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In the

Supreme Court of the United States

STATE OF ARIZONA,

COMPLAINANT,

V.

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

DEFENDANTS,

UNITED STATES OF AMERICA AND STATE OF NEVADA,

INTERVENERS,

STATE OF NEW MEXICO AND STATE OF UTAH

IMPLEADED DEFENDANTS.

No. 8 Orig.

Washington, D. C.
October 10, 1978

Pages 1 thru 70

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA, Complainant, v. STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, and COUNTY OF SAN DIEGO, Defendants, UNITED STATES OF AMERICA and STATE OF NEVADA, Interveners, STATE OF NEW MEXICO and STATE OF UTAH, Impleaded Defendants.	No. 8 Orig.

Washington, D.C.
Tuesday, October 10, 1978

The above-entitled matter came on for argument at 1:20 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

DOUGLAS B. NOBLE, Deputy Attorney General, Tishman Building, 3580 Wilshire Boulevard, Los Angeles, California 90010; for Defendant State of California et al.

ROBERT P. WILL, General Counsel, P.O. Box 54153, Terminal Annex, Los Angeles, California 90054; for Defendant Metropolitan Water District of Southern California.

RALPH E. HUNSAKER, Chief Counsel, Arizona Water Commission, 222 North Central Avenue, Suite 800, Phoenix, Arizona 85004; for the Plaintiff.

RAYMOND C. SIMPSON, Esq., 2032 Via Visalia, Palo Verdes Estates, California 90274; for Petitioners Fort Mojave Tribe et al.

LAWRENCE A. ASCHENBRENNER, Esq., 1712 N Street, N.W., Washington, D.C. 20036; for Cocopah Indian Tribe.

TERRY NOBLE FISKE, Esq., 1200 American National Bank Building, 818 - 17th Street, Denver Colorado 80202; for Colorado River Indian Tribes.

LOUIS F. CLAIBORNE, Office of the Solicitor General, Department of Justice, Washington, D.C. 20530; for Intervenor United States of America.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 8 Original, Arizona against California.

You may proceed whenever you are ready, Mr. Noble.

ORAL ARGUMENT OF DOUGLAS B. NOBLE, ESQ.,

ON BEHALF OF THE DEFENDANTS ET AL.

MR. NOBLE: Mr. Chief Justice, and may it please the Court:

Before beginning, I would like to clarify the Court's hearing list. I am here today speaking on behalf of all ten of the state parties, the three states of Arizona, California, and Nevada and also the seven California defendants as to two of the three matters before the Court--the Joint Motion for Entry of a proposed Supplemental Decree filed by the ten parties and the United States on May 26, 1978, and also as to the Intervention Motion of the Chemehuevi, the Fort Mojave, and Quechan Indian Tribes, which I will henceforth refer to as the Fort Mojave Motion for the sake of convenience.

As to the third matter before the Court, the Intervention Motion of the Cocopah and the Colorado River Indian Tribes, I will speak only for the four parties designated in the Court's hearing list. Mr. Will will speak for the four parties designated next to his name. And Mr. Hunsaker will follow on behalf of not only the State of Arizona but also the Palo Verde Irrigation District of California.

I would just like to briefly go into the background of this case. I know it has certainly been before this Court before. The suit in this matter was initiated by the State of California, invoking this Court's original jurisdiction, in 1952. They named California and seven California agencies using Colorado River water as defendants.

The purpose of the suit was to seek an adjudication of the relative rights of the States of Arizona and California in the lower mainstream of the Colorado River.

Subsequent to the filing of the complaint in the Court, the United States and the State of Nevada were allowed to intervene on their own motions; and the States of New Mexico and Utah were joined at the request of California.

A trial was held before a special master appointed by this Court. He made his findings and a report available to the Court, with a proposed decree. And following two different sessions of oral argument, the Court issued its opinion in this matter in 1963 and a decree implementing that opinion in 1964.

The present proceedings before this Court all constitute further business under three different articles of that 1964 decree--Article II, Article VI, and Article IX.

The present series of pleadings was initiated by the ten state parties that I speak for on May 2, 1977, when we filed a joint motion for entry of a supplemental decree listing

present perfected rights under the Court's mandate in Article VI of the decree. That was done pursuant to language in Article VI, which authorizes any party to petition to the Court in the event that the parties and the Secretary of the Interior are unable to reach agreement on the present perfected rights list mandated by the Court under Article VI.

Subsequent to the filing of that petition, which was done because agreement could not be reached, the ten state parties and the United States did reach agreement not only on present perfected rights lists but on a proposed supplemental decree, including those lists and including language demanded by the United States to protect the five lower Colorado River Indian tribes on whose behalf the United States originally intervened in the case, among others.

Despite the fact that this language was inserted in the proposed supplemental decree to protect the five tribes, three of the tribes--which I have designated the Fort Mojave Motion--have intervened, attacking that proposed supplemental decree, claiming that it is prejudicial to them and also asserting additional present perfected rights over and above those quantified by this Court for those reservations in its 1964 decree. At the same time the other two tribes along the lower Colorado, which I designated the Cocopah Motion, have intervened, urging the Court to enter the proposed supplemental decree but also seeking intervention for purpose of asserting

additional present perfected rights.

Therefore, there are two basic questions I think initially before this Court. First of all, is the proposed supplemental decree fair to all five Indian tribes, and should it be entered by this Court at this time?

We believe that the answer to both of these questions is a resounding yes, and this is the answer not only of the ten state parties but also of the United States and two of the five tribes, including, I might add, the Colorado River Indian Tribes, which hold by far the majority of all the Indian rights along the lower Colorado River.

Looking at these questions one by one, Is the decree fair? There are three major provisions of the decree which we believe are designed and have the effect of protecting the Indian tribes' interests under the decree and, in fact, conferring benefits upon them.

First of all, there is subordination language under which all major non-federal present perfected rights are subordinated to all Indian present perfected rights presently decreed in the '64 decree, and any additional Indian present perfected rights that may be decreed in the future as a result of recognition of enlarged reservation boundaries.

Q That takes care, however, of only one part of the Indians' claims to greater reservations of water, does it not? One was the effect of new boundaries, and the other was

the effect of a mistake stemming from failure of zealous representation by the United States or from whatever cause in the original allocation of irrigable acreage; is that not right?

MR. NOBLE: That is true, Your Honor. We have excluded these from the subordination agreement because we have taken the position that recalculation of irrigable acreage for the lands that existed in the reservations, that were recognized as reservation lands in 1964, is barred by res judicata because the Indians were adequately represented and because the issues were fully litigated at that time.

We also feel that these claims are basically limitless claims. I think the various submissions we have here have so many different figures and such huge claims that we felt we simply could not subordinate to something like that.

I think perhaps a more important issue, though, is that this proposed supplemental decree represents a compromise. The fact that the Indian tribes represented by the United States may not have gotten everything they conceivably could have wanted out of this decree does not mean that the U.S. did not adequately represent them or that this increase prejudices them.

Q They were allocated some 900,000 acre feet of water per annum, were they not?

MR. NOBLE: That is approximately correct, Your Honor, slightly over 900,000.

Q Acre feet.

MR. NOBLE: Yes.

Of the additional amounts they claim, even under Table C(1), in the second Fort Mojave brief where they claimed over 600,000, there is no way to determine, I do not believe, how much of that is recalculation and now much of it relates to boundary disputes. I think maybe four or five hundred is recalculation.

I think if you will check those, almost all of those asserted additional present perfected rights, pursuant to recalculation, are for reservation with priority dates before 1900. And, therefore, regardless of whether or not this is included in the subordination agreement, these rights will be satisfied ahead of almost all of the non-federal present perfected rights. I believe the figure is almost 93 percent of the non-federal present perfected rights have priority dates after 1900.

And, furthermore, Your Honor, there is really very little chance at all, if any, that the full amount of present perfected rights, even including the largest additional claim asserted by the Fort Mojave Motion, there is very little chance that this total could ever not be satisfied. Figures of the worst drought year on the river, combined with the obligation of the upper basin and the amount of water that will be available, plus the amount available due to the storage

projects, indicate that even in the worst year there will be more than enough water to satisfy all the present perfected rights, all the Indian rights, all the non-Indian rights, and all the additional rights claimed in the Fort Mojave brief. So, it is our contention that in no way does the proposed supplemental decree prejudice the Indians. The fact that the subordination language does not include the additional claims, these additional claims, does not render it prejudicial in any way. And it was a compromise reached after years of negotiation with the United States.

