ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 8 Orig.

TITLE STATE OF ARIZONA,
v. Plaintiff
STATE OF CALIFORNIA ET AL.

PLACE Washington, D. C.

DATE December 8, 1982

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF ARIZONA, :

Plaintiff, :

v. : No. 8 Orig.

STATE OF CALIFORNIA ET AL. :

- -x

Washington, D.C.

Wednesday, December 8, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 o'clock a.m.

APPEARANCES:

CARL BORONKAY, ESQ., Los Angeles, California; on behalf of State Parties.

RALPH HUNSAKER, ESQ., Los Angeles, California; on behalf of State Parties.

LAWRENCE A. ASCHENBRENNER, ESQ., Washington, D.C.; on behalf of Indian Tribes.

LOUIS F. CLAIBORNE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 8 Original, the State of Arizona against the State of California and others.

Mr. Boronkay, you may proceed whenever you are ready.

ORAL ARGUMENT OF CARL BORONKAY, ESQ.,

ON BEHALF OF STATE PARTIES

MR. BORONKAY: Mr. Chief Justic, and may it please the Court, I would like first to give a brief statement of the background of the case before commencing argument.

This proceeding before the Court derives from a suit filed by the State of Arizona in this Court in 1952 to determine its rights to Colorado River water. That proceeding was heard by Special Master Simon Rifkind, who after lengthy hearings filed a report with the Court. This Court's decision in 1963 allocated water among the states of Arizona, California, and Nevada.

Also determined were the water rights of a number of federal establishments, principally five Indian reservations along the lower Colorado River. The key issue involving the Indian reservations was the measure of the Winters doctrine rights of the Indian

reservation. Master Rifkind determined that the proper measure was the practicably irrigable acreage of the reservations. He then determined the acreage for each of the reservations, and allocated water in accordance with that determination.

This Court adopted Master Rifkind's determination of irrigable acreage and the water allocations, and in 1964 entered its decree implementing the 1963 decision.

Thereafter, in 1977, in connection with a joint motion to enter a supplemental decree respecting the listing of present perfected rights, which matter was called for in Article VI of the 1964 decree, the five tribes of these reservations sought to intervene for the purpose of seeking additional water for the reservations. In the following year, the United States filed a motion to amend the 1964 decree to seek additional water for each of the reservations.

These pleadings and the responsive pleadings of the State Parties were referred to Elbert P. Tuttle as Special Master to hear the matter. Master Tuttle has held lengthy hearings, and has made a report which is filed before this Court. He has ruled that it was proper to reopen the original proceedings for the purpose of hearing claims that there exists additional

irrigable acreage on the reservation than was presented in the initial proceeding.

I refer to this as the reopening issue. Some refer to it as the omitted lands issue.

He has ruled further that it was proper to hear claims of irrigable acreage for -- based on boundary changes made by the Secretary of the Interior for the reservations subsequently to entry of the 1964 decree, and he ruled that the State Parties could not challenge whether the irrigable acreage claim was in fact within the boundaries of the reservations. I will refer to this as the boundaries issue.

Finally, he has ruled that it was proper for the tribes to intervene as independent parties with their own counsel to make claims for additional water for the reservation, despite the claims -- the defenses of the three states based on the Eleventh Amendment, and he permitted the United States to continue to make claims for additional water on behalf of each of the tribes.

I will now address these three issues, and my colleague will address following certain issues, equitable and legal, related to reopening the case, and also discuss issues respecting Master Tuttle's findings with regard to practicably irrigable acreage.

With respect to reopening the case to hear claims that there existed additional irrigable acreage over that contended for by the United States in the original proceedings, Master Tuttle concedes at the outset that were these claims to be made in a different lawsuit, they would be subject to the bar of res judicata, that these claims are not indeed new claims, but were within the issues originally tried and determined some 20 years before.

He states, however, that Article IX of the decree --

QUESTION: Did he say it would be res judicata or law of the case?

MR. BORONKAY: He stated it would be res judicata were these claims to be made in another proceeding.

QUESTION: Oh, I see.

MR. BORONKAY: In this particular instance, he referred, to avoid that bar, he states that Article IX of the Court's decree permits the reopening of that issue. That article provides that any party may apply at the foot of the decree for its amendment or for further relief, and that this Court reserves jurisdiction for the purpose of entering any proper order in relation to the subject matter of the

controversy.

We submit that that language neither in its form nor its purpose allows a party to come back many years after final adjudication to reopen an issue on the basis of perhaps an error in trial judgment or what amounts to the splitting of a cause of action. This language of Article IX is found in major water adjudications, particularly equitable apportionment cases. Its office and function is to permit the Court to modify a decree due to changed cirumstances. Its orientation is in the future. A changed condition which means the decree is no longer workable, which means it has to be modified to become workable.

We are aware of no case that has interpreted language such as this to allow a party to come back merely because he has a change of position, a different position that he feels he should have taken and could have taken in the original suit, and yet this is the position urged by the United States and adopted by Master Tuttle.

We submit that it is not only unprecedented, but it is unsound to accept this interpretation, for it obviously allows relitigation of issues finally determined, casts an intolerable burden on the courts, creates instability in judgments, and, of course, adds

unnecessary costs to litigants.

QUESTION: What do you suggest was the purpose in the original report and action of this Court in leaving some of these matters open for adjustments?

MR. BORONKAY: The adjustment that I believe the Chief Justice refers to would be the boundary adjustments in Article II(D)(5) of the decree, and that is a specific provision that permits the reopening for a specific purpose, and I will indicate that the condition of reopening for that purpose has not been met in this case, but with regard to Article IX, that is -- I might call it a phrase of art. It is not just a bland, broad statement reserving jurisdiction for any purposes. It has a certain function to fulfill, and that is the modification of a decree for changes in the future.

We submit that Article IX in no way permits a party merely to say that if he had a second chance he could do better, and that is the use being made of that article here.

QUESTION: I suppose if the use of Article IX made here is acceptable, one of the states or the lower basin states -- basin states, either one could ask to relitigate the division of water --

MR. BORONKAY: Precisely. Indeed, if Article IX may be read so broadly, and we don't think it should,

there would be no reason for any party having an interest to come in and relitigate matters if they feel they have certain equities, or they believe they could do better. Moreover, I believe there could be the peroidic reopening of this case for claims of irrigable acreage.

QUESTION: This wouldn't be the last of it, either.

MR. BORONKAY: Indeed, it would not. I foresee future generations of United States Attorneys wanting to second guess their predecessors, and utilizing current technology, saying, indeed, we might have asked for a greater amount of irrigable acreage than was claimed 20 years earlier, and I don't see any place to stop that process.

Moreover, Article IX was proposed by Master Rifkind. Master Rifkind made it clear in the record again and again that he was striving for a certainty so far as possible of water rights and finality of a decree, and he is the master that urged this terminology, and yet it would be used to undermine his purpose.

Accordingly, we feel there was no basis for reopening the litigated matter which Judge Tuttle indicates was litigated, and Article IX provides no

basis for relitigating some 20 years later.

If there are no questions, I will turn to the boundaries issue, if I may. With respect to the boundariers determination of Master Tuttle, we respectfully submit his treatment is no more defensible than with respect to the reopening issue. It is to be recalled that the boundary issue was fully tried in the first litigation, that California protested that some of the boundaries being urged by the United States were wrong, that the irrigable acreage on parts of the Mojave and Colorado River Indian Reservations were outside the reservations, and therefore had no basis for a Winters doctrine water right.

