No. 8, Original
IN THE

Supreme Court of the United States

October Term, 1982

STATE OF ARIZONA,

Complainant,

vs.

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

Defendants,

UNTIED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

ON THE REPORT OF THE SPECIAL MASTER.

MOTION OF THE STATES OF ARIZONA, CALIFORNIA, AND NEVADA AND THE OTHER CALIFORNIA DEFENDANTS FOR LEAVE TO FILE BRIEF IN RESPONSE TO REPLY BRIEFS OF THE UNITED STATES AND THE FIVE INDIAN TRIBES; AND BRIEF IN RESPONSE TO REPLY BRIEFS.

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Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

ON THE REPORT OF THE SPECIAL MASTER.

MOTION OF THE STATE PARTIES FOR LEAVE TO FILE BRIEF IN RESPONSE TO REPLY BRIEFS FILED BY THE UNITED STATES AND THE FIVE INDIAN TRIBES.

The State Parties (the States of Arizona, California and Nevada, and The Metropolitan Water District of Southern California, the Coachella Valley Water District, the Palo Verde Irrigation District, the Imperial Irrigation District,

the City of Los Angeles, the City of San Diego and the County of San Diego) move for leave to file a joint brief in response to the briefs filed by the United States, by the Five Tribes jointly and by the Quechan Tribe in reply to the exceptions and supporting briefs of the State Parties.

1. The order of this Court provided for the filing of exceptions to the Report of Special Master, Elbert P. Tuttle, with briefs in support of exceptions, and reply briefs.

2. Substantive exceptions and supporting briefs, which would set forth their legal positions, were not filed by the United States or the Tribes. As the United States points out, its "Exceptions" relate only to suggested changes to the form of the decree recommended by the Special Master. (Exceptions of the United States, p. 4.) The "Exceptions" filed by the Tribes is merely a statement of concurrence with the exceptions filed by the United States.

3. Following the filing of exceptions of the State Parties, the State of Arizona and The Metropolitan Water District, the United States, the Five Tribes collectively, and the Quechan Tribe filed reply briefs. In these reply briefs the legal positions and arguments of these parties regarding the report of the Special Master are presented for the first time to this Court and to the State Parties.

4. In reviewing the above sequence of the filing of briefs, it is observed that the State Parties have become the "moving party" with respect to objections to the report of the Special Master. Accordingly, consistent with common procedure, the State Parties should have an opportunity to reply to the opposing parties' briefs.

5. The filing of such a brief would be similar to the procedure employed in the original case where opening briefs, answering briefs and reply briefs were filed by the parties.

Based upon the above, the State Parties request leave of the Court to file the accompanying brief in which they respond to the arguments of the United States and the Tribes set forth in the respective reply briefs.

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Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Intervenors,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

ON THE REPORT OF THE SPECIAL MASTER.

STATE PARTIES' BRIEF IN RESPONSE TO REPLY BRIEFS.

SUMMARY OF ARGUMENT.

In this brief the State Parties respond to the briefs submitted by the United States, the five Indian Tribes, and the Quechan Tribe in reply to the exceptions to the Special

Master's Report and brief in support thereof filed by the State Parties.[1]

Two basic legal themes are presented by the United States and the Tribes in their reply briefs. First, they would have the Court believe that their petition and motions respecting their so-called "omitted lands" claims do not seek to accomplish retrial of the water rights litigation tried before former Special Master Rifkind from 1956-1958 and decided by this Court in 1963. Thus they claim that they are merely applying more accurately the "practicably irrigable acreage" formula for measuring the "reasonable needs" of the Five Tribes, which formula was the subject of that prior adjudication. They further assure the Court that it is a simple matter and only a minor inconvenience to the non-Indian users in Arizona, California and Nevada who would be adversely affected by entertaining and validating those claims. The lengthy record, some 7280 pages reflecting 36 court days over an 8 month period, demonstrates beyond question that a full retrial has taken place; that the claimants have been permitted by the Special Master to reopen a final adjudication after almost a quarter century; and that the proposed awards are extremely harmful to the State Parties who have relied on the 1964 Decree and whose water rights would be diminished.

Second, the United States and the Tribes urge that certain disputed boundaries on the Fort Mojave and Colorado River Reservations left by this Court for later determination, along with a major intervening boundary readjustment on the Fort Yuma Reservation, have been "finally determined" and are

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[1]Reply Brief for the United States (U.S. Reply Brief), Reply Brief of Chemehuevi, Cocopah, Colorado River, Fort Mojave and Quechan Indian Tribes (Reply Brief of the Five Tribes) and Separate Response of the Quechan Tribes (Quechan Brief).

beyond any affected water claimant's right to question. Hence, the parties adversely affected by such new claims would be left in the anomalous position of being permitted to test only the irrigable nature of the so-called "boundary lands" and not whether they are actually within the legislative or executive descriptions of the Indian reservations which are the bases for the additional claimed water rights. Not surprisingly, no authority is cited for so unlikely and unfair a proposition. Rather, its proponents simply extrapolate it from the Secretary of the Interior's authority to survey and fix boundaries of various kinds of federal lands under his jurisdiction. We see no reasonable basis for substitution of the Secretary's administrative survey responsibilities for the requirement that lands whose claimed water right is based upon their being part of an Indian reservation be shown so to be when that status is challenged, as is the case here. The startling position of the United States is but a step away from their urging that the soils classification of claimed reservation lands too is not subject to trial, for soils classification too is an official function of at least three government agencies, the Bureau of Reclamation, the Bureau of Indian Affairs, and the Soils Conservation Service.

As to the practicably irrigable acreage determination, the United States attempts to shield the Master's Report behind the notion that a relatively small portion of its total claim is subject of our Exception and behind the sheer volume and apparent thoroughness of the Report. The Five Tribes take somewhat the same tack and also avoid any real discussion of the Master's critical errors in the determination of almond and grape prices by pointing out the instances in which he ruled against them in an effort to show his fairness. The Quechan Tribe directs itself primarily against strawmen arguments not even raised by the State Parties' Exception and makes elaborate calculations based on in-

applicable Arizona grape prices. The State Parties are not impressed by our opponents' assumptions that they can avoid thorough analysis of our Exceptions in the expectation that this Court will simply not choose to examine any of the Master's errors in factual determinations, no matter how egregious.

Only one brief, that of the Quechans, discusses the alleged conflict of interest of the United States in the original case. No exception was filed relating to this matter and the record fails to support the allegation.

In short, we believe that the legal position of the United States and the Tribes on omitted lands and boundary lands is untenable. They should not be permitted to retry the water rights of the reservations under the misleading description, "omitted lands." Further, they do not meet the prerequisite for seeking adjustment of existing reservation water allocations because disputed boundaries have not been "finally determined" in the context of this litigation. In any case, their analysis of the evidence relating to the practicable irrigability of the disputed lands is seriously flawed. Finally, the Special Master's treatment of the conflict of interest question has not been raised as an issue herein.

ARGUMENT.

I.

THE "OMITTED LANDS" ISSUE.

A. REPLY BRIEF OF THE UNITED STATES.

(1) The Real Issue: the Meaning of Article IX.

