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No. 8 Original

# In the Supreme Court of the United States

OCTOBER TERM, 1961

STATE OF ARIZONA, COMPLAINANT

*v.*

STATE OF CALIFORNIA, ET AL.

## RESPONSE OF THE UNITED STATES TO THE MOTION ON BEHALF OF THE NAVAJO TRIBE OF INDIANS FOR LEAVE TO INTERVENE

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## CITATIONS





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## INTRODUCTORY STATEMENT

The Motion for Leave to Intervene on Behalf of the Navajo Tribe is similar to an application filed by the Navajo and other Indian tribes for separate representation in the trial of this case. That application was filed early in the trial proceedings before the Special Master and was referred to and disposed of by him (Tr. 2638–2646; Transcript of July 18, 1956). Although the relief there sought, unlike the present application, did not extend to intervention of the Indian tribes as parties,[1] the effect of granting

[1] One of the grounds for the earlier application was "6. There is doubt as to whether petitioners may intervene as separate parties since their interests are committed to

their application would have been tantamount to their intervention. This was recognized by the Special Master who stated, "In short, the petitioners would in every sense behave like parties but remain non-parties" (Tr. 2643). Accordingly, the reasoning by which the Special Master denied that application applies here—"The legal power of the Attorney General to represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action" (Tr. 2644–45). The United States resists the present motion as it resisted the earlier one.

It should be noted that the Special Master makes no adjudication of the water rights of the Navajo Indian Reservation. The Special Master's Report does not affect rights or priorities of Indian reservations for which no specific provision is made (see Article VIII, subdivision (C), of the Recommended Decree on page 360 of the Report), except as legal principles enunciated therein may apply on the basis of *stare decisis*. Nothing has been taken from the Navajo Indians and their complaint is that their rights have not been affirmatively recognized.

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adjudication by the intervention of the United States * * *" (p. 2, Motion for Leave to File Representation of Interest by the Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California; Gila River Pima-Maricopa Indian Community, Arizona; Hualapai Indian Tribe of the Hualapai Reservation, Arizona; Navajo Tribe of Indians of the Navajo Reservation, Arizona and New Mexico; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; the San Carlos Apache Tribe, Arizona; and the Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Reservation, Arizona).

## ARGUMENT

### I

### THE UNITED STATES IS AUTHORIZED EXCLUSIVELY TO REPRESENT THE INDIAN TRIBES IN LITIGATION AFFECTING THEIR PROPERTY RIGHTS

The representation of Indian tribes by the United States is an aspect of the plenary power of the United States to manage the affairs of Indians and Indian tribes. *Worcester* v. *Georgia,* 6 Pet. 515; *United States* v. *Kagama,* 118 U.S. 375; *United States* v. *Ramsey,* 271 U.S. 467. "The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 308; *Lone Wolf* v. *Hitchcock,* 187 U.S. 553, 565; *Tiger* v. *Western Investment Co.,* 221 U.S. 286, 311.

Congress has generally delegated to the Secretary of the Interior the management of Indian property and to the Attorney General the conduct of litigation affecting that property. Thus, as to the authority of the Secretary of the Interior, it was said in *United States* v. *Anglin & Stevenson,* 145 F. 2d 622 (C.A. 10) certiorari denied, 324 U.S. 844, 628–629:

> We do not forget that historically and traditionally the Secretary of the Interior has been selected as the executive arm of the Government to execute the declared Congressional policy with the Indians. As such, he and his

> subordinates have the responsibility of discharging the obligation of the Government to its Indian wards, and in that respect, he is given wide discretionary powers to deal with the individual Indians who are dependent upon the Government for tutelage and protection. [Cases omitted.] In the discharge of these duties, he acts as supervisor, agent, guardian, and trustee of the Indian and his property, whether in the nature of lands or restricted funds. While exercising the powers and duties imposed by law, he is clothed with sovereign immunity, and ordinarily is not amenable to judicial processes, or bound by judicial decrees absent legislative consent. * * * It is not the judicial function to administer the affairs of incompetent Indians, and courts should be at pains not to invade the trust or encroach upon the prerogative which has been traditionally assigned to the Secretary of the Interior.

The authority of the Attorney General to control litigation affecting Indian property is equally broad. This is, of course, necessary in order to effectuate the responsibility of the Secretary of the Interior. It is provided in 28 U.S.C. 507(b) that "[t]he Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party * * *."[2] See also *United States* v. *Winston,*

[2] "In all States and Territories where there are reservations or allotted Indians the United States Attorney shall represent them in all suits at law and in equity." Act of March 3, 1893, 27 Stat. 631, 25 U.S.C. 175. See also Act of June 22, 1870, 16 Stat. 164, as amended September 3, 1954, 68 Stat. 1229, 5 U.S.C.

