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5/16/96

May 7, 1996

96-002 - 002

Mr. Henry Evans
Evans Consulting
2201 N. Central, Suite D
Phoenix, AZ 85004

~~SALT RIVER~~

Dear Henry:

As per your request, enclosed are documents regarding navigability. They were provided to me by Bob Hoffman of Snell and Wilmer.

If you need anything else in the future, please feel free to ask and I will do my best to get it for you.

Sincerely,

David M. Martin
Deputy Director

enc.: Letter from Bob Hoffman
Pretrial Order
Finding of Fact and Conclusions of Law

Maricopa County, Lower Salt River
03-005-NAV
4/7/03
Evidence Item No. 002

One Arizona Center
Phoenix, Arizona 85004-0001
(602) 382-6000
Fax: (602) 382-6070

PHOENIX, ARIZONA

TUCSON, ARIZONA

IRVINE, CALIFORNIA

SALT LAKE CITY, UTAH

Robert B. Hoffman (602) 382-6315

May 3, 1996

Mr. David Martin
ARIZONA ROCK PRODUCTS ASSOCIATION
1825 West Adams
Phoenix, Arizona 85007

Re: Navigability

Dear David:

Pursuant to your request, I am enclosing a copy of a pretrial order in a United States District Court case which in paragraph 30 it is stipulated that the Salt River is not now and never has been a navigable river. The order was agreed to by an assistant attorney general for Bruce Babbitt as Attorney General of Arizona.

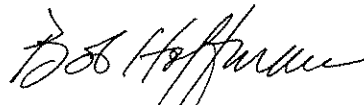
The second enclosure is a copy of the findings of fact and conclusions of law in the case in which in paragraph XXIII thereof the Judge adopted the factual stipulation of the pretrial order as a basis for rendering his decision.

The case involved the question of title to the riverbed of the Salt River as it passed through the Salt River Pima Indian Reservation. The holding of the case was that the south boundary of the reservation was a certain point in the riverbed and that the United States on behalf of the Indians owned title to the riverbed north of said line.

If you have any further questions, please call.

Yours truly,

SNELL & WILMER L.L.P.



Robert B. Hoffman

RBH:dm
Enclosures
2165535.WP

ORIGINAL

FILED

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AUG 13 1976

DEPUTY CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY: [Signature] DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN
COMMUNITY, :

Plaintiff, :

vs. :

No. Cv-72-376-Phx.

ARIZONA SAND & ROCK CO., an
Arizona corporation, et al., :

Defendants. :

JOHNSON & STEWART MATERIALS,
INC., et al., :

Plaintiffs, :

vs. :

No. Cv-73-579-Phx.

ROGERS C. B. MORTON, Secretary
of the Department of the
Interior, et al., :

Defendants. :

CITY OF MESA, an Arizona
a municipal corporation, :

Plaintiff, :

vs. :

No. Cv-73-769-Phx.

ROGERS C. B. MORTON, Secretary
of the Department of the
Interior, et al., :

Defendants. :

SALT RIVER VALLEY WATER USERS'
ASSOCIATION, an Arizona corpora-
tion, et al., :

Plaintiffs, :

vs. :

No. Cv-74-553-Phx.

ROGERS C. B. MORTON, Secretary
of the Department of the
Interior, et al., :

Defendants. :

AUG 18 1976

STATE OF ARIZONA, ex rel., :
W. A. ORDWAY, Director of the :
Arizona Department of :
Transportation, :

Plaintiff, :

vs. :

No. Cv-74-529-Phx.

ROGERS C. B. MORTON, Secretary :
of the Department of the :
Interior, et al., :

Defendants. :

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

These consolidated actions involve the south boundary of the Salt River Indian Reservation in Township 1 North, Range 5 East, Gila and Salt River Base and Meridian, north of Mesa, Arizona. As a result of a decision by the then Secretary of Interior on January 17, 1969, a plat of survey was prepared and filed on August 17, 1972, showing that boundary at a location which would result in the inclusion within the reservation of certain property to which other parties claim an interest. The individual actions are these:

No. CIV-72-376. This is an action filed by the Indian Community against Arizona Sand and Rock Co., et al., for trespass, ejectment and damages for the removal of sand and gravel. The issue of the amount of damages, if any, has been severed and only the issue of liability is now before the Court. Of the defendants originally named in this action, only the following still remain: Johnson & Stewart Materials, Inc., Allied Concrete & Materials Co., Salt River Valley Water Users' Association, Arizona State Highway Commission (now the Arizona Department of Transportation), the County of Maricopa, Roy Johnson and Earl C. Johnson and their respective wives and the Executor of the Estate of Leroy Johnson, Deceased. Trans-america Title Insurance Company subsequently became a party defendant to this action on its motion to intervene upon the grounds that it has issued a policy of title insurance upon property owned by Allied Concrete & materials Co.

In this action the Indian Community seeks an order of ejectment against all defendants from the reservation as determined by the Secretarial memorandum of January 17, 1969, and damages for trespass against all defendants except Allied Concrete Materials Company, Inc.,

In the course of proceedings in this case the court ruled that it would not consider a collateral attack by the defendants upon the decision of the Secretary of the Interior and this ruling resulted in the filing of the subsequent actions in which the following claims are asserted:

No. CIV-73-579. This is an action instituted by Johnson & Stewart Materials, Inc., Roy Johnson and Earl C. Johnson and their respective wives, and the executor of the Estate of Leroy Johnson (hereinafter collectively referred to as "Johnson & Stewart") against the Secretary of Interior seeking to invalidate the decision of the Secretary and the 1972 Plat of Survey. The plaintiffs claim an interest in a portion of the disputed property by reason of unpatented mining claims and assert that the Secretarial memorandum of January 17, 1969 is unlawful, exceeds the Secretarial powers, violates due process and constitutes a taking of property interests without just compensation and due process.

No. CIV-73-769. This is a similar action brought by the City of Mesa. It claims a fee simple interest in portions of the disputed property by reason of patents issued by the United States prior to the filing of the 1972 Plat of Survey.

No. CIV-74-553. This is a similar action brought by the Salt River Valley Water Users' Association. The Association claims an interest in a portion of the disputed property pursuant to a contract entered into with the United States in 1917 by which said land, which previously had been withdrawn for reclamation purposes, was conveyed to the Association, as Agent of the United States, for use in connection with the operation of the Salt River Project, a Federal reclamation project.

No. CIV-74-529. This is an action brought by the State of Arizona on behalf of the Director of the Arizona Department of Transportation. The State of Arizona claims an interest in a portion of the disputed property by reason of certain licenses and permits for the removal of sand and gravel and rights of way which were granted to the Department by the Bureau of Reclamation, Department of Interior.

The above consolidated cases came on for trial before the court, sitting without a jury, on March 17, 18, 22, 23 and 31, 1976, the plaintiffs were represented by their respective counsel, and the defendants were represented by their respective counsel; thereupon oral and documentary evidence was introduced by and on behalf of each of the parties, and at the close of all of the evidence, the parties rested and thereafter, within the time granted by the court, each of the parties filed their briefs and proposed Findings of Fact and Conclusions of Law, and the cause was then submitted to the court for its consideration and decision, and the court having considered all of the evidence and testimony submitted at the trial of the cause, and the briefs of counsel, and being fully advised in the premises, now makes and orders filed its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

I

The Salt River Pima-Maricopa Indian Reservation was created by the Executive Order of President Rutherford B. Hayes, dated June 14, 1879. In issuing this order President Hayes acted pursuant to the authority of the Act of February 28, 1859).

II

The Reservation set aside by this Executive Order lies immediately east of what is now the City of Scottsdale and north of the City of Mesa. Its southern boundary is described in the Executive Order as being " * * up and along the middle of the [Salt] river * * ". At issue in this proceeding is the location of the river boundary in Township 1 North, Range 2 East, Gila and Salt River Base

and Meridian.

III

The area comprising the Salt River Reservation had been surveyed in 1868 by W. F. Ingalls under contract with the General Land Office. Ingalls' field notes and the plats of his survey show the Salt River flowing in two distinct channels, generally about one-half mile apart, from a point in Section 25, T2N, R5E, and thence southwesterly about six miles to Section 7, T1N, R5E, where they reunite.

