

96-002-015

SALT RIVER

016-026

COPY

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4 Phoenix, Arizona 85004-0001
5 (602) 382-6315
6 Attorneys for Petitioners CalMat Co.,
7 CalMat Co. of Arizona, CalMat
8 Properties Co., CalMat Land Co.,
9 and Allied Concrete & Materials Co.

96-002-015

SALT RIVER

016

BEFORE THE

ARIZONA NAVIGABLE STREAMBED ADJUDICATION COMMISSION

10 IN THE MATTER OF THE
11 NAVIGABILITY OF THE SALT
12 RIVER [From Granite Reef Dam to the
13 Gila River confluence]

Admin. Docket No. 94-1

**NOTICE OF LACK OF
JURISDICTION AND REQUEST
FOR TERMINATION OF
PROCEEDINGS**

14 CalMat Co., a Delaware corporation, CalMat Co. of Arizona, an Arizona
15 corporation and successor in interest by merger to Arizona Sand & Rock Company, CalMat
16 Properties Co., a California corporation, CalMat Land Co., a California corporation, and
17 Allied Concrete & Materials Co. (collectively "Petitioners"), hereby give notice that prior
18 to July 1, 1992, the reach of the Salt River from Granite Reef Dam to the Gila River
19 confluence was determined to be not navigable by judicial action. Therefore, this
20 Commission has no jurisdiction to make a finding in this docket and should terminate this
21 proceeding. This should be done immediately and, in any event, no later than January 7,
22 1994, in order to remove unnecessary and illegal clouds on titles and to prevent the needless
23 expenditure of public and private funds in the preparation for the noticed public hearing in
24 this matter.

25 This notice and request is based upon the following:
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1. Petitioners each own or owned land in or near the current bed of the Salt River between the Granite Reef Dam and the confluence with the Gila River. Petitioners' title to this land has been clouded by this proceeding.

2. On July 17, 1972, the Salt River Pima-Maricopa Indian Community filed a complaint in United States District Court for the District of Arizona, entitled "Salt River Pima-Maricopa Indian Community v. Arizona Sand & Rock Company, et al.," Action No. CIV 72-376 PHX (hereinafter the "Suit"). Defendants in the Suit included the State of Arizona, Allied Concrete & Materials Co., one of the Petitioners herein, and Arizona Sand & Rock Company, whose successor in interest is CalMat Co. of Arizona, also one of the Petitioners herein. A copy of the complaint is attached hereto as Exhibit A.

3. The Suit sought to eject the defendants from lands claimed to be a part of the Salt River Indian Reservation and sought over \$13 million in damages for trespass.

4. The nature of the dispute in CIV 72-376 PHX can be determined by reference to the Pretrial Order and the Findings of Fact and Conclusions of Law in the case, copies of which are attached hereto as Exhibits B and C, respectively. Essentially, the dispute was over the location of the south boundary of the Salt River Indian Reservation. The Salt River has or had two channels as it passed along the south side of the Salt River Indian Reservation. Exhibit C at page 5. The south boundary of the Reservation as established by Executive Order dated June 14, 1879, was "up and along the middle of [the Salt River]." Exhibit B at page 5. The defendants contended that the boundary of the Reservation was the middle of the north channel as established by a 1962 survey and decided by the United States Bureau of Land Management. Exhibit C at pages 5-6. The Indian Community claimed the boundary to be an ambulatory line within the south channel. Exhibit C at pages 7-8. Thus, the area in dispute lay in between the two channels and included a portion of each.

1 The State of Arizona claimed rights in the land in dispute by virtue of permits and
2 licenses granted on and after 1942 from the Bureau of Land Management and a right-of-way
3 also granted from the Bureau for Country Club Drive. Exhibit B at pages 8-9. A map
4 clearly determining the area in dispute was attached as Exhibit A to the State of Arizona's
5 "Motion for Summary Judgment" in Action No. CIV 72-376 PHX, a copy of which is
6 attached hereto as Exhibit D. On Exhibit A to Exhibit D hereto, the area in dispute is
7 delineated between the two dotted lines and the land claimed by the defendants is also
8 delineated.

9 5. From the beginning of the Suit, it was recognized by the parties that title to
10 the land from which the Indian Community sought to eject the defendants and sought
11 damages for trespass was a critical issue. For example, in paragraph III of the Second
12 Claim for Relief, the Indian Community alleged "Title to this land [at issue] is held by the
13 United States as trustee for plaintiff." Exhibit A, page 6. Moreover, in its motion to
14 dismiss the complaint, the State of Arizona recognized that the Indian Community was
15 required to demonstrate a superior interest in the land at issue in order to succeed in its
16 ejectment and trespass action and that therefore title to the land was a critical issue in the
17 case. See Exhibit E hereto which is a copy of the State of Arizona's "Motion to Dismiss
18 and Motion for Joinder of Necessary or Indispensable Parties," at pages 4-7. The State
19 made this understanding clear by stating as follows:

20 The Respondent [the State of Arizona] therefore contends that
21 it would be virtually inconceivable that this action, allegedly
22 brought in trespass but which could more accurately be
23 characterized as a quiet title action in which Plaintiffs are
24 seeking to obtain a determination as to the exact location of
25 the boundary of their Executive Order Indian Reservation,
26 could possibly proceed to judgment without first joining those
departments and agencies of the United States Government
which presently claim ownership of those disputed riparian
lands . . .

1 "Reply to Plaintiffs' Memorandum in Opposition to United States Attorney's Motion to
2 Dismiss," filed in CIV 72-376 PHX, at pages 2-3 (emphasis added). A copy of the Reply
3 is attached as Exhibit F.

4 6. The riparian lands at issue in the Suit as to which title was to be determined
5 in CIV 72-376 PHX were lands in the bed of the Salt River in the reach between the Granite
6 Reef Dam and the confluence of the Gila River. These lands lie within the subject area of
7 the proceedings in this docket and are located within the approximate Ordinary High Water
8 Mark Boundary as delineated in the maps attached to the Disclaimer dated December 14,
9 1993, by the State Land Commissioner, a copy of which is attached as Exhibit G hereto.

10 7. On April 13, 1977, final judgment was entered in Action No.
11 CIV 72-376 PHX. A copy of the Judgment is attached as Exhibit H hereto. Incorporated
12 by reference and made a part of the Judgment were Findings of Fact and Conclusions of
13 Law. Exhibit H at page 1 (also enumerated "1439"). The judgment makes the following
14 explicit statement:

15 XXIII

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

18 From the foregoing Findings of Fact the Court draws
19 the following Conclusions of Law:

20 Exhibit H at "1454."

21 In the Pre-Trial Order the parties agreed and the Court ordered in relevant part as
22 follows:

23 6. . . . Fee title to [the disputed] property is vested
24 in the United States.

25 * * * *

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

Exhibit B at "1063" and "1068."

1 These facts formed the basis of the Findings of Fact (Exhibit C) upon which the
2 Conclusions of Law and Judgment (Exhibit H) were based.

3 8. At the beginning of the dispute and as a defense to the claim in the Suit, the
4 State of Arizona had contended that the Salt River was navigable and that the State owned
5 its bed. See paragraph IX of the State of Arizona's Answer to the Complaint in Action No.
6 CIV 72-376 PHX, attached hereto as Exhibit I. Attachment A to Exhibit I hereto is a letter
7 from the State of Arizona to the Bureau of Land Management. The letter documented the
8 grounds the State of Arizona had for disputing the establishment of the Reservation boundary
9 in the south channel of the Salt River. The letter states:

10 3. That the bed of the once navigable Salt River
11 was reserved to the State of Arizona at the time of the
12 Admission to the Union of the State under the so-called equal-
13 footing doctrine. Scott v. Lattig, 227 U.S. 229, 33 S.Ct. 242,
14 57 L.Ed. 490 (1913).

15 Exhibit I at "160."

16 9. The issue of navigability was also discussed by the Judge in his "Memoran-
17 dum in Support of the Judgment" in the Suit, a copy of which is attached as Exhibit J
18 hereto. This explicit reference was made as a basis for the finding of fact that the Salt River
19 was not navigable.

20 . . . Chillson [a surveyor] did not determine the south bound-
21 ary of the reservation either, although he was instructed to do
22 so. He did meander one bank of the river, as this was in
23 keeping with the survey rules of the time. (The Salt River
24 was a non-navigable stream and the rules only required the
25 surveyor to meander one bank).

26 Exhibit J at page 9.

 10. It was necessary that the issue of navigability of the Salt River be decided as
part of Action No. CIV 72-376 PHX. Under the equal footing doctrine, the State succeeds
to title to beds of navigable streams even if there has been a prior reservation (such as to

1 an Indian tribe) unless a "clear intention" is expressed to reserve the bed of such a stream.
2 United States v. Holt State Bank, 270 U.S. 49, 58, 70 L.Ed. 465, 470 (1926).¹

3 This principle was known and recognized in Arizona before the Suit was even filed.
4 Morgan v. Colorado River Indian Tribe, 103 Ariz. 425, 443 P.2d 421 (1968) involved a
5 boating accident in the Colorado River. The parties agreed that the accident occurred on
6 the Arizona side of the Colorado River. The Tribe claimed that it owned the submerged
7 lands and navigable waters where the accident occurred by virtue of executive orders issued
8 before statehood. They argued that therefore the accident occurred within the reservation
9 and outside the jurisdiction of the Arizona courts. The appellant claimed that the State
10 owned the submerged lands by virtue of the navigability of the Colorado River at statehood
11 and that therefore the accident occurred outside the reservation and within the jurisdiction
12 of Arizona courts. The Supreme Court held that the State of Arizona held title to the
13 submerged lands and navigable waters where the accident occurred based upon an analysis
14 similar to that set forth in United States v. Holt State Bank, *supra*.²

15 If the Salt River had been navigable the State would have held title to the disputed
16 lands notwithstanding the location of the south boundary of the reservation. The State would
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19 ¹ In the case of Indian reservations, such a "clear intention" has been found where the
20 tribe in question clearly relied on fisheries for its livelihood and this reliance was part of the
21 reservation language. See, Alaska Pacific Fisheries Co. v. United States, 248 U.S. 78, 63
22 L.Ed. 138 (1918); Puyallup Indian Tribe v. Port of Tacoma, 717 F.2d 1251 (9th Cir. 1983),
23 cert. denied, 465 U.S. 1049 (1984); Muckelshoot Indian Tribe v. Trans-Canada Enterprises,
24 Ltd., 713 F.2d 455 (9th Cir. 1983), cert. denied, 465 U.S. 1049 (1984). There is no
25 evidence in any of the attached documents that the Salt River Pima-Maricopa Indian
26 Community ever claims that the purpose of Hayes Executive Order establishing the
reservation was to support their reliance on a fishery in the Salt River. In State of Alaska
v. Ahtna, Inc., 891 F.2d 1401 (9th Cir. 1989), cert. denied, 495 U.S. 919 (1990), the Court
could find no "specific intention" in the reservation language notwithstanding the fact that
the Natives in fact relied on fisheries for their livelihood. Therefore, the Court held that
the State of Alaska held title to the Gulkana River.

² The Court went on to hold that the Tribe nevertheless was sovereignly immune from
suit and affirmed the judgment of the Superior Court dismissing the suit. Id. at 426.

1 have been entitled to ejection and the State, rather than the Tribe, would have been
2 awarded damages for trespass.

3 11. The final judgment (Exhibit I) entered on April 13, 1977, in the Suit is a
4 "final determination" by judicial action prior to July 1, 1992, within the meaning of Laws
5 1992, Ch. 297, § 1.F.2 which provides:

6 F. This act does not affect:

7 . . .

8 2. Reaches of watercourses where determinations
9 have been made by judicial actions before the effective date of
10 this act.

11 The effective date of Laws 1992, Ch. 297, was July 1, 1992. The land in dispute in
12 CIV 72-376 PHX lays in the streambed of the Salt River in the reach of the river in this
13 proceeding. This section of the Act deprives this Commission of jurisdiction to make
14 navigability determinations where there has been a prior determination, such as occurred in
15 the Suit.

16 12. "Determination" is not further defined in Laws 1992, Ch. 297. There is no
17 standard definition of "determination" in other Arizona statutes or case law. Many other
18 courts, however, have used definitions of "determined" in the context of statutes or
19 procedures being examined in cases before them. These definitions may be instructive as
20 to what the Arizona Legislature meant in the streambed legislation.

21 In Piccone v. United States, the Court of Claims said: "In ordinary usage,
22 'determination' refers to a final decision." Id., 407 F.2d 866 at 873 (Ct. Cl. 1969). The
23 Wisconsin Supreme Court reached a similar conclusion in stating that the term "determina-
24 tion" meant "final judgment" in an appeals statute. Thomas/Van Dyken Joint Venture v.
25 Van Dyken, 279 N.W.2d 459, 463 (Wis. 1979). A New York court indicated that
26 "determination" implies an ending or finality and is used frequently as an equivalent with
judgment or decree. People v. Rubinstein, 20 Misc.2d 410, 193 N.Y.S.2d 117, 118 (1959).

1 13. The State may argue that since they stipulated to the finding of non-
2 navigability, the issue of navigability was not "determined." This argument flies in the face
3 of the principles of interpretation of judgments.

4 Arizona courts have stated that that which is necessarily implied by a judgment is
5 included therein. In Re Estate of Thompson, 1 Ariz. App. 18, 398 P.2d 926 (1965). Here,
6 of course, the judgment is explicit with its finding of non-navigability. But even had it not
7 been, the finding of non-navigability was necessary in order for judgment to be awarded to
8 the Salt River Pima-Maricopa Indian Community.

9 Under the doctrine of res judicata, a judgment on the merits of a prior suit bars a
10 second suit between the same parties not only upon facts actually litigated but also upon
11 points which might have been litigated. See Gilbert v. Board of Medical Examiners of the
12 State of Arizona, 155 Ariz. 169, 745 P.2d 607 (Ct. App. 1987). Here, if the findings had
13 not explicitly ruled on the navigability issue, the navigability issue still would have been
14 decided against the State because the State had the opportunity to litigate the issue in a suit
15 where a determination of title was necessary to the result.

16 Judgment by confession or consent still carry res judicata effect. See Industrial Park
17 Corp. v. U.S.I.F. Palo Verde Corp., 26 Ariz. App. 204, 547 P.2d 56 (1976). Here, even
18 if the State had consented to the judgment with no reference to the navigability issue, res
19 judicata would bar the State from raising any claim to title based upon navigability in any
20 subsequent action with the Salt River Pima-Maricopa Indian Community.

21 If the State cannot relitigate the issue of navigability against its Indian citizens in a
22 new case against the Salt River Pima-Maricopa Indian Community, why should the State be
23 able to claim title based upon navigability against its other citizens who own property on the
24 same reach of the river? Fairness dictates that the State should be bound equally to all of
25 its citizens. The streambed statute recognized this moral obligation when it directed that the
26 legislation would have no effect on determinations made prior to July 7, 1992.

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ORIGINAL AND FIVE COPIES
FILED this 22nd day of
December, 1993, with:

Rebecca Good, Secretary
Arizona State Streambed Adjudication
Commission
1616 West Adams Street, 3rd Floor
Phoenix, Arizona 85007

and COPY OF THE FOREGOING
mailed this 22nd day
of December, 1993, to:

Ronald A. Schlosser, Esq.
Jeffrey A. Bernick, Esq.
Philip f. Simon, Esq.
RIDENOUR, SWENSON, CLEERE & EVANS, P.C.
302 North First Avenue, Suite 900
Phoenix, Arizona 85003

The Honorable Fife Symington
Governor of the State of Arizona
State Capitol Building
1700 West Washington
Phoenix, Arizona 85007

Mark Killian, Speaker
Arizona House of Representatives
House Wing - 1700 West Washington
Phoenix, Arizona 85007

M. Byron Lewis, Esq.
John B. Weldon, Jr., Esq.
JENNINGS, STROUSS & SALMON, P.L.C.
2 North Central, 16th Floor
Phoenix, Arizona 85004-2393



SALT RIVER

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FILED

①

1 Royal D. Marks,
 2 Richard B. Wilks, and
 3 Philip J. Shea, of
 4 MARKS & MARKS
 5 310 Title & Trust Bldg.
 6 114 West Adams Street
 7 Phoenix, Arizona 85003
 8 Tel: 254-5171
 9 Attorneys for Plaintiff

JUL 17 1972

W. J. ... CLERK
 UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA
 BY ... DEPUTY CLERK

10 IN THE UNITED STATES DISTRICT COURT
 11 FOR THE DISTRICT OF ARIZONA

12 SALT RIVER PIMA-MARICOPA
 13 INDIAN COMMUNITY,

Plaintiff,

CW72-376 BHM
 NO. WEC

vs.

COMPLAINT

14 ARIZONA SAND AND ROCK COMPANY, an)
 15 Arizona corporation; JOHNSON & STEWART)
 16 MATERIALS, INC., an Arizona corpora-)
 17 tion; MESA SAND AND ROCK, INC., an)
 18 Arizona corporation; ALLIED CONCRETE &)
 19 MATERIALS CO., an Arizona corporation;)
 20 SALT RIVER VALLEY WATER USERS ASSOCIATION,)
 21 AKA Salt River Project; ARIZONA STATE)
 22 HIGHWAY COMMISSION comprised of Lou Davis,)
 23 Rudy E. Campbell, Walter Surrentt, Walter)
 24 A. Nelson, and Len W. Mattice; MARICOPA)
 25 COUNTY; JOHN L. MERRILL and Mrs. John L.)
 26 Merrill, husband and wife; JOHN L. MERRILL,)
 27 Administrator of the Estate of Ira L.)
 28 Merrill, deceased; IRA KEITH MERRILL and)
 29 Mrs. Ira Keith Merrill, husband and wife;)
 30 GILBERT ALLEN MERRILL and Mrs. Gilbert)
 31 Allen Merrill, husband and wife; JOHN DOE)
 32 ICKES and SARAH ANN ICKES, husband and)
 wife; ROY JOHNSON and Mrs. Roy Johnson,)
 husband and wife; EARL C. JOHNSON and)
 Mrs. Earl C. Johnson, husband and wife;)
 JOHN CAMPO III, Executor of the Estate of)
 LEROY JOHNSON, deceased; RICHARD G.)
 KLEINDIENST, United States Attorney)
 General; ROGERS C.B. MORTON, Secretary)
 of the Department of the Interior; and)
 WILLIAM SMITHERMAN, United States Attor-)
 ney for the District of Arizona,)

Defendants.

LAW OFFICES
 MARKS & MARKS
 TITLE & TRUST BLDG.
 114 WEST ADAMS STREET
 PHOENIX, ARIZONA 85003

1 FIRST CLAIM FOR RELIEF

2 The plaintiff asserts a claim for damages and ejection
3 and in support of this claim it alleges:

4 I

5 The plaintiff is an American Indian Tribe organized
6 pursuant to the Indian Reorganization Act of June 18, 1934,
7 25 U.S.C.A. 461 et seq. The defendants ARIZONA SAND AND ROCK
8 COMPANY, JOHNSON & STEWART MATERIALS, INC., MESA SAND AND ROCK,
9 INC., and ALLIED CONCRETE & MATERIALS CO., are corporations that
10 were organized under the laws of the State of Arizona. The defen-
11 dant SALT RIVER VALLEY WATER USERS ASSOCIATION is a corporation
12 that was organized under the laws of the Territory of Arizona.
13 Defendant ARIZONA STATE HIGHWAY COMMISSION is an agency of the
14 State of Arizona comprised of Lou Davis, Chairman, Rudy E. Campbell,
15 Vice-chairman, Walter Surrent, Walter A. Nelson, and Len W. Mattice;
16 MARICOPA COUNTY is a corporate subdivision of the State of Arizona.
17 The defendants John L. Merrill and Mrs. John L. Merrill, his wife,
18 Ira Keith Merrill and Mrs. Ira Keith Merrill, his wife, Roy Johnson
19 and Mrs. Roy Johnson, his wife, Earl C. Johnson and Mrs. Earl C.
20 Johnson, his wife, and John Campo III, are residents of Maricopa
21 County, Arizona. The defendant John L. Merrill is also joined as
22 the Administrator of the Estate of Ira L. Merrill, deceased, that
23 was probated in the Maricopa County Superior Court, Cause No.
24 P 73839 ; and John Campo, III, is joined as Executor of the Estate
25 of Leroy Johnson, deceased, which is being probated in the
26 Maricopa County Superior Court, Cause No. P 91997 . The defendants
27 Gilbert Allen Merrill, Mrs. Gilbert Allen Merrill, John Doe Ickes
28 and Sarah Ann Ickes are residents of California who caused an
29 event to occur within this State which gave rise to plaintiff's
30 claim for relief.

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II

This is a civil action in which the matter in controversy arises under the laws of the United States. The plaintiff being an Indian tribe with a governing body duly recognized by the Secretary of Interior, jurisdiction is conferred on this Court by 28 U.S.C.A. 1362.

III

The plaintiff occupies a reservation set aside for its exclusive use and enjoyment by an Executive Order issued on June 14, 1879, by President Rutherford B. Hayes. This land is situated entirely within Maricopa County, Arizona.

