COLORADO RIVER INDIAN TRIBES

OFFICE OF THE ATTORNEY GENERAL

CHRONY

March 2, 2009

Andrea Lynn Hoch
Legal Affairs Secretary
Office of the Governor
State Capitol Building
Sacramento, CA 95814

Re: ***Response to letter dated September 12, 2008***

Dear Ms. Hoch:

In your letter dated September 12, 2008, you requested that the Colorado River Indian Tribes ("CRIT" or "Tribes") address the issues of allotment and the termination, or disestablishment, of the Colorado River Indian Reservation ("Reservation"). Specifically, you asked CRIT to analyze the Act of April 21, 1904, 33 Stat. 189, 224 ("1904 Act"), the Act of March 3, 1911, 36 Stat. 1058, 1063 ("1911 Act"), and the Act of April 30, 1964, 78 Stat. 188 ("1964 Act") and to comment on your analysis of these statutes.

The Tribes must respectfully, but emphatically reject the assertion that the Reservation was terminated by the Act of 1904, and the attendant conclusion that "it appears that any CRIT California reservation lands, which were terminated in 1904, have not been restored." Coming from the Office of the Governor of the State of California, such assertions damage the Colorado River Indian Tribes as a sovereign, diminish the social, economic, and national defense contributions made by the members of the Tribes over more than a century of peaceful industry, but most important, they again put at risk the well being of future generations.

Nonetheless, the Tribes appreciate the opportunity to provide the Governor's Office with additional support for the validity of its land holdings within the State of California. What follows is a discussion of the statutory text, legislative history, and case law relevant to the enactments cited in your question to us. We offer as well, a frank discussion of other pertinent factors which, we hope, will settle the question of the existence of the Colorado River Indian Reservation within the State of California, and which will clarify the location and extent of the Reservation boundary that has, as you are aware, been a topic of recurring debate. The Tribes' detailed response follows.

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1. DID THE 1904 ACT TERMINATE THE RESERVATION?

No, the 1904 Act did not terminate the Reservation. The introductory passage of Section 25 of the 1904 Act authorizes the Secretary of the Interior to "utilize, and dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain . . . ." Essential to the context and applicability of this authority is the phrase "such works." The "works" so identified are reclamation works, a class of public works newly authorized by the Reclamation Act of June 17,1902 (32 Stat. 388). The 1904 Act contemplates disposal to settlers (the public) of reservation lands made irrigable by these new projects, and *only* those newly irrigable lands. The Reclamation Act of 1902 - whether read alone or in combination with the 1904 Act - neither expressly or impliedly states that works undertaken pursuant to that Act upon Indian Reservations, such as those authorized under the 1904 Act, will serve to auto-disestablish such reservations. The assertion, as stated in your letter of September 12, 2008, that this was in fact the outcome of the combined Acts, deeply disturbs the Tribes.

Notably, the language used throughout the 1904 Act is permissive in character: "in carrying out any irrigation enterprise which *may* be undertaken . . . and which *may* make possible . . . reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian Reservations in California and Arizona, the Secretary of the Interior is hereby authorized to . . . dispose of any lands in said reservations which *may* be made irrigable . . . ." (Emphasis added.) A full and fair reading of the statute reveals that its effects were prospective, and that any disposition of lands under the Act was dependant upon, and could only be executed subsequent to an evaluation to determine irrigability, and the construction of the necessary irrigation infrastructure. At its heart, the 1904 Act authorized a future taking, by eminent domain, of lands Congress believed would be more productive in the hands of white settlers. Your Office may wish to consider the present-day ethical and political ramifications of an attempt to revitalize such a policy.

Further, Section 25 of the 1904 Act is replete with references to the present and continuing existence of the Reservations it impacts. First, it refers exclusively to *"the irrigable lands* on the Yuma and Colorado River Indian Reservations in California and Arizona." (Emphasis added.) It does not generalize. It does not reference any other portion of Reservation lands; only "lands that may be made irrigable" are identified as lands subject to the authority granted under the 1904 Act. Nor does it speak of the Reservations in the past tense. In addition, of those lands made irrigable by works constructed pursuant to the 1904 Act as amended by the Act of March 3, 1911, ten acres were to be "reserved for and allotted to each of the Indians belonging on said reservations . . . ." This construction would be surplusage were it the intent of Congress that "said reservations" would cease to exist under the 1904 Act. Finally, in addition to "charges required to be paid under [the Reclamation] Act," settlers were also required to pay "upon the unallotted Indian lands . . . [a sum which] shall fairly represent the value of the unallotted lands in said reservations before reclamation[.]" This additional sum was to be used to pay the costs of reclamation, and "the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time . . . for their benefit." This is not language of termination; this is language of continuity.

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The information and maps provided to your Office perhaps do not clearly convey the fact that approximately fifty (50) percent of the land within the Reservation boundaries is "irrigable" as contemplated by the 1904 Act. The remainder of the lands within the Reservation are mountainous or hilly – unsuited to irrigation as practiced either in 1904, or modernly. Thus, even had there been an effort pursuant to the 1904 Act to reclaim, divest, and redistribute to settlers all irrigable lands within the Colorado River Indian Reservation, this would still leave approximately fifty percent of the Reservation lands (plus 10 acres of the irrigable acreage for "each of the Indians belonging on said reservation" per the 1904 Act as amended by the 1911 Act,) intact. As you are aware, however, no such effort was undertaken. (*See: Part IV, Executive and Departmental Orders Published in the Federal Register*, Vol. 2 – 1937; published March 8, 1937, p. 1402)

In the Northwest Corner Lands, where the Reservation extends deepest into California, the ratio of irrigable to non-irrigable land is significantly lower due to the high mountains, and extensive rocky hills in that region. The irrigable area in the Northwest Corner Lands was estimated by Supreme Court Special Master Rifkind to be approximately 5,933 acres. *(Report of Special Master Rifkind*, at 272 (December 5, 1960). Even using a conservative 50% ratio of irrigable to non-irrigable land, there are 6,000 acres of Reservation land on the California side of the Colorado River which were never within the scope of lands the Secretary "may" have disposed of – just in the Northwest Corner Lands. These are lands indisputably within the Colorado River Indian Reservation.

To be certain, the 1904 Act was intended to authorize a significant taking of Reservation lands in the name of western progress and settlement. The land was to be identified and assessed for its irrigability, and if found ripe for irrigation purposes, it was to be plucked out of the Reservation holdings, and doled out to yeomen settler/farmers. Said yeomen farmers were to pay the constitutionally required "just compensation" for the taking, out of which both the value of the land, and the cost of reclamation (development) was to be recovered by the United States, with the "remainder" to inure to the benefit of "said Indians." While this plan offered some benefit to the Tribes – their allotments would receive water from a U.S. Government-built and maintained irrigation system, and any extra income generated by settler payments might one day be spent "for their benefit." - this boon, would be tempered by the likely loss of more than half of their irrigable land; a bittersweet "benefit" at best.

The Tribes are all too familiar with the 'disestablishment effect' your letter characterizes the 1904 Act as having, but that statute did not, by itself, or in combination with the 1902 Reclamation Act, terminate, disestablish, or even diminish the CRIT Reservation. Reading the 1904 Act in that way ignores both the text of the Act itself, and the relationship CRIT has maintained with the United States throughout the century since that Act was passed. Such a reading also conflicts with United States Supreme Court and other federal court precedent. Again, a century ago, westward expansion and massive takings of Reservation lands in the name of economic development and progress were deemed societal goods which, in some cases, outweighed their costs. The Tribes do not believe we overstate the matter when we say that today, in light of all that has transpired over the intervening decades, these values have changed, and that the Governor's Office will be hard-pressed to justify reliance upon the 1904 Act to

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support a reassertion of takings envisioned by, and authorized therein, but which never actually occurred.

Although initially the allotment program was managed on a national scale under the General Allotment Act of 1887, by the turn of the century Congress handled the surplus land question on a reservation-by-reservation basis. *See Solem v. Bartlett*, 465 U.S. 463, 467 (1984). The 1904 Act is precisely such a statute, the relevant portion providing:

> [T]he Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and dispose of any lands in [the Reservation] which may be irrigable by such works in like manner as though the same were a part of the public domain: *Provided*, That there shall be reserved for and allotted to each of the Indians belonging on the [Reservation] five acres of the irrigable lands. The remainder of the lands irrigable in [the Reservation] shall be disposed of to settlers under the provisions of the reclamation Act.
>
> 33 Stat. 224.