In addition, Your Honor, there is a second point. I said at the beginning there were three provisions in the proposed supplemental decree to protect and benefit the Indian tribes. The second one, in addition to the subordination language, is a provision that allows the Indians unrestricted use of their water. Let me rephrase that. It allows the Indians to put their water to any use. It does not limit them to agriculture even though the measure of the right is agricultural use.

Q And its justification.

MR. NOBLE: Yes, that is true. But we have conceded, at the request of the United States, to allow the Indian tribes to put their water to other use as long as the total amount of water consumed from the river does not exceed what it would have been had it been put to agricultural use. As far as we know,

this is a right that has not yet been recognized by any court. So, we feel it is a major concession.

Finally and--

Q The other possible uses are in mining, for example?

MR. NOBLE: Mining, industrial, perhaps a municipal use. The Indians--

Q The municipal would hardly use any of it.

MR. NOBLE: That is true. The Indians might rent some of the land on the reservation to companies that could put the water to other use.

Thirdly, the third point in the proposed supplemental decree to protect the Indians is the provision that explicitly reaffirms the validity of Articles II(D)(5) and (9) which, it is our contention, are the articles this Court designed to handle the assertion of any additional Indian water rights claims. There is, therefore, no prejudice to the assertion of additional claims by the proposed supplemental decree.

Q May I just go back a minute? The amount of water the Indians can take out of the water and use for non-agricultural uses, does that include water that they could just sell? Or do they have to use it?

MR. NOBLE: The water would have to be used on the reservations, whether it is used by Indians or non-Indians.

Q But it has to be used on that land.

MR. NOBLE: Yes, that is true. There is no provision in that language that allows them to transport it or to sell it.

Q Not out of the water shed area.

MR. NOBLE: That is correct.

Q And you think selling the water on the reservation to somebody else would not be using the water on the reservation? It would be using it very profitably, would it not?

MR. NOBLE: I beg your pardon, Your Honor. I am not sure that I understand you.

Q I was just following my Brother White's question. Is not selling the water on the reservation to somebody else using the water very profitably on the reservation?

MR. NOBLE: Yes, I think that is correct, and I answered that that would be permitted under our language. But the language would not allow water to be used off the reservation.

Q The water itself.

MR. NOBLE: Yes, the water itself. For instance, if the Indians could rent the land and, say, a non-Indian farmer, which has happened in a number of cases, could use that water on his land, that would be tantamount to selling it for use on the reservation, I would think.

Q But they could not sell it to Los Angeles?

MR. NOBLE: If Los Angeles chose to use it on the

reservation, I suppose they could.

Q No, but they could not sell it for transporting by pipeline or flown to Los Angeles.

MR. NOBLE: No. There is no provision in the language that allows the water to be transported off the reservation.

It is therefore our contention that the proposed supplemental decree in no way prejudices the Indian tribes. They may still come in and assert their additional rights.

Q We do have a category of miscellaneous rights that are not subordinate to the Indian claims and percentagewise it is not insignificant.

MR. NOBLE: Well, percentagewise, Your Honor--

Q At least for one or two tribes it is not insignificant.

MR. NOBLE: It is .56 percent.

Q What is the largest percentage figure for each tribe if you look it up individually; do you know?

MR. NOBLE: For each tribe?

Q What is your .56 percent; that is all tribes together?

MR. NOBLE: No; 99.44 percent of the non-federal present perfected rights are major, by the definition in the decree, and will be subordinated; .56 percent, which represents 17,504 acre-feet will not be subordinated. Of this 17,504 acre-feet, most of them are junior to Indian claims anyway.

So, the Indians would take ahead regardless of the subordination agreement.

Of the others, as I answered to a previous question, to Mr. Justice Stewart, there is almost no conceivable situation in which there will not be enough water to satisfy the lowest Indian priority, which is the Cocopah, which, I might add--

Q The question was, Can you make that same statement you made a moment ago about Indians generally about each tribe, the water rights of each tribe vis-a-vis these miscellaneous rights?

MR. NOBLE: I am not really sure I understand the question.

Q You spoke about the Indians generally, but I suppose each tribe has a different set of rights.

MR. NOBLE: That is true.

Q And they have different priorities.

MR. NOBLE: To answer your question, the lowest priority among the Indian tribes is the Cocopah Indian Tribe. They have, I believe, 2,744 acre-feet, with a 1917 priority.

Q How about them vis-a-vis the miscellaneous rights?

MR. NOBLE: Their percentage, vis-a-vis the miscellaneous rights--they have about one-eighth of the total of the miscellaneous rights. But our calculations have shown

that by the time you get to the Cocopahs, even if you were to satisfy all of the non-federal rights ahead of the Cocopahs, you would still have about two million acre-feet left under the worst conditions.

And I might further point out, Your Honor, that the Cocopahs themselves are urging the implementation of this decree.

Q I understand that. I understand that.

MR. NOBLE: They would be in the worst position of all the tribes. I have not calculated--

Q What is the justification for not subordinating some rights to the Indian rights?

MR. NOBLE: The justification was more a practical one, I would say, than anything else. First of all, we are dealing with--I do not know the exact number of miscellaneous claimants. It is 50 or 60, maybe it is more, individual people, many of whom only have one acre-foot of right. The logistical problem of getting them all to consent to the subordination agreement was so insurmountable that in our negotiations with the United States on this we simply agreed that it was not feasible and that it would not prejudice the Indian tribes anyway.

Q Were there any cities involved in that?

MR. NOBLE: Yes, there were, the cities of--

Q It would not be too hard to get their consent,

would it?

MR. NOBLE: I do not know, Your Honor. I think it well might be. A lot of these people out there have been waiting 15 years for these rights, and we do not understand why they have not gotten them. And I have no way of knowing that.

We have also taken the position that a decree should be entered in this case, and it should be entered in order to end the chance for disagreements in the future, to give the holders of non-Indian present perfected rights the same court recognition of their right that the federal present perfected rights holders have.

Furthermore, we feel that the decree should be entered now because of the fact that the parties have waited so long--not just the parties but also the claimants, and the fact that a lot of the small claimants are technically illegal diverters from the river until such time as they have a contract with the Secretary of the Interior for the water, pursuant to the Court's decree. And they are unable to get contracts, they are unable to get loans, to develop their land until they have an assured water right.

Q Mr. Noble, in response to Justice White's earlier question about why some rights were not subordinated to the Indian rights, I take it there was some give and take in negotiating this decree, that there was nothing in the

original decree that would have mandated subordination of any of the rights that are now being subordinated.

MR. NOBLE: Nothing at all, Your Honor. This was a concession that the states made in order to try to wrap up this matter. It was done after long periods of compromise. And, as I have said in answer to Justice Stewart's question before, this is a compromise, and I think you have to judge the adequacy of the representation of the United States on behalf of the Indian tribes on the basis of the fact that compromises were made, as they are in any legal proceeding.

I think furthermore that when we look at this, we have to consider that the proceedings under Article VI, as far as the United States is concerned, are basically ended. So, we have to look at the past representation of the United States. The United States has now joined us in proposing a decree. It is not a question of whether there is now a speculative possibility that the United States will not be able to represent the Indians adequately in the future. The fact is that they have represented them adequately in the past.

I have a good deal more argument on intervention. I do not want to take Mr. Will's time. But I will simply say that as to the intervention question, our position on behalf of all ten state parties as to the Fort Mojave Motion is that we believe it should be denied simply because it does seek not only to assert additional present perfected rights but also to

attack and destroy the proposed supplemental decree, which we feel is fair to the Indian tribes and should be entered now.

As to the Cocopah motion, four of us that I speak for have taken a different position because we feel this motion is made under the proper articles of the decree. It does not prejudice the states. And if there are certain conditions attached to the grant of intervention, pursuant to the consent of the three states, then we feel that the rules under Federal Rule 24, which we feel the Court should use as a guide to judge intervention, we feel that the requirements for permissive intervention will be met.

Q You agree with the United States then on the intervention?

MR. NOBLE: Yes, we do. Let me make one exception to that. We have put in one condition. I am not sure if the United States agrees on this. We believe that if intervention is allowed, then only one voice should be allowed to speak for the Indians in--

Q I guess the United States would consent to the intervention of the tribes with respect to future rights, even the three tribes?

MR. NOBLE: Yes.

Q But you would not?

MR. NOBLE: We would, Your Honor. If the three tribes made the same motion that the Cocopahs and the Colorados

made, we would treat them the same. We have no animus against the three tribes. And if this Court were to consider their motion to be such, we would take the same positions we have taken vis-a-vis the two tribes.

Q And you waive the Eleventh Amendment rights of your four clients, if any, to the extent of the conditions to which you agree; is that it?

MR. NOBLE: I waive the Eleventh Amendment rights of the States of California and Nevada as to intervention under those conditions.