IV

The fact of these two channels was the source of uncertainty over a period of many years as to the location of the reservation boundary in T1N, R5E. This uncertainty was expressed by the Acting Commissioner of the General Land Office in a letter dated March 7, 1892, to the Commissioner of Indian Affairs, stating that entries were being made along the river and that his office did not know whether or not the island between the channels was within the reservation.

V

The location of the middle of the Salt River in Township 1 North, Range 5 East, has been complicated by extensive works of man. Beginning in about 1870 a series of irrigation canals, together with their headings and dams, diverted river waters from their natural channels. Since 1911, with the construction of Roosevelt Dam and Granite Reef Dam, only occasional flood waters have flowed through this Township.

VI

The Salt River Indians formally requested the Interior Department to resolve the uncertainty of the boundary in this Township by a Community Council resolution dated March 23, 1940. In his cover letter forwarding this resolution to his superiors, the Superintendent of the Pima-Maricopa Agency observed that non-Indians were removing sand and gravel from the river bed and were dumping refuse on it.

VII

In 1962, the Salt River Community and a principal sand and gravel claimant, Arizona Sand & Rock, sought to settle the boundary controversy by agreeing to an arbitrary midline through the disputed area which they proposed to have surveyed and then fixed by Act of Congress. The Phoenix office of the Bureau of Land Management undertook to fix this negotiated midline along the ground but it was instructed by its Washington Office that its function was only to fix true boundaries and not to participate in the settlement of disputes by fixing compromise lines.

VIII

The Phoenix office of the Bureau of Land Management sought to fix the boundary in the main channel of the River in this Township but, finding an uncertainty as to which of the channels was the principal one, referred the question to the Bureau Director in Washington. The letter of referral, sent by the Acting State Director of the BLM and dated October 26, 1962, included extensive historical material bearing on the channels of the River in this area and recommended a finding that the north channel was the main channel.

IX

The inquiry of the Phoenix District was answered in the memorandum of the Director of the Bureau of Land Management dated March 5, 1963. This memorandum reviewed the historical material and concluded that "The preponderance and weight of the evidence favors the recognition of the north channel of the Salt River as being the south boundary of the reservation." It also spoke candidly of the conflict between Indian and public land interests:

This Bureau has a prime and direct interest in the determination of this boundary through a continuing public land interest in lands outside the reservation. In general terms, lands and resources north of this boundary inure to the benefit of the Indians while the land and resources south of this line are subject to laws and regulations pertaining to public lands.

This memorandum was approved by the Assistant Secretary, Public Land Management, on May 6, 1964.

X

The Secretary of the Interior determined that, in this and in several other matters, the Bureau of Land Management was making decisions affecting Indian lands without due regard for their interests. Accordingly he directed the Solicitor to review the matter.

XI

The Solicitor personally became familiar with all material in the file of this proceeding, and, by memorandum dated January 17, 1969, held that the record indicated that the boundary of the reservation in Township 1 North, Range 5 East, was in the south channel of the Salt River. It is clear on the face of this memorandum, together with the 24 exhibits attached to it, that the Solicitor's review of the matter was done thoroughly and intelligently.

XII

By memorandum dated January 17, 1969, the Secretary of the Interior advised the Director of the Bureau of Land Management that he had determined, on the basis of the Solicitor's opinion, that the southern boundary was in the south channel.

XIII

Following the change of administration in the Executive branch of the Government on January 20, 1969, the matter was assigned for reconsideration by the new Assistant Secretary for Public Land Management. After a study of the extensive administrative record which included aerial photographs, discussions with representatives of the Indians and private interests, and after flying over the area to make a personal inspection, this Assistant Secretary directed a memorandum to the Director of the Bureau of Land Management in which he, in effect, confirmed the Secretarial order of January 17, 1969, and in which he determined that the south boundary should be accepted as being in the south channel as it existed during the 1965-66 flood.

XIV

Pursuant to the determination that the boundary lies in the south channel, a survey was undertaken under the supervision of Clark Gumm, Chief of the Cadastral Survey. The plat of this survey, consisting of four pages, was accepted on August 17, 1972.

XV

Pursuant to the order of the Chief of the Cadastral Survey, the thalweg of the south channel, i.e. the line connecting its lowest points, rather than the midline between the opposite banks, was located by the surveyors as the boundary. The reason for fixing the thalweg was that that was midline of the last water that flowed through the channel and because of the difficulty of locating accurately the banks of the channel.

XVI

The Arizona State Director of the Bureau of Land Management caused notice to be given in the Federal Register on September 8, 1972, that the plat of survey would be filed on October 16, 1972, unless it was protested before that date, and that all protests would be acted upon before the plat was filed.

XVII

Protests were timely filed by all parties to this action except the Secretary. Normally, such protests would be considered by the Director of the Bureau of Land Management but, because of the Bureau's particular interest in these proceedings, the protests were referred to the Secretary's office.

XVIII

The protests of all the parties to this action, except only that of the Indian Community, were directed only to the Secretarial Order of January 17, 1969, and did not deal with the manner in which the survey was carried out. Particularly, they did not question the use of the thalweg to fix the middle of the south channel nor the description of the surveyed boundary as being ambulatory. By memorandum dated August 2, 1973, the Acting Deputy

Assistant Secretary advised the Director of the Bureau of Land Management that the protests of all the parties except that of the Indian Community were dismissed and that the Indian Community had submitted a withdrawal of its protest conditioned on the dismissal of the others. Accordingly the Director of the Bureau of Land Management was directed to file the plat of survey in the Arizona State Office.

XIX

The claims of the parties with respect to lands within the southern boundary of the reservation in Township 1 North, Range 5 East, as that boundary is defined in the plat of survey dated August 17, 1972, are as follows:

(a) The Salt River Valley Water User's Association claims a possessory interest in the north half of the northwest quarter, the northwest quarter of the northeast quarter, and the southwest quarter of the northwest quarter. These were purportedly withdrawn under the first form withdrawal orders issued pursuant to Section 3 of the Act of June 17, 1902, 43 U.S.C. 416, which authorizes withdrawals of public land for reclamation project purposes. The Association's claim to withdrawn lands is based on its contract with the United States dated September 6, 1917, by which the United States transferred to it the care, operation and maintenance of the project. There is no instrument or other record of transfer to the withdrawn lands in Section 3 to the Association.

(b) The State Highway Commission and Maricopa County have not in this proceeding claimed any interests in lands north of the surveyed boundary. However the Indian Community has claimed against them for sand and gravel removed from the withdrawn lands in Section 3. These removals of sand and gravel were made under color of authority of permits issued by the Secretary of the Interior pursuant to the Act of August 4, 1939, 43 U.S.C. 387.

(c) Allied Concrete and Materials Company, Inc. holds a deed to the southwest quarter of the northwest quarter of Section 3.

(d) Johnson & Stewart Materials. Roy Johnson, Earl C. Johnson and the late Leroy Johnson have removed sand and gravel under unpatented mining claims from the northwest quarter of the northwest quarter of Section 9.

(e) The City of Mesa holds record title to the south half southeast quarter, §7; the north half, northwest quarter, §18; the northwest quarter and the west 33' of the northeast quarter, northeast quarter of §18; and the southeast quarter, northeast quarter of §3.

XX

In determining that the boundary lies in the south channel of the river in Township 1 North, Range 5 East, the Secretary gave due consideration to the pertinent historical materials. Particularly:

(a) The Secretary gave due consideration to the historical record preceding the issuance of the Executive Order of June 14, 1879, and properly determined that it does not indicate whether the north or the south channel was intended as the boundary. A map dated March 4, 1879, shows that Captain A. R. Chaffee recommended a reservation with a south boundary in the south channel; an earlier map identified as being "traced in the Adjutant General's office, January 1879" shows a proposed reservation with a south boundary running north of the river; Major General McDowell, Commander of the Military Division of the Pacific, recommended a reservation with a south boundary being "along the middle of the Salt River"; Inspector J. H. Hammond, reporting on March 8, 1879, that the Pimas and Maricopas had settled on both sides of the river, recommended a reservation with the north bank of the Salt River as the south boundary. The Executive Order followed the recommendation of the acting Commissioner of Indian Affairs dated June 12, 1879, by stating the boundary to be "up and along the middle of the said river" without specifying one channel or the other.