Nowhere in the 1904 Act does Congress declare that any CRIT lands lost reservation status or were otherwise divested of Indian interests. In 1911, the 1904 Act was amended in order to double the size of the Indian allotments to ten acres, but again, no changes were made that illustrated an intent by Congress to disestablish or diminish the Reservation. 36 Stat. 1063. The absence of such language is important because although some in Congress may have anticipated the dissolution of Reservations at some future point, the Supreme Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act." *Solem*, 465 U.S. at 468-69.

Diminishment of a reservation is never "lightly inferred." *Id.* at 470. Once a reservation is created "no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress *explicitly* indicates otherwise." *Id.* (emphasis added); *see generally County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992)(adhering to basic canon of statutory construction that laws are to be construed liberally in favor of Indian tribes). Hence, a 1908 statute authorizing and directing the Secretary of the Interior "to sell and dispose" of portions of the Cheyenne River and Standing Rock Indian Reservations did nothing to diminish the reservations or change their boundaries. *Solem*, 465 U.S. at 472-73. Similarly, a 1906 statute providing for Indian allotments and the settlement and entry, under the homestead laws, of the surplus lands that remained lent "no support" to the argument that the Colville Reservation was terminated. *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 354-55 (1962). Again, an 1892 statute opening "all" of the lands of the Klamath River Indian Reservation to "settlement, entry, and purchase" by non-Indians under the homestead laws did not "even suggest that Congress intended thereby to terminate" that reservation. *Mattz v. Arnett*, 412 U.S. 481, 494-97 (1973). These statutes certainly opened the way for non-Indian settlers to own land within Indian reservations, but that is all they did, and nothing more. *See Id.* at 497.

Furthermore, unless otherwise provided by Congress, the allotments under these surplus land statutes were to be administered under the provisions of the General Allotment Act of 1887,

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25 U.S.C. § 335, the policy of which was to continue the reservation system while allotments remained in trust for a period of at least twenty-five years. *Mattz*, 412 U.S. at 496; 25 U.S.C. § 348. Hence, only after the trust period expired could a reservation have been disestablished. *Mattz*, 412 U.S. at 496. In 1934, however, Congress enacted the Indian Reorganization Act, which repudiated the allotment policy altogether and mandated that allotments would continue to be held in trust until Congress provided otherwise. 25 U.S.C. § 462. Approximately 841 allotments, accounting for 8,410 acres, existed on the Colorado River Indian Reservation at that time (1934), and each of these were to remain in trust indefinitely. *See Allotment Information for Western BIA Region* (Indian Land Tenure Foundation), http://www.indianlandtenure.org/ILTFallotment/specinfo/sd%20Western .pdf. (Accessed 2/05/2009) To date, Congress has not provided otherwise and allotments continue to be held in trust on the Reservation; none of these allotments have ever been alienated to non-Indians.[1] *Id.*

The twin issues of disestablishment and diminishment on the Reservation have, in fact, previously been litigated in federal court. In *Colorado River Indian Tribes v. Town of Parker*, 705 F.Supp 473 (D. Ariz. 1989), the Town of Parker, which is located entirely within the exterior boundaries of the Reservation, asserted that it could enforce its building code on tribally owned lots because the town had been disestablished from the Reservation pursuant to an act of Congress. The Act of April 30, 1908, 35 Stat. 70, 77, provided in relevant part that the Secretary of the Interior was authorized "to reserve and set apart lands for townsite purposes in the . . . Reservation, in California and Arizona, and to survey, plat, and sell the tracts so set apart in such manner as he may prescribe." *Id.* at 474-75. The court, relying almost exclusively on the *Solem*, *Mattz*, and *Seymour* line of cases and their progeny, held that the Town of Parker had not been disestablished from the Reservation, further stating that the tribally owned lots "are, and *always have been* part of the . . . Reservation and that, said lots, are Indian country." *Id.* at 480 (emphasis added). Of particular note, the Town of Parker had argued that the 1904 Act supported disestablishment, but the court flatly rejected this by stating that the statute "fail[ed] to disclose a clear congressional intent to diminish the CRIT reservation" and was not "helpful to Parker's position." *Id.* at 476. Considering this holding that a 1908 statute did not disestablish a portion of the Reservation and that certain tracts of land were *always* part of the Reservation, it is a non sequitur to then conclude that a *prior* law, the 1904 Act, actually terminated the Reservation. Indeed, it is an especially difficult assertion to support when the court flatly rejected the Town of Parker's claim that the 1904 Act supported its disestablishment argument.

2. THE 1964 ACT DID NOT "RESTORE" THE RESERVATION

The position taken in your letter mischaracterizes the 1964 Act by imputing meaning that does not exist, overlooking text that does exist, and ignoring prior legislation that the 1964 Act responded to. For example, you state that the 1964 Act "restored the unsold and unallotted land in Arizona to the reservation" but that "unallotted lands in California would be restored only 'when and if determined to be within the [R]eservation.'" In fact, neither the word "restore," nor the concept of restoration, is found anywhere in the 1964 Act. The underlying reason for this absence is simply that the Reservation had never been disestablished to begin with, so there was

[1] The decline in the number of allotments between 1935 and 1986 is attributable to both: (1) individuals exchanging their allotments with the Tribes for land assignments; and (2) the repurchase of allotments by CRIT.

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no need for a subsequent restoration; the second, more overt reason for its absence is that the sole purpose of the 1964 Act was to fix "beneficial ownership" of Reservation lands with the Tribes. Also, as explored more fully below, you misapply the phrase "when and if determined to be within the [R]eservation" to *all* of CRIT's land in California.

The concept of "restoration" *does* appear in the record, as cited above, in the Departmental Order issued by Secretary of the Interior Harold Ickes, published in the Federal Register on March 8, 1937. That Order confirms the character and intent of the 1904 Act as previously described herein, and states in pertinent part:

> Whereas, no reclamation project was undertaken on the Colorado River Reservation under the Reclamation Act of June 17, 1902 (32 Stat. 388), authorized by section 25 of the Act of April 21, 1904, supra, and no part of the lands of said reservation (except a small area in the townsite of Parker), has been opened to settlement and sale or other form of disposition under any of the public land laws of the United States, and such lands have always been regarded as constituting a part of the Colorado River Reservation, . . .
>
> Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the Act of June 18, 1934 (48 Stats. 984), I hereby find that restoration to undoubted tribal ownership of all undisposed of lands within the Colorado River Indian Reservation, including any vacant townsite lots within said reservation, will be in the public interest, and the said lands are hereby restored to such tribal ownership and are added to and made a part of the existing Colorado River Indian Reservation, subject to any valid existing rights, for the use and benefit of the Indians of that reservation and such other Indians as may be entitled to rights thereon.
> (*Colorado River Indian Reservation, Arizona and California, Order of Restoration*, Part IV, Executive and Departmental Orders Federal Register, Vol. 2 – 1937; published March 8, 1937, p. 1402)

You will note that this Order was issued some twenty-seven years prior to the 1964 Act. Secretary Ickes sought to confirm by this Order that the intentions of the Department of the Interior, and presumably those of the Federal Government at large, had changed regarding the "open" status of reclamation projects and subsequent land divestment on the Colorado River Indian Reservation. By 1937, the United States had had fifty years to consider the effectiveness and wisdom of the General Allotment Act of 1887, and efforts were already underway to undo some of the damage. The Secretary apparently also sought to fix "beneficial" ownership status in the Tribes, however, as discussed below, he was not entirely successful, and it was in the 1964 Act that Congress finally confirmed and codified the Tribes' beneficial ownership status in all of its Reservation lands.

Beneficial ownership was at issue due to the language used by Congress when it created the Reservation. To explain, the Act of March 3, 1865 (13 Stat. 559) stated that the Reservation was established for the "Indians of said [Colorado] River and its tributaries," making it unclear whether there was an open-ended offer to any Indian along the Colorado River to settle there, or

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whether the Indians already settled on the Reservation were the exclusive owners.[2] S. Rep. No. 88-585, at 2 (1963); *Hearing on H.R. 8027 Before the Subcommittee on Indian Affairs,* 88th Cong. 9 (Feb. 6, 1964)(statement of Morris Udall, U.S. Representative and author of H.R. 8027, a companion bill to S. 2111). Until this question was resolved, only the Secretary of the Interior, not CRIT, could lease Reservation lands. Act of August 9, 1955, 69 Stat. 539; Act of June 11, 1960, 74 Stat. 199 ("1960 Act"); Act of September 5, 1962, 78 Stat. 428 ("1962 Act"). The 1964 Act was passed for the sole purpose of answering the ownership question in favor of the Tribes, thereby amending the 1960 Act to allow CRIT, not the Secretary of the Interior, to lease its land in Arizona and California. 78 Stat. 188-89.