IV

The defendants named in paragraph I have trespassed upon the plaintiff's reservation and have damaged the plaintiff as specified below:

A. Since December 12, 1953, the defendants Johnson & Stewart Materials, Roy Johnson, Earl C. Johnson and the late Leroy Johnson have entered upon a portion of the northwest quarter of the northwest quarter of Section 9, Township 1 North, Range 5 East, G&SRB&M, which is entirely within plaintiff's reservation, and have extracted no less than 413,300 yards of sand and gravel of a value of not less than \$8,266,000.

B. Since July 5, 1947, the defendants Mesa Sand and Rock, Inc., John L. Merrill, Gilbert Allen Merrill, Sarah Ann Ickes, Ira Keith Merrill and the late Ira L. Merrill have entered upon a portion of the southeast quarter of the northeast quarter, the northeast quarter of the southeast quarter, and the northwest quarter of the southeast quarter of Section 4, Township 1 North, Range 5 East, G&SRB&M, which is entirely within plaintiff's reservation, and have extracted no less than 225,600 yards of sand and gravel of a value of not less than \$4,512,000.

1 C. Since some time prior to 1966 the defendant Arizona
2 Sand and Rock Company has entered upon a portion of the northeast
3 quarter of Section 8, Township 1 North, Range 5 East, G&SRB&M,
4 which is entirely within plaintiff's reservation, and has extrac-
5 ted no less than 157,900 yards of sand and gravel of a value of
6 not less than \$3,158,000.

7 D. Since 1959 the defendant Allied Concrete & Materials
8 Co. has entered upon a portion of the southwest quarter of the
9 northeast h a l f of Section 3, Township 1 North, Range 5 East,
10 G&SRB&M, which is entirely within plaintiff's reservation, and
11 has extracted no less than 207,200 yards of sand and gravel of a
12 value of not less than \$4,154,400.

13 E. Since 1962 the defendant Salt River Valley Water
14 Users Association has entered upon a portion of the northwest
15 quarter of Section 3, Township 1 North, Range 5 East, G&SRB&M,
16 which is entirely within plaintiff's reservation, and used it as
17 a dumping ground, dumping upon it such refuse as trees, concrete
18 and dirt. To remedy this condition the plaintiff will be required
19 to remove ten feet of refuse over an area of ten acres at a cost
20 of \$112,550.

21 F. The defendants Arizona Highway Commission and
22 Maricopa County have entered upon a portion of the northeast
23 quarter of the northwest quarter of Section 3, Township 1 North,
24 Range 5 East, G&SRB&M, which is entirely within plaintiff's
25 reservation, and have extracted no less than 63,300 yards of
26 sand and gravel of a value of not less than \$1,266,000.

27 V

28 The appropriate relief to redress the wrongs caused by
29 these defendants to plaintiff is to award plaintiff money damages
30 in the amounts stated above and to issue an order ejecting these
31 trespassing defendants from plaintiff's reservation.

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WHEREFORE plaintiff prays for the following relief:

1. For judgment against Johnson & Stewart Materials, Roy Johnson, Earl C. Johnson, and John Campo III, Administrator of the Estate of Leroy Johnson, deceased, for \$8,266,000 and for an order ejecting them from plaintiff's reservation;

2. For judgment against Mesa Sand and Rock, Inc., John L. Merrill, Gilbert Allen Merrill, Sarah Ann Ickes, Ira Keith Merrill and John L. Merrill, Administrator of the Estate of Ira L. Merrill, deceased, for \$4,512,000 and for an order ejecting them from plaintiff's reservation;

3. For judgment against Arizona Sand and Rock Company for \$3,158,000 and for an order ejecting it from plaintiff's reservation;

4. For judgment against Allied Concrete & Materials Co. for \$4,154,000 and for an order ejecting it from plaintiff's reservation;

5. For judgment against Salt River Valley Water Users' Association for \$112,550 and for an order ejecting it from plaintiff's reservation;

6. For judgment against Arizona Highway Commission and Maricopa County for \$1,266,000 and for an order ejecting them from plaintiff's reservation; and

7. For judgment against all the foregoing defendants for plaintiff's costs and for such other relief as the Court deems just.

MARKS & MARKS

By Royal W. Marks

By Arny John

ATTORNEYS FOR PLAINTIFF

1 SECOND CLAIM FOR RELIEF

2 The plaintiff asserts an additional claim for relief
3 against the defendants Richard G. Kleindienst, Rogers C.B. Morton
4 and William C. Smitherman as follows:

5 I

6 The plaintiff is an Indian tribe organized pursuant to the
7 Indian Reorganization Act of June 18, 1934, 25 U.S.C.A. 461 et seq.
8 Richard G. Kleindienst is the Attorney General of the United
9 States. Rogers C.B. Morton is the Secretary of the Department of
10 the Interior. William C. Smitherman is United States Attorney for
11 the District of Arizona.

12 II

13 This claim for relief is an action in the nature of
14 mandamus to compel officers of the United States to perform a duty
15 owed to plaintiff. The jurisdiction is conferred on this Court
16 by 28 U.S.C.A. 1361.

17 III

18 The plaintiff occupies a reservation set aside for its
19 exclusive use and enjoyment by an Executive Order issued on June
20 14, 1879, by President Rutherford B. Hayes. Title to this land
21 is held by the United States as trustee for the plaintiff. The
22 nature of the trust relationship between the United States and
23 the plaintiff is such that the United States, acting through its
24 appropriate officers, is required to take all necessary and appro-
25 priate steps to redress damages caused by trespassers upon the
26 reservation and to obtain court orders ejecting such trespassers
27 from the reservation.

28 IV

29 The plaintiff has advised the defendants Rogers C.B.
30 Morton and Richard G. Kleindienst of the claims alleged in the
31 First Claim for Relief and has requested that they undertake
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appropriate litigation to obtain money damages and orders of
ejection against the trespassers. Despite their knowledge of
these claims and their trust obligation to prosecute them they
arbitrarily and wrongfully refuse to do so.

WHEREFORE plaintiff prays for an order compelling the
defendants Richard G. Kleindienst, Rogers C.B. Morton and William
C. Smitherman to take immediate appropriate action to prosecute
before this Court the claims alleged in the First Claim for Relief.

MARKS & MARKS

By Raymond D. Marks

By Philip J. Lee

ATTORNEYS FOR PLAINTIFF

12/16/93
I hereby certify that this is a true and correct copy of the original on file in my office and in my custody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

W. J. [Signature] Deputy

96-002-015

SALT RIVER
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA
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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.,

Plaintiff,

vs.

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

Defendants.

NO. CIV-73-579-Phx.

CITY OF MESA, an Arizona municipal
corporation,

Plaintiff,

vs.

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

Defendants.

NO. CIV-73-769-Phx.

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

Plaintiffs,

vs.

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

Defendants.

NO. CIV-74-553-Phx.

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:

19 NO. CIV-72-376. This is an action filed by the Indian
 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:

12 NO. CIV-73-579. This is an action instituted by
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
20 Secretarial memorandum of January 17, 1969 is unlawful, exceeds
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
25 the City of Mesa. It claims a fee simple interest in portions of
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,
and the East Half of the Northwest Quarter of
29 the Northeast Quarter of Section 18, all in
Township 1 North, Range 5 East of the Gila and
30 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 Concreté 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 boun-
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:

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

21 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

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- 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

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20. Francis Smith, Secretary
Salt River Project
1521 Project Drive
Tempe, Arizona
 21. Victor I. Corbell, former President of
Salt River Project
303 East Del Rio Drive
Tempe, Arizona
 22. Ted Wilson, Supervisor
Hydrologic Records and Analysis
Salt River Valley Water Users' Association
1521 Project Drive
Tempe, Arizona
 23. Jim Gardner, Supervisor
Cartographic Section of Drafting Department
Salt River Valley Water Users' Association
1521 Project Drive
Tempe, Arizona
 24. John S. Schaper
215 East Lexington
Phoenix, Arizona 85012
 25. Joe T. Fallini
Boise, Idaho area
exact address unknown
 26. George Hedden, former Assistant Area Director of
Bureau of Indian Affairs
1902 East Dartmouth
Mesa, Arizona
 27. Garnet Hayes
10000 East McDowell
Scottsdale, Arizona
 28. Charles K. Luster
Director of Public Works
City of Mesa
55 North Center
Mesa, Arizona
 29. Francis H. Lathrop
Deputy County Engineer
Maricopa County
3325 West Durango
Phoenix, Arizona
 30. Joseph C. Alexander
Maricopa County Right of Way Agent
111 South Third Avenue
Phoenix, Arizona
 31. Title Officer
Lawyers Title of Arizona
2200 North Central Avenue
Phoenix, Arizona
 32. Title Officer
Transamerica Title Insurance Company
114 West Adams
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

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

IX.

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

DATED this 17th day of March, 1976.

W. D. Murray
W. D. Murray, Senior U. S. District
Court Judge

APPROVED AS TO FORM AND CONTENT:

MARKS & MARKS

By Philip J. Shea
Philip J. Shea
Attorneys for Plaintiff

SMITH, RIGGS, BUCKLEY, RIGGS & FULLER

By Donald O. Fuller
Donald O. Fuller
Attorneys for Johnson & Stewart
Materials, Inc., Johnson & Campo

PERRY & HEAD

By Dale A. Head
Dale A. Head
Attorneys for Allied Concrete & Materials

BRUCE E. BABBITT
The Attorney General

By Donald O. Loeb
Donald O. Loeb
Assistant Attorney General
Attorneys for Arizona State Highway Commission

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MOISE E. BERGER
The County Attorney

By David B. Krom
David Krom
Deputy County Attorney
Attorneys for Maricopa County

POWERS, BOUTELL, FANNIN & KURN

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

WILLIAM SMITHERMAN
United States Attorney

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

JENNINGS, STROUSS & SALMON

By Robert E. Murley
Robert E. Murley
Attorneys for Salt River Valley Water
Users' Association and Salt River
Project Agricultural Improvement and
Power District

96-002-005

FILED

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SALT RIVER
019

AUG 13 1976

CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
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.

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

Defendants.

No. Cv-74-529-Phx.

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, ejection 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.

64

SALT RIVER

020

FILED

DEC 8 1973

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

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4 Telephone No.: 261-7291

5 Attorneys for Defendant Arizona State
Highway Commission
6

7

8

IN THE UNITED STATES DISTRICT COURT

9

FOR THE DISTRICT OF ARIZONA

10 SALT RIVER PIMA-MARICOPA INDIAN)
COMMUNITY,)

11)
12 Plaintiff,)

13 -v-)

14 ARIZONA SAND AND ROCK COMPANY,)
an Arizona corporation, et al.,)

15 Defendants.)
16)

No. CIV 72-376 PHX

MOTION FOR SUMMARY
JUDGMENT
(Oral argument requested)

17

COMES NOW the Defendant Arizona State Highway Commission

18

by and through its attorneys undersigned, pursuant to Rule 56 of the Federal

19

Rules of Civil Procedure and respectfully moves this Court for an order grant-

20

ing a summary judgment against the Plaintiff and in favor of this Defendant on

21

the grounds that there are no genuine issues as to any material facts and the

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Defendant Arizona State Highway Commission is therefore entitled to judgment

23

as a matter of law. Defendant's Motion is based upon the ground that even if

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the Plaintiff is correct in its factual contention that the true boundary of the

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Plaintiff's Executive Order Indian Reservation lies along the line determined

26

by the survey dated August 17, 1972, adopted by the Secretary of the Depart-

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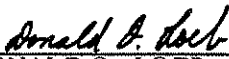
ment of the Interior as the south boundary of the Plaintiff's Executive Order

28

1 Indian Reservation, Plaintiff's remedy, if any, is properly against the United
2 States of America before the Indian Claims Commission or in the alternative,
3 in an action in inverse eminent domain in the United States Court of Claims
4 for the taking of tribal lands without just compensation, and not against this
5 Defendant.

6 DATED this 3rd day of December, 1973.

7 GARY K. NELSON
8 The Attorney General

9
10 
11 DONALD O. LOEB
12 Assistant Attorney General
13 Attorneys for Defendant Arizona State
14 Highway Commission

13 MEMORANDUM OF POINTS AND AUTHORITIES

14 The Plaintiff Indian Community was granted its reservation
15 pursuant to an Executive Order dated June 14, 1879, signed by President
16 Rutherford B. Hayes. In that Executive Order the south boundary of the
17 Plaintiff's reservation was defined as running "up and along the middle of the
18 Salt River".

19 Plaintiff now contends that the south boundary of its reserva-
20 tion lies along a line within the so-called south channel of the river established
21 by the survey dated August 17, 1972. (See dotted line on multi-colored map
22 attached hereto marked as Exhibit A and incorporated by reference herein.
23 Said map also shows the relative locations of the various properties held by
24 the Defendants in the present action.) The facts in this case, however, reveal
25 that portions of land within the bed of the Salt River lying north of this line
26 were treated as being lands within the public domain for a substantial period
27 of time following the date of the Presidential Executive Order.
28

1 Pursuant to Act of Congress dated May 20, 1862, Congress
2 approved the Federal Homestead Act which was entitled an Act "to secure
3 homestead to actual settlers on the public domain". Now 43 U.S.C. § 161, et
4 seq. The Homestead Act made available for settlement only "unappropriated
5 public lands". Rice v. United States, 348 F. Supp. 254, 257 (1972).

6 The affidavit of Brian Rockwell, attached hereto as Exhibit B,
7 an experienced title examiner with the Arizona Highway Department, Title
8 Section, reveals that the following patents were issued by the General Land
9 Office covering lands then assumed by the appropriate United States Government
10 officials to be within the public domain: Homestead Certificate No. 160 issued
11 July 3, 1890; Homestead Certificate No. 935 issued June 25, 1892; Homestead
12 Certificate No. 1146 issued April 23, 1896; Desert Land Certificate No. 558
13 dated August 24, 1896 (issued under the Act of Congress of April 24, 1820
14 "An Act making further provisions for the sale of public lands"); Homestead
15 Certificate No. 981 issued February 14, 1900; Homestead Certificate No. 1108
16 issued October 23, 1901 and Patent No. 873498 issued July 21, 1922. None of
17 those conveyances has ever been canceled or declared invalid despite the fact
18 that each of the above grants encroaches upon lands now claimed to be a part
19 of Plaintiff's Executive Order Indian Reservation. These separate grants are
20 numbered and depicted in purple on the map attached hereto, marked as Exhibit
21 C and incorporated by reference herein.

22 There is no claim made here that the parties or their prede-
23 cessors in interest obtained these conveyances thru any fraud or other uncon-
24 scionable conduct. Nor do any of the patents, homestead certificates, recla-
25 mation withdrawals or use permits contain any reservations, conditions or
26 exceptions placing any of the Defendants on notice that these lands may form
27 a part of an Indian reservation.

28

1 In tracing the legal descriptions contained on the face of those
2 homestead certificates and land patents it may be demonstrated that each of
3 those conveyances relates to real property at least a portion of which lies north
4 of the survey line of August 17, 1972, now claimed to represent the south
5 boundary of the Plaintiff's Indian Reservation.

6 If these homestead applicants were attempting to gain title to
7 land which any Indians actually occupied at the time those applications were
8 made, those patent applications would have been denied since the lands would
9 not have been subject to entry. Interior Dept., Circular 3, Interior Dec. 371
10 (1884); Schumacher v. State of Washington, 33 Interior Dec. 454 (1905);
11 Ma-gee-see v. Johnson, 30 Interior Dec. 125 (1900). It is therefore respect-
12 fully submitted that the mere issuance of these conveyances constitutes a
13 recognition on the part of governmental officials within the various departments
14 and bureaus who issued those homestead certificates and land patents, etc.,
15 that those lands were not a part of the Plaintiff's Indian Reservation at the time
16 those conveyances were issued but that said lands constituted a part of the
17 public domain. It is of course hornbook law that Indian lands are not included
18 in the term "public lands" which are subject to sale or disposal under general
19 laws. Bennett County, South Dakota v. United States, 394 F.2d 8, 11 (8th
20 Cir., 1968).

21 In addition to the issuance of these land patents and home-
22 stead certificates, the General Land Office and various other agencies and
23 departments of the United States government, treated other lands within the
24 bed of the Salt River as it passes by the Plaintiff's Executive Order Indian
25 Reservation as being unreserved lands within the public domain and not as
26 Indian territory. As was discussed previously in this Defendant's Motion to
27 Dismiss and Motion for Joinder of Necessary or Indispensable Parties, the
28 Arizona Highway Department entered upon a portion of the lands in question

1 within the bed of the Salt River pursuant to express authority granted by the
2 Secretary of the Interior under the provisions of 43 U.S.C. § 387. The three
3 permits for removal of gravel, dated September 8, 1948, October 1, 1952 and
4 January 14, 1972, respectively, copies of which are attached to that Motion,
5 covered lands which had been previously withdrawn from the public domain by
6 the United States Department of the Interior, pursuant to the provisions of what
7 is now 43 U.S.C. § 416. It is clear that those lands could not simultaneously
8 be "administered under the federal reclamation laws" yet at the same time be
9 lands set aside to the Plaintiff Indian Community as a part of their Executive
10 Order Indian Reservation under the jurisdiction of the Bureau of Indian Affairs.
11 It is therefore respectfully submitted that even if we assume arguendo that the
12 survey line of August 17, 1972, represents the south boundary of Plaintiff's
13 reservation, the issuance of these conveyances constituted separate takings of
14 real property from the Plaintiff Indian Community for which the Plaintiff may
15 be entitled to just compensation in either an action in inverse eminent domain
16 against the United States Government under the Tucker Act, 28 U.S.C. §§
17 1346(a)(2) and 1491, or as an Indian Claim cognizable under 25 U.S.C. §§
18 70(a)-(w). Fort Berthold Reservation v. United States, 390 F.2d 686 (Ct. Cl.,
19 1968).

20 It has long been held that fee title to Indian lands is vested in
21 the federal government. Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).
22 In Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 543-544 (1832), the Court,
23 speaking through Justice Marshall, made it clear that absolute legal title to
24 the lands of Indian tribes was in the United States, subject only to the Indian
25 right of occupancy.

26 The history of the relations between the federal government
27 and the various Indian tribes is replete with instances where the government
28

1 has created, modified, altered and rearranged the boundaries of Indian reser-
2 vations. It is equally clear that the United States Government has both the
3 power and the authority to "extinguish" recognized title to Indian lands.
4 25 Univ. of Florida L. Rev. 308, 311 (1973), "Note, American Indian Land
5 Claims-Land versus Money as a Remedy". Such extinguishment can be
6 accomplished in a variety of ways: by treaty, conquest, purchase, occupancy,
7 exercise of complete dominion adverse to the right of occupancy or otherwise
8 Ibid. at 311.

9 With the passage of the Act of Congress dated August 13, 1946
10 (60 Stat. 1049) now found in 25 U.S.C. §§ 70(a)-(w) (1970), which created the
11 Indian Claims Commission, tribes were given the right to sue the United States
12 government in order to recover damages for the extinguishment of Indian title
13 to land. Otoe & Missouri Tribe of Indians v. United States, 131 Ct. Cl. 593,
14 131 F. Supp. 265 (1955). Even before the enactment of the Act creating the
15 Indian Claims Commission, an Indian tribe which has been granted legal right
16 to permanent occupancy of a sufficiently defined territory (i. e., recognized
17 title) had the right to complain of damages arising under the Fifth Amendment
18 for the taking of their land. Mitchel v. United States, 34 U.S. (9 Pet.) 711
19 (1935). Once title in a tribe has been recognized by treaty or statute, any
20 subsequent taking of that land may result in a liability of the United States
21 government. Sac & Fox Tribe of Indians v. United States, 161 Ct. Cl. 189,
22 315 F. 2d 896 (1963). The Indians therefore acquired compensable property
23 interests when the Executive order creating their reservation was issued.
24 69 Yale Law Journal 628, 630-631 (1960), "Tribal Property Interests in
25 Executive-Order Reservations; A Compensable Indian Right".

26 Wrongful transfer of tribal lands to third parties by the
27 Secretary of the Department of the Interior may also constitute a violation or
28

1 breach of the trust responsibility owed by the United States to its Indian wards.
2 Seminole Nation v. United States, 316 U.S. 286, 62 S.Ct. 1049, 86 L. Ed. 1480
3 (1942); United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, 30 L. Ed. 228
4 (1886).

