In The

UNITED STATES SUPREME COURT OF THE UNITED STATES

October Term, 1989

Before The Special Master

State of Arizona,

v.

State of California, et al.

REPLY MEMORANDUM OF THE UNITED STATES OF AMERICA TO THE BRIEF OF THE STATE PARTIES ON PRETRIAL ISSUES

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I

INTRODUCTION

In their "Brief on Pretrial Issues," the State Parties address several questions, referred to the parties by the Special Master at our meeting of February 26, 1991. The United States' Reply Memorandum concerns four of the issues discussed by the State Parties in their opening brief. They are: (1) Whether the United States and the Quechan Tribe are precluded from asserting claims for additional water on lands within the disputed boundaries of the Fort Yuma Indian Reservation; (2) whether the State Parties may compel discovery of a Department of Justice internal legal memorandum reflecting the deliberative process and the mental impressions, conclusions, opinions, and legal theories of its attorneys; (3) whether the evidentiary record developed before Special Master Rifkind in Arizona v. California, 373 U.S. 546 (1963), regarding the location of the western boundary of the Colorado River Indian Reservation, is admissible in this proceeding; and (4) whether this proceeding involves only that portion of the western boundary of the Colorado River Indian Reservation governed by the 1969 Order of the Secretary of the Interior or whether the entire western boundary of the reservation is to be determined.

II

ARGUMENT

A. The State Parties Have Failed To Overcome The Express Language In Article II(D)(5) That Allows The United States And The Quechan Indian Tribe To Litigate The Boundaries Of The Fort Yuma Indian Reservation In This Proceeding.

The State Parties' argument that the United States and the Quechan Tribe of Indians are precluded from asserting claims for additional water on lands within the disputed boundaries of the Fort Yuma Indian Reservation is predicated upon two theories. First, the State Parties assert that the United States' claim for water is barred by the doctrine of res judicata. They argue that because the United States did not assert such a claim in Arizona v. California, 373 U.S. 546 (1963) (Arizona v. California I) it is precluded from doing so in this proceeding. Second, the State Parties contend that stipulated judgment entered in Quechan Tribe of the Fort Yuma Reservation v. United States of America, (Claims Court Docket No. 320, 1951), is the equivalent of a judicial determination that the Fort Yuma Reservation boundary lands were ceded to the United States by an 1893 Agreement.[1] See State

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[1] In Article 1 of the 1893 Agreement, the Quechan Tribe of Indians agreed "upon the conditions hereinafter expressed," to relinquish all their right, title, and interest to their 1884 Executive Order reservation. Articles 2 through 8 of the Agreement describe the conditions agreed to by the government and the procedures for distributing a small potion of the remaining lands back to the Indians. The 1893 Agreement was ratified by Congress in 1894, 28 Stat. 286, 332. The legal effect of this agreement is the ultimate issue for trial before the Special Master in the fall.

parties' Opening Memorandum at p. 43. Both arguments are without merit.

1. The Court's holding in Arizona v. California II that the parties may not utilize Article IX of its 1964 Decree to reopen and relitigate that which was "fully and fairly litigated in 1963" is not applicable to the Article II(D)(5) boundary issues.

The State Parties expend considerable energy to make the modest point that the United States did not claim water for the disputed boundary lands of the Fort Yuma Reservation in Arizona v. California I. This we readily admit. When this litigation was initiated by Arizona in 1952, the United States' relied on a 1936 Solicitor's Opinion for its position that the boundary lands of the Fort Yuma Indian Reservation had been ceded to the United States by the Quechan Tribe in 1893.[2] That position was reaffirmed in 1977 by a subsequent Solicitor's Opinion (84 I.D. 1, 1977).

In 1978, the Secretary of the Interior reviewed this matter for the first time. Based upon the legal analysis provided by his Solicitor, the Secretary reversed the 1936 and 1977 Solicitor's Opinions. The Secretary's action ended the debate within the Department of the Interior, and finally determined that the 1893 Agreement did not divest the Quechan Tribe of its lands and that the original 1884 Reservation boundary was still intact.

