

ORIGINAL

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: STATE OF ARIZONA, Complainant v. STATE OF
CALIFORNIA, ET AL.

CASE NO: 8, Original C.A.

PLACE: Washington, D.C.

DATE: Tuesday, April 25, 2000

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Supreme Court U.S.

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2 IN THE SUPREME COURT OF THE UNITED STATES

3 ----- -X

4 STATE OF ARIZONA, :

5 :

6 v. : No. 8, Original

7 STATE OF CALIFORNIA, ET AL. :

8 ----- -X

9 Washington, D.C.

10 Tuesday, April 25, 2000

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 11:11 a.m.

14 APPEARANCES:

15 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor
16 General, Department of Justice, Washington, D.C.; on
17 behalf of the United States.

18 MASON D. MORISSET, ESQ., Seattle, Washington; on behalf
19 of the Quechan Indian Tribe.

20 JEROME C. MUYS, ESQ., Washington, D.C.; on behalf of the
21 State Parties.

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P R O C E E D I N G S

2

(11:11 a.m.)

3

4 CHIEF JUSTICE REHNQUIST: We'll hear argument
5 next in No. 8, Original, the State of Arizona v. the State
of California.

6

Mr. Minear.

7

ORAL ARGUMENT OF JEFFREY P. MINEAR

8

ON BEHALF OF THE UNITED STATES

9

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

11 This case presents another chapter in the
12 Arizona v. California water rights adjudication. The case
13 involves the so-called boundary land claims that were left
14 undecided in Arizona I and Arizona II.

15 The United States takes exception to the
16 Master's recommendation that a 1983 Claims Court consent
17 judgment between the United States and the Quechan Tribe
18 precludes litigation of their water rights claim
19 concerning the Quechan boundary lands. The Master
20 concluded that the settlement extinguished the tribe's
21 right to those lands and, therefore, eliminated the basis
22 for claiming water rights in this adjudication.

23 QUESTION: Mr. Minear, where do we find the best
24 map showing the boundaries of the land in question?

25 MR. MINEAR: I think the -- the best map would

1 be that that is appended to the tribe's brief, the red-
2 colored brief.

3 QUESTION: Okay.

4 MR. MINEAR: There are two maps here. One is
5 the general locator map which shows the --

6 QUESTION: Well, the big one is just -- it's too
7 small to see. The -- the one at page 24a, exhibit E? Is
8 that what you're referring to?

9 MR. MINEAR: I was looking at locator map number
10 2 that's also included here, yes, the one that you're
11 showing me there.

12 QUESTION: And are the -- is it blue boundary
13 that -- in that map that shows the land in question?

14 MR. MINEAR: I believe that's so, although it's
15 actually more complicated than that because due to a
16 number --

17 QUESTION: I just couldn't find anything that
18 really showed me what we were dealing with. But you think
19 it's basically the land encompassed in blue.

20 MR. MINEAR: Yes, with -- with the understanding
21 that there are a number of allotments and other lands that
22 are excepted from that area.

23 QUESTION: Yes.

24 MR. MINEAR: The actual lands --

25 QUESTION: But -- and the total is some 25,000

1 acres?

2 MR. MINEAR: That is correct. The total -- the
3 maximum claim would be 25,000 acres.

4 QUESTION: And is all of that land practicably
5 irrigable as the -- the cases deal with that term, all
6 25,000 acres, or some smaller portion of it?

7 MR. MINEAR: A smaller portion of it, Your
8 Honor.

9 QUESTION: And we don't know how much because it
10 hasn't been determined?

11 MR. MINEAR: That is correct. There were
12 preliminary determinations that were made by Special
13 Master Tuttle in the report that was reviewed in Arizona
14 II. However, the Court did not reach these issues with
15 regard to the amount of practicable irrigable acreage
16 because of the way it disposed of that case.

17 QUESTION: And the preliminary studies show how
18 -- how much in acre-feet of water year are we talking
19 about, probably?

20 MR. MINEAR: I think it could be as much as
21 70,000 acre-feet.

22 QUESTION: And how would that impact on existing
23 distribution and users? Is that a significant figure?

24 MR. MINEAR: It's a relatively small amount, but
25 of course, we're dealing with a part of the country where

1 all water is quite precious. The total amount of water
2 that's divided by the -- the Boulder Canyon Act is 7 and a
3 half million acre-feet. So, 70,000 acres is -- is
4 significant, but a relatively small portion of the total
5 amount.

6 I would like to return to the point I was making
7 before with regard to the Master's determination in this
8 case. He concluded, as I said, the tribe's lands were
9 extinguished by the Claims Court consent judgment and,
10 therefore, there was no basis for claiming water rights in
11 this case. And we -- we respectfully submit the Master
12 erred because he misunderstood the judgment and the scope
13 of its preclusive effect.

14 QUESTION: Well, Mr. Minear, now the Government
15 takes the position here with respect to the preclusion
16 claim which the Master rejected; that is, the change of
17 position on the part of the Government when the Interior
18 Solicitor changed his mind. There the Government says
19 that that claim, the preclusion claim, was waived. I take
20 it with respect to the Court of Claims judgment preclusion
21 argument you don't take the position that that's waived?

22 MR. MINEAR: That hasn't been our -- been our
23 argument, no. Our argument has been simply the judgment
24 does not have issue-preclusive effect.

25 And the reason for that is that for a judgment

1 to have preclusive effect, the issue underlying it must be
2 actually litigated and determined, and that determination
3 must be essential to the judgment that is entered. And
4 that simply is not the case in this situation.

5 QUESTION: Mr. Minear, I think that the States
6 are saying there's some kind of special preclusion rule
7 that they call a statutory preclusion. They concede that
8 the ordinary rule is the consent judgment doesn't decide
9 any issues. They say -- they use a term I hadn't heard
10 before, statutory preclusion.

11 MR. MINEAR: Your Honor, the -- the State
12 parties are referring to the provisions for claim
13 preclusion that exist in the Indian Claims Commission Act.
14 And our understanding of that act is as follows. That act
15 dealt with the creation of a special commission, a Article
16 I court, to resolve Indian claims. And in the course of
17 enacting the statute, Congress made quite clear what the
18 preclusive effect of that administrative body's claims
19 would be.

20 And that's, of course, an appropriate thing for
21 Congress to do because, as this Court indicated in
22 University of Tennessee v. Elliott, it's for Congress to
23 determine what preclusive effect a -- an administrative
24 body might have.

25 And our view is that the statutory preclusion

1 that's provided is simply the equivalent of the merger in
2 bar rules that would -- would apply to a judicial
3 decision. Now, that deals with the question of claim
4 preclusion not issue preclusion.

5 And what we have here with regard to the consent
6 judgment is a question of -- the more narrow question of
7 issue preclusion. There's no doubt that the judgment by
8 the Claims Court precluded any further assertions by the
9 tribe against the United States with respect to these
10 lands. The question that's presented here is whether it
11 made a determination with regard to the status of the
12 boundary lands. And we believe it did not.

13 QUESTION: Do you think it really was the -- the
14 intent of the legislation that established the Indian
15 Claims Commission that the United States should acquire a
16 judgment which lets the United States off and settles
17 matters as far as the Government is concerned but leaves
18 all of the settlers who -- who are on the reservation
19 entirely up in the air as to whether -- you know, what
20 their rights are with respect to the land?