The 1960 and 1962 Acts provide additional evidence of the Reservation's existence, and dispel assertions that it had been terminated in 1904. For example, the 1960 Act states:

> That, until a determination has been made of the beneficial ownership of the lands on the Colorado River Indian Reservation, Arizona and California, that were set apart by the United States for the Indians of the Colorado River and its tributaries, the Secretary of the Interior is authorized to lease any unassigned lands on the [R]eservation which are located within Arizona. . . . Income received from such leases of unassigned lands may be expended or advanced by the Secretary for the benefit of the Colorado River Indian [T]ribes and their members.

Here, notwithstanding the question of beneficial ownership, Congress clearly recognized the Reservation's existence (as well as its existence in both "Arizona and California"). Thus, the argument that the reservation was terminated at the same time that Congress was authorizing the Secretary of the Interior to lease land on that reservation for the benefit of the Tribes and their members residing thereon, strains logic. The 1962 Act contained language nearly identical to that found in the 1960 Act, but it also authorized the leasing of certain lands in California.[3] Again, the 1964 Act was a direct response to these special leasing statutes which recognized the Reservation's existence but left open the question of beneficial ownership; and for all the reasons stated above, the assertion that the 1964 Act somehow "restored" the Reservation is simply unfounded in either the legislative history or the law.

3. THE RESERVATION EXTENDS INTO CALIFORNIA

You also stated:

> As you know, the boundaries of CRIT Reservation lands in California, if any, have not been resolved and are still subject to dispute. Consequently, the pre-condition in the 1964 Act to restoration of any California lands has not been satisfied. Thus, it appears that any CRIT California reservation lands, which were terminated in 1904, have not been restored.

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[2] This question alone recognizes the existence of the Reservation, even if beneficial ownership was at issue. Nothing in the 1964 Act's legislative history indicates a dispute about whether the Reservation existed. In fact, even a cursory review of the history reveals that the Reservation's actual existence was, if anything, simply taken for granted. S. Rep. No. 88-585 (1963); H.R. Rep. No. 88-1304 (1964); Hearing on H.R. 8027 Before the Subcommittee on Indian Affairs, 88th Cong. (Feb. 6, 1964); 109 Cong. Rec. 20,072-73 (1963).

[3] In CRIT's letter to you dated June 4, 2008, these lands in California were referred to as the "Northwest Corner Lands."

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Having addressed the "termination" and "restoration" issues above, the Tribes respond, again, to the assertion that the Reservation does not extend into California and to the assertion that a genuine dispute over this fact still exists. In our letter to you dated June 4, 2008, the Tribes covered this issue in detail, so here, pursuant to your limited request, the Tribes focus primarily on the 1960, 1962, and 1964 Acts.

To recap, the 1960 Act provided that the Secretary was authorized to lease land on the Reservation, but only in Arizona. The 1962 Act authorized the Secretary to lease land on the Reservation in Arizona *and* California, but not land positioned "south of Section 25 of Township 2 South, Range 23 East, San Bernardino Base and Meridian, California." [For ease of reference, this land is the portion of the Reservation that lies along the California side of the Colorado River, comprises approximately the lower one-half of the length of the Reservation border in California, and forms what is commonly referred to as the "Western Boundary."] At that time, the status of the land described above - and *only* that land - was disputed, and Congress chose not to resolve the issue by way of the 1962 Act.

South of Section 25 of Township 2 South, Range 23 East, the question at the heart of the boundary dispute involves the interpretation of the 'call' of the boundary along the lower section of the Reservation on the California side of the Colorado River. The Executive Order of May 15, 1876 in which the call was stated uses the description: [From "the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; . . ." In 1876, when the call of the Reservation boundary was drafted, the common understanding and usage of the term "bank" when employed as a call in legal boundary descriptions indicated the permanent high-water mark. It is this interpretation of the call that the Tribes assert is the correct one - relying on boundary surveys conducted by the United States at the time the Reservation was created, and which have been confirmed by resurvey numerous times since - fixing the boundary at the permanent high-water mark. However, in modern usage, a call to the "bank" of a river is often employed, or interpreted, to indicate the water's edge. The difference between these interpretations is the difference between those bottomlands that lie along the river's edge, within California, being included or excluded from the Reservation. This is not, as you are aware, an inconsiderable amount of land, comprising lowlands along some 25 miles of the River/Reservation Boundary. It was the uncertain status of only this land that caused the U.S. Supreme Court in *Arizona v. California*, 376 U.S. 340 (1964) to hold in abeyance a final determination of the amount of Colorado River water the Tribes would be entitled to, until the disputed boundaries were finally determined. If these bottomlands were included in the Reservation, the Tribes were likely entitled to additional water, if they were excluded, the entitlements would stand as then determined. The Tribes thereafter entered into a settlement agreement pursuant to which it accepted a fixed entitlement of water, without adjudication of the boundary issue. (See attached copy, *Arizona v. California*, 530 U.S. 392 (2000), at pg. 4 for discussion of litigation history, at pg. 17 for discussion of settlement adopted.) Thus, since 1964, the Tribes have borne the burden of rebuffing challengers to its beneficial ownership of these lands, each of whom cites the phrase "when and if determined to be within the [R]eservation" as evidence of their wearisome claims.

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Congress expressly authorized the Secretary of the Interior to lease lands in California that were *not* disputed, however. Those lands form the northwestern part of the Reservation and are unambiguously contained within the boundary permanently marked by two California mountaintops. Two years later, Congress declared CRIT to be the beneficial owner of Reservation lands in Arizona *and* California, and so, from that point forward it could lease the same land in Arizona *and* California that the Secretary of the Interior was authorized to lease under the 1962 Act. Again, Congress chose not to resolve the dispute over certain California lands, but CRIT was expressly authorized by Congress to lease its northern California lands. Furthermore, the Reservation was defined by the 1964 Act as follows:

> "Colorado River Reservation" means the reservation for Indian use established by the Act of March 3, 1865 (13 Stat. 559), as modified and further defined by Executive Orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915, *all of which area shall be deemed to constitute said [R]eservation.* (emphasis added).

As described previously here, and in CRIT's letter dated June 4, 2008, the above-cited Executive Orders placed the Reservation's northwest and northeast boundaries in California and atop permanent mountains. Congress, through the 1964 Act, recognized that these boundaries were unambiguous and indisputable; thus, again, CRIT was expressly authorized to lease these lands in California. Your letter makes a sweeping assertion about *all* of CRIT's land in California that fails to acknowledge the express language of the 1964 Act. Unfortunately, your letter *does* acknowledge the often – and often intentionally - misquoted phrase in the 1964 Act: "when and if determined to be within the [R]eservation." Whether carelessly cited as a standalone provision, or purposely misquoted by those who would deprive the Tribes of their lands for personal gain, as a matter of law and fact, the provision clearly refers to the California lands "south of section 25 of township 2 south, range 23 east, San Bernardino base and meridian," not the California lands *north* of this area. As you are aware, Congress has plenary power over Indian affairs, U.S. Const. Art. I, § 8, cl. 3; *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (plenary power of Congress over Indian affairs drawn from U.S. Constitution), and in this instance Congress has clearly spoken. Hence, despite claims to the contrary by residents, departments, organizations, or individuals in your State or elsewhere, since 1876, no genuine dispute has existed, nor can a cognizable claim be raised or supported, over whether the Reservation extends into California in the area bounded by permanent mountaintops.[4] This was not settled by the 1964 Act, but merely confirmed.

Finally, the Supreme Court awarded water rights to CRIT for the land it *indisputably* owned in California. *Arizona v. California*, 376 U.S. 340, 345 (1964) (CRIT received a maximum of 717,148 acre-feet of water for its lands, *including in California*, and the Court set priority dates for lands reserved by the 1874 Executive Order of November 16, 1874, except as later modified, and lands reserved by the 1876 Executive Order of May 15, 1876); *Arizona v. California*, 439 U.S. 419, 428 (1979) (slightly expanded CRIT's water rights and specified how many acre-feet of water was awarded pursuant to each Executive Order, totaling over 54,000

[4] As described in CRIT's letter dated June 4, 2008, the Tribal government and the Federal government regard the dispute over the southwestern boundary in California as having been resolved by the Secretary of the Interior's 1969 Order.

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acre-feet for CRIT's land in California). Clearly, the Supreme Court would not have awarded water rights to CRIT for its California lands if it believed the Reservation did not legally extend into California, and neither would it have set the priority dates when it did if the Reservation had only recently been restored.