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[2] See Opening Memorandum of the United States at pp. 7-15 and the Opening Memorandum of the Colorado River Indian Tribes and the Quechan Tribe of the Fort Yuma Reservation at pp. 22-23, discussing the 1936 Margold opinion.

The State Parties contend, however, that this action comes too late. They argue that the principles of "certainty and finality" preclude the United States from making a claim for water for these lands twenty-seven years after the publication of the 1964 Decree. State Parties' Memorandum at pp. 31-35. The State Parties are wrong.

The argument that the principles of "certainty and finality" act to bar the United States' claim for water for the Fort Yuma Reservation boundary lands is rooted in the Court's discussion of the scope of its jurisdiction under Article IX of the 1964 Decree. See Arizona v. California, 460 U.S. 605, 619-628 (1983) (Arizona v. California II).[3] The issue was joined because, in 1978, the United States petitioned the Court to reopen the 1964 Decree to consider "claims for 'omitted' lands for which water rights could have been sought in the litigation preceding the 1964 decree." Arizona v. California, supra, 460 U.S. at 616.

The United States' petition to reopen the 1964 Decree was denied. Arizona v. California, 460 U.S. 605 (1983). The

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[3] Article IX of the 1964 Decree reads, in part:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Arizona v. California, 376 U.S. 340, 351 (1964).

Court reasoned that while the "technical rules of preclusion are not strictly applicable" to the instant case, "a fundamental precept of common law adjudication is that an issue once determined by a competent court is conclusive." Arizona v. California, supra, 460 U.S. at 620. The Court went on to hold that "Article IX did not contemplate a departure from these fundamental principals so as to permit the retrial of factual or legal issues that were fully and fairly litigated 20 years ago." Id. at 621.

The State Parties' reliance on the Court's construction of Article IX to defeat the United States' claim for water associated with the Fort Yuma boundary dispute, is misplaced. Admittedly, if Article IX were the only basis for the United States' claim, the State Parties' argument would be relevant, although incorrect.[4] However, in this case, Article II(D)(5) of the Court's 1964 Decree and its 1979 Supplemental Decree provides

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[4] Special Master Tuttle's report rejects outright the notion that the United States is precluded under Article IX from asserting a claim for water on the Fort Yuma Reservation boundary lands:

> * * * Article IX, even if most narrowly construed, would recognize the propriety of entertaining claims as to the Chemehuevi, Fort Yuma, and Cocopah Reservations paralleling those that can be raised as to the Fort Mojave and Colorado River Reservations under Article II(D)(5). Citations omitted.

Report of Special Master Tuttle, at pp. 56-57, note 73.

for such a claim in the event the boundaries of the five reservations are "finally determined."[5]

2. Article II(D)(5) expressly allows the United States' claim for water associated with the Fort Yuma boundary lands.

Special Master Tuttle held that the purpose of Article II(D)(5) is to allow the parties to litigate the Fort Yuma Reservation boundary and its attendant water rights:

> All of the parties agree that the Court should now determine any additional present perfected rights. Although the 1964 Decree acknowledged and expressly provided for boundary disputes only with respect to the Fort Mojave and the Colorado River Indian Reservations, the additional proviso of the 1979 Decree, issued after the Court was apprised of boundary disputes concerning the other Reservations, indicates that the amounts determined for all five Reservations "shall continue" to be subject to adjustment. **Thus, adjustments for boundary determinations affecting any of the Reservations were explicitly provided for in the 1979 Decree and impliedly contemplated in the 1964 Decree in the event that the boundaries of the respective reservations are finally determined.**

Report of Special Master Tuttle, at p. 56, (Emphasis added) (footnotes omitted). The Special Master's conclusion was adopted by the Supreme Court in its decision in Arizona v. California II,

> Our supplemental decree of 1979 did not * * * resolve these [boundary] disputes. Rather, it not only expressly left unaffected Article II(D)(5) providing for the possible adjustments with respect to the Colorado River and Fort Mojave Reservations, but it also left open the issues about the boundaries of the other reservations.

Arizona v. California, supra, 460 U.S. at 634.

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[5] The five reservations are the Colorado River, the Fort Mojave, the Fort Yuma, the Cocopah and the Chemeheuvi Indian Reservations. Arizona v. California, supra, 460 U.S. at 631-634.