(b) The Secretary gave due consideration to the Ingalls' survey of 1868 and properly concluded that it provided evidence, though limited and inconclusive, that the south channel was larger than the north. The Secretary noted that where section lines crossed channels the length of the section lines from bank to bank were an average of 4.83 chains across the south channel and 3.71 chains across the north channel. It was established at the trial that the perpendicular distances across the channels could be calculated at points

where the section lines crossed the channels on the basis of data provided in Ingalls' notes and the average width of the south channel so computed, was 301.19 feet and that of the north channel was 183.55 feet.

(c) The Secretary gave due consideration to the sketch plat of the reservation prepared in the Surveyor General's office in Tucson and dated July 12, 1879, and reasonably found it unpersuasive. It is not a survey plat and there is no evidence that the person who drew it ever saw the Salt River.

(d) The Secretary gave due consideration to the surveys of Chillson in 1888 and Farmer in 1910 and reasonably concluded that they did not fix the boundary and that they provide no indication of which was the main channel. Both of these surveyors, having been retained to survey the reservation for agricultural allotment purposes, meandered only the north bank of the north channel which was the southern boundary of the reservation lands suitable for farming. Neither the plats of their survey nor their field notes indicate the relative sizes of the channels. There is a dotted line on the Farmer plat labelled "Reservation Boundary" which would lie approximately in the north channel if such channel had been defined on the plat. But this is not a survey line, no reference to it is made in the Farmer field notes, and it was most likely placed on the plat by someone other than Farmer merely to indicate that the boundary was south of the meander line.

(e) The Secretary gave due consideration to the letter of the Commissioner of Indian Affairs to the Commissioner of the General Land Office, dated August 1892, which refers to a plat which has not been identified, which the Indian Commissioner said "indicates that the principal portion or branch of the river runs south of the island, and that what is termed the north channel is a much narrower stream."

(f) The Secretary gave due regard to the topographical survey map of 1902-03 prepared by the United States Geological Survey which shows that the south channel was the main channel at that time.

It in fact shows the historic south channel to be the only water-bearing channel. This map was revised in 1913 and at that time the south channel is still represented as it was in 1902-03.

XXI

It is not clear what aerial photography was considered as part of the administrative record. The aerial photography in evidence in this case confirms that the south channel is the main channel. Beginning with the earliest aeriols of 1934, the principal channel coming into Township 1 North, Range 5 East, from Township 2 North, Range 5 East, is the historic south channel. At a point immediately north of the northeast quarter of section 3 in T1N, R5E, a new branch of the south channel veers to the west to the northwest corner of section 3 from whence it turns south and rejoins the historic south channel in the southwest quarter of Section 3. A second new branch of the south channel also makes a counterclockwise arc from the southwest of Section 3 across the south halves of Sections 4 and 5 and then rejoins the historic south channel in Section 8. It is undisputed that these two new branches are avulsive changes in the flow of water through the old south channel. Except for these avulations, the mainstream of the Salt River in this Township is the south channel as it was described in the Ingalls' plat of 1868 and the United States Geologic Survey plat of 1902-03.

XXII

The contention of the non-Indian land claimants that the Salt River in this Township has historically been a braided stream without discrete channels is not supported by evidence. The river ran in two well-defined channels in 1868 and in one well-defined channel in 1902-03. Since the interception of the river waters by upstream dams the works of man and wind erosion have done substantial damage but these changes do not affect the location of the boundary.

XXIII

The court finds all of the facts agreed to by the parties in the Pre-Trial Order.

From the foregoing Findings of Fact the court draws the following

CONCLUSIONS OF LAW

I

This court has jurisdiction of the consolidated cases under Title 28 U.S.C. 1331, 1361, 1362, 2201, 2202 and Title 5 U.S.C. 701-706.

II

The Congress has vested in the Secretary of the Interior the authority and the duty to survey the boundaries of Indian Reservations. Act of April 8, 1964, 13 Stat. 41, 25 U.S.C. §176.

III

A survey undertaken by the Secretary of the Interior within the scope of his statutory authority is accorded extra-ordinary deference by the judiciary.

IV.

Interior Department proceedings for the determination of instruction to surveyors, and the conduct of the survey on the ground, are executive functions with respect to which the Secretary is not required to give a hearing to affected persons or to make findings on the basis of a record.

V

A person who makes entry upon land which is near reserved land, the boundary of which has not been fixed by a survey, enters subject to the risk that his entry may later be determined to be within the reservation.

VI

The Secretary of the Interior has the legal authority and responsibility to review and to reverse any action taken with respect to a survey by the Director of the Bureau of Land Management.

VII

The fact finding procedures employed by the Department of the Interior to determine the boundary of the Salt River were adequate and the relevant facts were placed before, and considered by, the Secretary of the Interior.

VIII

The court can review the Secretary's survey of the south boundary of the Salt River Indian Reservation only to determine if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. In reviewing the Secretary's decision, the court is limited to reviewing the administrative record.

IX

Boundaries of Indian reservations cannot be diminished except by Act of Congress. Act of March 3, 1927, 25 U.S.C. 398(d). Principles of estoppel and adverse possession cannot be invoked to deprive an Indian tribe of its land.

X

The Secretary of the Interior cannot be estopped from enforcing the public policy in favor of the protection of Indian rights.

XI

The land claimants all have standing to sue.

XII

Lands reserved for Indians are not part of the public domain and any patents, licenses, permits, or claims issued under, or made pursuant to, the public land laws are void ab initio.

XIII

The laws protecting Indians must be liberally construed for their benefit and protection.

XIV

Practical construction given to laws fairly susceptible of different constructions, by those charged with the duty of executing them, is entitled to great respect.

XV

The July 12, 1879 map entitled "Plat showing lands reserved for Pima and Maricopa Indians by Executive Order of June 14, 1879" is not an official plat since it does not reflect the findings of a duly authorized and approved survey of the land represented.

XVI

Neither the Chillson survey nor the Farmer resurvey attempted to locate the south boundary of the reservation, but merely meandered the north bank of the north channel of the Salt River. A meander line is not a boundary but merely determines the sinuosities of a river.

XVII

The south boundary of the Salt River Indian Reservation was not surveyed before 1972. The 1972 survey was an original survey of the boundary and not a resurvey conducted pursuant to 43 U.S.C. 772.

XVIII

When a stream has two or more channels the middle of the stream is synonymous with the thread of the stream or the middle of the main channel.

XIX

The branching out of a boundary stream into a new channel, circumventing a body of land rather than eroding through it, is an avulsion which does not result in a change in the boundary. The boundary rather remains fixed in the former channel. In consequence of this principle the counterclockwise arcing of the mainstream around the north and west of Section 3, and through the south halves of Sections 4 and 5, as shown in the aerial photographs, did not remove the boundary from the south channel from which the avulsive changes took place.

XX

The Secretary of Interior's determination that the south boundary of the Salt River Indian Reservation lies along the deepest points of the south channel was reasonable.

XXI

The plat of survey accepted in 1972 correctly fixes the south boundary of the Salt River Indian Reservation as established by the Executive Order of June 14, 1879.

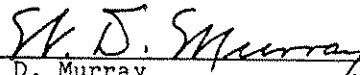
XXII

Since the Secretary of the Interior acted within the scope of his statutory authority and since the statute pursuant to which he acted is constitutional, the suits against the Secretary are in fact suits against the United States and must be dismissed on the grounds of sovereign immunity.

XXIII

The United States is not an indispensable party to the action brought by the Salt River Indian Community.

Done and dated this 16th day of August, 1976.



W. D. Murray
Senior United States District
Judge.

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COURT REPORTER
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA
DEPUTY CLERK

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SALT RIVER PIMA-MARICOPA INDIAN
COMMUNITY,

Plaintiff,

vs.

ARIZONA SAND & ROCK CO., an
Arizona corporation, et al.,

Defendants.

NO. CIV-72-376-Phx.

JOHNSON & STEWART MATERIALS, INC.,
et al.,

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vs.

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et al.,

Defendants.