5 The potential remedies now available under federal law may
6 even extend to the return of lands to the Tribe from whom such lands have
7 earlier been wrongfully taken. Such an order requiring the return of land to an
8 Indian tribe recently occurred in the controversial case of Pueblo de Taos v.
9 United States, 15 Indian Cl. Comm'n. 66 (1965). For centuries prior to 1906
10 the Taos Indians had continued to reside on lands lying within the so-called
11 Blue Lake area of New Mexico. In 1906, President Roosevelt set aside the
12 Blue Lake area as a forest reserve and thereby interrupted the Tribe's Indian
13 title and right of occupancy, although the Indians were given the exclusive use
14 of the Blue Lake area for a period of 12 years. In 1918 a permit was issued
15 allowing non-Indians to graze their cattle upon the disputed lands. Up until
16 the year 1950 the Indians were denied exclusive use of these lands and the
17 Forest Service continued to issue use permits to non-Indians covering the
18 disputed lands. In 1965 the Indian Claims Commission issued its opinion
19 finding title to 130,000 acres in the Taos Indians. It was not until 1970,
20 however, after extensive lobbying campaign had been conducted that Congress
21 passed Pub. L. No. 91-550 (Dec. 15, 1970) whereby the United States agreed
22 to hold 48,000 acres of the disputed lands in trust for the Taos Indians. Of
23 course, the return of Indian lands wrongfully taken by the United States govern-
24 ment is the exception rather than the rule.

25 Although there is abundant precedent indicating that Indian
26 tribes may under appropriate circumstances recover the monetary value of
27 lands wrongfully appropriated by the United States government, the author of
28

1 the above cited law review article (25 Univ. of Florida L. Rev. 308 at 325)
2 notes that " . . . many problems would result if Congress decided to transfer
3 privately held land to an Indian tribe in settlement of a claim. . . . ". And
4 " . . . if there were transfers of private lands the amount necessary to
5 compensate the present owners would be astronomical. . . . ". Ibid. It is
6 submitted that just such problems would occur if the Plaintiff Indian Community
7 were to be successful in their efforts to recover lands lying between the north
8 and south channels of the Salt River abutting their Reservation.

9 It is also obvious that the Plaintiff has an adequate remedy
10 available at law. Under the aforementioned statutes, it can obtain reimburse-
11 ment from the federal government for the alleged taking of reservation lands
12 resulting from the formal transfer of lands thought to be unreserved and open
13 to entry under the Public Land Laws but now claimed to lie within the boundarie
14 of Plaintiff's Executive Order Indian Reservation.

15 The law is also clear that the conveyance of Indian lands to
16 adverse holders constitutes a taking by the United States under the Fifth
17 Amendment to the United States Constitution. Creek Nation v. United States,
18 302 U.S. 602, 622, 58 S.Ct. 384, 82 L.Ed. 482 (1938). In the Creek Nation
19 case, supra, lands held by the Creeks were inadvertently set aside by the
20 United States for the use of other tribes due to an erroneous survey in 1872.
21 Here, as in the Creek case, supra, the act of the government in conveying
22 away the Plaintiff's interest in what it claims is a part of its reservation was
23 sufficient to terminate the interests of the Plaintiff Indian Community in the
24 lands in question (assuming the correctness of their contention for purposes
25 of argument). United States v. Cherokee Nation, 474 F.2d 628, 636 (U. S.
26 Ct. Cl., 1973).

1 These conveyances, though they may have resulted in a reduc-
2 tion in the total quantum of interests held by the Plaintiff Indian Community in
3 the land lying within the boundaries of their reservation, did not necessarily
4 change the boundaries of that reservation.

5 "A reservation may be diminished in land
6 size by sale of portions thereof to non-Indians
7 without changing the reservation's boundaries."
8 United States ex rel Condon v. Erickson, 478
9 F.2d 684, 688 (8th Cir., 1973).

10 And this principle of law is reinforced by the present definition of "Indian
11 Country" which includes all land within an Indian reservation "notwithstanding
12 the issuance of any patent". United States ex rel Condon v. Erickson, *ibid* at
13 688. Thus, in the present case, the conveyance by the government of lands
14 now claimed to lie within the Plaintiff's Indian reservation is not necessarily
15 inconsistent with its continued existence as a reservation. *Ibid*. See also
16 City of New Town, North Dakota v. United States, 454 F.2d 121, 125 (1972).

17
18 CONCLUSION


19 Since the Defendant Arizona State Highway Commission
20 obtained from officials within the United States Bureau of Reclamation, use
21 permits expressly authorizing the State to enter upon a portion of the lands in
22 question lying north of the survey line dated August 17, 1972, in order to
23 remove sand and gravel, those officials must have treated the lands in question
24 as being unreserved public lands open to entry and not lands forming part of
25 Plaintiff's Executive Order Indian Reservation. Therefore, even if it be
26 conceded that this survey line constitutes the south boundary of Plaintiff's
27 Reservation, the issuance of these permits by officials within the United States
28

1 Government (along with the issuance of homestead certificates, land patents,
2 right of way grants, reclamation withdrawals, etc.) constituted separate
3 takings of Plaintiff's lands for which the Tribe may be entitled to compensation
4 in an appropriate proceeding filed against the United States of America, but
5 not in separate actions for damages against individual grantees innocent of
6 any wrongdoing.

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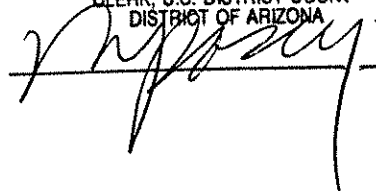
Respectfully submitted,

GARY K. NELSON
The Attorney General



DONALD O. LOEB
Assistant Attorney General
Attorneys for Defendant Arizona State
Highway Commission

I hereby ~~cert~~ and certify on 12/6/93
that the foregoing document is a full, true and correct
copy of the original on file in my office and in my cus-
tody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA


Deputy

1 COPY of the foregoing Motion for Summary
Judgment mailed/delievered this _____
2 day of December, 1973, to:

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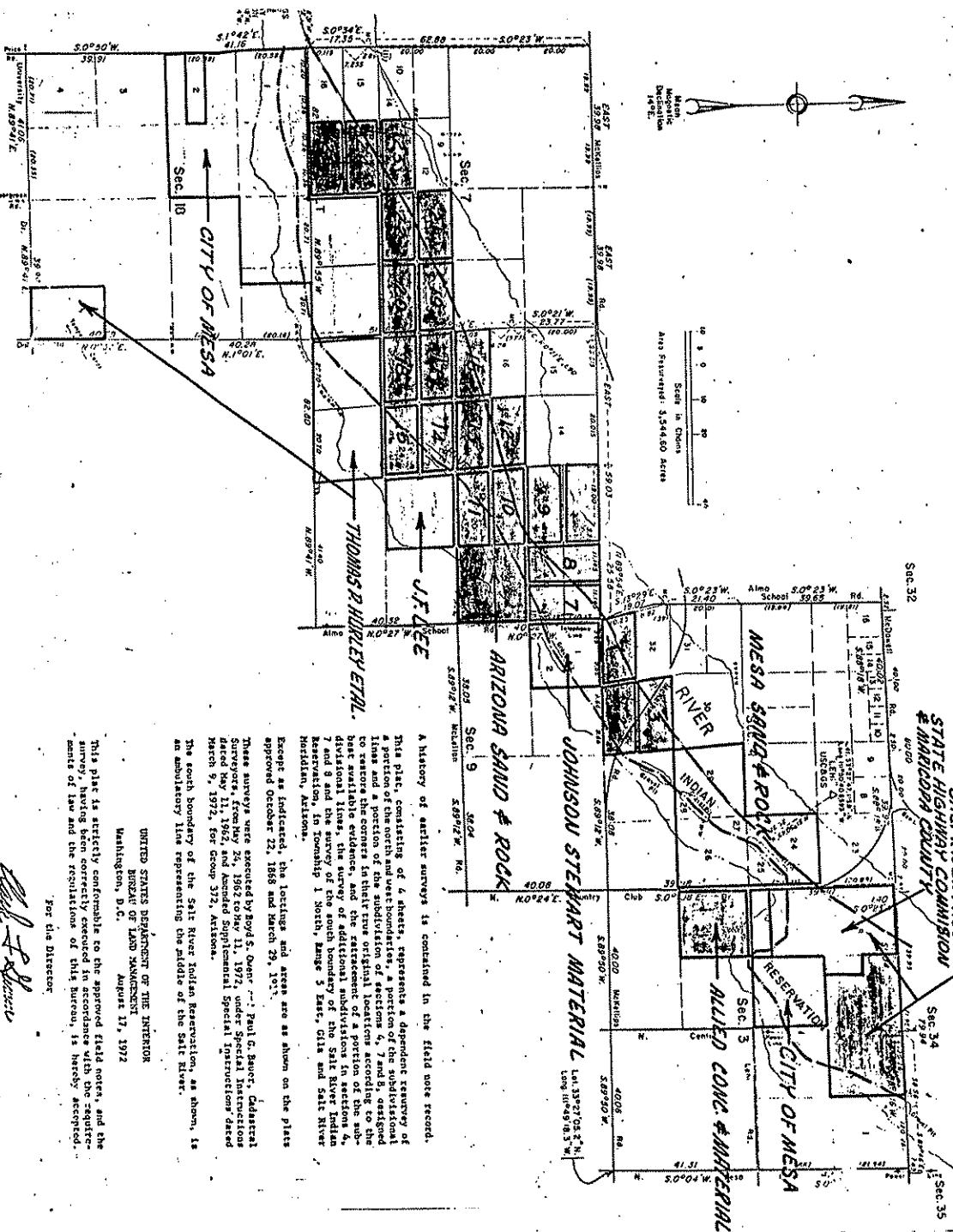
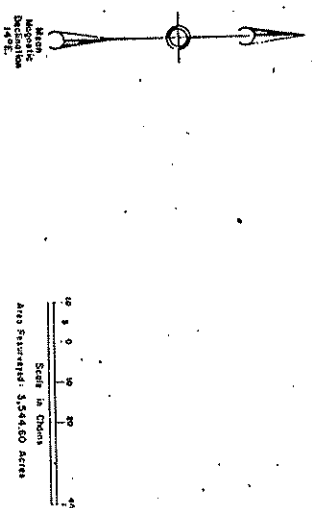
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27
28

TOWNSHIP 1 NORTH, RANGE 5 EAST, OF THE GILA AND SALT RIVER MERIDIAN, ARIZONA

DEPENDENT RESURVEY AND SURVEY OF THE SOUTH BOUNDARY OF THE SALT RIVER INDIAN RESERVATION

SALT RIVER PROJECT
STATE HIGHWAY COMMISSION
& MARICOPA COUNTY



A history of earlier surveys is contained in the field note record.

This plat, consisting of 4 sheets, represents a dependent resurvey of a portion of the north and west boundaries, a portion of the subdivision lines and a portion of the subdivision of sections 4, 7 and 9, original to restore the corners in their true original locations according to the best available evidence, and the attachment and subdivision in sections 4, 7 and 9, of 79 acres of the south boundary of the Salt River Indian Reservation, in Township 1 North, Range 5 East, Gila and Salt River Meridian, Arizona.

Except as indicated, the locations and areas are as shown on the plats approved October 22, 1888 and March 29, 1913.

These surveys were executed by Floyd S. Owen, Paul G. Sawyer, Cadastral Surveyors, from May 25, 1962 to May 11, 1972, under Special Instructions dated May 11, 1962, and Amended Supplemental Special Instructions dated March 9, 1972, for Group 372, Arizona.

The south boundary of the Salt River Indian Reservation, as shown, is an arbitrary line representing the middle of the Salt River.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D.C. August 17, 1972

This plat is strictly conformable to the approved field notes, and the survey having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director
W. F. Brown

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Homestead Certificate No. 1146
issued April 23, 1896

Desert Land Certificate No. 558
dated August 24, 1896

Homestead Certificate No. 981
issued February 14, 1900

Homestead Certificate No. 1108
issued October 23, 1901

Patent No. 873498
issued July 21, 1922

6. My examination also revealed the fact that permits for the removal of gravel issued by the Bureau of Reclamation to the State of Arizona dated September 8, 1948, October 1, 1952 and January 14, 1972 also relate to real property lying north of the aforementioned cadastral survey line.

R. Brian Rockwell
R. BRIAN ROCKWELL

SUBSCRIBED AND SWORN to before me this 7th day of September, 1973.

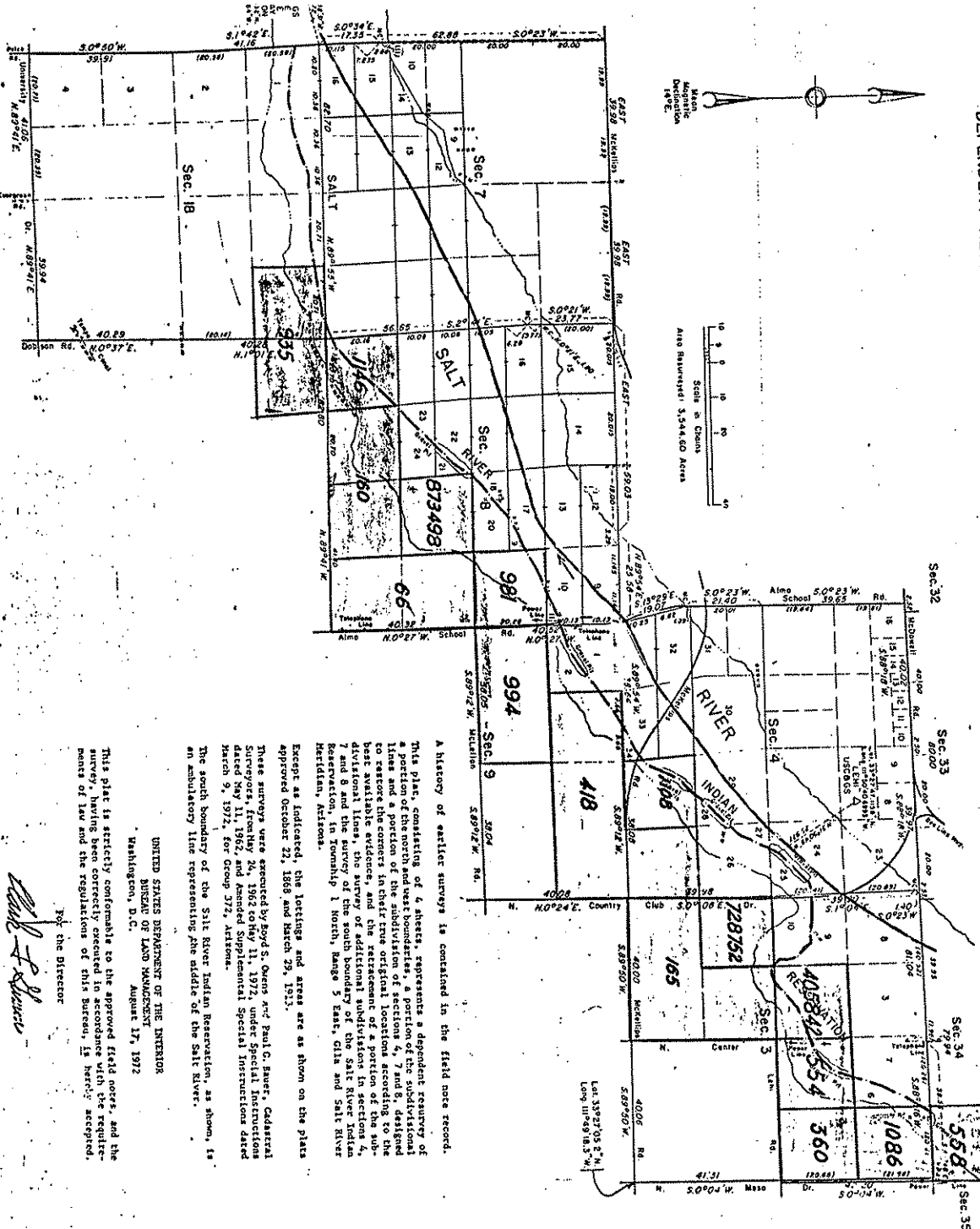
William M. Price
Notary Public

My Commission Expires:

9-30-75

TOWNSHIP 1 NORTH, RANGE 5 EAST, OF THE GILA AND SALT RIVER MERIDIAN, ARIZONA

DEPENDENT RESURVEY AND SURVEY OF THE SOUTH BOUNDARY OF THE SALT RIVER INDIAN RESERVATION



Scale in Chains
Also Resurveyed 3,544.60 Acres

A history of earlier surveys is contained in the field note record.

This plat, consisting of 4 sheets, represents a dependent resurvey of a portion of the north and west boundaries, a portion of the subdivisional lines and a portion of the subdivision of section 4, according to the best available evidence, and of additional subdivisions in sections 4, 20, 22, 24, 26, and 32, of the south boundary of the Salt River Indian Reservation, in Township 1 North, Range 5 East, Gila and Salt River Meridian, Arizona.

Except as indicated, the lettings and areas are as shown on the plats approved October 27, 1868 and March 29, 1933.

These surveys were executed by Boyd S. Owens and Paul G. Sauer, Cadastral Surveyors, on March 24, 1962 to July 11, 1972, under Special Instructions dated May 11, 1962, and amended Supplemental Special Instructions dated March 9, 1972, for Group 372, Arizona.

The south boundary of the Salt River Indian Reservation, as shown, is an ambulatory line representing the middle of the Salt River.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
Washington, D.C. August 17, 1972

This plat is strictly conformable to the approved field notes, and the survey, having been correctly executed in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

Paul F. Edwards

Chief, Division of Cadastral Survey

SALT RIVER
021

FILED

OCT 17 1972

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY *W. J. Furstenu*
DEPUTY CLERK

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6 Surrett, Walter A. Nelson and Len A. Mattice

7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF ARIZONA

10 SALT RIVER PIMA-MARICOPA INDIAN)
COMMUNITY,)
11)
Plaintiff,)
12)
-v-) No. CIV 72-376 PHX WEC
13)
ARIZONA SAND AND ROCK COMPANY,) MOTION TO DISMISS AND
14 et al.,) MOTION FOR JOINDER OF
NECESSARY OR
15 Defendants.) INDISPENSABLE PARTIES
16) **(ORAL ARGUMENT REQUESTED)**

17 COME NOW the Defendants, the Arizona State Highway
18 Commission, comprised of Lew Davis, Rudy E. Campbell, Walter Surrett,
19 Walter A. Nelson and Len A. Mattice, by and through their attorneys, Gary
20 K. Nelson, the Attorney General, and Robert V. Kerrick and Donald O. Loeb,
21 Assistant Attorneys General, pursuant to Rules 12 (b)(1) and 12 (b)(7) of the
22 Federal Rules of Civil Procedure, and respectfully move the Court for an
23 order dismissing the Plaintiffs' Complaint or in the alternative for an order
24 requiring joinder of necessary or indispensable parties on the following
25 grounds.

26 1. The Plaintiff has failed to join certain indispensable parties
27 as required by Rule 19 of the Federal Rules of Civil Procedure who include but
28 are not limited to the following entities, agencies and officers: The United

1 tions thereof, the Plaintiff must first establish that it has some right, title
2 or possessory interest in the real property on which the alleged acts of
3 trespass are said to have occurred.

4 The law is clear that a Plaintiff in an action based upon tres-
5 pass to realty must prove either actual or constructive possession in himself
6 at the time of the alleged trespass before he may bring such an action.
7 West Virginia Pulp and Paper Co. v. Cohen, 153 F.2d 576 (4th Cir. , 1946);
8 Bennet v. Rewis, 212 Ga. 800, 96 S.E.2d 257 (1957). Where the plaintiff in
9 a trespass action cannot prove actual occupancy, as is the case here, such a
10 plaintiff must show title in himself. Daniels v. Coleman, 253 S.C. 218, 169
11 S.E.2d 593 (1969). Furthermore, the plaintiff in an action in trespass to
12 realty must recover upon the strength of his own title and not upon the weakness
13 of the defendant's title. Stottlemyer v. Kline, 259 A.2d 52 (Md., 1969).

14 Nowhere in its complaint does the Plaintiff Indian Community
15 allege either actual or constructive possession of the real property which
16 forms the subject matter of this action and from which the various Defendants
17 are alleged to have removed sand and gravel without the consent of the
18 Plaintiff. The only portion of the complaint in which the Plaintiff indicates any
19 right, title or interest in the real property in question which would give it the
20 requisite standing to bring the present law suit appears in paragraph IV of
21 Plaintiff's First Claim of Relief wherein the Plaintiff alleges that "The defen-
22 dants named in Paragraph I have trespassed upon the Plaintiff's reservation. . . ."

23 The Plaintiff has not even attempted to set forth the physical
24 dimensions or boundaries of its Indian Reservation in its Complaint although
25 it is clear from the filing of the present action that the Plaintiffs are attempt-
26 ing to assert dominion, ownership and control over certain portions of real
27 property which at the present time are not acknowledged to be within the

1 exterior boundaries of the Salt River Pima-Maricopa Indian Reservation by
2 those agencies of the United States Government presently exercising control
3 over this area of land.

4 The Defendant, Arizona Highway Commission, entered upon a
5 portion of the land in question bordering the Salt River under the authority of
6 three permits issued by the United States Department of Interior, Bureau of
7 Reclamation, for the purpose of removing gravel and construction material.
8 These permits, copies of which are attached hereto marked as Exhibits "A",
9 "B" and "C" respectively, and incorporated by reference herein, were dated
10 September 8, 1948, October 1, 1952 and January 14, 1972. The real property
11 which forms the subject of these permits had been previously withdrawn from
12 the public domain by the United States Department of the Interior pursuant to
13 the provisions of what is now 43 U.S.C. § 416. These permits were then
14 issued pursuant to authority granted to the Secretary of the Interior under
15 the provisions of 43 U.S.C.A. § 387. Hence, it is clear that the real property
16 in question cannot simultaneously be both land set aside to the Plaintiff
17 Indian Community as an Executive Order Indian Reservation and land which
18 at one time formed a part of the public domain but which has also been with-
19 drawn from entry pursuant to the provisions of 43 U.S.C. § 416.