170 U.S. 522, 525. "If the United States is entitled to institute an action on its own behalf and on behalf of the Indians, the Indians cannot determine the course of the suit or settle it contrary to the position of the Government." Cohen, *Handbook of Federal Indian Law* (1942), p. 370; *Federal Indian Law,* Department of the Interior (1958), p. 336. *Conner* v. *Cornell,* 32 F. 2d 581, 584–585 (C.A. 8); *McGugin* v. *United States,* 109 F. 2d 94 (C.A. 10); *White* v. *Sinclair Prairie Oil Co.,* 139 F. 2d 103, 106–107 (C.A. 10); *United States* v. *Adamic,* 54 F. Supp. 221, 223 (W.D. N.Y.).

This Court recognized the complete control of the United States over Indian litigation in *Heckman* v. *United States,* 224 U.S. 413, where the United States sued to set aside conveyances of allotted lands by restricted Indians, as follows (pp. 444–446):

> There can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indians' acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representation which traces its source to the plenary control of Congress in

306; Executive Order No. 6166 of June 10, 1933 (Reorganization of Executive Agencies), Section 5, 5 U.S.C., following Section 132; Reorganization Plan No. 2 of May 24, 1950, 64 Stat. 1261, as amended July 5, 1952, 66 Stat. 121, 5 U.S.C., following Section 292.

> legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.
>
> * * * * *

It is then clear that the United States, acting through the Attorney General, has full authority to represent the various Indian tribes in the pending litigation. It is equally clear that the action of the Attorney General in doing so is binding upon those tribes. For instance, in the action entitled *Pueblo of Picuris* v. *Abeyta,* 50 F. 2d 12 (C.A. 10), the court dismissed an appeal taken by the Pueblo after the Attorney General had decided not to appeal, stating at page 13 that "a decree rendered in a suit brought by the pueblo does not bind the United States, while a decree rendered in a suit brought by the United States does bind the pueblo." In *Mars* v. *McDougal,* 40 F. 2d 247 (C.A. 10) certiorari denied, 282 U.S. 850, a suit brought by an Indian was dismissed because an earlier suit involving the same claim brought in the name of the United States had been dismissed with prejudice on motion of the Attorney General.

In this case the Attorney General, acting for the United States, has undertaken representation of the interests of the several Indian tribes [3] and it "is to be

[3] In the Lower Basin of the Colorado River there are 25 Indian Reservations. Evidence of the water rights of each of them, and Proposed Findings of Fact and Conclusions of Law and briefs in support thereof, were submitted by the United States to the Special Master. See particularly Findings of Fact and Conclusions of Law Proposed by the United States, pp. 37, 42, 45, 51–125, 227, 230–235, 237. The decisions which

presumed" that "the United States will be governed by such considerations of justice as will control a Christian people in their treatment of [a] * * * dependent race." *Missouri, Kansas & Texas Ry. Co.* v. *Roberts,* 152 U.S. 114, 117. It is plain that there is no basis for intervention by the Navajo Tribe either as a matter of right or as a matter of judicial discretion.

## II

### BECAUSE THE NAVAJO TRIBE HAS HERETOFORE HAD AMPLE OPPORTUNITY TO MAKE REPRESENTATIONS RESPECTING ITS INTEREST IN THE LITIGATION, ITS UNTIMELY MOTION FOR LEAVE TO INTERVENE NOW IS WITHOUT JUSTIFICATION

Even were it not clear that intervention by the Navajo Tribe is precluded by the United States' exclusive authority, there is in the circumstances of this case no justification for the motion at this stage of the proceeding.

The controversy respecting allocation of the waters of the Lower Colorado River has plagued the States of the basin, the United States, and the people of the

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have been made respecting the extent to which the United States should accept and the extent to which it should except to the Master's Report have necessarily involved an exercise of judgment as to what will best serve the interests of all the Indian reservations involved. If the Navajo Tribe were to be permitted to intervene because of disagreement with the Attorney General's judgment it would follow that each of the tribes inhabiting the 24 other reservations should have the same opportunity. Thus the force of the authorities which deny the right of an Indian tribe to intervene in a case where the representation of its interests has been undertaken by the United States is multiplied in the instant case.