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CITY OF MESA, an Arizona municipal
corporation,

Plaintiff,

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SALT RIVER VALLEY WATER USERS'
ASSOCIATION, an Arizona corpora-
tion; et al.,

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et al.,

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1 STATE OF ARIZONA, ex rel., W. A.)
 2 ORDWAY, Director of the Arizona)
 Department of Transportation,)
 3 Plaintiff,) NO. CIV-74-529-Phx.
 4 vs.)
 5 ROGERS C. B. MORTON, Secretary of)
 the Department of the Interior;)
 6 et al.,)
 7 Defendants.)

8 CONSOLIDATED PRETRIAL ORDER

9 I.

10 These consolidated actions involve the south boundary
 11 of the Salt River Indian Reservation in Township 1 North, Range
 12 5 East, Gila and Salt River Base and Meridian, north of Mesa,
 13 Arizona. As a result of a decision by the then Secretary of
 14 Interior on January 17, 1969, a plat of survey was prepared and
 15 filed on August 17, 1972, showing that boundary at a location
 16 which would result in the inclusion within the reservation of
 17 certain property to which other parties claim an interest. The
 18 individual actions are these:

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 20 Community against Arizona Sand and Rock Co., et al., for trespass,
 21 ejectment and damages for the removal of sand and gravel. The
 22 issue of the amount of damages, if any, has been severed and only
 23 the issue of liability is now before the Court. Of the defendants
 24 originally named in this action, only the following still remain:
 25 Johnson & Stewart Materials, Inc., Allied Concrete & Materials
 26 Co., Salt River Valley Water Users' Association, Arizona State
 27 Highway Commission (now the Arizona Department of Transportation),
 28 the County of Maricopa, Roy Johnson and Earl C. Johnson and their
 29 respective wives and the Executor of the Estate of Leroy Johnson,
 30 Deceased. Transamerica Title Insurance Company subsequently
 31 became a party defendant to this action on its motion to inter-
 32 vene upon the grounds that it has issued a policy of title

1 insurance upon property owned by Allied Concrete & Materials Co.

2 In this action the Indian Community seeks an order of
3 ejectment against all defendants from the reservation as deter-
4 mined by the Secretarial memorandum of January 17, 1969, and
5 damages for trespass against all defendants except Allied Concrete
6 and Materials Company, Inc.

7 In the course of proceedings in this case the Court
8 ruled that it would not consider a collateral attack by the
9 defendants upon the decision of the Secretary of the Interior
10 and this ruling resulted in the filing of the subsequent actions
11 in which the following claims are asserted:

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13 Johnson & Stewart Materials, Inc., Roy Johnson and Earl C. Johnson
14 and their respective wives, and the executor of the Estate of
15 Leroy Johnson (hereinafter collectively referred to as "Johnson &
16 Stewart") against the Secretary of Interior seeking to invalidate
17 the decision of the Secretary and the 1972 Plat of Survey. The
18 plaintiffs claim an interest in a portion of the disputed property
19 by reason of unpatented mining claims and assert that the
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21 the Secretarial powers, violates due process and constitutes a
22 taking of property interests without just compensation and due
23 process.

24 NO. CIV-73-769. This is a similar action brought by
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26 the disputed property by reason of patents issued by the United
27 States prior to the filing of the 1972 Plat of Survey.

28 NO. CIV-74-553. This is a similar action brought by
29 the Salt River Valley Water Users' Association. The Association
30 claims an interest in a portion of the disputed property pursuant
31 to a contract entered into with the United States in 1917 by
32 which said land, which previously had been withdrawn for

1 reclamation purposes, was conveyed to the Association, as Agent
2 of the United States, for use in connection with the operation of
3 the Salt River Project, a Federal reclamation project.

4 NO. CIV-74-529. This is an action brought by the State
5 of Arizona on behalf of the Director of the Arizona Department of
6 Transportation. The State of Arizona claims an interest in a
7 portion of the disputed property by reason of certain licenses
8 and permits for the removal of sand and gravel and rights of way
9 which were granted to the Department by the Bureau of Reclamation,
10 Department of Interior.

11 For convenience, the parties will some times hereinafter
12 be designated by referring to the plaintiff in No. CIV-72-376
13 as the "Indian Community", the defendants in the remaining docket
14 numbers as the "Secretary", and the remaining parties as the
15 "Land Claimants".

16 II.

17 The jurisdiction of this Court is invoked under Title 28
18 U.S.C. §1331 (Federal Question), §1361 (Action to Compel a Federal
19 Officer to Perform his Duty), §1362 (Indian Tribe as a Plaintiff),
20 §§2201-2202 (Declaratory Judgment) and Title 5 U.S.C. §§701-706
21 (Administrative Procedure Act).

22 To the extent this action might be regarded as an
23 action against the United States, the Land Claimants rely upon
24 the rationale of Ritter v. Morton, 513 F.2d 942 (9th Cir., 1975);
25 Armstrong v. Udall, 435 F.2d 28 (9th Cir., 1970); Andros v. Rupp,
26 433 F.2d 70 (9th Cir., 1970).

27 III.

28 The following facts are admitted by the parties and
29 require no proof:

30 1. The Salt and the Verde Rivers converge at a point
31 approximately four miles northeast of what is now Granite Reef
32 Dam in Maricopa County, Arizona, to form the Salt River.

1 2. On October 22, 1868, there was filed with the
2 General Land Office of the United States of America a plat of
3 survey and subdivision of Township 1 North, Range 5 East of the
4 Gila and Salt River Base and Meridian in conformity with the field
5 notes of the survey thereof conducted by W. F. Ingalls and William
6 H. Pierce.

7 3. By Executive Order dated January 10, 1879, President
8 Rutherford B. Hayes set apart for the use of the Pima-Maricopa
9 Indians as an additional reservation a large parcel of land
10 within Maricopa County, Arizona, including what is now the greater
11 Phoenix area.

12 4. By Executive Order dated June 14, 1879, President
13 Rutherford B. Hayes cancelled his previous Executive Order dated
14 January 10, 1879, and set apart for the use of the Pima-Maricopa
15 Indians a substantially smaller tract of land described in part
16 as follows:

17 Beginning at the point where the range line
18 between ranges four and five each crosses the
19 Salt River, thence up and along the middle of
20 said river to a point where the easterly line
21 of Camp McDowell Military Reservation, if pro-
22 longed south, would strike said river, thence
23 northerly to the southeast corner of Camp
24 McDowell Reservation; thence west along the
25 southern boundary line of said Camp McDowell
26 reservation to the southwest corner thereof;
27 thence up and along the west boundary of
28 said reservation until it intersects the
29 north boundary of the southern tier of
30 sections in township three north, range six
31 east; thence west along the north boundary
32 of the southern tier of sections in township
three north, ranges five and six east to the
northwest corner of section thirty-one, town-
ship three north, range five east; thence
south along the range line between ranges
four and five east to the place of beginning.
[Emphasis added]

29 5. On December 27, 1887, L. D. Chillson was instructed
30 to survey the exterior boundaries of the Salt River Indian
31 Reservation and to subdivide the reservation into 40 acre allot-
32 ments. On July 11, 1888, there was filed with the General Land

1 Office a plat of survey in conformance with Chillson's field notes.
2 The surveyor meandered the north bank of Salt River as it flows
3 through Township 1 North, Range 5 East.

4 6. On July 2, 1902 the Secretary of the Interior, pur-
5 suant to Section 3 of the Reclamation Act (Title 43 U.S.C. §§416,
6 432 and 434), entered a Second Form of withdrawal order purporting
7 to withdraw the public lands in the Salt River Valley including
8 all of the land situated in Township 1 North, Range 5 East.
9 Thereafter, on June 29, 1940 and June 3, 1954, the Secretary
10 entered orders purporting to change from Second Form Withdrawal
11 to First Form Withdrawal the withdrawal of certain lands situated
12 within Section 3 of said township, more particularly described as
13 Lots 2, 3, 4 and the Southwest Quarter of the Northwest Quarter
14 of Section 3 in Township 1 North, Range 5 East, Gila and Salt
15 River Base and Meridian. The Salt River Valley Water Users'
16 Association claims an interest in this property pursuant to the
17 provisions of a contract between the Association and the United
18 States dated September 6, 1917. It is within this area that the
19 Bureau of Reclamation issued sand and gravel permits to the
20 Arizona Highway Department and Maricopa County. Fee title to
21 this property is vested in the United States.