Q So long as those conditions are met.

MR. NOBLE: As long as those conditions are met and subject to the reservation. We do not concede in this case that intervention would be as a matter of right due to inadequate representation. But if intervention is proper, even in the presence of adequate representation, we would consent because we feel the conditions can make the intervention such that it will not cause undue delay and prejudice of the lawsuit. It is timely under these articles, under II(D)(5) and (9).

Q II(D)(5) and (9).

MR. NOBLE: Yes. Thank you.

MR. CHIEF JUSTICE BURGER. Very well.

Mr. Will.

[Continued on page following.]

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ORAL ARGUMENT OF ROBERT P. WILL, ESQ.,

ON BEHALF OF THE METROPOLITAN WATER DISTRICT

OF SOUTHERN CALIFORNIA ET AL.

MR. WILL: Mr. Chief Justice, and may it please the Court:

The Metropolitan Water District is responsible for providing a major portion of the water supply for the urban area of Southern California, which includes some 11 million people. The future water supply for that area is undoubtedly going to rest entirely upon our efforts to secure a water supply from sources outside that area as our local resources are exhausted at this time.

Approximately 60 percent of our present water supply, or 1.2 million acre-feet, is delivered from the Colorado River today. That amount will decrease to somewhat less than 550,000 acre-feet of water when Arizona is expected to begin using its full entitlement following completion of the Central Arizona Project. That is anticipated to occur in approximately 1985.

The assertion of the various tribal briefs that they may be entitled to as much as 600,000 additional acre-feet of water of diversions which, by calculation is roughly 237,000 acre-feet of consumptive use, would represent 20 percent of our present Colorado River supply and, in 1985, perhaps as much as 60 percent of that total water supply from the river.

To give you a perspective of what 237,000 acre-feet

of water would do in an urban area, a population of roughly a million and a quarter people in that area could subsist upon that.

As the allocation of the Metropolitan Water District from the Colorado is junior to the California agricultural uses, the burden of any additional allocations to the tribes would undoubtedly fall upon our agency.

The tribes, with respect to the allocations of water, make essentially two claims: One with respect to existing rights that involve their present reservation boundaries and those with respect to disputed lands.

With respect to those lands that are in dispute, several boundary disputes were before the special master in this case in its early stages. They were fully tried and adjudicated at that time and presented to this Court. This Court decided at that time that they were apparently not right for a decision. Since that time, however, a number of other boundary disputes on other reservation lands have appeared, and we are now faced with a variety of new claims with respect to these boundaries.

As we at Metropolitan have attempted to identify the various boundary disputes, we now appear to be faced with a multiplicity of administrative and judicial actions that assert for the tribes a final determination as to the disputed lands which they take the position are conclusive as far as the tribal

water rights are concerned. As most of these actions were initiated by the United States, either in the form of secretarial orders or actions in District Court for trespass, ejectment, or quiet title, we feel that it has been almost impossible for us to learn without some kind of approach from the Federal Government that puts us on notice as to the various types of actions they are taking to settle the boundary disputes. This is the reason that in our brief we therefore requested this Court to appoint a special master for the purpose of once again settling these boundary disputes with respect to the allocation of waters from the river--not to try land titles but, for the purposes of this decree, to identify those lands which are entitled for water rights.

Q Do you think that the United States disagrees with you on this? They seem to think that they have not made up their mind about some things. But eventually, do they say or do they not say, that they would oppose the appointment of a special master for this purpose?

MR. WILL: It is my understanding that they would oppose the appointment of a special master, but I would have to let the Solicitor's Office respond directly to that.

Q This would be in implementation or effectuation of II(D)(5)?

MR. WILL: Yes, under the provisions there. However--

Q II(D)(5), as I remember it, refers specifically

only to the Fort Mojave Reservation and the Colorado River Reservation--

MR. WILL: That is correct.

Q --disputes involving the boundaries of those two reservations, which were known to the Court in the early 1960s. Perhaps it was because these other boundary disputes were not exposed or known to the Court that II(D)(5) is limited to only those two reservations. Do you think it could be understood to be generic?

MR. WILL: I think it could either be that or this Court could act under Article IX of the decree, which permits it of course to take any other action with respect to--

Q Yes, it is kind of open-ended.

MR. WILL: Yes. We, of course, disagree that any of these determinations are final. And we believe that with respect to those who have water rights along the river, with secretarial orders or administrative actions are concerned, that we are entitled to a hearing in some type of proceeding where all of these matters can be brought to some type of conclusion and the pre-1929 rights that are involved on this river will be finally settled. Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Will.

Mr. Hunsaker.

[Continued on page following.]

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ORAL ARGUMENT OF RALPH E. HUNSAKER, ESQ.,

ON BEHALF OF THE COMPLAINANT ET AL.

MR. HUNSAKER: Mr. Chief Justice, and may it please the Court:

I am speaking today on behalf of the State of Arizona and for the Palo Verde Irrigation District. I would first indicate to the Court that Arizona concurs and adopts the position espoused by Mr. Noble in virtually all of its aspects, and we would urge strenuously today that the Court adopt the stipulated supplemental decree.

In one respect we do take a different position, however, and that is--and this may not even need be reached by the Court in the event that the Court felt that intervention was not proper. Then this issue, I do not believe, would even need be reached by the Court. But we do feel that Arizona cannot accede to the position taken by California and the others spoken of by Mr. Noble that would indicate that they had waived their Eleventh Amendment rights. And so Arizona would indicate to this Court that it would not so waive those rights and would urge that those rights be protected fully.

In this respect, we are not unmindful of this Court's decision in Moe v. Confederated Salish & Kootenai Tribes. However, here we think that the tribes have already been represented zealously by the United States. They have asserted their rights. And we believe that they have done so fully and

zealously. In that respect then we would urge that the matter continue as it has, with the United States representing those interests and presenting those interests.

Your Honor, with respect to the matter of intervention, we again would urge that there not be intervention allowed in this matter by the tribes, and would urge that the Court allow the matter continue, with the Indians being represented by the United States.

In respect to the matter of the disputes over boundaries and those items, Arizona would urge that this litigation was commenced as water litigation and that when we begin to talk about boundary disputes, those are land matters. And we would urge that those issues should properly be taken up before district courts who can rule on those disputes. And then at such time as those become final, the matter can be brought back to this Court under Article II(D)(5) where appropriate or under Article IX where appropriate and any additional water rights which may pertain to those lands that are finally determined to be within Indian boundaries can be determined by this Court, pursuant to those articles of the decree that would allow that determination.

That would conclude the position as to the State of Arizona and the Palo Verde Irrigation District.

Q So, you do not think there are any other issues for a special master to deal with in this case?

MR. HUNSAKER: Your Honor, we would again urge that no, there are not, that these matters can be taken care of; and the judicial procedure is set up in the district courts to take care of those matters. And we urge that that is the proper place for those to be taken care of. Then at the appropriate time the matter could be brought back before this Court under the two articles mentioned.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Simpson.

ORAL ARGUMENT OF RAYMOND C. SIMPSON, ESQ.,

ON BEHALF OF THE FORT MOJAVE INDIAN TRIBE ET AL.

MR. SIMPSON: Mr. Chief Justice, and may it please the Court:

I apparently am the first speaker to address the Court today with a contrary viewpoint. I would like very briefly to indicate that at the outset, when we were told that we had 20 minutes in which to deal with this particular subject which has covered so many years, I could only think of the old statement of Henry Ward Beecher that no soul was ever saved after the first 20 minutes, and concluded that I would do my best to equal what he had done.

In this particular case, on behalf of the Indians that I represent, I would state to this Court that there are two things that we have emphasized in our brief. The first one was that we called for intervention, which I respectfully

suggest to the Court possibly was a semantic error. As you have heard from other counsel, most people here do not seem to disagree with the idea of the Indians having independent counsel. We have had some disagreement. I respectfully suggest to the Court that possibly the Indians became parties when the United States actually in its original petition petitioned to intervene on behalf of the Indians as trustees for the Indians, so that certainly the other parties would not be prejudiced if we had what might be described as a substitution of counsel for the purpose of asserting the claims by the Indians.

But we have had some things which I think are particularly important with respect to the entry of the supplemental decree, which is the primary thing with which we are concerned. Mr. Noble has explained that some background was necessary in order to permit the Court to understand that this truly was a fair proposal. May I respectfully share a little bit of background regarding this with the Court, which I consider to be critical?