The State Parties do not dispute that Article II(D)(5) allows for the resolution of the Fort Yuma boundary. They contend, however, that it impliedly reserves to the State Parties the opportunity to assert a preclusion defense to any claim for water rights associated with those lands. This position is in obvious conflict with the Court's interpretation of Article II(D)(5).[6] It is also wholly inconsistent with the position the State Parties took before the Supreme Court in Arizona v. California II. See Exceptions of the States of Arizona, California and Nevada, et al., at p. 60, n. 29 (1982) ("Although Article II(D)(5) of the 1964 Decree refers to the disputed boundaries of only two reservations, the State Parties have not objected to its application to the other reservations as well."). That the State Parties intended Article II(D)(5) to allow the resolution of the various boundary disputes, as well as the water rights associated with those lands, is evidenced by their actions before the Special Master in Arizona v. California II. In that proceeding, both the Fort Yuma Reservation boundary and the water rights appurtenant to the boundary lands were "fully and fairly" litigated by the State Parties.[7] Furthermore, at no time during

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[6] The Supreme Court was aware of the United States' failure to claim lands on behalf of the Quechan Tribe in Arizona v. California I, and saw the issue as whether those lands should now be considered a part of the reservation, "thereby entitling the Tribe to appropriate additional water rights." Arizona v. California, supra, 460 U.S. at 632.

[7] Special Master Tuttle did not take evidence regarding the appropriate location of the disputed boundaries in Arizona v. California II. He did rule as a matter law, after briefing by (continued...)

that proceeding, or in subsequent briefs to the Court, months later, did the State Parties argue that the United States and the Quechan Tribe were precluded from asserting their claim for water for the Fort Yuma Reservation boundary lands.

The State Parties find persuasive the fact that the Court's 1984 Decree is silent with regard to their assertion of a preclusion defense. State Parties' Memorandum at pp. 40-43. Unlike the earlier Decrees, where much of the language of Article II(D)(5) was agreed to, that Article was the subject of a heated debate in 1984. Nowhere in that debate, however, do the State Parties raise the issue of preclusion. The State Parties cite extensively from their "Comments on the Decree Proposed by the United States and Revised Decree Proposed by the State Parties," but cannot point to one paragraph that deals with this issue. By contrast, in that same document, the State Parties do list several issues which they see as arising out of an "administrative" boundary decision. Conspicuously absent from this list is any mention of the State Parties' asserted preclusion defense.[8]

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[7](...continued)
the parties, that the three secretarial orders establishing the boundaries of the reservations were "final determinations." Report of Special Master Tuttle at pp. 66-76. The Master then proceeded to take evidence regarding the water rights associated with these lands.

[8] The State Parties' reference to its "Comments on the Decree Proposed by the United States, etc. . ." (hereinafter "State Parties' Comments") is misleading. The discussion relied upon by the State Parties in that document deals with the United States' proposal that "* * * final administrative decisions which (continued...)

The only reasonable interpretation of Article II(D)(5), is that provided by Special Master Tuttle:

> * * * the additional proviso of the 1979 Decree, issued after the Court was apprised of boundary disputes concerning the other Reservations, indicates that the amounts determined for all five Reservations "shall continue" to be subject to adjustment. Thus, adjustments for boundary determinations affecting any of the Reservations were explicitly provided for in the 1979 Decree and impliedly contemplated in the 1964 Decree in the event that the boundaries of the respective reservations are finally determined.

Report of Special Master Tuttle, at p. 56.[9]

3. The 1983 Claims Court "Final Judgment" entered in Docket No. 320 and based upon the "Stipulation and Settlement and Entry of Final Judgment" is not binding upon the United States and is not a "final determination" of the disputed boundary of the Fort Yuma Reservation.

The State Parties also make the untenable argument that a stipulated judgment entered in Quechan Tribe of the Fort Yuma Reservation v. United States of America, (Claims Court Docket No. 320, 1951) ("Quechan litigation) is a final determination of the disputed boundary of the Fort Yuma Reservation. State Parties' Opening Memorandum at pp. 43-48. The assertion is wrong.