22 7. On October 11, 1910, R. A. Farmer was instructed to
23 survey (1) the boundary and exterior lines embraced within the
24 Salt River Indian Reservation, and (2) to subdivide the Salt River
25 Indian Reservation. On March 29, 1913, there were filed with the
26 United States General Land Office in Washington, D. C. plats of
27 survey of Township 1 North, Range 5 East, Township 2 North,
28 Range 5 East, and Township 2 North, Range 6 East of the Gila and
29 Salt River Base and Meridian, Arizona, in conformance with R. A.
30 Farmer's field notes. On these plats there appears a dotted line
31 labeled "reservation boundary". A dispute exists between the
32 parties whether this line constitutes a part of the survey.

1 8. By Executive Order dated September 28, 1911, Presi-
2 dent William Howard Taft amended the Presidential Executive Order
3 dated June 14, 1879, so as to permanently withdraw from settle-
4 ment, entry, sale or other disposition all those tracts of land
5 lying south of the Salt River in Sections 25, 26, 34 and 36,
6 except the Southeast Quarter of the Southeast Quarter, Section 34,
7 in Township 2 North, Range 5 East, of the Gila and Salt River
8 Base and Meridian, for the use of the Pima and Maricopa Indians.

9 9. On September 30, 1924, the United States Surveyor
10 General Charles M. Donahoe, filed with the United States General
11 Land Office a supplemental plat of Section 35 of Township 2 North,
12 Range 5 East, Gila and Salt River Base and Meridian in compliance
13 with instructions contained in General Land Office letter "E"
14 dated July 11, 1924. A supplemental plat relating to a portion
15 of Section 12 of Township 1 North, Range 4 East was also filed
16 at the same time by Surveyor General Donahoe.

17 10. Between 1892 and 1933 the United States issued
18 patents covering various parcels of which, either directly or by
19 mesne conveyances, the City of Mesa is now record owner. Such
20 parcels are as follows:

21 PARCEL NO. 1: The Southeast Quarter of the
22 Southeast Quarter of Section 7, Township 1
23 North, Range 5 East of the Gila and Salt River
Base and Meridian, Maricopa County, Arizona.

24 PARCEL NO. 2: A strip or parcel of land 300
25 feet in width off the West side of the North-
26 east Quarter of the Northeast Quarter of
Section 18, Township 1 North, Range 5 East,
extending the entire length North and South of
said Quarter Section.

27 PARCEL NO. 3: The East Half of the Southwest
28 Quarter of the Southeast Quarter of Section 7,
29 and the East Half of the Northwest Quarter of
the Northeast Quarter of Section 18, all in
30 Township 1 North, Range 5 East of the Gila and
Salt River Base and Meridian, Maricopa County,
Arizona.

31 PARCEL NO. 4: The West Half of the Southwest
32 Quarter of the Southeast Quarter of Section 7,
and the West Half of the Northwest Quarter of

1 the Northeast Quarter of Section 18, all in
2 Township 1 North, Range 5 East of the Gila and
Salt River Base and Meridian.

3 PARCEL NO. 5: The Northwest Quarter of
4 Section 18, Township 1 North, Range 5 East
of the Gila and Salt River Base and Meridian,
5 EXCEPT the South one-half of the North one-
half, and the North one-half of the South one-
6 half of Lot 2 (which said Lot 2 is sometimes
referred to as the Southwest Quarter of said
7 Northwest Quarter) deeded to the United States
of America in instruments recorded March 23,
8 1954, in Docket 1311, at Page 210.

9 PARCEL NO. 6: All of the Southeast Quarter
of the Northwest Quarter of Section 3, Town-
10 ship 1 North, Range 5 East, of the Gila and
Salt River Base and Meridian, EXCEPT the East
11 33 feet and the South 20 feet thereof.

12 11. Johnson & Stewart claims certain rights, titles,
13 interests and licenses in the Northwest Quarter of the Northwest
14 Quarter of Section 9, Township 1 North, Range 5 East pursuant to
15 certain unpatented mining claims located originally in 1947 and
16 again relocated in 1953 which have been worked, mined and main-
17 tained to the present time in compliance with all applicable
18 federal and state laws.

19 12. Allied Concrete and Materials Company, Inc. holds
20 record title originating with patents from the United States to
21 the Southwest Quarter of the Northeast Quarter of Section 3, Town-
22 ship 1 North, Range 5 East, Gila and Salt River Base and Meridian.

23 13. Maricopa County, a political subdivision of the State
24 of Arizona, has removed sand and gravel within Section 3 pursuant
25 to permits issued by the Bureau of Reclamation which date from
26 and after 1948.

27 14. The Arizona Department of Transportation has claimed
28 certain rights to remove sand and gravel within Section 3, Town-
29 ship 1 North, Range 5 East of the Gila and Salt River Base and
30 Meridian, pursuant to permits and licenses issued by the United
31 States Department of the Interior, Bureau of Reclamation, which
32 date from and after 1942 and has been granted rights of way

1 covering portions of Country Club Drive by the Bureau of Reclama-
2 tion.

3 15. In 1962, the Arizona State office of the Bureau of
4 Land Management, at the request and expense of Arizona Sand and
5 Rock Co. and the Indian Community, undertook to establish an
6 agreed line for the south boundary of the reservation. In the
7 course of this work, the surveyors reported the existence of two
8 channels within the Salt River, one lying north of the other.

9 16. On October 26, 1962, the Arizona State Director of
10 the Bureau of Land Management requested the Director of the Bureau
11 of Land Management to decide whether the north or south channel
12 constituted the boundary of the reservation. The State Director's
13 report indicated that his position conflicted with that of the
14 Bureau of Indian Affairs Superintendent at the Salt River Pima-
15 Maricopa Reservation.

16 17. In response to the State Director's request, the
17 Director of the Bureau of Land Management ruled on March 5, 1963,
18 that the north channel constituted the reservation boundary in
19 Township 1 North, Range 5 East, Gila and Salt River Base and
20 Meridian.

21 18. A memorandum dated April 14, 1964 from the Associate
22 Solicitor of Public Lands to the Assistant Secretary, Public Land
23 Management, concluded that the evidence "preponderated" in favor
24 of the north channel as the southern boundary of the reservation.

25 19. The Secretary of the Interior in 1968 requested the
26 Solicitor of the Department of the Interior to review the Bureau
27 of Land Management's 1963 opinion. The Solicitor is the chief
28 legal officer of the Department of the Interior and has the
29 responsibility for the legal affairs of both the Bureau of Land
30 Management and the Bureau of Indian Affairs.

31 20. By memorandum dated January 17, 1969, to the
32 Secretary of the Interior, the Solicitor of the United States

1 Department of the Interior, expressed the opinion that the bound-
2 dary of the Salt River Indian Reservation lies within the south
3 rather than the north channel of the Salt River.

4 21. By memorandum dated January 17, 1969 the former
5 Secretary of the Interior, Stewart L. Udall, relying upon the
6 Solicitor's 1969 memorandum, concluded that the south boundary
7 of the Salt River Indian Reservation lies within the south
8 channel of the Salt River in Township 1 North, Range 5 East of
9 the Gila and Salt River Base and Meridian and ordered the Bureau
10 of Land Management to note the official records accordingly.

11 22. By memorandum dated November 17, 1971 to the Director
12 of the Bureau of Land Management, Harrison Loesch, the then
13 Assistant Secretary - Public Land Management, determined that the
14 south boundary of the Salt River Indian Reservation in Section 3,
15 of Township 1 North, Range 5 East should be accepted as being in
16 the south channel as it existed during the 1965-66 flood.

17 23. On August 17, 1972, a plat of dependent resurvey
18 and survey was filed with the United States Department of the
19 Interior, Bureau of Land Management in Phoenix, Arizona, by Clark
20 F. Gumm, Chief of the Division of Cadastral Survey of the United
21 States Department of the Interior purporting to show thereon the
22 south boundary of the Salt River Indian Reservation as an ambula-
23 tory line representing the middle of the Salt River.

24 24. The Federal Register in Volume 37, #175 for Friday,
25 September 8, 1972, at page 18224, announced that interested
26 parties were to be given the opportunity to protest the filing of
27 the aforementioned 1972 plat of survey.

