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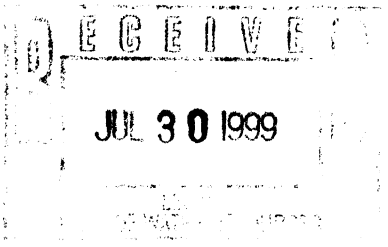
July 28, 1999



To: See Attached Service List

Re: Arizona v. California, No. 8, Original

Dear Counsel:

Enclosed please find Report and Recommendation and Appendix regarding the above captioned matter.

Sincerely,

Frank J. McGarr

FJM/mg
Enc.

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UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

State of Arizona,	)	
	)	
Plaintiff,	)	
v.	)	No. 8 Original
	)	
State of California, et al.,	)	
	)	
Defendant.	)	

REPORT AND RECOMMENDATION

I. Introduction

On October 10, 1989, the United States Supreme Court granted the motion of the States of Arizona and California to reopen the decree in *Arizona v. California, No. 8 Original* to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations, 493 US 886 (1989).

I was appointed as Special Master to hear the parties and to make recommendations to the Court. Since that time, the matter has been the subject of a series of pleadings, hearings and rulings leading up to a determination of disputed boundary issues.

Prior to the completion of the case by hearings on the allocation of water rights flowing from the earlier decisions, extensive negotiations on water rights resulted in a Settlement Agreement submitted for review by the Special Master with a motion seeking a recommendation of approval to the Supreme Court.

There are two motions to approve settlement agreements, together with memoranda in support thereof, and the Agreement and proposed decree to effectuate it.

The first is the joint motion relating to the Fort Mojave Reservation. The second is a similar motion, memorandum, agreement and proposed decree which resolves the issues concerning the Colorado River Reservation.

This case arises out of the historic Colorado River decision in *Arizona v. California*, 373 U.S. 546 (1963) (hereafter "*Arizona I*") and its aftermath, *Arizona v. California*, 460 U. S. 605 (1983) (hereafter "*Arizona II*"). It was initiated in 1989 by the States of California and Arizona, The Metropolitan Water District of Southern California, and the Coachella Valley Water District ("State Parties") to obtain a final determination of two Indian reservation boundary disputes left unresolved in *Arizona I* (Fort Mojave and Colorado River) and one which was presented but not resolved in *Arizona II* (Fort Yuma (Quechan), so that the reservations' water rights could be finally established in order to facilitate critical water planning in the lower Colorado River Basin.

In *Arizona I*, five Indian reservations along the lower Colorado River (Fort Mojave, Colorado River, Chemehuevi, Cocopah and Fort Yuma) were awarded water rights necessary to satisfy "the future as well as the present needs of the Indian Reservations" in accordance with *Winters v. United States*, 207 U.S. 564 (1908). *Arizona I* at 600. The Indians' needs were measured by the amount of "practicably irrigable acreage" on each reservation multiplied by a unit diversion duty for such acreage. *Id.* at 600-01.

California had contested whether certain lands for which *Winters* rights were sought by the United States for the Colorado River and Fort Mojave reservations were actually within their boundaries. The Fort Mojave and Colorado River boundary issues were tried before Special Master Rifkind, who generally rejected the United States' boundary claims, adopted the California positions, and recommended water allocations for those reservations based upon

his boundary determinations. This Court, in otherwise adopting the recommendations of the Special Master with respect to the United States' Indian claims, found it "unnecessary to resolve those [boundary] disputes," *Id.* At 601, and its 1964 Decree provided for "appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U.S. at 344.

In 1969 and 1974, the Secretary of the Interior issued orders determining the boundaries of the Colorado River and Fort Mojave reservations, respectively. In 1978, the Secretary also issued an order determining the Fort Yuma (Quechan) Reservation boundary.

In 1978, the United States filed a petition to reopen *Arizona I* and , *inter alia*, allocate additional water rights to the three reservations for the practicably irrigable acreage within the disputed boundary areas. The Special Master appointed to hear those claims, Elbert P. Tuttle, declined to consider the merits of the Secretary's orders, concluding that they constituted "final determinations" of the boundaries within the meaning of the 1964 Decree. *Arizona II* at 634-35. He conducted a trial solely on the issue of the practicable irritability of the added lands and recommended an award to the three tribes of an additional 104,000 acre-feet of diversions annually. Metropolitan and Coachella thereupon sought resolution of the three boundary disputes in the United States District Court for the Southern District of California.

This Court subsequently rejected Special Master Tuttle's recommendations and directed the State Parties to pursue the district court action, *Arizona II* at 636, 638, which they did. After the district court voided the Secretary's 1974 Fort Mojave boundary determination and held that a *de novo* trial as to the proper boundary was appropriate, *Metropolitan Water District of Southern California v. United States*, 628 F. Supp. 1018 (S.D. Cal 1986), the Ninth Circuit granted the United States and the Fort Mojave Tribe an interlocutory appeal and held

that the waiver of sovereign immunity in the Quiet Title Act, 28 U.S.C. § 2409a, did not authorize the State Parties' action and ordered the district court to dismiss the case for lack of jurisdiction. *Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987). This Court granted *certiorari* and the Ninth Circuit's decision was affirmed by an equally divided Court *sub nom California v. United States*, 490 U. S. 920 (1989).

On July 19, 1989, the State Parties moved the Court to reopen the 1964 Decree:

> "[in] order to finally determine (1) the disputed boundaries of the Fort Mojave and Colorado River Indian Reservations which were left unresolved in *Arizona I* and (2) the amount and priority of the water rights for those reservations as a result of such determinations."
>
> "The State Parties also request the Court (1) to determine whether the United States' claim for additional water for the Fort Yuma Indian Reservation resulting from a 1978 redetermination of the boundary of that reservation and asserted in *Arizona v. California*, 460 U. S. 605 (1983) ("*Arizona II*"), is precluded by the doctrine of *res judicata* and (2) if not, to determine the proper boundary of that reservation and the amount and priority of additional water rights, if any, to which the reservation may be entitled. Such determinations are necessary in order to finally establish the water entitlements of the three reservations and to remove the clouds on the entitlements of non-Indian users on the Lower Colorado River caused by the United States' claims."

The United States and the Tribes did not oppose the State Parties' motion and the Court granted it on October 10, 1989. 493 U.S. 886 (1989).

On November 17, 1989, Robert B . McKay, Professor Emeritus at New York University School of Law, was appointed Special Master to conduct the reopened proceedings. 493 U.S. 970. Following his death in 1990, the undersigned was appointed to succeed him on November 13, 1990. 498 U. S. 964. Since that time, the matter has been the subject of a

series of pleadings, hearings and rulings leading up to a determination of disputed boundary issues. The central issue in the case was decided in Order No. 14 dated September 20, 1993, which held that the western boundary of the Colorado River Indian Reservation was a riparian boundary.

The proceedings before the Special Master have resulted in twenty-two substantive memorandum opinions and/or procedural orders, which are summarized in Appendix 1 to this Report. The texts of all of them, as well as the transcript of various meetings and the trial of the Colorado River Indian Reservation boundary dispute, are included in the record of these proceedings which accompany this Report.

At an initial meeting with the parties on February 26, 1991, the Special Master was informed that they had agreed in principle to settlement of the Fort Mojave boundary dispute. It was also agreed that certain preliminary issues should be resolved before addressing the merits of the boundary disputes on the Colorado River and Fort Yuma (Quechan) Indian reservations, including whether the United States and the Quechan Tribe were precluded from asserting their claims.

II. The Fort Yuma (Quechan) Indian Reservation Dispute

This dispute involves approximately 25,000 acres of land in the vicinity of the Fort Yuma (Quechan) Indian Reservation in California and Arizona, and the question of whether these disputed boundary lands are part of that reservation and therefore entitled to a consequent increase in the water rights allocated to the reservation by the 1964 Decree in *Arizona I*. No claim had been made for those lands by the United States in *Arizona I* because there was a 1936 Interior Department Solicitor's Opinion (the "Margold Opinion") to the effect that the disputed lands were not part of the reservation. Apparently, the Margold Opinion was

considered a controlling determination by the United States that the disputed lands were not part of the reservation. The Margold Opinion was affirmed by subsequent Solicitors in 1968 and 1977. Later in 1977, Secretary of the Interior Andrus directed his Solicitor to review the issue once again. On December 29, 1978, Solicitor Krulitz issued an opinion concluding that an 1893 Agreement between the United States and the Quechan Tribe purporting to cede certain tribal lands to the United States was invalid because the United States had not honored a number of conditions in the Agreement. Secretary Andrus then issued an order approving the Krulitz Opinion and including the disputed boundary lands within the Reservation.

In *Arizona II*, Special Master Tuttle had proposed an additional allocation of 78,519 AF of diversions for the disputed boundary lands, which, as noted above, the Court rejected on the grounds that the boundary had not been "finally determined" within the meaning of the 1964 Decree. The United States and the Quechan Tribe were prepared to make the same claim in these proceedings, but the State Parties objected that they were precluded from doing so by having failed to assert their claim in *Arizona I* and, alternatively, by virtue of a final judgment by the Court of Claims in 1983 approving a settlement awarding the Tribe $15 million in a suit filed against the United States in 1951 for the alleged taking of the disputed boundary lands pursuant to the 1893 Agreement. Following extensive briefing of this issue, I rendered Memorandum Opinion and Order No. 4 on September 6, 1991, which rejected the State Parties' first argument but accepted their second based on the 1983 Court of claims judgment. This holding precluded the Quechan Tribe from asserting their claims in this case. Motions by the United States and the Tribe for reconsideration of that decision were denied by Orders Nos. 5 and 7 of January 20, 1992 and May 15, 1992, respectively. A renewed motion by the

Tribe for reconsideration was denied by Order No. 13 of April 13, 1993. Those orders are set forth in Appendices 2 A-D to this Report.

III. The Fort Mojave Indian Reservation Dispute

The Fort Mojave Reservation dispute involved the question of the proper location of the western boundary of a portion of the Reservation in California known as the Hay and Wood Reserve. At issue were some 3350 acres of land with annual water requirements of approximately 12,087 acre feet. After extensive negotiations, the United States, the Fort Mojave Indian Tribe, the States of California and Arizona, The Metropolitan Water District of Southern California, and the Coachella Valley District entered into a Stipulation and Agreement and a supporting memorandum which are attached as Appendix 3.

The settlement (1) agrees on the location of the disputed boundary, (2) disclaims any intent to determine title to and jurisdiction over the bed of the last natural course of the Colorado River within the agreed upon boundaries and preserves the claims and arguments of California and Arizona, on the one hand, and the United States and the Fort Mojave Tribe, on the other, and (3) awards the Tribe the lesser of an additional 3,022 acre-feet of water diversions or enough water to supply the requirements of 468 acres, (4) precludes future claims by the United States or the Tribe for additional Colorado River water for existing trust or allotted lands within the Hay and Wood portion of the Reservation in California and (5) disclaims any intent to affect any claims to or jurisdiction over any lands.

