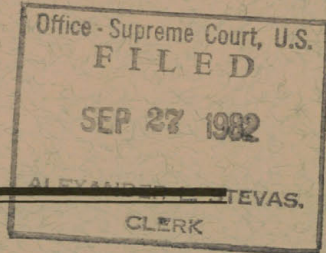


No. 8, Original



In the Supreme Court of the United States
OCTOBER TERM, 1982

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

**SUPPLEMENTAL MEMORANDUM FOR
THE UNITED STATES WITH RESPECT TO
ITS FIRST EXCEPTION TO THE
SPECIAL MASTER'S REPORT**

REX E. LEE
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

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The First of our Exceptions to the Final Report of the Special Master in this case, filed in May 1982, addressed the recommended disallowance of water rights claimed by the United States in respect of specified irrigable acreage on the southwest boundary of the "checkerboard area" of the Fort Mojave Indian Reservation solely on the ground that, on the record before the Master, the land in question had not been shown to have been "finally determined" by formal action of the Department of the Interior to lie within the boundaries of the Reservation. See U.S. Exceptions 5-7. We represented that survey work under way was expected to confirm the Reservation status of a portion of that acreage as natural accretion to Sections concededly part of the Reservation; we stated that, when the survey was

complete, we would submit the result to the Court; and we indicated the anticipated net effect on the recommended decree. *Id.* at 6–7.

In their Answering Brief (at 1–2), the State Parties maintained their position with respect to all “boundary lands”—that “unilateral actions by the Secretary of the Interior” do not qualify as “final determinations” justifying additional river diversion rights under the Court’s 1964 Decree. They agreed, however, that the acreage in question “should be treated the same as other ‘boundary lands’ in this case.” *Id.* at 2. Nor did the State Parties interpose any objection to our submitting directly to the Court the evidence of final surveys covering this acreage.

A

The surveys alluded to have been completed, finally approved and filed. Accordingly, we herewith tender the relevant documents as part of the record in the case. Specifically, we are submitting to the Court (with copies to all parties):

1. A survey plat, in three sheets, officially accepted and filed September 16, 1982, covering:

- (a) 131.63 acres of accretion to Section 4, T. 17N, R. 22W, G.& R.R.M., all of which are additional “boundary lands,” being the major portion of an area identified as Parcel FM–11 in the Record of the case (17 acres of Parcel FM–11 having been treated by the Special Master as Reservation lands for which water rights have been recommended);
- (b) 255.87 acres of accretion to Section 10 of the same Township, of which 234.41 acres constitute Parcel FM–12 (Lot 3, comprising a total of 21.46 acres, having been treated in the earlier proceedings as Reservation land for which

water rights have been adjudicated), and of which 162.41 acres are additional "boundary lands" (some 72 acres of Parcel FM-12 having been treated in the earlier proceedings as Reservation land for which water rights have been adjudicated);

- (c) 1.75 acres of accretion to Section 22 of the same Township, no part of which is claimed as additional "boundary land" in this proceeding; and
- (d) 383.84 acres of accretion to Section 24 of the same Township, of which 158.22 acres are additional "boundary lands" identified in the Record as Parcel FM-13A (Lots 5, 9, 10, 11, 12, 13 and 14, comprising a total of 225.62 acres, having been treated in the earlier proceedings as Reservation land for which water rights have been adjudicated);

2. The Field Notes appertaining to the foregoing survey;

3. A survey plat, approved March 22, 1963 and filed June 5, 1963, covering:

- (a) 108.16 acres of accretion to Section 20, T. 17N, R. 21W, G. & R.R.M., of which 98.55 acres are additional "boundary lands" identified in the Record as Parcel FM-13B (Lot 2, comprising 9.61 acres, having been treated in the earlier proceedings as Reservation land for which water rights have been adjudicated); and
- (b) 241.76 acres of accretion to Section 32 of the same Township, of which 200.12 acres are additional "boundary lands" identified in the Record as Parcel FM-13C (Lots 3 and 9, comprising a total of 41.64 acres, having been treated in the earlier proceedings as Reservation land for which water rights have been adjudicated);

4. The Field Notes appertaining to the foregoing survey; and

5. A letter dated September 17, 1982, from the Chief Cadastral Surveyor of Arizona to the Solicitor General, transmitting the foregoing documents (reproduced as Appendix A, *infra*, 1a-2a).