In its reply regarding omitted lands, the United States pays relatively little attention to the actual meaning and scope of Article IX of this Court's 1964 Decree (U.S. Reply Brief, pp. 6-8) and instead emphasizes a balancing of equities approach in which the State Parties' detrimental reliance on the 1964 Decree is downplayed while alleged unfairness to the Tribes from failure to relitigate practicable irrigability is played up. (U.S. Reply Brief, pp. 3-6, 9-22). The failure to fully deal with Article IX is understandable. The broad meaning given Article IX by the United States and the Special Master is simply not supportable in light of the record of proceedings before Former Master Rifkind. Article IX does not reserve any jurisdiction to retry the practicable irrigability of lands recognized as part of the Indian reservations at the time of the original lawsuit. (See Exceptions of the State Parties, pp. 23-32). Since no jurisdiction is even reserved, the equitable issue of whether it should be exercised becomes irrelevant. The crucial question therefore is not balancing of equities and detrimental reliance but the meaning of Article IX.[2] Therefore, while we will answer

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[2]The State Parties introduced evidence as to detrimental reliance at trial since it would have been relevant had the Master found a conflict of interest in the United States' representation of the Tribes at the earlier trial (*United States v. Truckee-Carson Irrig. Dist.*, 649 F.2d 1286 (9th Cir. 1981)). However, a balancing of equities approach has no relevance to the applicability of *res judicata* and even under the Master's rationale, applies to the discretionary exercise of jurisdiction under Article IX only if Article IX is misread to reserve such jurisdiction.

the United States' reliance and fairness arguments, we emphasize their conditional relevance.

The United States offers little argument as to the meaning of Article IX and simply adopts the Special Master's reliance on the absence of limitations of any kind in its language. It contends that "in those circumstances, it would be most unusual to now attempt to restrict the plain terms of [Article IX]." (U.S. Reply Brief, p. 7). This contention is defective, however, because it ignores the genesis of Article IX. Indeed, the Special Master elsewhere concedes that "the context in which [former Master Rifkind] wrote [Article IX] is important." (Spec. Master's Rep., p. 53). An indisputable overriding objective of the former master was to establish with finality the totality of the Tribes' reserved water rights. With the context of this objective, the United States' arguments about the "plain terms" of Article IX fall flat.

(2) The Equitable Issues.

Only if Article IX is misread do we reach the balancing of equities approach used by the Master and argued by the United States. In its arguments, the United States attempts to gloss over the fundamental questions of law inherent in asking this Court to consider the omitted lands claim by contending (1) that the objective of the claim is merely to correct an inadvertent mistake that occurred in the prior proceeding, and (2) that such correction would have a *de minimis* and not inequitable impact on the State Parties. It argues, in effect, that the justiciability of the omitted lands claim should somehow turn on the magnitude of the relief sought and not on the legal ramifications inherent in the reconsideration of a previously adjudicated issue. These contentions are factually and legally insupportable.

a) Correction of Allegedly Inadvertent Error.

It is essential that the Court view the "omitted lands" issue in its stark and injurious reality, not as the benign scenario the United States tries to paint in its reply brief. The quantities involved are not insignificant, as the United States repeatedly suggests (U.S. Reply Brief, pp. 6, 16), nor do they entail "relatively minor adjustments" to the 1964 Decree. If allowed, they would increase the Tribes' water entitlements by nearly 136,000 acre-feet for the United States' claims alone and around 195,000 acre-feet for both United States' and Tribes' claims, the latter figure representing more than a 20 percent increase over the water rights decreed in 1964.

Nor is this severe impact on the State Parties necessitated by any compelling need to correct a "mistake" in the earlier proceedings, in the sense of an inadvertent oversight, as the United States insists on characterizing the purpose of its restated claim. (U.S. Reply Brief, pp. 9, 20). Rather, as we fully demonstrate in our brief on exceptions, the reason for the "omission" was a conscious, admitted decision by United States trial counsel 25 years ago not to assert claims for certain lands because they were not viewed as "practicably irrigable" under the standards and policy employed at that time. But whatever label present United States counsel may now choose to place on the decisions of their predecessors, the doctrines of *res judicata* and law of the case preclude the "second guess" they so boldly urge on the Court.

Stripped of its misleading verbiage, the United States is plainly asserting that the original Government trial counsel made a judgment as to "practicable irrigability" which, with the benefit of 25 years of hindsight after a favorable ruling by this Court on the then novel "practicably irrigable acreage" measure of Indian needs, appears to have been

too conservative, too "fair", as Special Master Tuttle puts it. (Spec. Master's Rep., pp. 48-49). The United States would like its earlier position liberalized, *nunc pro tunc*! The United States' attempt to disown previous counsel's unequivocal assurances to former Master Rifkind and the State Parties that they could rely on the "bill of particulars" presented by the United States for each reservation is not only inequitable to the extreme but lacks precedent and should be firmly rejected.

The United States mischaracterizes the purpose for which it purports to invoke Article IX, namely, "to ensure that the chosen standard [of practicably irrigable acreage as the measure of the 'reasonable needs' of the Tribes] was applied correctly." (U.S. Reply Brief, p. 7). That misstates what the United States has attempted to do in this proceeding. The United States does not contend that previous Government counsel did not apply the test "correctly." Indeed, after pleading ignorance before the Special Master as to why previous counsel made no water claims for certain lands, only recently and cleverly characterized as "omitted lands," present counsel claimed privilege and successfully opposed introduction into evidence of governmental memoranda that could have provided that answer. (Rep. Tr. 4514-4517). It is clear beyond serious question that the United States simply wishes to retry the practicably irrigable acreage issue under its more recently developed views. The State Parties urge the Court not to countenance the use of Article IX in aid of the United States' attempt to load the burden of the belated omitted lands claims on the State Parties, especially when it has chosen to withhold from this Court the reasons why such claims were not asserted by previous Government counsel. Even-handed justice demands no less.

The Tribes characterize the implementation of the "practicably irrigable acreage" standard by former Government counsel as follows (Reply Brief of the Five Tribes, p. 49):

> "Whether incidental or unincidental, the fact remains clear that the Tribes were not adequately represented."

The United States denies "any impropriety" or "breach of fiduciary duty" by their predecessors, but magnanimously reminds the Court "that the victim was not responsible for the unjust result and in no position to prevent it." (U.S. Reply Brief, pp. 20-21). Without conceding that there was any unjust result, the State Parties also wish to remind the Court that *they* certainly were not responsible for any miscues by prior Government counsel and similarly were not in a position to prevent it!

Indeed, if the Tribes have truly been denied "their full quota of water because of past governmental default" in violation of "the Nation's assumed obligation toward a dependent people", as the United States suggests (U.S. Reply Brief, p. 22), the only equitable solution is to require the United States to make appropriate compensation to the Tribes for its lawyers' alleged "mistakes". The burden of making the Tribes whole because of any presumed prior trial errors by United States counsel should not be visited on non-Indian water users in Arizona, California and Nevada. The State Parties reiterate their view that the most equitable solution to the omitted lands issue is to leave the 1964 decreed reservation rights stand and to remand the Tribes to the Court of Claims.

b) Allegedly De Minimis and Not Inequitable Effect on State Parties.

The United States attempts to downplay the effect of reopening the 1964 Decree on the State Parties by arguing that (1) the quantities of water involved in the so-called

omitted lands claims are *de minimis*, and (2) regardless of the quantities involved, there is nothing inequitable in making the requested "adjustments" at this late date.

As to the magnitude of the Special Master's omitted lands award, we have pointed out that the increase represents over 20 percent from the original decreed allocation. Although the Special Master expressly repudiated the United States' earlier claims that the quantities involved are "insignificant", he nevertheless concluded that they "appear to be relatively minor adjustments of the kind which might legitimately be expected in the aftermath of a much larger original case." (Spec. Master's Rep., p. 55). The State Parties continue to be dismayed by the apparent total disregard by both the United States and the Special Master of the impact of their recommended action.