21 MR. MINEAR: Well, first, with regard to this
22 claim, none of those --

23 QUESTION: It doesn't seem to me that a -- that
24 a just -- just Government would do something like that.

25 MR. MINEAR: None of those issues -- in this

1 case those issues will not arise, and the reason is this.
2 The judgment itself was predicated on the Secretary's 1978
3 order which dealt with those specific issues. And so, we
4 do believe that it would have claim-preclusive effect in
5 the sense that it was predicated on that judgment. But
6 those issues are simply not before the Court here. There
7 is -- there hasn't been any dispute with regard to any of
8 the settlers whose rights were protected by the
9 Secretary's order himself.

10 The question here instead is a quite different
11 one.

12 QUESTION: How are they protected by the
13 Secretary's '78 order? I didn't --

14 MR. MINEAR: The -- the Secretary's '78 order,
15 followed by the Secretary's 1981 order, identified the
16 particular tracts of land that are owned by private
17 persons that the tribe has no claim to, and the tribe has
18 -- has indicated that it agrees with that -- that outcome.
19 So, those issues simply won't arise here.

20 The only question is --

21 QUESTION: Well, they might change their mind in
22 the future.

23 QUESTION: Yes.

24 QUESTION: You say they won't arise because the
25 tribe now agrees, but they might change their mind. They

1 changed their mind about this.

2 MR. MINEAR: Well, I don't believe they changed
3 about this, that the tribe's positions -- they've put
4 forward alternative positions, but they have been
5 consistent.

6 QUESTION: Well, the Secretary certainly changed
7 his mind about this.

8 MR. MINEAR: The Secretary did change his mind,
9 but the position since 1978 has been consistent.

10 QUESTION: Now, what if -- what if the -- what
11 if we were to accept the State's submission that the
12 Special Master's ruling on that aspect of res judicata was
13 wrong and that the fact that the Government changed its
14 mind is not a basis for going back into the case again?
15 How would that affect the Government's position with
16 respect to the rest of the articles -- the rest of its
17 arguments?

18 MR. MINEAR: Well, I think that our position
19 here is that the -- the Secretary was entitled -- this
20 matter had not been determined and had been preserved by
21 this Court's decision in Arizona I in its decree in 1979.
22 The Court --

23 QUESTION: Yes, but the -- the -- it was argued
24 to the Special Master that the Secretary's changing his
25 mind, not just the Solicitor's changing his mind, was

1 something that avoid the effect of res judicata.

2 MR. MINEAR: No, I'm afraid I don't understand
3 that argument. As -- I believe that the -- what had
4 happened here --

5 QUESTION: I -- as I read these -- the Master's
6 report, it said that the -- it was an unforeseen
7 circumstance that the Margold opinion would be reversed by
8 a -- a later Solicitor and that, therefore, res judicata
9 didn't apply.

10 MR. MINEAR: That was -- that was the ruling
11 that the Master gave in rejecting the State's argument
12 with regard to res judicata.

13 QUESTION: Right. Now, what if -- what if we
14 think the Master was wrong in rejecting the State's
15 argument for that reason?

16 MR. MINEAR: I think the Master's decision, his
17 judgment, should still be affirmed for a quite different
18 reason, and that is that this Court in Arizona I made
19 clear that the boundary land issues would simply not be
20 reached in this litigation in Arizona I. And it made that
21 clear in its 1964 decree, and it extended it to this -- to
22 this reservation in its 1979 decree.

23 QUESTION: Well, what was the reason then for
24 arguing preclusion on this basis before the Master if it
25 didn't make any difference?

1 MR. MINEAR: Well, we think that the -- the
2 Master simply misunderstood the law and the prior
3 proceedings here.

4 We think there are two issues here and let me
5 try and walk through each of them.

6 One is the -- the claim preclusion argument the
7 State is making in -- in an exception to the Master's
8 ruling which held that there was no claim preclusive
9 effect from this Court's past decisions. This Court in
10 Arizona I said that we're not going to decide the boundary
11 land issues. In Arizona II, the issue arose again.

12 QUESTION: Well, it said boundary land issues
13 with regard to reservations, other than this one. It
14 didn't name this one as one of the boundary land issues,
15 did it?

16 MR. MINEAR: In 1963, they addressed two
17 boundary land issues --

18 QUESTION: Right.

19 MR. MINEAR: -- the Fort Mojave --

20 QUESTION: Right.

21 MR. MINEAR: -- and the Colorado River Indian
22 Reservation.

23 In 1979, it became clear, after the Secretary's
24 decision here, that there were three other reservations
25 that had these issues. The Court in response, in 1979,

1 entered a -- modified its decree to make clear that all
2 five reservations would now be -- their boundary lands
3 would be open. And let me read the language to you from
4 the '79 decree.

5 The quantity fixed in paragraph 1 through 5 of
6 article II(d) of said decree -- which deals with the
7 Indian reservations, all five of them -- shall continue to
8 be subject to appropriate adjustment by agreement or
9 decree of this Court in the event that the boundaries of
10 the respective reservations are finally determined.

11 Special Master Tuttle, when he saw this
12 provision, said, well, all of these issues are open, but
13 he said, ultimately I'm going to accept the Secretary's
14 decision as a final, conclusive determination of those
15 water rights -- and -- of those boundary lands and the
16 accompanying water rights.

17 This Court in Arizona II said, no, there has to
18 be judicial review of the Secretary's decision. And
19 that's what the United States has sought since that time
20 with regard to the Quechan Tribe, and that's all we're
21 asking for here.

22 QUESTION: How does that -- that's the -- when
23 you say judicial review -- maybe you could answer this
24 later if I'm not right on the point. I think I am. But
25 my understanding of this is that this whole problem arises

1 because we don't really know who owns this land, and there
2 was an opinion in the Interior Department that said at one
3 point the United States still owns it and then at another
4 point that the Indian tribe owns it.

5 MR. MINEAR: That's basically correct.

6 QUESTION: But suppose we accept your arguments
7 completely. It's still open under the second decree to
8 make the argument and the settlement doesn't preclude it.
9 We still haven't answered who owns the land, have we?

10 MR. MINEAR: That's --

11 QUESTION: And so what's supposed to happen
12 next? Aren't we supposed to -- I mean, we'll solve all
13 these problems and we can find out who owns the land. At
14 one point the district court was going to litigate that,
15 and they reached an answer, and the Ninth Circuit set it
16 aside for some reason and this Court split 4/4.

17 MR. MINEAR: That's correct.

18 QUESTION: All right. So, we can't send it to
19 the district court or we can? Who's supposed to know --

20 MR. MINEAR: Right now at the -- after the --
21 the California case, the Ninth Circuit decision, this
22 Court appointed Special Master McGarr to decide these
23 issues and we thought to decide them on the merits.

24 QUESTION: So, he's supposed to decide. If
25 you're right, we then send it back to the Special Master

1 and ask him now to decide the question of who owns the
2 land.