20 This Court cannot possibly grant a judgment in favor of the
21 Plaintiffs and against any of the various Defendants, all of whom claim to have
22 derived certain rights in and to the real property in question from the United
23 States Government and its various agencies, without first holding that the
24 Plaintiff was in either actual or constructive possession of the real property in
25 question or was the owner in fee of this land. Such a determination in favor of
26 the Plaintiff in this trespass action would be tantamount to a judicial decree
27 quieting title in the Plaintiff Indian Community. Furthermore, such an

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1 adjudication would effectively constitute a denial of any right, title or interest
2 in and to the real property in question so far as any agency of the United States
3 Government including the Department of the Interior is concerned.

4 Such a determination would in all probability render the
5 Department of the Interior and one or more agents liable to any and perhaps
6 all of the named Defendants for loss or damage sustained as a result of the
7 improper action of the Department of the Interior in issuing Use Permits
8 covering lands which were not owned by nor subject to the control of the
9 Department of the Interior.

10 It is therefore earnestly submitted that the Plaintiff should not
11 be permitted to circumvent the critical issue of title to the real property in
12 question by adopting the simple expedient of neglecting to name the United
13 States or any of its agencies, employees or officers as parties Defendants to
14 the present action. This contention is buttressed by the fact that the Plaintiffs
15 themselves have alleged in Paragraph III of their Second Claim for Relief that
16 "Title to this land is held by the United States as trustee for the plaintiff."

17 In his highly regarded treatise on Federal Practice, Professor
18 James William Moore states that in general, the United States is an indispen-
19 sable party in actions involving Indian lands because of its governmental
20 interest. Moore's Federal Practice, Vol. 3A ¶19.09[8]. This principle was
21 recently recognized in the case of Fontenelle v. Omaha Tribe of Nebraska,
22 430 F.2d 143 (8th Cir., 1970). This was an action brought by the plaintiff's
23 successors in interest to certain parcels of land which had been allotted to
24 individual members of the Omaha Tribe of Indians. The action was brought
25 against both the United States and the Omaha Tribe of Nebraska seeking to
26 quiet title to these lands and to establish the eastern boundary line of these
27 properties which the plaintiffs claimed extended to the present channel of the
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1 Missouri River. Since the lands of the Omaha Tribe are held for the Tribe's
2 perpetual occupancy by the United States as trustee, the Court held that the
3 United States was an indispensable party to this action. Reasoning contained
4 in the Fontenelle decision is equally applicable to the present controversy
5 since the Plaintiff Indian Community has only a right of occupancy and use of
6 the lands in question and the United States retains title to the real property in
7 fee. Spaulding v. Chandler, 160 U.S. 394, 16 S.Ct. 360 (1896).

8 A similar conclusion was reached by the Court in First
9 National Bank of Holdenville, Oklahoma v. Ickes, 60 F. Supp. 366 (D.C. 1945),
10 wherein the Court held that the interest of the United States in restricted
11 Indian Property may not be foreclosed by a judgment in proceedings in which
12 the United States is not a party. The Court in that case stated that the interest
13 of the United States in restricted Indian property is not distinct and severable
14 from that of the Secretary of the Interior and no decree affecting that interest
15 can be entered unless the United States is present as a party with an oppor-
16 tunity to be heard. See also, Nicodemus v. Washington Water Power Co.,
17 264 F.2d 614 (C.A. 9th, 1959); Prairie Band of Potowamie Indians v. Puckee,
18 321 F.2d 767 (10th Cir., 1963).

19 Although the case of Schutten v. Shell Oil Co., 421 F.2d 869
20 (Ct. App. 5th Cir., 1970) does not relate to Indian Lands, certain principles
21 enunciated therein are applicable to the present controversy. In that case
22 certain persons claiming to be owners of certain lands brought an action in
23 Federal Court seeking to evict an oil company and also for an accounting for
24 oil, gas and other minerals allegedly removed from the land. The Fifth Circuit
25 Court of Appeals held that the District Court had properly dismissed the action
26 for failure to join the defendant-lessor which also claimed title to the land in
27 question. The lessor could not be joined because its joinder would have
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1 destroyed diversity of citizenship. More important, however, the Court went
2 on to hold that the question of ownership of the land had to be adjudicated
3 before the trespass issue could be reached and that the lessor had a definite
4 interest in the issue. The Court stated that while the lessor might not be
5 bound by a judgment rendered in its absence, it would have been prejudiced
6 by a judgment adverse to the defendant oil company.

7 As in the present action, the Plaintiff in the Schutten case,
8 supra, was not in possession of the land in question, although it claimed
9 ownership thereof. The Court made the following comment with regard to
10 the Plaintiff's action in trespass:

11 " . . . It cannot be denied that appellants' action
12 in trespass is based upon its claim of ownership
13 of the land overlying the mineral deposits. This
14 claim is directly opposed to the Levee Board's
15 claim of ownership which is 'backed up' by its
16 possession in fact. This question of actual owner-
17 ship must necessarily be adjudicated before the
18 trespass and accounting issues are reached. . . ."

19 Schutten v. Shell Oil Co. , 421 F.2d at p. 874.

20 The Defendant, Arizona Highway Commission, therefore, re-
21 spectfully submits that the Department of the Interior and its sub-agencies, the
22 Bureau of Reclamation and the Bureau of Land Management, as well as the
23 appropriate officers and agents thereof, are at the very least necessary if not
24 indispensable parties to the present action within the meaning of Rule 19(a) of
25 the Federal Rules of Civil Procedure and must be joined before this Court can
26 even attempt to determine whether or not the Plaintiff Indian Community has
27 standing to bring its action in trespass.

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1 It is therefore, respectfully submitted that the Court should
2 take appropriate action to assure joinder of such officers and agents as
3 necessary or indispensable parties under Rule 19, of the Federal Rules of
4 Civil Procedure.

5 II. Rule 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction.

6 In Paragraph III of its First Claim for Relief, the Plaintiff
7 asserts that this Court has jurisdiction to adjudicate the present controversy
8 under the provisions of 28 U.S.C.A. § 1362. However, federal jurisdiction
9 of a claim cannot be sustained under this statute or 28 U.S.C.A. § 1331
10 (The Federal Question Statute) on the bare allegation that it "arises under the
11 Constitution, laws or treaties of the United States." A suit does not so arise
12 unless it really and substantially involves a dispute or controversy respecting
13 the validity, construction or effect (of federal law) upon the determination of
14 which the result depends, and the Court will look beyond the naked allegations
15 of the complaint to determine whether the asserted claim is controlled or
16 conditioned by Federal Law. Prairie Band of Potawatomie Tribe of Indians v.
17 Puckee, 321 F.2d 767 (10th Cir. 1963). 25 U.S.C.A. § 70(a), expressly
18 establishes jurisdiction in the Indian Claims Commission to hear and determine
19 any and all claims against the United States on behalf of any Indian Tribe in
20 law or equity "arising under the Constitution, laws or treaties of the United
21 States, and executive orders of the President." 25 U.S.C.A. § 70(a) relates,
22 however, only to claims accruing before August 13, 1946. Claims arising
23 thereafter fall within the jurisdiction of the United States Court of Claims,
24 pursuant to 28 U.S.C.A. § 1505.

25 Although specific reference is made in both 25 U.S.C.A. §
26 70(a) and 28 U.S.C. § 1505 to "executive orders of the President", 28 U.S.C.A.
27 § 1362, relied upon by the Plaintiff to establish jurisdiction in the United States
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1 District Court for the District of Arizona, contains no reference whatsoever
2 to controversies arising under executive orders of the President.

3 Nor are the decisions cited by the Plaintiff in its Memorandum
4 in Opposition to Defendants Merrills and Mesa Sand & Rock's Motion to Dismiss
5 in point. Creek Indians National Council v. Sinclair Prairie Oil Co., 142 F.2d
6 842 (10th Cir., 1944) relates to an Indian allotment and involved construction
7 of certain treaties between the United States and the Creek Tribe. McCauley v.
8 Makah Indian Tribe, 28 F.2d 867 (9th Cir., 1942) involved the construction of
9 a treaty between the United States and an Indian tribe. Although the decision
10 in Skomomish Indian Tribe v. France, 269 F.2d 555 (9th Cir., 1959) was
11 concerned with the meaning of a Presidential Executive Order, the Court
12 there held that construction of that Executive Order was dependent upon and
13 drew into question of the construction of a treaty previously entered into
14 between the United States and the Indian Tribe.

15 It is therefore respectfully submitted that since the rights and
16 obligations of the parties to this action involve a construction of the Presidential
17 Executive Order dated June 14, 1879, and not of any statutory, Constitutional
18 or treaty provisions, this Court lacks subject matter jurisdiction of the present
19 controversy and Plaintiff's First Claim for Relief should be dismissed pursuant
20 to Rule 12(b)(1) of the Federal Rules of Civil Procedure. It is further sub-
21 mitted that 25 U.S.C. § 398(D) specifically states that any future changes in
22 the boundaries of Executive Order Indian Reservations shall be made by
23 Congress alone and that this Court, therefore, lacks subject matter jurisdic-
24 tion of the present controversy by reason thereof.

25 Respectfully submitted this 17th day of October, 1972.

26 GARY K. NELSON
The Attorney General

Donald O. Loeb
DONALD O. LOEB
Assistant Attorney General

27 I hereby attest and certify on 12/6/93
for the foregoing document is a full, true and correct
copy of the original on file in my office and in my cus-
tody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA

[Signature] Deputy

1 Copy of the foregoing mailed this
2 17 day of October, 1972, to:

3 Royal D. Marks
4 Richard B. Wilks, and
5 Philip J. Shea, of
6 MARKS & MARKS
7 310 Title & Trust Bldg.
8 114 West Adams Street
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10 Attorneys for Plaintiff

11 GOVE L. ALLEN
12 Standage & Allen
13 244 South Horne Street
14 Mesa, Arizona 85204
15 Attorneys for Defendants Merrill

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19 Mesa, Arizona 85204
20 Attorneys for Defendants:
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22 Roy Johnson and Mrs. Roy Johnson
23 Earl C. Johnson and Mrs. Earl C. Johnson
24 John Campo III, Executor of the Estate of
25 Leroy Johnson, deceased

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8 *Donald O. Loeb*
DONALD O. LOEB
9 Assistant Attorney General

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Permit issued 5/20/67

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Salt River Project
Permit for Removal of Gravel

(176r-444)
This permit was terminated
May 15th, 1967
R.K. Esser 6/12/72
74 + 198

THIS AGREEMENT, made this 8th day of September 1948

1948, pursuant to the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter styled the United States, represented by the Contracting Officer executing this agreement, and ARIZONA HIGHWAY DEVELOPMENT, STATE OF ARIZONA, hereinafter styled the Contractor:

WHEREAS, in accordance with the authority vested in the Secretary of the Interior by Section 20 of the Act of August 4, 1957 (39 Stat. 1287), the Contracting Officer is authorized to grant a permit to the Contractor for the removal of gravel from the hereinafter described vacant public land which is embraced in withdrawal under the provisions of the Act of June 17, 1902 (32 Stat. 388);

NOW, THEREFORE, it is mutually agreed as follows:

1. In consideration of the obligations herein assumed by the Contractor, the United States does hereby authorize and permit the Contractor to enter upon the following described lands:

The Southwest Quarter of the Northwest Quarter (1/4), Section Three (3), Township One (1) North, Range Five (5) East, Gila and Salt River Indian, Pinal County, Arizona.

For the purpose of gravine removal therefrom.

2. The Contractor covenants and agrees that only gravel shall be removed from such locations on the herein described land as may be designated by the Contracting Officer, and that the excavation and stripping of the ground, the removal of gravel therefrom, and all other operations hereunder, shall at all times be subject to the control, direction and approval of the Contracting Officer.

3. The Contractor covenants and agrees to remove from the herein described land all garbage, trash and junk that heretofore has been dumped, which debris may be buried in an old pit located thereon; and that it will not dump or cause or permit to be dumped any garbage, trash or junk on any part of the herein described land. The Contractor further agrees:

(a) To post the herein described land immediately after the execution of this permit;

(b) To construct and maintain at its own expense a fence along the west boundary of said Quarter Section, and as much of the north and south boundaries as is required to eliminate the dumping of trash on these lands.

(c) To maintain the entire area of said land in a healthful condition and presentable appearance.

4. This permit shall continue as long but in no event beyond 50 years from the date of this permit, as in the opinion of the Contracting Officer it is considered expedient and not detrimental to the public

Contract and may be terminated by either the Contracting Officer or the Contractor upon thirty (30) days' written notice. Within said thirty (30) days there shall be removed at the expense of the Contractor any structures or accessories placed on the land by the Contractor, except fences constructed by the Contractor; provided, that any structure or accessories, other than fences constructed by the Contractor, remaining on the land at the expiration of said thirty (30) days shall become and thereafter remain the property of the United States. The Contractor shall not remove any fences constructed by it upon the land herein described; upon the expiration of this permit, all such fences shall become and thereafter remain the property of the United States.

5. The Contractor shall not use the hereinabove described premises for any purpose other than the removal, processing and treating of gravel incident to using it for municipal purposes. The material removed hereunder shall be used for no purposes other than the construction and maintenance of public roads and streets serving and being within or in the immediate vicinity of the Salt River Project, Arizona, and the striping of the ground and the removal of the materials shall at all times be under the control and subject to the approval of the Regional Director, Region III, Bureau of Reclamation.

6. The Contractor, for itself and for its representatives, agrees to hold harmless, and forever releases and discharges, the United States, its officers, agents and employees, from any and all damages or claims for damages either at law or in equity, which directly or indirectly may accrue or result from the operations under this contract.

7. This permit shall not be exclusive in character and the United States reserves its right to use, lease or permit the use of the land described herein or any part thereof for any purpose. It is understood by the Contractor that the land herein described may be used for purposes other than the removal of gravel, and the Contractor, having full knowledge of such contemplated uses, for itself and its representatives agrees to hold harmless and forever releases and discharges the United States, its officers, agents, attorneys and employees, from any and all damages or claims for damages either at law or in equity, which directly or indirectly may accrue or result from operations under this permit.

8. It is expressly understood and agreed that all rights granted to the Contractor hereunder shall be subject (a) to the right of any of the United States, its representatives, contractors, successors and assigns, to construct, operate and maintain without liability for damage to the works or equipment of the Contractor, canals, laterals, ditches, electrical transmission lines, telephone lines, and any other structures or works of any kind or nature constructed under the Act of Congress approved June 17, 1902 (32 Stat. 384), and acts amendatory thereof or supplementary thereto; and (b) to the right of the Salt River Valley Water Users' Association, under the supervision and control of the Contracting Officer, to remove boulders and gravel from any of the lands described herein during the term of this permit, provided that such operations by said Association shall not interfere with the Contractor's operations.

9. The Salt River Valley Water Users' Association, at all times during the term of this permit, shall have the right to inspect the lands herein

disseminated and the Contractor's operations thereon; the Contractor shall promptly take such remedial action as said Association, at any time and from time to time, may, by written notice endorsed by the Contracting Officer, recommend for the protection of any lands, facilities, or works of the Salt River Federal reclamation project.

10. No interest in this permit shall be transferred by the Contractor to any other party and any such transfer shall cause an automatic termination of this permit so far as the United States is concerned; all rights of action, however, for breach of this agreement are reserved to the United States, as provided by Section 3737 of the Revised Statutes of the United States.

11. The Contractor shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and shall require an identical provision to be included in all subcontracts; provided, however, that this clause does not refer to, extend to or cover the business or activities of the Contractor which are not related to or involved in the performance of this contract.

12. There is reserved to the United States all uranium, thorium, or any other materials which are or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same.

13. No member of the Legislature or Council shall be admitted to any claim or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

14. (a) Any notice, demand or request required or authorized by this contract to be given or made to or upon the United States shall be deemed properly given or made if delivered, or mailed postage prepaid, to Regional Director, Region III, Bureau of Reclamation, Boulder City, Nevada.

(b) Any notice, demand or request required or authorized by this contract to be given or made to or upon the Contractor shall be deemed properly given or made if delivered, or mailed postage prepaid, to

Josephine Highway Department, Phoenix, Arizona

(c) The designation of the person to or upon whom any notice, demand or request is to be given or made, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this article for other notices.

15. The term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

IN WITNESS WHEREOF, the parties hereto have executed this instrument the date first shown above.

THE UNITED STATES OF AMERICA,

By (Sgd.) L. R. Douglass
Acting Regional Director, Region 3

ARIZONA HIGHWAY DEPARTMENT, STATE OF ARIZONA,
Contractor,

By [Signature]
REGIONAL STATE ENGINEER

ATTEST:
[Signature]
Secretary
Arizona State Highway
Commission

Regional Draft 9/3/52
Contract No. 14-06-300-21

*copy made
6/12/52
[Signature]*

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECREATION

ATTACHMENT No 4A

Salt River Project

Permit for Removal of Gravel

THIS AGREEMENT, made this 1st day of October, 1952, pursuant to the Act of June 17, 1902 (32 Stat. 380), and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter styled the United States, represented by the Contracting Officer executing this agreement, and ARLENE HIRSHAY BARNETT, STATE OF ARIZONA, hereinafter styled the Contractor:

WHEREAS, in accordance with the authority vested in the Secretary of the Interior by Section 10 of the Act of August 4, 1919, (41 Stat. 1167), the Contracting Officer is authorized to grant a permit to the Contractor for the removal of gravel from the hereinafter described vacant public land which is embraced in withdrawal under the provisions of the Act of June 17, 1902 (32 Stat. 380);

HOW, THEREFORE, it is mutually agreed as follows:

1. In consideration of the obligations herein assumed by the Contractor, the United States does hereby authorize and permit the Contractor to enter upon the following described land:

Lot four (4), (SW/4), Section Three (3), Township One (1) North, Range five (5) East, Gila and Salt River Meridian, Maricopa County, Arizona,

for the purpose of removing gravel therefrom.

EXHIBIT B

2. The Contractor covenants and agrees that only gravel shall be removed from such locations on the herein described land as may be designated by the Contracting Officer, and that the excavation and stripping of the ground, the removal of gravel therefrom, and all other operations hereunder, shall at all times be subject to the control, direction and approval of the Contracting Officer.

3. The Contractor covenants and agrees to remove from the herein described land all garbage, trash and junk that heretofore has been dumped, which debris may be buried in an old pit located thereon; and that it will not dump or cause or permit to be dumped any garbage, trash or junk on any part of the herein described land. The Contractor further agrees:

- (a) To post the herein described land immediately after the execution of this permit;
- (b) To construct and maintain at its own expense a standard fence along the west boundary of Lot 4 and so much of the north boundary as is required to eliminate the dumping of trash on these lands.
- (c) To maintain the entire area of said land in a healthful condition and presentable appearance.

4. This permit shall continue so long but in no event beyond 50 years from the date of this permit, as in the opinion of the Contracting Officer it is considered expedient and not detrimental to the public

interest and may be terminated by either the Contracting Officer or the Contractor upon thirty (30) days' written notice. Within said thirty (30) days there shall be removed at the expense of the Contractor any structure or accessories placed on the land by the Contractor, except fences constructed by the Contractor; provided, that any structure or accessories, other than fences constructed by the Contractor, remaining on the land at the expiration of said thirty (30) days shall become and thereafter remain the property of the United States. The Contractor shall not remove any fences constructed by it upon the land herein described; upon the expiration of this permit, all such fences shall become and thereafter remain the property of the United States.

5. The Contractor shall not use the hereinabove described premises for any purpose other than the removal, processing and treating of gravel incident to using it for municipal purposes. The material removed hereunder shall be used for no purposes other than the construction and maintenance of public roads and streets serving and being within or in the immediate vicinity of the Salt River Project, Arizona, and the strip-ping of the ground and the removal of the materials shall at all times be under the control and subject to the approval of the Regional Director, Region III, Bureau of Reclamation.

6. The Contractor, for itself and for its representatives, agrees to hold harmless, and forever releases and discharges, the United States, its officers, agents and employees, from any and all damages or claims for damages either at law or in equity, which directly or indirectly may be caused or result from the operations under this contract.

7. This permit shall not be exclusive in character and the United States reserves the right to use, lease or permit the use of the land described herein or any part thereof for any purpose. It is understood by the Contractor that the land herein described may be used for purposes other than the removal of gravel, and the Contractor, having full knowledge of such contemplated uses, for itself and its representatives agrees to hold harmless and forever releases and discharges the United States, its officers, agents, attorneys and employees, from any and all damages or claims for damages either at law or in equity, which directly or indirectly may accrue or result from operations under this permit.