The Quechan litigation was a suit brought by the

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[8](...continued)
remain unchallenged by judicial proceedings for more than one year should constitute 'final determinations.'" This proposal and its ensuing discussion is not relevant to the State Parties' contention that the Court, in drafting Article II(D)(5) for its 1984 Supplemental Decree, intended to allow the defense of preclusion.

[9] The State Parties readily concede that they conceived this argument only after the Court ruled in 1983 that Article IX would not allow the United States to reopen the 1964 Decree to revisit and expand their claim for water for the omitted lands. State Parties' Opening Memorandum at p. 36. This fact alone casts doubt on the sincerity of the State Parties' argument.

Quechan Tribe in 1951 under the Indian Claims Commission Act for loss of their reservation. The United States responded that the reservation lands had been ceded to the United States by the Quechan Tribe pursuant to an 1893 agreement which was subsequently ratified by Congress in 1894. In 1978, the Secretary reversed this position and reinstated the original 1884 boundary of the Fort Yuma Reservation. The Secretary found that the 1893 Agreement and subsequent legislation did not work an immediate cession by the Tribe and that the Tribe retained ownership of such lands, with certain exceptions. United States' Opening Memorandum at pp. 19-22.

The United States and the Quechan Tribe settled the Quechan litigation in 1983. A judgement of $15,000,000.00 was entered, based upon a the parties' "Stipulation For Settlement and Entry of Final Judgment."[10] The stipulated judgment, reads:

> (1) * * * Entry of final judgment shall finally dispose of all rights, claims, or demands which the plaintiff has asserted or could have asserted with

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[10] In our Opening Memorandum, we described the scope of the Quechan Tribe's claim as (1) the fair market value of those portions of the reservation on the effective dates of the permanent acquisitions; and (2) damages for the **temporary deprivation** of those lands which were reaffirmed by the executive order of December 20, 1978, or of those lands which, after a period of temporary deprivation were permanently acquired. The lands upon which a claim for a permanent taking was based were also stipulated to as (1) lands as to which valid rights were acquired by third parties before or after 1884 (2) and reclamation work projects constructed on the reservation pursuant to statutes after 1884. The exceptions are described in detail in the Secretarial Determination and Directives signed by Secretary Watt on January 30, 1981, and published in 46 Federal Register at page 11,372, et seq. To our knowledge, the United States is not claiming water rights for any lands held by third parties and recognized in the Secretary's Order.

> respect to the claims in Docket 320, and plaintiff shall be barred thereby * * *.

The State Parties contend that this language extinguishes the United States' claim for water:

> "the judgment of the Claims Court * * * is a 'final determination' that the disputed 'boundary lands' were ceded to the United Stated (sic) by the 1893 Agreement. Consequently, they are not held in trust by the United States for the Tribe but are public domain lands not entitled to a Winters water right.

See State Parties' Opening Memorandum at p. 48. This assertion, however, ignores applicable law.

Consent judgments entered upon settlement by the parties are not subject to the defense of issue preclusion. See Wright & Miller, Federal Practice and Procedure, section 4443 at pp. 381-391. "As a general rule, * * * an issue is not 'actually litigated' for the purposes of collateral estoppel unless the parties to the stipulation manifest an intent to be bound in a subsequent action." Red Lake Band v. United States, 607 F.2d 930, 934 (Ct.Cl. 1979), see also Sekaquaptewa v. MacDonald, 575 F.2d 239, 247 (9th Cir. 1978). The reasoning behind this rule is apparent,

> The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. And if preclusive effect were given to issues not litigated, the result might serve to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation.

Otherson v. Department of Justice, I.N.S., 711 F.2d 267, 275 (D.C. Cir. 1983), quoting Restatement (Second) of Judgments

section 27, comment e. Moreover, where the parties' intent regarding the future effect of a stipulation is evidenced, that intent should be controlling. Wright & Miller, Federal Practice and Procedure, section 4443 at p. 382. An "intention to be so bound should not be readily inferred." Red Lake Band v. United States, supra, 607 F.2d at 934. In the instant case, the State Parties ignore the parties' expressed intent that,

> (2) The final judgment entered pursuant to this stipulation shall be construed to be a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any way.