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entire region for nearly half a century. After earlier unsuccessful attempts to bring the matter before this Court, *Arizona* v. *California,* 283 U.S. 423, *Arizona* v. *California,* 292 U.S. 341, *Arizona* v. *California,* 298 U.S. 558, this case was initiated in 1952. The United States' Petition in Intervention was filed in December, 1953. Hearings before the Special Master began on June 14, 1956, and continued intermittently until August 28, 1958. Proposed findings of fact and conclusions of law, and briefs in support thereof, answering briefs, and reply briefs were submitted to the Special Master during the period ending July 1, 1959. On May 5, 1960, the Special Master submitted his draft report to the several parties. In August, 1960, the Special Master heard oral argument by the parties with respect to his draft report and on January 16, 1961, the Special Master's report dated December 5, 1960, was received and ordered filed by the Court. Exceptions of the several parties to the report were filed on February 27, 1961, and briefs in support of exceptions, answering briefs and reply briefs have now been submitted to the Court. After nearly nine years, during which the first Special Master appointed by the Court died and was replaced, and the second Special Master suffered a heart attack from which he fortunately recovered, the case is now ready for argument to and consideration by the Court.

A decision of the great issues which for many years have impeded full development of the water resources of the southwestern region of the United States, and hence the full development of the other resources of the region, is now imminent. Even were there merit

to the subject motion, which we deny, we respectfully submit that that decision should not be delayed by the intervention now of additional parties. It is too late to consider whether additional parties, who are clearly neither necessary nor indispensable, should now be given leave to enter the case.[4]

The Tribe's review of "Past efforts of Navajo Tribe to Secure Adequate Representation," in its argument to establish timeliness of its motion, does not disclose all of the pertinent facts. While it is true, as above noted, that it and other tribes did petition the Court to require the Attorney General to designate separate counsel to represent their interests, the Special Master, to whom the petition was referred, as a part of his mentioned ruling, encouraged the applicants to proffer to the Attorney General, and the Attorney General to consider for presentation in the case, any relevant evidence in their possession. He also specifically authorized the applicants to file an *amicus curiae* brief with him upon conclusion of the hearings and he expressly invited an application to the Court for review of his ruling.

Neither the Navajo Tribe nor any other tribe of the Lower Colorado River Basin sought review of the Master's decision or availed itself of the opportunity

[4] We suggest that the contention that allowance of the motion would not make necessary referral of the case back to the Special Master or otherwise delay decision by the Court is frivolous. If the "void" which the Tribe would fill consists of the absence of evidence, a point on which the motion and the supporting documents is peculiarly vague, it cannot be filled without the taking of additional evidence.

to file an *amicus* brief with the Special Master. All interested tribes were invited to review the evidence being prepared by the United States with regard to the claims for water rights for the respective reservations inhabited by them. The Navajo Tribe accepted this invitation and its representatives who made the examination found no fault and made no adverse comment with regard to such evidence. Neither did the Tribe nor its General Counsel suggest or proffer any additional evidence. On the contrary, the Chairman of the Tribal Council, by letter of March 5, 1957, to the Solicitor, Department of the Interior,[5] stated that, after its review by the Tribe's Assistant General Counsel and its consulting engineers, he was "entirely satisfied" with the preparation of evidence "to show Indian water rights on the Navajo Reservation."[6]

A copy of the letter of February 2, 1961, addressed by the General Counsel for the Tribe to the Attorney General, referred to in the motion and the brief in support thereof, is attached as Appendix B. It is to be noted that in that letter the only reference to any of the five areas in which it is stated in paragraph IV of the motion that "The United States

[5] Copy of the letter is annexed as Appendix A.

[6] In support of the claim asserted in the United States' Petition of Intervention with respect to the Navajo Indian Reservation (see Appendix II to the Petition) the evidence was designed to establish the reserved rights to use specific quantities of the waters of certain tributary streams for agricultural, domestic, stock watering and similar purposes on the reservation. See Findings of Fact and Conclusions of Law Proposed by the United States before the Special Master, Findings 4.0.2, 4.0.3, 4.2.1–4.2.13, Conclusion 4.2.