4. CONCLUSION

Contrary to the assertion stated in your letter, the 1904 Act did not terminate, or disestablish, the Reservation. Neither did that Act diminish the Reservation. These facts are established by the plain text of the 1904 Act, by examination of the purpose of the Reclamation Act of 1902, by the subsequent actions of Congress and the Secretary of the Interior recognizing the continuity and vitality of the Reservation, and by clear United States Supreme Court precedent. Furthermore, as noted in *Colorado River Indian Tribes v. Town of Parker*, a federal District Court concluded that the Reservation was not disestablished by the 1904 Act, or a 1908 statute similar in purpose to the 1904 Act, finding that the tracts of land within Parker townsite had always been part of the Reservation. *See* Act of April 30, 1908, ch.153, 35 Stat. 70. As a result, the suggestion that the 1964 Act served to "restore" the Reservation is neither logical nor grounded in the plain statutory language.

The Tribes also do not agree with your analysis that the 1904 act had any effect on CRIT lands within California, or that the fixed boundary between Black Mountain, in Arizona, across the Colorado River to Monument Peak in California, to Riverside Mountain in California, to the west bank of the Colorado River in California, is in dispute, or that it reasonably could be disputed. The boundary simply *is* in California. Congress has expressly rejected the claim that the Reservation does not extend into California, reiterating its existence there in every enactment since its boundaries were clarified in 1876. Such claims frequently arouse the concern of Legislators and other State officers, both in California and Arizona, prompting them to demand that the Tribes answer these same questions with grim regularity. As for that, it is a tried and true strategy to curry temporary support for the proponent who has some interest in either forestalling a legal action being pursued by the Tribes, or delaying fulfillment of a legal obligation due the Tribes. As for a valid, honest, or legally sufficient strategy, based as it is on misleading citations and negligent or willful misinterpretations of fact and law, it is a tired, and untrue one.

Thank you, Ms. Hoch, for providing the Tribes with the opportunity to respond to your questions. These are neither unfamiliar questions, nor, as you have just seen, do they raise legal issues or factual challenges which are especially difficult to address, and to dispel. They are, however, a recurring source of concern for the Tribes. When an Officer of your stature, from a State as important to the Tribes enterprises as California is, expresses doubt as to the very existence of the Reservation – even if only to test the validity of arguments raised by third parties, as appears to be the case here – the Tribes are compelled to expend resources to respond with appropriate vigor. While this is a "cost of doing business," it is a cost that goes much deeper than the hours it has taken to prepare this memorandum. Each round of inquiries that receives the attention – even passing attention – of State or Federal officials becomes fuel for further delay and legal costs related to the exercise or enforcement of the Tribes leasing rights, and other endeavors or enterprises. We therefore urge your Office to refrain from, and reject with like vigor, any repetition of the factually incorrect, legally insupportable assertions as expressed in your letter of September 12, 2008. Your comments or questions are welcome, and may be

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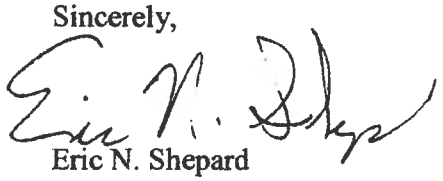
addressed to Tribes' Office of the Attorney General, or you may reach the Office of the Attorney General by phone at: (928) 669-1271.

Sincerely,



Eric N. Shepard
Attorney General,
Colorado River Indian Tribes.

Enclosures: *Arizona v. California*, 530 U.S. 392 (2000)
Colorado River Indian Tribes v. Town of Parker, 705 F. Supp. 473 (1989)
Colorado River Indian Reservation, Arizona and California, Order of Restoration, Part IV, Executive and Departmental Orders, Published in the Federal Register, Vol. 2, March 8, 1937

CC: Eldred Enas
Tribal Council Chairman
Colorado River Indian Tribes

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C

United States District Court, D. Arizona.
COLORADO RIVER INDIAN TRIBES, an Indian Tribe, Plaintiff,
v.
TOWN OF PARKER, a Municipal Corporation, et al., Defendants.
No. CIV-83-2359-PHX-R6S.

Jan. 17, 1989.

Indian tribes challenged legal authority of town to regulate building activities on lands within town that were owned by tribes and held in trust for them by the United States. On tribes' motion for summary judgment, the District Court, Strand, J., held that town was not disestablished from reservation.

Motion granted.

West Headnotes

Zoning and Planning 414 ⚿236.1

414 Zoning and Planning
414V Construction, Operation and Effect
414V(A) In General
414k236 Application to Persons or Places
414k236.1 k. In General. Most Cited Cases
(Formerly 209k32(10))
Town did not have authority under state law to enforce its building code laws on lands located within town but owned by Indian tribes and held in trust for tribes by United States; congressional intent, subsequent events, and pragmatic factors failed to show that tribally owned lands were disestablished from reservation. Act April 30, 1908, 35 Stat. 70.

***473** Russell Barsh, Alletta D'a Belin, Santa Fe, N.M., for plaintiff.
John B. Weldon, Jr., Stephen E. Crofton, Jennings, Strouss & Salmon, Phoenix, Ariz., and Gerald W. Hunt, Hunt, Stanley, Hossler & Moore, Yuma, Ariz., for defendants.
William White, Washington, D.C., James Loss, Phoenix, Ariz., for amicus curiae U.S.

ORDER

STRAND, District Judge.

I. INTRODUCTION

In this action, plaintiff Colorado River Indian Tribes ("CRIT" or the "Tribes") challenges the legal authority of the Town of Parker ("Parker") to regulate building activities on lands within the town that are owned by the Tribes and held in trust for them by the United States. Parker asserts that it possesses authority under state law to enforce its building laws on these lands because Parker was disestablished from the CRIT reservation in 1908 by a congressional act. *See* Act of April 30, 1908, ch. 153, 35 Stat. 70, 77 ("Act") (CRIT Ex. 8). This Act, among other things, enabled "the Secretary of the Interior to reserve and set apart lands for townsite purposes in the Yuma Indian Reservation, California and, the Colorado River Indian Reservation in California and Arizona...." *Id.*

II. TRIBES' MOTION FOR SUMMARY JUDGMENT

Presently before the court is the Tribes' motion for summary judgment, Parker's opposition thereto, plaintiffs' reply, and the United States Government's amicus curiae memorandum. Virtually all of the evidence submitted by the parties consists of undisputed historical documents. In a situation where the facts are not disputed, as here, the case is well suited for summary judgment.

III. ISSUE PRESENTED

The issue raised in this litigation and now before the court is whether the town of Parker has the authority under state law to enforce its building code laws on lands owned by the Tribes and held in trust for them by the United States.

IV. ANALYSIS

The CRIT reservation was created by a congressional act of March 3, 1865, and ***474** modified and further defined by executive orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915 (CRIT Exs. 1-3). At the turn of the century, Congress passed a series of surplus land acts to force the Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement. *Solem v. Bartlett*, 465 U.S. 463, 466-67, 104 S.Ct. 1161, 1164, 79 L.Ed.2d 443 (1984).[FN1] It is settled law that some land acts diminished reservations, and other land acts did not. *Id.* 465 U.S. at 469, 104 S.Ct. at 1165. The effect of any given act depends on the language of the act and the circumstances underlying its passage. *Id.* "The first and governing principle" in a courts analysis of this issue is that "only Congress can divest a reservation of its land and diminish its boundaries." *Id.* at 470, 104 S.Ct. at 1166; *Mattz v. Arnett*, 412 U.S. 481, 505 & n. 23, 93 S.Ct. 2245, 2258 & n. 23, 37 L.Ed.2d 92 (1973); *United States v. Grey Bear*, 828 F.2d 1286, 1289 (8th Cir.), *reh. denied*, 836 F.2d 1086 (1987), *reh. granted, vacated in part*, 836 F.2d 1088 (1987) (citations omitted).[FN2]

> FN1. The surplus land acts were the result of a view that Indians should be assimilated into American society and an increasing demand for new lands in the western part of the country. *Solem*, 465 U.S. at 466, 104 S.Ct. at 1164. The surplus land acts anticipated the imminent demise of the Indian reservation system, however, the Supreme Court has determined that it is unwilling "to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act." *Id.* at 469, 104 S.Ct. at 1165.

> FN2. The opinion was vacated only with respect to the issue of prejudicial misjoinder under F.R.Crim.P. 8(b). *Grey Bear*, 836 F.2d at 1088.