B

As we have elaborated in our Reply Brief (at 22-31), we believe neither the Court nor its Special Master is required to review this or any other final and formal administrative determination by the Department of the Interior defining Indian Reservation boundaries. Accordingly, we do no more than submit the documents evidencing the fact that such a final determination has been made. Suffice it to say that, in this instance (as the plats recite), the boundary adjustments are attributable to a gradual westward movement of the Colorado River between 1905 (when the previous survey was made) and the early 1950s (when the River was channelized), resulting in substantial accretion on the eastern bank, inuring to the Fort Mojave Reservation where it is the upland owner. See 1962 Field Notes (Item 2, *supra*) at 1B; 1982 Field Notes (Item 4, *supra*) at 3.

We add only that the process is long since complete and that, because of channelization, we anticipate no occasion for future adjustments. Indeed, it will be noted that, in most cases, accretion is not claimed to the present bank of the Colorado, but only to the bank defining the last natural bed of the river. That is because the further movement or narrowing of the channel, resulting from artificial channelization, has been treated (perhaps too conservatively) as avulsive and as not affecting land titles. See 1982 Field Notes (Item 4, *supra*) at 3; Appendix B, *infra*, 3a.

C

A word of explanation as to the acreage figures is appropriate. As we have noted in describing the surveys, we do not claim additional water rights for all the newly surveyed accretions. In three cases—Items 1(d), 3(a) and 3(b) above—that is because the portion of the accretions that merely completed or “squared off” fractional Sections originally designated as part of the Fort Mojave Indian Reservation were apparently treated as within the Reservation by Special Master Rifkind in the earlier proceedings and were accorded diversion rights by this Court in 1964. Thus, Parcels FM-13A, FM-13B and FM-13C embrace only the accretions to those Sections beyond their normal closing lines, as indicated on the attached sketch map (Appendix B, *infra*, 3a), taken from Exhibit SP 159.

The same considerations lead us to forego a claim for some 21.46 acres of the accretion to Section 10, T. 17N, R. 22W—Item 1(b) above. But, here, a further adjustment is necessary. As indicated in our Exceptions (U.S. Exceptions at 5 n.3), we accept the Special Master’s finding that some 72 acres of Parcel FM-12 (cross-hatched on the attached sketch) were awarded diversion rights by the 1964 Decree. Accordingly, we omit any claim for that portion of Parcel FM-12.

In the case of Item 1(a), we claim all the surveyed accretion, but note that it is some 17 acres less than the area of Parcel FM-11. The reason is that those 17 acres, the northern “tail” of the parcel, appear to be embraced within the “LaFollette Tract,” as to which the present Master has recommended water rights. See Report at 59, 192.

Finally, we make no claim in respect of Item 1(c) because that small area of accretion was not before the

Special Master and he therefore had no occasion to make a finding as to the practical irrigability of the parcel.

The upshot is that a total of 751 additional gross acres—which the Special Master has found “practicably irrigable”—have now been determined by formal surveys to lie within the boundaries of the Fort Mojave Reservation. This translates to 713 net irrigable acres which, applying the established water duty of 6.46 acre-feet per acre, increases the entitlement of the Reservation by 4,606 acre-feet of diversions. Unsurprisingly, the required adjustment is marginally greater than the overly conservative estimate recited in our Exceptions. Accordingly, the quantification of diversion rights for the Fort Mojave Reservation reflected in Article A(5) of the proposed Decree we submitted with our Exceptions (at 2a) should be amended to substitute 163,537 acre-feet (instead of 162,862 acre-feet) and the total acreage figure should be shown as 25,303 acres (instead of 25,199).