3 MR. MINEAR: Yes. Or in the alternative -- the
4 ultimate reason why we're trying to determine the land
5 here is to determine the amount of water that ought to be
6 dealt --

7 QUESTION: I know but you can't get the water
8 till you decide who owns the land.

9 MR. MINEAR: Yes.

10 QUESTION: And -- and so, it's -- I just wanted
11 to know who is supposed to decide that if you are right.

12 MR. MINEAR: Yes.

13 QUESTION: And the answer is the Special Master.

14 MR. MINEAR: The Special Master should decide
15 it.

16 QUESTION: Well, actually this Court should
17 decide it upon the --

18 MR. MINEAR: Recommendation.

19 QUESTION: -- recommendation of the Master I
20 assume.

21 QUESTION: Correct, correct, correct.

22 QUESTION: Is that correct?

23 MR. MINEAR: That is -- that is correct.

24 QUESTION: I don't think we should do it without
25 sending it back.

1 MR. MINEAR: To -- to be specific, obviously
2 this Court acts with the assistance of the Special Master.

3 But our -- our concern here is that this claim
4 has not been determined on the merits. And it -- it
5 deserves its day in court. And so, we think that the
6 Master simply pretermitted this issue without --

7 QUESTION: Now, there was a case from the Ninth
8 Circuit in the Pend Orielle case that seemed to apply
9 issue preclusive effect to the Indian Claims Commission
10 judgment in a suit between the tribe in that case and
11 third parties. So, at least the Ninth Circuit has found
12 issue preclusion on circumstances like the ones here.

13 MR. MINEAR: Well, Your Honor, I think there's a
14 distinction here. We don't argue that there can be issue
15 preclusion from an issue that is actually litigated and
16 determined by the --

17 QUESTION: Cannot be. You do not argue that
18 there cannot be.

19 MR. MINEAR: There cannot be. Excuse me. There
20 cannot be issue preclusion where the issue is actually
21 litigated and determined. In the Pend Orielle case -- I'd
22 like you to take a look to that -- at that case because
23 it's quite clear there that the -- looking at the opinion
24 on page 926 F.2d 1508, the opinion indicates that the
25 status of the lands at issue there had plainly been

1 adjudicated by the commission.

2 The same is true with the other cases that are
3 cited by the State. In Gemmill, the ICC made a finding
4 that the land had been taken. The settlement that was
5 dealt with there dealt with the question of damages, not
6 the question of liability. There's been no liability --

7 QUESTION: So, you say if -- if the Claims
8 Commission procedure had really dealt specifically and
9 expressly with the issues, then fine.

10 MR. MINEAR: That's correct.

11 QUESTION: Preclusion.

12 MR. MINEAR: That's right.

13 QUESTION: But that that didn't happen here?

14 MR. MINEAR: That's correct. And I think you
15 can tell that from the -- the judgment that is -- that is
16 reproduced in our brief at pages 66a and 67a. The
17 judgment simply states, a judgment is rendered for
18 plaintiff --

19 QUESTION: What -- what page are you reading
20 from?

21 MR. MINEAR: This is 66a of the gray brief, our
22 exceptions brief.

23 QUESTION: Thank you.

24 MR. MINEAR: Judgment is rendered for plaintiff
25 in the amount of \$15 million. It doesn't explain the

1 theory for that award. It simply is a settlement of the
2 suit.

3 Moreover, on page 67a, the parties made clear
4 they do not expect it to have preclusive effect. The
5 final judgment is based on a compromise and settlement and
6 shall not be construed as an admission by either party for
7 the purposes of precedent or argument in any other case.

8 QUESTION: Well, can -- can a court limit the
9 preclusive effect of its judgment, I mean, by simply
10 saying this shall not have preclusive effect?

11 MR. MINEAR: Well, I think that a court can --
12 has that power. It can determine what the scope of its
13 judgment is. What I think is important here is that there
14 never was any actual litigation over the issue, and that's
15 essential.

16 QUESTION: Let me just get one thing clear. The
17 -- Judge McGarr apparently thought that one of the issues
18 that was resolved by the settlement was the ownership of
19 the land. Is that a fair reading of his understanding of
20 what happened?

21 And your position is that really was not an
22 issue in the litigation that was settled.

23 MR. MINEAR: It certainly was not actually
24 litigated and determined.

25 QUESTION: It wasn't litigated, but was it an

1 issue that conceivably the settlement might have been
2 intended to resolve?

3 MR. MINEAR: Well, there are two -- two
4 different approaches, yes. The issue -- ultimately the
5 litigation was aimed at that, and the tribe had two
6 different views. One was that either we had taken the
7 land. The other view was we -- the tribe still owned the
8 land, but they're entitled to temporary damages. And the
9 tribe and United States agreed in that latter view of what
10 this case was about. Now, that -- you have to go beyond
11 the judgment to determine that, and we don't think you
12 really need to do that. We think it's enough here simply
13 to realize that the Court itself did not adjudicate --

14 QUESTION: The judgment itself didn't say which
15 of those two views it was taking.

16 MR. MINEAR: That's correct.

17 QUESTION: They may have gotten money either for
18 the taking or for the fact that although it hadn't been
19 taken, the Government had occupied it temporarily for some
20 time.

21 MR. MINEAR: From the judgment --

22 QUESTION: You can't tell which of the two they
23 were given the money for.

24 MR. MINEAR: You cannot from the judgment. We
25 believe if you look behind the judgment, it would support

1 our view that in fact it was for a temporary occupation,
2 but we don't think you need to reach that.

3 I'd like to reserve the remainder --

4 QUESTION: That -- that was put in -- that
5 second theory -- by an amendment later on. Right?
6 Originally it was like the other cases. It was a taking
7 claim?

8 MR. MINEAR: No. I think -- actually, Your
9 Honor, I think that the claim was -- existed in the
10 initial petition. There was a claim that the agreement
11 that -- that removed the land was entirely nugatory. The
12 tribe vacillated back and forth between the various
13 theories. There was a later amendment, but we think that
14 amendment went more to a taking rather than to the idea
15 that the agreement was invalid and the tribes, therefore,
16 still owned the land.

17 I would like to reserve --

18 QUESTION: Very well, Mr. Minear.

19 Mr. Morisset.

20 ORAL ARGUMENT OF MASON D. MORISSET

21 ON BEHALF OF THE QUECHAN INDIAN TRIBE

22 MR. MORISSET: Mr. Chief Justice, and may it
23 please the Court:

24 I'd like to address Justice Scalia's point about
25 the settlers and the farmers. I want to make it very

1 clear, as I think is pointed out in the letter of counsel
2 to the tribe in '83, which is reproduced in our red brief
3 at page 9a, that the tribe was well aware at the time of
4 the settlement that it was being paid for the lands which
5 had passed into ownership with settlers, as you say, or -
6 - or farmers, ranchers, and other interests at the time of
7 the agreement.

8 On page 10a, counsel says, after telling the
9 tribe that they have persuasive evidence about damages,
10 quote, at the very top of the page, the loss of the so-
11 called Bard lands, the lands that were taken for levies,
12 the lands taken for the All-American Canal, and the sand
13 and gravel removed from the reservation, period, unquote.

14 QUESTION: This is -- this is -- where were you
15 reading from, Mr. Morisset?

16 MR. MORISSET: This is -- this is page 10a of
17 our red brief. It's appendix B.

18 QUESTION: Whereabouts on the page?

19 MR. MORISSET: The very top of the page, top of
20 page 10a.

21 QUESTION: Oh, thank you.

22 MR. MORISSET: Now, if the question to me is --
23 and I think this is implied -- does the tribe have a
24 claim against settlers, the answer is no. Can the tribe
25 in any way move to get that land back? No. The tribe has

1 been paid for that. The Secretary made it very clear in
2 his order, as the Solicitor General has -- has so well
3 put, that all perfected rights are protected and those do
4 not somehow go back to the tribe. The tribe doesn't have
5 any claim on them.

6 QUESTION: What about that provision at the end
7 of the opinion? It says, this judgment is not usable in
8 any other -- in any other litigation. I mean, if somehow
9 you sued the settlers, it wouldn't be useable.