8. It is expressly understood and agreed that all rights granted to the Contractor hereunder shall be subject (a) to the right of way of the United States, its representatives, contractors, successors and assigns, to construct, operate and maintain without liability for damage to the works or equipment of the Contractor, canals, laterals, ditches, electrical transmission lines, telephone lines, and any other structures or works of any kind or nature constructed under the Act of Congress approved June 17, 1902, (32 Stat. 303), and acts amendatory thereof or supplementary thereto; and (b) to the right of the Salt River Valley Water Users' Association, under the supervision and control of the Contracting Officer, to remove boulders and gravel from any of the lands described herein during the term of this permit, provided that such operations by said Association shall not interfere with the Contractor's operations.

9. The Salt River Valley Water Users' Association, at all times during the term of this permit, shall have the right to inspect the lands herein

described and the Contractor's operations thereon; the Contractor shall promptly take such remedial action as said Association, at any time and from time to time, may, by written notice endorsed by the Contracting Officer, recommend for the protection of any lands, facilities, or works of the Salt River federal reclamation project.

10. No interest in this permit shall be transferred by the Contractor to any other party and any such transfer shall cause an automatic annulment of this permit so far as the United States is concerned; all rights of action, however, for breach of this agreement are reserved to the United States, as provided by Section 3737 of the Revised Statutes of the United States.

11. The Contractor shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin, and shall require an identical provision to be included in all subcontracts; Provided, however, That this clause does not refer to, extend to or cover the business or activities of the Contractor which are not related to or involved in the performance of this contract.

12. There is reserved to the United States all uranium, thorium, or any other materials which are or may be determined to be peculiarly essential to the production of fissionable materials, whether or not of commercial value, together with the right of the United States through its authorized agents or representatives at any time to enter upon the land and prospect for, mine, and remove the same.

13. No member of or delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

14. (a) Any notice, demand or request required or authorized by this contract to be given or made to or upon the United States shall be deemed properly given or made if delivered, or mailed postage prepaid, to Regional Director, Region III, Bureau of Reclamation, Boulder City, Nevada.

(b) Any notice, demand or request required or authorized by this contract to be given or made to or upon the Contractor shall be deemed properly given or made if delivered, or mailed postage prepaid, to Arizona Highway Department, Phoenix, Arizona.

(c) The designation of the person to or upon whom any notice, demand or request is to be given or made, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this article for other notices.

15. The term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

IN WITNESS WHEREOF, the parties hereto have executed this instrument the date first shown above.

THE UNITED STATES OF AMERICA,

By/s/ W. H. Taylor
Eng. Malcolm
Acting Regional Director, Region 3,
Bureau of Reclamation

ARIZONA HIGHWAY DEPARTMENT, STATE OF ARIZONA
Contractor,

By/s/ R. D. Canfield
Deputy State Engineer

Contract No. 14-06-314-15

SCHEDULE A

LAND DESCRIPTION

The West 330 feet of the South 660 feet of Lot 3, Section 3,
T. 1 N., R. 5 E., G&SRM, Arizona.

3. (f) Limits of permit area will be determined by personnel of Arizona Highway Department and Bureau of Reclamation prior to removal of material.
- (g) Permittee shall sprinkle water on haul roads and pit area for dust control.

Schedule B
General Conditions

ORIGINAL

1. This permit shall not be exclusive in character and shall at all times be subject to easements or rights existing or of record in favor of the public or third persons and to the right of the United States to enter the above-described land for the purpose of removing or processing construction materials therefrom or thereon, and it is expressly understood and agreed that all rights granted to Permittee hereunder shall be subject to the right of the United States, its representatives, contractors, subcontractors, and assigns to construct, operate, and maintain without liability for Permittee's inability to remove or process any material as a result of such construction, operation, or maintenance of works of any kind or nature constructed under the Act of Congress approved June 17, 1902 (32 Stat. 386), and acts amendatory thereof or supplementary thereto. There is also excepted and reserved the right to prospect and carry on developments for oil, gas, coal, and other minerals on said lands under the Act of October 2, 1917 (40 Stat. 297), and the Act of February 25, 1920 (41 Stat. 437).

2. The Permittee shall not use the permit area for any purpose other than the removal of sand and gravel.

3. The stripping of the ground and the removal of the materials shall at all times be under the control and subject to the approval of the Contracting Officer.

4. The Permittee shall post warning notices around excavations and shall use such other safety measures as may be deemed necessary.

5. The Permittee will not dump or cause to be dumped any garbage, trash, or junk or any other material other than the material removed pursuant to this permit on any part of the permit area.

6. The Permittee shall prevent unauthorized removal of material from the permit area.

7. The Permittee insures that all materials shall be extracted in accordance with approved practices so as to preserve to the maximum extent all scenic, recreational, and other values of the land. At termination of operation, pit areas will be graded to blend with surrounding terrain and drainage reestablished; however, before complete restoration of premises is accomplished by Permittee, the Contracting Officer will be contacted as to type of disposition to be made of any stockpiled material.

8. The Permittee shall maintain the permit area in a condition of safety and presentable appearance. On or before the termination of this permit, Permittee shall return the permit area to a condition satisfactory to the Contracting Officer and shall remove at the expense of the Permittee, any structures, equipment, or accessories placed or installed in the permit area by the Permittee. Any such structures, equipment, or accessories remaining in the permit area after termination of the permit term or any extension thereof which may be granted by the Contracting Officer, shall become and thereafter remain the property of the United States or, at the option of the United States, may be removed by the United States at the cost and expense of the Permittee. Permittee shall promptly pay to the United States cost or expense of removal upon billing therefor.

9. No interest in this permit shall be transferred by the Permittee to any other party and any such transfer shall cause an automatic annulment of this permit so far as the United States is concerned; all rights of action, however, for breach of this agreement are reserved to the United States, as provided by Section 3737 of the Revised Statutes of the United States.

10. (a) During the performance of this contract, the Permittee hereinafter called "Contractor" agrees as follows:

(1) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Equal Opportunity clause.

(2) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under this Equal Opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The Contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

M. S. 6083

(5) The contractor will furnish all information and reports required by Executive Order No. 11245 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the Contractor's noncompliance with the Equal Opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended in whole or in part, and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The Contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, That in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) The Contractor hereby agrees as follows:

(1) To comply with Title VI (Section 601) of the Civil Rights Act of July 2, 1964 (78 Stat. 241), which provides that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance," and to be bound by the regulations of the Department of the Interior for the effectuation thereof, as set forth in 43 CFR 17.

(2) To obligate his subcontractors, subgrantees, transferees, successors in interest, or any other participants receiving Federal financial assistance hereunder, to comply with the requirements of this provision.

11. No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom, but this restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

12. The Permittee warrants that no person or agency has been employed or retained to solicit or secure this permit upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial agencies maintained by the Permittee for the purpose of securing business. For breach or violation of this warranty, the United States shall have the right to annul this permit without liability or in its discretion to require the Permittee to pay, in addition to the contract price or consideration, the full amount of such commission, percentage, brokerage, or contingent fee.

13. (a) Any notice, demand, or request required or authorized by this permit to be given or made to or upon the United States shall be deemed properly given or made if delivered, or mailed postage prepaid, to the Contracting Officer at the address appearing below his signature.

(b) Any notice, demand, or request required or authorized by this permit to be given or made to or upon the Permittee shall be deemed properly given or made if delivered, or mailed postage prepaid, to the Permittee at the address appearing below Permittee's signature or below the signature of the person executing this permit on behalf of the Permittee.

(c) The designation of the person to or upon whom any notice, demand, or request is to be given or made, or the address of any such person, may be changed at any time by notice given in the same manner as provided in this article for other notices.

Note: To enter permit area, permittee should contact the Phoenix Development Office for the key to the gate.

SALT RIVER

022

19

1 GARY K. NELSON
 The Attorney General
 2 ROBERT V. KERRICK, Assistant Attorney General
 DONALD O. LOEB, Assistant Attorney General
 3 206 South 17th Avenue
 Phoenix, Arizona 85007
 4 Phone Number: 261-7291
 Attorneys for Defendants Arizona State
 5 Highway Commission, comprised of
 Low Davis, Rudy E. Campbell, Walter
 6 Surret, Walter A. Nelson and Len A. Mattice

FILED
 OCT 2 1972
 DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

10 SALT RIVER PIMA-MARICOPA INDIAN)
 COMMUNITY,)
 11)
 Plaintiff,)
 12)
 -v-)
 13)
 ARIZONA SAND AND ROCK COMPANY,)
 14 et al.,)
 Defendants.)
 15)
 16)

No. CIV 72-376 PHX WEC
 REPLY TO PLAINTIFF'S
 MEMORANDUM IN OPPOSITION
 TO UNITED STATES
 ATTORNEY'S MOTION TO
 DISMISS

17 In the Plaintiff's Memorandum dated September 20, 1972,
 18 they assert that the annotation to 25 U.S.C.A. § 175 lists "countless cases"
 19 in which that statute has been successfully invoked by Indian Tribal plaintiffs.
 20 However, that particular annotation cites only three court decisions in all of
 21 which, Tribal requests for representation by the United States Attorney
 22 pursuant to 25 U.S.C.A. § 175 were summarily turned down.

23 This Respondent, therefore, respectfully submits that the
 24 legal memoranda filed by the Plaintiff contain no authorities whatsoever
 25 justifying its demand that the United States Attorney undertake representation
 26 of the Plaintiff Indian Community in the present action.

27 This Respondent further contends that the Plaintiff has an
 28 adequate remedy at law in that it is free to contract for the services of its

1 own private attorneys under the provisions of 25 U.S.C.A. § 81. The
2 existence of such an adequate remedy at law, of course, precludes the
3 Plaintiff from invoking the provisions of 28 U.S.C. § 1361, the so called
4 Federal Mandamus Act.

5 It should also be pointed out that all of the alleged "depreda-
6 tions" said to have been committed by the various defendants named and
7 served in the present action, have occurred with the express sanction and
8 consent of various agencies of the United States Government, including the
9 Department of the Interior, the Bureau of Land Management and the Bureau
10 of Reclamation, all of which have for years purported to exercise dominion,
11 ownership and control over the real estate in question.

12 For example, the Respondent Arizona Highway Department
13 entered upon a portion of the lands in question under the authority of three
14 permits issued by the United States Department of Interior, Bureau of
15 Reclamation to remove gravel and construction material. These permits
16 were dated October 1, 1952, September 8, 1948 and January 14, 1972
17 respectively. The real property which forms the subject of these permits
18 had been previously withdrawn from the public domain by the Department of
19 the Interior pursuant to the provisions of what is now 43 U.S.C. § 416.
20 And these permits were then issued pursuant to authority granted to the
21 Secretary of the Interior under the provisions of 43 U.S.C. § 387.

22 This Respondent therefore contends that it would be virtually
23 inconceivable that this action, allegedly brought in trespass but which
24 could be more accurately characterized as a quiet title action in which the
25 Plaintiffs are seeking to obtain a determination as to the exact location of
26 the boundary of their Executive Order Indian Reservation, could possibly
27 proceed to judgment without first joining those departments and agencies
28 of the United States Government which presently claim ownership of these

1 disputed riparian lands. Of course once these agencies are properly joined
2 in the present lawsuit, an inevitable conflict of interest similar to that
3 described by the Ninth Circuit Court of Appeals in the Rincon Band of
4 Mission Indians case cited in this Respondent's Memorandum of Law becomes
5 quite apparent.

6 It is therefore respectfully submitted that this Court enter an
7 order denying Plaintiff's request that the United States Attorney General be
8 required to represent it in the action brought this Defendant.

9 RESPECTFULLY SUBMITTED this 29th day of September, 1972.

10 GARY K. NELSON
11 The Attorney General

12
13 By Donald O. Loeb
14 DONALD O. LOEB
15 Assistant Attorney General
16 Attorneys for Defendant Arizona Highway
17 Commission

18 Copy of the foregoing mailed this
19 29th day of September, 1972, to:

20 Royal D. Marks
21 Richard B. Wilks, and
22 Philip J. Shea, of
23 MARKS & MARKS
24 310 Title & Trust Bldg.
25 114 West Adams Street
26 Phoenix, Arizona 85003
27 Attorneys for Plaintiff

28 GOVE L. ALLEN
Standage & Allen
244 S. Horne Street
Mesa, Arizona 85204
Attorneys for Defendants Merrill

I hereby attest and certify on 12/6/93
that the foregoing document is a full, true and correct
copy of the original on file in my office and in my cus-
tody.

CLERK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA
[Signature] Deputy

1 DARRELL F. SMITH
Smith & Buckley
2 637 East Main Street
Mesa, Arizona 85204
3 Attorneys for Defendants:
Johnson & Stewart Materials, Inc.
4 Roy Johnson and Mrs. Roy Johnson
Earl C. Johnson and Mrs. Earl C. Johnson
5 John Campo III, Executor of the Estate of
Leroy Johnson, deceased
6

7 KILLIAN & LEGG
9 West Pepper Place
8 Mesa, Arizona 85201
Attorneys for Mesa Sand and Rock, Inc.
9

10 PERRY & HEAD and GEORGE SORENSON, JR.
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11 Phoenix, Arizona 85013
Attorneys for Allied Concrete & Materials
12

13 ROBERT E. HURLEY
111 West Monroe
Phoenix, Arizona 85003
14 Attorney for Salt River Valley Water Users Association

15 RONALD W. MEYER
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16 Phoenix, Arizona 85003
Attorney for Maricopa County
17

18 WILLIAM SMITHERMAN, United States Attorney
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21 C. A. CARSON, III
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22 Phoenix, Arizona 85012
Attorneys for Arizona Sand and Rock Company
23

24
25
26
27
28

SALT RIVER LAND MEETING RESCHEDULED

December 14, 1993

The State Land Department has rescheduled a public meeting to provide information and to answer questions about the Salt River navigability issue and the disclaimer which the State has made to lands outside the present channel of the Salt River, for Tuesday, December 21, at 7 p.m. at the Phoenix Civic Plaza, Yuma Room. The Yuma Room is located in Plaza South, entrance on 3rd Street, south of Washington.

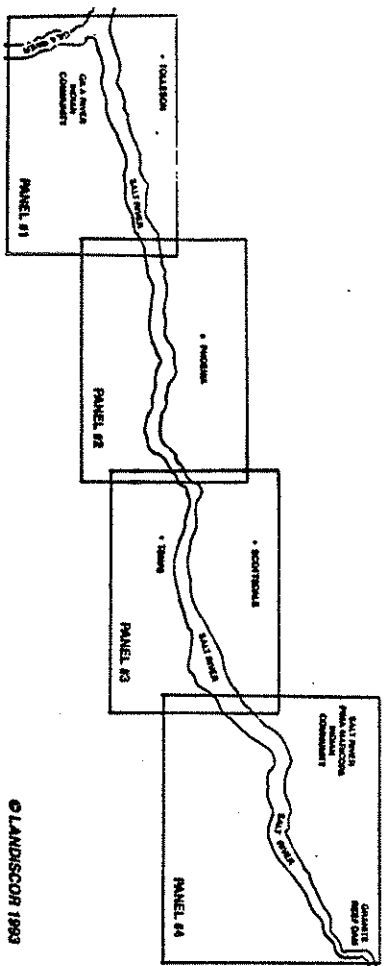
The December 9 public meeting had to be rescheduled due to overcrowding at the Maricopa County Auditorium.

PANEL #1

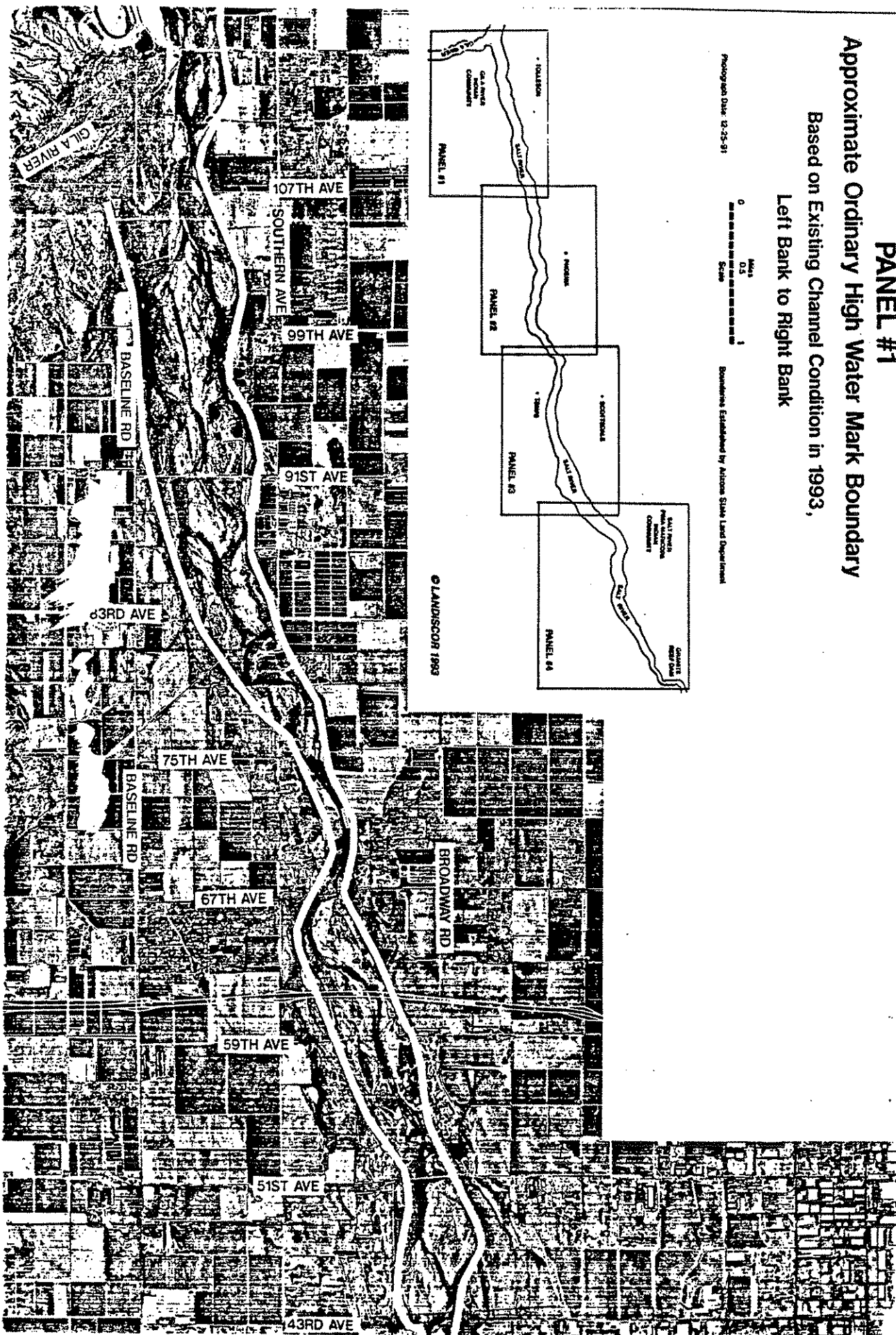
Approximate Ordinary High Water Mark Boundary

Based on Existing Channel Condition in 1993,
Left Bank to Right Bank

Photograph Date: 12-25-91
Scale: 0 0.5 1 Miles
Boundaries Established by Arizona State Land Department