IV. The Colorado River Indian Reservation Dispute

The Colorado River Reservation dispute involved claims for water rights related to certain lands affected by the proper location of a portion of the western boundary of the Reservation in California. Following denial of the California and Arizona motion for summary

judgment on the issue and subsequent trial of the dispute as to the boundary, I rendered a series of opinions on the location of the boundary. Those opinions concluded that the disputed boundary was a riparian boundary along the west bank of the Colorado River, not its mid-channel (Orders Nos. 14 and 16), and that it was not affected by California Civil Code 830 (Order No. 18).

The State of California, the United States, the Colorado River Indian Tribes, The Metropolitan Water District of Southern California and the Coachella Valley Water District subsequently entered into extensive negotiations and later executed a Stipulation and Agreement dated February 23, 1999, settling all water rights disputes associated with the disputed boundary, but, unlike the Fort Mojave settlement, did not resolve the boundary dispute itself. That Stipulation and Agreement and a supporting memorandum are attached as Appendix 4.

The settlement (1) awards the Tribes the lesser of an additional 2100 acre-feet of diversions or enough water to irrigate 315 acres of land, (2) precludes future claims by the Tribes and/or the United States on their behalf for any additional reserved water rights from the Colorado River for lands in California, (3) embodies an agreement not to seek adjudication in these proceedings of the correct location of the disputed boundary, (4) preserves the claims and arguments of California, on the one hand, and the United States and the Tribes, on the other, with regard to title to and jurisdiction over the bed of the Colorado River within the Reservation, (4) precludes reliance by any of the settlement parties on the Special Master's several opinions on the boundary issues in any future boundary litigation among the parties, and (5) provides that it shall only become effective upon the Special Master's unqualified recommendation to the Court for its approval, the court's unqualified approval of the Special

Master's Report in this regard, and the issuance of an appropriate decree reflecting approval of the Agreement.

The motion addressed herein seeks the Special Master's approval and recommendation to the Court of the settlement agreement regarding the Colorado River Indian Reservation dispute.

The achievement of this proposed settlement is to the credit of the parties and is the result of extensive negotiation. It resolves the water rights allocation issue which was at the heart of the dispute between the parties. It is a salutary result.

I point out, however, for the Court's consideration, that the original reference to me as a Special Master was to consider the State Parties' Motion to Reopen the Decree of October 10, 1989, "... To Determine Disputed Boundary Claims ..." and in my various opinions in the case, that is what I have done.

It is true that boundaries determine acreage and acreage determines water rights, and it can be cogently argued that a settlement of water rights claims and allocations without reference to boundaries is sufficient to close the case.

My concern that this settlement agreement leaves unresolved the boundary dispute specifically referred to the Special Master has been addressed by the parties at my request, in a joint response of the settlement parties in a letter dated April 22, 1999 which is appended hereto as Appendix 4. In that response the point is made that the instant boundary dispute, originally a vehicle for water rights determinations, cannot resurface in the future in the context of a tribal water rights claim, thus achieving the finality which the Supreme Court reference was intended to achieve.

It seems apparent that the inclusion of California in this settlement could not have been achieved without that states' reservation of the right to challenge the boundary location for other reasons, but the state holds no water rights which would thereby be adversely affected. The resolution of the water rights issue without determination of the Colorado River Indian Reservation boundary achieves a final result as to water rights, allowing California to continue to litigate the boundary issue only if it arises in some context other than water rights. This conclusion allays but does not totally satisfy the concerns of the special Master that the settlement does not fully address the issue referred to him.

This conclusion does not address that aspect of the Court's reference to a Special master intended to remove the clouds on the titles of non-Indian users, and that fact is the basis for anticipated objections to this settlement by West Bank Home Owners Association. But the Association is not a party to this litigation, its leave to intervene having been denied, and its objection therefore, is not within the purview of the settlement approval deliberations.

V. Recommendations

A. The Fort Yuma (Quechan) Dispute

As noted above, the Special Master has ruled that the United States and the Quechan Tribe are precluded from asserting a water rights claim for the disputed Quechan boundary lands, which obviated the need to address the merits of the boundary dispute. I recommend that the Court adopt that disposition of the controversy. Orders Nos. 4, 5, 7 and 13 are relevant to this decision and are fond in Appendix 2.

The United States and the Quechan Tribe have indicated their objections to this decision and their intent to file exceptions to that ruling.

B. The Fort Mojave Dispute

The achievement of these proposed settlements is to the credit of the parties and is the result of extensive negotiation. They resolve the water rights allocation issues which were at the heart of the disputes between the parties. It is a salutary result. The Fort Mojave settlement includes the boundary determination, and no boundary issue remains.

C. The Colorado River Dispute

The Supreme Court reference to me as a Special Master at the outset of this case was the result of the motion of the State Parties to reopen the 1964 Decree in order to finally determine the disputed boundaries of the Fort Mojave and Colorado Indian Reservations, which were left unresolved in *Arizona I* and to finally determine the amount and priority of the water rights for those reservations as a result of such determinations.

The United States and the Tribes did not oppose this motion and it was granted on October 10, 1989. 493 U.S. 886 (1989).

Extensive litigation before me followed and boundary determinations were made. In the Colorado River Indian Reservation settlement those rulings are expressly nullified as among the settling parties and the settlement is effectuated by agreed water rights allocation.

As a result, the instant boundary dispute, originally a vehicle for water rights determinations, cannot resurface in the future in the context of a tribal water rights claim, thus achieving the finality as to water rights which the Court's reference was seemingly intended to achieve.

That result, however, leaves open a long standing boundary dispute which affects rights other than water rights, and sets aside for redetermination at an unknown future date, the boundary determination made by the Special Master in this case.

Nonetheless, this decision finally determines boundary claims as to the Fort Yuma and Fort Mojave reservations. As to the Colorado River dispute, the agreement on water rights allocations is a major achievement as to the central issue of water rights and should not be abandoned because peripheral issues remain. These considerations weigh heavily in favor of acceptance and approval of the settlement presented here despite its failure to lay to rest the Colorado River Reservation boundary dispute.

The Special Master has reviewed the Fort Mojave and Colorado River settlement agreements and supporting memoranda, has concluded that their approval would equitably resolve the water rights disputes in the matter referred to me, and recommends that they be approved by the Court.

The effectuation of this settlement, both as to the Fort Mojave and Colorado River reservations, can be achieved by a supplemental decree which amends this Court's decree of March 9, 1964, and amends also the Court's supplemental decree of January 9, 1979. A proposed draft of such a supplemental decree is attached hereto as Appendix 6.

The motion to approve the settlements agreed to by the United States, the State of California, the State of Arizona, the Fort Mojave Indian Tribe, the Colorado River Indian Tribes, the Metropolitan Water District of Southern California and the Coachella Valley Water District is granted and approval of the agreement is recommended to the Supreme Court of the United States.

Dated: July 28, 1999

Frank J. McGarr
Special Master

UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

State of Arizona,	)	
	)	
Plaintiff,	)	
v.	)	No. 8 Original
	)	
State of California, et al.,	)	
	)	
Defendant.	)	

APPENDIX I
REPORT AND RECOMMENDATION

UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

State of Arizona,	)	
	)	
Plaintiff,	)	
v.	)	No. 8 Original
	)	
State of California, et al.,	)	
	)	
Defendant.	)	

APPENDIX I
SUMMARY OF OPINIONS

On October 10, 1989, the United States Supreme Court granted the motion of the States of Arizona and California to reopen the decree in *Arizona v. California, No. 8 Original* to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations, 493 US 886 (1989).

I was appointed as Special Master to hear the parties and to make recommendations to the Court. Since that time, the matter has been the subject of a series of pleadings, hearings and rulings leading up to a determination of disputed boundary issues, which Memorandum Opinions are included with this Report and Recommendation. The central issue in the case was decided in Order No. 14 dated September 20, 1993, which held that the western boundary of the Colorado River Indian Reservation was a riparian boundary.

I

The litigation of this matter before the Special Master has resulted in twenty-two Orders, some procedural and some accompanied by memoranda deciding substantive issues. The more significant substantive orders are summarized as follows.

Order No. 1: Dated June 1, 1991. Set the pre-trial issues to be heard and set a hearing date thereon. Subsequent orders dealt with deposition and document discovery matters.

Order No. 4: Dated September 6, 1991. Dealt with a variety of issues and held:

(1) The Quechan Tribe is not precluded from asserting water rights based on boundary land claims in this proceeding, despite the contention of the States that the Fort Yuma boundaries were earlier fixed and that the Quechan Tribe is barred by the doctrine of res judicata.

(2) However, the Quechan Tribe filed a suit in the U. S. Court of Claims and by way of settlement of that suit, ceded its boundary lands to the United States in exchange for Fifteen Million Dollars in 1983, and is thus precluded from reasserting that claim in this proceeding.

(3) The parties disagreed as to whether the Supreme Court, in instituting these proceedings before a Special Master to determine the Western boundary of the Colorado River Reservation, intended the resolution of the location of the entire disputed Western boundary of the Colorado River, or only a portion of that boundary. It is determined in Order No. 4 that the reference to the Special Master intended resolution of the entire boundary and the matter has proceeded on that basis.

Order No. 5: Dated January 20, 1992. Addresses the motion of the United States for reconsideration for Order No. 4, holding that its claim in this case has been earlier settled and cannot be reasserted. The motion for reconsideration was denied.

Order No. 7: Dated May 15, 1992. The Quechan Tribe joins the United States in a further motion for reconsideration of Order No. 4, which motion is denied.

Order No. 8: Dated September 21, 1992. The Colorado River Indian Tribes moved for joinder in the proceedings of all individuals and entities with claims to land in the area asserted by the Tribes to be part of the Colorado River Indian Reservation. The State Parties opposed the motion; the Motion to Join Additional Parties was denied.

Order No. 9: Dated November 4, 1992. The states of Arizona and California moved for a summary judgment to the effect that the Executive Order of May 15, 1896 established the west bank of the Colorado River, subject to erosion, accretion and avulsion, as a portion of the western boundary of the Colorado River Indian Reservation. The tribes and the United States opposed. The State Parties Motion for Summary Judgment was denied.

Order No. 11: Dated March 10, 1993. A proposed pretrial order approved by the parties, was approved by the Special Master.

Order No. 13: Dated April 13, 1993. The renewed motion of the Quechan Tribes for a second reconsideration of Order No. 4, excluding them as claimants in this case was denied.

Order No. 14: Dated September 20, 1993. A memorandum, after hearing, holding that the Executive Order of 1876 established the western boundary of the Colorado River Indian Reservation as a riparian boundary and not a fixed line. Therefore, the Executive Order of 1876 did not create additional water rights for the Tribes.