QUESTION: Were the boundaries in dispute, all those that had federal lands on one side and tribal lands on the other?

MR. BORONKAY: To my recollection, there are federal lands abutting the Indian reservations in the case of Fort Mojave and Colorado River. And so, California in protesting these boundary determinations of the United States raised that issue. The United States joined in that issue. There was no protest to its being tried, and indeed it was fully tried, and for the most part, the boundaries were found to be incorrect.

QUESTION: What did we do with that determination?

MR. BORONKAY: This Court adopted the irrigable acreage that was computed based on the boundary determination, adopted the water allocated dependent on the amount of acreage so computed, but rejected the findings as to the boundaries as being unnecessary.

QUESTION: Well, we set it aside. We didn't adopt that --

MR. BORONKAY: This Court did not adopt the boundary findings, though it did adopt the acreage that was calculated --

QUESTION: Yes, yes.

MR. BORONKAY: -- on those boundaries.

QUESTION: Yes. As long as that was the acreage within the boundaries as then -- as the Master had determined, but we didn't say those were the boundaries.

MR. BORONKAY: This Court did not determine the boundaries --

QUESTION: What is II(D)(5)? What is that?

MR. BORONKAY: II(D)(5) provides in setting forth the allocations of water for the different reservations, that provision states that these

allocations with respect to Fort Mojave and the Colorado River Indian Reservation, that the allocations being adopted by this Court that Master Rifkind found were subject to adjustment in the event the boundaries are finally determined.

And so, the issue before the Court today is whether the United States could properly avail itself of Article II(D)(5), whether it has made a showing that the boundaries of these -- the disputed boundaries of these two reservations had been finally determined.

QUESTION: Well, the Master thought that he was finally determining them, didn't he? They had been litigated between adverse parties. And that wasn't good enough for this Court, I take it.

MR. BORONKAY: Master Rifkind had attempted to determine the boundaries, and it wasn't good enough for this Court, and I suggest that it wasn't good enough for this Court for the reason that this Court was concerned with the possibility that due to the states' participation, the parens patriae doctrine would bind other parties that might have land claims who were not parties to the suit.

Accordingly, this Court rejected the findings as to boundaries, but the matter might have been finished at that point with respect to irrigable acreage

of each reservation, and as to the water allocation dependent on irrigable acreage. I suggest that the doctrine of res judicata would have bound all the parties to the irrigable acreage determination had not the Court in II(D)(5) given the United States another chance, so to speak, an extra chance.

But I do not feel this Court intended by giving the United States the extra chance that it could determine those boundaries conclusively on the adverse party by unilateral action such as it has presented in this case. In this case, it relies on secretarial orders based on surveys of boundaries for approximately 90 percent of its boundary claim, and for approximately 10 percent it relies on four or five judgments, most of which are stipulated judgments.

In neither of these situations are the parties adversely affected, the State Parties, given any opportunity to participate in the determination of those boundaries, and yet the United States says we are bound by those boundaries. Our water rights are directly affected by those boundary determinations, which include or exclude irrigable acreage, and yet the United States comes forward and says it may unilaterally determine those boundaries for the purpose of modifying water allocations of these reservations which resulted from a

complete adjudication with all adverse parties present.

We submit that that wasn't the intent of this Court. It would be ironic indeed if the very boundaries that were tried and found to be incorrect before Special Master Rifkind were to be conclusively imposed upon the State Parties by virtue of having the stamp of approval of the Secretary of the Interior some years later.

QUESTION: Have any actions been filed by the states separately to contest the boundaries as determined by the Secretary of Interior?

MR. BORONKAY: Yes. Because of the concern as to Special Master Tuttle's rulings, the Metropolitan Water District filed in the United States District Court approximately a year and a half ago an action in both declaratory relief and under the Administrative Procedures Act to test the administrative orders. That action is still pending. The Court having heard it on a motion to dismiss for lack of standing, for sovereign immunity of the United States, for statute of limitations purposes.

The Court, however, felt that it should not rule pending the determination by this Court of this case.

QUESTION: The states don't claim any interest in the land itself. You are concerned only with the

water rights attached to it which might change because of the boundary change. Is that right?

MR. BORONKAY: That is correct. We are directly affected by that boundary just as an adjoining landowner would be directly affected by their boundary. We are affected for a species of real property, water, as opposed to land.

So, for these reasons, we feel that the mischief that could result from a ruling that the boundary determinations of the Secretary of the Interior is very great when we consider that these reservations all abutt vast federal acreage under the ruling -- under the control of the Secretary of the Interior, and that he again and again surveys and resurveys land, and by doing so he can add a great irrigable acreage to the reservations, give them an additional water right with an early priority, adverse to our position, and under the proposed interpretation of the United States, we would have no ability to contradict those boundary determinations no matter how obviously wrong they were.

QUESTION: We are talking about what the boundaries of the reservations were when the suit was started, aren't we?

MR. BORONKAY: We are actually --

QUESTION: We are talking about -- What did

Master Rifkind purport to find?

MR. BORONKAY: He rejected the --

QUESTION: What kind of boundaries? The boundaries at the time the suit started.

MR. BORONKAY: He essentially found with regard to the two reservations -- there are five now that have boundary questions. There were only two at that time.

QUESTION: Yes. Yes.

MR. BORONKAY: With respect to the Colorado River Indian Reservation, he found that the intended boundary, the west bank of the Colorado River, was to be the boundary as the river imperceptibly moved.

QUESTION: Yes.

MR. BORONKAY: The United States took a position that the boundary was a fixed boundary. Hence they sought to determine meander lines, and --

QUESTION: Were these reservations established by Act of Congress, or by executive order, or by --

MR. BORONKAY: Some by executive order and some by Acts of Congress, and I can't tell you at this moment whether the Colorado River Indian Reservation was one or the other.

With respect to Fort Mojave --

QUESTION: But you are not -- the question

isn't whether or not that a reservation that had a -- whose boundaries were not in dispute during this lawsuit could now be changed, and the boundaries just expanded. That is not the issue.

MR. BORONKAY: It is not the issue in that we have no land interest, and --

QUESTION: This is what is the accurate boundary at some time in the past.

MR. BORONKAY: It is what the boundary was in the past, but the Secretary of the Interior in actions taken subsequently to the 1964 decree purports to restore lands, adding irrigable acreage, which he would like recognized as always having been part of the reservations.

QUESTION: Yes.

MR. BORONKAY: Now, we submit that when you consider all the acreage that it is possible to add to the reservations and give them additional water rights to the detriment of the State Parties, we feel that the United States has not met the condition of Article II(D)(5) that there have been a final determination of the boundaries for the purpose of modifying an adjudicated water right, a right of each of these reservations which resulted from a full adjudication.

We don't feel that merely Secretarial action,

administrative action, valid for administrative purposes, is the type of action or activity that should permit the United States unilaterally to come in and say, now, we can modify the water rights and you can't challenge it.

I believe this Court intended that we either have the opportunity to challenge those water -- the boundaries for water adjudication purposes or, as we conclude, the United States is premature. They have come to the Court in advance of being able to show that the boundaries have been finally determined.