I would take the Court back to the year 1970. At that time, if Your Honors please, I was representing five Indian tribes on the lower Colorado River, known as the Confederated Tribes. We were asked to come to Washington because we were told that the decree of this Court back in 1964 had said the government and the states had an obligation

to establish present perfected rights under Article VI and that they had two years to do it. As we know, sometimes attorneys do have a habit of getting extremely busy, and they seek more time. And through the kindness of this Court it stretched from 1966 up till 1970. In 1970 a stipulation had been worked out. The stipulation provided in substance, I submit to this Court, exactly what the supplemental decree today provides. The Indians were told at that time that the United States Government desired their concurrence. The Indians asked the question, "What about certain lands to which title has been established? What about the type of examinations presented to the master in the original concept? We are advised by you, the Bureau of Indian Affairs, that in appropriate soil studies, if land classifications were actually undertaken, this would result in an entitlement of more water than has been mentioned so far. We ask the articles to speak to this. We do not like to buy a pig in a poke.

"We feel very strongly that with the passage of six years--in fact, preparation should have taken place in the fifties so that this Court could have had all the actual facts. We would like to ask only one thing. We do not want a handout. We do not want something as a gift. But we do strongly seek that which we believe we are entitled to under the decree of this Court." Because of that reason, it was difficult to obtain consent to the stipulation.

Many maneuvers took place. Eventually a meeting in 1975 took place with the Solicitor, with the Department of the Interior, with representatives of the states who are here today, and the irrigation districts. And at that meeting speeches were made regarding why the stipulation should be adopted.

When this whole thing was concluded, the primary thing that was asked, by way of a question by me to those present, was: "Gentlemen, all of you have said one thing. You have said that this river has plenty of water. There is no shortage. There will be no problem. Therefore, I propose one. If you do not believe there is any shortage of water as a problem, then it should not make any difference to you where the priorities are established. You should be willing to agree that the Indians should come first. So, there is no shortage. Will you agree?" They would not.

In the proposed stipulation they ultimately found that this would not be sold to the Indians. So, they went together and came up with the proposed supplemental decree. We oppose the supplemental decree for reasons already advanced. But we go a bit further. We oppose it, I would say to this Court, first because it includes false facts. Let me be specific.

I refer, for example, to the response of the United States. In their response they pointed out that in working

out the supplemental decree--

Q Do you want to give us the citation? What date is the response? Which response; the June 9th one or not?

MR. SIMPSON: November, 1977, the response of the United States to the joint motion for determining the present perfected rights--

Q What page?

MR. SIMPSON: This is on page 6. The exact language referred to there states that if the amendments proposed above are not made--thus the agreement satisfactory to the United States is reached, the United States is entitled to require a showing of the proofs that support the claims to which it gave tentative approval as part of an overall settlement.

Mr. Noble has emphasized that this is a settlement. There is compromise. The feeling of the tribes is that the United States, in its capacity as a trustee, should have over this very long period of time, have undertaken to determine what type of land is there, what type of soil classification. What water or quantity of water are the Indians entitled to?

They do not ask you to give them something to which they are not entitled. But, secondly, they ask more. When you set up the priority dates--

Q Mr. Simpson.

MR. SIMPSON: Yes.

Q I want to be sure I follow your argument. I

understood you to say, when you were responding to Mr. Justice White, that you were going to call our attention to language in this document that was a false fact. Have you done that?

MR. SIMPSON: No, I believe I perhaps misstated myself if I stated that, Your Honor. What I meant to state was that we oppose the supplemental decree because it is predicated upon false facts which have never been established as a true statement. And what I was referring to in the reference is that the proof of the priority dates set out in the supplemental decree is something which has never been supplied by the states and which even the Federal Government in its response says, "We have worked out a compromise. We would have requested proof, which they had not done but as trustee we say they should have done." And so we say that when you take Palo Verde Irrigation District--

Q But they said they would have required proof if they had not reached agreement.

MR. SIMPSON: That is correct, Your Honor.

Q And they did reach agreement. So, the requirement of proof was--there was no need for a hearing then.

MR. SIMPSON: Your Honor, if I may respectfully express why I think there is, if you are a trustee and you are representing the Indians, and the Indians do not want priority dates which come before their entitlement, and other people engaged in litigation will stipulate to dates which bring them

before that, if they will stipulate to a date that the Indians do not believe is adequate, it is our contention that you as trustee would be obligated as a matter of law not to stipulate away a priority date of this particular type. This is where we feel that the United States as trustee has been deficient. But, more importantly, we feel it is why the supplemental decree cannot be entered because the amount of water that is given to the irrigation districts, if they can prove they are entitled to it--which we do not believe they are--then the date would be perfectly all right.

We do not feel that something as vital as water in the Southwest can be stipulated away by a date that gives the people claiming it a date earlier than the Indian date.

Q That is only true with respect to the miscellaneous rights, is it not?

MR. SIMPSON: That is not my understanding, Your Honor. What I am suggesting is take Palo Verde--

Q I thought all presently perfected rights, except a small category, were subordinate to the Indian claims.

MR. SIMPSON: I might comment on that, Your Honor, specifically. The language purports to say that in the event of a shortage, all of these rights to which you have alluded would be subordinated to the Indian claims.

Q Except that small category.

MR. SIMPSON: Yes, Your Honor. I am suggesting that

this is specious and that the language is dangerous because, one, I do not believe that the Indians should be subordinate to begin with, which they are under this, because the proof of the correctness of the other entities and their priority dates have never been submitted.

Secondly, I am suggesting that it is predicated upon the requirements that the Indians would have to prove that there was a shortage when in fact there is a shortage now. And, thirdly, I am suggesting that if they are going to be so kind to the Indians as to say, "You will never suffer," then why not simply say by stipulation, rather than that they will have to prove this, say, "You will come first"?--because if there is plenty of water, there is no problem. If there is a shortage, then they have a priority.

The impact of the subordination agreement, in my judgment, places an unfair burden upon the Indians. And, most of all, it requires that this Court put its stamp of approval on an agreement purporting to set forth facts as to entitlement which do not conform to the decree of this Court.

Q From the original decree, Mr. Simpson, the question of subordination was left open, was it not, as between the states and the Indians?

MR. SIMPSON: You are completely correct, Justice Rehnquist.

Q So that the government in effect gained a victory

for the Indians by persuading the states to agree to subordinate what I understand to be the very major portion of the water claims to the Indian rights.

MR. SIMPSON: This would appear to be from the language. I suggest it is not a major victory. And my reason why is that if I represent a client and I believe that my client has a priority date that, using a figure, would be, say, 1900; and if you come along and you tell me no, your client is going to have a date that is going to be 1890, when I believe your client's priority date is really, say, 1910, you say, "Well, do not worry. You agree that mine will be 1890. And then if you ever get in trouble, come in and prove that there is a shortage, and I will subordinate mine to you." I believe that the premise is false.

Q So, you are suggesting that the priority dates for present perfected rights--priority dates that have been assigned or have been agreed upon--are inaccurate?

MR. SIMPSON: I definitely am suggesting that.

Q And have all the presently perfected rights been assigned priority dates?

MR. SIMPSON: Most of them, Your Honor, except those involved in omitted lands or some of the abandoned lands.

Q Yes, but the ones that have been identified have been assigned priority dates?

MR. SIMPSON: That is correct.

Q And you say that some of those--many more of them than just these miscellaneous rights--have priority dates prior to the Indians?

MR. SIMPSON: That is correct, Your Honor. The Indian dates under the decree of this Court commence with the date establishing the reservation. That is their priority date.

Q Why would anybody agree to subordinate rights like that to Indian rights then? Why did the states ever turn around and say, "We have got earlier priority dates than these Indian rights, but we are just going to subordinate them"?

MR. SIMPSON: The answer, Your Honor, is twofold.

Q They did not want to litigate.

MR. SIMPSON: First of all, they did not want to litigate. That is right. Secondly, they did not want to have a hearing where the fallacious nature of the priority dates they had assigned to themselves had been set out. And, thirdly, I feel that the fact that the Indians, because of various reasons that I cannot go into in great detail, have not had these lands added created a fear.

For example, to be specific, I think of a case regarding the Fort Mojaves because I believe it was Mr. Noble who referred to the fact that some of these orders by the Secretary and some of the boundary disputes that have been

settled do not become final. In the case of Mojave v. LaFollette, which is one where I was counsel, which went to judgment, the United States District Court for Phoenix found that approximately 1,300 acres of land in that instance had belonged to the Fort Mojave Tribe and that there were accretions to it and it still belonged to the Fort Mojave Tribe. They have not been included.