10 MR. MORISSET: Well, if -- I think it would be
11 useable in the sense that you need to look beyond --
12 behind the agreement to see what happened at the time and
13 whether or not the tribe has any claim left on those kinds
14 of claims. The answer is no, they do not.

15 QUESTION: So, it useable then.

16 MR. MORISSET: I don't think it's useable by the
17 tribe. It might be useable by someone else in defense.

18 QUESTION: That doesn't square with my
19 understanding of that provision at the end of the -- at
20 the end of the settlement agreement, but --

21 MR. MORISSET: Well --

22 QUESTION: -- it would be nice. I don't see how
23 you get it out of that language.

24 MR. MORISSET: I think it -- I think it's clear
25 from the language and the underlying facts that at the

1 time the tribe and the United States were in complete
2 agreement on who owned the land, and the answer was the
3 United States in trust for the tribe. And they did not,
4 in any way, attempt to get compensation for that kind of
5 claim per se. They did -- were willing to give up their
6 claim against the United States as part of the deal, and
7 their claim against the United States is now foreclosed by
8 the judgment.

9 It's an entirely different question as to
10 whether or not this is still land in reservation. As has
11 been pointed out, who's going to decide this? Because if
12 -- if we drop the case at this point, it's never going to
13 be clear who owns the land unless we insist, as the tribe
14 would insist, that the Solicitor is correct and it's still
15 within the reservation boundaries. We think that this --
16 this boundary question needs to be decided by this Court
17 after remand for a fact finding by -- by a -- a special
18 master so we can put this at rest.

19 We are talking about a drop in the bucket of the
20 overall water, 1 -- less than 1 percent of the water, but
21 a huge bucket for the tribe. This is a desert tribe.
22 They need that water for -- for agriculture. We're
23 talking somewhere between 6,000 to 10,000 acres that might
24 be irrigable in answer to Justice O'Connor's question.
25 The Master went through that in great detail: peanuts

1 versus cauliflower versus lettuce. But -- so, it's not
2 quite clear how much land there would be, but somewhere
3 along those lines. The rest --

4 QUESTION: Mr. Morisset, would you explain that
5 to me in relation to the famous 1978 decision? Because
6 what's called the Krulitz opinion consistently refers to
7 this disputed land as non-irrigable acreage. So, if -- if
8 it's non-irrigable acreage, then they'll -- even if the
9 tribe title loses -- or the United States as trustee's
10 title is -- is settled, if there's no irrigable acreage,
11 that would be the end of the matter. Right?

12 MR. MORISSET: Well, the -- Special Master
13 Tuttle found -- and I don't think that that would be
14 overturned on a -- a new remand to a new special master -
15 - that in fact there were -- there was some irrigable
16 acreage and there was a great deal of technical discussion
17 about what that meant, having to do with soil types,
18 whether you could get water there, whether you could grow
19 crops or not.

20 I think the -- the Solicitor of the Department
21 in '78 was speaking generally because generally we are
22 talking about, as Justice O'Connor has pointed out, the
23 land that's in this upper northwest corner, which is a
24 mesa territory, and much of that is non-irrigable.

25 But I think now in the cession, there is -- and

1 again, it's still contentious exactly how much --
2 somewhere between 6,000 to 8,000 to 10,000 acres that
3 could be irrigated under modern techniques.

4 I'd like to yield the rest of my time to the
5 Solicitor General for reply if necessary, Mr. Chief
6 Justice.

7 QUESTION: Mr. Muys, we'll hear from you.

8 ORAL ARGUMENT OF JEROME C. MUYS

9 ON BEHALF OF THE STATE PARTIES

10 MR. MUYS: Mr. Chief Justice, and may it please

11 the Court:

12 The States of Arizona and California, the
13 Coachella Valley Water District, and the Metropolitan
14 Water District of Southern California all support Special
15 Master McGarr's report and recommendations.

16 We are pleased that we were able to resolve the
17 50-year-old water rights disputes on the Fort Mojave and
18 Colorado River Reservations and obtain the Special
19 Master's endorsement of those settlements. We urge the
20 Court to approve them also, and further to adopt the
21 Special Master's disposition of the Government's and the
22 Quechan Tribe's additional water right claim for certain
23 disputed boundary lands on the Fort Yuma Indian
24 Reservation.

25 The Fort Yuma controversy over the title status

1 to the 25,000 acres we've heard about, relating to a
2 cession of those lands by the tribe under an 1893
3 agreement approved by Congress in 1894 and on which the
4 tribes and the Government rely, has been with us almost
5 for 100 years. It was seemingly resolved in a 1936
6 decision by the Secretary of the Interior approving
7 Solicitor Margold's opinion which found that the cession
8 under the 1893 agreement was effective and had conveyed
9 title to these lands to the Government. Indeed, the tribe
10 relied on that as a final decision by the Secretary in
11 filing its 1951 petition with the Indian Claims Commission
12 in which it sought compensation for what it called the
13 wrongful expropriation of those 25,000 acres of land. The
14 Government's answer to that position before the Indian
15 Claims Commission asserted that the Government had title
16 to those lands and indeed had performed all of its
17 obligations under the 1893 agreement.

18 The Government's later assertion of a winner's
19 reserved water right for the Fort Yuma Indian Reservation
20 when it intervened in Arizona I 2 years later in 1953
21 proceeded on that same premise. And this Court's decision
22 in 1963 awarded the Government its full claim for the Fort
23 Yuma Reservation for all the practicably irrigable acreage
24 within the Fort Yuma Reservation as determined by the
25 Secretary's 1936 decision.

1 20 years later in 1983, the tribe's Indian
2 Claims Commission action finally culminated in a
3 settlement judgment, approved by the Claims Court which
4 awarded the tribes \$15 million for, quote, all rights,
5 claims, or demands which the tribe has asserted or could
6 have asserted, closed quote, in that action which plainly
7 included the tribe's claim for the taking of the disputed
8 boundary lands. The language of --

9 QUESTION: But it also included the tribe's
10 claim that it was their land all along and the damages
11 were for trespass on land to which they held or the
12 Government as trustee held title.

13 MR. MUYS: That is correct, Justice --

14 QUESTION: And it settled that claim too.

15 MR. MUYS: It had a whole array of claims in
16 their petition, including all the language I think from
17 the Indian Claims Commission Act, unfair and dishonorable
18 dealings with the Government. It had a whole laundry list
19 of claims, but the -- the principal claim was that the --
20 the disputed lands had been unfairly taken under the 1893
21 cession agreement.

22 QUESTION: How do you know that --

23 QUESTION: Well, I -- I suppose the usual rule
24 is that when lands are -- are taken and there -- there is
25 -- is a finding in favor of the previous owner, the

1 Government ends up owning those lands. But is that true
2 in all cases if the damages are marked just for trespass?

3 MR. MUYS: No. If -- if the tribe had had only
4 a claim for trespass by the Government and got paid for it
5 and still retained title to its lands, there's no doubt
6 that if some other settlers or some third parties had
7 trespassed on their land, they would have a further claim
8 against those third parties.

9 But under the Indian Claims Commission Act, when
10 you bring a claim for a taking of aboriginal or trust
11 lands and you get an agreement, either an adjudicated or a
12 settlement agreement, that is paid -- that Congress pays,
13 that does not -- not only extinguishes the claims against
14 the United States, it extinguishes title that the tribe
15 had in those reservation --

16 QUESTION: Is that right? I mean, I don't
17 remember my A. James Kausner property law too well, but my
18 -- my basic thought there was that land is special and you
19 have to go through a lot of formalities to transfer title
20 in land.