Stipulated Judgment at p. 2. Accordingly, there is no basis for the State Parties' contention that the stipulated judgment in the Quechan litigation is a 'final determination' that the disputed 'boundary lands' of the Fort Yuma Reservation. That issue was not "actually litigated" by the parties and is not binding upon them.

B. The State Parties May Not Compel Discovery Of A Department of Justice Internal Legal Memorandum Recommending Settlement In Quechan Tribe of the Fort Yuma Reservation v. United States of America, (Claims Court Docket No. 320, 1951).

The State Parties only address two to the four defenses asserted by the United States to oppose the State Parties' attempt to compel the discovery of an internal Department of Justice legal memorandum.[11] First, they argue that the

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[11] The State Parties have failed to discuss the United States' arguments that the Assistant Attorney General's settlement recommendation is absolutely protected by the "deliberative process" privilege. That privilege extends to "settlement proposals" as well as documents which discuss (continued...)

Department of Justice Settlement Memorandum is a communication between lawyers, and is therefore not protected by the attorney-client privilege. Second, the State Parties contend that a document discussing settlement strategy instead of trial strategy is not attorney-work product under Fed.R.Civ.P. 26(b)(3).

1. The United States Department of Justice Settlement Recommendation is an appropriate attorney-client communication and entitled to protection.

The State Parties do not dispute the confidentiality of the Assistant Attorney General's recommendation of settlement in the Quechan litigation. They argue only that its recipient, the United States Deputy Attorney General, is not a "client" within the scope of the attorney-client privilege. State Parties' Opening Memorandum at p. 49. The State Parties are wrong.

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[11](...continued)
"settlement strategy" including "recommendations, draft documents, proposals, suggestions and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The State Parties have also failed to address the United States' assertion of the attorney work product privilege which protects the "disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney * * *." Fed.R.Civ.P. 26(b)(3). Even if the Court were to find that the State Parties have a "substantial need" for the document in question, this privilege is absolute. See Duplan Corp. v. Moulinage et Retordierie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974) ("No showing of relevance, substantial need or undue hardship should justify compelled disclosure of an attorney's mental impressions, conclusions, opinions or legal theories.").

We respectfully ask the Court's leave to file a short supplement to this memorandum in the event the State Parties' Response to the United States' Opening Memorandum discusses these issues for the first time.

The purpose of the attorney-client privilege is to encourage clients to make full disclosure to their attorneys in order to obtain legal advice. Fisher v. United States, 425 U.S. 391, 403 (1976). "Uninhibited confidence in the inviolability of the relationship is viewed as essential to the protection of the client's legal rights, and to the proper functioning of the adversary process." Coastal States Gas Corporation v. Department of Energy, 617 F.2d 854, 862 (D.C. Cir. 1980). Moreover, while the purpose of the privilege is to protect the client's disclosures, "the federal courts extend the privilege also to an attorney's written communications to a client * * *." Id.

The authority to settle the Quechan litigation on behalf of the United States rested with the Deputy Attorney General -- just as authority to settle litigation in a private law suit rests with the client. In order to make an informed decision regarding that issue, the Assistant Attorney General for the Land and Natural Resources Division, provided the Deputy Attorney General with a comprehensive legal memorandum recommending settlement. In any other context, such a document would be viewed as inviolate and absolutely protected from disclosure.[12] The rule is no different when the litigants are

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12 In settling the Quechan litigation, the Deputy Attrney General and the Assistant Attorney General acted both as the attorney, by recommending settlement, and as the authorized entitly to speak for the client, becasue of their authority to engage in and settle the litigation in which the United States or an agency or officer thereof is a party. See 28 U.S.C. 516 (the conduct of litigation in which the United States, an agency or an officer there of is a party is reserved to the Department of

(continued...)

settling a case in which the United States is a party. See Coastal States Gas Corporation v. Department of Energy, supra, 617 F.2d at 863 ("[I]t is clear that an agency can be a 'client' and agency lawyers can function as 'attorneys' within the relationship * * *."); Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242, 252-253 (D.C. Cir. 1977); and Porter County Chapter of Izaak Walton League of America v. Atomic Energy Commission, 380 F.Supp. 630, 633 (N.D. Indiana 1974) (Where papers containing legal advice from staff counsel of the Atomic Energy Commission were exempt from disclosure under the Freedom of Information Act, citing the attorney-client privilege.).