has failed vigorously to assert" the interests of the Navajo Indians is the request that exception be taken to the Report's adoption of irrigable acreage on an Indian reservation as a basis for measurement of the quantities of water reserved for use on the reservation. In a telephone conversation between a member of tribal counsel's staff and a representative of the Department of Justice which preceded the letter [7] it was explained that, notwithstanding our agreement with the proposition that irrigable acreage is not the sole basis for measuring the quantum of the waters reserved for use on an Indian reservation (see fn. 28, p. 80, of our Answering Brief), we did not consider the language of the Report in this respect an appropriate subject for exception. This conclusion was predicated on (1) the Special Master's express recognition (Rept. 265) that, with respect to the five reservations to which the Recommended Decree applies, the basis for measurement which he adopted does not mean that the reserved waters may not be used for purposes other than agricultural and related uses, (2) the absence of prejudice to any claim which might later be made with respect to the Navajo reservation in view of the Master's exclusion of that reservation from the area of adjudi-

[7] The letter was written in response to our suggestion during that conversation that counsel's views respecting exceptions to be noted by the United States, orally indicated during the conversation, should be put in written form for our further consideration. In light of the purpose of the letter and in light of counsel's intention stated during the telephone conversation to arrange a conference at a later date, it was assumed that written response to the letter was not expected.

cation, and (3) the fact that the evidence of water rights appurtenant to the Navajo reservation presented to the Master, with the full approval, as above noted, of the Tribe's Assistant General Counsel, its consulting engineer, and the Chairman of the Tribal Council, had employed irrigable acreage as the appropriate and principal basis for measuring the quantum of the rights reserved. Except for repeating this request in the letter of February 2, 1961, counsel for the Tribe made no further effort to demonstrate to the Attorney General or his representatives that the exception should be noted notwithstanding these circumstances.

We respectfully submit that in all this there is nothing to justify a reopening of the case to permit counsel for the Navajo Tribe to support his present views at this late stage in the case.

## III

### THE CHARGE OF "INADEQUATE REPRESENTATION" IS WITHOUT MERIT

Even were the motion of the Navajo Tribe legally cognizable and appropriate at this time, it should be denied for the reason that at their strongest the assertions of "inadequate representation" present nothing more than the question whether the judgment of the Attorney General or the judgment of tribal counsel is better, concerning the manner in which the rights of the United States with respect to the Navajo and other Indian reservations in the Lower Basin can best be asserted and protected. This is evident from

the motion and supporting documents. It is at least partially demonstrated by what has already been said in this response. But even though we wish to avoid arguing against any claim of right which the United States may possibly have in behalf of the Navajo and other Indian tribes, we feel that it is appropriate to make at least a brief response to the Navajo Tribe's enumeration of "five areas of major importance" in which it is charged the United States "has failed vigorously to assert" the Tribe's interests.

### A. THE JUSTICIABILITY OF TRIBUTARY USES

The first of the enumerated "areas" involves the United States' omission to except to the Special Master's refusal to adjudicate its claims of right with respect to the Navajo Indian Reservation. It is true that in the Government's Petition of Intervention a necessity for determination of its rights with respect to the Navajo and all other Indian Reservations was alleged. It is also true that before the Special Master we urged that the rights to use water from available sources on the Navajo Reservation and all other Indian reservations within the Lower Basin should be adjudicated by the decree in this case. (See *e.g.,* Tr. 13000–13016.) In our submissions to the Special Master we proposed findings of fact and conclusions of law for the adjudication of all such rights on the basis of our evidence respecting the same, including those appurtenant to the Navajo Reservation (*supra,* p. 6, fn. 3, and p. 10, fn. 6).

But on August 23, 1957, the Special Master had announced his intention to receive evidence from the

United States of its claims of right to use tributary waters on the several Indian reservations, but to defer the taking of evidence of possibly conflicting claims on the same tributaries until after report to and action by the Court with respect to other issues in the case. The rationale for this ruling appears at pp. 13796 to 13805 of the transcript. No limitation with respect to the trial of mainstream Indian reservation rights was imposed. Tr. 13809. Although we disagreed then,[8] and continue to disagree, with the Master's suggestion that the several States lack power in their capacities as *parens patriae* to bind the claimants in those States of conflicting rights, we concluded on reflection that for the other reasons given, relating to the practical management of the litigation, neither the Court nor the Special Master on reconsideration would be disposed to reverse the ruling. Either because of absence of proof of conflicting claims or in reliance on the ruling, the States generally refrained from challenging the evidence submitted by the United States with respect to its claims of right to use water from tributary sources on the several Indian reservations.

The Special Master's determination that mainstream and tributary uses above Lake Mead are not accountable in the allocation of mainstream water if approved would make irrelevant an adjudication at

[8] Counsel for the Government advised the Special Master at the time that review of the ruling, either by request to him for reconsideration or by application to the Court, would probably be sought (Tr. 13806).