I may illustrate that with the Fort Yuma Reservation, where there have been various solicitor opinions over a 40-year period recognizing particular boundaries, but the day before the United States filed its motion you had a new solicitor's opinion that ignored the three prior opinions and added 25,000 acres to that reservation, and according to the United States, we have no ability to challenge that, and yet our water rights are directly determined.

I would like in the moments left to turn to the question of the intervention of the tribes. Master Tuttle allowed the five tribes to intervene despite objections of the three states urging their Eleventh Amendment rights. In doing so, he relied on Section --

on Title XXVIII of the United States Code Section 1362.

We submit that 1362 doesn't relate at all to a waiver of sovereign immunity of the states. Master Tuttle cites some three United States District Court cases which I submit badly misread the decision of this Court written by Mr. Justice Rehnquist in Moe versus the Salish and Kootenai tribes. That case permitted the Indian tribe to have the same position as the United States with respect to a statute that did not permit the United States District Court to issue an injunction against state enforcement of sales tax on the reservation.

The case reasoned that 1362 permitted the tribes to file a suit where the United States could have sued in their behalf and failed to do so. So that case treated the tribes as being in the same position as the United States where the tribes brought the suit instead of the United States.

This is a far cry, I submit, from saying that the tribes are to be treated the same as the United States for all purposes, such as waiver of the Eleventh Amendment rights of the states, and indeed, in the many statements of this Court in numerous cases that in order -- that Congressional intent to waive the state's sovereign immunity must be direct and explicit and will

not be implied unless there is an overwhelming --

QUESTION: "Waive" isn't really quite the right word, is it? It is override. "Waive" suggests a voluntary --

MR. BORONKAY: Over -- That is correct. I stand correct. Override, unless there is an overwhelming implication. Well, there is neither an explicit indication in 1362 of such overriding, nor is there any kind of implication in my opinion.

For these reasons, we feel that 1362 provides no basis for Master Tuttle's permitting intervention of the tribes. Moreover, if it were construed to permit an intervention, it would be, or the overriding of the Eleventh Amendment, it would be a partial waiver or partial overriding in that the section itself, 1362, confers jurisdiction upon the United States District court. It does not refer or purport to extend the original jurisdiction of this Court.

And finally, as the Moe case indicates, it was only where the United States could have and failed to sue on behalf of the Indian tribes that the Indian tribes have the right to sue. In this instance, we have the United States having brought the very cause of action which the tribes seek to intervene.

For all these reasons --

QUESTION: Counsel, you didn't refer to the case of Maryland versus Louisiana in connection with this intervention issue. Did you think that case was one that has some relevance for our purposes?

MR. BORONKAY: I believe it is distinguishable on the grounds that the states were already involved, and I didn't see any practical effect to be attained by the sovereign immunity question as to individuals.

I would like to have saved my remaining time for rebuttal.

(General laughter.)

CHIEF JUSTICE BURGER: Mr. Hunsaker?

ORAL ARGUMENT OF RALPH HUNSAKER, ESQ.,

ON BEHALF OF THE STATE PARTIES

MR. HUNSAKER: Mr. Chief Justice, and may it please the Court, as the Court is aware, there are two main categories of land which are involved in this matter. The first of which Mr. Boronkay addressed is boundary lands. The second of which I would call consciously excluded lands, and which we have referred through this matter as omitted lands.

The states believe that they had finally litigated the matter of these excluded lands, and I think a review of the record will show that Master Rifkind also believed that. I will not take the time to

quote, but I will paraphrase some comments from the United States Attorneys with respect to these lands to get it in our minds.

Mr. Warner, the United States Attorney who tried the case, indicated to Master Rifkind that the decree will serve the purpose of res judicata for the maximum water for the reservations, and that there would be no claim for other lands on the reservations even though they may be irrigable, and he felt also, as he indicated, that it was his duty to prove to the full extent that he could the Indian water claims, and also that the maps which they put into evidence showing the irrigable lands constituted the United States bill of particulars with respect to the lands that they claimed to be irrigable.

Now, we believe that this does not therefore describe inadvertent mistakes as the United States Attorneys now seek to label the efforts of the U.S. Attorneys in the 1950's. We believe that the 1963 decision and '64 decree of this Court became the law of the case, that the matters were fully litigated, and that res judicata principles apply.

We had spent seven weeks approximately presenting evidence on this reopening matter, and indeed the very same kind of evidence that was presented in the

fifties with respect to the claims for the five reservations were presented in the relitigation of these issues. There were soil classification experts who were called to classify the soils involved, engineers who were called to talk about irrigation systems and methods of irrigating the lands involved. There were maps presented showing the irrigation -- the irrigable acreages claimed in addition to those submitted in the decree in 1964.

QUESTION: Mr. Hunsaker, to what extent does the larger amount of practically irrigable acreage found by the present Special Master come from examining new technology?

MR. HUNSAKER: In that regard, there -- most of the lands submitted by the tribes comes from the examination of new technology, so-called sprinkler and drip irrigation, and so virtually a large percent, and I cannot tell you the exact percentage now, but a large percent of the lands presented by the tribes themselves at this time comes from those technological advances.

QUESTION: Well, is that land that couldn't be irrigated by other traditional methods that were in effect at the time of the previous decree?

MR. HUNSAKER: No, the testimony in the case would indicate that these lands were somewhat hilly, and

they could have been, I guess, leveled, but the economics of doing that may have been prohibitive.

We feel that the fact that the current United States Attorneys choose to ignore the assurances of their predecessors of the fifties cannot serve as a basis for relitigation of the issues. In effect, they are saying that our predecessors cannot bind us, and we do not believe that Court decrees should be treated so lightly, but in fact deserve finality.

We think that in Article IX, when this Court indicated that it would retain jurisdiction for matters which were "deemed proper," that this was not mere surplusage of language, but that this Court intended that in order to come back before the Court with additional matters, that they must indeed be proper, and we feel that in this effort, that Article IX should not be construed so broadly as to make this attempt at relitigation proper, and even if it were to be so considered, that nevertheless the preclusive doctrines about which we have briefed and talked about this morning should prevent this effort.

QUESTION: Are you to be understood as saying that Article IX was not intended to allow a sort of newly discovered issue problem to be raised?

MR. HUNSAKER: Well, Your Honor, I suppose in

the proper context that a newly discovered issue could be raised. However, we do not think that this is a newly discovered issue, for these lands were indeed considered by the United States Attorneys in the fifties, and for whatever their reasons were, were excluded as being irrigable at that time, and were not therefore presented to the Court, but they nevertheless were considered by those attorneys at that time as to whether or not they should be presented as being irrigable.

QUESTION: Why -- Assuming the tribes are properly in the case, why should the tribes be bound by the previous decision? Were they parties at that time?

MR. HUNSAKER: They were parties in that the United States represented them at the hearing before the Special Master Rifkind. We feel that the case of Heckman versus United States clearly sets forth the obligation of the United States, and it indicates that the representation by the United States is a full representation, and that therefore they were represented in the action.

It is true that they were not represented by independent attorneys --

QUESTION: Assume -- Is there some claim in the case that the United States breached its trust, or

did not properly represent the tribes at that time?