28 25. Protests were filed by all of the original parties
29 to the above entitled and numbered consolidated action, excepting
30 Maricopa County and the Secretary.

31 26. All of the aforementioned protests have been denied
32 by the Department of Interior excepting the protest of the

1 Indian Community which was withdrawn upon condition that the other
2 protests be denied. The parties were informed that such denial
3 represented final administrative action by the Department of
4 Interior.

5 27. The Land Claimants, other than Maricopa County,
6 claim certain rights, titles, claims and other interests to lands
7 lying north of the reservation boundary as set forth in the 1972
8 plat of survey.

9 28. A diversion dam (Granite Reef) was built below
10 the confluence of the Salt and Verde Rivers in 1906-1908.

11 29. Storage dams were constructed on the Salt and Verde
12 Rivers as follows:

<u>SALT RIVER</u>		<u>STORAGE CAPACITY</u>
Roosevelt Dam	1905 - 1911	1,381,580 acre feet
Horse Mesa	1924 - 1927	245,138 acre feet
Mormon Flat	1923 - 1925	57,852 acre feet
Stewart Mountain	1928 - 1930	69,765 acre feet
<u>VERDE RIVER</u>		<u>STORAGE CAPACITY</u>
Horseshoe	1944 - 1946	139,238 acre feet
Bartlett	1936 - 1939	178,477 acre feet

19 30. The Salt River is not now and never has been a
22 navigable river.

23 IV.

24 The contested issue agreed upon between the Land
25 Claimants and the Secretary is as follows:

26 With regard to Causes No. CIV-74-553, CIV-74-529 and
27 CIV-73-579, whether the Secretary in connection with his 1969
28 memoranda and 1972 survey, acted in a manner which was arbitrary,
29 capricious, an abuse of discretion, or otherwise not in accordance
30 with law. No agreement has been reached as to other contested
31 issues of fact and law in said actions.

32 No agreement has been reached as to the contested

1 issues of fact and law between the plaintiff Indian Community and
2 the defendants in Cause No. CIV-72-376. No agreement has been
3 reached as to the contested issues of fact and law between the
4 plaintiff City of Mesa and the Secretary of the Interior in Cause
5 No. CIV-73-769.

6 V.

7 The following additional issues of fact and law are
8 deemed material:

9 A. By the Indian Community:

10 1. Whether the Salt River Project, the State of
11 Arizona, and Maricopa County, have been mere licensees with re-
12 spect to the lands withdrawn for reclamation purposes in Section
13 3, with the result that they lack standing to have the Secretary's
14 Survey set aside.

15 2. Whether the Secretary's Survey of the southern
16 boundary of the Salt River Indian Reservation was arbitrary,
17 capricious, or beyond the scope of his authority, with the result
18 that it should be set aside as being invalid.

19 3. If the Court orders that the Secretary's Survey
20 of the southern boundary of the Salt River Indian Reservation is
21 invalid, then the next issue will be whether the Court can pro-
22 ceed any further in the matter other perhaps than to remand the
23 proceeding to the Secretary of the Interior.

24 4. If the Court finds the Secretary's Survey of the
25 southern boundary of the Salt River Indian Reservation is invalid
26 and thereupon retains jurisdiction to determine where the boundary
27 should be relocated, then the remaining issue will be - where is
28 the southern boundary of the Salt River Indian Reservation to be
29 relocated.

30 B. By the Land Claimants jointly:

31 1. Whether the south boundary of the Salt River
32 Indian Reservation was established prior to the Secretarial

1 Memorandum of January 17, 1969.

2 a. Whether the contemporaneous historical
3 evidence surrounding the issuance of the Executive Order of June
4 14, 1879 indicate that it was the intent of the Order to establish
5 the south boundary in the center of the north channel.

6 b. Whether the south boundary was platted and
7 fixed by the Surveyor General's map dated July 12, 1879.

8 c. Whether the south boundary was established
9 by the L. D. Chillson survey of 1888 and the official plat of
10 record filed in the General Land Office.

11 d. Whether the south boundary was established
12 by the R. A. Farmer survey of 1910 and the official plat of record
13 filed in the General Land Office.

14 e. Whether the south boundary was fixed by
15 interpretations and holdings of the Department of the Interior or
16 its bureaus or divisions as being in the north channel.

17 f. Whether the United States as trustee and
18 the Indian Community as beneficiary have acknowledged by their
19 actions and transactions over a period of many years that the
20 reservation did not extend south of the R. A. Farmer 1910 boundary
21 line.

22 g. Whether the members of the plaintiff, Salt
23 River Pima-Maricopa Indian Community, and the trustee of their
24 reservation lands, for many years have taken no action or failed
25 to register any objection to the establishment of mining claims,
26 grants of patents or licenses within the property involved in
27 this litigation.

28 h. Whether the members of the plaintiff Indian
29 Community ever cultivated, inhabited or used or asserted any
30 dominion or control over the so-called island located in Section 9
31 of Township 1 North, Range 5 East.

32 2. If the south boundary of the Salt River Indian

1 Reservation was not established prior to the Secretarial memoran-
2 dum of January 17, 1969, was the 1969 memorandum of the Secretary
3 and the 1972 survey pursuant thereto arbitrary, capricious, an
4 abuse of discretion or otherwise not in accordance with law?

5 a. Whether the Secretarial memorandum of Jan-
6 uary 17, 1969 created new boundaries for the reservation in
7 violation of the provisions of Title 25 U.S.C. §398(d), Title 25
8 U.S.C. §211 and Title 43 U.S.C. §772 or clarified the original
9 boundaries.

10 b. Whether the Secretary properly interpreted
11 the Executive Order of June 14, 1879.

12 c. Whether due process of law was violated by
13 the Secretary of the Interior when he refused to hold any hearings
14 or take any evidence on the question of the disputed boundary
15 and refused to recognize any protests other than those questioning
16 the appropriate location of the boundary line within the south
17 channel.

18 3. Assuming the Secretarial memorandum of January
19 17, 1969 was valid, whether the memorandum was followed and
20 properly applied through the use of a "thalweg" as the "middle of
21 the river" in the August 17, 1972 plat of survey.

22 4. Assuming the line shown on the 1972 plat of
23 survey is not binding upon the Court, where is the "middle of the
24 river" in compliance with the Executive Order of June 14, 1879
25 and is that line ambulatory?

26 a. The effect of the man-made changes within
27 the bed of the Salt River upon the location of the south boundary.

28 b. Whether the south boundary should be an
29 ambulatory line.

30 c. Whether the reference in the Executive
31 Order to the "middle" of the river should be interpreted as refer-
32 ring to a medial line between the high banks, to the "thalweg",

- 1 to the "thread of the stream", or to some other measuring line.
- 2 d. At what level of water flow should the
- 3 "middle" of the river be measured?
- 4 e. Whether the "middle" of the river should
- 5 be determined with reference to the existence of the river bed
- 6 when dry.
- 7 f. Whether the evidence, geologic information
- 8 and photographs show a highly erratic river flow and that the
- 9 location of channels within the defined cut banks is constantly
- 10 subject to change.
- 11 g. Whether the Salt River in Township 1 North,
- 12 Range 5 East should be regarded as containing two "channels".
- 13 h. If so, whether at the present time, the
- 14 north channel of the Salt River in Township 1 North, Range 5
- 15 East is the main channel of the river.
- 16 i. Is it scientifically possible today to
- 17 determine a midline boundary, complying with the original Execu-
- 18 tive Order by using the high banks or cutbanks of the river?
- 19 j. Whether by reason of the doctrine of prior
- 20 appropriation such water which does occasionally flow in the
- 21 river bed is not available for use by the adjacent owners, includ-
- 22 ing any of the parties hereto, but must be permitted to continue
- 23 down stream for diversion by the Buckeye Irrigation District,
- 24 whose landowners have prior appropriative rights thereto.
- 25 k. Whether by reason of the foregoing circum-
- 26 stances access to the flow of water in the river bed is of no
- 27 value to any of the parties hereto.
- 28 l. Whether the common law rules respecting a
- 29 boundary lying between two parcels separated by a river are inap-
- 30 plicable to these actions.
- 31 m. Whether this Court may properly fix a period
- 32 of time when the flow of water in the Salt River became so

1 infrequent that the common law rules ceased to apply and the
2 Court may fix a line, susceptible to survey on the ground, which
3 will fix a permanent boundary to the reservation.