21 MR. MUYS: Yes.

22 QUESTION: And a settlement can't transfer title
23 unless -- unless, you know, these certain formalities are
24 -- certainly wouldn't cut off third parties. And I guess
25 if it isn't litigated, it wouldn't even cut off second

1 parties from suing somebody else.

2 Now, is -- is there some special thing in -- in
3 respect to the tribal land that means those ordinary
4 precautions are not applicable?

5 MR. MUYS: Well, they're something special in
6 the Indian Claims Commission Act, Justice Breyer.

7 QUESTION: All right. But if the Indian Claims
8 Commission Act is different, then under ordinary
9 principles, it would not work. It's dependent on that
10 act.

11 MR. MUYS: Quite correct.

12 QUESTION: All right. That -- that act -- you
13 know, they have a whole -- I'm trying to look at the words
14 of that, and I thought the words of that don't necessarily
15 favor you too much.

16 MR. MUYS: Well, the words of that act make it
17 clear that the -- the claims brought by the tribe against
18 the United States are extinguished as against the United
19 States.

20 QUESTION: No. It's shall be a full discharge
21 of the United States of all claims.

22 MR. MUYS: Correct. But if you talk -- if the
23 -- if the claim is for taking of land and the Government
24 pays for the lands that were taken, the courts have
25 interpreted the statute as saying obviously the title to

1 those lands has been extinguished. When the tribe got
2 money, they no longer had title to the --

3 QUESTION: Okay. That's the part I don't quite
4 see because why be extinguished as except against the
5 United States? Why would third parties be involved and
6 why, if it weren't litigated, second parties, et cetera?

7 MR. MUYS: Because otherwise the act's finality
8 purposes would be utterly frustrated. The tribes would
9 come in, get paid by the Government for their claims for
10 extinguishing title, then they'd go out and sue the
11 settlers Justice Scalia mentioned. They'd assert water
12 rights for lands they didn't own anymore. They could
13 roam --

14 QUESTION: If litigated, absolutely. If not
15 litigated?

16 MR. MUYS: Well, the act does not -- we agree
17 with the Government and the tribes that under collateral
18 estoppel you need a litigated, adjudicated issue before
19 you -- there's any preclusion, but not under the Indian
20 Claims Commission Act. The Indian Claims Commission Act
21 says that the Attorney General is authorized to settle
22 cases and settlement judgments are treated the same as
23 adjudicated judgments. They're sent to Congress and
24 Congress pays them. In the Ninth Circuit and this Court
25 in United States against Dann in 1985 said that when that

1 happens, the tribe's title is extinguished by operation of
2 the --

3 QUESTION: So -- so, all settlements under the
4 Indian Claims Commission Act must be treated as
5 adjudications?

6 MR. MUYS: I think as a practical matter, that's
7 -- that's the result of the statute and that's the way the
8 Ninth Circuit and the Eighth Circuit have interpreted
9 final judgments by the Claims Court on Indian Claims
10 Commission --

11 QUESTION: Are you relying on the Pend Orielle
12 case?

13 MR. MUYS: Yes, Pend Orielle --

14 QUESTION: But there, there was specific --

15 MR. MUYS: There were specific findings.

16 QUESTION: -- litigation of the issue and
17 findings, and we don't have it here. And it's -- I'm not
18 sure you have to read that into section 22 of the Indian
19 Claims Commission Act.

20 MR. MUYS: Well, you have -- you have the
21 judgment and the -- I read the part of the judgment that
22 says all the tribe's claims are -- that could have been
23 asserted can no longer be asserted against the United
24 States or in any future action, which we read as against
25 anybody. And that's the way the Ninth Circuit has read

1 it. The Ninth Circuit has said not only is the tribe's
2 title extinguished as against the United States, but as
3 against third parties. And it's Pend Orielle, Gemmill,
4 Western Shoshones. We -- we cite the cases I think at
5 page -- oh, in our --

6 QUESTION: But that's of those cases, if you're
7 looking at it.

8 MR. MUYS: Right.

9 QUESTION: Is there any one -- I grant you the
10 Ninth Circuit says this sort of thing.

11 MR. MUYS: Right.

12 QUESTION: And that -- that's their law.

13 MR. MUYS: Right.

14 QUESTION: But in the cases themselves, is there
15 any case that doesn't involve either a litigated matter or
16 findings that have the equivalent effect?

17 MR. MUYS: Well, the -- the cases the Special
18 Master relied on, Gemmill and Pend Orielle, were
19 settlement judgments, but there had been earlier
20 litigation on liability in which there were findings made
21 by the Indians Claims Commission.

22 No findings were made in the Quechan situation
23 because they never got to that point. They did the -- the
24 early stages on liability and then the -- the tribe moved
25 to stay the proceedings while they tried to get Congress

1 to reconvey the land to them. Congress refused to do so.
2 The tribe reopened the -- the Claims Court proceedings and
3 settlement occurred.

4 The settlement was prompted by this Court's 1983
5 decision in Arizona II in which the agreement that the
6 Government says they had with the tribe, that the 1978
7 secretarial order had finally and conclusively established
8 the tribe's title in these disputed lands was put in
9 serious doubt by this Court. They said that's just not
10 the way it works. A series of ex parte orders in which
11 the affected parties, not just landowners, but water users
12 had no -- no role just doesn't cut it. And they said, go
13 back to the district court and -- and finish that
14 litigation.

15 QUESTION: Mr. Muys, the problem I have -- I --
16 I can accept your -- your proposition that the -- that
17 settlements under the Claims Commission Act are -- are
18 different and that even if the matter is not litigated, it
19 -- it is binding on the parties, and if they say so, as
20 they did here, as against other parties as well.

21 But only as -- what's distinctive about this
22 case is that there were alternative claims for relief and
23 you don't know which one of the two they got the money
24 for. The Indians said either -- either --

25 MR. MUYS: Well, the fact --

1 QUESTION: -- the land was taken away from us
2 and you owe us damage for taking it away, or the land
3 wasn't taken away from us and you owe us damages for
4 trespassing on it. And without deciding which of the two
5 is true, how can we decide which of those -- which of
6 those two propositions to cram down the throat of
7 everybody else in the future? They -- they go in
8 different directions.

9 MR. MUYS: We say all of the above, Your Honor.

10 QUESTION: Well, you can't. They're -- they're
11 contradictory. I mean --

12 MR. MUYS: Five of the laundry list of all sorts
13 of claims, but the judgment says that I quoted -- and this
14 is at page 18 of our reply brief. The judgment says they
15 got \$15 million for all rights, claims, or demands which
16 the tribe has asserted. Now, there's no room -- wiggle
17 room in there to exclude any of the particular alternative
18 theories.

19 QUESTION: But if you say --

20 QUESTION: Well --

21 QUESTION: -- the claim for trespass, they got
22 \$15 million for trespass damages for all the years that
23 the United States has trespassed.

24 The -- in the -- in the number of cases that you
25 cited --

1 MR. MUYS: Right.

2 QUESTION: -- for the special preclusion effect
3 of these settlements, as far as I know, none of them put
4 forth this alternative. The others all said the
5 Government took our land, we want to be compensated, and
6 then there was a determination.

7 But here, it seems to me it's like when a case
8 goes to the jury on alternate theories, they come back
9 with a general verdict. Then you don't know which one
10 they relied on. There's no preclusive effect from that
11 general verdict, is there?