MR. HUNSAKER: Your Honor, that claim was discussed during the case, but we submit that the Special Master did not make any finding in that regard. We further submit that the record does not have any testimony in it which would support such a finding, and while it was mentioned, that was essentially all that occurred. It was simply broached in the context of being mentioned, but there was no finding or --

QUESTION: But the preclusion of the tribe would depend upon -- in this case would depend upon the adequate representation of the United States in the original decree?

MR. HUNSAKER: That's right. It would depend upon the representation of the United States at that time, and again which we submit was a full representation. For the --

QUESTION: Mr. Hunsaker, if the Court were to determine that the omitted lands issue recommendation of the new Special Master is erroneous, would the Court then have to remand on any question of conflict of interest as far as the tribes are concerned?

MR. HUNSAKER: I believe that there is insufficient evidence. Indeed, I am not aware really of any direct evidence that was presented in the trial, and

I suppose that the only way that that determination could be made would be upon a remand, because there certainly is no finding in this record at this time by Special Master Tuttle to that effect.

QUESTION: The Special Master really -- he wouldn't have gone to the questions of law of the case unless he had felt the Indians would be bound under some principles analogous to res judicata.

MR. HUNSAKER: I think that's correct, Your Honor. Indeed, Master Tuttle cites, we submit, in his discussions about whether or not Article IX was intended to preclude the representation of evidence, he cites only one brief, and that is the Imperial Irrigation District, versus all of the evidence that Master Rifkind sought from in the way of admissions from the United States Attorneys and put on the record himself that he intended the litigation of the Indian issues to be final.

And we feel that it is overwhelming in the history of the transcript of these proceedings in the 1950's that it was intended to be and should be final. There has been no fraud alleged, which is one of the bases that this Court talked about in the Sea Land Services, Inc., versus Gaudet opinion as a -- serving as a basis to set aside a judgment or decree of the Court,

and no such allegations were made, and indeed no such evidence was presented.

We do not feel that the matter of reliance upon the decree is a necessary element of the preclusive doctrines about which we talked. Nevertheless, evidence was presented in the context of the trial held below, and in the context of the equities involved to show that there was major reliance upon the decree which had been rendered by this Court in 1963.

Indeed, Arizona came to this Court with the original action for the very purpose of finally and fully establishing its right to this water. They had been before the Congress many occasions seeking to obtain authorization for the Central Arizona Project, and had met with resistance, among the claims being that they did not have a final adjudicated right to the water involved.

And so, that was the very purpose in coming to the Court with the original action, to establish that. Since that time, they have obtained authorization through the Congress for the Central Arizona Project. They have assessed taxes against their citizens in three of the counties to assure repayment of the reimbursible features of the project. They have gone before the Congress and talking about sizing of the canal to

deliver the water, and reliance upon the fact that there would be received the amount of water that was determined to be its remaining entitlement in this decision.

And indeed the United States supported it before the Congress, indicating that it had a firm supply to its remaining entitlement, and therefore it could invoke the reclamation laws of the United States for purposes of building this project.

We submit to the Court that the preclusion doctrines to apply to this situation, and that it should affirm the 1964 decree as written, and return the parties to their stated reliance upon that decree.

On the other hand, if Article IX is broad enough to permit the reopening of the nature that occurred before Master Tuttle, then we submit that it is likewise broad enough to reopen for all purposes. And some of those purposes that were presented to Master Tuttle and rejected by him as not appropriate are the fact that this Court in the interim since 1964 decided two very important cases that defined further the reserved water rights doctrine, those cases being United States versus New Mexico and the State of Washington versus the Washington State Commercial Passenger Vessels Fishing Association.

The definitions and guidelines which were rendered by this Court in those two decisions, we submit, are that the reservation doctrine only reserves that amount of water which is for the primary purposes for which the reservation was created, and not for any secondary purposes which it may serve, and further, that though there may be a maximum reserve -- reserved water, that the -- that doesn't necessarily mean that the particular people involved will receive that full amount, but they will receive the amount of that scarce natural resource that is necessary to provide them with a moderate living.

These decisions came down in '78 and '79 respectively. We submitted to Master Tuttle the question on the basis that if he construed Article IX broadly enough to permit a reopening, then it, too, should be construed broadly enough to permit a reopening to look at these issues and see whether or not there should be a revision of the decree of 1964 based upon these new guidelines that have been presented by this Court in these two decisions. We submit that those issues should have been heard by Master Tuttle and were not.

The technology problem is also --

QUESTION: You say should have been. To what

extent were those other matters pressed on the Special Master?

MR. HUNSAKER: Your Honor, we -- Mr. Chief Justice, we presented motions to the Master at a pretrial hearing that we be allowed to hear these issues before him. These motions were presented in writing, and the Master overruled our motions. Indeed, we were in the process of discovery with respect to the moderate living standard that would be applied. At the time we had arranged to go to the various Indian reservations to visit with them, and the Bureau of Indian Affairs to obtain records with respect to the leasing of lands and this kind of evidence, and of course that came to a halt when our motions were denied.

There is also a very practical problem that Arizona some day must face, and that is that there is so much Indian land in the state that if the practicable irrigable acreage standard is to be applied throughout the state, then the existing water supply could only supply one-third of the Indian reservation lands, and none of the non-Indian lands, and we feel that this issue, too, could be visited if the '64 decree is construed broadly enough to allow reopenings of the type that is sought for here.

QUESTION: Have water rights been generally

settled? Have reserved rights been settled with respect to all the reservations?

MR. HUNSAKER: Mr. Justice White, they have not. There is --

QUESTION: Is there some general adjudication in progress?

MR. HUNSAKER: There is a general adjudication on some of the reservations that is in process, not on all. At this time, the Ninth Circuit has ruled that the Arizona enabling act precluded it from adjudicating Indian water rights, and my understanding is that this Court has accepted certiorari with respect to that issue. That is now before this Court from the Ninth Circuit.

QUESTION: Well, were they -- were the adjudications going on in -- the general adjudications going on in the state courts?

MR. HUNSAKER: Yes, Your Honor.

QUESTION: What has the Ninth Circuit decision got to do with that?

MR. HUNSAKER: Well, their -- Okay. I should explain that, Mr. Justice White. They have -- There are cases going on in the state courts, and there were cases going on in the federal courts. The district courts in the state of Arizona ruled that under the McCarren Act

it was proper that the state courts adjudicate these issues, and so they referred the federal court proceedings to the state courts.

The United States and the Indian tribes there involved appealed those decisions to the Ninth Circuit, and the Ninth Circuit has now held that Arizona may not adjudicate, not because of the McCarren Act or any of its holdings, but because of the Constitution, which has some language in it with respect to divesting Arizona of jurisdiction over Indian lands.

QUESTION: You mean the order of reference is the subject of the appeal?

MR. HUNSAKER: I am sorry. I missed your question.

QUESTION: The referring by the Federal District Court to the state courts, is that being challenged in the Ninth Circuit?

MR. HUNSAKER: Yes, Your Honor, and in addition to that, the question of the Constitution has been presented.

QUESTION: Well, whatever the standard was in this -- in this case, it wouldn't necessarily prevent a different standard being applied in other proceedings with different parties, would it?

MR. HUNSAKER: Mr. Justice White, we have --

QUESTION: Especially if the different standard you are insisting upon originated in this Court.

