigable under the objec-

[26] See, *e.g.*, Tr. 5716 where the United States' agricultural engineer states that he is not overly concerned by the gravelly nature of the soils in question here. The United States' economist visited each parcel claimed by the United States to examine the soil characteristics. Tr. 764, 793.

> tive BIA Standards designed for the soil in the lower Colorado River Valley. The standards used by the State Parties' soils experts may be derived from his lengthy experience in soil classification, but those standards are certainly ill-defined and incapable of objective verification. As indicated above, I believe that the State Parties and their experts also have overstated to some extent the degree of rockiness of these soils. The United States appears to have more correctly classified these lands in soil categories that indicate their suitability to farming. Other lands containing a significant degree of gravel and cobble are now farmed at nearby locations.

Obviously, the Master cannot be faulted in this respect. Nor can he justly be criticized for preferring the careful assessment by the United States' agricultural economist as to the appropriate yields for sandy and gravelly lands. Report at 134-141, 159-160. Contrary to the State Parties' contention, the United States' expert did not base his sandy and gravelly land yields merely on the reduction ratios in one publication, but considered a variety of factors, including yields actually achieved on such lands in the area. Tr. 777-780; Tr. 5997-5998, 6056-6068. Report at 140. Unsurprisingly, his yield estimates were preferred over those of the State Parties' expert whose analysis was "almost exclusively based on a publication which appears to be somewhat dated and thus not likely to render a reliable yield figure by itself." *Id.* at 140.

The Master's Report (at 141-145, 159-160) speaks for itself on the topic of production costs for such lands. We add only that the State Parties are mistaken in arguing that the Master's rejection of their experts' projected increased production costs was simply a one-sided refusal to accept opinion evidence. See State Parties' Brief at 81-85, 90-91. Instead, he plainly stated that he was "more convinced by the United States' economist's opinion that many of these costs would not increase as projected by the State Parties * * *." Report at 143. The description of the State Parties' evidence as "vague and unconvincing" (Report at 142) has firm support in the record. See Tr. 3706-3707, 3892-3905, 4342-4343, 4409.

Indeed, the Master was quite specific in articulating his reasons for rejecting the State Parties' assertion of increased

production costs. For example, it was implied that the United States failed to include in its estimate certain costs associated with the sprinkler irrigation of the sandy lands. But, as the Master noted, "[t]he United States has always proposed sprinkler systems for irrigating these sandy lands and has clearly indicated the costs estimated to be appropriate for such on-farm systems as projected." Report at 144, citing to Tr. 490-494, 5604-5605, 5841-5843, U.S. Exh. 42 at 30-35, 37, Table 7, Table 10, app. B, app. C. The State Parties did not design on-farm systems, but took "a per-acre cost estimate." Report at 144. Hence, the Master found that "[t]he State Parties' presentation regarding the cost of sprinkler irrigation systems hardly impairs the persuasiveness of the United States' detailed cost analysis." *Ibid.* In these circumstances, the Master was fully justified in relying on the cost figures projected by the United States' experts.

C. The Special Master Correctly Resolved The Factual Issues Relating To Power Costs.

The State Parties argue that the Master erred in accepting the power rate of 30 mills estimated by the United States' experts because those experts projected a general rate for use on all five Reservations. State Parties' Brief at 87, 92-93. The State Parties later urge that the Master was wrong in rejecting their allegation that the United States failed to account for "wheeling" or transportation costs in projecting power rates. State Parties' Brief at 93-94. Those criticisms are unconvincing in light of the record established by the United States and the Master's findings on the issue of the proper power rate.