There is a strong presumption that reservation lands and boundaries remain in tact. *See Solem*, 465 U.S. at 470, 104 S.Ct. at 1166; *DeCoteau v. District County Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092, 43 L.Ed.2d 300 (1975); *Grey Bear*, 828 F.2d at 1289. Before the disestablishment or diminishment of reservation boundaries will be found, a clear congressional intent to do so must be established. *Solem*, 465 U.S. at 470, 104 S.Ct. at 1166; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 97 S.Ct. 1361, 1362, 51 L.Ed.2d 660 (1977); *Grey Bear*, 828 F.2d at 1289. Further, disestablishment will not be lightly inferred. *Solem*, 465 U.S. at 470, 104 S.Ct. at 1166.

The primary factors a court must consider to determine congressional intent with respect to this issue are: (1) the statutory language of the 1908 Act; (2) the events surrounding its passage; (3) the subsequent treatment of the land after the passage of the Act, including pragmatic factors which would indicate the de facto diminishment of the reservation. *Solem*, 465 U.S. at 470-72, 104 S.Ct. at 1166-67; *Rosebud*, 430 U.S. at 587, 97 S.Ct. at 1363; *Mattz*, 412 U.S. at 505 & n. 25, 93 S.Ct. at 2258 & n. 25; *Grey Bear*, 828 F.2d at 1289. The court will consider each of these factors in turn.

A. Statutory Language

The language of the Act ordinarily is the most probative evidence of congressional intent. *Solem*, 465 U.S. at 470, 104 S.Ct. at 1166. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation its land. *Id.* When such language is buttressed by an unconditional commitment from Congress to compensate the Indian tribe a sum certain for its opened land, there is an almost insurmountable presumption that Congress meant for the tribe's reservation to be diminished. *Id.* In the present case, the statutory language used in the 1908 Act provides in relevant part as follows:

there is also appropriated out of any money in the Treasury not otherwise appropriated, the further sum of five thousand dollars, or so much thereof as may be necessary, to enable the Secretary of the Interior to reserve and set apart lands for townsite purposes in the Yuma Indian Reservation, California, and the Colorado River Indian Reservation, in California and Arizona, and to survey, plat, and sell the tracts so set apart in ***475** such manner as he may prescribe, the net proceeds to be deposited in the Treasury of the United States to the credit of the Indians of the reservations, respectively, to be reimbursed out of the funds arising from the sale of the lands.

Act of April 30, 1908, ch. 153, 35 Stat. 70, 77 (CRIT Ex. 8).

Upon its face, the Act does not express an intent to diminish the CRIT Reservation. There is no explicit declaration that the reservation or any part thereof was terminated or ceded. Indeed, the provisions of the instant Act stand in sharp contrast to the explicit language of cession employed in the Lake Traverse and 1904 Rosebud Acts discussed in the Supreme Court's *DeCoteau* and *Rosebud Sioux Tribe* opinions. *Solem*, 465 U.S. at 469 n. 10, 473, 104 S.Ct. at 1165 n. 10, 1167. The Act, rather than reciting an Indian agreement to "cede, sell, relinquish and convey" the opened lands, simply authorizes the Secretary to reserve and set apart lands on two Indian reservations unspecified as to size and location for townsite purposes, to sell the tracts, and to create Indian accounts for the proceeds.[FN3]

> FN3. The 1908 Act is a unilateral statute enacted by Congress similar to the statute in *United States v. Celestine*, 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909) which the Supreme Court held had not terminated reservation status. The statute did not expressly vacate the reservation and restore the land to the public domain as required by the Supreme Court in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). In addition, the statute was not the ratification of a bilateral agreement between the Indians and the United States as in *Rosebud Sioux Tribe*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660.

Furthermore, there is no unconditional commitment to compensate the Indians a sum certain for their opened lands. *Solem*, 465 U.S. at 470-71, 104 S.Ct. at 1166; *DeCoteau*, 420 U.S. at 441, 95 S.Ct. at 1091; *Grey Bear*, 828 F.2d at 1290; *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087, 1092 (10th Cir.1985), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). Where, as here, the compensation for the land unspecified in size and location is not set at any fixed price and the Tribes are guaranteed reimbursement only for the lands actually disposed of by the government, no unconditional commitment by Congress to pay the tribes a sum certain exists. *See Solem*, 465 U.S. at 473, 104 S.Ct. at 1167; *Grey Bear*, 828 F.2d at 1290.

While the court has not found a disestablishment case which interprets language identical to the instant Act's language, courts interpreting similar acts which also include a townsite provision have not found disestablishment from the reservations. *See Confederated Salish & Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir.)*cert. denied*, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982);[FN4] *United States ex rel. Condon v. Erickson*, 478 F.2d 684, 689 (8th Cir.1973). Additionally, the Supreme Court when faced with interpreting similar language, albeit not language creating a township, has concluded that such language "did no more than to open the way for non-Indian settlers to own land on the reservation in a manner which the federal government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of wards." *Solem*, 465 U.S. at 473, 104 S.Ct. 1167 (quoting *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356, 82 S.Ct. 424, 427, 7 L.Ed.2d 346 (1962)).

> FN4. *See also Confederated Salish & Kootenai Tribes v. Namen*, 380 F.Supp. 452, 464 (D.Mont.1974); *Security State Bank v. Pierre*, 162 Mont. 298, 511 P.2d 325, 329 (1973).

Based upon the court's interpretation of the statutory language of the Act, the court concludes that there was no clear expression of congressional intent to disestablish the town of Parker from the reservation.

B. Events Surrounding the Passage of the Act

Explicit language of cession and unconditional compensation are not the only method in determining a finding of diminishment of an Indian reservation, as a court may examine the events surrounding the passage of a surplus lands act. *Solem*, 465 U.S. at 470, 104 S.Ct. at 1166 (citing ***476***Rosebud Sioux Tribe*, 430 U.S. 584, 97 S.Ct. 1361). In the instant case, there is little in the way of legislative history by which congressional intent may be interpreted. Unlike *Rosebud Sioux Tribe* or *DeCoteau*, there were no comments on negotiations or agreements with the Indian tribes to set aside or cede the Parker townsite nor language indicating an intent to disestablish

Parker from the reservation. In addition, even when surrounding legislative history has referred to reservations as "reduced" or "diminished" that has been held to be, without more, inconclusive of congressional intent. *Solem*, 465 U.S. at 478, 104 S.Ct. at 1170.

When events surrounding the passage of a surplus land act-particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports presented to Congress-unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, it may be inferred that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest that the reservation boundaries remained unchanged. *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166.

Based upon the materials submitted and reviewed by the court, the circumstances surrounding the passage of the 1908 Act fail to establish a clear congressional purpose to disestablish the Parker townsite from the CRIT Reservation. As stated, there were no negotiations, agreements or treaties with the Tribes concerning a cession of their lands to the federal government. The 1908 Act, in contrast to the Lake Traverse Act and 1904 Rosebud Act, did not begin with an agreement between the United States and the Indian tribes, in which the Indians agreed to cede a portion of their territory to the federal government. *See Solem*, 465 U.S. at 476, 104 S.Ct. at 1169.

The few surrounding circumstances that are available for study and analysis fail to disclose a clear congressional intent to diminish the CRIT reservation. Neither the earlier acts, including the 1904 Act,[FN5] nor the origins of the bill are helpful to Parker's position that the 1908 Act disestablished the town of Parker from the CRIT reservation. The proposed draft of the bill introduced by the Secretary of the Interior James R. Garfield in November, 1907 concerned itself with allotment of the lands, sale of lands for townsite purposes, and reserving lands for school and administrative purposes. *See* House Document 43, 60th Cong., 1st Sess. (1908); Senate Report 278, 60th Cong., 1st Sess. (1908) (Lawrence C. Kelly, Parker Arizona, An Analysis of Its Origin, Its Relation to the Colorado Indian Reservation, and Its History, Ex. 12 (December, 1987) ("Kelly Report")). This draft legislation and the accompanying descriptive letter to the Speaker of the House of Representatives is not helpful to Parker's position as many of the proposals were left out of the eventual Act and the suggestion for a townsite is not discussed in detail. *See* Kelly Report, at 14.

> FN5. This act dealt with the reclamation and irrigation of allotted lands on the reservation and the opening of the remainder of the reservation to non-Indian settlers. Act of April 21, 1904, 33 Stat. 224, sec. 25 (1904) (CRIT Ex. 4).