Order No. 15: Dated October 13, 1993, a procedural order setting a response time on the State Parties' Motion for Clarification . A subsequent opinion on a Motion for Clarification, dated November 10, 1993, was also mistakenly numbered Order No. 15

The Motion for Clarification raises the issue that the determination of the western boundary of the Colorado River Indian Reservation as a moving boundary does not resolve whether the boundary is the west bank of the river or the mid-channel line. The Opinion specifically holds that the Executive Order of 1876 meant the west bank, and this need not be clarified. The Opinion recognizes that no issue was presented or decided as to whether California's ownership of the west half of the river prior to the Executive Order of 1876 supports the conclusion that the Executive Order conveyed more than it had the right to convey, with the consequence that despite its language, it conveyed to the mid-channel line as a matter of law. This issue was deferred for further briefing and hearing, preferably in conjunction with the determination by the Master of the issue of the extent of practicably irrigatable acreage, and was subsequently addressed in Order No. 18..

Order No. 16: Dated March 20, 1995. This order addresses the motion of the State Parties for summary judgment, holding that the legal effect of the Executive Order of May 15, 1876 was to establish the mid-channel of the Colorado River as the western boundary of the disputed portion of the Colorado River Indian Reservation. This contention is based on the argument that although the 1876 Executive Order has been held to establish the west bank as a boundary, the Executive Order was legally enabled to convey to the mid-channel only because of California's prior rights of ownership.

The second of the State Parties' motions for summary judgment flows from the first. The State Parties argue that the Reservation's practicably irrigatable acreage should be

reduced by the amount of riverbed acres owned by Arizona and California as a result of the mid-channel boundary determination described above.

In an extended discussion and opinion on these motions, the State Parties Motion for Summary Judgment on the claimed mid-channel location of the Reservation boundary is denied, and as a consequence of this ruling, the State Parties' motion for a summary adjustment of water rights flowing from their mid-channel claim is also denied.

Order No. 17: Dated March 29, 1995. The West Bank Homeowner's Association filed a Motion for Leave to Intervene, which in a Memorandum Opinion was denied. This ruling was followed by an Order of the Supreme Court, dated April 24, 1995, denying the West Bank Homeowner's Association's Motion for Leave to Intervene.

Order No. 18: Dated September 28, 1995. The Colorado River Indian Tribes, joined by the United States moved for a summary judgment holding that as a consequence of a California statute enacted in 1872 (CCC-830), granting the land between the high and low watermarks on the west side of the river, the 1876 Executive Order divested the lands above the high water mark of their riparian character, and as a consequence , despite the express intent of the 1876 Executive Order to create a riparian boundary, it actually created a fixed boundary along the ordinary high watermark as it existed in 1876.

The State Parties filed a cross motion for summary judgment seeking a ruling that the California statute had no application to the dispute before the Special Master.

In a Memorandum Opinion and Order, the Motion for Summary Judgment of the Tribes and the United States was denied and the Cross Motion for Summary judgment of the State Parties was granted.

Order No. 19: Dated January 18, 1990. The issue of riparian versus fixed boundary was relitigated in the context of cross summary judgment motions. The ruling was, once again, that the 1876 Executive Order of President Grant intended to and achieved the establishment of a riparian boundary, not a fixed boundary. Once again, the Tribes and the United States' Motion for Summary Judgment was denied and the cross motion of the State Parties was granted.

Order No. 20: Dated April 3, 1996. The motion of the State of California for two modifications of Order No. 19 is denied.

II

In sum, the consequence of the various orders and opinions reviewed above is as follows:

A. It has been held that the Quechan Tribe of the Fort Yuma Reservation is precluded from asserting an additional water rights claim in *Arizona v. California* for certain disputed boundary lands because of a final claims court judgment of August 9, 1983, in Indian Claims Commission, Docket No. 320. (Memorandum Opinion No. 4, dated September 6, 1991). This issue having been finally resolved in the proceeding before the Special Master is referred to the United States Supreme Court with a recommendation that the Court adopt this determination.

B. The western boundary of the Colorado River Indian Reservation is a riparian boundary.

C. A California statute enacted in 1872 (CCC-830) does not alter the conclusion stated in (B) above.

The issue currently awaiting determination is the Special Master's ruling on the motions of the parties seeking the Special Master's approval and recommendation to the Court of the settlement agreement.

I call attention to the fact that the Quechan Indian Tribe has been precluded from seeking a final determination of the boundary of the fort Yuma Reservation. Orders Nos. 4, 5, 7 and 13 are relevant to that decision, and counsel for the tribe has indicated his intention to object to that portion of this report.

Dated: _____, 1999

_____

Frank J. McGarr
Special Master

UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

STATE OF ARIZONA Plaintiff, v. STATE OF CALIFORNIA, et al., Defendant.	)	No. 8 ORIGINAL

MEMORANDUM OPINION AND ORDER NO. 4

This case pends as the result of an order of the Supreme Court of the United States reopening an earlier decree and appointing a Special Master to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Reservations.

It has been determined that the disposition of certain preliminary issues will facilitate the conduct of discovery and the preparation for hearing of the boundary determination issues.

Several preliminary issues have been identified and briefed by the parties, and the consideration of and disposition of these issues is the purpose of this memorandum.

I

The first question is whether the United States and the Quechan Tribe are precluded from asserting a claim for water for certain lands added to the Fort Yuma Reservation as a result of the Secretary of the Interior's order of December 20, 1978. The

legal basis for the preclusion would be the doctrine of res adjudicata.

The Fort Yuma dispute involves approximately 25,000 acres of land in the vicinity of Fort Yuma in California, and the question is whether these disputed boundary lands are part of the Fort Yuma reservation, with a consequent increase in water rights allocated to Fort Yuma by the 1964 Decree in Arizona I. At the time of the Arizona I controversy, there was extant a 1936 Interior Department Solicitor opinion (The Margold Opinion) to the effect that the disputed lands were not part of the reservation.

The United States made no claim to these lands in Arizona I, apparently because the Margold Opinion was considered controlling, and the Margold holding was affirmed by the Interior Department on two subsequent occasions in 1963 and 1977.

Later in 1977 a newly appointed Solicitor Krulitz issued an opinion overruling the three earlier Solicitor opinions and the Secretary of Interior issued an order revising the boundary of the Fort Yuma Reservation to include the disputed lands. These actions of the Solicitor and the Secretary were sua sponte; without notice to affected parties and without hearing.

Based upon this ruling, the United States filed a motion to reopen the decree in Arizona I to assert a claim for water rights based upon the newly formulated Fort Yuma boundaries, and claimed also a priority date for the water rights based upon the formerly

disputed lands, of January 9, 1884, the date of the Executive Order creating the reservation.

It is the position of the States that in the hearings before Special Master Rifkind in Arizona I, the United States (and all other parties) relied upon the Margold opinion, accepted without contest the pre Krulitz Fort Yuma boundaries, and within those boundaries claimed in addition to land being irrigated, the maximum possible "practically irrigable" lands, which claim was recognized in full by Master Rifkind and which determination was adopted by the Supreme Court in its 1964 decree.

In a attempt to fix then present perfected rights, Article II(d)(5) of the 1964 Decree required the parties to furnish a list of perfected rights within 2 years, but the State parties and the United States were unable to agree on such a list and the State parties submitted the matter to the Supreme Court for determination. Further negotiations resulted in an agreed upon Supplemental Decree issued by the Court in 1979. The States argue that while the Supreme Court in this Supplemental Decree expressly reserved boundary issues for future determination as to the other two reservations, there was no reservation of boundary issues for future determination as to Fort Yuma, since no issue of boundary dispute had been raised by the parties.

The current motion to reopen Arizona I to finally determine the disputed boundaries of the three reservations becomes the context for the States claim that Fort Yuma boundaries were

earlier fixed and that res adjudicata bars further consideration of this issue as to Fort Yuma.

The Quechan Tribe of the Fort Yuma Reservation disagrees and points to the provision of the 1979 Supplemental Decree providing for the adjustment of Water rights on all three reservations "in the event that the boundaries of the respective reservations are finally determined." This response does not dispose of the issue, but merely rephrases it. The Supplemental Decree can be construed as saying that boundaries of Fort Yuma having been finally determined and res adjudicata, water rights may be allowed only on those formerly adjudicated boundaries as to Fort Yuma and on boundaries yet to be resolved on the other two reservations.

The State parties cite Nevada v. United States, 463 U.S. 129 in support of their contention that res adjudicata applies to the Fort Yuma boundary issues here. This case cites the traditional principle of res adjudicata and applies it to a situation where, the United States, having litigated to a conclusion the recognition of water rights for an Indian Tribe, could not in later litigation seek rights inconsistent with those previously determined.

The case tells us merely that the time honored principle of res adjudicata applies to the United States in a case involving an Indian Tribe and water rights claims, and that despite the seemingly endless pendency of such cases, the importance of

achieving finality in judicial decisions is still a viable principle.

The States argue further that the finality rationale they seek to have applied here was relied on by the Supreme Court in an analogous situation in Arizona II. In 1978 the United States moved to modify the 1964 Decree in order to obtain additional water rights for certain omitted lands. The State parties argued that the issue had been determined finally by the 1964 Decree and that the later claim was precluded. The court ruled that the extent of irrigable acreage within the uncontested boundaries of the reservation was settled by the 1964 decree. If one accepts the States argument that the Fort Yuma boundaries were fixed and uncontested in the proceedings eventuating in the 1964 Decree in Arizona I, this case is much to the point.

It is a fact that the court in 1983 granted additional water rights to the Fort Mojave reservation for lands added thereto pursuant to the 1979 decree, but the States argue that the factual situation there was the basis for an exception to the rule of res adjudicata not present here, in that it was based on circumstances not known in 1964.

In this connection, it should be noted that in 1964, a circumstance unknown to the United States was the fact that the Secretary of the Interior decision (the Margold opinion) on which it relied would be reversed ex parte by a later appointed Secretary.

The United States, and the Quechan Tribe take the position that despite the fact that the U.S. as trustee for the Quechan Tribe (the Tribe was not a party) did not assert water rights claims for Fort Yuma boundary lands in 1960, the Tribe is not precluded from doing so now, for the reason that 1979 and 1984 Supreme Court decrees in the case provided that water rights therein fixed could be adjudicated in the future as reservation boundaries were finally determined.

As discussed earlier, this language relied upon by the Quechan Tribe does not dispose of the issue. While it clearly leaves for future determination adjustment of water rights as boundaries are determined, it has no application to the Fort Yuma boundary question if in fact the Fort Yuma boundary had been earlier fixed, which takes us back to the undisputed fact that in the 1964 determination, Fort Yuma made no boundary claims.