12 MR. MUYS: There is, and -- and I think we -- we
13 tried to emphasize, as the Ninth Circuit and we think this
14 Court in approving the Ninth Circuit's several Dann
15 decisions agreed, that the Indian Claims Commission Act is
16 something unique.

17 QUESTION: But even -- even on the Indian Claims
18 Act preclusion, shouldn't we consider in fact -- or may we
19 not at least consider, for whatever value it may have, the
20 -- the amount of money that they got?

21 Your -- your brother has pointed out to us that
22 on page 10a of the -- the red brief, the terms of the
23 settlement are set out. The terms of the settlement cover
24 occupational trespass damage, lack of -- loss of rents, as
25 well as certain takings for the canal, and levies and so

1 on. And they got \$15 million for that, which suggests to
2 me that if there had been a settlement which took into --
3 which -- which had been a settlement for a taking and had
4 valued the land in fee, the amount of the settlement would
5 have been more than \$15 million.

6 Can we not bear in mind the amount that they got
7 and say that tends to support the argument that, despite
8 the language and despite the language of the statute, the
9 only thing they were settling, in effect, was an
10 occupational claim, a trespass kind of claim, plus a few
11 incidental takings? Is -- is that an illegitimate line of
12 reasoning?

13 MR. MUYS: Well, we think it's not appropriate
14 to go behind the judgment, Your Honor. The tribe
15 itself --

16 QUESTION: The -- the judgment includes the \$15
17 million.

18 MR. MUYS: Yes, but it also says \$15 million is
19 for all claims that were asserted. Why should the Court,
20 why should we, why should anyone have to try and parcel
21 out and figure out --

22 QUESTION: Because you can't have it -- you say
23 all of the above. The answer to that is you can't have it
24 both ways. They -- they settled on -- on a -- if -- if
25 they had -- if they had come up with -- let's put it this

1 way. If they had come up with a settlement that said, we
2 don't know, but regardless of whether your claims are for
3 trespass or whether your claims are for taking, we'll give
4 you this and you take this and you go away, that would
5 have been a situation in which there would have been total
6 ambiguity and there would have been no way to go behind
7 the general language that you quote.

8 Here, however, there is a way to go behind it,
9 and if -- if you accept the general principle that you
10 can't have it both ways, why not go behind it and give
11 effect to what they actually agreed upon?

12 MR. MUYS: You mean figure out what \$15 million
13 may have bought?

14 QUESTION: Well, figure -- take the \$15 million
15 as support for the claim that they -- the argument that
16 they are making here, that the only thing they settled was
17 the trespass claim plus incidentals. And -- and it seems
18 to me that as to that, the \$15 million is probably good
19 evidence.

20 MR. MUYS: Well, actually on -- on your point,
21 Your Honor, the tribe concedes -- and the fact is that the
22 -- if you were paying for 25,000 acres of raw desert land
23 that was taken in -- in 1893, it would be worth -- I
24 believe something in the record -- about 50 cents an acre.
25 So, it would be a much lower level of damages than what

1 the tribe astutely sought.

2 QUESTION: Well, also that whole --

3 QUESTION: You're saying you can't reason that
4 way.

5 QUESTION: That whole analysis assumes that the
6 tribe is 100 percent correct in -- in its -- in its legal
7 position ---

8 MR. MUYS: That's right.

9 QUESTION: -- without any discount for the fact
10 that it may be wrong.

11 MR. MUYS: When you look at the -- what happened
12 after this Court's decision in Arizona II, as we point out
13 in our brief, the Government backed away from what it says
14 was its complete agreement with the tribe that --
15 conclusively -- the tribe conclusively got title in the
16 1978 Secretary's opinion. They said, wait. This is all
17 very contingent. We may lose out in San Diego or
18 somewhere. They didn't because they invoked a sovereign
19 immunity defense and precluded any decision on the merits.

20 QUESTION: That's entirely fair to play it both
21 ways as against the Government. We don't know what the
22 money was for, whether it was for the trespass or for the
23 taking. You waived them both. So, as against the United
24 States, you can't claim either one. Fair.

25 But when you try to apply the same principle

1 against other parties, you have to make up your mind which
2 of the two you're going to impose on the other parties.
3 Are you going to impose the proposition that the Indians
4 own the land, or are you going to impose the proposition
5 that they don't own the land because it's been taken away.
6 And with this kind of a -- of a settlement, you have no
7 way of knowing which of the two to impose. You have to
8 impose the one or the other.

9 Which one of the two does this settlement
10 require us to impose on third parties? You can't say both
11 because they lead to inconsistent results.

12 MR. MUYS: We don't think they lead to
13 inconsistent results, Your Honor. And I think it's not,
14 you know, coincidental that this --

15 QUESTION: Sure, they do. If the Indians own
16 the land, they're entitled to the water. If they don't
17 own the land, they're not entitled to the water. Now,
18 which -- which -- do I impose that portion of the
19 settlement that may have been given them -- to them for
20 the taking or that portion that was given to them for the
21 trespass? I have no idea.

22 MR. MUYS: But when the tribe brings a claim for
23 a taking and the Government pays them for that claim and a
24 whole bunch of other claims, and then the Government and
25 the tribe draft an unambiguous judgment which says all

1 claims, everything in there, are gone --

2 QUESTION: Well, I thought -- I thought they
3 brought a claim for more than a taking, that they have --

4

5 MR. MUYS: They did.

6 QUESTION: -- alternative theories. And the
7 thing that's striking about this procedure is that now you
8 have the two parties to the settlement agreement, the
9 United States and the tribe, coming in and telling us the
10 same story, which is it isn't what you say it is.

11 MR. MUYS: It would have been very easy to say
12 what they were settling in the judgment.

13 QUESTION: Well, but they're telling us now. It
14 didn't tell us in the judgment, and they're telling us
15 now. Do we disregard that?

16 MR. MUYS: But -- but it's their -- it was their
17 judgment, and I guess if the parole evidence rule means
18 anything and if finality of judgments means anything, as
19 Judge McGarr said, if a final judgment that says you're
20 getting \$15 million and your title is extinguished means
21 anything, this argument is completely specious. That --
22 the -- the tribe's title is gone. They got \$15 million,
23 maybe not all of it for a taking --

24 QUESTION: Why does it mean your title is
25 extinguished?

1 MR. MUYS: Because that's what --

2 QUESTION: It means you don't have a claim
3 against the Government. That's different from saying your
4 title is extinguished.

5 MR. MUYS: Well, the Ninth Circuit, which --
6 this is the circuit that done most of the interpreting of
7 the act, has said that the effect of the compensated
8 judgment under the Indian Claims Commission Act, when you
9 had a -- a takings claim is to extinguish the tribe's
10 title.

11 QUESTION: Is that -- is that --

12 QUESTION: -- be willing to accept that if --

13 MR. MUYS: Not in --

14 QUESTION: -- it were only a takings claim, but
15 it wasn't only a -- it was an alternative claim for either
16 a taking or -- or a trespass. And -- and the Ninth
17 Circuit decision doesn't speak to that. I honestly don't
18 know which of the two effects of the judgement to impose
19 upon somebody else. They're -- they're inconsistent --

20 MR. MUYS: Well, but what is --

21 QUESTION: -- because they were alternative
22 theories.

23 MR. MUYS: -- the basis for even going behind
24 the judgment? A judgment says, all claims are
25 extinguished. Can that be any clearer?