MR. HUNSAKER: We have great concerns that the state courts or the Federal District Court would feel bound by the standard set forth by this Court because it was instigated by the state courts.

QUESTION: Well, which standard? Which standard? The latest standard.

MR. HUNSAKER: Well, that's the thing that we feel there is some uncertainty about. We feel that the moderate living standard is a further definition, and that that should be applied. We would, of course, on behalf of the state urge that application before any state court or district court in the federal courts. However, we are not certain that this would be applied, but it does present us with a dilemma and a problem, and we feel again that if Article IX permits the reopening of the type here, then that would permit a reopening for purposes of looking at whether or not the standard should be applied in a state where it obviously cannot work.

In the remaining time available to me, I would like to just for a moment approach the question of some factual exceptions that we made. I will not go into

detail on these, because time does not permit, and further, I think the Court will see what we have asserted in the briefs, but I would like to simply say that some of the legal questions with respect to the factual issues are as follows, and some of the factual questions.

This Court may not wish to reweigh all of the evidence from this lengthy trial, but we did except to some of the findings of Special Master Tuttle, and as to the United States claims, the errors relate to the lands which even the United States experts projected to be only marginally profitable, but they based such projections on yields and production costs and power rates that we feel are not properly established in the evidence and resulted in a shifting of the burden of proof to the states rather than the Master requiring the burden of proof to be carried by the United States.

As to the Indian tribe claims, the errors, we submit, relate to lands which the Master found profitable, and thus deserving of a permanent water right based only on the projection of what we have termed exotic crops, crops without a commercial history, unproven in the area. In fact, one of the crops happened to be grapes, and there have been some attempts at grape growing in the Lower Colorado River Basin, and

they did not last, and have not carried on to be -- have not proven to be profitable.

QUESTION: Which reservation was it proposed to grow grapes on? Or which climatic zone of the --

MR. HUNSAKER: Well, I believe, Mr. Justice Rehnquist, that it is proposed essentially now on all reservations, because of the problem of drip and sprinkler irrigation which I talked about, but there was considerable evidence in particular about that on the Fort Yuma Reservation.

QUESTION: That would be right by Yuma?

MR. HUNSAKER: Yes, that is correct. And that is the area where there was some evidence with respect to some attempts at grape growing that did not last on the Monsanto Ranch near that area.

But the Master with respect to crop prices used a method that was not employed by any of the experts in the case, including those hired by the Indian tribes, and also did not take into account the law of supply and demand as to what size market must be looked at with respect to whether or not a new grape acreage could be brought into production and not affect the market prices to be received.

CHIEF JUSTICE BURGER: Thank you.

Mr. Aschenbrenner?

ORAL ARGUMENT OF LAWRENCE A. ASCHENBRENNER, ESQ.,
ON BEHALF OF THE INDIAN TRIBES

MR. ASCHENBRENNER: Mr. Chief Justice, and may it please the Court, the tribes relied on the government's brief on the boundary dispute issue, and so I intend to defer that question to Mr. Claiborne, and proceed with the question of the omitted lands and the other issues raised by counsel for the states.

The states say that the 1964 decree can't be reopened because, one, res judicata bars it, two, Article IX does not authorize it, and three, the law of the case precludes it. We say they are mistaken on all three grounds.

First, res judicata only applies to a subsequent case between the same parties in the same cause of action, a different case. This is the same case. Second, Article IX by its express terms certainly authorizes any change whatsoever. And third, we say the law of the case does not bar reopening where there has been a gross error which the states admit, where this error has caused manifest injustice to one of the parties, and there has been no significant showing of detrimental reliance upon the other party.

QUESTION: To what extent do you mean that the states admit the so-called gross error to which you

refer?

MR. ASCHENBRENNER: Mr. Justice Rehnquist, I say that because they admitted that 80 percent of the land claimed by the United States is practicably irrigable today and 50 percent of the combined claims of the tribes in the United States are irrigable today, and that is what their experts admitted in trial. Now, in their briefs and in this oral argument, they are contending that a major portion of that land would not have been irrigable at the original trial, but it is today, but the fact is, and the record shows, that the only change in technology that appears in the record concerns drip irrigation, and drip irrigation the states' experts contended could be substituted and replaced with, if it didn't work properly, sprinkler irrigation.

Well, sprinkler irrigation was available during the original trial. The only difference in standard between the original trial and the present trial was the use of the Soil Conservation Service standards with respect to sandy lands. That is only 1,750 acres.

QUESTION: What you are arguing is just that the government was greedy enough the first time around.

MR. ASCHENBRENNER: No, Your Honor, I wouldn't

put it that way, and Special Master Tuttle didn't put it that way.

QUESTION: No. Well, that is why we are reviewing his findings.

MR. ASCHENBRENNER: All that the tribes are asking for is to apply the same standard that was applied in the original case, practicably irrigable acres standard to determine what water should be allocated.

QUESTION: Yes, but I asked you about what sort of a gross error it was that you claimed should allow this matter to be reopened after all these years. And it boils down to just the fact that by hindsight, the government should have been more aggressive or more assertive, or whatever you want to say, that maybe they could have gotten more if they had asked for it, but that is not even a doctrine for reopening under a law of the case, as I understand it.

MR. ASCHENBRENNER: Your Honor, we are not merely saying that hindsight, that now because of hindsight it is apparent they made a mistake. It is apparent from the prior record before Judge Rifkind that the methodology was totally flawed.

QUESTION: Do you think in any other kind of a case, say, where there wasn't a Special Master, but just

litigation between ordinary private parties, one party could come in 15 years later simply because it was an equitable decree and there had been a provision to allow reopening and saying under law of the case I now find that I want to reargue things that were settled 15 years ago?

MR. ASCHENBRENNER: Not in the usual case that was 15 years old, Your Honor. What we have to look at is the timing of the tribe's motion in perspective of this entire case, and we have to look to see what has happened to change the situation between 1964 and today. I assume that if the tribes have discovered the error, and the United States had, and made the motion in 1965, nobody would claim that this grievous error shouldn't have been corrected. But so what has materially happened in the --

QUESTION: Why do you say that? I mean, if the decree had become final and been entered, I suppose anyone whose standing under the decree when entered would object to a reopening, whether in '65 or now. Their claims might have been better the more time had elapsed.

MR. ASCHENBRENNER: Well, I suppose one thing it gets back to, Your Honor, is Article IX, which expressly provides for reopening. Contrary to the

state's position that it only aplies to equitable apportionment cases, this provision was submitted by the Imperial Irrigation District for the express purpose of avoiding a claim of res judicata against the United States, and to correct any error that the United States might suggest to the Court had occurred --

QUESTION: But --

MR. ASCHENBRENNER: Pardon me.

QUESTION: Go ahead.

MR. ASCHENBRENNER: And they submitted this, Your Honor, on January 11th, 1963, long after the issue of equitable apportionment went out of the case. And all the parties agreed to it.

QUESTION: Do you contend that Article IX would allow any party to reopen any question if they found that they simply hadn't made as strong claims as they now thought they should have?

MR. ASCHENBRENNER: No, Your Honor.

QUESTION: Then how do you distinguish your claim from that of, say, the states, who might feel, as they aparently do, that had they asked for more, asked for it in a different way in '63, they would have gotten it?