The United States asserts that the impact of the Special Master's proposed "omitted lands" award on the State Parties is not an "appropriate inquiry" and that "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." (U.S. Reply Brief, p. 9). The State Parties contended before the Special Master that the extent to which they relied on the 1964 Decree in subsequent water resources planning and development is irrelevant to whether or not the doctrine of *res judicata* is applicable to the omitted lands claim. Although the Special Master held that *res judicata* was not applicable to the issue, which the State Parties dispute, he did not rule that detrimental reliance was an essential element of that doctrine. (Spec. Master's Rep., pp. 30-32).

The Special Master did find the States Parties' reliance relevant to whether or not it would be appropriate to reopen the 1964 Decree under the law of the case doctrine. (Spec. Master's Rep., p. 38). With respect to the State Parties' reliance, the Special Master concluded as follows (*Id.* at 46):

> Much of the discussion regarding reliance is superfluous. Not a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications. Some parties have presented in this case more specific and convincing proof of detrimental reliance than have others. Nevertheless, it would be unrealistic to conclude that those parties would not have used the 1964 Decree as a basis of future plans. Under some circumstances every party might suffer a detriment because of reliance on that Decree even though I find it 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.

The United States filed no exception to those findings. Consequently, the United States bends the rules in seeking to review this question by way of its reply brief. The seven pages of its brief (pages 9-16) devoted to attempting to refute the Special Master's assessment of the reliance issue should be stricken.[3]

To set the record straight, however, it is necessary for the State Parties to address the United States' discussion of the nature of their reliance on the 1964 Decree.

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[3]In the same vein, the United States' attempt to supplement the record by appending to its brief recent Arizona newspaper clippings relating to the impact of the Special Master's recommendations on Arizona is totally inappropriate and should be disregarded.

As we have pointed out in our brief supporting our exceptions (pages 47-53), the record demonstrates that the quantification of the Tribes' reserved rights in the 1964 Decree served as the foundation of the State Parties' efforts in developing projects to utilize available water in excess of those and other existing rights. Water projects the size of the Central Arizona Project and the Southern Nevada Water Project are not built in a short period of time, but require years of planning and construction and vast sums of money. The scope and cost of the project is dependent on the water available. Therefore, before the first shovel is placed in the ground a reliable quantity of water is mandatory.

1. *The Southern Nevada Water Project.*

Construction of the Southern Nevada Water Project began after the 1964 Decree had identified the reserved rights held by the Tribes. To meet the contract delivery amounts of 299,000 acre-feet annually through the Project facilities requires a diversion capability in excess of this amount. With existing contract diversion rights in Nevada for Colorado River water of approximately 400,000 acre-feet annually, interjection of additional priority water rights at this time may render the planning of the past and present work meaningless for the future. Characterization of the State Parties' concern for only "future impact[s]" simply misconstrues the facts. (U.S. Reply Brief, p. 15). State water projects are not the pipe dreams suggested by the United States and Tribes but ongoing efforts which were begun in reliance on the 1964 decreed rights to meet the present and future needs of hundreds of thousands of people.

The United States further contends that Nevada has almost 10,000 acre-feet of uncommitted water set aside for future developments in two areas near the Nevada Fort Mojave

reservation lands. Nevada, not presently using this water, should therefore be able to find another water source thus making the water available to satisfy the Tribes' additional claims. (*Id.*) The simplistic approach adopted by the United States misses the mark.

Federal legislation (P.L. 86-433) entitled Nevada to acquire approximately 15,000 acres of public land adjacent to the Colorado River for development. The State has expended a considerable amount of money in purchasing approximately 6,000 acres and intends to acquire the remaining acres in the near future. (Federal patents dated, October 26, 1966, May 12, 1967, June 3, 1968, April 28, 1971). Nevada undertook the task in the mid-60's to begin a gradual development of the area. The only viable water supply is the Colorado River and it cannot be denied that Nevada relied on the 1964 Decree to insure an adequate supply of water would be available during the development process. Stating that the water is "uncommitted" misconstrues the extreme reliance the State has placed on the water to provide for the present and future needs of the area.

Assumptions on potential return flows to the Colorado River have no value in quantifying the impact of the additional claims on a state's total allocation. A state presently receives "credit" only for measured return flows. As noted in the State Parties' brief supporting their exceptions (page 52), no methodology has yet been adopted to quantify "consumptive use", defined as diversions less return flows. The location of a particular parcel of land therefore has no relevance at this point. Criticism of a state official's testimony that decreed rights held by the Tribes and any additional claims may be considered consumptive use amounts is thus unwarranted in the context of the evidence. (U.S. Reply Brief, p. 14).

2. *The Central Arizona Project.*

The United States brushes aside Arizona's detrimental reliance by asserting that there is no basis for supposing that the Central Arizona Project would have been aborted if the "omitted lands" claims sustained by the present Master had been recognized in 1964. (U.S. Reply Brief, p. 10). Of course, Arizona made no claim that the Central Arizona Project would have been aborted. Arizona does, however, claim that different actions would have been taken and that strong reliance has been placed upon the 1964 Decree for the last 18 years.

Almost immediately after the entry of the 1964 Decree, Arizona relied upon it in submitting to Congress estimated water availability for the Central Arizona Project and in preparing cost-benefit ratios based upon that supply of water. After the project was authorized by Congress, Arizona further relied upon the amount of water which would be delivered through the Central Arizona Project aqueduct in taxing its citizens in order to provide revenues to ultimately pay for the reimbursable features of the Project under federal reclamation law. This was done in expectation of ultimately receiving water through the aqueduct which would sustain its economy, allow it to partially control the groundwater overdraft occurring in Central Arizona, and bring economic benefits to its citizens through the use of the anticipated supply of water. If it had been known that the supply available to Arizona would be 127,227 acre-feet less than planned on (U.S. Reply Brief, p. 12, n. 10), the lesser water supply could have resulted in substantially different conduct on the part of the State of Arizona.

A complex web of planning and engineering occurs in the construction of a federal reclamation project the size of the Central Arizona Project. One of the strands of that web

includes the question of water supply. Basic to the decision of the size of the aqueduct and pumping plants is the determination of how much water will be delivered through that aqueduct and what size pumps will be needed to pump the water. It would be an absurdity to build an aqueduct which would carry more water than could be delivered because the cost of the excess size of the aqueduct would not be justifiable to the persons who were to pay for that excess. The Central Arizona Water Conservation District imposed a tax to pay for the aqueduct and pumping plants of the Central Arizona Project. The tax was levied based upon an aqueduct which had been sized in reliance upon the receipt of the additional 127,227 acre-feet of water which would no longer be available if the Tribes are awarded the additional water which the Special Master proposes. Had Arizona known in 1964 that this amount of water would not be available to it the aqueduct would undoubtedly have been sized smaller. Public law 90-537, Section 301A; House Floor Debate Sept. 5, 1968, Remarks of Congressman Udall and Senate Report 408, pp. 40, 41.

The United States argues that what the State Parties are urging is an abandonment of the "practicably irrigable" standard (U.S. Reply Brief, p. 19), which it contends was intended to assure the Tribes of its future needs. Arizona does indeed have grave concerns about the application of this standard, for if it is applied throughout Arizona on all Indian reservations, then based upon existing decreed amounts of water for Indians, together with claims which have been asserted or stated by various Indian Tribes, and based upon the available water supplies in Arizona, only one-third of the Indian claims could be satisfied and none of the non-Indian claims. Those hard facts indeed cause Arizonans to question the "practicably irrigable acreage" standard as logical, workable or fair in the arid southwest.