© LANDSCORP 1993

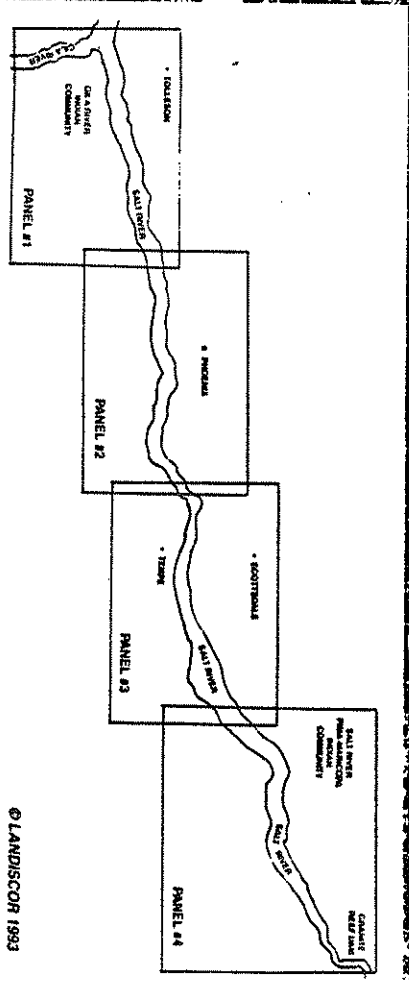
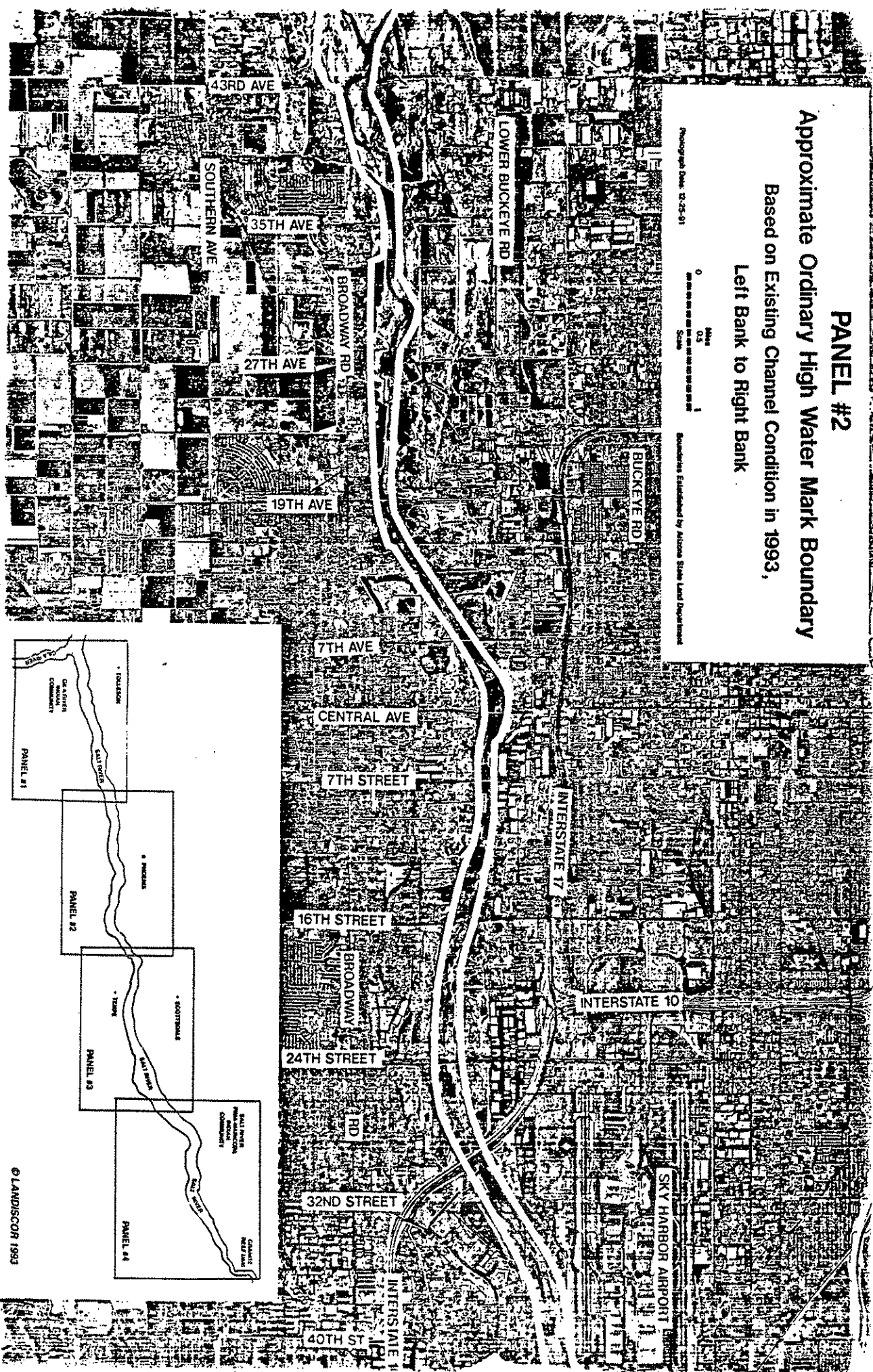


PANEL #2

Approximate Ordinary High Water Mark Boundary

Based on Existing Channel Condition in 1993,
Left Bank to Right Bank

Photograph Date: 10-25-91
 Scale: 1" = 100' (Horizontal), 1" = 100' (Vertical)
 Boundaries Established by Arizona State Land Department

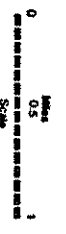


© LANDISCOR 1993

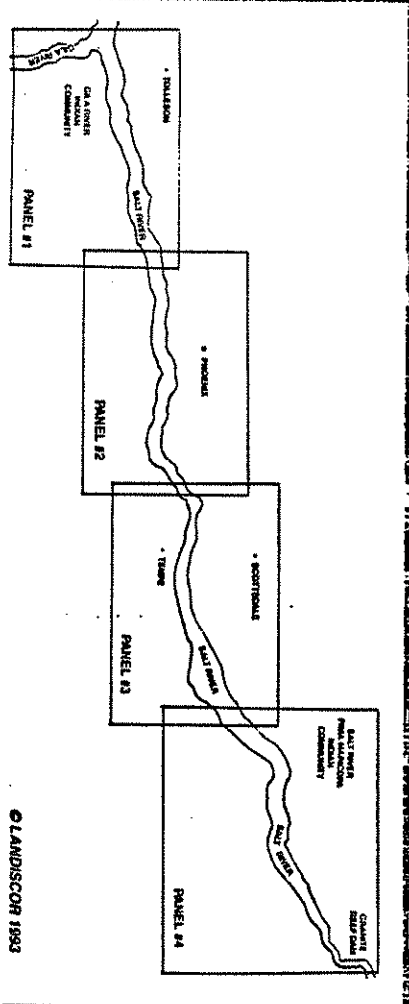
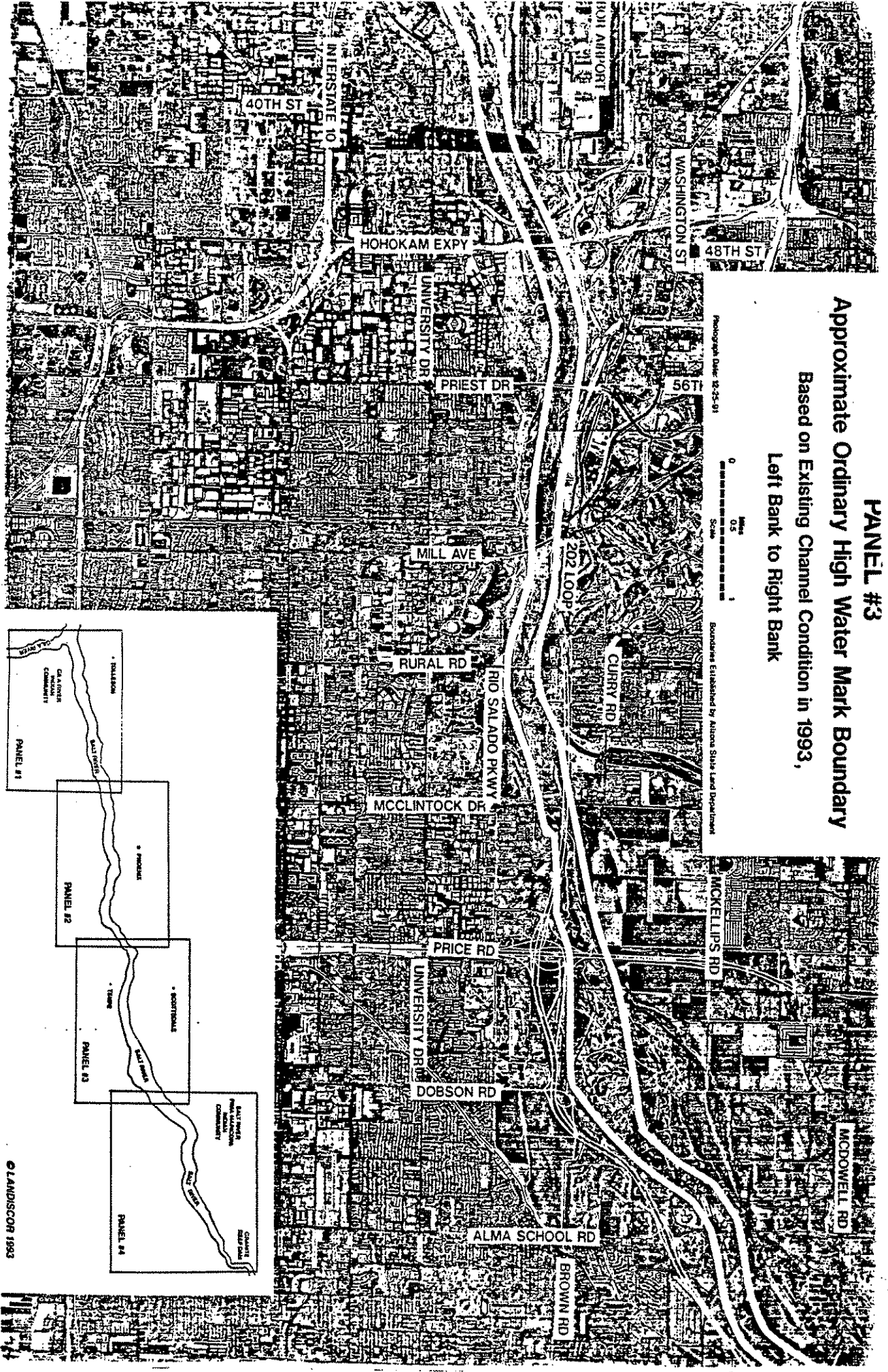
PANEL #3

Approximate Ordinary High Water Mark Boundary
Based on Existing Channel Condition in 1993,
Left Bank to Right Bank

Photograph Date: 8-25-91



Boundaries Established by Arizona State Land Department



1 2. That the ultimate boundary line established by
2 the Department of the Interior, Bureau of Land Management's
3 survey and plat of survey as accepted and approved on August
4 17, 1972 establishes the South boundary of the SALT RIVER
5 PIMA-MARICOPA INDIAN RESERVATION in Township 1 North, Range
6 5 East of the Gila and Salt River Base and Meridian, Maricopa
7 County, State of Arizona as a fixed boundary line.

8 3. That the Defendants JOHNSON & STEWART MATERIALS,
9 INC., EARL C. JOHNSON, EMMA JOHNSON, his wife, ROY JOHNSON,
10 MRS. ROY JOHNSON, his wife, and JOHN CAMPO III, Executor of
11 the Estate of LeROY JOHNSON claim certain interests in the
12 Northwest quarter of the Northwest quarter of Section 9,
13 Township 1 North, Range 5 East of the Gila and Salt River
14 Base and Meridian and that all property lying north of the
15 boundary line as established by the August 17, 1972 survey
16 lies within the reservation and said Defendants are hereby
17 ordered to vacate the premises.

18 4. It is further ordered that the proper damages
19 owing by these Defendants to the Plaintiff is \$30,000.00 for
20 the fair rental value of the Plaintiff's property and \$36,000.00
21 for the fair market value of the sand, gravel, rock and aggre-
22 gate material removed from the Plaintiff's property.

23 5. That pursuant to Rule 54 of the Rules of Civil
24 Procedure, the Court finds there is no just reason for delay
25 in entry of the Judgment and orders that this Judgment be
26 entered forthwith.

27 6. It is further ordered that if the Defendants
28 JOHNSON & STEWART MATERIALS, INC., EARL C. JOHNSON, EMMA
29 JOHNSON, his wife, ROY JOHNSON, MRS ROY JOHNSON, his wife, and
30 JOHN CAMPO III, Executor of the Estate of LeROY JOHNSON or
31 any of the Defendants shall appeal this Judgment within the
32 time allowed by law and post the necessary supercedeas bond

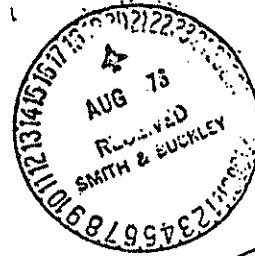
1 that no execution shall be issued pending the outcome of that
2 appeal or the settlement of the appeal between the parties.

3 DONE IN OPEN COURT this 11th day of April,
4 1977.

5
6
7 W. D. Murray
8 Hon. W. D. Murray
9 Senior United States District Judge

10
11
12 I hereby attest and certify on 2/27/92
13 that the foregoing document is a full, true and correct
14 copy of the original on file in my office and in my cus-
15 tody.

16
17
18 CLERK, U.S. DISTRICT COURT
19 DISTRICT OF ARIZONA
20 By [Signature] Deputy
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164

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SALT RIVER PIMA-MARICOPA INDIAN
COMMUNITY, :
Plaintiff, :

vs. :

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

No. Cv-72-376-Phx.

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

vs. :

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

No. Cv-73-579-Phx.

CITY OF MESA, an Arizona
a municipal corporation, :
Plaintiff, :

vs. :

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

No. Cv-73-769-Phx.

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

vs. :

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

No. Cv-74-553-Phx.

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

Plaintiff,

vs.

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

Defendants.

No. Cv-74-529-Phx.

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 impersuasive. 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 aeriels 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.

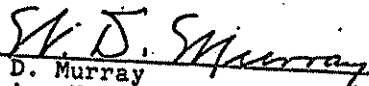
XXII

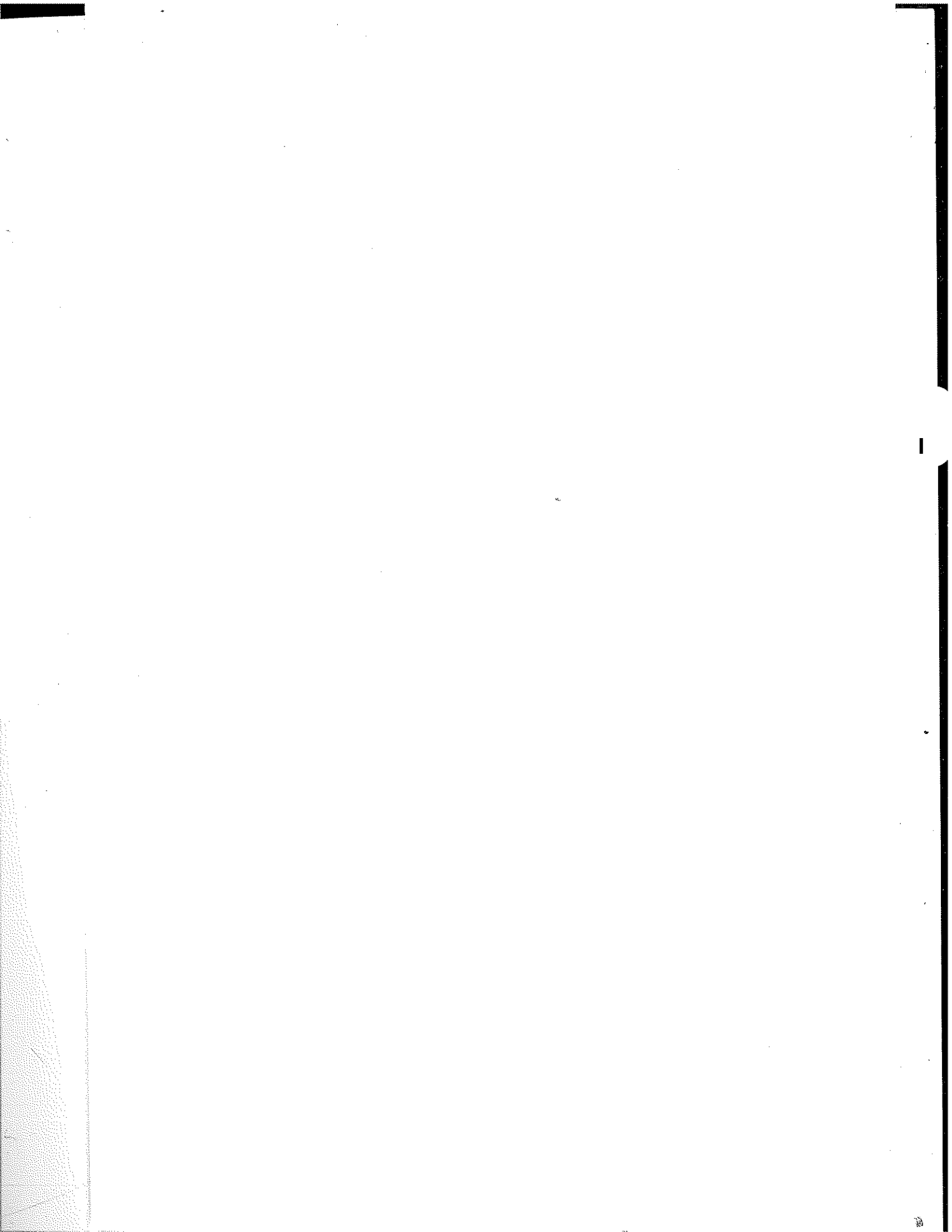
Since the Secretary of the Interior acted within the scope of his statutory authority and since the statute pursuant to which he acted is constitutional, the suits against the Secretary are in fact suits against the United States and must be dismissed on the grounds of sovereign immunity.

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.



FILED (29)

JAN 3 1973

W. J. FUR... CLERK
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY *D. Malone*
DEPUTY CLERK

1 GARY K. NELSON
The Attorney General
2 ROBERT V. KERRICK, Assistant Attorney General
DONALD O. LOEB, Assistant Attorney General
3 206 South 17th Avenue
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4 Telephone: 261-7291
Attorneys for Defendants Arizona State
5 Highway Commission, comprised of
Lew Davis, Rudy E. Campbell, Walter
6 Surrett, Walter A. Nelson and Len W.
Mattice

8 IN THE UNITED STATES DISTRICT COURT

9 FOR THE DISTRICT OF ARIZONA

10 SALT RIVER PIMA-MARICOPA INDIAN)
COMMUNITY,)

11 Plaintiff,)

12 -v-)

13 ARIZONA SAND AND ROCK COMPANY,)
14 an Arizona corporation, et al.,)

15 Defendants.)
16)

No. CIV 72-376 PHX WEC

ANSWER OF THE DEFENDANT
ARIZONA STATE HIGHWAY
COMMISSION

17 COMES NOW Defendant, Arizona State Highway Commission,
18 by and through counsel undersigned, and for its answer to Plaintiff's
19 Complaint filed herein, admits, denies and alleges as follows:

20 FIRST CLAIM FOR RELIEF

21 I

22 Defendant admits that the Arizona State Highway Commission
23 is an agency of the State of Arizona comprised of Lew Davis, improperly
24 named and served as Lou Davis, Chairman, Rudy E. Campbell, vice-chair-
25 man, Walter W. Surrett, Walter A. Nelson and Len W. Mattice; Defendant
26 is without sufficient knowledge or information with which to form a belief as
27 to the truth or falsity of the remaining allegations contained in paragraph I
28 of Plaintiff's First Claim for Relief and therefore denies the same and places

1 Plaintiff on strict proof thereof.

2 II

3 Denies each and every, all and singular, the allegations
4 contained in paragraph II of Plaintiff's complaint and alleges affirmatively
5 that the controversy, if any, involves the construction of an Executive Order
6 dated June 14, 1879 by President Rutherford B. Hayes, setting aside a
7 certain portion of real property within the State of Arizona as Plaintiff's
8 Indian Reservation.

9 III

10 Admits each and every allegation contained in paragraph III
11 of Plaintiff's complaint.

12 IV

13 Defendant is without sufficient knowledge or information
14 with which to form a belief as to the truth or falsity of the allegations con-
15 tained in subparagraphs (a), (b), (c), (d), (e) of paragraph IV of Plaintiff's
16 First Claim for Relief and therefore denies the same and places the
17 Plaintiff on strict proof thereof; Defendant expressly denies the allegation
18 contained in paragraph IV of Plaintiff's First Claim for Relief to the effect
19 that this Defendant has trespassed upon the Plaintiff's Reservation and has
20 allegedly damaged Plaintiff or entered upon any portion of Plaintiff's Indian
21 Reservation for any purpose whatsoever, including the removal of sand
22 and gravel.

23 V

24 Defendant denies each and every, all and singular, the
25 allegations contained in paragraph V of Plaintiff's First Claim for Relief.

26 VI

27 As and for Defendant's first Affirmative Defense, Defendant
28 alleges that Plaintiff's First Claim for Relief fails to state a claim upon

1 which relief may be granted.

2 VII

3 Plaintiff is not now, nor has it ever been in either actual
4 or constructive possession of the real property lying south of the north
5 channel of the Salt River in Maricopa County, Arizona, which forms the
6 subject of the present action and therefore is entirely without standing to
7 bring such action against Defendant.

8 VIII

9 That the real property upon which Defendant, its agents
10 and servants are alleged to have trespassed was originally part of the public
11 domain of the United States of America and has long ago been withdrawn
12 from the public domain by the United States Department of the Interior
13 pursuant to the express provisions of U.S.C. A. § 416.

14 IX

15 Defendant has entered upon those lands which are particu-
16 larly described in the Appendix A attached hereto pursuant to the express
17 authorization of officers and agents of the United States Department of
18 Interior pursuant to the provisions of 43 U.S.C. A. § 387 and other pertinent
19 Federal statutes and regulations.

20 X

21 That the Plaintiff's claim for relief is barred by the statute
22 of limitations.

23 XI

24 That the Plaintiff's claims for relief are barred by laches.

25 XII

26 That under Rule 19, Federal Rules of Civil Procedure, the
27 United States Government as the appropriate officers and/or agents thereof
28 are either necessary or indispensable parties to the present action.