D

It will be noted that, in respect of the two southernmost areas of accretion, the survey was formally accepted in 1963. Obviously, the plat evidencing that survey could have been submitted to the Special Master to support the claim made for those areas. Unfortunately, that was not done, no doubt because this was part of a larger survey that was abandoned and the existence of the approved plat was overlooked. Indeed, the plat was noticed only after the Special Master’s Report was filed—disallowing water rights for these and other like accreted lands—and the decision was made to complete the survey to identify the accretions to the north.

We submit, however, that our delinquency in this respect has in no way prejudiced the State Parties. If the newly completed survey is to be taken into account—as

we believe it should—there can be no objection to noticing also the limited survey completed some years ago. It is surely in everyone's interest to avoid a later return to this Court for that purpose.

E

We have been punctilious to avoid any arguable double claim, eliminating any acreage otherwise apparently included as Reservation lands in the prior proceedings or so treated by the present Special Master in his Final Report. The areas now claimed have been determined by official surveys to constitute natural accretion to tracts which are concededly part of the Fort Mojave Reservation. And the Special Master has expressly found the accreted acreage to be practicably irrigable. In these circumstances, it seems plain the additional acreage embraced by our First Exception should be treated as part of the Fort Mojave Indian Reservation and accorded appropriate river diversion rights.

Unless the Court were to accept the State Parties' contention that no administrative determination with respect to adjustment of Reservation boundaries is effective until judicially reviewed and approved, we submit no purpose would be served by referring the matter to the Special Master. Indeed, as we understand them, the State Parties share our view that if other formal and final decisions of the Interior Department with respect to Reservation boundaries are sufficient to justify an award of additional diversion rights, the same rule should be followed here. Of course, in this instance, as for all the other boundary adjustments, this Court's acceptance of the administratively determined boundary changes for the purpose of water allocation would be

without prejudice to any later judicial challenge in an appropriate forum. See the Proviso to Article A of our proposed Decree. U.S. Exceptions at 2a-3a.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1982

APPENDIX A

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
ARIZONA STATE OFFICE
2400 VALLEY BANK CENTER
PHOENIX, ARIZONA 85073

IN REPLY REFER TO

9600 (942)

Group 367, Arizona

September 17, 1982

Mr. Rex E. Lee
U.S. Solicitor General
U.S. Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20538

Dear Mr. Lee:

Enclosed are copies of the plat, in three sheets, and the field notes for T. 17 N., R. 22 W., Gila and Salt River Meridian, Arizona, and the plat and field notes for T. 17 N., R. 21 W., Gila and Salt River Meridian, Arizona.

The field notes for T. 17 N., R. 21 W., were approved March 12, 1963, and the plat, which is conformable to the field notes, was accepted, for the Director, Bureau of Land Management, on March 12, 1963 and was officially filed in the Arizona State Office on June 5, 1963.

The field notes for T. 17 N., R. 22 W., were approved September 16, 1982, and the plat, which is conformable to the field notes, was accepted, for the Director, Bureau of Land Management, on September 16, 1982 and was officially filed in the Arizona State Office on September 17, 1982.

In T. 17 N., R. 21 W., those lots in secs. 20 and 32, as shown on the enclosed plat, which lie west of the 1905 meander line are accretion to the Fort Mojave Indian Reservation.

In T. 17 N., R. 22 W., those lots in secs. 4, 10, 22 and 24, as shown on the enclosed plat, which lie southwest of the 1905 meander line are accretion to the Fort Mojave Indian Reservation.

I am sending, under separate cover, the additional copies of the field notes and plats of these two townships which have been requested for your use.

I will be available to answer any technical questions concerning these surveys.

Sincerely,

/s/ James P. Kelley

JAMES P. KELLEY

Chief Cadastral Surveyor of Arizona

Enclosures

3a

APPENDIX B

[SKETCH MAP]

APPENDIX B