The United States made no water rights claims in the 1964 decree because the United States necessarily relied on the 1935 Secretary of the Interior opinion, the decree that all Fort Yuma boundary lands had been ceded by the Quechan Tribe to the United States, which action foreclosed such claims and thus foreclosed any possibility that the United States, as trustee for the Quechan Tribe, could assert water rights claims on behalf of the Tribe, based on claimed Fort Yuma boundary lands. It had no other option. But it is clear that the later Secretary of the Interior opinion arbitrarily changing this decision was a

circumstance not known in 1964, thus constituting an exception to the application of the rule of res adjudicata.

While, therefore, I agree with the conclusion of Master Tuttle that the 1964 Decree may be read to mean that future boundary determinations referred to, apply only to two reservations, and not to Fort Yuma, the overall and final determination of this aspect of this close question must be in favor of the Quechan Tribe, I hold that the Tribe is not precluded from asserting water rights based on boundary land claims on this proceeding, because although the U. S. on behalf of the Tribe failed to assert such claims in the proceeding leading to the 1964 decree, a later and then unknown circumstance bars the application of the doctrine of res judicata to this issue.

This leaves as the only bar to the Quechan Tribes boundary lands claims in this case, the question whether the settlement by the Tribe of its U.S. Court of Claims suit filed in 1951 and settled in 1983, ceded its boundary lands to the United States in exchange for 15 million dollars, with the final order in the case effective today despite the intervening 1978 action of the Secretary. The Quechan Tribe is not precluded from litigating its boundaries by any circumstance or argument raised by the State parties with the exception of this remaining contention that the Quechan Tribe lost its claim to title to the lands involved herein by the settlement its Court of Claims case, and did not regain ownership of those lands by virtue of the

Secretary's later reversal of the Margold opinion in 1978. The issue thus stated focuses upon the exact notice and terms of the settlement and what the 15 million paid to the Tribe brought in exchange. If it paid the Tribe for title in the U.S. of the lands in question, the Quechan Tribe has already settled the claims it asserts here. A full understanding of this settlement is vital to the determination of the impact it has on the standing of the Quechan Tribe to claim in this case.

We are led therefore to the issue raised by the parties as to the discoverability of the United States memorandum recommending the settlement in question.

Despite the natural inclination to view this memorandum as possibly helpful in understanding the scope of the settlement, the State cannot make the required showing of need and hardship, nor can it be argued that an attorney's mental impressions communicated to his client in any circumstances present here, be subject to compulsory disclosure.

The assertion of both attorney client privilege and work product protection is meritorious. The settlement agreement and the court order implementing it stand alone as the source from which the rights of the parties flow. The holding and effect of the Court of Claims decision on this case will be decided upon the public record, and the demand by the States for the United States memorandum recommending settlement is denied.

II

Turning to the Court of Claims record, Claims Court Docket No. 320, the petition therein of the Quechan Tribes of the Fort Yuma Reservation regarding its claimed title to certain lands, is based upon an Executive Order of President Chester A. Arthur dated January 9, 1894, grating to the Tribe a tract of land on the California side of the Colorado River, with later Executive Orders and governmental actions diminishing the land granted to the detriment of the Quechan Tribes and culminating in a 1893 Agreement with the Quechans, which the petitioner in the Claims Court now alleges was entirely nugatory. Further governmental actions additionally reduced Quechan lands. The case was ultimately settled for $15 million paid to the Tribe in 1983.

I assume for purposes of this Opinion that the Fort Yuma boundary lands being claimed by the Quechan Tribe in this litigation are within the lands subject to the Court of Claims case, docket No. 320.

In the stipulation for settlement of that matter, the Quechan Tribe in a settlement approved by the Tribal Council and presented to the court by its attorney of record, agreed that in exchange for a $15 million judgment the Tribe would ". . . be barred thereby from asserting any further rights, claims or demands against the defendant and any future action on the claims encompassed on docket no. 320 . . ."

The parties in the agreement ". . . waive all rights to appeal from or otherwise seek review of such final determination . . ."

If the boundary lands claim of the Quechan Tribe here are lands also the subject of and part of Court Claims Docket No. 320, and I assume that this is so, the above quoted language precludes the Quechan Tribe from water rights claims based on boundary lands claims in this case.

The ex parte action of the Secretary in 1978 cannot be viewed as any way dispositive of this issue. The final order of the Court of Claims addresses itself to all the claims of the Tribe then pending, presumably including the land in issue here, and is not affected, as a final judicial decision, by an earlier administrative order.

Therefore, it must be concluded that by virtue of the Court of Claims settlement and the money received by the Quechan Tribe as the result of that settlement, the Tribe is precluded from further boundary claims as to the Fort Yuma Reservation, and is thus precluded from asserting claims in this proceeding.

III

The question arises whether the Supreme Court, in instituting these proceedings, intended the final determination of the entire disputed western boundary of the Colorado River Reservation, or only that portion of the boundary dealt with in the Secretary of the Interior's Order of June 3, 1969. The

States seek a final determination of the entire western boundary. The United States and the Colorado River Indian Tribes argue that only the upper portion of the disputed western boundary is justiciable in this proceeding. They contend the lower one-third of the boundary cannot be litigated here because there has been no final determination of that portion of the western boundary by the Secretary. Some background is helpful in addressing this issue.

In Arizona I, Special Master Rifkind held a full evidentiary hearing on the entire boundary dispute. The California parties contended that the 1876 executive order established the river as the boundary, a boundary therefore which changed as the river did. The United States argued that the 1876 boundary remained fixed despite changes in the course of the river. This fundamental disagreement remains central to the dispute between the parties in this proceeding.

The Rifkind determination of this issue was found by the Supreme Court to have been unnecessary and the court reserved the issue for future determination, but accepted the water allocations based upon the boundary determination Master Rifkind made.

Later in 1969, the Secretary of the Interior issued an ex parte order which determined only the northerly two-thirds of the disputed western boundary. This is the fact underlying the position of the United States and the Tribes that under the resolution of water rights scheme envisioned by the Supreme

Court, the determination of water rights is based upon the final determination of boundaries and that the final determination by the Secretary of the northern portion of the boundary not only makes water rights thus affected justiciable, but is the limit of the jurisdiction of the Special Master.

The Tribes further argue that the upper portion of the boundary is unique in that the adjacent lands are in federal ownership whereas in the southern section private rights are involved. While that consideration may have motivated the Secretary in 1969, it is not necessarily controlling here. The determination of boundaries for the purpose of allocating water rights need not be considered as res adjudicata as to private title questions.

As earlier said, the central issue in this case is the determination of the principle to be applied to the application of the 1876 executive order, that is whether that order created a fixed boundary or a boundary that changed with the course of the river. The United States and the Tribes impliedly expect that the boundary decision could determine a fixed boundary as to one portion of the reservation and a shifting boundary as to another, as against the compelling logic that however the boundary dispute is resolved, that resolution should be uniformly applied.

Stated another way, once the principle of boundary determination embodied in the 1876 order is determined, consistency compels its application to the entire reservation, and that decision should be made now rather than later. The fact

that the meandering of the river will probably benefit one party or another as to one portion of the reservation, and be detrimental as to the other, cannot justify any expectation that a differing principle of determination could be applied to each section.

More compelling is the reading of what the Supreme Court intended in its reference in this case as it granted the State parties' motion to reopen the case. The court at that time had before it a history of lengthy litigation which had produced little by way of resolution of issues. Largely as a result of the court's piece-meal limitation of earlier Special Master's jurisdiction, there had been produced a situation which had not only failed to provide any simplification of the case, but had created a litigious marathon which promised to be interminable.

An examination of the pleadings supports the State parties contention that the court finally intended to resolve all boundary issues as a basis for the determination of all consequent water rights issues. The southwestern boundary of the reservation was not intended to be excluded from the reference. The court's reference to the Special Master is to determine the disputed boundaries of the Fort Mojave, Colorado River and Fort Yuma Indian Reservations. There is no exclusion, in fact, or by implication of any portion of the boundary involved. It is the determination of the Special Master that the entire boundary dispute has been referred, and his intention is to address and resolve the western boundary question, both north and south. It

should be emphasized that this boundary determination is to create a basis for the allocation of water rights to the claimants in this case. It is not intended to assert jurisdiction over persons not parties or to determine titles to land.

IV

The parties differ sharply as to the use of the evidentiary record developed in Arizona I. The States would have this court accept and rely on that earlier evidence, subject only to the right of all parties to supplement the record. The Tribes would like to see the issues before this Special Master determined on a fresh record. The United States takes no position on the issue.

The United States fully litigated the issues in Arizona I as trustee for the Tribes who intervened later. The argument of the Tribes that they cannot be bound by a record in a proceeding to which they were not a party is not persuasive. Their interests were fully and adequately represented, and when the Tribes later petitioned to intervene, they, like all intervenors, took the case and the record as they found it. To the extent that evidence was admitted by a prior Special Master, it is deemed properly admitted, although in any use in this proceeding of evidence from an earlier proceeding, objections to its admissibility may be raised and will be resolved.

Further discussion of this issue is not required in light of the determination made at the time this issue was discussed before the Special Master. As was said at that time, parties

wishing to rely on evidentiary matters in earlier records shall designate such portions of the record. The Special Master will hear and rule on objections to such designations before the final hearing in this matter. Because there were only three witnesses in Arizona I, this problem will seemingly relate largely to documents. This latter circumstance robs of some of its vitality the Tribes claim that admitting earlier evidence will deprive the Special Master of an opportunity to judge the credibility of witnesses.

The refusal of this court to allow the Quechan Tribe to re-litigate the settled boundaries of the Fort Yuma reservation seems to moot the question discussed in the briefs as to the determination of practically irrigable lands in Arizona II as part of this proceeding. A further discussion of that issue when we meet again will assist the court in its final determination.

By way of summary,

1. The Quechan Tribe is precluded from re-litigating Fort Yuma boundary claims;

2. The reference of this case to a Special Master intended the resolution of the entire western boundary of the Colorado River Reservation;

3. The evidentiary record developed in Arizona I may be used in this proceeding, subject to certain limitations. The use of the evidentiary record on the practically irrigable acreage on the Fort Yuma disputed boundary lands developed in Arizona II seems to have been mooted by the preclusion of the Quechan Tribe's claim.

This Memorandum has addressed the issues argued and briefed by the parties with the belief that their resolution will pave the way for completion of discovery.

Dated: Sept 6, 1991

By: Frank J. McGarr
Frank J. McGarr
Special Master

ARIZONA V. CALIFORNIA, ET AL.
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UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

STATE OF ARIZONA Plaintiff, v. STATE OF CALIFORNIA, et al., Defendant.	)	No. 8 ORIGINAL **MEMORANDUM OPINION AND ORDER NO. 5**

In a Memorandum Opinion and Order No. 4 of September 6, 1991, I held that the United States was precluded from asserting claims for water for lands held in trust by the United States for the Quechan Tribe of the Fort Yuma Indian Reservation. That preclusion was based upon the decision that the Tribe had already been compensated for the extinguishment of its title to the land at issue here by the settlement of the case in the Court of Claims known as Docket 320.