1 QUESTION: I -- I assume you're right about
2 that.

3 MR. MUYS: Yes.

4 QUESTION: I assume you're right about that, but
5 I still want to go in just a little bit to ask you about
6 the Ninth Circuit's holding --

7 MR. MUYS: Certainly.

8 QUESTION: -- because has the Ninth Circuit said
9 that the Indian Claims Commission, when in -- in a
10 situation like this, it extinguishes claims of third
11 parties? I mean, it's --

12 MR. MUYS: Yes.

13 QUESTION: In other words, title passes as
14 against the world? I mean, that would be enormously
15 unfair, wouldn't it? You could have two parties who want
16 to transfer land for some reason, and then suddenly
17 everybody else is cut off. They didn't have a chance to
18 appear. They had no -- I mean, who knows what third
19 parties have claims against the Government or against the
20 tribe? And why should two parties be able to get together
21 and quiet title as against the world? I don't see that.

22 MR. MUYS: Well, they didn't --

23 QUESTION: You're saying that -- that was
24 Justice Souter's question. And it's the -- in my next
25 question, if you're going to say, it does quiet title

1 against the world, I'm going to ask why. And it seems
2 enormously unfair. If you're going to make the more
3 limited claim that all it does is stop this party from
4 litigating against the world, that's quite different. But
5 then I'm going to say if you're prepared to cut back, why
6 not cut back on that too to ordinary collateral estoppel
7 principles.

8 MR. MUYS: Well, all I can say, Your Honor, is
9 that Congress was very concerned about having finality
10 come to these Indian claims.

11 QUESTION: Sorry. Which is the answer? That
12 is, is it the case that the Ninth Circuit says that a
13 settlement, as between the Government and the tribe, cuts
14 off all claims as -- that the world might assert, quiets
15 title as to the world? What do they say?

16 MR. MUYS: Well, they said it quiets title as
17 against the world as far as the tribe's name. The tribe
18 cannot assert title.

19 QUESTION: You're -- you're not arguing here
20 that the world is --

21 MR. MUYS: No. I'm not saying the world --

22 QUESTION: That's -- so, that was the answer to
23 Justice Souter's question. That's what I was looking for.

24 QUESTION: Well, you're simply saying that the
25 tribe is bound because it was a party to the thing.

1 MR. MUYS: Right, and the judgment extinguished
2 their title.

3 QUESTION: There's no third party -- no third
4 party relying -- going against the judgment.

5 MR. MUYS: No. And Judge McGarr says if you
6 have title -- the tribe's title extinguished --

7 QUESTION: Then -- then that is my question.

8 MR. MUYS: -- that's the end of it.

9 QUESTION: All right. No. Yes. But the reason
10 I wanted to get the answer to Justice Souter is that you
11 agree that ordinary property rules govern in respect to
12 those third parties. So, my question then is, and why
13 shouldn't they govern too in respect to ordinary rules of
14 collateral estoppel?

15 MR. MUYS: Because the Indian Claims Commission
16 Act superseded ordinary common law rules of collateral
17 estoppel and res judicata and established a statutory bar
18 that takes effect when payment is made to a tribe for
19 their claims. And that -- when their title is
20 extinguished, that's the end of it. They can't -- they
21 can't have the Government owning the disputed lands as a
22 result of the title being extinguished and then come
23 against third parties such as Arizona and California water
24 users and say, well, yes, our title is extinguished
25 against the Government --

1 QUESTION: Mr. Muys?

2 MR. MUYS: -- but it was resurrected somehow --

3

4 QUESTION: Are you going to cover the State's
5 other res judicata argument?

6 MR. MUYS: I'd be happy to move that, Your
7 Honor.

8 I might say that this is not an insignificant
9 amount of water that's involved here. There are 78,500
10 acre-feet of water at issue on these disputed boundary
11 lands. That's enough water to serve the annual
12 requirements of a city of 375,000 individuals. Rule of
13 thumb is an acre-foot of water covers the needs of a
14 family of five for a year. So, it's not an insignificant
15 amount of water.

16 It comes out of the hides of the Arizona and
17 southern California urban water users. Southern
18 California's current supply is -- is woefully inadequate
19 even meet their current needs. Arizona's are rapidly
20 reaching that same kind of critical stage. It's not an
21 insignificant amount of water. These Indian rights would
22 have priority over all the other water users on the lower
23 river. They'd have an 1884 priority ahead of all the
24 Arizona, California, and Nevada water users.

25 But as to our res judicata point, we -- we think

1 the -- the finality principles that the Court applied in
2 Arizona II to omitted lands and precluded an assertion of
3 water rights for those lands applies here. What the
4 Government knew in 1936 -- in 1951 when Arizona against
5 California was filed and then the Government intervened,
6 they knew that the Secretary had rendered his 1936
7 decision saying that the disputed lands were owned by the
8 Government.

9 QUESTION: But the so-called omitted lands --
10 correct me if I'm wrong -- were -- were not within the
11 disputed boundary areas, were they?

12 MR. MUYS: They were not. They were within the
13 conceded boundaries.

14 QUESTION: And -- and I -- I had thought that
15 the decrees of the Court in Arizona I and II indicated
16 that it was not conclusive as to the boundary lands.

17 MR. MUYS: It's true. There was nothing in the
18 '79 -- in the '64 decree or '79 decree or '84 decree that
19 precluded this claim. The language of the decree
20 expressly left open -- the words of the Court -- left open
21 all the boundary disputes.

22 QUESTION: So, it seems to me that -- that the
23 Court's treatment of omitted lands and boundary lands for
24 preclusive purposes is quite different.

25 MR. MUYS: Well, no -- no preclusion argument

1 was made with respect to boundary lands, Your Honor. But
2 after this Court's decision in Arizona II and after the
3 Court's later decision in Nevada against United States,
4 the light finally dawned on the State parties that there
5 is a valid preclusion -- or res judicata argument here
6 with respect to Fort Yuma. And here's the way we think it
7 would work.

8 When the Government was preparing its case in
9 Arizona I, they -- they made a claim for all the
10 practicably irrigable acreage within the reservation.
11 They looked at the reservation. In one corner of the
12 reservation were a lot of marginally irrigable lands.
13 They decided not to make a claim for those, not to
14 overreach and prejudice their broader claims. These were
15 the so-called omitted lands.

16 In the other corner of the reservation, are
17 25,000 acres of disputed lands. The Government looked at
18 the situation. They said, well, the tribe and the Bureau
19 of Indian Affairs all asserted this much broader boundary
20 and the title to these lands, but the Secretary rejected
21 it. So, they made a strategic litigation decision not to
22 make a claim for those disputed boundary lands.

23 To us, it's the same principle. It's the same
24 bedrock res judicata principle. What is your claim? Why
25 did you not make it? Well, now they say they didn't make

1 it because they couldn't make it. They -- we could not
2 have made a claim for --

3 QUESTION: It's kind of ironic for you to be
4 making that claim when you woke up later, and you do
5 acknowledge that -- that any preclusion claim is
6 ordinarily an affirmative defense, and if you don't raise
7 it on time --

8 MR. MUYS: Correct.

9 QUESTION: -- at the first opportunity to do so,
10 you lose it.

11 MR. MUYS: We do, Your Honor. But we're saying
12 that this Court has recognized that in -- in trial courts,
13 even though a party may be held to have waived its claim,
14 the -- a district court on its own motion or an appellate
15 court on its own motion may assert a --

16 QUESTION: And we are ourselves --

17 MR. MUYS: You are the trial court.

18 QUESTION: -- the trial court here.

19 MR. MUYS: So, we say if you feel we waived it,
20 we urge you to, on your own motion, invoke it.

21 QUESTION: Why?

22 MR. MUYS: Because it's -- it's consistent with
23 the whole principle of res judicata. This litigation has
24 to be brought to an end. The claim --

25 QUESTION: The -- the whole principle of

1 preclusion, as I understand it, is it ordinarily follows a
2 party presentation. It's a defense for you to raise or
3 not raise. Sometimes parties don't want to raise it.
4 They want to get a litigated decision. And yes, a court
5 can but ordinarily a court won't. The court will say you
6 could have raised it, you didn't, I'm not going to raise
7 it for you.