The State Parties agree with the United States that they are concerned with the "future impact" of the additional claims on their water allocations. For as the Special Master recognized, "What the Tribes gain someone else will lose, at least in the future." (Spec. Master's Rep., p. 38). If the Tribes gain these additional rights an aqueduct and pumping system which is already largely constructed and which was sized for delivery of additional 127,227 acre-feet will, during the 50-year repayment period of the Central Arizona Project, be partially unfilled and unused, and Arizonans will pay for that unused capacity. No linguistic gymnastics by the United States or the Tribes' counsel can remove one portion of the planning efforts made, costs incurred, and reliance placed on the 1964 Decree for the Central Arizona Project. Arizona's reliance has been justified at every step of the way in the past and its hopes for the future are that the amount of water which has been relied upon for 18 years as being available under the 1964 Decree will in fact be delivered through the Central Arizona Project.

3. *The Metropolitan Water District.*

Despite the unchallenged finding of the Special Master, the United States is skeptical of the reliance by the Metropolitan Water District upon the water allocations of the reservations in the 1964 Decree. It notes that the action of Metropolitan was to obtain a substitute supply for the water Arizona was allocated and ultimately would use. (U.S. Reply Brief, pp. 13-14). But while the concentration was on that huge supply, it does not follow that in determining the needed substitute supply the Indian allocations were wholly ignored. Thus, Metropolitan rounded out the additional supply needed, taking into consideration the new supply the City of Los Angeles, a member agency of Metropolitan, would be obtaining from the Owens Valley. (Rep.

Tr., p. 2928). It cannot be said that an increased Indian supply of some 30 percent would have had no bearing upon Metropolitan's efforts to offset its loss or the continuance of its annexation policy.

Nor is the obvious negative impact of reduction of Metropolitan's water rights alleviated by the baseless suggestion of the United States that Metropolitan can satisfy its needs since it has ultimate contractual rights to 2.5 million acre-feet from the State Water Project and the Colorado River. (U.S. Reply Brief, p. 16). It is not large numbers in contracts that constitute adequate water supply. It is water delivered pursuant to contract *in relation to demand* that must be examined. The United States blithely ignores this second part of the equation.

Metropolitan's service area covers over 5,100 square miles, comprising most of five counties and a portion of a sixth in Southern California. It includes some 129 cities and a population of over 12,000,000 people. Its statutory purpose is to supply water for domestic and municipal purposes. It supplements the local supply of its member public agencies. This varies greatly among the agencies with some taking relatively little from Metropolitan annually while others are almost wholly dependent on Metropolitan's imported supply. In 1979 some 45 percent of the water used in Southern California was supplied by Metropolitan. (Rep. Tr., pp. 2907-2914). Metropolitan is very concerned with its ability to continue to meet the water needs of the people relying upon it. The United States' casual reference to contract rights figures independent of demand figures is naive at best and not helpful in considering the issues before us.

4. *Present Perfected Rights Argument.*

The United States argues that because the question of present perfected rights was left open in the 1964 Decree for later inclusion by way of stipulation or, if necessary,

litigation (Article VI) that the State Parties could not have really relied upon the decreed rights of the Tribes as having been a final adjudication. (U.S. Reply Brief, pp. 3-6). It argues further that a bonus from the concluding of present perfected rights is that the case will be completed and could not thereafter be reopened again as everyone fears. (U.S. Reply Brief, p. 6).

Taking the second point first, does the United States really mean that but for the provision of the Decree calling for specification of present perfected rights (Article VI) it would not have reevaluated its earlier trial decisions and not claimed on behalf of the Tribes additional water for lands it previously decided were not entitled to water? This conclusion is hard to believe in light of the legal approach of the United States throughout the renewed proceedings — that Article IX contemplates and permits the correction of errors in failing to claim the maximum water each reservation may be entitled to. (U.S. Reply Brief, pp. 7-8; Motion of the United States for Modification of Decree and Supporting Memorandum, Dec. 1978, pp. 27-28). Certainly the Tribes would not feel so constrained since their position has nothing to do with the present perfected rights listing required by the 1964 Decree, but simply that the United States failed to adequately represent them in the original case, and that their reservations are entitled to greater water allocations. (Reply Brief of the Five Tribes, pp. 48-51). Thus the bonus suggested by the United States to make its position regarding the validity of State Parties' reliance on the 1964 Decree more attractive is wholly illusory.

But an even more fundamental fallacy is present in the contention of the United States that because present perfected rights were to be listed eventually in a supplemental decree the 1964 Decree could not have been regarded by the parties as a final adjudication of Indian reservation rights

and so no one is hurt by their additional claims so many years later. (U.S. Reply Brief, pp. 3-6).

To start with, the major decision of the original case allotted the lower basin's Colorado River Compact amount among the three states — Arizona, 2.8 million acre-feet (maf), California, 4.4 maf, and Nevada, .3 maf. Present perfected rights are not additional water rights, but are charged against the allotment of the state in which they exist. *Arizona v. California*, 376 U.S. 340, 343 (1964). Thus, so far as planning is concerned, Nevada having no non-Indian present perfected rights, could and did rely upon its adjudicated entitlement in planning its water projects. California agencies, too, could rely upon the adjudicated entitlement of the State without regard to the expectation of a supplemental decree specifying present perfected rights.

In California, by virtue of the Seven Party Agreement providing for intrastate priorities to the mainstream supply written into every California water delivery contract with the Secretary of the Interior, it was clear that the first three agricultural priorities (which were the only projects with present perfected rights) were good against Metropolitan in the amount of 3.85 million acre-feet, regardless of what the lesser magnitude of their present perfected rights might turn out to be.[4] All that was important for the juniormost priorities, such as Metropolitan, to know was how much of their entitlement exceeded the statutory 4.4 million acre-feet priority in California and was therefore subject to curtailment when the Central Arizona Project became operational. As to the Indian claims in California, all parties (including the United States at that time) believed they were fixed by the 1964 Decree. Some were already encompassed in the

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[4]Wilbur & Ely, *Hoover Dam Documents* (1948), pp. A479-A483, A507.

agricultural priorities under the Seven Party Agreement (*e.g.*, The Fort Yuma (Quechan) Reservation served by the Yuma Project).

Thus, only the so-called "miscellaneous" present perfected rights were a question mark. These consist mostly of relatively minor potential uses by individuals. *Arizona v. California*, 439 U.S. 419 (1979). While certain claimed present perfected rights may have been in dispute, the order of magnitude of this category was known, both in California and Arizona, and therefore constituted no real impediment to planning use of respective water entitlement in either state. As is indicated in subsection 2, *supra,* Arizona could and did rely on its adjudicated entitlement and that of each of the Indian reservations in going ahead with the long-sought Central Arizona Project. The fact that both of these states in early negotiations asserted greater present perfected rights quantities has not the significance the United States implies (U.S. Brief, p. 5), for it represents customary preliminary negotiating posture. Each state knew its "bottom line" and in fact reduced its claims accordingly long before the entry of the Supplemental Decree in 1979. Thus the contemplated listing of present perfected rights did not, in fact, prevent the State Parties' reliance on the determinations in the 1964 Decree.

(3) Consequences of Reopening.

The State Parties contended before the Special Master that the 1964 Decree could not be selectively opened only to permit the United States and the Tribes to relitigate the magnitude of the "practicably irrigable acreage" on each reservation. We argued that if the Decree is to be opened, the State Parties should be permitted to demonstrate that subsequent decisions of this Court in *U.S. v. New Mexico*, 438 U.S. 696 (1978), and *Washington v. Washington State*

Commercial Passenger Fishing Vessel Ass'n., 443 U.S. 658 (1979), demand a closer look at the water rights implications of the 19th Century land withdrawals establishing the five reservations. In particular, the State Parties contended that such a review would result in a *reduction* in the 1964 allocations to the Tribes. The Special Master refused to consider those cases or to let the State Parties make a showing of their impact. The Master erred in opening the 1964 Decree and only compounded that error by doing so selectively.