MR. ASCHENBRENNER: You can only justify reopening under the law of the case doctrine, which is

this case -- we are trying to reopen the same case -- if you can find a gross error, where the other party had not changed his position and relied to his detriment, and as I will point out in a minute, none of the three parties which claimed to show reliance demonstrated it in the record.

QUESTION: But of course you don't get to the reliance unless you show the sort of -- what you refer to as a gross error that would justify the evaluation of reliance.

MR. ASCHENBRENNER: Right, Your Honor. Well, the gross error -- take the Chemehuevi tribe, for example. The government only asserted and was awarded a little fraction better than one-half of the irrigable acreage which Judge Tuttle found to be practically irrigable lands.

QUESTION: All other principals are bound by the acts of their attorneys. Why shouldn't the Indian tribes be?

MR. ASCHENBRENNER: Well, as Judge Tuttle pointed out, the Indians weren't even there by their own attorney.

QUESTION: Well, but, so you don't think --

MR. ASCHENBRENNER: They were there by the government.

QUESTION: Yes, but certainly under Heckman they are bound.

MR. ASCHENBRENNER: They are -- Well, now, Heckman didn't discuss the issue of whether or --

QUESTION: Do you assert they are not bound?

MR. ASCHENBRENNER: I -- Yes, we allege inadequate representation, and we stick by that. We --

QUESTION: But the Special Master didn't find in your favor on that, did he?

MR. ASCHENBRENNER: No, but he didn't find against us. In Footnote 71 of his report, he expressly found it unnecessary to determine whether there was a conflict or whether the conflict of interest prevented the tribes from being bound, citing Hansberry versus Lee, because he found we had a right to reopen under Article IX, so he did not reach the issue of inadequacy of representation.

And under Article IX, we are not compelled to show inadequacy of representation under due process grounds. We merely have to show, as Judge Tuttle found, a grievous error, lack of detrimental reliance.

QUESTION: Your definition of any grievous error, I suppose, is any claim that might have been made but wasn't, that you could open up any portion of the decree under that standard.

MR. ASCHENBRENNER: No, I would say you couldn't, Your Honor. As Judge Tuttle said, you only reopen the decree where there is good cause therefore. There is no good cause to change the practicably irrigable acreage standard. The same policy reasons which caused Judge Rifkind to say that we would determine the future needs of the tribes measured by irrigable acres exists today, because it provides the certainty which other water users needed, and you couldn't estimate how much the Indian population would increase. Policy reasons are the same. And the same applies to the other issues. If there is a good reason to change, if it wouldn't hurt the other party, if it would do justice under the law of the case, you could do it.

What the -- I think the states are arguing is that -- or I should say what they are doing, I believe, is confusing the grounds for reopening with the standard to be used once reopened, it is determined that the decree should be opened. Justice -- Judge Tuttle found, and we agree that the mere fact there has been change in technology is no ground to reopen the decree. The mere fact that if we came into Court today and more acreage would be irrigable because of advanced technology is not a ground to reopen. It is only if we did not get a fair

hearing at that time under those standards that were applied, but Judge Tuttle found that was ground for reopening.

But he said, now, having found grounds for reopening, he said, then it only makes sense to apply today's technology, because it would just complicate the case to go back and look at the technology in 1956 to '58. Furthermore, the states never asked him to do so. The states put on no evidence as to the difference in technology between '60, 1960 and 1980, and they didn't ask the Master to make any findings about it, and they took no exceptions to it.

That issue should be out of the case. The only thing the states did was ask the Master to determine the technology at the time the reservations were created. That's way back in 1865 or 1870. The Master did reject that out of hand, but they never requested him to take into account the difference in technology between 1960 and 1980.

The states suggest that there would be no injustice to the tribes because this Court approved of the Special Master's holding, Special Master Rifkind's holding that the acreage he found was reasonable. But what this Court held was that "The various acreages of irrigable land which the Master found to be on the

different reservations we find to be reasonable." Now, the states suggest that what he is talking about is a determination that the number of acres found was reasonable.

We suggest what the Court -- the Court had just previously said two sentences above, that the tribes were entitled to all the practicably irrigable acres on the reservation, and therefore that couldn't be what it intended, it must have intended merely to approve of the determination of irrigability of the acres that the Special Master awarded.

With respect to the timing of our motion and the state's claimed reliance, our motions were filed in 1977 and '78, 13 and 14 years after the decree, before there was any substantial certainty with respect to the present perfected rights. Remember, the tribes were awarded 905,000 acre feet in the original case, less than one-seventh of the 7,500,000 acres awarded to the Lower Basin. But it wasn't until 1979 that over three-quarters of the present perfected rights were determined.

Now, present perfected rights have priority over all other rights, including the Central Arizona Project and the Metropolitan Water District, yet it wasn't until after the tribes' motions were filed that

over three-quarters of the rights, of the present perfected rights were determined. How, therefore, could Central Arizona Project and MWD find -- place great reliance on the Indian allocation of '64?

Second, there was huge uncertainty with respect to the amount of water in the Colorado River. Even today the state of Arizona claims that there is an assured supply of water of 550,000 acres. They claim that there was 356,000 when they tried to get the Central Arizona Project going. In other words, Arizona told the Congress when they got the Central Arizona Project authorized that there was far less water than they now feel is available today. This is largely due to the fact that the Upper Basin states have not used the water as fast as was anticipated.

Third, the states knew that the boundary disputes had not been determined, and that the tribes, if they won the boundary disputes, would be entitled to more water, so there was uncertainty with respect to even the additional Indian claims.

The Metropolitan Water District claims reliance, arguing that after the '64 decree, they went to their own water project and asked for additional water to take the place of the water they lost to Arizona, but they did not ask for any additional water

for the water they lost to the Indians. They lost 550,000 acres feet to Arizona, and they lost 55,000 acre feet to the Indians, but they didn't ask their own California Water Project for that -- to make up for the 55,000.

Now, today, in this case we are only asking for 16,000 additional acre feet for the Indians, or less than one-third of the 55,000. Metropolitan Water District's excuse for not asking for the original 55,000 was that it was such a relatively minor amount, it was unnecessary. Well, we suggest if they didn't bother to go after 55,000 acres and supplement it, is it reasonable to believe that they would think 16,000 was such an enormous amount that it would change their position?

Furthermore, the Metropolitan Water District right now is using 1.3 million acre feet. The 16,000 acre feet we are claiming is just a fraction more than 1 percent of their water, well within the range of estimating accuracy, the closest to which they claim they can estimate in the river is 10 percent.

Finally, what the states are really complaining about is injury or impact rather than detrimental reliance, but even the injury they claim is not to the extent to which it is claimed. Take Arizona,

for example. The testimony of Wes Stryner, the director of the Land and Water Resources Department of the State of Arizona, said that the per capita use of water in Phoenix is over twice what it is in the city of Tucson, and the reason it is over twice as much is because of the watering of lawns, trees, and ornamental shrubs, and that if the people in Phoenix would reduce their water rate to be equivalent to Tucson, there would be more than enough water to satisfy all the additional land claims.

So, what does it come down to? Do the Indians get the water for agriculture on the reservation, or do the people of Phoenix get it for ornamental shrubs, if you want to talk about equities.