4 n. Whether the extensive man-made activities
5 within the bed of the Salt River in the subject area starting from
6 before the creation of the Indian Reservation in 1879, continuing
7 through the present and anticipated in the future, have so arti-
8 ficially influenced and changed the flow and the course of the
9 Salt River that the Court may properly and permanently fix the
10 south boundary as a midline between the natural high banks (out-
11 side banks) of the Salt River.

12 5. Whether the Indian Community's claim for damages
13 and ejectment is barred by statutes of limitation, laches,
14 estoppel or immunity.

15 a. Whether the plaintiff Indian Community has
16 standing to sue in trespass or ejectment without first establish-
17 ing its possessory interest in the disputed land.

18 b. Whether if any portion of the reclamation
19 withdrawn land in Section 3 is included within the reservation,
20 the Salt River Valley Water Users' Association, the Department
21 of Transportation and Maricopa County are immune from liability
22 to the Indian Community because they have used the land pursuant
23 to valid contracts and permits from the United States and in the
24 case of the Association as agent of the United States.

25 C. By the Secretary:

26 1. The Secretary maintains that all he has thus
27 far done is resolve an internal departmental dispute and has not
28 affected any of the non-Indians alleged interests, that no federal
29 question is present and that he has fulfilled the requirements of
30 the Administrative Procedure Act.

31 2. The Executive Order of June 14, 1879, which
32 established the present Salt River Pima-Maricopa Reservation

1 described the south boundary of the Salt River Pima-Maricopa
2 Reservation by means of calls to natural objects. The Executive
3 Order also preserved Indian interests lying south of the Salt
4 River.

5 3. Calls to natural objects govern courses and
6 distances run by a surveyor.

7 4. A meander line is not a boundary but merely
8 describes the sinuosities of the banks of a stream and the
9 amount of land to be conveyed.

10 5. The Bureau of Land Management is the agency
11 within the Department of the Interior charged with administering
12 the public lands of the United States. The Bureau of Land Manage-
13 ment had an admitted self-interest in its 1963 opinion that the
14 north channel of the Salt River constituted the boundary of the
15 Salt River Pima-Maricopa Indian Reservation.

16 6. None of the non-Indian land claimants acquired
17 any interest in lands between the north and south channels of
18 the Salt River subsequent to, or in reliance upon, the Director
19 of the Bureau of Land Management's May 3, 1963 opinion.

20 7. Neither the Bureau of Indian Affairs nor the
21 Salt River Pima-Maricopa Tribe have ever assented to the Bureau
22 of Land Management's view that the north channel of the Salt
23 River is the southern boundary of the Salt River Indian Reserva-
24 tion.

25 8. Notwithstanding the rights asserted by the non-
26 Indian land claimants, the United States has fee title to much of
27 the land lying between the north and south channels of the Salt
28 River.

29 9. The south boundary of the Salt River is an
30 ambulatory line which changes with the non-avulsive changes in
31 the main channel of the Salt River.

32 10. The 1972 survey was conducted in accordance

1 with the instructions by the Department of the Interior and
2 accepted surveying practice.

3 11. A topographic map made in 1902-03 shows the
4 Salt River running only in one channel--the south channel-- and
5 a dotted line in the center of said channel indicates the reser-
6 vation boundary.

7 12. None of the parties suing the Secretary have
8 suffered a legal wrong because of agency action or have been
9 adversely affected or aggrieved by agency action within the
10 meaning of a relevant statute.

11 13. The Court's jurisdiction in the suits against
12 the Secretary is limited to determining, on the basis of the
13 administrative record before the Secretary, whether the Secretary
14 acted in a manner which was arbitrary, capricious, an abuse of
15 discretion, or otherwise not in accordance with law and, if so,
16 to remanding the case to the Secretary for further proceedings.

17 D. By the City of Mesa, Transamerica Title Insurance
18 Co. and Allied Concrete & Materials Co.:

19 1. Did the filing of the 1972 Plat of Survey con-
20 stitute a decision by the Secretary of Interior regarding the
21 proper location of the reservation boundary?

22 2. As against the claims of adjoining patentees
23 from the United States and their successors in interest, did the
24 Secretary of Interior have legal authority to decide the location
25 of the boundary?

26 3. Did the filing of the 1972 Plat of Survey as a
27 part of the public records of the Phoenix office of the Bureau of
28 Land Management constitute a decision by the Secretary of Interior
29 that all property lying to the north of the reservation boundary,
30 as there delineated, was the property of the United States as
31 trustee for the Indian Community?

32 4. Does the 1972 Plat of Survey as now filed with

1 the Bureau of Land Management constitute a cloud upon the titles
2 of the City of Mesa and Allied Concrete & Materials Co.?

3 5. Was the filing of the 1972 Plat of Survey,
4 including the boundary line shown thereon, within the legal powers
5 of the Department of Interior irrespective of the nature and extent
6 of the administrative procedures which preceded the filing of the
7 plat?

8 E. By the Arizona State Highway Commission:

9 1. What is the appropriate scope of review of
10 the decision of the former Secretary of the Interior, Stewart L.
11 Udall?

12 2. What is the appropriate standard of review?

13 3. Are plaintiff Indian Community's claims for
14 relief in trespass barred by the provisions of A.R.S. §12-542?

15 4. To what extent does prior construction of the
16 June 14, 1879 Executive Order by the Bureau of Indian Affairs,
17 the General Land Office (now the BLM) and the Bureau of Reclama-
18 tion indicate a long-standing administrative interpretation of
19 the location of the boundary within the bed of the Salt River?

20 5. Whether or not the plaintiff's action against
21 the State of Arizona in the Federal District Court is barred by
22 the Eleventh Amendment to the United States Constitution.

23 6. Whether or not there may be other indispensable
24 parties having fee or lesser interests in real property lying
25 within the bed of the Salt River within Township 1 North, Range 5
26 East, who may be adversely affected by any determination which
27 this Court may make.

28 7. Whether or not the United States of America
29 is an indispensable party to the present action under Rule 19
30 of the Federal Rules of Civil Procedure.

31 8. If the line to be established is a fixed rather
32 than an ambulatory line, what date (or flow) should be utilized

1 for the purpose of establishing the rights of the parties to the
2 lands in question?

3 9. Should the entire matter be remanded to the
4 Department of the Interior in order to hold hearings, take testi-
5 mony, allow the introduction into evidence of exhibits, take
6 testimony and generally augment a woefully inadequate administra-
7 tive record.

8 F. By Johnson & Stewart Materials, Inc.:

9 Johnson & Stewart Materials, Inc. adopts the issues
10 of fact and law set forth above jointly by the Land Claimants
11 without additions thereto.

12 G. By Salt River Valley Water Users' Association and
13 Salt River Project Agricultural Improvement and Power District:

14 Salt River Valley Water Users' Association and the
15 Salt River Project Agricultural Improvement and Power District
16 adopts the issues of fact and law set forth above jointly by the
17 Land Claimants without additions thereto.

18 VI.

19 A list of exhibits is attached hereto and incorporated
20 herein by reference. The parties stipulate to the admission in
21 evidence of all exhibits previously marked for identification.
22 This stipulation is made solely in the interests of trial conven-
23 ience and does not preclude any party from challenging any exhibit
24 as being wholly irrelevant and immaterial to any of the issues in
25 this litigation or as being beyond the scope of review of the
26 Secretary's actions nor to challenge the weight to be given to any
27 of the contents thereof.

28 VII.

29 The Land Claimants intend to offer all of the following
30 depositions:

31 Deposition of Boyd S. Owens, dated March 28, 1974.

32 Deposition of the Honorable Stewart L. Udall, dated

1 October 22, 1974.

2 Deposition of Harrison Loesch, dated October 22, 1974.

3 Deposition of Edward Weinberg, dated October 21, 1974.

4 Deposition of Henry Taliafero, dated October 22, 1974.

5 Deposition of Clark Gumm, dated October 21 and October
6 22, 1974.

7 The Indian Community intends to offer the following
8 depositions:

9 Deposition of James H. Jones, Jr., dated January 15,
10 1975, together with all depositions marked as exhibits herein.

11 The Secretary intends to offer the following depositions:

12 The Secretary believes that depositions are not rele-
13 vant to the lawsuits in which he is a defendant since the only
14 issue therein is the reasonableness of the decision made on the
15 basis of the administrative record. In the event the Court per-
16 mits the use of depositions herein, the Secretary reserves the
17 right to use any of the depositions listed herein by the other
18 parties.