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XIII

That this Court is without subject matter jurisdiction of the present controversy by reason of the fact that Plaintiff's cause of action does not arise under the Constitution, laws or treaties of the United States but instead arises under the Executive Order of President Rutherford B. Hayes dated June 14, 1879, establishing Plaintiff's Indian Reservation.

XIV

That Plaintiff, in order to establish their First Claim for Relief against Defendant, is attempting to unilaterally expand the area of its Executive Order Indian Reservation in express violation of the specific terms and provisions of 28 U.S.C.A. § 398(d) whereby Congress unequivocally stated that any future changes in the boundaries of Executive Order Indian Reservations shall be made by Congress alone.

XV

That Defendant entered upon the real property which forms the subject matter of the present action under the express authority of three separate permits issued by the United States Department of the Interior, Bureau of Reclamation, authorizing the removal of gravel and construction materials therefrom. That the real property to which these three permits dated October 1, 1952, September 8, 1942 and January 14, 1972, respectively, had been previously withdrawn from the public domain by the United States Department of the Interior pursuant to the provisions of 43 U.S.C.A. § 416 and that said permits were issued pursuant to authority granted to the Secretary of the Interior under the provisions of 43 U.S.C.A. § 387.

XVI

That at no time did this real property form any part of the Plaintiff's Executive Order Indian Reservation. That neither the present Secretary of the Interior nor any of his predecessors are authorized to

1 unilaterally re-establish the south boundary of the Salt River Pima-Maricopa
2 Indian Community Executive Order Reservation, and that any attempt to do
3 so in the absence of a formal judicial decree quieting title in the Plaintiff
4 Indian Community or in the United States of America in trust for said
5 Indian Community is void and of no force and effect.

6 XVII

7 That the filing of the Plaintiff's purported cause of action in
8 trespass and ejectment is premature for the reason that there exists at the
9 present time a controversy relating to the proper interpretation of the
10 Presidential Executive Order dated June 14, 1879, which has never been
11 satisfactorily resolved. That any other entries by Defendant upon the
12 subject real property were all made with the express written consent and
13 approval of duly authorized agents within the United States Department of
14 the Interior and in accordance with law.

15 XVIII


16 That the order entered by Stewart L. Udall, former
17 Secretary of the Interior, on January 17, 1969, whereby the Secretary
18 purported to unilaterally relocate the south boundary of the Salt River
19 Indian Reservation is erroneous, illegal, unlawful and constitutes arbitrary
20 and capricious action and is an abuse of any discretion which may have been
21 conferred by statute upon the Secretary. That in connection herewith,
22 Defendant has attached hereto, marked as Exhibit "A" and incorporated by
23 reference herein, a true and correct copy of a formal protest submitted by
24 Defendant to the United States Department of the Interior, Bureau of Land
25 Management, as well as the supplement thereto and that Defendant hereby
26 incorporates by reference each and every argument set forth therein pro-
27 testing the filing of the plat of survey prepared in accordance with the above
28 described order by former Secretary of the Interior Stewart L. Udall.

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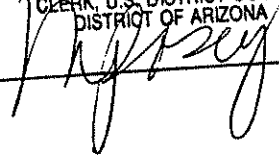
WHEREFORE, having fully answered Plaintiff's First Claim for Relief, Defendant prays that Plaintiff take nothing thereby and that Plaintiff's Complaint be dismissed and that Defendant recover its costs incurred herein together with such other and further relief as the Court may deem just and proper.

DATED this 3rd day of January, 1973.

GARY K. NELSON
The Attorney General


ROBERT V. KERRICK
Assistant Attorney General
Attorneys for Defendant Arizona State
Highway Commission

I hereby attest and certify on 12/14/73
that the foregoing document is a full, true and correct
copy of the original on file in my office and in my cus-
tody.

CLEK, U.S. DISTRICT COURT
DISTRICT OF ARIZONA
 Deputy

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VERIFICATION

STATE OF ARIZONA)
) ss.
County of Maricopa)

ROBERT V. KERRICK, being first duly sworn, upon oath,
deposes and says:

That he is one of the attorneys for the Defendant and is
authorized to make this verification; that he has read the foregoing Answer
and knows the contents thereof and knows them to be true, except those
matters set forth on information and belief, and as to those matters he
believes them to be true.



ROBERT V. KERRICK

SUBSCRIBED AND SWORN to before me this 3rd day of
January, 1973.



Notary Public

My commission expires:
9-30-75

1 Copy of the foregoing Answer mailed
2 this 3rd day of January, 1973, to:

3 Royal D. Marks
4 Richard B. Wilks, and
5 Philip J. Shea, of
6 MARKS & MARKS
7 310 Title & Trust Building
8 114 West Adams Street
9 Phoenix, Arizona 85003
10 Attorneys for Plaintiff

11 GOVE L. ALLEN
12 Standage & Allen
13 244 South Horne Street
14 Mesa, Arizona 85204
15 Attorneys for Defendants Merrill

16 KILLIAN & LEGG
17 9 West Pepper Place
18 Mesa, Arizona 85201
19 Attorneys for Mesa Sand and Rock, Inc.

20 DARRELL F. SMITH
21 Smith & Buckley
22 637 East Main Street
23 Mesa, Arizona 85204
24 Attorneys for Defendants Johnson & Stewart
25 Materials, Inc, Johnson and Campo

26 PERRY & HEAD
27 222 West Osborn Road, Suite 212
28 Phoenix, Arizona 85013
Attorneys for Allied Concrete & Materials

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Attorney for Salt River Valley Water Users Assn.

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Phoenix, Arizona 85007

GARY K. NELSON
THE ATTORNEY GENERAL
JOHN T. AMET
CHIEF COUNSEL
STANLEY Z. GOODFARD
ASSISTANT CHIEF COUNSEL

October 13, 1972

State Director
Bureau of Land Management
Federal Building
Phoenix, Arizona

Re: Protest of the proposed filing Dependent Resurvey
and Survey of the South Boundary of the Salt River
Indian Reservation, dated August 17, 1972.

Dear Mr. Fallini:

Conforming with the Federal Register Volume 37, No. 175, page 18224, dated September 8, 1972, the State of Arizona by and through its Highway Commission hereby submits formal protest to the above proposed boundary change. This protest is based upon the grounds set forth herein as well as those additional grounds which the Arizona State Highway Department intends to set forth in an amended Notice of Protest to be filed within the thirty day period following the 16th day of October, 1972.

1. The plat of survey filed erroneously assumes that the phrase "up and along the middle of" the Salt River, contained in the Presidential Executive Order dated June 14, 1879, refers to the main channel and not the thread of the stream. The terms "middle of the river" and "thread of the stream" are synonymous and may be defined as the middle line between the shores when the water is at its natural stage at medium height and neither swollen by flood nor shrunken by drought. 11 CJS Boundaries § 33, pp. 578-579; Tiffany, Real Property (3rd Ed.) § 661, p. 705. The location of the thread of the stream and the location of the main channel relate to two different objectives.

EXHIBIT A

Mr. Fallini
October 13, 1972
Page Two

2. The Secretary of the Interior is without the authority or power to unilaterally redetermine by resurvey the proper location of the southern boundary of the Salt River Indian Reservation. Lakelands Inc. v. Chippewa & Flambeau Improvement Co., 237 Wis. 326, 295 N.W. 919. The Indians' right to the ownership of the disputed lands is to be decided under general rules of law governing quiet title actions, not by an ex parte determination of the Secretary of the Interior or his delegates. Fontenelle v. Omaha Tribe of Nebraska, 430 F.2d 143 (1970). This rule of law is particularly applicable to the present controversy since a substantial period of time has elapsed since the establishment of this Indian Reservation by Executive Order in 1879 during which numerous third parties both private and governmental have acquired vested rights in and to the disputed riparian lands in question. (A list of some of such conflicting interests is attached hereto as Appendix A)
3. That the bed of the once navigable Salt River was reserved to the State of Arizona at the time of the admission to the Union of the State under the so called equal-footing doctrine. Scott v. Lattig, 227 U.S. 229, 33 S.Ct. 242, 57 L. Ed. 490 (1913).
4. That the notice appearing at page 18224 in Volume 37, No. 175 of the Federal Register was totally inadequate in that it failed to properly advise interested parties of any federal statutes or regulations pursuant to which the plat of survey was to be filed in the Office of the Bureau of Land Management on the 16th day of October, 1972.
5. That the filing of the resurvey and establishment of the South boundary of the Salt River Indian Reservation in accordance therewith, would constitute an illegal attempt to change the boundaries of an Executive Order Indian Reservation in violation of 25 U.S.C. § 398d and 25 U.S.C. § 211.
6. At no time since the establishment of the Salt River Indian Reservation by Presidential Executive Order have the members of that Tribe asserted or attempted to assert any dominion or control over the lands lying to the south of the north channel of the Salt River and therefore any attempt to relocate the south boundary of said Reservation ninety-three years after the date of its creation is barred by laches. Smith v. Town of Fowler, 33 P.2d 1034 (1959).

Mr. Fallini
October 13, 1972
Page Three

7. The Arizona Highway Department has not been granted access to many of the 24 Exhibits utilized and examined by the Field Solicitor in the formulation of his Opinion Memorandum M-36770 dated January 17, 1969, and therefore is without sufficient information to adequately frame its protest at this time.

8. The surveyors conducting the resurvey have ignored the historical background surrounding the various changes, both natural and manmade, which have occurred over the past ninety-three years and which have altered the course and flow of the Salt River.

9. Some of the changes in the flow of the Salt River and in the location of the channels underlying said river may well have occurred as a result of avulsion rather than by accretion. In order to make a proper determination of this important factual issue, an in depth hydrological study should be made by a competent riparian boundary expert or hydrologist before any permanent boundary line is established by survey or otherwise. Such a study should also include an inquiry into the questions of whether or not the island separating the north from the south channel of the Salt River was once a part of the mainland on one side or the other and the question of the date of formation of such island. City of Victoria v. Schott, 195 S.W. 681 (Texas 1895).

10. The survey is deficient in that it contains no evidence indicating that the south channel is either the deepest or the widest channel and hence it cannot be affirmatively stated that the south channel is in fact the "main" channel of the Salt River.

11. That if a determination is made that the boundary lies along the middle of the main channel of the Salt River rather than along the thread of the stream, the main channel is now the north channel rather than the south channel.

12. The purpose of the dependent resurvey and survey of the south boundary of the Indian Reservation should have been to determine the location of a line lying ". . . up and along the middle of the Salt River." However, since neither the Special Instructions dated May 11, 1962, nor the amended Supplemental Special Instructions dated March 9, 1972,

Mr. Fallini
October 13, 1972
Page Four

directed to those individuals performing the survey have been made available to the Arizona Highway Department, this protestant has no way of knowing what those performing the survey were told to accomplish.

Respectfully submitted,

GARY K. NELSON
The Attorney General

Donald O. Loeb

DONALD O. LOEB
Assistant Attorney General

DOL:jn

APPENDIX A

The areas affected by the proposed boundary change in which the State of Arizona has an interest are located at North Country Club Drive (SR 87) and the Salt River Bed in Section 3, Township 1 North, Range 5 East, Gila and Salt River Meridian, Maricopa County, Arizona, more particularly described as follows:

Lots 2, 3 and 4 and South half Northwest
quarter (S1/2 NW 1/4) of Section 3, Town-
ship 1 North, Range 5 East.

A search of the above described property shows the record owner is the United States of America (Bureau of Land Management) by virtue of the Treaty of Guadalupe-Hidalgo-1848. Subject to the Secretary of Interior's order, dated January 17, 1969, determines the south boundary of the south channel of the Salt River to be Reservation Boundary.

The above property is subject to the following encumbrances as shown on the records of the Bureau of Land Management, Phoenix, Arizona:

A. Rights as granted by the Secretary of the Interior to the Salt River Valley Water Users' Association under the provisions of the Act of June 17, 1902, (32 Stat. 388) as agreed upon in contract between the United States of America and the Salt River Valley Water Users' Association, dated September 6, 1917.

B. Withdrawals for reclamation purposes ordered by the Secretary of the Interior dated July 10, 1940, and June 30, 1954, to Bureau of Reclamation.

C. R/W Highway AR 01728, dated July 30, 1951, amended July 22, 1965, to Arizona Highway Department, through West half West Half Southwest quarter Northwest quarter (W 1/2 W 1/2 SW 1/4 NW 1/4), Section 3, Township 1 North, Range 5 East, Route 87. This is our drainage easement for pipe culverts under Country Club Drive. (SR 87)

D. R/W Highway AR 035991, dated August 16, 1966, to Arizona Highway Department, through Southwest quarter Northwest quarter (SW 1/4 NW 1/4) and Lot 4 (Northwest quarter Northwest quarter (NW 1/4 NW 1/4) in Section 3, Township 1 North, Range 5 East. This is the right of way for State Route 87.

E. R/W Highway AR 035714, dated February 14, 1968, to Arizona Highway Department, described as the South 40 feet of the South half Southwest quarter Northwest quarter (S 1/2 SW 1/4 NW 1/4). Note: Right of Way into the maintenance camp.

F. Maintenance Camp AR 032447 to Arizona Highway Department dated May 13, 1963, described as that portion of the South half Northwest quarter (S 1/2 NW 1/4) of Section 3 Township 1 North, Range 5 East, more particularly described as follows:

Beginning at the West quarter corner of said Section 3; thence Easterly along the South line of the Northwest quarter (NW 1/4) of said Section 3, a distance of 111.83 feet; thence Northerly and parallel with the West line of said Section 3, a distance of 40 feet to THE TRUE POINT OF BEGINNING; thence continuing northerly and parallel with said West section line a distance of 240 feet; thence Easterly and parallel with said South line of the Northwest quarter (NW 1/4) a distance of 1000.00 feet; thence Southerly and perpendicular to the last described course a distance of 240 feet; thence Westerly 40 feet Northerly of and parallel with said South line of the Northwest quarter (NW 1/4) of Section 3, a distance of 1000.00 feet to THE TRUE POINT OF BEGINNING. 5.49 acres

Note: For some reason, the survey line has excluded the above camp, part of which would be included in the so called south channel.

The authority for this above Grant came from the Federal Aid Act implemented August 27, 1958, 72 Stat. 885 Title 23, U.S.C. § 317.

MATERIAL SITES

The State Highway Department over the years has had at least three (3) valid Material Pits in the affected area.

G. M.S. No. 1161: Legal description of this pit covered all of Lot 4 and Southwest quarter of Northwest quarter (SW 1/4 NW 1/4), Section 3, Township 1 North, Range 3 East, Gila and Salt River Meridian, Arizona, was approved October 1, 1952, under Contract No. 14-06-300-21 from Bureau of Reclamation and was later terminated by letter dated April 28, 1969 - termination to take effect on June 30, 1969.

H. M.S. No. 74 and 198: Legal description of this pit covered all of Lot 3, Northeast quarter Northwest quarter (NE 1/4 NW 1/4) Section 3, Township 1 North, Range 3 East, Gila and Salt River Meridian, Arizona, was approved September 8, 1948, under Contract No. 176a-444 from the Bureau of Reclamation, and was later terminated by letter dated March 30, 1967. Termination to take effect May 15, 1967.

I. M. S. No. 6083: Legal description of this pit covered the West 330 feet of the South 660 feet of Lot 3, Section 3, Township 1 North, Range 5 East; Gila and Salt River Meridian, Arizona, was approved January 1, 1972, and expired June 30, 1972, under Contract No. 14-06-314-15 from the Bureau of Reclamation.

J. The Secretary of the Interior, through Public Land Regulations, also has granted several patents in the affected area.



Attorney General
Highway Division
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GARY K. NELSON
THE ATTORNEY GENERAL
JOHN T. AMEY
CHIEF COUNSEL
STANLEY Z. GOODFARB
ASSISTANT CHIEF COUNSEL

November 15, 1972

State Director
Bureau of Land Management
Federal Building
Phoenix, Arizona 85025

Re: Protest by the Arizona State Highway Commission of the proposed filing of Dependent Resurvey and Survey of the South Boundary of the Salt River Indian Reservation, accepted August 17, 1972.

Dear Mr. Fallini:

The State of Arizona, by and through the Arizona Highway Commission hereby submits its Amended Notice of Protest against the Plat Survey of the South Boundary of the Salt River Indian Reservation accepted August 17, 1972. The Highway Commission filed its original Notice of Protest with the Bureau of Land Management in Phoenix, Arizona, on October 13, 1972.

Enclosed herewith are Exhibits 1, 2, and 3 consisting of three aerial photographs of the Salt River described as follows:

1. Aerial Mosaic Photographs (with overlay) of Salt River taken December 31, 1965.
2. Aerial Mosaic Photographs of Salt River taken December 31, 1965.
3. Aerial Mosaic Photographs of Salt River taken January 6, 1966.

It is respectfully submitted that careful visual study and analysis of the enclosed aerial photographs clearly demonstrates the obvious fact that during the period from 1965 through 1972, the main channel of the ambulatory Salt River has been and continues to be the North rather than the South Channel. It is further submitted that the enclosed photographic exhibits

EXHIBIT A

Mr. Fallini
November 15, 1972
Page Two

reveal the additional fact that the water at its lowest level clearly defines the thread of the Salt River as the North Channel.

The Arizona Highway Commission, by and through the office of the Attorney General of Arizona, hereby requests the opportunity to present oral argument along with the testimony of expert witnesses at any hearing or hearings which may be held in connection with the filing of the above described plat of survey.

The Commission is also in possession of a number of additional pertinent photographs and documentary evidence which it reserves the right to introduce into the record at any future administrative proceedings brought for the purpose of establishing the South Boundary of the Salt River Indian Reservation.

Respectfully submitted,

GARY K. NELSON
The Attorney General

Donald O. Loeb

DONALD O. LOEB
Assistant Attorney General

DOL:jn
Enclosures

96-002-015

SALT RIVER
020

FILED

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AUG 18 1976
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.	:	

MEMORANDUM

On the question of standing to sue, the court has determined all the "land claimants" have standing.

- A. The City of Mesa's standing is not contested but the others are.
 - B. Allied Concrete's standing is based on control of lands of patented status.
 - C. Johnson & Stewart (and the individual claimants) base their standing on mining claims.
 - D. Salt River Valley Water Users' Association and Salt River Project claims under 43 U.S.C. 416 and 43 U.S.C. 421.
- Arguments of lack of standing to sue in part are defective in that they presume the ultimate issue (whether the lands in question belong to the Indians or was "public." Further argument of lack of standing is that their rights are merely contract rights.
- E. State of Arizona & Maricopa County rely on permits issued by the Bureau of Land Management pursuant to 43 U.S.C. 387.

I. LEGAL DISCUSSION OF STANDING

A. The test.

The Administrative Procedure Act (5 USC §702) provides for the right of review in the following language.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Although "legal interest" used to be given a very strict interpretation, the law of standing has been revamped by the Supreme Court in recent years. In companion 1970 cases, the Court established a two pronged test for standing to challenge agency action under the APA.^{1/}

(1) The agency action challenged must have caused the plaintiff "injury in fact." The injury then, must not be hypothetical; there must be current adversariness. One party which may have difficulty in arguing this point is Salt River Valley Water Users' Association; apparently, their contracts have not yet been cancelled. Nevertheless, rejecting standing on this ground would be anomolous because a verdict for the Indians would certainly mean cancellation of the contracts because they were void ab initio. (2) The second consideration is that the injury in question must be to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." For example, in environmental cases, the parties frequently seek protection under the EPA legislation which in fact was designed to protect environmental interests. Here the parties seek to protect their "property" interests which fall within the due process clause of the Constitution.

In two other recent Supreme Court cases [Sierra Club v. Morton, 405 U.S. 727 (1972) and United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973)]. See also Cady v. Morton, 527 F.2d 786, 791 (9th Cir. 1975)], the court applied the above test to noneconomic injuries, requiring only that parties assert individualized harm.

Although the Indians and Secretary argue otherwise, I think it is easy for this court to envision sufficient harm to the land claimants by a verdict for the Indians, to entitle the claimants to standing. An attenuated line of causation from the agency action to

^{1/} Data Processing Service v. Camp, 397 U.S. 150 (1970) and Barlow v. Collins, 397 U.S. 159 (1970). See also American Horse Protection Ass'n, Inc. v. Frizzell, 403 F. Supp. 1206 (D. Nev. 1975). Data Processing the petitioners sought to protect their "competitive position." In Barton, tenant farmers were asserting property rights viz. the landowners, but were granted standing. Here a similar possessory right is being argued by some of the land claimants.

the interest injured and protected is adequate. American Horse, n.1 supra.

B. Applying the Test to Particular Types of Interests

1. Mining Claims.

The general rule is that government officials can properly cancel entries, but they do not have an arbitrary and unlimited power to do so. 63 Am. Jur.2d, Public Lands, §64 at 535.