2. The United States Department of Justice Settlement Recommendation is entitled to protection as attorney work product.

The State Parties challenge the United States' work product defense on only two grounds. First, the State Parties contend that because the Department of Justice Settlement Memorandum was prepared to settle litigation, it was not prepared in "anticipation of litigation." Second, they argue that the protection of Fed.R.Civ.P. 26(b)(3) applies only when the subject document is prepared in anticipation of litigation in the case in which the protection is sought. Both of these arguments fail.

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[12](...continued)
Justice); and 519 (the Attorney General shall supervise all litigation to which the United States, an agency or an officer there of is a party.).

a. The Department of Justice Settlement Recommendation was prepared in "anticipation of litigation."

The State Parties read Fed.R.Civ.P. 26(b)(3)'s requirement that a document must be prepared "in anticipation of litigation or for trial" literally and argue that it would not apply to an attorney's analysis of litigation in the context of settlement. We believe that the drafters of the Federal Rules of Civil Procedure intended the words "in anticipation of litigation" to apply in a much broader context. "[T]he test should be whether in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of litigation." Wright & Miller, Federal Practice and Procedure, section 204 at p. 208 (1970). The United States is entitled to the protection of Rule 26(b)(3) and the work product doctrine because the recommendation of the Assistant Attorney General to settle the Quechan litigation can fairly be said to have been prepared because of that litigation.

b. Under Rule 26(b)(3), work-product materials retain their immunity from discovery after the termination of the litigation for which the documents were prepared.

The State Parties also contend that work-product materials lose their immunity once the litigation for which they were created is terminated. State Parties' Opening Memorandum at p. 50. While they concede that this rule has not been adopted by the Supreme Court, id. at 51, the State Parties ignore the fact that, as late as 1983, "all of the Courts of Appeals that had

decided the issue under Rule 26(b)(3) had determined that work-product materials retained their immunity from discovery after termination of the litigation for which the documents were prepared * * *." Federal Trade Commission, et al. v. Grolier Inc., 462 U.S. 19, 26 (1983).

The rationale for such a rule is apparent:

> The invasion of "[a]n attorney's thoughts, heretofore inviolate," and the resulting demoralizing effect on the profession, are as great when the invasion takes place later rather than sooner. * * * Many Government agencies, for example, deal with hundreds or thousands of essentially similar cases in which they must decide whether and how to conduct enforcement litigation. * * * He would get the benefit of the agency's legal and factual research and reasoning, enabling him to litigate "on wits borrowed from the adversary." **Worse yet, he could gain insight into the agency's general strategic and tactical approach to deciding when suits are brought, how they are conducted, and on what terms they are settled.**

Federal Trade Commission, et al. v. Grolier Inc., supra, 462 U.S. at 31 (Brennan, J., concurring) (emphasis added). See also Duplan Corp. v. Moulinage et Retordierie de Chavanoz, 509 F.2d 730, 735 (4th Cir. 1974) ("Should an advocate's thoughts, theories, opinions and impressions, collected and developed during pending litigation become discoverable in connection with later litigation because they are thought to be relevant, our adversary system would clearly suffer.").

The minority position advocated by the State Parties should be rejected. The better reading of Rule 26(b)(3) is that work product materials retain their immunity from discovery after termination of the litigation for which the documents were prepared.

c. The State Parties have made no showing of substantial need for the document in question.

Finally, the State Parties have failed to demonstrate any need for the internal memorandum at issue. Rule 26(b)(3) specifically states that it is their burden to show "that the party seeking discovery has a substantial need for the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means." The State Parties can only say that the Department of Justice Settlement Memorandum will only "confirm what the Claims Court pleadings and judgment show on their face and that such reinforcement constitutes 'substantial need.'" State Parties' Opening Memorandum at p. 51. Mere confirmation of what the State Parties interpret to be the scope of the Stipulate Judgment in the Quechan litigation, falls short of the "substantial need" test articulated by Rule 26(b)(3).