Both the *New Mexico* and *Washington* cases were decided subsequent to this Court's decision in this case (1963) and focused solely on reserved water rights issues to a degree not possible in *Arizona v. California* where larger sovereign issues were involved.[5] The United States, in supporting the Special Master's decision, ignores *New Mexico* and implies, through a chart on "irrigable acres per capita," that the "moderate living" test of the *Washington* case has been met by the Master's omitted lands award (U.S. Reply Brief, pp. 19-20, n. 17). But, as noted, the Master refused to consider the *Washington* case or its impact in this matter. Therefore, the United States argument is improper and should be disregarded. If it is considered, then an additional reason compels allowing the State Parties their requested opportunity to demonstrate that the "practicably irrigable acreage" test, properly reevaluated and applied in light of the *New Mexico* and *Washington* decisions, results in a reduction in the Tribes' 1964 decreed rights.

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[5]In *U.S. v. New Mexico*, 438 U.S. 696 (1978), the Court held that intent at the time the reservation is established is the critical factor in creating and quantifying an implied water right. Additionally, in *State of Washington v. Fishing Vessel Assn.*, 443 U.S. 658 (1979) this Court determined that the tribes' reserved fishing right was limited to that which secures the Indians a *moderate* living.

Based on the foregoing, the State Parties submit that the contentions advanced by the United States and the Tribes in support of the omitted lands claim are without merit.

B. REPLY BRIEF OF THE FIVE TRIBES.

The reply brief of the Tribes do not raise any substantive points not discussed by the United States. Therefore no independent argument is presented to their omitted lands-Article IX argument.

II.
THE "BOUNDARY LANDS" ISSUE.

A. REPLY BRIEF OF THE UNITED STATES.

The United States takes the imperious position that once it has purported to define Indian reservation boundaries for its own administrative purposes, whether by unilateral administrative order or through quiet title litigation, those boundaries are binding on parties whose water rights are adversely affected by the boundary determinations, even though they have had no opportunity to protest or participate in the administrative or court proceedings that led to the boundary determinations. In other words, parties to water rights litigation involving *Winters* doctrine rights of Indian reservations may contest only whether the lands claimed to be practicably irrigable — the measure of the water right — are, in fact, so, but may not contest whether such lands are within the reservations whose water rights are to be determined.

To merely state the position is to demonstrate its conflict with the most elementary rules of justice. For this position shields from correction the most grievous errors in boundary determinations imaginable to the permanent detriment of others no less dependent upon the limited water supply than the Tribes.

The United States cites no decision involving *Winters* doctrine water rights in which a court has precluded a challenge to one of the essential predicates of such a claim. Instead, the United States relies essentially upon three arguments to support its novel thesis of absolute power to insulate reservation boundary determinations by the Secretary from challenge: (a) Example of the original proceeding; (b) Authority of the Secretary of the Interior to fix reservation boundaries; and (c) Language of the 1964 Decree.

(1) Example of the Original Proceeding.

The United States would have the Court regard the trial proceedings and findings of Former Master Rifkind respecting the disputed boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation as completely erroneous exercises properly avoided by Special Master Tuttle. It ignores, however, the fact that the United States, as well as the other parties, understood that to be an element of the basis for measuring *Winters* doctrine water rights — claimed irrigable acreage must obviously be within the respective reservation. Accordingly, the United States without protest joined the State Parties in trial before Former Master Rifkind of the disputed boundaries of the Fort Mojave and Colorado River reservations. Indeed, the United States wanted that determination to constitute a binding adjudication for title as well as water allocation purposes. (Answering Brief of the United States, August 1961, pp. 94-95).

This Court declined to accept the boundary findings as an adjudication of the boundaries (consistent with the position urged on the Court by the California Defendants (Opening Brief of the California Defendants in Support of Their Exceptions to the Report of the Special Master, May

22, 1961, pp. 279-81)), but adopted the Former Master's water allocations for the respective reservations *based upon those boundary determinations*.[6] Indeed, it could not do otherwise since the measure of a reservation's water right depended upon the practicably irrigable acreage actually being located *on that reservation*. This fundamental concept is further illustrated by the Court's providing for possible adjustment of the reservation water allocations upon final determination of the disputed boundaries — if the reservation is shown to be larger, any additional practicably irrigable acreage will provide a basis for an additional water allocation.

The original proceedings before Former Master Rifkind, therefore, do not support the position of the United States that the location of the claimed practicably irrigable acreage may not be examined and contested in proceedings to determine water rights.

(2) Authority of the United States to Fix Reservation Boundaries.

The United States displays some recognition of the weakness of its arguments in its effort to distinguish the "formality" of its present boundaries position with its mere "advocacy" position before Former Master Rifkind. Thus it states the boundaries of two reservations it urged in trial

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[6]Thus the Former Master allocated water for the Olive Lake and Ninth Avenue cutoff parcels and the Court adopted those allocations even though it declined to rule that those parcels were, in fact, within the boundaries of the Colorado River Reservation. Conversely, the Former Master did not allocate water for other parcels claimed by the United States to be within the boundaries of the Colorado and Fort Mojave Reservations but which he determined were not part of those reservations. Again, the Court adopted the Master's findings for water allocation purposes and did not allocate water for these parcels even though it declined to rule that the parcels were in fact, outside the reservation boundaries.

in the earlier case were not then "officially approved." (U.S. Reply Brief, p. 24). We can only wonder why disputed boundaries that are worthy of trial would lose that characteristic when unilateral administrative action, however official, is taken by an adversary party; what legerdemain of the government official removes the previously recognized genuine conflict of fact?

The important point, however, is not that self-serving "official" action was taken by the United States, but that essential elements of its claim were contested. As we have pointed out, one such element is the location of the claimed irrigable acreage. If the acreage is not within the reservation, it patently cannot support a *Winters* water right. The fact that the Secretary of the Interior has the responsibility for establishing the boundaries of Indian reservations through surveys and the like for administrative purposes does not conflict with the judicial requirement that all contested elements of the claimed water right be proven.

Thus, we have no difficulty in conceding the authority of the Secretary to conduct surveys and resurveys and to fix the boundaries of the subject Indian reservations in order to segregate them from other federal lands subject to his management authority. It does not follow, however, that in protecting its water rights a party, adverse to the claimed water rights of an Indian reservation, may not contest those boundaries for the purpose of ascertaining the proper irrigable acreage to be used in measuring the reservation's water right.

A rather puzzling statement by the United States is that most of the reservation boundaries presented before Former Master Rifkind were administratively, rather than judicially, determined, yet they were accepted by the State Parties and the Court for water allocation purposes. (U.S. Reply Brief, p. 24). We believe this reveals a fundamental lack of com-

prehension of how justiciable issues are framed. The pivotal criterion is not the authority of the Secretary to determine reservation boundaries; it is whether or not the "determined" boundaries are contested by adversary parties. This latter criterion is what determines whether the boundaries are the subject of trial proceedings, not the "official" imprimatur they bear. Had the boundaries of the Colorado River Indian Reservation and the Fort Mojave Indian Reservation not been challenged in the original proceedings before Former Master Rifkind, they would have been properly utilized in the reservations' water allocations despite lack of "official approval." But the converse is equally true — official approval cannot shield erroneous reservation boundary determinations from the right of parties adversely affected to challenge those determinations and prove the error in water rights litigation.

(3) Language of the 1964 Decree.