Alternative intervention, for just a minute. I think that Maryland versus Louisiana is directly on point. I can't see any difference. In that case, 17 pipeline companies intervened in the case of 30 cases -- 30 states against another state and the United States against another state, the exact fact situation we've got here, except it's more stay.

QUESTION: You don't have to rely, then, on 1362.

MR. ASCHENBRENNER: No, Your Honor.

If there are no questions, I am going to say

thank you, Your Honor.

CHIEF JUSTICE BURGER: Very well.

Mr. Claiborne?

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. CLAIBORNE: Mr. Chief Justice, and may it please the Court, before turning to the boundary lines, it might be useful to say one or two words in addition to what has been said by Mr. Aschenbrenner about the omitted lands question.

I would ask the Court to recognize that Article IX of the decree in this case is specific in allowing amendment and modification. The word "modification" when the provision was referred to was omitted by the State Parties. It is that word on which we rely.

Now, that term, "modification," is not the common standard provision in the original decrees of this Court. It is, on the contrary, a special form of words which is common to water decrees, including the water decrees of this Court in interstate cases, such as Wisconsin versus Illinois and New Jersey versus New York, cited by the Special Master.

In the ordinary original case in which this Court retains jurisdiction, such as the off-shore cases,

beginning with the Louisiana and Texas cases, the order retaining jurisdiction is far more restrictive. In those cases, for instance, it read, "Jurisdiction is reserved by this Court to enter such further orders and to issue such further writs as may from time to time be deemed advisable or necessary to give full force and effect to this decree," not to bury this decree, not to modify this decree.

QUESTION: Do you think, Mr. Claiborne, that that language would normally be used to aid the parties in the event of some substantial change in the supply of water in the river, or something of that kind?

MR. CLAIBORNE: Justice O'Connor, that --

QUESTION: Rather than to reopen it for issues which were litigated by the parties at the time of the original decree?

MR. CLAIBORNE: Justice O'Connor, certainly such provisions do typically address the question of changed circumstances, and for that reason they are appropriate in order decrees where predictability is not always as certain as it might be, but it also authorizes here the correction we suggest of mistakes and omissions, at least if they can be shown to be of sufficient magnitude to justify the exercise of the Court's discretion.

For the moment, I am only speaking of the power which the Court retained to reopen. Whether the Court as a matter of discretion ought to exercise that power is a different question.

I want to say one more thing about Article IX. It was not an inadvertent provision that was slipped in at the last moment without anyone's noticing. It was a provision written by the Special Master himself in his draft decree in May of 1960, this same Special Master who had held the United States to making all its claims, and who had indicated a reluctance to be ready to reopen, but perhaps not too surprisingly, although the Special Master pushed the government attorneys as far as he could to making their full claim, warned them that reopening was a closed door; nevertheless, when coming to writing his decree, perhaps thought to himself, I must, notwithstanding having pressed the government to making its full claim, allow for the event that I or they had made an error which justice requires to be corrected at some later date.

It will, of course, be in the lap of the Court to determine whether that application will fail or not, but I ought not wholly close the door.

That provision written by the Special Master

in May of 1960, circulated to the parties. Briefs were written commenting upon the decree, commenting upon the report. Oral hearings were held in New York for three days before the Special Master, before he finalized his report and recommended decrees. In none of those proceedings was any suggestion made that Article IX ought to be narrowed, specifically, narrowed so as to prevent a reopening of the Indian allocations. No word of that in any of these briefs, in any of these hearings.

The matter this Master adhered to his recommended decree in this respect. Article IX remained unchanged, and that report was submitted to this Court. This Court received the report in December of 1960, and did not decide the case until June of 1963. In the interval, there were hundreds of pages of briefs. There were two lengthy oral arguments in this Court, and during all of that time, no party suggested that Article IX had been drawn too widely, too broadly.

On the contrary, the only party to speak to Article IX was the Imperial Irrigation District, insisting upon it as the way of preventing any claim of res judicata should a mistake have occurred and correction be appropriate.

At all events, the Court issued its opinion in

June of 1963, and then allowed the parties further time in which to prepare a decree modifying that which the Master had suggested in light of the Court's opinion. That, of course, resulted in further briefing. One of the provisions that was submitted to this Court as an agreed provision of the decree was Article IX, and as I say, no one during this further period once again suggested any narrowing of that provision.

In that light, it seems to us we are entitled to read Article IX to mean what it says, and it does say that a modification may be made. Now, we don't suggest that the Court was inviting the parties to rehear the legal principles on which the case had been decided. We do suggest that the Court indicated its willingness to entertain an application for a factual error that had been made in the case.

Let me say one other thing about the omitted lands claim. The fear has been expressed that if --

QUESTION: Mr. Claiborne, suppose the case, the issue is reopened, as you suggest it should be, and suppose that there is a later case that indicates rather clearly that the standard used by the Court and by the Special Master in this '64 decree has now been changed, or that it should no longer be applied. Why wouldn't you say that the new legal standard would apply? I am

not saying there is one, but suppose there was?

MR. CLAIBORNE: Justice White, I make two answers, or perhaps three. First, the Court has retained power to do precisely as suggested. It would be most unusual for the Court to invite a -- what is in effect a rehearing of the legal standard on which the Court decided the case in the first instance.

QUESTION: Any stranger than inviting relitigation of the very issue that was litigated in the first place?

MR. CLAIBORNE: I think so, Justice White.

QUESTION: Well, you must. That's right.

MR. CLAIBORNE: I should have said parenthetically that I do not concede that there is presently from this Court any different standard with respect to the measurement of water properly allocated to Indian reservations. On the contrary, as late as 1979, this Court in effect in its decree reaffirmed the continuing application of the practically irrigable standard. The Court entered a decree which specified water rights on that basis, and it expressly provided that with respect to any boundaries that were finally determined, allocations of water should be based on precisely the same formula.

Therefore, the Court itself has reaffirmed the

application of that standard in this case as recently as three years ago.

Let me say with respect to the fear that if the case is reopened now for this purpose, other applications may be made to the Court at some future date with respect to other matters or indeed on behalf of the tribes for still more water, with respect to the last, I would say that for our part we would not have the courage to come before the Court to apply again. At that time, latches reliance would indeed be an effective bar against our application, but finally, the Court is free, and we invite it to do so, to specify in its decree at the end of this case a different Article IX, a modification of Article IX which closes the door.

The Court is perfectly free to say, we will no longer entertain a modification after this case is finalliy closed.

QUESTION: I suppose we are equally free to construe the existing Article IX to prevent the sort of reopening which the government has tried to make here.

MR. CLAIBORNE: Justice Rehnquist, I cannot say the Court is not free. I must say that to so construe Article IX would be to strain its words.

QUESTION: Certainly not to strain the doctrine of law of the case.

MR. CLAIBORNE: If I may turn to the question of boundaries, I should say first that the boundary adjustments in this case would entitle the tribes with respect to the acreage which had been restored to their reservations to a total of about 127,000 acre feet of diversions from the --

QUESTION: Why do you call it restored? Do you say that it was perfectly clear at the time the Special Master determined boundaries that he correctly determined them, but that the United States has now just enlarged the boundaries, or what?

MR. CLAIBORNE: Mr. Justice White, no. We say that the Secretary and some Supreme Court judgments have determined what the original boundaries were.