The United States has moved for reconsideration of this decision, the matter has been fully briefed by the Justice Department for the United States and in opposition by the Metropolitan Water District of Southern California, the Coachella Valley Water District and the States of California and Arizona.

The United States argues in support of its motion for reconsideration that the final order of the Court of Claims closing out Docket 320 cannot be the basis for a resolution of this matter. The United States relies upon other actions taken by the United States, and in particular, on the 1978 order of the Secretary of the Interior, relying on a Solicitor's Opinion

overruling earlier decisions and revising the boundary of the Fort Yuma Reservation to include the disputed lands.

The United States posits its motion on the argument that the Secretary's Order is valid, thus satisfying the Tribe's then pending claim, which claim then became moot and was not a part of the settlement agreement of 1983. To put it another way, the United States would ignore the Court of Claims because the Quechan Tribe settled, for 15 million dollars in that Court, a case that had been mooted and was thus not pending.

As ingenious as this argument is, it is a new-comer on this long litigated scene. The United States certainly did not pay $15 million to the Quechan Tribe to settle a Court of Claims case which it believed was not pending because it had been mooted by a Solicitor's ruling many years before. The Tribe in arguing that it already owned the land the Solicitor's ruling gave it, is hard put to explain why it continued to pursue the same land in the Court of Claims and accepted $15 million in exchange for the relinquishment of that claim.

The Tribe's answer to this dilemma is that to conclude that the United States so acted defies common sense, and so it does. This leads to the conclusion that the United States in settling the Court of Claims case, commonsensibly concluded that the Tribe had not achieved Title under the Solicitor's opinion, and the Tribe in both filing and settling the case was clearly of a mind that the Solicitor's opinion had not settled the Title question and that only the Court of Claims could.

The United States in a footnote makes the Reductio Ad Absurdum argument that if the Special Master is right that the $15 million extinguishes the Tribe's claim to the land, then the United States now owns the land free and clear of any interest of the Tribe. While that issue is not being precisely decided in this Opinion, it is not an unthinkable conclusion.

Certain documents are pointed out by the United States, such as an irrelevant pre-trial stipulation in Docket 320, which cannot be read to modify the final order in that case, as well as letters to the Tribe from its counsel or from the Secretary approving the settlement, which cannot affect the unambiguous impact of the court's final order in that case.

The stipulation of May 26, 1983 referred to above, incidentally, was rejected by the United States in part as proposed for the reason, agreed to by the Special Master here, "because of the Supreme Court Opinion in Arizona v. California that there must be a judicial (emphasis supplied) determination of the Quechan boundary."

The resolution of the Claims Court Docket 320 case is clear and unambiguous and leaves no room for parole evidence or interpretation contrary to its clear meaning. Nothing in the judgment language diminishes its impact on the issue considered here, that is whether it finally resolves the Quechan Tribe claim in such a manner as to preclude the Tribe from further boundary claims as to the Fort Yuma Reservation in this proceeding.

The United States places its principal reliance on the 1978 Secretarial order and complains that the Special Master virtually ignores it. So did the United States in the Court of Claims, very probably because the ex parte secretarial reversal of earlier decisions could not be deemed to rob the Court of Claims of its jurisdiction over the parties before it and the land in issue, in a case in which the United States was claiming for the Tribe lands which it now argues the Tribe then owned. The 1978 Secretary's Order did not and could not deny the Court of Claims jurisdiction over the claim the United States had brought before it. In the Court of Claims all the circumstances of the case indicate that at that time the United States agreed with this conclusion. The final outcome of the Court of Claims case is dispositive of the Quechan Tribe claim and it cannot be reopened here.

The motion of the United States to reconsider the Memorandum Opinion Order No. 4 of September 6, 1991 is denied.

Dated: Jan 29, 1992

Frank J. McGarr

UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

STATE OF ARIZONA Plaintiff, v. STATE OF CALIFORNIA, et al., Defendant.	)	No. 8 ORIGINAL **MEMORANDUM OPINION AND ORDER NO. 7**

In Order #4 of September 6, 1991, it was determined that the United States was precluded from asserting claims for water for lands held by the United States in trust for the Quechan Tribe of the Fort Yuma Indian Reservation.

The United States has moved for a reconsideration of that decision and an allowance of the assertion in this litigation of the Quechan Tribe claims. The Tribe, as an intervenor in the case, has similarly moved.

The State Parties have filed a memorandum in opposition, the United States has replied and the matter is fully briefed. This Opinion addresses that single issue.

The opinion denying the Quechan Tribe standing in this litigation turned on the effect of a settlement of a case brought by the Tribe in the Court of Claims which was settled in 1984 by a payment of $15 million to the Tribe. The United States and the Tribe argue that the Special Master's interpretation of that settlement is incorrect. It is the thrust of their argument that a Secretary of Interior's Order in 1974 was not correctly

apprehended, and its impact on the controversy not properly understood.

The reference by the Master to the Secretary's Order as sua sponte and ex parte correctly describes the order. Its validity need not be determined here, although at the time of the settlement central to this discussion, its validity had been challenged and was open to question, and it could not have been considered by the Tribe as an absolutely guaranteed grant of rights to them. If the Tribe, represented by the United States, was really settling only title to lands other than those covered by the 1978 Secretary's Order, this extraordinarily important fact appears nowhere in the settlement record, despite the fact that the lands covered by the 1978 Order relied upon here were central to the Court of Claims case which was being settled.

The plain and unambiguous effect of the settlement and Order of 1984 cannot be modified by speculation as to what the parties meant or by inferences as to their intent drawn from other documents. And if the Secretary's order of 1978 had an impact on the earlier filed and later settled Quechan Tribes' Court of Claims case, as the United States now argues, that fact nowhere appears in an unambiguous settlement agreement approved by the Court and thus made the final Order in the case. In the absence of ambiguity, the law barring parole evidence is too well settled to require citation.

It is the essence of the position of the Tribe and the United States that the proceeding in Docket No. 320 involved two

claims by the Quechan Indians, only one of which was settled. The two issues involved, it is argued, were the claims by the Tribe that the taking in 1893 had not adequately compensated the Tribe, and also that because the taking was unfair, it was invalid and the Tribe was entitled to damages for the unlawful use of its lands thereafter.

Thus, it is argued, the Tribe regarded as a separate issue its title to the land and the consequent water rights, as to which issue it looked to a separate forum.

It is also the Tribe's position that the final order in Docket No. 320 is not a final determination of a fully litigated issue and that preclusion cannot bar the Tribe here because it cannot be said that the issue of title to the lands in the Tribe was fully litigated and finally decided. The validity of the Tribe's position depends on the accuracy of its statement that issue preclusion does not operate where the first proceeding is resolved by settlement.

The argument of the United States and the Quechan Tribe therefore rests on two pillars:

a) Docket No. 320 disposed only of a damage claim for taking and trespass and did not affect title to the reservation land and its consequent water rights.

b) or alternatively, if title was an issue, it cannot preclude later claims because it was settled and not fully adjudicated.

In addition, the United States and the Tribe argue that whatever the effect of the final disposition of Docket No. 320, it cannot be relied on by parties not involved in that litigation since it governs only claims against the United States. The Tribe concedes that the settlement and payment of money forever bars the Quechan tribe from further claims against the United States as to this reservation land, but contends that the settlement has no preclusive effect as to third parties, unless the issue was the same in the present action, was actually litigated and is essential to a prior final judgment.

This position mandates the conclusion that the United States, having acquired title to the lands in question and having settled claims against it as to the validity of that acquisition, may now, as adjudicated title holder, denigrate its title position for the benefit of the Tribe and to the detriment of others in this litigation because those others were not involved in the earlier litigation. This argument is without merit. Title to land is absolute. It is in the title holder as to the world, and cannot be asserted as to some parties and denied as to others.

The requirement of comparability it is further argued, is not met because of the uniqueness of proceedings under Indian Claims Act and because the litigation involves a waiver of sovereign immunity. Neither of these considerations affect the finality or effect of a judgment.

Finally, the Tribe draws comfort from a clause in the Claims Court judgment to the effect that it " . . . shall not be construed as an admission by either party for the purposes of precedent or argument in any way". This language in the settlement judgment which expresses the traditional caution of settling parties that for purposes of other litigation they are not admitting anything, has no consequence to or limiting effect upon the final judgment. Despite the relied upon clause, the judgment is what it says and has such preclusive effect as its language supports, without regard to the clause under consideration.

Elaborating on the issues discussed above, the argument that Docket No. 320 has both a damage claim and a title issue and that only the damage claim was settled, is made in the context of a record which does not give support to that position. The essence of the Tribe's petition in Docket No. 320 was that the 1893 taking illegally extinguished the Tribes title to the land. What the Tribe sought was a determination of the title issue, and if successful, on that issue, the tribe sought consequent damages from the government for its wrongful use of the illegally taken land. The only viable basis for a damage or trespass claim was that the 1893 taking was illegal and that title therefore remained with the Tribe. When the Tribe accepted money in settlement of this claim, it relinquished its claim to title. The argument that the Tribe somehow settled its claim against the United States while yet retaining title, and did so with no word

of this unique circumstance appearing in the final judgment order is without merit. The Court of Claims closed the case with an order that barred the Tribe from the assertion of any further claims as to the lands in issue, and whatever the Tribe may have believed, then or now, as to its retention of title for water rights purposes, is not supported by the record in the case.

This leads us to the next question as to whether the final order extinguishing the rights of the Quechan Tribe can have a preclusive effect, either as res judicata or collateral estoppel when, as is true here, it was a settled issue rather than a litigated issue.

The contention of the Tribe that consent judgments entered as a result of settlement by the parties cannot be the basis of the defense of issue preclusion finds no support in the law. It is based on the argument that the settlement of Docket No. 320, the receipt of money by the Tribe, and the entry of a Final Judgment cannot and does not prevent the Tribe from prosecuting title to water rights which, it is claimed, were not affected. Docket No. 320 extinguished the Quechan Tribe claim to the land, and any claim to water rights, depending as such claim does on the ownership of the land, was also extinguished. The case of United States v. Gemmell, 535 F.2d 1145 (9th Cir.); cert. denied, 429 U.S. 982 (1976) and Kalispel Indian Tribe v. Pend Oreille, 926 F.2d 1502 (9th Cir. 1991), cert. denied, 112 S.C. 415 (1992) support this conclusion.

Central to the Tribes's position, is the contention that an issue not actually litigated cannot be the basis for preclusion. To put the matter more precisely, the question is whether a settlement of litigation resulting in a final judgment can have the same preclusive effect as the resolution to final judgment of the same matter after trial. The argument is based on the Restatement (Second) of Judgments (1982) P 256 to the effect that a matter stipulated to by the parties cannot be the basis of collateral estoppel. We need not concern ourselves with whether the case law supports this contention, since in fact it is not apropos here. We are not talking about a stipulation of fact or issue, we are talking of a final judgment in a case in which the parties here were parties there. In that factual context, the Gemmell and Kalispel cases support the result here reached. The matter is res judicata and the parties to that litigation are precluded from relitigating it again.