Finally, the United States would attribute the position denying the affected parties the opportunity to challenge the boundaries element of its new water rights claim to language in the 1964 Decree allowing adjustment of the water allocations of the Colorado River and Fort Mojave Reservations "in the event that the boundaries of the respective reservations are finally determined." (1964 Decree, Art. IID(5).) This provision quite clearly does not support the position of the United States. The Court, having declined to treat Former Master Rifkind's boundary findings as an adjudication of title, simply made the water allocations of the affected reservations subject to future adjustment. Nowhere in this or any other provision of the Decree does the Court purport to eliminate the right of adverse water claimants to participate in judicial proceedings testing expanded reservation boundaries. The United States would have us infer

this conclusion, however, by reasoning: (1) the Court did not expressly state that the boundary determination would occur in proceedings before the Court and thus must not have anticipated making the determination; (2) there does not appear to be any other judicial forum for that determination; (3) if there were such a forum, it would be an unreasonable burden to require the United States to validate its boundary determinations; (4) hence the Court must have meant that when the Secretary officially determines a boundary, it is "finally determined" as that term was used by the Court. The United States may then proceed to this Court for adjustment of the reservation's water allocations and the parties adversely affected are restricted in protecting their water supply to contesting the irrigable nature of claimed new reservation land and confirming the United States' arithmetic regarding the per acre unit diversion quantity. The addition of land to the reservation by way of Secretarial orders is to be a *fait accompli*, irrespective of how palpably erroneous. (U.S. Reply Brief, pp. 23-28).

A number of observations may be made in rejecting this syllogism. First, while the Court's statement certainly includes the possibility that final determination of the disputed boundaries may occur elsewhere, the language does not preclude determination before this Court in appropriate circumstances. Secondly, the Court's statement does not, even under the most liberal of interpretations, refer to resolution of the just-litigated boundaries by unilateral administrative action. Third, avenues of judicial determination have been pointed out by the State Parties. (Exceptions of the State Parties, pp. 69, 73 n.41, 75).

We believe that this Court, by its statement providing the possibility of water allocation adjustment upon boundary settlement, did not intend to excuse the United States from proving a contested element of its case — that the lands

presented as a basis for additional reservation water rights are in fact within the reservation. The United States, on the ground of its contended uncertainty of appropriate judicial forum, would have this Court simply dispense with that issue and deprive the State Parties of a most fundamental defense. It would seem that if the affirmative resolution of this uncertainty is to allow the State Parties to raise a crucial issue in the defense of their water rights, while the negative resolution would deprive them of that opportunity, the choice must be the former. In balancing the difficulties and detriment to the various parties, the Court should confirm that the boundary questions are subject to independent judicial determination for water rights purposes, whether it be in a United States District Court or before this Court, and that adjustment in the water allocations of the reservations may proceed only following such determination.

The United States has gone to great lengths to avoid trial of the disputed reservation boundaries. When one examines the factual and legal circumstances of their proposed boundaries, its reluctance is quite understandable. In the case of the Fort Mojave Reservation, the United States' boundary determination arbitrarily ignores the call in the description of the Hay and Wood Reserve. In the case of the Colorado River Reservation, it utilizes two different legal theories for fixing different segments of one boundary, achieving, through inconsistency, the best of both worlds. In the case of the Fort Yuma Reservation, the brand new boundaries were created by a stroke of the pen of the then Solicitor of the Department of the Interior the day before the United States filed its petition with this Court seeking additional water for the enlarged reservation. That administrative action involves several thousand acres of land accepted by Congress in 1894 by way of a cession agreement with the

Quechan Tribe, which cession had been sustained by three previous Solicitors.

But the United States well-founded reluctance to have the disputed reservation boundaries undergo the scrutiny of trial is no legal justification for depriving affected parties the cardinal legal right — their day in court.

B. REPLY BRIEF OF THE FIVE TRIBES.

No separate response is made to the brief of the five Tribes inasmuch as they merely adopt the argument of the United States as to the boundary lands question. (Reply Brief of the Five Tribes', p. 55).

C. SEPARATE RESPONSE OF THE QUECHAN TRIBE.

The Quechan Tribe asserts that the State Parties' position that the boundary determinations of the Secretary of the Interior have not been "finally determined" as contemplated by the 1964 and 1979 decrees is presented for the first time. It also states that in the original case "no State party contested the right of the Court to accept as final and binding for the purpose of this litigation the then-recognized boundaries of the Indian Reservations involved. The boundaries at that time were the result of Secretarial Orders, Court judgments, and Acts of Congress. Nevertheless, they were all deemed to be final for the purpose of water allotments then presented to the Court." (Quechan Brief, p. 33).

The Quechan Tribe makes the same error as the United States in emphasizing that other reservation boundaries established by actions of the Secretary were accepted as legally sufficient for water allocation purposes in the proceedings before Former Master Rifkind. Again, it was not the fact that they had the Secretary's imprimatur that made them acceptable, but that the State Parties believed them to be correct, and for that reason did not challenge them and create a justiciable issue as to those boundaries.

In addition, the Quechan Tribe presents a wholly improper argument that the State of California participated in previous administrative proceedings involving a claim that the Hay and Wood Reserve *of the Fort Mojave Reservation* was subject to the Swamp Land Act of 1850. (Quechan Brief, pp. 37-38). The fact that the Fort Mojave Tribe is represented in this case both by the United States and by its own counsel, and that neither set of attorneys has made this argument should weigh heavily in reviewing its merits. Moreover, inasmuch as the alleged facts referred to are not in the record of this proceeding, little shrift should be given this argument. Furthermore, even on its face, the argument is off the mark for it appears to refer to proceedings involving whether certain land is swamp and overflow land made subject to transfer to the States by Congress, and not the issue of delineation of boundaries.

The Quechan Tribe closes this argument, on behalf of the Fort Mojave Tribe, we assume, with the contention that State Parties' "current complaint is not entitled to much consideration since they didn't even see fit to take an appeal from the determination by the Secretary of Interior's Order of June 3, 1974, acknowledging ownership of the Hay and Wood Reserve by the Fort Mojave Tribe." (Quechan Brief, p. 38). This statement overlooks the fact that the Secretary of the Interior has confirmed in unequivocal language that there is neither opportunity for affected parties to participate in the promulgation of such Secretarial orders, nor is there opportunity to present any administrative appeal. (Exceptions of the State Parties, Appendix B). A judicial remedy is all that may be resorted to.

III.
DETERMINATION OF PRACTICABLE IRRIGABLE ACREAGE.

A. REPLY BRIEF OF THE UNITED STATES.

The United States takes the position that this Court should not reevaluate any of the evidence as to practicable irrigability of acreage claimed by the United States for three apparent reasons: 1) the amount of water rights subject to the State Parties' Exception is "relatively minor, . . . only . . . 22,000 acre-feet"; 2) the Special Master has already made a thorough and careful analysis of the evidence; and 3) the State Parties' quarrel is essentially that the Master found the United States' experts more convincing (U.S. Reply Brief, pp. 31-39).

The superficial appeal of these arguments is belied by a moment's thought. The State Parties would not take exception to the Master's findings if they were only of "minor" significance. 22,000 acre-feet may be a relatively small part of the total United States claim but every acre-foot is significant in a water-short area. Moreover, the amount of acreage in dispute at the time of trial between the State Parties and the United States (excluding the settled claims on the Colorado River Reservation) was only about 5400 gross acres or approximately 36,000 acre-feet (State Parties Exh. 110). The United States never acted as if it considered *that* figure a "minor" amount even though the State Parties had already conceded the practicable irrigability of over 80% of the United States' claims. So, it is quite presumptuous of the United States to now so cavalierly dismiss the State Parties' Exception relating to well in excess of half the disputed water over which this matter went to trial.