C. The Evidentiary Record Developed In Arizona v. California I For The Colorado River Boundary Dispute Is Not Binding On The Parties.

We disagree strongly with the State Parties assertion that the record developed before Special Master Rifkind in Arizona v. California I, "is binding upon all of the parties * * * but may be supplemented." State Parties' Opening Memorandum at p. 75. The State Parties make the simplistic argument that because the United States appeared in its capacity as trustee in that proceeding, the Tribe is bound by the

"evidentiary presentation made before Special Master Rifkind." Id. at 63. This begs the question.

The issue presented by the existence of a record before Special Master Rifkind on the boundary disputes is not whether the Colorado River Indian Tribes are bound by the appearance of its trustee, but the legal sufficiency of that record for use in these proceedings.

The United States agrees with the Colorado River Indian Tribes' position that the record developed before Special Master Rifkind "is not entitled to special treatment but may only be considered by the Master if it is admissible under the Federal Rules of Evidence." Opening Memorandum of the Colorado River Indian Tribes and the Quechan Tribe of the Fort Yuma Reservation at p. 19. See F.R.E. 804(b)(1) and Cater-Wallace, Inc. v. Otte, 474 F.2d 529, 536 (2nd Cir. 1972, cert. denied, 412 U.S. 929 (1973). There other compelling reasons for this Court to reject the State Parties' argument.

The Court's Order of Reference provides that the Special Master is to "determine the disputed boundaries of the Fort Mojave, Colorado River and Fort Yuma Indian Reservations * * *." Arizona v. California, ____ U.S. ____, 107 LEd.2d 180 (1989). It is not predicated upon the proceedings in Arizona v. California I. The earlier Masters' attempts to resolve the boundaries of the several reservations were "set aside" as "unnecessary" by the Court in 1963, Arizona v. California, supra, 373 U.S. at 601 and in 1983, Arizona v. California, supra, 460

U.S. at 636-637. Moreover, the Court specifically rejected the State Parties' argument that the boundary disputes should have been litigated by Special Master Tuttle:

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and our 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums.

Id. at 637. Given that the Court found the record and proceedings for the boundary dispute before Special Master Rifkind "unnecessary" to their 1963 decision, that record continuing significane beyond that proceeding. Now that the Court has properly chosen to exercise its extraordinary origninal jurisdcition to adjudicate the boundary lands, the parties must develop their own record in this proceeding. In such a case, "the issues stand undisposed of, as if [the first trial] had never been tried." Hunt v. United States, 53 F.2d 333 (10th Cir. 1031). See also, Pasquel v. Owen, 97 F.Supp. 157, 158 (W.D. Missouri 1951).[13]

D. In The Event The Court Should Proceed With An Adjudication Of The Boundary Lands South Of The Benson Line, The United States Requires Sufficient Time To Determine The Appropriate Alignment Of That Boundary And The Water, If Any, It Will Claim.

In the event the Court determines that the parties should proceed with the adjudication of the western boundary of the Colorado River Indian Reservation below the Benson line, the

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[13] Our reading of the Court's Order of Reference does not prohibit the parties from stipulating to the admissability of any portion of the record developed in Arizona v. California I. In the absence of such an agreement, however, the parties are not otherwise bound by that record as it pertains to the boundary disputes.

United States will require more time to determine the appropriate alignment of that boundary and the water, if any, it will claim. The complexity of the problem we face is best expressed by the Ninth Circuit when it was faced with a similar problem:

> The proper resolution of this appeal [of the district court's judgment that certain lands along the Colorado River are the within the reservation's boundaries and thus are the property of the United States] has proved as difficult to divine as determining the course of the Colorado River * * * during the period of time with which this case is concerned. Both have proved elusive, and, even now, some doubt with respect to both remains.