There is the Fort Mojave hay and wood reserve, Your Honor. All of this is land again where I was counsel. Thirty-five hundred acres were determined. And I understand as late as 12:00 o'clock today the Secretary of the Interior dismissed the protest making that final. There is no water for any of this land decreed. It is easy to say you can come back in later under Article IX. But this particular land I am talking about under present perfected rights would in fact be land that would go to the date that the tribe actually had the reservation established. And this date would be later than the date that has been agreed upon by the irrigation district without, as the government says, proving that they were entitled to those dates. This is the reason we feel so strongly about it and why we feel that the relief that is requested of this Court is simply to establish a hearing. You gave the government two years to do this in 1964. They have not done it yet. They worked out an agreement after all these years. The Indians only want what the facts would show. They

believe that this could be done within a reasonable time frame, and that is why they opposed the entry of the decree.

Q Suppose the government had not stipulated, had not made this compromise or this agreement and said that we just cannot agree. Then I suppose that this original action would be reopened, and there would be further proceedings in this original action with the appointment of a special master to hold the hearings and to recommend decision; is that right?

MR. SIMPSON: Precisely, Your Honor. I know that I do not like to upset the Court by suggesting more work, knowing how busy you are. But I do feel that this is something you decreed in 1964 that has not been done yet. The Indians only ask that it be done. The fact that it has not been done is not their fault. They believe, as an illustration that I would give as I move toward my conclusion--these Indians feel strongly about the river. The Mojaves, for example, in their original name, translated into English, means "People of the River." They have been there since time immemorial. They have court findings to that effect. Their position strongly is that they want the water that permits them to develop their lands, their reservation, to the highest and best economic use possible. They want the help of this Court, which they have not been able to obtain without some type of independent representation.

Q You have not mentioned paragraphs two and three of the proposed decree, which are asserted by the government

to fully protect your interests. We have talked at length about the subordinating language of the proposed decree, but not paragraphs two and three thereof which refer to Article II-(D)(5) and Article IX.

MR. SIMPSON: Your Honor, our feeling is that unfortunately in this particular instance we do have, when you mention the other paragraphs, certain ambiguities. The Indians have not been consulted. And in fact because this was moving ahead and they had not been consulted regarding this, they did a thing which is quite common--they objected to the whole thing. There may be areas of compromise--

Q No, no, it is not that you object to the whole decree. The point is that paragraphs two and three of the decree fully protect your interests and therefore undercut your objection to the whole decree.

MR. SIMPSON: But, Your Honor, that is what I do not believe, because I do not believe--

Q You have not told us about that. Why do you not believe it?

MR. SIMPSON: I do not believe it because I do not believe that the subordination that has been talked about later on--

Q This is not subordination. This is something else; i.e., carving out Article II(D)(5) issues and Article IX issues from the effect of this proposed decree, which is

involved solely with Article VI issues.

MR. SIMPSON: That we would concur with, Your Honor, that portion of it. We do not agree with the subordination aspect. We feel it is a false promise.

Did you have something further you wanted?

Q I am not quite sure I understand your answer. If the proposed decree contains, as is proposed, paragraphs two and three, is not your position fully protected even though the decree be entered?

MR. SIMPSON: I do not believe so, Your Honor, and I do not believe so because I believe it places a burden upon the Indians then to come back and to demonstrate their new entitlement to lands which were omitted to begin with.

Q Will you not always have that burden?

MR. SIMPSON: We have the burden, but we were supposed to have--if there was a trustee performing--the assistance of the trustee. And I find that the Indians have requested help freuqnelty. They do not get it. That is the reason they felt that this Court would say, "We believe that what we have decreed has not been done; therefore, it should be done, and we are going to insist upon it, that it would be accomplished."

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Simpson.

Q Mr. Simpson, through whose offices were the subordination of the state claims accomplished?

MR. SIMPSON: The subordination of the state claims--

Q The Federal Government, was it not?

MR. SIMPSON: I believe this, Justice Rehnquist. I think that the negotiation was to subordinate though a claim that really was subordinate--excuse me. It was an agreement that made it paramount first--in other words, it was a reverse subordination. The states really should not be first, and they were.

Q The states claimed a certain priority and gave it up in the settlement, in the proposed decree that both the government and the states want to enter.

MR. SIMPSON: This is true.

MR. CHIEF JUSTICE BURGER: Mr. Aschbrenner.

ORAL ARGUMENT OF LAWRENCE D. ASCHBRENNER, ESQ.,

ON BEHALF OF THE COCOPAH INDIAN TRIBE

MR. ASCHENBRENNER: Mr. Chief Justice, may it please the Court:

I am speaking today on behalf of the Cocopah Indian Tribe. The Cocopah Tribe is the southernmost of the five Colorado River tribes, located about 12 miles southwest of Yuma on the eastern side of the Colorado River. It is also the smallest in size of its reservation, about 1,800 acres, and its membership, less than 600. And it also has the latest--

Q Less than six, did you say?

MR. ASCHENBRENNER: Less than 600, almost 600. And

it has the latest and therefore the most vulnerable priority date, namely--

Q 1917?

MR. ASCHENBRENNER: 1917. In the original decree in this case, Cocopah was awarded water for 431 practicably irrigable acres. Since that time, an additional 780 acres, or almost twice that much, of practicably irrigable acres have been determined to be within the boundaries of the reservation, accreted lands as a result of Cocopah v. Morton in 1975.

In 1974 the Cocopahs for the first time learned that the government had failed to assert claims for all the practicably irrigable acres in the original tribe. So, since 1974 and 1975 the Cocopahs, along with the other four tribes, have repeatedly requested the United States to come back to this Court and make claims for both these so-called omitted lands and the boundary-determination dispute lands. But as of today--

Q These would be in addition to so-called presently perfected rights?

MR. ASCHENBRENNER: Yes, Your Honor. While the omitted lands would--

Q Should have been presently perfected rights?

MR. ASCHENBRENNER: That is right. Yes, Your Honor.

Q Why does not res judicata bar the claims to the omitted lands?

MR. ASCHENBRENNER: We submit that res judicata does not bar the tribes and the government on their behalf from now making a claim for the so-called omitted lands because we claim that during the trial of this case, number one, the government had a conflict of interest, indisputably a conflict of interest. They, by their complaint, expressly made claim for the Indian tribes and they expressly made claim for the federal reclamation projects, both competing for the same waters of the river. The states and the government pass off this conflict of interest as theoretical, and it is theoretical when the river is full and there is water enough for everybody. But in times of shortage, it will become actual.

So, number one, we say the government did have a conflict of interest. We do not say--that is, the two tribes--that we can prove at this moment that that conflict of interest caused the government's representation to be inadequate. It might have.

Q Do you think the government, at least the United States, does not now say that you would never be entitled to any more water for the omitted lands?

MR. ASCHENBRENNER: No, in fact we advised ten days ago, Your Honor--

Q I take it from their submissions here, from the things they have said, that they just have not made up their mind yet.

MR. ASCHENBRENNER: They have now, Mr. Justice White, made up their mind. Ten days ago they told us they would assert claims in this Court for both the omitted lands, and they have already promised to do it for the boundary-dispute lands.

Q And that would mean the appointment of a special master to adjudicate to--

MR. ASCHENBRENNER: Yes, Your Honor.

Q Do the other parties, do the states oppose any future adjudication of additional rights for omitted lands?

MR. ASCHENBRENNER: Yes, Your Honor, on the grounds of res judicata. The reason we say we are not bound by res judicata then is, number one, the government had a conflict. Number two, regardless of its conflict, the government admits that it did not make claims for all of the lands that it should have in the original case. In fact, the government affirmatively--

Q Let us assume no conflict. Set that aside. And that is exactly what the doctrine of res judicata is supposed to take care of. It does not allow you to say, "Gee, I wish I had brought that up in the original case." The case has now been decided, and you are barred from bringing it up now. That is what res judicata means.

MR. ASCHENBRENNER: Yes, Your Honor. The exception, however, to res judicata is if you were inadequately represented in the original case.

Q I said let us put that aside. Then I wonder about your second argument.

MR. ASCHENBRENNER: You mean put the conflict aside.

Q Put the conflict aside.

MR. ASCHENBRENNER: If you put the conflict aside, then the exception to res judicata is the overriding requirement of due process. That is notice, number one, and a full and fair opportunity to be heard. The tribes in this case did not select their own counsel, did not have their own counsel--

Q Now you are getting back to the conflict.

MR. ASCHENBRENNER: No, I am getting back to notice, Your Honor. The tribes did not have notice that the government was abandoning their right to certain irrigable acres. In fact, if they had been in the courtroom, they would have been affirmatively misled into believing that the government was claiming water for all irrigable, just like the master was misled and this Court was misled into believing that. Therefore, they did not have notice. They did not have an attorney in court of their own. They did not have enough money to hire an attorney.