Similarly, the administrative correspondence, primarily the letters of Superintendent Atkinson written to the Commissioner of Indian Affairs between November, 1903 and December 1907, which often mentioned the creation of a townsite on the reservation; a hope to keep the townsite dry; the impact of the railroad on the land; the need for a new school and irrigation facilities; and the benefits a townsite would create for the Indians, do not assist in the effort to determine congressional intent (Parker Exs. 5-9). Furthermore, the Department of the Interior's October, 1907 letter to the Superintendent providing, in part, that in the absence of information demonstrating that "it would be to the advantage of the Indians to establish a townsite at this time, the Office does not believe that such legislation should be urged" does not help divine a clear congressional intent, but does *477 demonstrate a concern for the welfare of the Indians (Parker Ex. 9).[FN6]

> FN6. The fact that there was a demonstrated concern about the welfare of the Tribes, the discussions about reserving land for Indian schools and keeping the townsite dry indicate that the townsite would remain an important part of the Indian reservation. This suggests that the areas opened up to non-Indian settlers would remain part of the reservation. *See Solem*, 465 U.S. at 474, 104 S.Ct. at 1168. Although the school provision was deleted from the 1908 Act, the Secretary of Interior issued an Order of February 10, 1911, modifying the 1908 Act that set aside land for the creation of Parker, which sets aside certain lots in Parker for school and administrative purposes. CRIT Ex. 42,

at 171-73 (Deposition of Lawrence Kelly, Ex. 6).

The events surrounding the passage of the 1908 Act fail to establish that Congress understood itself to be relinquishing all interest in the lands. In the absence of some clear statement of congressional intent or a contemporaneous understanding that the CRIT reservation would be diminished by the Act, the strong presumption favoring retention of reservation status cannot be overcome. *Solem*, 465 U.S. at 472, 104 S.Ct. at 1167; *Grey Bear*, 828 F.2d at 1290-91.

C. Subsequent Treatment of the Land

Events that occurred after the passage of a surplus land act have been looked at to decipher congressional intent. *Id.* 465 U.S. at 471, 104 S.Ct. at 1166. However, these subsequent events have secondary importance.[FN7] Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs ("BIA") and local judicial authorities dealt with unallotted open lands. *Id.* The court has also recognized that pragmatic factors may be relevant in interpreting a surplus land act. *Id.*

FN7. "Although subsequent legislation usually is not entitled to much weight in construing earlier statutes, it is not always without significance." *Mattz*, 412 U.S. at 505 n. 25, 93 S.Ct. at 2258 n. 25 (citations omitted).

The question of the legal status of the town of Parker was hotly debated in the years following its creation in 1908. The subsequent treatment of the CRIT reservation by Congress, the Executive branch, and the courts is inconsistent and shows disagreement and confusion on the issue rather than a widely held understanding or treatment of Parker as being disestablished from the CRIT reservation. For example, examination of the Department of the Interior documents indicates disagreement between the Indian Office and the General Land Office ("GLA") as to whether Parker was Indian country. The Indian Office consistently maintained the position that Parker was Indian country on issues concerning liquor distribution, while, the GLA took a contrary position on issues relating to residence permits and traders licenses. Additionally, the opinions of the Solicitor of the Department of the Interior have been inconsistent over the years, but the majority of these opinions favor the Tribes' position that Parker remained within the boundaries of the CRIT reservation. *See* CRIT Exs. 25, 26, 28.

The February 10, 1911 Order of the First Assistant Secretary of the Interior sets aside land for school and agency purposes. CRIT Ex. 42 (Deposition of Lawrence Kelly, Ex. 6). The 1911 Order modified the June 10, 1908 Order that set aside the land for Parker. The 1908 Act and the 1911 Order accomplished the dual purposes of setting aside land for the town of Parker, while also setting aside land in Parker for a school and administrative purposes that were contained in Secretary Garfield's proposed bill. The 1911 Order setting aside land for a school in Parker tends to indicate that the townsite was intended to remain as a part of the Indian reservation and was not disestablished from the reservation by the 1908 Act. *See Solem*, 465 U.S. at 474, 104 S.Ct. at 1168.

Subsequent congressional legislation and reports such as the Act of 1939, [FN8]*see* Act of ***478** August 5, 1939, ch. 431, 53 Stat. 1203, and the Senate Report on the bill (CRIT Ex. 15); S.Rep 809, 76th Cong., 1st Sess. July, 1939 (CRIT Ex. 16), favors the Tribes' position as they reflect a congressional understanding that unsold lots in Parker were part of the reservation and that Parker was located within the CRIT Reservation. Similarly, the Secretary of the Interior's March 8, 1937 Order reflects the belief that Parker lands have always been considered part of the reservation and do not demonstrate an intent to diminish (CRIT Ex. 12).

FN8. In this act, Congress authorized the sale by auction of the unsold town lots within Parker but only with the consent of the Tribes' Tribal Council. It should be noted that the Supreme Court has refused to equate reservation status with Indian title, and that, therefore, the fact that title to the area in question passed to non-Indian purchasers is not determinative of the status of the land. *See Celestine*, 215 U.S. 278, 30 S.Ct. 93.

Parker has produced numerous post-1908 correspondence indicating a belief in some quarters that Parker

was a "town off the reservation" or "not in Indian country." *See Parker's Opposition,* at 24-57; *Parker's Controverting Statement of Facts,* Ex. 1 (Kelly Report). Parker contends that a Department of Interior decision which placed Parker under the heading of "Ceded Indian Reservations" evidences subsequent treatment of Parker as being disestablished. *See*38 Int. Dec. 97, 140-09 (1909) (Kelly Report Ex. 59). However, isolated phrases and references to diminishment "are hardly dispositive," *Solem,* 465 U.S. at 475, 104 S.Ct. at 1168, in light of the contrary historical evidence concluding that Parker is within Indian territory, nor are the isolated phrases sufficient to overcome the strong presumption that reservation status was left intact.

Undoubtedly, the unfamiliarity with "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership" fueled the confusion over whether Parker remained Indian country. *See id.* at 468, 104 S.Ct. at 1164. Prior to 1948, Indian lands were defined to include only lands in which an Indian held a recognized property interest. *Id.,* at 468, 104 S.Ct. at 1165 (citing *Ash Sheep Co. v. United States,* 252 U.S. 159, 40 S.Ct. 241, 64 L.Ed. 507 (1920); *Bates v. Clark,* 95 U.S. 204, 24 L.Ed. 471 (1877)). Therefore, fee land owned by a non-Indian would not be "Indian country." The fact the land was not "Indian country," fails to determine the issue of whether the land remained part of the reservation.

In 1948, Congress "uncoupled reservation status from Indian ownership" and resolved any ambiguities concerning what type of lands were "Indian country." *See Solem,* 465 U.S. at 469, 104 S.Ct. at 1165. Congress statutorily defined "Indian country" to include lands held in fee by non-Indians within the boundaries of Indian reservation. Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. sec. 1151).

After the Supreme Court's 1962 decision in *Seymour v. Superintendent of Washington State Penitentiary,* 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962) law enforcement officials from the federal government, the Tribes, Parker, state, and county, acknowledged that Parker was considered "Indian country" under *Seymour,* and agreed that Indians accused of crimes in Parker were subject to tribal and federal law, not state law. CRIT Ex. 61 (Minutes of December 17, 1963 Meeting concerning Jurisdiction of Law and Order Officials on Colorado River Reservation and the Town of Parker).

In 1964, Congress confirmed the understanding that Parker had always been part of the CRIT reservation. Pub.L. No. 88-302, sec. 2, 78 Stat. 188 (April 30, 1964). Section 2(b) of the 1964 act defines the CRIT reservation:

"Colorado River Reservation" means the reservation for Indian use established by the Act of March 3, 1965 (13 Stat. 559), as modified and further defined by Executive orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915, *all* of which area shall be deemed to constitute said reservation.

Id. (emphasis added) (CRIT Ex. 21). The 1964 act clearly did not exempt Parker from the definition of the CRIT reservation. *Id.*

In January 1978, the Congressional Research Service issued a report to the Senate Judicial Machinery Subcommittee, which was headed by Senator DeConcini of Arizona, entitled "Parker, Arizona-Indian Country or State Land?" CRIT Ex. 23. The report concluded that Parker was Indian country and is part of the Colorado River Reservation. *Id.* In April 1978, Senator*479 DeConcini of Arizona introduced a bill to the Senate (S. 2854) for the purpose of granting the State of Arizona criminal and civil jurisdiction within Parker (CRIT Ex. 24). Senator DeConcini noted that: "None of the enabling legislation establishing Parker expressed an intention that the lands sold be withdrawn from the reservation, nor did the State of Arizona assume jurisdiction over Indian reservations within its boundaries pursuant to Public Law 280." *Id.* Senator DeConcini recognized that Parker remained subject to a complicated patchwork of state, federal, and tribal jurisdiction. *Id.* A purpose of this bill was to clear up the jurisdictional and procedural confusion. S. 2854 was introduced as an amendment to 18 U.S.C. sec. 1162(a) and 28 U.S.C. sec. 1360(a), which would have added Parker to the list of areas in Indian country wherein states are conferred civil and criminal jurisdiction. *Id.* Although S. 2854 failed to pass it, along with the 1978 Report, further indicates that Congress never diminished the CRIT reservation.