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this time of the rights to use water on the Navajo Reservation as against users of mainstream water. If the Court agrees with our first and second exceptions to the report where we oppose this determination, it will then be necessary to determine the appropriateness of an application, under Article IX of the Recommended Decree and the Special Master's ruling of August 23, 1957, for adjudication of those rights.[9] Under the same authority, application can be made for adjudication of those rights if, contrary to the Master's determination at page 324 of the Report, actual conflict between the claims asserted by the United States and other water users from the tributaries involved is demonstrable. But in the present posture of the case, we submit that

[9] On the record made before the Special Master the extent of conflict between tributary uses on the Navajo Reservation and downstream uses of mainstream waters is uncertain. See Tr. 12817; 12819–20. If, as suggested in the letter of February 2, 1961, from the General Counsel for the Navajo Tribe to the Attorney General, there is possible basis for a claim of right to use water from the mainstream on the Navajo Reservation, this is a matter of which the Court can properly be asked to take cognizance only by an application to receive additional evidence after decision on the pending exceptions to the Special Master's report. It is not an appropriate subject for exception now because no pleading, no evidence and no argument to support such a claim has been submitted to the Court or to the Special Master. Apparently in recognition of this situation and of the Tribe's acquiescence in and approval of the Government's limitation of its claims with respect to the Navajo Reservation to tributary uses, the Tribe has not charged that the omission heretofore to assert a claim of right to use mainstream waters on the reservation constitutes "inadequate representation."

the United States' decision not to except to the Master's omission to adjudicate the rights to use tributary waters on the Navajo and other Indian reservations represents a reasonable exercise of judgment and that any other course would be ill-advised, unwise, and not in the best interest of any of the Indian tribes, the United States, or the efficient administration of the litigation.

### B. ABORIGINAL RIGHTS OF THE NAVAJO TRIBE

The second of the areas of "inadequate representation" enumerated in the motion relates to the theory of reservation by the United States of rights to the use of water on Indian reservations advocated by the United States and adopted by the Special Master. Complaint is made that the United States has not asserted aboriginal rights in the Navajo Indian Tribe to the use of water on the Navajo Reservation and that such rights are paramount and superior to all other claims of right in the same source of water supply.

We submit that the doctrine of reservation by the United States of rights to use water on Indian resercations established on lands withdrawn from the public domain is in no way inimical to the Navajo Indians or to Indians inhabiting the other reservations with respect to which we have advocated the doctrine in this case. Where there is evidence of use and occupancy on which a claim of aboriginal title might be based, there is nothing in the doctrine to pre-

clude a further claim based on aboriginal title. However, the extent of the rights based on such title which might be claimed with respect to the Indian reservations in the Lower Basin is extremely limited, if such rights exist at all, while the doctrine on which we have primarily relied is all embracing.

For example, without regard to what the Navajo Indians may claim in litigation with the United States before the Indian Claims Commission or elsewhere respecting their aboriginal title to the lands on which they roamed before they were confined to their reservation, the fact is that under Article IX of the Treaty of 1868 (U.S. Exhibit 201) the Navajo Tribe expressly relinquished "all right to occupy any territory outside their reservation, as herein defined," reserving only the right to hunt on unoccupied lands contiguous to the Reservation. The reservation as defined by the Treaty consisted of only a relatively small area in the eastern portion of the reservation as it now exists (U.S. Exhibit 293, last page). There were a large number of additions by subsequent Executive Orders and acts of Congress (*Ibid.*). Only four of the eighteen areas of water use with respect to which specific proof was prepared and submitted to the Special Master are located within, or partly within, the original Treaty reservation (U.S. Proposed Finding of Fact 4.2.10). Obviously, lands outside the reservation created by the Treaty of 1868 were open to settlement and the surplus nonnavigable waters thereon were subject to appropriation under the

Desert Land Act of 1877 (43 U.S.C. 321) until such lands were reserved by later executive order or statute. So far as rights to use water on the original Treaty reservation are concerned, we believe that the priority date as of the date of creation of the reservation, June 1, 1868, is sufficient to protect the interests of the Navajo Tribe against any claims of conflicting rights in the water sources on that area.[10]

Moreover, the doctrine of reservation of rights to the use of water by the United States for use on Indian reservations as announced by the Special Master was presented and argued extensively in the United States' submissions to the Special Master. The Navajo Tribe did not take exception to that presentation by filing an *amicus curiae* brief with the Master or otherwise. We note also that in the letter of February 2, 1961 addressed by General Counsel for the Tribe to the Attorney General, no mention of this point was made. We submit that even if the record before the Master warranted a claim of right in behalf of the Navajo Tribe based on aboriginal title, the omission to assert such claim before the Special Master has in no way prejudiced the interests of the Tribe and does not in any manner support the charge of "inadequate representation."