8 MR. MUYS: Well, we are late, Your Honor.

9 QUESTION: Well, the -- the Master treated it on
10 the merits, didn't he?

11 MR. MUYS: He did. He --

12 QUESTION: He didn't --

13 MR. MUYS: -- he found we hadn't waived it and
14 that we weren't untimely. We think he's correct. And --
15 and there's no prejudice that we can see. And the
16 Government and the tribes haven't argued any for the
17 delay.

18 So -- and the Court has said in connection in
19 preclusion defenses, the big controlling factor is that
20 the other side have a fair opportunity to defend and were
21 they prejudiced in somehow. Those factors aren't present
22 here.

23 But the Special Master, although he held we
24 weren't untimely, he ruled against our res judicata
25 argument because he said, oh, there's a new circumstance.

1 This 1978 Solicitor's opinion overruling three prior
2 Solicitor's opinion which is something new. That's not
3 the kind of changed circumstance that courts rely on to -
4 - to excuse an otherwise applicable res judicata bar. The
5 operative facts remain the same. The 1893 agreement was
6 there. The 1894 act was there.

7 All Solicitor Krulitz did was take the -- the
8 rejected legal theory that the Secretary didn't adopt in
9 1936 and belatedly apply it to the same facts. That --
10 that just doesn't make any sense. If you could keep
11 avoiding a res judicata bar by changing your mind
12 repeatedly and coming up with new legal theories on the
13 same operative facts, res judicata would be a worthless
14 doctrine.

15 QUESTION: May I ask one question?

16 MR. MUYS: Yes.

17 QUESTION: The settlement that we're trying to
18 puzzle out occurred in 1983 I think. And under one
19 version of the settlement, the -- the land thereafter was
20 within the reservation. In another version of the
21 settlement, the land was not within the reservation. Is
22 there any evidence in this record as to how the parties
23 treat it? Where -- did they put up boundary signs
24 anywhere or say you're in the reservation now or not? Or
25 what -- is there any evidence to tell us how the parties

1 to that settlement viewed the consequences with respect to
2 the land?

3 MR. MUYS: Well, the -- the parties to the
4 settlement, the Government and the tribe, of course
5 adopted and supported, indeed, obtained the final
6 Solicitor's opinion that reversed the three earlier
7 Solicitor's opinion and held that the tribe had title to
8 those lands. And in making that --

9 QUESTION: That was before the settlement.

10 MR. MUYS: That's before the settlement.

11 QUESTION: That was before the settlement. And
12 after the settlement, did they continue to treat the
13 disputed land in the same way?

14 MR. MUYS: Well, they didn't -- they -- I don't
15 think anything has changed on the ground. The secretarial
16 order is still applicable. Certain private interests have
17 been protected, and --

18 QUESTION: So, there was no conduct post-1983 in
19 which the tribe, in effect, moved the boundary lines back
20 to say, I guess, we've given up title to this land.
21 Nothing like that.

22 MR. MUYS: They haven't -- they haven't gone out
23 and developed it.

24 QUESTION: But your theory is that they did give
25 up that part of the reservation in the settlement.

1 MR. MUYS: Yes. The title was extinguished.

2 QUESTION: Yes.

3 MR. MUYS: Nothing has happened to that land in
4 the disputed area since 1983 decision. The -- the tribe
5 and the Government prevented a decision on the merits
6 before Judge Brewster in the San Diego district court.
7 Then they acquiesced in our motion to reopen the decree,
8 presumably preferring to have -- hoping to have Judge
9 Tuttle reappointed as Special Master as opposed to the --
10 the adverse decisions they got from Judge Brewster in San
11 Diego. But --

12 QUESTION: Thank you, Mr. Muys.

13 MR. MUYS: Thank you, Your Honor.

14 QUESTION: Mr. Minear, you have 2 minutes
15 remaining.

16 REBUTTAL ARGUMENT OF JEFFREY P. MINEAR

17 ON BEHALF OF THE UNITED STATES

18 MR. MINEAR: Thank you, Your Honor.

19 I'd like to first just simply make the point
20 with regard to the State's exception that our -- our
21 position here is -- is rather simple. Arizona I made
22 clear that boundary land issues would not be determined in
23 that litigation. So, we could not have raised the Quechan
24 boundary land issue at that time. It simply wasn't
25 available.

1 In 1979, the Court made that clear.

2 QUESTION: I thought it only said boundary lands
3 with respect to two other reservations. It didn't
4 specifically say boundary lands here.

5 MR. MINEAR: It implicitly -- I think that you
6 could read that implicitly into the -- into what the Court
7 determined. That's how Master Tuttle read it. But what's
8 explicit is the Court's 1979 decree where it makes clear
9 that all five -- all five reservation boundaries remain
10 open. And I think that discloses the -- the claimed
11 preclusion effect of this Court's past decisions.

12 With regard to the issue-preclusive effect
13 of the consent judgment. I'd like to make several points
14 on that.

15 First of all, in answer to Justice Stevens'
16 question about the change in position of the United
17 States, since 1978, we have consistently taken a position
18 with regard to these lands. It's articulated in the 1978
19 and 1981 decisions of the Secretary, and we have continued
20 to rely on those decisions. We have not suggested in any
21 way that the boundaries that are laid out quite
22 specifically in those orders have been renounced in any
23 way. And in fact, our assertion of the water right
24 throughout this whole period indicates that we believe the
25 consequences of the judgment of the Claims Court was

1 simply to preclude the claims against the tribe -- by the
2 tribe against the United States.

3 The United States and the tribe agreed on who
4 owned the land. That's what led to the settlement. There
5 is simply no longer a controversy after the 1978 decision
6 that these lands were held by the tribe and that we were
7 paying trespass damages. The judgment doesn't say that,
8 but if you look behind it, that's what you're going to
9 find.

10 In that -- given that situation, we think the
11 fair thing to do is to litigate this question of the
12 validity of the Secretary's decision on the merits.

13 QUESTION: It isn't just the judgment doesn't
14 say it, it's also that one of the claims that they made
15 was -- was the claim that was just inconsistent with the
16 -- with the fact that they accepted the Solicitor's new
17 opinion.

18 MR. MINEAR: That's absolutely right, and I
19 think that the point that you made is well taken that
20 there's a contradiction here.

21 CHIEF JUSTICE REHNQUIST: Thank -- thank you.
22 Thank you, Mr. Minear.

23 The case is submitted.

24 (Whereupon, at 12:07 p.m., the case in the
25 above-entitled matter was submitted.)

CERTIFICATION

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

STATE OF ARIZONA, Complainant v. STATE OF CALIFORNIA, ET AL.
CASE NO: 8, Original

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BY: Susan M. May
(REPORTER)