The Ninth Circuit has rendered some contradictory opinions on the status of mining claims as property interests worthy of due process rights. See United States v. Walker, 409 F.2d 477 (9th Cir. 1969); Adams v. Witner, 271 F.2d 29 (9th Cir. 1958) and U. S. v. Consolidated Mines & Smelting, 455 F.2d 432 (9th Cir. 1971); see also Wilbur v. U.S., 280 U.S. 306 (1930) and Best v. Humboldt Mining Co., 371 U.S. 334 (1963).

2. Cancellation of Leases, Licenses and Contracts.

This is the problem related to Arizona's, Maricopa County's and the SRV's standing. In discussing the erosion of the "privilege vs. rights" doctrine, Davis [Administrative Law Text, p. 184, §7.13 (1972)] states:

Many licenses that were once regarded as privileges have become rights. The movement is strong and clear, although some traces of the privilege doctrine remain in state courts.

Davis goes on to note that occupational licenses have always been treated more favorably because they can obviously very easily affect economic interests.

Interests which may be merely possessory and based on contract or license cannot therefore be automatically excluded from due process protection. See e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); Boddie v. Conn., 401 U.S. 371 (1971); and Johnson v. Lower Elwha Tribal Community, Etc., Wash., 484 F.2d 200 (9th Cir. 1973). In Sessions, Inc. v. Morton, 348 F. Supp. 694 (C.D. Calif. 1972) the plaintiff sought review of a decision by the Secretary of Interior terminating a lease on Indian lands. The court found judicial review under the Administrative Procedure Act (5 U.S.C. §702) was

permitted despite the government's argument that the decision was discretionary and hence unreviewable. The reasoning employed in Sessions at 699 is applicable here (especially with regard to the alleged violations by the SRV of their contract):

Here, extinguishment of the rights and obligations of the parties must abide a determination of facts showing a breach of the contractual terms of the lease. Such a function, judicial in scope, is not entrusted to the Secretary but rather is reserved to court action.

To hold, as defendants urge, that the Secretary's decision is binding termination of the lease if supported by substantial evidence in the administrative record, would make one of the interested parties to the lease the final arbiter of the respective rights and obligations of the parties to the lease contract. Such a ruling would be an anathema to the concept of due process...

The Secretary and the Indians rely on cases which are distinguishable. For example, Bowman v. Udall, 243 F. Supp. 672 (D.D.C. 1965) aff'd sub nom., Hinton v. Udall, 364 F.2d 676 (D.C. Cir. 1966) and Mollohan v. Gray, 413 F.2d 349 (9th Cir. 1969) involved standing under the Taylor Grazing Act (43 U.S.C. 315 et seq.). That act (§315 b) specifically provides that permits granted under it shall not create a right in the land and authorizes the Secretary to cancel in his discretion. Furthermore, in Bowman, the court found the testimony on financial loss speculative and indicated that the only interests which were being threatened were subsurface rights, not the surface rights involved in grazing permits. In Sessions (at p. 699) the court also distinguished Mollohan by stating: although the court "appears to speak in terms of cancellation, analysis of the facts makes it clear that it was continued use (non-renewal) of part of the grazing allotment granted to plaintiff on an annual basis that concerned the Court." This latter factor is in keeping with the cases regarding due process and dismissal of teachers before their contracts have terminated as opposed to not renewing their contracts for the upcoming year. In the cases at issue here, it seems that "cancellation" rather than "nonrenewal" occurred, and therefore the parties are entitled to due process.

II. A BRIEF REVIEW OF THE COURT'S ORDER ON THE SUMMARY JUDGMENT

MOTIONS.

A. The Issues

The court's order on the summary judgment motions should be reviewed because it applies to many of the arguments now being raised with regard to the proposed findings and conclusions.

There were two motions which the court ruled on: 1) the motion by the Indians seeking to have the Secretary's decision declared discretionary and unreviewable and declaring the defendants liable for past and continuing trespass, and 2) the City of Mesa's motion (joined by the other land claimants) seeking to have the 1972 plat and underlying survey set aside. This latter motion was premised on the theory that the government issuance of patents to the plaintiffs exhausted the Secretary's authority over the land in question and statutes which prevent the creation or the enlargement or contraction of reservation boundaries without Congressional approval as well as those laws which preclude the execution of resurveys so executed as to impair the bona fide rights of any claimant, entryman, or owner.

B. The Court's Resolution of the Issues

1. Although Mesa had contended that a patent is the highest evidence of ownership and the jurisdiction of the land department ceases with the issuance of a patent (43 U.S.C. §1151), the court noted that 25 U.S.C. §176 and 43 U.S.C. §52 permits the Secretary to survey public and Indian lands. Since the court noted the determination of rightful ownership (public or private) was the ultimate issue of the case, it concluded that summary judgment was premature.

2. Furthermore, 43 U.S.C. §52 indicates that the survey of private land is permissible insofar as it is necessary to complete a survey of public lands. The court found two Supreme Court cases which suggested the Secretary has the right to initially determine for purposes of the survey what is public land, Kirwan v. Murphy, 189 U.S. 35 (1903) and Lane v. Darlington, 249 U.S. 331 (1919). In Kirwan, at 55, the court employed the following rationale:

"After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists he now has the legal title. If the Land Department decides in his favor, he is not injured. If they give patents to the applicants for preemption, the courts can then in the appropriate proceeding determine who has the better title or right."

In Lane, at 333-34, the court emphasized that the government like a private landowner has the right to survey for its own purposes and if as a result of the survey adopted, patents are given to the land and conflicts develop, the courts can then decide who had better right or title. The language is particularly significant as it relates to rights derived under the APA and due process clause:

...This retracing of the Hancock line is not directed to the plaintiffs, but, as we have said, is an investigation by the United States on its own account. The plaintiffs gained no rights by the approval of the Sickler line: they lost none by the substitution of the Perrin line. These acts were neither adjudications nor agreements. The plaintiffs' rights were fixed before...

The court therefore denied the land claimants' motions in the case at bar, refusing to strike the plat and survey from the public record.

3. The court also noted that a patent is void ab initio if the land was not legally available for patent. Because the validity of the patents was a factual issue, the City of Mesa's contention that the Secretary lost jurisdiction over the land when the patents issued, was also insufficient to support a summary judgment.

4. The Indians' motion was also denied, for although the court recognized the cases which said that decisions of the land department regarding surveys were unassailable by the court, there was an exception to this general rule. Such decisions were challengeable "in direct proceedings." That exception applied to the case at bar because the land claimants have directly sued the Secretary of Interior.

III. BURDEN OF PROOF AND OTHER ISSUES NOT DECIDING THE MERITS OF THE BOUNDARY DISPUTE.

A. The Effect of Patents on the Burden of Proof

The land claimants relying on patents argue now as they

did in their summary judgment motion that there is a very strong presumption of the validity of patents and that they can only be overturned if there is fraud or gross error. Mesa argues that there has been no evidence of fraud or gross error and the court should not give a presumption to the correctness of the 1972 plat and survey. "Gross error" may be evidenced when the Land Department grants patents to lands which had never been surveyed.

Despite the possibility of "gross error" classification, there are a number of cases which have dealt with the priority of patents over lands which have previously been conveyed or reserved. Lands which have been appropriated or reserved for a lawful purpose are not public and are impliedly excepted from subsequent laws, grants and disposals. Such patents have been held void ab initio because the Land Department does not have authority over the lands they are purporting to convey. See e.g., Northern Pac. Ry. Co. v. U.S., 227 U.S. (1913); U.S. v. Minnesota, 270 U.S. 181 (1926); Scott v. Carew, 196 U.S. 100 (1905); Burfenning v. Chicago, St. Paul, Min. & Ohio Ry. Co., 163 U.S. 321 (1896); Wilcox v. McConnel, 38 U.S. (13 Peters) 496 (1839); U. S. v. Conway, 175 U.S. 60 (1899); LaRogue v. U.S., 239 U.S. 62 (1915); U. S. v. Stewart, 121 F.2d 705 (9th Cir. 1971). The presumption of patent validity has not been employed in these cases. Northern Pac. at 366 dealt specifically with this issue:

The Court of Appeals expressed the view that the rule that resolves doubts in favor of the patent issued by the United States does not apply in such case... Much can be said in support of that view. It must be borne in mind that the Indians had the primary right. The rights the Government has are derived through the cession from the Indians. If the Government may control the cession and control the survey and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter but as effectual as fraud.

The presumption of patent validity cases then are inapplicable to our factual situation.

Another approach supporting this conclusion is to consider the cases which suggest that where there is no survey, patents are ineffectual in conveying the land. A review of the factual

setting in this case reveals that although there were three official surveys of the area, the Ingalls' survey came before the reservation was even created and it did not even meander the Salt River, but merely contained a sketch of the river and some descriptions in the field notes. Chillson did not determine the south boundary of the reservation either, although he was instructed to do so. He did meander one bank of the river, as this was in keeping with survey rules at the time. (The Salt River was a nonnavigable stream and the rules only required the surveyor to meander one bank). The Executive Order's words "up and along the middle of the river" on their face are in conflict with a conclusion that Chillson surveyed the boundary of the Reservation. Farmer likewise meandered only one bank of the river, but someone apparently drew a dotted line up the middle of the river in his survey. The brief of the City of Mesa makes some argument to the effect that even though the field notes do not reflect that Farmer meandered both banks of the Salt River, Farmer probably estimated the middle of the river and that ought to be sufficient for our purposes. Somehow Farmer is supposed to have estimated the middle of the river by measuring the distance between the right bank and the waters edge. At any rate, suffice it to say that this court feels itself to be correct in finding that there had been no official survey of the southern boundary of the reservation until 1972. (Even the expert Vorhees conceded that point.) For support of the conclusion that patents are ineffective in conveying land which has not been surveyed see Horne v. Smith, 159 U.S. 40 (1895); Lee Wilson & Co. v. U.S., 245 U.S. 24 (1917); and Carroll v. U.S., 154 F. 425 (9th Cir. 1907). It is especially interesting to note the court's response to the equitable "reliance" argument propounded by the patent holders in Lee Wilson, supra at 32: "...if for the sake of the argument we assume the existence of the equitable considerations insisted upon, it is manifest that the prayer for their enforcement is in the nature of things beyond the sphere of judicial authority however much relief on the subject may be appropriately sought from the legislative department of the government."

B. A Patent Revocation Proceeding is Necessary

Although this argument has been raised time and again, the court has resolved this issue through an earlier order which indicated the Indians could sue on their own behalf and it was not necessary for the United States to join in their behalf.

C. Laches, Estoppel, Statute of Limitations, etc.

The land claimants now argue that the Indians are estopped from asserting their title to the land in question because they have "acquiesced" for so long in the assertion of titles etc. inconsistent with such ownership. Such acquiescence is in fact very debatable as the record reflects the apparent confusion over the boundary in the 1890's and in the 1940's till the present. Nevertheless, courts have rejected the application of laches to assertions of title by the government or Indians. (U.S. v. Minnesota, supra, Northern Pac. v. U.S., supra, and U.S. v. Stewart, supra.)

IV. THE ADMINISTRATIVE PROCEDURE ACT AND DUE PROCESS

This section deals with the heart of the court's approach to the case, for it concerns the extent to which the court may and should review the Secretary's decision as to the interpretation of the Executive Order and the survey.

A. The Administrative Procedure Act does Not Apply to All Administrative Action.

The Indians and Secretary contend first and foremost that this court cannot review the Secretary's decisions regarding the land in question. To determine whether this is the case, it is necessary to look to the Administrative Procedure Act initially. 5 U.S.C. §701 provides that the APA shall apply to agency action "except to the extent that--(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."

An examination of the statutes which could be construed as authority for the survey (43 USC §2, 43 USC §52, and 26 USC §176) reveals that there is no specific indication of Congressional intent to exclude surveying activities of the Secretary of Interior from judicial review. Although cases demonstrate that the Secretary of

Interior has many times argued that he is "above" the APA, courts have rejected the argument.

Proceeding to the second exemption to the APA, a more difficult question arises. Almost every agency action involves an element of discretion and perhaps that is why the courts have had such difficulty in dealing with this exception. See Jaffe, Judicial Control of Administrative Action, pp. 374-75 (1965); Ferry v. Udall, 336 F.2d 706, 711 (9th Cir. 1964). The leading case on the discretion exemption, and for that matter the Administrative Procedure Act in general, is Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). In that case the Secretary of Transportation was not authorized by two federal statutes to finance construction of highways through public parks if a "feasible and prudent" alternative route existed and if no such route was available to approve construction only if there had been "all possible planning to minimize harm" to the park. The Secretary had argued that his determination of highway routes (in this case through a park) was discretionary. The court, however, stated:

...[T]he Secretary's decision here does not fall within the exception for action "committed to agency discretion." This is a very narrow exception [citing authority]... The legislative history of the Administrative Procedure Act indicates that it is applicable in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply."

The court found "law to apply" in the form of the statutory limitations referred to above in routing a highway through a park.

This circuit has time and again attempted to resolve agency discretion's interaction with law. The most recent attempt was in Ness Inv. Corp. v. U.S. Dept of Agr. Forests, 512 F.2d 706 (9th Cir. 1975); Accord, Strickland v. Morton, 519 F.2d 467 (9th Cir. 1975). In Ness at 715, the court formulated the following test:

Thus we face the following alternative propositions: Where consideration of the language, purpose and history of a statute indicate that action taken thereunder has been committed to agency discretion: (1) a federal court has jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion involves violation by the agency of constitutional, statutory regulatory or other legal

mandate or restrictions: (2) but a federal court does not have jurisdiction to review agency action for abuse of discretion when the alleged abuse of discretion consists only of the making of an informed judgment by the agency.

Earlier formulations of the test were endeavoring to get at the same conceptual distinction. For example in Mollohan v. Gray, 413 F.2d 349, 351 (9th Cir. 1969), the court spoke in terms of mandatory discretion and permissive discretion in the following manner:

With a mandatory type statute, administrative discretion is limited to deciding whether the statutory requirements have been met; if they are met, the Secretary must take certain action. With a permissive type statute, even where an applicant meets all of the statutory requirements, the Secretary still has discretion to refuse to act. Discretionary action under a permissive type statute is exempted from judicial review under the Administrative Procedure Act.

Applying these various tests to the facts of Salt River, leads to the conclusion that at least some aspects of the Secretary of Interior's actions are reviewable under the Administrative Procedure Act. In looking at those actions, it is important to distinguish between the 1969 decision interpreting the phrase "up and along the middle of the river" from the Executive Order and the actual survey and 1972 plat.

The land claimants maintain that the 1969 decision cannot be construed as falling within the definitions of surveys as used in the various statutes authorizing the Secretary to survey lands (e.g., 43 U.S.C. §2 and §52 and 25 U.S.C. §176). Here the Executive Order itself is the law to apply; interpreting a phrase like "up and along the middle of the river" is certainly in part a legal process which a court should be allowed to examine. Furthermore, Section 706 of Title 5 states: "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of terms of an agency action. I conclude then, that the 1969 decision interpreting the Executive Order is within the APA.

When the court concludes that the 1969 decision was in fact correct, then it must decide whether the survey itself falls within the discretionary exemption. The manner in which a line is laid on

the ground and the factors that enter into that decision call for a great deal more expertise than this court has. The land claimants complain that the actual survey itself had defects in that the thalweg line was run up the deepest part of the existing gravel pits and that could hardly have been the thalweg line back in 1879 when the reservation was created. Furthermore, they argue that the selection of the old south channel was a mistake because there is a different south channel now which has resulted from accretive rather than avulsive changes. Although there may well be a difference of opinion as to where the thalweg of the southern channel now lies, it is doubtful that this court is better equipped to determine that fact than the cadastral survey team.

One further point argued by the land claimants on this discretionary issue is that all of the Secretary's actions should be limited by the constitutional law--in particular the due process clause. Since there is no hearing provided, nor opportunity to submit evidence or even notice as to the 1969 decision, the parties are entitled to review. There was an opportunity to respond to the 1972 plat and survey because it was published in the Federal Register and notification was given that objections to it would be considered.

B. The Scope of Review

Assuming at least some of the Secretary's decision is reviewable, the following provisions of the Administrative Procedure Act (§706) applies:

...The reviewing court shall--

- (2) hold unlawful and set aside agency action findings, and conclusions found to be--
 - (A) arbitrary capricious, an abuse of discretion, or other wise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by facts to the extent that the facts are subject to trial de novo by the reviewing court...

1. Subsection (C)

In Overton Park, the court indicated that the first question to be asked is whether the Secretary has properly construed his authority to act. In Salt River it seems to me that the Secretary was within his authority in making the particular series of decisions which he did. Each was consistent with his duty to survey reservation boundaries.

2. Subsection (A)

Perhaps the lowest common denominator of the scope of review is the arbitrary or capricious test.

To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment... Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency. [Id. at 416].

Using this test, it is impossible for the court to end up reversing the Secretary, for his opinion was obviously well thought out and considered a great deal if not all of the relevant evidence.

3. Subsection E

With regard to the substantial evidence test the Supreme Court has stated (Id. at 414) that it applies "only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself... or when the agency action is based on a public adjudicatory hearing." The action in question simply doesn't fall within either category and so the substantial evidence test does not apply.

4. Subsections B and D

Both of these subsections to §706 may be considered jointly for the purpose of this action. The law of course which is alleged to have been violated is the constitutional right to due process. Certainly there was nothing in the statutes here explicitly requiring a hearing, and the cases cited in the opinion on the summary

Judgment motions make it doubtful that due process requirements are necessary before the government surveys land. See Lane v. Darlington, supra and Kirwan v. Murphy, supra. The surveys themselves had no legal effects on the claimants' rights until the courts resolved the conflict. This brings us to the last and most relevant type of review for the case at bar.

5. Subsection F

There are only two situations in which de novo review is required according to the Supreme Court. Overton Park, supra, and Camp v. Pitts, 411 U.S. 138 (1973). The first is "when the action is adjudicatory in nature and the agency fact finding procedures are inadequate. The second is when issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action.

Both of these alternatives require a consideration of what is adjudicatory action. Davis, supra at 123-24 makes these generalizations. A rule making activity is generally designed to apply to a number of unnamed parties, it requires further proceedings to be enforced, and it ordinarily looks to the future. An adjudicatory action on the other hand applies to a smaller number of named parties, has immediate impact, and is retrospective (considers past action). The APA in 5 USC §553 provides for notice and an opportunity to submit evidence in the case of some rulemaking activities. 5 USC §554 indicates that where adjudicatory requirements are mandated by statute [see e.g., Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964) and U.S. v. Walker, 409 F.2d 477 (9th Cir. 1969), and especially Law Motor Freight Inc. v. CAB, 364 F.2d 139 (1st Cir. 1966)] notice and hearings may be required. Other cases discuss the meaninglessness of trying to categorize the agency action in question. Dusquesne Light Co. v. EPA, 481 F.2d 1 (3rd Cir. 1973) and Appalachian Power Co. v. EPA, 477 F.2d 495 (4th Cir. 1973). The latter case at 501 suggests a very practical approach:

...[I]f the resulting administrative action, whether regarded as rulemaking or otherwise "is individual

in impact and condemnatory in purpose" or "when the issue presented is one which possesses a great substantive importance, or one which is unusually complex or difficult to resolve on the basis of pleadings or argument," a hearing preceding any final administrative action is appropriate.

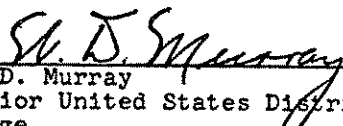
Certainly the criteria in the Appalachian Power case are satisfied in these Salt River circumstances. The issue is not so much, however, whether an opportunity for a hearing, etc. arises at the administrative level (if in fact that administrative decision is not binding) but rather that at some stage before final adjudication of rights the parties are afforded a right to submit evidence, etc.

I have concluded that (given the implication that some form of classification is necessary) the first requirement is not satisfied. This is not an adjudicatory action and I refer to the specific language of the court in Lane v. Darlington, referred to in the order on the motions for summary judgment. The court there specifically said that the survey was not an adjudication. At any rate, even if it were an adjudication, the fact finding procedures may have been adequate in that they involved efforts to submit evidence by disputing agencies (the BIA and the BLM) and much of the relevant evidence was considered.

The second provision for de novo review however, seems to fit our fact situation perfectly; issues that were not before the agency (Secretary) are now being raised in a proceeding to enforce nonadjudicatory agency action. As the court suggested in its opinion on the summary judgment motions, the surveys in and of themselves were not final--further court action was necessary to affect legal rights. Normally these proceedings would be for patent revocation brought by the United States. Here, however, it is in the form of a trespass and damage action initiated by the Indians. Certainly new issues were raised at trial than had been considered by the Secretary, although their relevance may be debatable. Other cases supporting de novo review here are U.S. v. Indpt. Bulk Transport Inc., 394 F.Supp. 1319 (S.D.

N.Y. 1975) and American Image Corp. v. U.S. Postal Serv., 370 F. Supp. 964 (S.D. N.Y.) aff'd, 503 F.2d 1397 (2nd Cir. 1974). In addition to these there are a number of recent Supreme Court decisions which have greatly expanded the concept of due process, see e.g. Fuentes, supra, and Boddie, supra.

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



W. D. Murray
Senior United States District
Judge.