[10] If in this case or in other litigation it should appear that there are conflicting claims of priority dates earlier than June 1, 1868, there is nothing in the Report of the Special Master to preclude a claim in behalf of the Indians of aboriginal title if the facts warrant such a claim being made.

C. LACK OF SEPARATE APPORTIONMENTS TO INDIAN TRIBES

The third and fourth "areas" enumerated in the motion to support the charge of "inadequate representation" relate to the United States omission to except to the Special Master's determination that uses of water on the several Indian reservations are chargeable to the State allocations and his failure to make separate apportionments to "indian users." The contention seems to be that in acquiescing in the Master's decision the United States has "consented * * * that the indians must * * * look to the states for their share of water." (Motion, pp. 5–6.)

The United States has never in this litigation contended for separate apportionments to the Indian Tribes. Early in the proceedings it did contend that a separate apportionment should be made to the United States, as against the several States. However, long before the hearings before the Special Master were concluded, the United States took the position that consumptive uses under rights claimed by the United States, except those involving international obligations, should be chargeable to the allocations to the respective States in which the uses were made. We further contended, however, that the United States' reserved rights which are in no way dependent on State authorization, and particularly its rights for use on the various Indian Reservations, are not limited by State allocations. This position was submitted to (see Findings of Fact and Conclusions of Law Proposed by the United States, Conclusion 11.5), and briefed before, the Special Master. Deci-

sion not to except to the Special Master's determination that the United States' claims of right with respect to the Indian reservations are limited by State allocations was predicated on the particular facts of this case and the realization that the ruling would work no prejudice because of (1) the preferred status given such rights under the Master's interpretation of the provision for satisfaction of "present perfected rights" in the Boulder Canyon Project Act, (2) the Master's determination that rights reserved for use on such reservations have priority as of the dates of creation of the reservations, and (3) the availability of uncommitted water within the allocations to those States in which are situated reservations which do not have very early priority dates. We submit that the judgment so exercised is reasonable and is no basis for the charge of inadequate representation.

The assertion by the Navajo Tribe that the United States has consented that the Indians must look to the States for their share of water misconceives the effect of the Master's ruling with respect to the chargeability of uses on the Indian reservations. On the contrary, the Master has clearly recognized that the right to make these uses does not depend upon consent or authorization by the respective States.

### D. BASIS FOR MEASUREMENT OF THE QUANTITY OF WATER RESERVED FOR USE ON INDIAN RESERVATIONS

The fifth "area" of complaint enumerated in the motion in support of the charge of "inadequate representation" relates to the omission of the United States to except to the Special Master's determination

that, with respect to the Indian reservations for which he has determined that water rights should be adjudicated, the quantum of the reserved water rights is "sufficient water to irrigate all of the practicably irrigable lands in a reservation and to supply related stock and domestic uses." At pages 11 and 12, *supra,* we have explained our reasons for not accepting the suggestion of the General Counsel for the Navajo Tribe that exceptions be taken to this determination in the Report. Beyond this, we question the standing of the Navajo Tribe even to suggest an exception to this determination by the Special Master which does not relate to the Navajo Reservation.

Nevertheless, if there is definitive evidence not yet brought to the attention of the Attorney General of substantial present or potential uses of Lower Basin water on the Navajo Indian Reservation additional to those with respect to which evidence has thus far been presented, we believe it will be incumbent upon the United States to bring such evidence before the Court if and when it is determined that the water rights pertaining to the Navajo Reservation are to be adjudicated in this case, and to make every reasonable argument in support of the inclusion of such uses within the reserved right.[11] However, we submit that

[11] In the case of one other Indian reservation (See Findings of Fact and Conclusions of Law Proposed by the United States, Finding 4.17.8 and Conclusion 4.17.2), evidence was introduced of the quantitative requirements of a project for commercial recreation and it was argued before the Special Master that use for such purpose was included in the reservation of rights to the use of water to accomplish the purposes

the Master's acceptance of that for which the United States has contended, on the basis of the evidence introduced with respect to the Indian reservations on the mainstream below Hoover Dam, is not basis for exception by the United States and it is not basis for exception by the Navajo Tribe. Neither is it basis for the charge that the United States has not adequately represented the Navajo Tribe's interest.