As the Master notes, the United States' estimate considered various power rates available to users in the vicinity of the Reservations, including a 23 or 24 mill rate available to preference power customers on the Colorado River Reservation, a draft contract rate of 40 mills for the Fort Mojave Reservation and the 28 to 29 mill rate offered by Arizona Public Service. Report at 173. Accordingly, the Master found the United States' estimate to be "fair." *Ibid.* The State Parties posited

the same criticisms before the Special Master as they do here. The Master found their concerns unpersuasive since nothing in the record supports the contention of counsel for the State Parties that the United States' experts failed to account for wheeling costs. Report at 173-174. [27]

The Master found added support for his conclusion in the failure of the State Parties to present a credible alternative to the rate proposed by the United States. In the Master's view, the State Parties' estimates contained a "fatal flaw" because they were based on higher rates which did not take effect until after the time period in question. Report at 175. [28] In short, the Master was correct in rejecting the State Parties' argument because it was unsupported by the record. The reiteration of that contention here is no more persuasive.

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[27] The State Parties refuse to acknowledge the basis for the 30 mill power rate adopted by the United States' expert. That rate was based on the various rates available during the critical summer months of 1979. No need existed to consider additional wheeling costs because that rate was considered available throughout the area. Counsel for the State Parties insist that a wheeling charge must be added to this rate but no evidence supports that contention.

[28] The United States' evidence demonstrated that crop price increases would have offset these higher costs. Report at 176, citing Tr. 6024-6025.

CONCLUSION

The several Exceptions of the State Parties should be overruled and, with the modifications suggested by the Exceptions of the United States, the Special Master's recommendations should be approved and the proposed Decree entered by the Court.

Respectfully submitted.

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Shale-project demise to free water for CAP

Would offset any boost for tribes, official says

By Mary A.M. Perry
Republic Staff

Exxon Corp.'s decision to drop a $5 billion oil-shale project in Colorado will release "hundreds of thousands" of acre-feet of water to Arizona for the Central Arizona Project, the director of the state Department of Water Resources said Wednesday.

Director Wesley Steiner refused to say exactly how much water would be made available. However, he said it would be "more than enough" to offset an additional 120,000 acre-feet per-year share from Arizona's Colorado River water that might go to five Indian tribes if the U.S. Supreme Court upholds a March opinion by a federal judge.

"The U.S. energy independence may be further down the road from Exxon's decision," he said, "but from the standpoint of Arizona water, it is good."

Exxon announced Sunday that it is pulling out of the $5 billion Colony Project in western Colorado, one of only two remaining commercial oil-shale projects under construction in the United States. The other project is in Parachute Creek, Colo.

The Water Resources Department has estimated that in 1985, the first year Colorado River water will be available to the CAP, 1.6 million acre-feet will be available for water deliveries in Maricopa County.

The amount available to Arizona will decline steadily as states in the river's upper basin develop their water projects. The department estimates about 1.2 million acre-feet will be available in the year 2000.

Colorado is an upper-basin Colorado River water user, while Arizona is in the river's lower basin. Both the federal Bureau of Reclamation and the state water department had counted the Colony project in their water projections for the CAP, Steiner said.

A March 17 opinion issued by U.S. District Judge Elbert Tuttle of Atlanta would give five Colorado River Indian tribes an additional 316,988 acre-feet of water each year. Of this amount, 120,000 acre-feet would come from Arizona's annual 2.8 million acre-feet entitlement.

This water would have to come from the water delivered by the $2.4 billion CAP, Steiner said.

He said the state water department will appeal Tuttle's decision to the U.S. Supreme Court. The state hopes, Steiner said, that the amount granted the Indians will be reduced to only 20,000 acre-feet per year for boundary changes in reservations.

Tuttle's additional water awarded to Arizona Indians was based on lands omitted from a 1964 Supreme Court decision.

The department will argue that the court already decided these lands should be ommited, Steiner said.

In other matters, Steiner said a federal program to augment the Colorado River's annual water supply through cloud seeding has been stalled.

The Department of the Interior will support only the demonstration program if the states pay for it without federal assistance, Steiner said.

"The states see it as a federal responsibility," he told the commission members. "They are not willing to pay for the entire project. I hate to see it die because it may be difficult to revive next year."