The fact that the Special Master wrote a long and fairly detailed analysis of the evidence certainly does not render

his report immune from examination as to error. Furthermore, the fact that the Master generally found the United States' experts more convincing than those of the State Parties does not foreclose analysis of expert conclusions. The State Parties cannot, and do not, take exception to the Master's finding that one set of experts was more convincing to him. But *no* expert opinion is better than the facts upon which it is based; and the Master's finding that one set of experts was *generally* more convincing does not allow him to accept those experts' factually-unsupported conclusions in *specific* areas while rejecting the conclusions of opposing experts on the ground that the latter's conclusions lack factual support.

An example of the inadequacy of the United States' reply is in the area of power rates. The United States cites various power rates in support of 30 mills as a good average figure and then states that nothing in the record supports the conclusion that its experts failed to account for wheeling costs. (U.S. Reply Brief, pp. 38-39). And yet the evidence only showed an existing power source on the Colorado River Reservation and showed that wheeling costs from there to the other reservations would be within a range of cost. (Rep. Tr., pp. 587-590, 648-49, 7057-7060). In such case, simple logic compels the conclusion that power at the source, with no wheeling costs, could not possibly cost as much as power that first had to be transported from the source to other reservations. And yet, the United States' experts assumed the *same* 30 mill power rate on *all* five reservations, and the Master so found. Error such as this must be reviewed by this Court.

B. REPLY BRIEF OF THE FIVE TRIBES.

The Tribes argue that only they looked to future water needs of the reservations through 20 to 30 year development plans while the State Parties were allegedly stuck in the

present deciding whether a prudent farmer would now decide the profitability of developing his land. (Reply Brief of the Five Tribes, pp. 56-57). The Tribes misstate the record. Of course, the State Parties examined what a prudent farmer would *now* decide, because practicable irrigability of acreage is based on current information, as the Tribes themselves point out. (Reply Brief, *supra*, at 61). The practicably irrigable standard adopted by this Court to meet present as well as future water needs of the reservations compels factual determinations as of the time water rights are allocated, not as of a date 20 or 30 years hence when different existing technologies could lead to different conclusions.[7] Where the State Parties, as well as the Tribes, must look to future development is in the case of permanent crops which take a number of years to reach full productive potential and which therefore cannot be analyzed for profitability just on the first year's return, but which instead must be analyzed over the 20 to 30 year life of the project. But this analysis of future returns is still based on projections made as of *now*, projections upon which a prudent farmer would *now* decide the profitability of developing land, and projections upon which this Court must *now* decide whether to allocate permanent water rights. The State Parties, every bit as much as the Tribes, considered the future development of reservation lands in permanent crops to reach their conclusions regarding practicable irrigability of acreage. For the Tribes to argue to the contrary is highly misleading.

The Tribes next argue that the State Parties allege "bias" merely because of the Special Master's failure to agree with their experts on all points, and then the Tribes cite instances

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[7]In fact, the State Parties have argued and continue to argue that practicable irrigability would more properly be determined as of the time the reservations were created and water rights impliedly reserved.

in which the Master ruled against them (Reply Brief, *supra*, at 62-64). In response, we note that the Master erroneously ignored cropping patterns (Spec. Master's Rep., pp. 273-74) such that under his theory, he could have ruled against the Tribes on three of the four crops and still sustained their claims. In such case, several rulings contrary to the Tribes do not belie the possibility of a predisposition to favor their overall claims. Moreover, the State Parties' allegations of unfair treatment and error do not relate to the Master's mere failure to agree with our experts, but to two far more fundamental errors in the very process by which he made findings of fact, both of which impacted directly and prejudicially in the crucial area of crop prices: 1) his decision to go beyond the *decision* of *any* of the experts, including the Tribes', in determining an almond price based on a three-year average (Exceptions of the State Parties, pp. 99-106); and 2) his willingness to ignore the most fundamental laws of supply and demand and simply not even *consider*, much less agree with our position on, the obviously relevant effect of markets on price. (Exceptions of the State Parties, pp. 107-116).

The Tribes apparently now agree with our view that "great care" must be taken as to any conclusion regarding profitability of land based on projections of crops not commercially proven in the area. (Reply Brief of the Five Tribes, pp. 65-66; Exceptions of the State Parties, pp. 94-98). But the Master's two errors, referred to above, in determining almond and grape prices, establish that he did not apply this standard. Had he done so, he would have determined prices for both crops that could not have supported a finding of profitability, that is, practicable irrigability of the lands in dispute.

The Tribes next discuss market impact and contend that staged plantings of almonds (at 250 additional acres per

year) and table grapes (at 500 additional acres per year) would preclude any glut on the market that would destroy the price structure. (Reply Brief of the Five Tribes, pp. 66-67). However, the experts for the Tribes presented no evidence as to the economic impact of staged construction of irrigation units to serve these supposed staged plantings of crops. The irrigation units designed were substantially larger than 250 or 500 acres. If these units were fully constructed initially, as designed, massive outlays of construction money would be needed for irrigation systems to serve fields that would not be planted for up to ten to twenty years. The economic analyses by which the Tribes' experts asserted practicable irrigability of lands assumed plantings contemporaneous with construction of water delivery systems. But there was no showing as to how those systems would be built in stages so that each part of the system would be ready when the area it served was to be planted. Absent such evidence, the Tribes' argument about staged plantings must be rejected.

In any event, the Tribes argue the staged planting of grapes based on the total of 95,000 acres in California and Arizona combined. They then go on to make a most startling admission:

> "the 'small Arizona grape market' upon which the States predicate their grape glut (cite) simply does not exist. Reservation grapes would be part of the overall Arizona *and California* market." (Reply Brief, *supra*, at 67).

But, if there is no separate and distinct Arizona grape *market*, how can the Tribes (and the Master)[8] assume an Arizona

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[8]The Tribes erroneously state that the Master's price of $867 "was very conservative in comparison to the $955 Arizona price. . . ." (Reply Brief, *supra*, at 68-69.) But the Master's price *is* the three-year (1977-79) Arizona average price adjusted by .92 for marketing charges (Spec. Master's Rep., pp. 226, fn. 145, 235-36, fn. 177).

grape *price*? In other words, if the Tribes wish to take advantage of the huge San Joaquin Valley grape acreage to absorb their vast new plantings without affecting price, they must *also* assume the price in the large San Joaquin market. That, of course, is exactly what the State Parties did, with the result that the considerably lower San Joaquin price ($680 instead of $867) shows grapes at 450 lugs per acre yield to be unprofitable (Exceptions of State Parties, pp. 107-116).

The Tribes cannot have it both ways. If they want an Arizona grape price, they face a small market which even assuming their unsupportable staged plantings of 500 new acres per year, would still have to absorb a 15% increase the first year and over a 300% increase in 20 years. And if the plantings were not staged, the whole increase would come at once. Either way, assumption of an unchanged Arizona grape price is undefensible. Absent a showing by the Tribes as to lack of market effect, this Court must reject the Master's adoption of the Arizona grape price and instead adopt the lower San Joaquin Valley price based on a larger market that could far better absorb the proposed new plantings.