Q You are using "misled" just by hindsight, are you not? "Should have been in the courtroom then"--are you accusing the government of bad faith at the time or just a mistake?

MR. ASCHENBRENNER: We do not know, Your Honor. We

do not know why.

Q You are just saying there was a failure to claim water for certain lands which now appear were omitted.

MR. ASCHENBRENNER: Yes. Under the same standards that applied in Arizona they were omitted, however.

Q Are you familiar with the case of United States against Candelaria in 271 US?

MR. ASCHENBRENNER: I have heard of it, but I cannot recall it, Your Honor.

Q It seems to me to hold exactly the opposite of what you say. It holds that the United States is not barred in a subsequent litigation where the tribe has originally litigated against a third party because it is the United States that has the primary right to sue. And it seems to me, if that is the law, you have got the thing topsy-turvy. You are saying in effect that this cannot be res judicata because only the United States would win the case and not the tribe.

MR. ASCHENBRENNER: If, Your Honor, the tribes were not adequately represented in the original case--and we claim that they were not adequately represented.

Q But that is your conflict of interest claim.

MR. ASCHENBRENNER: In part, yes. We say, number one, there was indisputably a conflict.

Q What more is there? Is it failure to dig up more evidence?

MR. ASCENBRENNER: Yes. And beyond that, Your Honor, today--for the last four years in the case of the Cocopahs--for the last eight and nine years since boundary disputes have been finally determined and after the tribes have pleaded with the government to come in here and assert water on their behalf, the government has failed to do so.

Q That is still your conflict or breach of fiduciary duty.

MR. ASCHENBRENNER: It is inadequate representation also, Your Honor. They only belatedly here, as a result of our motions to intervene, have agreed on the record to file claims for the boundary-dispute lands and the omitted lands. And as to the omitted lands, they only agreed to go for less than half of the water we feel we are entitled to in the original case.

Mr. Claiborne is going to advise you that they have agreed to go for water for the omitted lands, but less than half that we claim.

Q But he also, I take it from his papers, will say he is not going to object to your intervention--

MR. ASCHENBRENNER: Yes, Your Honor.

Q --in connection with the determination of the additional water rights.

MR. ASCHENBRENNER: So, you are going to have your say, are you not?

MR. ASCHENBRENNER: If you allow intervention.

Q I mean, as far as the United States is concerned, they will submit their claims and yours too.

MR. ASCHENBRENNER: Not unless we are allowed to intervene, Your Honor.

Q The United States is not trying to keep you out.

MR. ASCHENBRENNER: No, that is true, Your Honor.

Q But other parties are.

MR. ASCHENBRENNER: Yes, Your Honor.

I would like to respond just briefly to Mr. Simpson's objection to the entry of the supplemental decree. He finds the subordination agreement specious and ambiguous. Frankly, if you look at it, we do not think it is ambiguous. It expressly provides that in times of insufficient water to satisfy all present and perfected rights, the Indians go first. You could not say it any clearer. And if it was ambiguous, it was clarified when both the states--which have the most to lose--and the United States responded to his objection and said, "Yes, that is exactly what it means. The Indians go first."

Q You are the most junior of the tribes.

MR. ASCHENBRENNER: So, we have the most to lose.

Q And the miscellaneous rights which are not subordinated to the Indian claims do not worry you?

MR. ASCHENBRENNER: No. We cannot conceive--we agree with the states--we cannot conceive that the river would ever

get down to 17,000 acre-feet.

In response to Arizona's contention that we should be barred from intervention by the doctrine of sovereign immunity, we just briefly state that we submit that when Arizona brought this suit to adjudicate its rights to the waters of the Colorado River, it must necessarily be deemed to have consented to the adjudication of the Indian rights. It knew that the United States was an indispensable party. In fact, it asked the United States to intervene in this case, expressly asked it. And it knew the United States would have to intervene on behalf of the tribes.

Q And it litigated the Indian rights.

MR. ASCHENBRENNER: And it did. It is a little late in the day for Arizona to claim sovereign immunity on this issue. Thank you, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Fiske.

ORAL ARGUMENT OF TERRY NOBLE FISKE, ESQ.,

ON BEHALF OF THE COLORADO RIVER INDIAN TRIBES

MR. FISKE: Mr. Chief Justice, may it please the Court:

I am representing the single entity, although plurally stated, of Colorado River Indian Tribes in Parker, Arizona. We have been discussing legal issues, and I realize that they are paramount, but I think some brief mention of the factual aspects of this particular reservation might be

helpful. It was created essentially in 1865 by act of Congress and soon thereafter, during the administration of U. S. Grant and the irrigation system by the United States was proposed and presumably set into operation, it is still incomplete, still relying upon the United States Government to assist them. Meanwhile they watch the water go downstream being utilized by others.

Within the concept of the Winters doctrine, as recognized and utilized by the special master and by this Court, that reservation or the Indians on that reservation are entitled to water measured by all--all--irrigable land within that reservation. They have not achieved that. It has not been presented on their behalf.

The two areas of concern--the first are the boundary disputes. The major boundary dispute area was settled in 1969. More than ten years later still no effort has been made by the United States on behalf of the tribes to obtain the adjudication which was tendered to them essentially by this Court in the decree.

Q Do you dispute the fairness of the representation in the United States in this proceeding?

MR. FISKE: In the entire Arizona v. California? We find it inadequate, Mr. Justice White.

Q Do you take the position that the United States may never settle a dispute between an Indian tribe and someone

else without the tribe's consent?

MR. FISKE: No, I would not take that position, that they never could, no.

With regard to the larger area, the omitted lands, again the Winters and the special master in this Court in this case, Arizona v. California, have indicated that the water rights of the Indians are to measured by all irrigable land within the reservation.

With regard to the omitted lands, the Colorado River Indian Tribes are not seeking a redetermination of what was considered by the master. They are seeking an initial original consideration of lands, the water claims for which were not presented to the master. Evidence was not presented upon them. There was no ruling, no consideration of them. The fact that there was a determination that some lands were irrigable does not constitute a determination that other lands were not irrigable. We would not be here today on this issue if there had been a determination certain lands are not irrigable.

The evidence that was presented to the special master--the lands that were presented to him by the United States--virtually all were accepted, indicating the conservative nature of the presentation.

The basic determination of irrigability can be seen on a map, a rather arbitrary line down the reservation. All of the lands that are irrigable are found on one side of the

line, none on the other. Examination of that land, of the soil conditions there, would determine that that line seems to bear little, if any, resemblance to the actual irrigability of those lands. There are lands not--

Q If there were proceedings before a special master for the determination of additional water rights, would any part of the proceeding revolve around not only whether a land was irrigable but the probability or economic feasibility of being used for agriculture?

MR. FISKE: Yes, sir. Those elements are included, according to the determinations prescribed by the government in determining irrigability, presented to and utilized by the master--

Q As I understand it, the United States also obtained a concession that water adjudicated did not need to be used for agriculture.

MR. FISKE: We do not consider that a concession, Mr. Justice White. We think that that is what the law is, and we think that that was recognized expressly by the master and presumably by the Court.

Our particular tribe's feeling about the stipulation essentially is their rights are senior. So, we are not concerned--

Q Is there some case or something that says that is the law?

MR. FISKE: I do not have the citation.

Q Or is that just something you people from Colorado know about? [Laughter]

MR. FISKE: I can certainly cite you later today the reference in the transcript by the master but I could not the case specifically.

There is some land that is not included within that determined to be irrigable which in fact today is being irrigated and growing crops. There is a great deal of land which chemically, from all standpoints of determination of irrigability is indistinguishable from adjacent land which is being irrigated.

The point that I wish to emphasize here is that we are not seeking to reopen a determination before as to irrigable or non-irrigable land but to have presented for the first time lands which simply were not included at all in that consideration.

With regard to the conflict of interest which we think is a basis for intervention on behalf of the Colorado River Indian Tribes, I would simply invite the Court's attention to the pleadings of the United States in 1952 when it sought to intervene, its motion, its brief, and the petition itself. Page after page, item after item of recitations of what the United States conceded then to be a complex and puzzling fabric of conflicting claims that it was responsible

for and that it had to administer and see to, conflicts even within its own agencies, including the Department of the Interior, the Bureau of Land Management, the Bureau of Reclamation, the National Park Service, all of which were asking for the same water, which in those same pleadings the United States conceded was inadequate.

Q Mr. Fiske, if Congress is told the United States is a litigant, that it must handle each of these types of claims, that is the end of it.

MR. FISKE: Except for intervention, Mr. Justice Rehnquist. We think that would be an alternative. The others that I was referring to are in fact agencies of the United States. They are seeking proprietary water rights in addition to seeking water rights for the beneficiary of its trust. And we would merely ask to be able to work with the United States and have access to the master for that purpose.