19 VIII.

20 The Land Claimants intend to call the following wit-
21 nesses at the trial:

- 22 *1. Lawrence Hanline, Bureau of Indian Affairs
23 124 West Thomas Road
Phoenix, Arizona
- 24 2. James H. Jones, Jr.
25 1536 East Mountain View Road
Phoenix, Arizona
- 26 3. Clark Gumm
27 Greater Washington, D.C. area, exact
address unknown.
- 28 4. Stewart Udall
29 6400 Goldsboro Road
Bethesda, Maryland
- 30 5. Leonard Halpenny
31 3938 Santa Barbara Avenue
Tucson, Arizona
- 32

- 1 6. Dr. Troy L. Pewe
2 538 East Fairmont Drive
3 Tempe, Arizona
- 4 7. Paul Smith, Bureau of Indian Affairs
5 124 West Thomas
6 Phoenix, Arizona
- 7 8. Earl Johnson
8 1401 North Alma School Road
9 Mesa, Arizona
- 10 9. Everett Stewart
11 1401 North Alma School Road
12 Mesa, Arizona
- 13 10. Boyd Owens, Bureau of Land Management
14 Valley Center, 24th Floor
15 Phoenix, Arizona
- 16 11. Orson Phelps
17 827 East Seventh Street
18 Mesa, Arizona
- 19 12. Waldo Williams
20 502 North Alma School Road
21 Mesa, Arizona
- 22 13. Lewis Phelps
23 1014 West University Drive
24 Mesa, Arizona
- 25 14. Forrest Jennings, Location Section
26 Arizona Department of Transportation
27 206 South 17th Avenue
28 Phoenix, Arizona
- 29 15. Richard Pinkerton, Photogrammetry
30 Arizona Department of Transportation
31 206 South 17th Avenue
32 Phoenix, Arizona
16. Bryan Rockwell, Title Section
Arizona Department of Transportation
206 South 17th Avenue
Phoenix, Arizona
17. Richard K. Esser, Supervisor
Production Control, Right of Way Operations
Arizona Department of Transportation
206 South 17th Avenue
Phoenix, Arizona
18. A. J. Pfister, Deputy General Manager
Salt River Project
1521 Project Drive
Tempe, Arizona
19. Don Weesner, Chief Engineer
Salt River Valley Water Users' Association
1521 Project Drive
Tempe, Arizona

- 1 20. Francis Smith, Secretary
2 Salt River Project
3 1521 Project Drive
4 Tempe, Arizona
- 5 21. Victor I. Corbell, former President of
6 Salt River Project
7 303 East Del Rio Drive
8 Tempe, Arizona
- 9 22. Ted Wilson, Supervisor
10 Hydrologic Records and Analysis
11 Salt River Valley Water Users' Association
12 1521 Project Drive
13 Tempe, Arizona
- 14 23. Jim Gardner, Supervisor
15 Cartographic Section of Drafting Department
16 Salt River Valley Water Users' Association
17 1521 Project Drive
18 Tempe, Arizona
- 19 24. John S. Schaper
20 215 East Lexington
21 Phoenix, Arizona 85012
- 22 25. Joe T. Fallini
23 Boise, Idaho area
24 exact address unknown
- 25 26. George Hedden, former Assistant Area Director of
26 Bureau of Indian Affairs
27 1902 East Dartmouth
28 Mesa, Arizona
- 29 27. Garnet Hayes
30 10000 East McDowell
31 Scottsdale, Arizona
- 32 28. Charles K. Luster
33 Director of Public Works
34 City of Mesa
35 55 North Center
36 Mesa, Arizona
- 37 29. Francis H. Lathrop
38 Deputy County Engineer
39 Maricopa County
40 3325 West Durango
41 Phoenix, Arizona
- 42 30. Joseph C. Alexander
43 Maricopa County Right of Way Agent
44 111 South Third Avenue
45 Phoenix, Arizona
- 46 31. Title Officer
47 Lawyers Title of Arizona
48 2200 North Central Avenue
49 Phoenix, Arizona
- 50 32. Title Officer
51 Transamerica Title Insurance Company
52 114 West Adams
53 Phoenix, Arizona

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33. Title Officer
Dynacompa, Inc.
930 East Highland
Phoenix, Arizona

34. State witness re grade and location of North
Country Club Drive

The Plaintiff Indian Community intends to call the
following witnesses at the trial:

- 1. W. S. Gookin
4203 North Brown Avenue
Scottsdale, Arizona
- 2. G. Donald Voorhees
Bureau of Land Management
Washington, D. C.

The Secretary believes that the jurisdiction of the
Court is limited to reviewing the administrative record upon which
the 1969 decision and 1972 survey were made since the relief
sought is a review of those administrative actions. However, if
the Court is of the view that the introduction of other evidence
is proper, the Secretary adopts the list of witnesses submitted
by the tribe and in addition may call the following:

- 1. Boyd S. Owens, Bureau of Land Management
Valley Center, 24th Floor
Phoenix, Arizona
- 2. James H. Jones, Jr.
1536 East Mountain View Road
Phoenix, Arizona
- *3. Harrison Loesch
Counsel to the Committee on Interior
and Insular Affairs
House of Representatives
Washington, D. C.
- 4. Edward Weinberg
1700 Pennsylvania Avenue, N.W.
Washington, D. C.
- 5. Henry B. Taliaferro, Jr.
815 Connecticut Avenue, N.W.
Washington, D. C.
- 6. Stewart L. Udall
6400 Goldsboro Road
Bethesda, Maryland
- 7. Clark Gumm
Address to be supplied

1 8. G. Don Vorhees
2 Bureau of Land Management
3 Department of the Interior
4 Washington, D. C.

5 IX.

6 The foregoing pretrial order has been approved by the
7 parties to this action as evidenced by the signature of their
8 counsel hereon, and the order is hereby entered and will govern
9 the trial of this case. This order shall not be amended except
10 by order of the Court pursuant to agreement of the parties or to
11 prevent manifest injustice.

12 DATED this 17th day of March, 1976.

13
14 W. D. Murray
15 W. D. Murray, Senior U. S. District
16 Court Judge

17 APPROVED AS TO FORM AND CONTENT:
18 MARKS & MARKS

19 **CEATIFIED TO BE A TRUE COPY**
20 **DATED: 05 JUN 1986**

21 By Philip J. Shea
22 Philip J. Shea
23 Attorneys for Plaintiff

24 **RICHARD H. WEARE, CLERK**
25 **U. S. DISTRICT COURT**

26 **BY [Signature] DEPUTY CLERK**

27 SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

28 By Donald O. Fuller
29 Donald O. Fuller
30 Attorneys for Johnson & Stewart
31 Materials, Inc., Johnson & Campo

32 PERRY & HEAD

33 By Dale A. Head
34 Dale A. Head
35 Attorneys for Allied Concrete & Materials

36 BRUCE E. BABBITT
37 The Attorney General

38 By Donald O. Loeb
39 Donald O. Loeb
40 Assistant Attorney General
41 Attorneys for Arizona State Highway Commission

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1 MOISE E. BERGER
The County Attorney

2
3 By David B. Krom
4 David Krom
5 Deputy County Attorney
Attorneys for Maricopa County

6 POWERS, BOUTELL, FANNIN & KURN

7
8 By James Powers
9 James Powers
Attorneys for City of Mesa and
Transamerica Title Insurance Co.

10 WILLIAM SMITHERMAN
11 United States Attorney

12
13 By John F. Flynn
14 John F. Flynn
Assistant U. S. Attorney
Attorneys for Secretary of the Interior

15 JENNINGS, STROUSS & SALMON

16
17 By Robert E. Hurley
18 Robert E. Hurley
19 Attorneys for Salt River Valley Water
Users' Association and Salt River
20 Project Agricultural Improvement and
Power District

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