### CONCLUSION

Because the Navajo Tribe is without right to intervene in this case, because granting of its motion for leave to intervene would further delay decision by this Court of the issues now before it, and because there is no basis for the Navajo Tribe's charge of "inadequate representation" of its interest by the United States, we urge that the motion for leave to intervene be denied.

Respectfully submitted.

ARCHIBALD COX,
*Solicitor General.*

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*Attorneys.*

NOVEMBER 1961.

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of the reservation (United States Brief before the Special Master in Support of Findings of Fact and Conclusions of Law, pp. 45–46).

## APPENDIX A

THE NAVAJO TRIBE,
Window Rock, Arizona, 5 March 1957.

Mr. J. REUEL ARMSTRONG
Solicitor, United States Department of the Interior
Washington 25, D.C.

DEAR MR. ARMSTRONG: By your letter of December 21, 1956, you invited me and my representatives to contact Mr. Geraint Humpherys, Field Solicitor of the Department of the Interior, in order to review the evidence of Indian water rights on the Navajo Reservation prepared for presentation in the trial of *Arizona* v. *California* before a Special Master of the Supreme Court.

Accordingly, accompanied by Laurence Davis, Assistant General Counsel of the Navajo Tribe, I visited Phoenix on January 17, 1957, and in the company of Mr. Humpherys and his staff, reviewed the material that had been prepared. Both Mr. Davis and I were very favorably impressed, but we did not wish to express any opinion in writing concerning the evidence until it had been reviewed by Dean H. T. Person, Consulting Engineer for the Navajo Tribe. Mr. Person visited Mr. Humpherys' office on February 1 and 2 of this year and reviewed the material. A copy of his letter to me dated February 25, 1957, is enclosed. As you can see, Dean Person completely approves of the evidence that has been prepared to date.

Therefore, permit me to state that I am entirely satisfied with the preparation of evidence done by

the Department of the Interior under the direction of Mr. Humpherys for the case of *Arizona* v. *California* to show Indian water rights on the Navajo Reservation. I only hope that the Department of Justice will coordinate completely with the Department of the Interior and make proper use of this material before the Special Master.

Thank you very much for giving us the opportunity to review the preparation by the Department of the Interior of evidence concerning our rights involved in the Arizona-California litigation before trial.

Sincerely yours,

/s/ Paul Jones
PAUL JONES, Chairman
Navajo Tribal Council.

cc: Mr. Norman M. Littell
Mr. Dean Person
Mr. G. B. Keesee
Mr. G. Warren Spaulding
Mr. Geraint Humpherys

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PERSON & MCGAW—ENGINEERS,
Engineering Building,
Laramie, Wyoming, February 25, 1957

Mr. PAUL JONES
Chairman, Navajo Tribal Council
Window Rock, Arizona.

DEAR MR. JONES:

In accordance with your wire of January 20, 1957, I visited the office of the Bureau of Indian Affairs at Phoenix on February 1 and 2 to review the data and exhibits which are being prepared for presentation in

the Arizona-California Colorado River suit before the United States Supreme Court.

Our findings resulting from this visit and review of data and exhibits are summarized below:

1. The irrigated and potentially irrigable acreages on the Navajo Reservation in the Lower Colorado River Basin as determined by the Bureau of Indian Affairs, agrees with our findings as submitted in our report to you in August, 1956.

2. The water requirements for presently irrigated and potentially irrigable Navajo lands as determined by the Bureau of Indian Affairs conforms substantially with our estimates of water requirements.

3. During our visit to Phoenix we examined the exhibits that had been prepared and discussed what the Bureau of Indian Affairs contemplated for exhibits which had not yet been prepared. We believe the exhibits will clearly show the situation in connection with the Navajo water rights in the lower Colorado River Basin.

4. It is our opinion that the Bureau of Indian Affairs is doing a conscientious and good job to present a clear and accurate picture of the Navajo water rights and water requirements in the lower Colorado River Basin.

Respectfully submitted.

[s] H. T. Person
H. T. PERSON

HTP:lm
cc Lawrence Davis

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## APPENDIX B

LAW OFFICES
NORMAN M. LITTELL
1824–26 JEFFERSON PL., N.W.
WASHINGTON 6, D.C.
FEDERAL 8–1895

FEBRUARY 2, 1961.