To accept the contention that a final judgment based on compromise has no real finality because it is not precedent in any other case between the same parties is to destroy the finality of judgments.

Further, the argument based upon the law of the case in Arizona v. California to the effect that the Tribe can be bound only by a "final determination of a fully litigated issue, (460 U.S. at 620) is of no effect here. A case terminated by a final dispositive order of the court is within the meaning of the

phrase "final determination of a fully litigated issue," whether the case was tried or settled.

The separate brief filed by the Quechan Tribe adds additional considerations to the argument discussed above by attributing some unique characteristics to Indian claims somehow distinct from other litigation vis a vis the finality of judgments. This contention carries no weight in this case. The Claims Court judgment extinguished the claim of the Tribe, as would be the effect of a final judgment in any litigation with any parties.

For the foregoing reasons, the motion of the United States and the Quechan Tribe for a reconsideration of Order #4 of September 6, 1991 is denied.

Dated: May 15, 1992

Frank J. McGarr

UNITED STATES SUPREME COURT

BEFORE THE SPECIAL MASTER

STATE OF ARIZONA Plaintiff, v. STATE OF CALIFORNIA, et al., Defendant.	)	No. 8 ORIGINAL **MEMORANDUM OPINION AND ORDER NO. 13**

In Memorandum Opinion No. 4, (September 6, 1991) it was held that the Quechan Tribe was precluded from asserting a water rights claim for certain disputed boundary lands because of a final Claims Court judgment of August 9, 1983 in Indian Claims Commission Docket No. 320. Memorandum Opinions 5 (January 20, 1992) and 7 (May 15, 1992) denied the United States and the Tribe's petitions for reconsideration.

Before the Special Master now, and the subject of this opinion is the renewed motion of the Quechan Tribes for a second reconsideration of the decision in Order No. 4 of September 6, 1991.

The State parties have moved to either reject the motion or after consideration, to deny it.

The State parties argue that the instant motion, filed as it is 18 months after the original ruling, and 10 months after the denial of a motion to reconsider, cannot rely on any rule justifying its filing as a simple additional motion for

reconsideration. That is a valid point which alone justifies a denial of the motion to reconsider.

Because the Quechan Tribe has appended numerous public records not heretofore presented, from files of Docket No. 320 and from the District Court proceedings in Metropolitan Water District of Southern California v. United States, 628 F. Supp. 1018, (S.D. Cal. 1986), it may be analogous to a Rule 60(b) motion alleging newly discovered evidence.

The State parties address this possibility with the argument that Rule 60(b) is applicable only in the instance of really newly discovered evidence. The newly presented evidence here has all been of record in cases in which the Quechan Tribe has been involved or interested in, and cannot in any way be regarded as newly discovered.

Even regarded as a Rule 60(b) motion, the instant motion is not within the one year limitation provided by that rule.

The foregoing procedural considerations alone warrant a denial of the Tribe's motion being herein considered. But there are other considerations which lead to the same conclusion.

In the interim between the dismissal of the Quechan Tribe in 1991, and the denial of the motion for reconsideration by the Tribe in 1992 on the one hand, and the present motion for reconsideration on the other, there has been considerable discovery, a complete hearing on the issues in the case, a closing argument and a post-hearing briefing schedule, a substantial portion of which has elapsed.

There has also been a settlement of the Fort Mojave Indian Reservation boundary dispute which will be presented to the Special Master for approval shortly.

A readmission of the Quechan Tribe into the case, some nineteen months after the preclusion order of September 6, 1991,and within a significantly lesser number of months of its final resolution, is not feasible. Simple practicality dictates at this point in the case, that the Quechan Tribe look to its right to file exceptions to the Special Master's report to the court this upcoming Autumn.

The brief of the Quechan Tribe, on the basis of the earlier record in the case and the newly proffered evidence revisits the hearing and the settlement of Docket No. 320 and attempts once again to demonstrate that the case disposed only of the damage issues and not the question of the Quechan Tribes title to the land in question. The contention is not new, although argued more fully than before in this latest reconsideration attempt.

The Quechan Tribe argues very ably and in great detail the theory that Docket 320 and the settlement thereof does not affect title in the Tribe. But the conclusion in the earlier opinion being reconsidered, that the relinquishment of all future claims regarding the subject matter of Docket No. 320 in exchange for a sum of money extinguished the Tribe's title in the subject lands, remains valid. What has not changed is the fact that the record in Claims Court Docket No. 320 supports that conclusion and

leaves no room for parole evidence or interpretation contrary to its clear meaning.

The renewed motion of the Quechan Tribe for reconsideration of the Special Master's Memorandum Opinion No. 4 (September 6, 1991) is denied.

Dated: April 13, 1993

Frank J. McGarr
Special Master

Pope & John, Ltd.
311 S. Wacker Drive
Suite 4200
Chicago, Illinois 60606
(312) 362-0200

In The

UNITED STATES SUPREME COURT OF THE UNITED STATES

October Term, 1989

Before The Special Master

State of Arizona,

v.

State of California, et al.

JOINT MOTION TO APPROVE SETTLEMENT AGREEMENT

The United States, the Fort Mojave Indian Tribe, the State of California, the State of Arizona, the Metropolitan Water District of Southern California and the Coachella Valley Water District (referred to jointly at "the settling parties") respectfully move the Special Master to include in his report to the Supreme Court recommendations that it (1) approve the Settlement Agreement which is Attachment One hereto and (2) a decree in the form of Attachment Two hereto. The grounds for this motion are described in the accompanying memorandum in support.

Respectfully submitted this 4th day of March, 1998.

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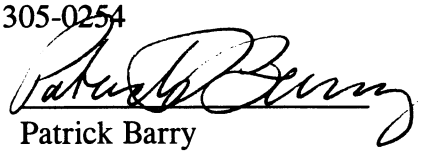
By: 
Patrick Barry

Attorney for the United States of America

In The

UNITED STATES SUPREME COURT OF THE UNITED STATES

October Term, 1989

Before The Special Master

State of Arizona,

v.

State of California, et al.

MEMORANDUM IN SUPPORT OF JOINT MOTION TO RECOMMEND APPROVAL OF SETTLEMENT AGREEMENT

The United States, the Fort Mojave Indian Tribe, the State of California, the State of Arizona, The Metropolitan Water District of Southern California and the Coachella Valley Water District (referred to jointly as "the settling parties") respectfully request the Special Master to include in his report to the Supreme Court recommendations that it (1) approve the Settlement Agreement which is Attachment One to the Joint Motion to Approve Settlement Agreement, and (2) adopt a decree in the form of Attachment Two to the Joint Motion to Approve Settlement Agreement. In support of this motion the settling parties provide the following comments.

I

BACKGROUND

The present proceedings stem from the Motion of the State Parties to Reopen Decree To Determine Disputed Boundary Claims With Respect to Fort Mojave, Colorado

River and Fort Yuma Indian Reservations and Supporting Memorandum (July 19, 1989) which, among other things, raised the question of whether the Fort Mojave Indian Tribe (Tribe) is entitled to additional water rights for lands which, in 1974, the Department of the Interior recognized as part of the Fort Mojave Indian Reservation in California ("disputed lands"). See Secretarial Order of June 3, 1974. Specifically, the "disputed lands" issue involves the appropriate western boundary for a tract of land called the Fort Mojave Indian Reservation Hay and Wood Reserve.

The attached settlement agreement resolves among the settling parties the water rights issues that are before the Special Master as well as the related issue of the proper location of the Hay and Wood Reserve boundary. The agreement is submitted to the Special Master for his review in order that he may include a recommendation for its approval in his final report to the Court.

II

NATURE OF THE AGREEMENT

The Settlement Agreement is straightforward. In order to facilitate the approval process, the settling parties briefly describe the terms of the Settlement Agreement:

STIPULATION (beginning at page 4):

1. The parties agree that the western boundary of the Hay and Wood Reserve shall be the boundary, as surveyed by the Bureau of Land Management in 1975, that conforms with the acreage description of 9,114 acres in the Executive Orders of March 30, 1870, and September 19, 1890.

   (a) The parties agree, however, that the Court shall make no finding or conclusion regarding the validity of the Secretarial Order of

June 3, 1974. Moreover, Arizona and California reserve the right to challenge the validity of that Order for the limited purposes of determining title to or jurisdiction over the last natural bed of the Colorado River. The United States and the Tribe reserve any defenses they may have to such a challenge.

(b) The parties agree that nothing in the stipulation is intended to determine title to or jurisdiction over the last natural course of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve.

(c) This paragraph reserves the States' claims to title to and jurisdiction over the last natural bed of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve and restates some, but not all, of the States' arguments in support:

(i) That the western boundary of the Hay and Wood Reserve was located on the east bank of the Colorado River when it was created;

(ii) That the United States lacked authority and the requisite intent to make the riverbed a part of the lands set aside as the Hay and Wood Reserve.

(d) This paragraph recites that the United States and the Tribe expressly reserve their claims to the bed of the Colorado River within the resurveyed boundaries of the Hay and Wood Reserve.

(e) The Stipulation shall not be construed to determine the validity of the arguments reserved by either the Tribe, the United States, the State of

Arizona or the State of California. Nor is the Stipulation to be construed as a waiver of sovereign immunity or subject matter jurisdiction by either the Tribe or the United States.

2. The parties agree that the Tribe's present perfected water rights for its California lands as set forth in *Arizona v. California*, 376 U.S. 340 (1964), 439 U.S. 419 (1979) and 466 U.S. 144 (1984) shall remain undisturbed by this Stipulation and Agreement.

3. Under this Settlement Agreement, the Tribe shall be entitled to an additional annual quantity of water not to exceed (a) 3,022 acre feet of diversions from the mainstream of the Colorado River or (b) the amount of water necessary to supply the consumptive use required for irrigation of 468 acres whichever is less.

4. The State Parties agree not to object to the use of the additional allocation of water on the Fort Mojave Indian Reservation lands in California consistent with the terms of previous decrees issued in this litigation from the date of this Stipulation and Agreement to the date of the issuance of a supplemental decree by the Supreme Court.

5. The Tribe or the United States on behalf of the Tribe will not claim or be entitled to additional Colorado River water for existing trust or allotted lands within the boundaries of the resurveyed Hay and Wood Reserve.

6. The Tribe waives all claims to additional water it may have for lands within disputed boundaries on the Intermediate Tract in California. This waiver does

not extend to Intermediate Tract lands in Arizona. However, nothing in the Stipulation shall be construed as a determination of title to or jurisdiction over lands within the Intermediate Tract.

7. The Tribe reserves the right to seek federal legislation confirming the boundaries of the Hay and Wood Reserve.

8. The Stipulation cannot be construed to (a) affect any claim to land of any person or (b) determine title to or jurisdiction over any such land.