United States v. Aranson, et al., 696 F.2d 654, 656 (9th Cir. 1982). This language is found in the first paragraph of the Aranson decision and is a useful introduction to the ambiguities and confusion associated with the western boundary of the Colorado River below the Benson line. Given the complexity of the problem, it is understandable why the United States has not determined its position as to the appropriate alignment of the that portion of the western boundary of the Colorado River Indian Reservation. Moreover, without a definition of the appropriate alignment of the boundary, we are unable to prepare our claim for water, if any, in this section of the reservation. At a minimum, the United States requires sufficient time to conduct a complete examination of the lands at issue and ascertain what claims, if any, it might choose to bring if required to do so in this proceeding.

We did not prepare such a claim in Arizona v. California II, because that proceeding was limited to the United

States' claim for additional water based on the lands governed by the 1969 Secretarial Order (the Benson line). Accordingly, if the Court is of the opinion that the United States' claim for water for lands bordering the western boundary of the Colorado River Indian Reservation and south of the Benson line are at issue in this proceeding, we can proceed only if given sufficient time and opportunity to determine the alignment of that boundary and to prepare our claims, if any, for the water associated with those boundary lands.

Moreover, if the United States determines that it indeed asserts that some or all of the lands south of the Benson line are a part of the Colorado River Indian Reservation, and we claim corresponding water rights for those lands, the character of the proceeding before this Court may change.[14]

Under Rule 19, Fed.R.Civ.P., private landowners and other private and public entities asserting an interest in the title to any lands claimed by the United States may be considered to be indispensable parties and must be joined.[15] See, e.g.

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[14] In the event the United States determines that it does not assert any claims for additional water rights on the disputed lands, the Court will have no need to adjudicate the reservation boundary south of the Benson Line. Indeed, it is highly questionable whether the Court would have jurisdiction to do so.

[15] Rule 19 applies to actions within the original jurisdiction of the Supreme Court. Rule 9.2 of the Rules of the Supreme Court provides that the Federal Rules of Civil Procedure "may be taken as a guide to procedure" in actions within the Court's original jurisdiction. While not strictly bound by Rule

(continued...)

McShan v. Sherrill, 283 F.2d 462, 463 (9th Cir. 1960)(no decree affecting the title to property can be entered in the absence of all parties interested in the title; they are indispensable parties); United States v. Wood, 466 F.2d 1385, 1388 (9th Cir. 1972) ("In a suit to quiet title, all persons interested in the title are indispensable parties."). If such persons exist and are not accessible to service, or if their joinder would oust the Court of jurisdiction, the case, at least insofar as it would affect the title of the absent parties, may be subject to dismissal. McShan v. Sherrill, supra, 283 F.2d at 464; Arizona v. California, 298 U.S. 558 (1936) (where the Supreme Court dismissed bill of complaint seeking an equitable apportionment of the waters of the Lower Colorado due to the absence of the United States as an indispensable party).

Given the sensitive and complex nature of the issues that await resolution in the event we proceed with an adjudication of the western boundary of the Colorado River Indian Reservation below the Benson line, we urge the Court to consider the ramifications to the parties before it entertains the State Parties' motion litigate this issue.

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[15](...continued)
19, the Court repeatedly has applied and cited the federal Rule governing joinder and the principles it endorses. See e.g., Arizona v. California, 298 U.S. 558 (1936); United States v. Louisiana, 354 U.S. 515 (1957); Idaho ex. rel. Evans v. Oregon, 444 U.S. 380 (1980).

III

CONCLUSION

For the reasons set forth above, the motions of the State Parties to preclude the United States from claiming water for the Fort Yuma Reservation boundary lands; to adjudicate the western boundary of the Colorado River Indian Reservation below the Benson line; to have the Special Master adopt and admit the evidentiary record before Special Master Rifkind as it relates to the western boundary of the Colorado River Indian Reservation; and to compel discovery of a Department of Justice internal legal memorandum should be denied.

Respectfully submitted this 9th day of May, 1991.

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UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

STATE OF ARIZONA, Plaintiff, vs. STATE OF CALIFORNIA, et al., Defendant,	NO. 8 ORIGINAL NOTICE OF SERVICE

This is to certify that on this 6th day of May, 1991, copies of the United States' Reply Memorandum to the Brief of the State Parties on Pretrial Issues were mailed to the following:

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