Re: *Arizona* vs. *California,* U.S. Supreme Court No. 9 Original, October Term, 1960

The Honorable ROBERT F. KENNEDY
Attorney General
Department of Justice, Washington, D.C.

DEAR MR. ATTORNEY GENERAL:

The Supreme Court has received the report of the Special Master in the above entitled cause between the states of Arizona and California over the waters of the Colorado River, and has set February 27, 1961 as the date for filing exceptions to the Special Master's report. The Special Master has made a number of proposed findings which are gravely prejudicial to the position of the Navajo Indian Tribe. This is to request that exceptions be taken to the report of the Special Master and that any other action be taken that may be necessary to protect and preserve the position of the Navajo Indian Tribe which is represented in this cause by the Department of Justice.

I have particular reference to the following proposed findings set forth in the Special Master's report:

1. *Main Stream of the Colorado River:* While the Special Master allocates water from the

main stream of the Colorado to five Indian tribes (see Master's report p. 267 et seq.) no allocation whatsoever is made for the Navajo Indian Tribe. If the Special Master's report is adopted this will mean that the Navajo Indian Tribe will not have any rights to water from the main stream of the Colorado River notwithstanding the fact that a substantial portion of the western boundary of the Navajo Reservation is formed by the Colorado River. This grave loss to the tribe will preclude future development of the reservation and otherwise prevent the beneficial development of the reservation intended by the Congress. If the evidence in the record does not merit an exception then I respectfully suggest that this phase of the case be completely re-examined and a request made to reopen the case for the purpose of submitting the necessary evidence. For example, one point that should be examined is whether or not consideration was given to the fact that there are now multipurpose reclamation projects on the Colorado River, and will be others in the near future, which have altered, or will alter, the elevation of the river such that it will be feasible to pump water from the river, an operation which may not have been considered feasible at previous river elevations.

2. *Winters Doctrine:* In his discussion of *Winters* vs. *United States,* 207 U.S. 564 (1908) and subsequent cases discussed in the Special Master's report in Section IV commencing on page 254, the Special Master takes the position that the reservation of water for the future needs of Indian reservations is based upon expanding agricultural and related water needs. With respect to those Indian tribes allocated water by the Special Master, water was reserved on the basis of practicably irrigable lands on those reservations and related stock and domestic uses. I respectfully request that

you take exception to this interpretation on the grounds that the so-called Winters doctrine is not so limited. It is true that water was reserved for Indian tribes for agricultural, stock, and domestic uses, but it was also reserved for any other use that Indian tribes might make of the reservations set aside for them by the United States Government. For example, on the Navajo Reservation there has been industrial development and we contemplate greatly expanded industrial development in the near future. This development will require water in substantial quantities and no recognition for such use is given in the Special Master's report. While the tribes allocated water by the Master may not have contemplated industrial development on their reservations, this construction of the Winters doctrine could be fatal to many tribes who depend on industrial development.

3. *Definition of Navajo and Hopi Reservations:* The description and discussion of the Navajo Reservation and the Hopi Reservation, appearing in the Special Master's report on pages 80 and 82 respectively, overlooks completely the fact that there is presently under litigation a dispute between the Navajo and Hopi tribes as to the ownership of the area which the Special Master refers to as the Hopi Reservation. As a consequence of this error the Special Master further errs in describing the Navajo Reservation as one of approximately 14,000,000 acres (p. 80) and in stating that some 6,000 Navajos occupied the "Hopi Reservation" (pp. 80–81).

The area referred to as the Hopi Reservation by the Special Master was in fact set aside by Executive Order of December 16, 1882 and pursuant to the Act of July 22, 1958 (P.L. 85–547; 72 Stat. 402) the Navajo and Hopi tribes are presently litigating

the title to this area before a specially constituted three-judge Federal District Court sitting at Prescott, Arizona (Healing et al vs. Jones, No. Civil 579. Prescott, U.S.D.C., Ariz.). The trial of this litigation was only recently completed and counsel for the Navajos and Hopis are in the process of submitting proposed findings of fact. The references in the Special Master's report to the "Hopi Reservation" which are both in error and severely prejudicial to the position of the Navajo Tribe should be corrected.

Respectfully submitted.

/s/ Norman M. Littell,
NORMAN M. LITTELL,
General Counsel, Navajo Tribe.

NML:rw
cc: The Honorable Stewart L. Udall
Simpson Z. Cox, Esquire
The Honorable Paul Jones
Joseph F. McPherson, Esquire

U.S. GOVERNMENT PRINTING OFFICE: 1961