9. This stipulation merges all other negotiations and understandings between the parties. It only effects those matters which are now before the Court.

10. By this Stipulation, the Tribe waives any claim against the United States arising out of the negotiation of the Agreement, the adoption of the terms of the Agreement, or the authority of the Tribe to enter into the Agreement.

III

CONCLUSION

The settling parties have worked diligently to resolve the issues related to this litigation. The settlement agreement is an equitable resolution of the issues presented in the disputes between the parties and before the Court and should be approved.

Respectfully submitted this 4th day of March, 1998.

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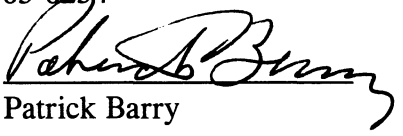
By: 
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No. 8, Original

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

Before The Special Master

State of Arizona,

v.

State of California, *et al.*,

JOINT MOTION TO APPROVE STIPULATION AND AGREEMENT

The Colorado River Indian Tribes, the United States, the State of California, The Metropolitan Water District of Southern California and the Coachella Valley Water District (referred to jointly as "the settling parties") respectfully move the Special Master to (1) recommend to the Supreme Court that it approve the Stipulation and Agreement which is Attachment 1 to the Joint Motion to Approve Stipulation and Agreement, and (2) issue a report containing his recommendations. The grounds for this motion are described in the accompanying memorandum in support.

Dated: March 4, 1999

Respectfully submitted,

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By: _____
Scott B. McElroy

CERTIFICATE OF SERVICE

I certify that I have placed a true and correct copy of the foregoing Joint Motion to Approve Stipulation and Agreement in the U.S. mail, postage prepaid, this 4 day of March, 1999, to the following:

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Martha Hailcox

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STIPULATION AND AGREEMENT

The Colorado River Indian Tribes ("Tribes"), the United States of America ("United States"), the State of California, the Metropolitan Water District of Southern California ("Metropolitan"), and the Coachella Valley Water District ("Coachella") (referred to collectively as the "State Parties"), hereby enter into the following Stipulation and Agreement.

I

RECITALS

1. On October 10, 1989, the United States Supreme Court granted the State Parties' motion to reopen the decree in Arizona v. California, 373 U.S. 546 (1963) ("Arizona v. California I") to determine disputed boundary claims with respect to the Colorado River, Fort Mojave and Fort Yuma Indian reservations. 493 U.S. 886 (1989) ("Arizona v. California III").

2. The boundary issue concerning the Colorado River Indian Reservation ("Reservation") involves the water rights related to lands affected by the location of a portion of the western boundary of the Reservation in California. Although the controversy has also engendered litigation and uncertainty as to the legal status of the federal lands in the disputed area and ownership of the western half of the bed of the Colorado River within the Reservation, this settlement addresses only the issue of water rights.

3. The same boundary issue was presented to the Supreme Court in Arizona v. California I and 20 years later in Arizona v. California II, 460 U.S. 605 (1983), but was not resolved. Similarly, an action by Metropolitan and Coachella instituted in the United States District Court for the Southern District of California to resolve the boundary dispute was dismissed on sovereign immunity grounds. Metropolitan Water Dist. v. United States, 628 F.Supp. 1018 (S.D. Cal. 1986), dismissed, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court sub nom. California v. United States, 490 U.S. 920 (1989).

4. In order to resolve the water rights issues referenced above, the United States, the Tribes and the State Parties have reached the agreement set forth below.

II

STIPULATION

A. Purpose. This Stipulation and Agreement settles all matters now at issue between the parties in this litigation with respect to Reservation water rights. Except as expressly provided herein, no modification of this Stipulation and Agreement without the consent of the parties shall be effective.

B. Water Rights. (1) In addition to the water rights decreed to the United States for the benefit of the Tribes in Arizona v. California I, the Tribes shall be entitled to an annual (calendar year) quantity not to exceed: (i) 2100 acre feet of diversions from the mainstream of the Colorado River; or (ii) the amount of water necessary to supply the consumptive use required for irrigation of 315 acres and for the satisfaction of related uses,

whichever of (i) or (ii) is less. The parties agree that this additional allocation shall be included in a supplemental decree to be issued by the Supreme Court at the conclusion of the present proceedings with a priority date of May 15, 1876 and subject to the same terms and conditions as apply to the water rights previously decreed to the United States for the benefit of the Tribes.

(2) Except as provided herein, the Tribes' present perfected water rights for its California lands as set forth in the 1964 Arizona v. California I Decree, 376 U.S. 340 (1964), the 1979 Supplemental Decree, 439 U.S. 419 (1979), and the 1984 Second Supplemental Decree in Arizona v. California II, 466 U.S. 144 (1984), shall remain undisturbed and shall not be affected in any manner.

(3) The State Parties shall not object to the use of the additional allocation of water provided for herein on the Reservation lands in the State of California, under the terms set forth in the 1964, 1979, and 1984 decrees in Arizona v. California during the period from the date of this Stipulation and Agreement to the date of the issuance of a supplemental decree by the Supreme Court as it relates to this dispute.

(4) The Tribes and/or the United States on behalf of the Tribes shall not claim or be entitled to any additional reserved water rights from the Colorado River for lands in the State of California other than those rights set forth in this Stipulation and Agreement and the prior decrees in Arizona v. California.

C. Disputed Boundary. The parties agree not to seek adjudication in this phase of

the litigation of the validity, correctness, or propriety of the January 17, 1969 Order of the Secretary of the Interior, Western boundary of the Colorado River Indian Reservation from the top of Riverside Mtn., Cal., through section 12, T. 5 S., R. 23 E., S.B.M., Cal., No. 90-1-5-668, 41-54 (1969 Secretarial Order). The United States and the Tribes, but not the other parties to this Stipulation and Agreement, agree that the lands described in the 1969 Secretarial Order, are included within the Reservation set aside by the Executive Order of May 15, 1876 and are held in trust by the United States for the benefit of the Tribes. The State of California disagrees, and expressly reserves the right to challenge the validity, correctness, and propriety of the 1969 Secretarial Order. The United States and the Tribes reserve any and all defenses they may have, including, but not limited to, exhaustion of administrative remedies and lack of subject matter jurisdiction, in the event the 1969 Secretarial Order is challenged.

D. Riverbed Lands. The State of California expressly reserves its claims to title to and jurisdiction over the bed of the Colorado River within the Reservation, and its respective arguments in support thereof. The United States and the Tribes expressly reserve their claim to title to and jurisdiction over the bed of the Colorado River within the Reservation, and their respective arguments in support thereof.

E. West Bank Homeowners Association. The State Parties agree to recommend to the Special Master in this proceeding that counsel for the West Bank Homeowners Association be permitted to file an amicus brief with the Special Master regarding this

agreement. The parties (1) reserve all arguments in opposition to the Association's interest in this proceeding and the right to file a brief in response to such amicus brief and (2) do not consent to, and reserve the right to object to, the filing of a Pro Se pleading by anyone.

F. Effect of Special Master's Boundary Opinions. It is the understanding and intent of the parties that, because the opinions issued by the Special Master in this litigation respecting the Colorado River Indian Reservation have not been reviewed by the Supreme Court, those opinions shall have no precedential or preclusive effect in any future litigation among the parties.

G. Scope and Effective Date. This Stipulation and Agreement merges all prior negotiations and understandings between the parties, contains their entire agreement and shall be effective upon unqualified recommended approval by the Special Master in his report to the United States Supreme Court in these proceedings and the Court's unqualified approval of the Special Master's report on this issue and the issuance of an appropriate decree.

H. Waiver. Nothing in this Stipulation and Agreement shall be deemed to create or give validity to any claim by the Tribes against the United States or in any way constitute acknowledgment of the validity of any claims by the Tribes against the United States. In addition, the Tribes hereby waive any claim against the United States arising out of:

(a) the negotiation of this Stipulation and Agreement;

(b) the adoption of the specific terms of this Stipulation and Agreement; or

(c) allegations concerning the lack of authority of the Tribes to enter into this Stipulation and Agreement.

This Stipulation and Agreement may be executed in any number of counterparts, and each executed counterpart shall have the same force and effect as an original instrument as if all the parties to the aggregate counterparts had signed the same instrument. Signature pages of this Stipulation and Agreement may be detached from any counterpart of this Stipulation and Agreement without impairing the legal effect of any signatures thereon and may be attached to another counterpart of this Stipulation and Agreement identical in form hereto but having attached to it one or more additional signature pages.

The parties hereto have executed this Stipulation and Agreement on the date set forth to the left of their signatures.

COLORADO RIVER INDIAN TRIBES

Date: Feb. 23, 1999 By _____

Its Chairman

THE UNITED STATES OF AMERICA

Date: 2/16/99 By _____

Its Trial Attorney

THE STATE OF CALIFORNIA
BILL LOCKYER
Attorney General
DOUGLAS B. NOBLE
NANCY ALVARADO SAGGESE
Deputy Attorneys General

Date: _____ By _____

By _____

THE UNITED STATES OF AMERICA

Date: _____ By _____

Its _____

THE STATE OF CALIFORNIA
BILL LOCKYER
Attorney General
DOUGLAS B. NOBLE
NANCY ALVARADO SAGGESE
Deputy Attorneys General

Date: January 14, 1999 By Nancy A Saggese

By Douglas B. Noble

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Date: 2/11/91 By _____

Its Assistant General Counsel

COACHELLA VALLEY WATER DISTRICT

Date: _____ By _____

Its _____

THE METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

Date: _____ By _____

Its _____

COACHELLA VALLEY WATER DISTRICT

Date: January 20, 1999 By _____
STEVEN B. ABBOTT
REDWINE AND SHERRILL

Its Attorney

No. 8, Original

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

Before The Special Master

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v.

State of California, *et al.*,

MEMORANDUM IN SUPPORT OF JOINT MOTION TO RECOMMEND APPROVAL OF STIPULATION AND AGREEMENT

The Colorado River Indian Tribes, the United States, the State of California, The Metropolitan Water District of Southern California, and the Coachella Valley Water District (referred to jointly as "the settling parties") respectfully request the Special Master to (1) recommend to the Supreme Court that it approve the Stipulation and Agreement which is Attachment 1 to the Joint Motion to Approve Stipulation and Agreement, and (2) issue a report and proposed decree containing his recommendations.[1] In support of their motion, the settling parties provide the following comments.

[1/]The proposed form of Decree, which the settling parties anticpiate filing with the Special Master within 30 days will include the recommendations set forth in the Joint Motion to Approve Settlement Agreement (March 4, 1998) related to the Fort Mojave Reservation. In the interim, the Special Master does not need to delay requesting comments on both agreements.