QUESTION: Well, that isn't restoring.

MR. CLAIBORNE: Restoring in the factual sense that these areas had been deprived of reservation status in the interim, and now they have been restored to their reservation status --

QUESTION: Well, how were they -- how were they deprived of reservation status in the interim?

MR. CLAIBORNE: Most importantly, by being deprived of allocation of water.

QUESTION: Well, had the Department of Interior treated these lands as being outside the

reservation?

MR. CLAIBORNE: The Department of the Interior had been ambiguous about the status of these boundary lands, and so Master Rifkind found. Indeed, his disallowance of the boundary claims which were advanced by the lawyers in litigation on behalf of the Department of Justice was in part premised on the fact that the Interior Department had been ambivalent in its characterization of the contested lands, and he found no final or formal or clear ruling from the Land Department as to these areas being included within the reservation, and accordingly, thought himself free to decide the matter for himself.

QUESTION: Well, if there was ambivalence, the latest position of the Interior Department doesn't remove it. It just -- it just exacerbates it, doesn't it?

MR. CLAIBORNE: Justice White, no, the --

QUESTION: Well, it is just the only -- the latest step. It is an ambivalence position.

MR. CLAIBORNE: The problem before was that there were solicitor's opinions looking one way, and there were other administrative actions looking the other way. This Court from its study of disestablishment cases is familiar enough with the

ambiguities that can arise from maps which show one thing and rulings which show another, and sometimes inconsistent rulings.

Now, at the highest level, the Department of the Interior, after full consideration, has formally, finally, and unambiguously determined what the true boundaries of each of these reservations is. Nothing ambivalent about the present status.

QUESTION: Well, unless it changes its mind in the next Administration.

MR. CLAIBORNE: We have no reason to anticipate such a change, Justice White.

QUESTION: Mr. Claiborne, has it been finally resolved as to the Fort Mojave Reservation as well?

MR. CLAIBORNE: It has, Justice O'Connor.

Now, no one questions that this function of determining, of defining the boundaries of an Indian Reservation is one peculiarly left to the Department of the Interior, that department which has a special responsibility with respect to the public lands of the United States, and also a special responsibility with respect to Indian affairs.

At least those formal administratively final decisions of the Department of the Interior are entitled to a presumption of correctness, and they must be given

effect until and unless the court with jurisdiction sets them aside, or until and unless they are administratively set aside, which is an occurrence not to be anticipated.

For all other purposes, these boundaries have been treated as final and fixed.

QUESTION: Mr. Claiborne, can I just interrupt on this? You say they are presumptively correct, but as I understand your opponents, they argue they had no opportunity -- they are treated as though they were conclusively correct.

MR. CLAIBORNE: Justice Stevens, I say at least they are presumptively correct.

QUESTION: But that doesn't win the case for you. Isn't it your position they are conclusively correct for the purpose of the case?

MR. CLAIBORNE: We don't have to, Justice Stevens, I think, take the position that they are not subject to challenge in the judicial proceeding elsewhere.

QUESTION: But they are not subject to challenge --

MR. CLAIBORNE: For the time being, they are presumptively correct and must be given effect for that because administrative decisions in the absence of a

vacation by a court are entitled to --

QUESTION: But in this proceeding, for the purposes of determining the respective water rights, are they not immune from challenge under the Master's decree, and your opponents were not given an opportunity to challenge? Or do I misread the report?

MR. CLAIBORNE: We do say, Justice Stevens, that in this proceeding, in this Court, in light of the Court's own ruling in 1973, there is no occasion to review these decisions. That does not mean that the State Parties will in other forums be deprived of an opportunity to challenge.

QUESTION: Well, Mr. Claiborne, what is your -- the United States' position in these other forums? Are you taking the position that the Secretary's proceedings are open to review, or are you moving to dismiss for want of jurisdiction, or on sovereign immunity grounds?

MR. CLAIBORNE: Justice White, as was correctly stated, I think, by Mr. Boronkay, the United States has in the proceeding filed in the Southern District of California submitted a motion to dismiss alleging --

QUESTION: So you are saying -- your position is that these determinations are not subject to review

anywhere, here or in another forum.

MR. CLAIBORNE: I hope I do not have to -- I disown the motion to dismiss which has been filed by the United States in the district court. Whether that -- all of those defenses or some of them will prevail in that court is something which --

QUESTION: Well, suppose they had prevailed. Would you still take the same position here?

MR. CLAIBORNE: Yes, we would. And -- we would, assuming that that decision had survived appeal or had not been appealed, and had had sustained our motion to dismiss, we would rest on the correctness of that ruling, and there is much law to the effect that --

QUESTION: But the United States is in this Court litigating. It is not -- So it is subject to being -- having its case decided here. You can't get out of this case with a sovereign immunity claim.

MR. CLAIBORNE: I appreciate that. I appreciate that that is so, though we invite the Court to follow the indications of its prior decision with respect to these boundary questions, remembering this. Were it not for the decree of this Court in 1964, water would presently be allocated to these boundary lands because there are final determinations administratively as to these boundaries, and because those lands have

been determined to be irrigable.

This Court enjoined the Secretary from granting water to such lands until either there was an agreement of the parties or this Court itself entered a further decree. What this Court did not suggest, indeed, suggested to the contrary, was that this Court would also review these administrative boundary determinations. On the contrary, as the Court well knows, at its previous hearing, the Court determined that the Special Master had wrongly in its name sought to determine the boundaries. The Court said that that matter would not be decided here, and even suggested that the Secretary was free to allocate water in the interim.

The decree for some reason was inconsistent with the opinion in this respect, and on the contrary, instructed the Secretary not to deliver water to these contested boundary areas until they had been finally determined, in which event an application must be made to this Court to obtain water for such irrigable acreage as was found there.

That is why we came to this Court, in obedience to the 1964 decree. We came late, in part because we wished to only come once. We waited until all the boundary determinations had been finalized, and

indeed, as the Court knows, in one case the finalization occurred the day before we filed our motion. We did not delay once we had in hand the final decisions of the Secretary.

Certainly the Court did not suggest on the last occasion that the United States must go out and get judicial vindication of secretarial orders. That would indeed be most unusual. Those orders are final. This Court has indicated that it need not review them, and for good reason. This Court is not normally charged in original cases with reviewing administrative findings of this kind.

If there are appropriate proceedings which can be had in some other court, and if a challenge in some other court should disallow any of these boundary adjustments, no harm will be done if in the meantime the water is allocated. The recommended decree provides that in the event that any boundary determination is upset judicially, the allocation made to that extent shall be diminished. The formula is clear. There will be no need to reapply to this Court.

Now that the matter is before the Court, we urge the Court not to be sidetracked by a suit belatedly filed after the close of the evidence before the Master in the Southern District of California, but to take this

opportunity to at long last allocate the water that has for many years properly been attributable to the boundary lands of these tribes.

The Court ought not be asked to postpone its rulings, and the tribes ought not be asked to postpone their entitlement to this boundary land any further.

With the exceptions which are not controversial filed by the United States, we urge the Court to approve in all respects the recommendations of the Special Master.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:33 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

STATE OF ARIZONA, Plaintiff v. STATE OF CALIFORNIA ET AL No. 8 Orig.

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and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY _____

(REPORTER)