One, perhaps the best, example is the water that was sought for and obtained for the Bureau of Land Management for irrigation and reclamation of the public lands, according to the application of the United States, the same kind of land in the same area to be utilized in the same way, and the United States was having to seek water rights for that.

Q What is the authority for the Court granting intervention to an Indian tribe over the objection of the United States?--which, I take it, you indicate is doing the kind of

statutory duty that it is supposed to do in this case. Are there some statutory provisions for the tribes litigating independently?

MR. FISKE: There is, so far as I know, not a specific statute--well, 1362, which deals with--Title XXVIII, Section 1362, which authorizes the bringing of actions by tribes themselves against any party.

Q In the district court.

MR. FISKE: Yes, sir.

Q Do you suppose if Congress enacted a law that the United States, the Solicitor General, or the Interior Department should be the exclusive representative of the Indian tribes that would be binding on a court when asked by an Indian tribe to appoint different counsel for it?

MR. FISKE: I think it probably would not be binding. Notwithstanding the plenary power of the Congress over Indian affairs, I think that requirement or prohibition of independent access to the courts on a general basis would have a difficult time standing a constitutional test.

Q What constitutional test, a First Amendment test?

MR. FISKE: I think it would be a Due Process test, to forbid them access to the courts. I think that would be contrary to the constitutional and congressional principles which have encouraged, particularly in more recent times--

Q I am assuming an act of Congress has so provided so there would be no room for argument as to whether or not that was contrary to other acts of Congress.

MR. FISKE: That is correct.

Also with regard to the conflict of interest in the 1952 pleadings, the attorney representing the United States appearing before the master made the statement in the transcript, "We are going to present the Indian claims first. And when we get through with that, we will have to change not only our hats, but we might have to change our entire costumes." There was a ready recognition of the difficulty and the conflict. And the United States admitted also in those pleadings and by that transcript that they really did not know--the representatives of the government really did not know what their duties and responsibilities were with these conflicting interests.

Finally, with regard to that, I would mention that there were innumerable contracts for the delivery of water by the United States to the very defendants in this action, the Metropolitan Water District, the other irrigation districts. So that at the time that the Indians were being adjudicated by the United States, they had the conflicting interests of the other defendants in this action. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Fiske.

Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. CLAIBORNE: Mr. Chief Justice, may it please the Court:

If I may first address the position of the United States with respect to the entry of the joint motion, as it has been called--as the Court knows, we urge unequivocally the entry of that supplemental decree which is attached to the joint motion which we have joined, originally a joint motion as between the state parties now joined also by the United States. We urge the entry of that supplemental decree first because we think it is procedurally correct, that it is something that should have been done long ago. It is the remaining matter under Article VI of the original decree.

But, more important, we urge the entry of that supplemental decree because, in our view, it is in the interest of the tribes for whom we appear in this litigation that it be done, and that it be done without awaiting any other matters that might be ripe for adjudication in this Court. We say that, as the Court know, because the subordination agreement, in our view, fully protects the interest of the tribes in both the water already adjudicated to them and any additional water which they may gain by reason of adjusted boundaries though not by reason of any claim--

Q Does your position necessitate saying that the

United States may settle a lawsuit affecting Indian tribes without the consent of the tribe?

MR. CLAIBORNE: It does, Mr. Justice White, and we invoke the Heckman case as plain authority for that proposition. We go on to say, as Mr. Justice Stewart has pointed out, that the entry of the decree not only gives advantage to the tribes but certainly does not prejudice them or jeopardize their claims in any way. On the contrary, it leaves open expressly any claims made under Article II or Article IX. And, what is more, it hastens, in our view, the adjudication of additional water rights for the tribes. It allows litigation henceforth to be about the Indians' water, not a bickering or a squabbling about the states' water.

Q And it would not decide in advance whether the water rights for omitted lands are precluded one way or another?

MR. CLAIBORNE: On the contrary, Mr. Justice White, we understand the provision of the proposed supplemental decree which says this has no effect on Article IX to mean this does not resolve that question, whether any claim for omitted lands is or not--

Q So, the decree would not put its hand on one side or the other the argument that will take place as to whether res judicata bars some of these claims.

MR. CLAIBORNE: Exactly so, Mr. Justice White.

We find ourselves in the difficulty that in saying

this, in urging the entry of the decree, we are opposing the wishes of three of the tribes before the Court. We do that with some reluctance. But we would not do it if we were not as sure as we are that it is in their interests, notwithstanding their saying to the contrary. And as trustee, having the right but also the obligation to take that course which seems to us to advantage our client, as we view these three tribes, we, notwithstanding their objection, urge the prompt entry of that decree. But we would not do it if we were in doubt about it. We are in no doubt that it is in their interests.

Turning now to the second question before the Court, which are the several motions for intervention, here we treat of course all five tribes on an equal footing. And we take the same view with respect to the three tribes--

Q Could I just go back a moment. I am sorry to interrupt you. But to the extent there is a claim that the United States had a conflict of interest in the adjudication of this case and at the same time a conflict of interest when you negotiated this settlement, is there any answer to that or need you give one?

MR. CLAIBORNE: We do and without reservation deny that we have suffered under a conflict of interest, that we have taken any action as a result of it, or that our action today in supporting the entry of the supplemental decree is in any way the product of a conflict of interest. At least at

this stage of the litigation it must be clear that we have no other conflicting interests to put forward. There is no question of additional water--

Q That may go to the res judicata question down the line but not here.

MR. CLAIBORNE: Not here, Mr. Justice White. That would be my submission.

Turning to intervention, as I say, we take the same view with respect to all five tribes provided that the petition for intervention of the three tribes--that is, the Fort Mojave Motion, as it is called--is limited, as is the other motion; that is, limited to asking for additional water, and does not either oppose the entry of the supplemental decree--to that extent, we would urge denial of that intervention--or dispute the present perfected rights which are sought to be finalized by the entry of that supplemental decree. To that extent, we would oppose that motion. But to the extent that the motion of the three tribes is limited, as is that of the two tribes, we would support it equally.

Q On that point, Mr. Claiborne, supposing intervention were denied entirely without prejudice to the right of the tribes to assert at a future date claims to additional water after the government has had an opportunity to analyze the claims and pass on what they exactly should be, would that, in your judgment, in any way prejudice the tribes?

MR. CLAIBORNE: Mr. Justice Stevens, if the proviso that it was without prejudice to their right to file or the United States to file on their behalf, no, it could not prejudice. I would submit to this Court--

Q Is it possible also that such a denial might eliminate some areas of litigation that might otherwise take place?

MR. CLAIBORNE: Mr. Justice Stevens, I fear not. And I would submit to the Court that the matters of the claims with respect to additional waters are now ripe or sufficiently ripe for adjudication, that it is appropriate to grant intervention today.

Q Is the only court in which the omitted lands issue be settled is here?

MR. CLAIBORNE: I think so.

Q Not so the boundary disputes?

MR. CLAIBORNE: Mr. Justice White, there are two answers to the last question. In my reading of the previous decree of this Court, only this Court can give additional water, whether in respect of enhanced boundaries or in respect of omitted lands. This Court on the last occasion declined to settle boundaries. I would invite it to decline again. But I would submit that those boundaries have now administratively been finalized. There are in fact, with respect to those that are relevantly claimed, no outstanding judicial proceedings--

Q Your colleagues in the states or someone suggested that the boundary disputes be litigated locally.

MR. CLAIBORNE: The states seem to take two views. As I understood Mr. Noble, he was suggesting that the master appointed by this Court should do what he attempted to do on the last occasion and was told by this Court he should not have done. I understood Mr. Will to say--or perhaps it was Mr. Hunsaker--that no, that was a matter appropriate for district court resolution.

I take a different view, that it is appropriate for neither at the moment. These boundaries have been finally set administratively. One of them has been set since 1969. Whatever judicial challenges there were have long since been settled by final judgments--

Q Because the administrative judgment is final.

MR. CLAIBORNE: At least until such time as a suit is filed, a suit is outstanding, this Court does not have to wait until the end of time when all possible suiters have either filed their suits or been precluded by--

Q Are those boundaries subject to attack in the district court now or not?

MR. CLAIBORNE: A difficult question, Mr. Justice White. We would take the view first that they were final, that at least the administrative action was final.