I. BACKGROUND

The present proceedings stem from the Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations and Supporting Memorandum (July 19, 1989) which, among other things, raised the question of whether the Colorado River Indian Tribes ("Tribes") are entitled to additional water rights for lands which the Department of the Interior, in 1969, recognized as part of the Colorado River Indian Reservation ("disputed lands"). See 1969 Order of the Secretary of the Interior, Western Boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, Cal., through section 12, T. 5 S., R. 23 E., S.B.M., Cal., No. 90-1-5-668 (41-54) (Dep't Interior Jan. 17, 1969) ("1969 Secretarial Order"). In the course of addressing the issue of water rights for the disputed lands before the Special Master, the parties have discussed questions related to the proper location of the Colorado River Indian Reservation ("Reservation") western boundary (which in turn raises issues of the extent of tribal, federal, and state jurisdiction over the disputed lands) and the ownership of the west half of the bed of the Colorado River, as well as a host of other issues. The Special Master has issued opinions which do not recognize any additional water rights for the disputed lands for use by the Tribes.

However, the settling parties have agreed on a settlement of the matter that resolves the water rights issues that are before the Master. See Stipulation and Agreement ("Agreement"). Except as between the United States and the Tribes, the issue of the question of the proper location of the Reservation boundary is not addressed by the Agreement. Likewise, the Agreement does not address the ownership of the west half of the bed of the Colorado River. The parties reserve all arguments regarding such matters. The Agreement is submitted to the

Master for his review in order that he include a recommendation for its approval in his report to the Court. The settling parties anticipate that the West Bank Homeowners Association, which unsuccessfully sought to intervene in the litigation, may attempt to object to the Agreement. See *Memorandum Opinion and Order No. 17* (Mar. 29, 1995) (denying Motion to Intervene). Upon the Master's completion of the preparation of a proposed decree and a final report, the matter will be ripe for submission to the Supreme Court.

II. THE NATURE OF THE AGREEMENT

The Agreement is straightforward. In order to facilitate the approval process, the settling parties here briefly describe its terms.[2]

1. The Tribes would obtain an additional 2,100 acre feet of water per year, subject to the same terms and conditions that apply to the Tribes' existing water rights. (¶ B). The Tribes would also agree not to claim any additional reserved water rights in California. These provisions are enforceable before the Supreme Court. The Tribes' existing rights would not be affected.

2. The State, The Metropolitan Water District of Southern California, and the Coachella Valley Water District agree not to object to the West Bank Homeowners Association filing an amicus brief opposing the settlement before the Special Master. (¶ E). The Tribes and the United States are not part of this agreement.

3. The settling parties reserve their respective positions with regard to the location of the Reservation boundary and title to the west half of the bed of the Colorado River. (¶¶ C, D).

[2/] In the event of a dispute over the meaning of the Stipulation and Agreement, the language of the Agreement would govern rather than this explanation.

4. The Master's opinions and reports would have no precedential or preclusive effect among the parties. (¶ F).

5. The Tribes would waive whatever rights exist to sue the United States for executing the Agreement and the accompanying documents.

6. The Agreement is contingent on the Court's unqualified approval of a report by the Master that contains an unqualified recommendation of approval of the Agreement.

III. CONCLUSION

The settling parties have worked diligently to resolve the water rights issues in this litigation. In resolving those issues, the settling parties have carefully avoided the peripheral issues. The Agreement is an appropriate resolution of the water rights issues presented in this dispute and should be approved.

Dated: March 4, 1999

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I certify that I have placed a true and correct copy of the foregoing in the U.S. mail, postage prepaid, this Memorandum in Support of Joint Motion to Recommend Approval of Stipulation and Agreement this 4 day of March, 1999, to the following:

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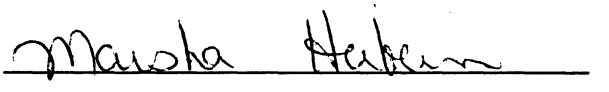

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April 22, 1999

Frank McGarr, Special Master
FOLEY & LARDNER
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Dear Special Master McGarr:

Re: Arizona v. California, No. 8, Original (Colorado River Indian Reservation

This constitutes a joint response on behalf of the settlement parties to your letter of April 6, 1999, expressing concern about the proposed settlement of the claim of the Colorado River Indian Tribes for additional Colorado River water rights in California.[1] You are quite right that the dispute has historically been referred to as a "boundary dispute." Although the State Parties used that characterization in their motion to reopen the Arizona v. California decree which initiated the current proceedings, they stated that resolution of the dispute was "necessary in order to finally establish [the Tribes'] water entitlements.[2] The United States' response pointed out that "a judicial resolution [of the boundary disputes] is sought *only* for the purpose of finally quantifying the [reservation's] water rights."[3] The present proceedings were seen as a pragmatic way to resolve the boundary dispute for water rights purposes only because the State Parties' independent district court action to resolve the dispute had been frustrated on sovereign

[1] Although we do not read your letter as applying to the Fort Mojave settlement because it included an agreement by the parties as to the disputed boundary and no boundary rulings were made in these proceedings, these comments apply to that settlement as well.

[2] Motion of the State Parties to Reopen Decree to Determine Boundary Claims with Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations and Supporting Memorandum (July 19, 1989) at 2.

[3] Response of the United States (September 1989) at 4 (emphasis added).

immunity grounds[4/] and the United States could not bring a traditional quiet title action against the State Parties because none of them claim title to the disputed area. U.S. Response at 5, n. 1.

The "boundary dispute" reference has always been "shorthand" for the Tribes' claim for additional water to meet the "reasonable needs" of the California portion of their reservation. This claim implicates the location of the western reservation boundary in California only because the "law of the case" in this interstate *water* dispute is that the Tribes' water rights are measured by the amount of water needed to irrigate the "practicably irrigable acreage" ("PIA") within the boundaries of their reservation. In short, but for the State Parties' objection to the Tribes' water rights claim for the disputed area, this matter would not be before the Special Master. The same result is produced by the proposed settlement, in that since the State Parties no longer object to the Tribes' substantially reduced water claim, there is no need to take the first step in adjudicating a disputed claim, as you correctly note in your letter, by determining whether the Tribes' claim is legally supportable.

In the original proceedings in Arizona I, all tribal water rights claims were adjudicated by the Supreme Court without any formal determination of their reservation boundaries. In particular, the water rights of the Fort Mojave and Colorado River reservations were adjudicated even though the underlying boundary disputes on those reservations were not resolved. The proposed Colorado River reservation settlement follows the same approach, in that the affected parties all have agreed that those Tribes shall be entitled to an additional allocation of water for general use in California. But the proposed settlement goes further than the Supreme Court's treatment of the two disputes in 1963, which left the door open for future claims by the Tribes regarding the disputed boundary areas, by barring any future claims by the Tribes under the reserved rights doctrine for additional water in California. Consequently, the present boundary dispute cannot resurface in the future in the context of a tribal water rights claim that has been the subject of this longstanding dispute. In short, the proposed settlement is a "final determination" of the boundary related water rights dispute that no longer requires resolution of the boundary location itself, with all its political jurisdiction and land title implications, which has become irrelevant to this interstate water dispute.

Moreover, just as the State Parties stipulated in the 1979 supplemental decree that the tribal allocations, although measured by PIA, could be used for any purpose on the reservations,[5/] so can the present increased allocation to the tribes be used anywhere on the reservation. Indeed, inasmuch as the title to the so-called "disputed area" is either owned outright by the United States (and administered as public lands by the Bureau of Land Management) or held in trust for the Tribes (and administered by the Tribes under the supervision of the Bureau of Indian Affairs), Coachella and Metropolitan have also entered into a separate agreement not to contest its use by the Tribes on those lands, in recognition that non-Indian water rights will not be adversely affected by such use. Although the State of California has reserved the right to challenge the boundary location for other reasons, it holds no water rights that would be adversely affected.

[4/] The Metropolitan Water District of Southern California v. United States, 830 F.2d 139 (9th Cir. 1987), aff'd by an equally divided Court sub nom. California v. United States, 490 U.S. 920 (1989).

[5/] Arizona v. California, 439 U.S. 419, 422(1979).

In conclusion, the settling parties are convinced that the proposed settlement will carry out the original purpose for reopening the decree for the resolution of the several disputed claims for additional water rights. Therefore we are optimistic that the Supreme Court will approve the proposed settlement, particularly since the Solicitor General supports it. Consequently, we urge the Special Master to approve it and send it to the Court.

Sincerely,

Patrick Barry,
Attorney, Indian Resources Section
Environment and Natural Resources
Division

cc: Scott McElroy, Esquire
Jerome C. Muys, Esquire
Karen Tachiki, Esquire
Douglas Noble, Esquire
Nancy Saggese, Esquire
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PER CURIAM

The Court having on _____ rendered its decision (1) regarding the exceptions to the Final Report of the Special Master herein with respect to the claim of the Fort Yuma (Quechan) Indian Tribe for an additional water allocation, (2) approving the settlement agreement among the State Parties, the Fort Mojave Indian Tribe and the United States, and (3) approving the settlement agreement among the State Parties, the Colorado River Indian Tribes and the United States, all as specified in the Court's opinion, __U.S. ___ ( ) the following supplemental decree is now entered to implement that decision.

SUPPLEMENTAL DECREE

It is ORDERED, ADJUDGED AND DECREED:

A. Paragraph (4) of Article II(D) of the Decree in this case entered on March 9, 1964 (376 U.S. 340, 344-45), is hereby amended to read as follows:

> (4)The Colorado River Indian Reservation in annual quantities not to exceed (i) 719,248 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date.

B. Paragraph (5) of Article II(D) of the Decree in this case entered on March 9, 1964 (376 U.S. 340, 345) and supplemented on April 16, 1984 (466 U.S. 144, 145) , is hereby amended to read as follows:

(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 132,789 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 20,544 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date.

C. Paragraph (5) of the introductory conditions to the Supplemental Decree in this case entered on January 9, 1979 (439 U.S. 419, 421-23) is hereby amended by adding the following exception at the end of the concluding proviso in the first sentence of that paragraph: "except for the western boundaries of the Fort Mojave and Colorado River Indian reservations in California."

D. Paragraph II(A)(24)of the Decree of January 9, 1979 (439 U.S. 419, 428) is hereby amended to read as follows:

(24) Colorado River Indian Reservation	10,745	1,612	Nov. 22, 1873
	40,241	6,037	Nov. 16, 1874
	5,860	879	May 15, 1876

E. Paragraph II(A)(25)of the Decree of January 9, 1979 (439 U.S. 419, 428) is hereby amended to read as follows:

(25) Fort Mojave Indian Reservation	16,720	2,587	Sept. 18, 1890

F. Except as otherwise provided herein, the Decree entered on March 9, 1964, and the Supplemental Decrees entered on January 9, 1979 and April 16, 1984, shall remain in full force and effect.

G. The Court shall retain jurisdiction herein to order such further proceedings and enter such supplemental decree as may be deemed appropriate.