C. SEPARATE RESPONSE OF THE QUECHAN TRIBE.

The Quechan (Ft. Yuma) Tribe has joined in the Five Tribes' Reply Brief but has also filed its own. Unfortunately, the Quechan Brief is directed more to the arguments in our Post-Trial Briefs before the Special Master than to our Exceptions filed with this Court. Considerable space is spent discussing heat units, problems of boron and topography, the qualifications of Mr. Lord, and the adequacy of Mr. Satermo's water delivery system, all of which matters we contested at trial and still disagree with, but none of which are raised by our Exceptions. All of this nonresponsive

argument (Quechan Brief, pp. 22-30) should therefore be stricken. In addition, the Quechan Brief argues the economic feasibility of citrus, dates, and asparagus and the nonapplicability of gross to net acreage reductions to Quechan "Northern Lands." (Quechan Brief, *supra*, at 31-32). The Special Master made no findings as to citrus, dates, and asparagus (nor was there sufficient evidence to support any finding as to profitability of such crops) and did apply a gross to net reduction to the "Northern Lands" (Spec. Masters' Rep., pp. 197, 254). If the Quechan Tribe had desired to challenge the Master on these points, it should have done so by filing its own exceptions. It is barred from doing so now and certainly cannot raise these matters in response to the State Parties' Exceptions. This nonresponsive argument should also be stricken.

The State Parties' challenge to the Master's finding of practicable irrigability of lands claimed only by the Quechan Tribe depends on the issue of grape prices. The initial response of the Quechans is to criticize the State Parties for "non-discussion of prices" and then to impugn the intellectual honesty of our experts. (Quechan Brief, *supra*, pp. 12-18). This is a curious tact by a party whose own experts, L. D. King and Joseph Lord, did not even run an economic analysis on any crop, by a party which instead rode the coattails of the Boyle Engineering analyses contracted for by three of the other Tribes. In any case, the reason the State Parties initially made less of prices than yields was simply because until the end of rebuttal testimony, there appeared to be no dispute as to prices between the State Parties' experts and the Tribes' experts (Boyle). It was only during rebuttal testimony that we learned that the Tribes' experts would assert higher prices if we challenged their yields. (Rep. Tr., p. 7095). Nevertheless, they stood by their original projections without change (Rep. Tr., pp.

7147-49) while we argued that our lower yields would not mean higher prices. (State Parties' Post-Trial Open. Brief, p. 203).

As to our experts' honesty, the Quechan Tribe might have avoided their reckless charges through a reading of the State Parties' Exceptions (pp. 110-111 and footnote 51). Our experts used San Joaquin Valley (Kern County) table grape prices and did not go back to the Cesar Chavez years of the early 1970's. Our experts did not repudiate their own standards by adopting the Boyle price for grapes. They adopted it because it seemed a reasonable price based on San Joaquin (Kern) grape prices of the past few years. The fact that the Boyle price was actually derived from Arizona prices for the 1971-78 period does not make its adoption by our experts wrong or unprincipled when the resulting price happens to be virtually the same figure derived from more recent San Joaquin prices. Moreover, all the Quechan calculations and statements about higher prices relate to Arizona prices, the misuse of which by the Master is the whole crux of our Exception regarding grape prices. The $943 per ton three-year average price (1977-79) is based on *Arizona* prices (Quechan Brief, *supra,* pp. 14-15; CR Exh. 56). The $930 per ton lowest of three years prices (1977-79) is an *Arizona* price as is the $869 five-year average price (1976-80) used in Appendix A, page 2 (Quechan Brief, *supra,* p. 17 and Appendix A, p. 3; CR Exh. 56.) And Arizona prices should not be used. (Exceptions of State Parties, pp. 107-113).

The Quechan Brief also cites Michael Bozick's testimony to allegedly show that even a conservative use of his price figures would show a profit on grapes. (Quechan Brief, *supra,* at 16-17 and Appendix A, pp. 1-2). But Bozick's testimony related solely to 1980 prices (Rep. Tr., p. 5530), a year in which Arizona prices shot up from the previous three years. (CR Exh. 56). None of the experts relied on

a price from just one year, and in any event, the Special Master explicitly excluded 1980 prices from consideration because of lack of 1980 actual costs for comparison. (Spec. Master's Rep., pp. 215-16). If the Quechan Tribe had wished to challenge this decision by the Master, it should have filed exceptions. This argument and appendix calculation based on Bozick's price testimony should be stricken and disregarded.

The Quechan Brief next addresses the issue of the market glut and prices, arguing that overplanting of a crop relative to market demand has nothing to do with the practicable irrigability of land (Quechan Brief, *supra,* at 19). That may be true where any number of crops can turn a profit on given land and where any overplanting of one crop can be replaced by another profitable crop. But in the present case, table grapes are the one and only crop found by the Master to be profitable on the "Northern Lands" of the Ft. Yuma (Quechan) Reservation. If grapes cannot be grown economically, then the land is not practicably irrigable under the Master's findings. So whether you really can market all these grapes in a small market without substantially affecting the assumed price is obviously a key question that directly determines practicable irrigability.

The Quechans then argue:

> "But if the effect of production on prices were to be a determining factor in whether to go into production, it is almost a certainty that the majority of all decisions by all growers to produce particular crops would be deemed economically infeasible because of the effect on the market." (Quechan Brief, *supra,* at 19).

This statement is manifestly absurd. Obviously, many crops can and are planted that have little or no effect on the price obtainable in the market where they are to be sold. But where, as here, the assumed Arizona market price is based

on a small market that would be overwhelmed with the new grape production from one or more Indian reservations, obviously such effect would be a determinative factor to a rational farmer. The Quechans' utter failure to appreciate this point apparently explains their continued aversion to any economic feasibility standard in this case, as shown in the next line of text:

> "Indeed, to us the very fact that this contention is made is the best possible argument against using economic feasibility as the criterion for determining practicable irrigability." (Quechan Brief, *supra* at 19).

IV.
CONFLICT OF INTEREST OF UNITED STATES.

The "Separate Response of the Quechan Tribe to the Exceptions Asserted by the State Parties" leads off with the argument that the United States has an ongoing conflict of interest in representing the interests of the Tribes and its other interests. (Quechan Brief, pp. 3, 5, 7.)

We are puzzled by the very presentation of such an argument since no finding was made by Special Master Tuttle as to any conflict of interest of the United States in representing the interests of the Tribes, and no party filed an exception to the absence of such a finding.[9] Hence, the Quechan Tribe is addressing a matter that has not been made an issue for resolution by this Court.

Moreover, the Quechan Tribe has failed to identify any conflict of interest in the representation by the United States in these proceedings. Its only exposition in this regard is

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[9]The Five Tribes attempt to reserve the conflict of interest issue in the event this Court determines that Article IX does not authorize the omitted lands claim. Reply Brief of the Five Tribes, p. 54 n. 33. We would note that there is no authority to reserve such an issue; this is especially so in light of the failure of the Tribes to file an exception on the failure of the Master to make a determination on this issue.

the assertion that ". . . the United States also has a duty to deliver water to their [the Tribe's] opposition pursuant to contracts made by the Secretary of the Interior . . . ." (Quechan Brief, pp. 4-5).

A simple reference to the decision of this Court in *Arizona v. California,* 376 U.S. 340 (1964), belies this contention. The United States has no obligation to favor junior priority contracting parties over holders of present perfected rights, including the Tribes. Those contracting parties with priorities lower than the Tribes and others simply are dependent upon there being adequate water to meet their contract entitlements. This is the very purpose of a system of priorities. Thus, there is no conflict between the duty of the United States to represent the Tribes' interest in Colorado River water and its having entered into water supply contracts with various non-tribal agencies.

This being the case, the Quechan's argument is without legal purpose. It merely describes differences in the claims made on its behalf by the United States and those made by itself through independent counsel. But the fact that the United States was quite properly more circumspect in its claims than the Tribe does not illustrate a conflict of interest.

For all the above reasons, the Quechan Tribe's argument entitled "Conflict of Interest" should be completely ignored.

Conclusion.

For the reasons stated herein and in our Brief in Support of Exceptions, the exceptions of the State Parties to the Report of Special Master Tuttle should be allowed and a decision entered accordingly.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1982