Secondly, we would wonder who had standing to challenge

them--that is, the boundaries. We are not talking about the title to the land within the reservation--the boundaries. Perhaps the tribes would, if they were dissatisfied with the settlement of the boundary under 1362--but they are not challenging over there. They are content with the administrative decision. The states--this is all public domain land, it is not state land--in principle have no standing. They may say that because it affects their water allocation, therefore they are a party aggrieved and therefore they have standing. That would be a matter for debate, as to which I do not want to make binding concession. But it is a close question.

In any event, no state has challenged any boundary, and in one case that boundary has been finally fixed some nine years ago. Therefore, in the terms of the decree of this Court in 1964, which said you may come back and ask for more water when the boundaries have been finally determined--I read that to mean finally determined by administrative action and especially so--

Q That was only with respect to two reservations though, was it not?

MR. CLAIBORNE: Mr. Justice Stewart, that is so. But in fairness, the reason only two reservations were listed, it must be supposed, is because it was then only known that there were these two boundary disputes. It has since turned out that all five reservations have such boundary disputes--

Q But the decree in it talked about only two reservations, the Fort Mojave Reservation and the Colorado River Reservation.

MR. CLAIBORNE: Mr. Justice Stewart, the states have not taken that point and, if I may say so, quite fairly.

Q It is very fair, but we are talking about what the decree says.

MR. CLAIBORNE: I would submit, Mr. Justice Stewart, that the decree leaves the opening in Article IX that any further motion--that any party is free to apply the foot of the decree for any further--

Q The general language of Article IX, you think.

MR. CLAIBORNE: --and supplemental decree, and that this certainly fairly falls within the reservation jurisdiction which this Court--

Q In any event, that is not implicated in approving the supplemental decree.

MR. CLAIBORNE: Not at all.

Q Mr. Claiborne, I do not think I caught your answer to My Brother Stevens question when he suggested earlier perhaps, What would you think of denying both petitions for intervention? Did you answer that you did not think we ought to deny them both?

MR. CLAIBORNE: I only perhaps gave a partial answer to that. My first answer is that if it were done with a view

to its being reopened at a later time, the time is now.

Q As to what issues?

MR. CLAIBORNE: The issue of the boundaries. That is ripe for adjudication, and the issue of the omitted lands. Though when we filed our papers, we spoke of further investigations that need to be done, and indeed there are further investigations that need to be done. But very shortly--and I am speaking in terms of the end of this year--the government ought to have had its tatter in order sufficiently to put before the Court or its master whatever claims, in our view--and they are indeed more conservative than the claims advanced by some of the tribes--are appropriately put forward both in respect to the boundaries and the disputed lands. And, therefore, I would not urge the denial of the motions for intervention because the matter is ripe.

Q But you do strongly urge the denial of one of the motions for intervention on the part of the three tribes.

MR. CLAIBORNE: Only in so far, Mr. Justice Stewart, as it attacks the entry of the decree. But otherwise--

Q But then you would group all five tribes under the motion of the two tribes?

MR. CLAIBORNE: Indeed, Mr. Justice Stewart.

To fully answer Mr. Justice Stevens, I have not completely answered. I have simply said the matter is ripe. I have not said why intervention, why not just the United States

putting forward these claims? It is certainly true, in our view, that intervention is not necessary. But we do think it is desirable. There is a congressional policy, which is evident in 1362 of the Judicial Code to allow tribes to represent themselves. There is a provision which allows the Secretary of the Interior today to appoint attorneys for tribes. In the peculiar situation of this litigation in light of the recriminations that have been made against the United States and its default in representation in the past, and in order to avoid further litigation about whether or not the United States has advanced all the claims that are appropriate, it seems to us right that in furthering the appearance of justice, that the tribes do be allowed to speak for themselves. It does not mean that the United States would drop out.

Q That is what I wanted to find out. I am a little puzzled about the responsibility for a given tribe's claim if the tribe through its counsel takes one position and the United States takes another position. Which attorney will speak for the tribe if they are allowed to come in?

MR. CLAIBORNE: Mr. Justice Stevens, in this litigation that is a little like the problem of the City of Los Angeles and the State of California both being in the lawsuit. It is no greater embarrassment for the tribe than the United States to be on the other side.

But, as a practical matter, the United States, as I

have indicated, will always be the more conservative of the two advocates. If the state has settled with the tribe, and the tribe is willing, the United States is not going to stand in the way--

Q No, but the converse is the problem. Will the United States still be free to settle over the objection of the tribe. And, if it is, how will it avoid the appearance of impropriety that apparerently causes you to consent to something that you say is not necessary?

MR. CLAIBORNE: I would have thought, once the tribe had been given permission to intervene as a full party, as a matter of the rules of litigation and quite outside of our role as trustee, no settlement could be effected without the consent of the tribe and indeed that to me is--

Q So, then this will make a significant change in the ability of the case to be disposed of without further litigation because you have to have a settlement among all five tribes by their separate counsel and not merely by the United States, which might think a settlement is in their best interest and otherwise would have the power to agree to such a settlement.

MR. CLAIBORNE: I appreciate the point, Mr. Justice Stevens. I simply suggest that in the circumstances of this case--

Q It seems to me the government is inconsistent.

On the one hand, you are saying there is nothing at all to the conflict of interest allegation. On the other hand, you are saying it is sufficiently substantial that we should depart from our normal course of handling these cases.

MR. CLAIBORNE: Mr. Justice Stevens, it was only in the Moe case two terms ago, I believe, that this Court said that it was appropriate for the tribe to represent itself. The fact that the United States could have been the plaintiff did not in any way suggest the tribe was not the appropriate party. But then went on to say that because, had the United States been the plaintiff, there would have been a waiver of the bar against enjoining the enforcement of state statutes, that same rule would be given--the tribe would enjoy the benefit of that same rule. But in passing the Court referred to situations in which we were co-plaintiffs. And I take it--and that was based partly on the Heckman case--that that is now the preferred litigating posture, that is, that the tribe and the United States both be permitted as full-fledged participants in litigation which so vitally concerns the tribes.

Q I think the point was made--I think by Mr. Simpson--that maybe a motion to intervene is not what this ought to be. Have not the tribes been in this litigation, and are they not still in it, from the very first moment that the United States intervened on their behalf and as their representative?

MR. CLAIBORNE: But, Mr. Justice Stewart, if they have a right to do more than whisper in our ear or to speak to the Court by way of amicus curiae in a way that is not binding, either on the Court or on their opponents in Court, they must intervene as a full party.

Q Normally the beneficiary of a trust does not even have the right to participate amicus curiae nor even whisper into the trustee's ear. The trustee represents them.

MR. CLAIBORNE: If this were ordinary trust law, Mr. Justice Stewart, certainly that would be the case.

Q It is true in general in fiduciary laws, is it not?

MR. CLAIBORNE: That is so. But, as we know, Indian law is a thing of itself.

Q It is a strange and wonderful thing. I know.

MR. CLAIBORNE: And I would ask the Court to indulge this much more strangeness by permitting the tribes to intervene with our undertaking to continue in the suit so that they might feel--

Q Let me ask you, Mr. Claiborne, have any of the conversations with the states addressed themselves to a possible settlement with respect to additional water rights for the Indians or not?

MR. CLAIBORNE: Yes; indeed, most of the delay that has been undergone from 1967 when all these claims were filed--

Q So, you in effect, are saying, as my Brother Stevens says, "Let us litigate. Let us not settle. Let us let the Indians in and let us litigate it."

MR. CLAIBORNE: It may be, Mr. Justice White--and I hope it will be so--that once the supplemental decree is entered, a new phase of litigation can begin. Our attempt had been--and this is revealed in the papers--to do both at the same time, that is, to get the states to agree as a condition for the entry of the supplemental decree, to add in the additional water for the boundaries as we then claim them; nothing, however, for omitted lands.

Q You need a little help at the bargaining table, I take it.

MR. CLAIBORNE: The states declined that invitation, but they may be open to it once their perfected rights are judicially approved.

Q Mr. Claiborne, would you say that the power and authority of the United States as a statutory trustee under an act of Congress is greater, broader, or less than a private trustee under ancient traditional rules of law.

MR. CLAIBORNE: The easy answer, Mr. Chief Justice, is different without resolving whether it is greater or less. I would have thought in some respects it must be less in that the tribes, though treated as wards and dependents, are in fact adults who are able to speak for themselves and whose right of

self-government has now been largely recognized, including in other acts of Congress. So, one must not treat them as incompetent beneficiaries in other respects. Certainly our power to dispose of Indian property and to make rules and regulations for Indian reservations may be greater than in the case of a private trust. I hope I have answered your question, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: Very well.

You have two minutes remaining here for your side of the table, Mr. Simpson. There is no constitutional requirement that you use it, however.

The case is submitted, gentlemen.

[The case was submitted at 2:55 o'clock p.m.]

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