On a pragmatic level, the court may consider who has actually moved upon the land in determining what

Congress intended. *Solem*, 465 U.S. at 471-72, 104 S.Ct. at 1166-67. "Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred." *Id.* at 471, 104 S.Ct. at 1166. There are limits, however, in how far a court can go to decipher Congress' intent with regard to the 1908 Act. *Id.* at 472, 104 S.Ct. at 1167. Where, as in this case, the Act and its legislative history, the events surrounding the Act's passage, and subsequent events "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," this court is bound by the "traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived...." *Id.* at 472, 104 S.Ct. at 1167. Evidence of subsequent events, including de facto considerations, can be used to corroborate more probative evidence of disestablishment. *See id.* at 471, 104 S.Ct. at 1166; *Rosebud Sioux Tribe*, 430 U.S. at 588 n. 3, 604-05, 97 S.Ct. at 1364 n. 3, 1372-73; *DeCoteau*, 420 U.S. at 428, 95 S.Ct. at 1085. Evidence of subsequent events, including de facto considerations, has never, by itself, met the strict disestablishment standard under *Solem*. This court does not interpret *Solem* as establishing a de facto diminishment analysis that can form an independent basis for determining that an Indian reservation has been diminished. At most, evidence of de facto diminishment is "one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *See id.* 465 U.S. at 473, 104 S.Ct. at 1167.

Nevertheless, a review of the de facto considerations fails to show that the lands at issue in this lawsuit-the tribally owned lands held in trust for the Tribes by the United States-have been de facto diminished.

With respect to the demographic trends, the court notes that: (1) the Tribes own approximately one-third of the lands within Parker. *Affidavit of R. Moore;* (2) the Indian population in Parker has increased from zero to 293 between 1910 and 1980, while during the same time frame, the non-Indian population in Parker has increased from 90 to 2,249; and (3) as of the 1980 census, 7,873 persons lived on the reservation as a whole of whom 1,965 are Indians.[FN9] *Plaintiff's Motion for Summary Judgment*, at 23-24; *Parker's Opposition*, at 55-56; *Plaintiff's Reply*. at 39. These figures reflect a numerical and percentage increase of Indians in Parker since 1908, as well as, an insignificant variation in the Indian versus non-Indian character of Parker as compared to the remainder of the reservation. Furthermore, there are considerably more than "a few surviving pockets of Indian allotments" found in Parker and the number of non-Indians that live on the reservation hardly show a "flooding" of non-Indians into Parker. *See* ***480***Solem*, 465 U.S. at 472 & n. 12, 104 S.Ct. at 1167 & n. 12.

> FN9. Parkers is included as part of the reservation for U.S. Census purposes.

The court notes that Parker provides governmental services within the townsite such as; electricity, water, refuse collection, telephone service, and natural gas service, to all of the lots in Parker, including the tribally owned lots. Parker also attempts to enforce its building and zoning ordinances on all the lots in Parker, including the tribally owned lots. The court also recognizes Parker's arguments that: (1) many non-Indians in Parker sincerely believe that Parker is not part of the CRIT reservation; (2) in the past, the Tribes often did not object to local law enforcement in Parker; (3) in the past, the Tribes have asked for zoning variances from Parker; (4) prior to 1978, no tribal offices were located within Parker; (5) the Tribes submitted a bid to provide refuse collection in Parker and accepted Parker's decision to hire another company.

It is undisputed that the Tribes have steadily increased their presence in numbers, lots owned, influence, and role in the law enforcement activities in Parker. The Tribes have established a tribal building code on tribal lots within Parker. *Affidavit of Steve Lamb.* Establishment of a tribal building code evidences that the Tribes have not acquiesced in allowing non-Indians to control the aesthetic character and quality of buildings in Parker. The Tribes require a payment of fees for a building permit, for review of building plans, and for inspection of the electrical, mechanical, and plumbing systems before the they give final approval to a new building. The tribal property is not subject to taxation or to assessments for sewage or other utility charges. *See* CRIT Ex. 22 (Letter from the Deputy Commissioner of Indian Affairs to Congressman Udall, dated December 16, 1964). Furthermore, members of the Tribes that live

in Parker are not subject to state income, property, privilege, or sales taxes. *See* CRIT Ex. 26 (Letter from Field Solicitor to Area Director, Phoenix Area Office, dated February 19, 1975), & Ex. 31 (Letter from the Chief Counsel Tax Division, Arizona Attorney General's Office, to Steven Bloxham, dated June 2, 1983).

A review of the events subsequent to the 1908 Act fail to show that Congress intended to diminish the CRIT reservation or that the tribally owned lots at issue have "long since lost its Indian character." *See* Solem, 465 U.S. at 471, 104 S.Ct. at 1166. In fact, subsequent events tend to confirm that the tribally owned lots within the town of Parker remain part of the CRIT reservation. A consideration of the pragmatic factors with respect to the tribally owned lots also fails to support a finding that the tribally owned lots were disestablished from the CRIT reservation.

V. Conclusion

The court concludes that the face of the 1908 Act, the legislative history, and the surrounding events do not demonstrate the necessary congressional intent to diminish the CRIT reservation. Subsequent events and pragmatic factors fail to show that the tribally owned lots were disestablished. Instead, the tribally owned lots remain what they have always been, a part of the Colorado River Indian Reservation. Since the tribally owned lots are part of the Colorado River Indian Reservation, Parker does not have the authority to impose or enforce any building or zoning ordinances with respect to this tribal property.

Based upon the foregoing,

IT IS ORDERED granting the Colorado River Indian Tribes' motion for summary judgment to the effect that the tribally owned lots in the Town of Parker now are, and always have been part of the Colorado River Indian Reservation and that, said lots, are Indian country, as that term is defined by federal law.

FURTHER ORDERED that the Town of Parker is hereby permanently enjoined from attempting to impose or enforce the provisions of Chapter Seven of the Parker Town Code, or any other laws, ordinance, rules, regulations or other requirements which seek or purport to regulate, license, or otherwise interfere with building activities occurring on the tribally owned lands ***481** held in trust by the United States within the Town of Parker.

FURTHER ORDERED that the Town of Parker is hereby permanently enjoined from preventing the provision of electrical and water utility service, or any other utility service over which the Town of Parker exercises direct or indirect control, to the tribally owned lands held in trust by the United States within the Town of Parker, to the extent that such deprivation of services is dependent solely upon compliance with Chapter Seven of the Parker Town Code or any other such law, ordinances, rules, regulations or other requirements of the Town of Parker which seek or purport to regulate, license or otherwise interfere with building activities occurring upon the tribally owned lands held in trust by the United States within the Town of Parker.

D.Ariz.,1989.
Colorado River Indian Tribes v. Town of Parker
705 F.Supp. 473

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INDIAN AFFAIRS: LAWS AND TREATIES

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PART IV
EXECUTIVE AND DEPARTMENTAL ORDERS PUBLISHED IN THE FEDERAL REGISTER
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VOLUME 2—1937
March 8, 1937

COLORADO RIVER INDIAN RESERVATION, CALIFORNIA AND ARIZONA
Order of Restoration

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Whereas, section 25 of the Act of April 21, 1904 (33 Stats. 224), as amended by section 3 of the Act of March 3, 1911 (36 Stats. 1063), provided for the reclamation and disposal of lands in the Colorado River Reservation, California and Arizona, and

Whereas, it apparently was intended that after reclamation a portion of such lands should become a pact of the public domain and made available for settlement under the public land laws, and

Whereas, no reclamation project was undertaken on the Colorado River Reservation under the reclamation Act of June 17, 1902 (32 Stat. 388), authorized by section 25 of the Act of April 21, 1904, supra, and no part of the lands of said reservation (except a small area in the townsite of Parker), has been opened to settlement and sale or other form of disposition under any of the public land laws of the United States, and such lands have always been regarded as constituting a part of the Colorado River Reservation, and

Whereas, the Indians of the Colorado River Reservation, the Superintendent in charge of that jurisdiction, and the Commissioner of Indian Affairs have recommended that the status of the unallotted or surplus lands of the reservation, including vacant townsite areas, be definitely restored as a part of the tribal holdings of the Indians of the Colorado River Reservation.

Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the Act of June 18, 1934 (48 Stats. 984), I hereby find that restoration to undoubted tribal ownership of all undisposed of lands within the Colorado River Indian Reservation, including any vacant townsite lots within said reservation, will be in the public interest, and the said lands are hereby restored to such tribal ownership and are added to and made a part of the existing Colorado River Indian Reservation, subject to any valid existing rights, for the use and benefit of the Indians of that reservation and such other Indians as may be entitled to rights thereon.

HAROLD L. ICKES,
Secretary of the Interior.

VOLUME 2—1937

1231 **EXECUTIVE ORDER**

Transfer of Certain Property and Functions From the Department of Agriculture to the Department of the Interior.

By virtue of and pursuant to the authority vested in me under Title II of the National Industrial Recovery Act, approved June 16, 1933 (48 Stat. 200), the Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (49 Stat. 115), and the Emergency Relief Appropriation Act of 1936, approved June 22, 1936 (49 Stat. 1608), it is hereby ordered as follows:

1. There are hereby transferred from the Department of Agriculture to the Department of the Interior the following Indian Subsistence Homesteads projects, including all real and personal property or any interest therein, together with all contracts, options, rights, interests, records, etc., acquired by the Department of Agriculture in connection with the said projects:

1. Great Fall Homesteads, Cascade County, Montana,
2. Burns Subsistence Homesteads, Harney County, Oregon,
3. Chilocco Homesteads, Kay County, Oklahoma,
4. White Earth Homesteads, Becker County, Minnesota,
5. Devil's Lake Homesteads, Ramsey County, North Dakota, and
6. Lake County Homesteads, Lake County, California.

2. The Secretary of the Interior is hereby authorized to administer the property transferred under paragraph 1 hereof, and in connection therewith to exercise all powers and functions previously given to the Secretary of Agriculture by Executive Order No. 7530 of December 31, 1936.

3. The Secretary of the Interior is hereby authorized to prescribe such rules and regulations as may be necessary to carry out the administrative functions transferred and delegated to him by this Executive Order.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,
Feb. 1, 1937.

[No. 7546]

1585 **COLORADO RIVER INDIAN RESERVATION, CALIFORNIA AND ARIZONA**

Order of Restoration

March 8, 1937.

Whereas, section 25 of the Act of April 21, 1904 (33 Stats. 224), as amended by section 3 of the Act of March 3, 1911 (36 Stats. 1063), provided for the reclamation and disposal of lands in the Colorado River Reservation, California and Arizona, and

Whereas, it apparently was intended that after reclamation a portion of such lands should become a part of the public domain and made available for settlement under the public land laws, and

Whereas, no reclamation project was undertaken on the Colorado River Reservation under the reclamation Act of June 17, 1902 (32 Stat. 388), authorized by section 25 of the Act of April 21, 1904, supra, and no part of the lands of said reservation (except a small area in the townsite of Parker), has been opened to settlement and sale or other form of disposition under any of the public land laws of the United States, and such lands have always been regarded as constituting a part of the Colorado River Reservation, and

Whereas, the Indians of the Colorado River Reservation, the Superintendent in charge of that jurisdiction, and the Commissioner of Indian Affairs have recommended that the status of the unallotted or surplus lands of the reservation, including vacant townsite areas, be definitely restored as a part of the tribal holdings of the Indians of the Colorado River Reservation.

Now, therefore, by virtue of the authority vested in the Secretary of the Interior by sections 3 and 7 of the Act of June 18, 1934 (48 Stats. 984), I hereby find that restoration to undoubted tribal ownership of all undisposed of lands within the Colorado River Indian Reservation, including any vacant townsite lots within said reservation, will be in the public interest, and the said lands are hereby restored to such tribal ownership and are added to and made a part of the existing Colorado River Indian Reservation, subject to any valid existing rights, for the use and benefit of the Indians of that reservation and such other Indians as may be entitled to rights thereon.

HAROLD L. ICKES,
Secretary of the Interior.

1629 **STOCKBRIDGE AND MUNSEE BAND OF MOHICAN INDIANS, WISCONSIN**

Proclamation Setting Aside Land for Reservation

March 19, 1937.

By virtue of authority contained in Section 7 of the Act of June 18, 1934 (48 Stat. L., 984), the lands described below, acquired by purchase for the use and benefit of the Stockbridge and Munsee Band of Mohican Indians of Wisconsin as authorized in accordance with the provisions of Section 5 of that Act are hereby proclaimed to be an Indian reservation:

All of Sec. 4, NE¼ Sec. 9, NW¼ Sec. 10, W½NE¼ Sec. 10, all in T. 28 N., R. 13 E., of the 4th Principal Meridian, Shawano County, Wisconsin, containing a total of 1049.88 acres more or less.

CHARLES WEST,
Acting Secretary of the Interior.

1659 **PROCLAMATION**

Reservation for Use of Pomo and Affiliated Indians of Lake County, California

June 10, 1937.

By virtue of authority contained in Section 7 of the Act of June 18, 1934 (48 Stat.

Westlaw.
120 S.Ct. 2304 Page 1
530 U.S. 392, 120 S.Ct. 2304, 147 L.Ed.2d 374, 68 USLW 4553, 30 Envtl. L. Rep. 20,666, 00 Cal. Daily Op. Serv. 4873, 2000 Daily Journal D.A.R. 6445, 2000 CJ C.A.R. 3590, 13 Fla. L. Weekly Fed. S 433
(Cite as: 530 U.S. 392, 120 S.Ct. 2304)

▷
Arizona v. California
U.S.,2000.

Supreme Court of the United States
State of ARIZONA, Complainant,
v.
State of CALIFORNIA, et al.
No. 8 Orig.

Argued April 25, 2000.
Decided June 19, 2000.

State of Arizona brought original action against State of California to determine States' and other parties' rights to waters of Colorado River. United States intervened, seeking water rights on behalf of five Indian reservations. Following determination that United States had reserved water rights for such reservations, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542, grant of tribes' motions to intervene, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318, and grant of States' motion to reopen decree, the Supreme Court, Justice Ginsburg, held that: (1) claims of Quechan Tribe for increased rights to water for disputed boundary lands of Fort Yuma Reservation were not precluded by Supreme Court decision finding, inter alia, that United States had reserved water rights for reservations; (2) such claims were not precluded by consent judgment entered in prior Court of Claims proceeding in which Tribe had challenged 1893 Agreement providing for Tribe's cession of such disputed lands; and (3) settlements of claim for additional water for Fort Mojave Reservation and Colorado River Indian Reservation would be approved.

Order accordingly.

Chief Justice Rehnquist concurred in part, dissented in part, and filed opinion in which Justices O'Connor and Thomas joined.

West Headnotes

[1] Judgment 228 ⇐739

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k739 k. Matters Which Could Not Have Been Adjudicated. Most Cited Cases
Secretarial Order issued by Department of Interior recognizing Quechan Tribe's beneficial ownership of disputed boundary lands of Fort Yuma Reservation, issued after Department had previously taken the opposite position and after Supreme Court had issued decision determining water rights of States of Arizona and California, United States, and various Indian Tribes, was not "later and then unknown circumstance" that would prevent Tribe's claims for increased water rights from Colorado River from being precluded by such Supreme Court decision, assuming that preclusion principles were otherwise applicable, inasmuch as order did not change underlying facts in dispute, but simply embodied one party's changed view of import of unchanged facts, and Tribe could not have been surprised by Government's shift, given that Tribe had been advocating just such a shift for decades.

[2] Judgment 228 ⇐633

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(C) Persons Who May Take Advantage of the Bar
228k633 k. Waiver of Bar. Most Cited Cases
Claims of Quechan Tribe for increased rights to water from Colorado River for disputed boundary lands of Fort Yuma Reservation were not precluded by 1963 Supreme Court decision determining water rights of States of Arizona and California, United States, and various Indian Tribes, inasmuch as States could have raised preclusion argument in 1979 or 1982, but did not do so until 1989, and supplemental decrees issued in 1979 and 1984 anticipated that disputed boundary issues would be decided not by preclusion but on merits.

[3] Judgment 228 ⇐540

228 Judgment
228XIII Merger and Bar of Causes of Action and

Defenses
228XIII(A) Judgments Operative as Bar
228k540 k. Nature and Requisites of Former Recovery as Bar in General. Most Cited Cases
While the technical rules of preclusion are not strictly applicable in the context of a single ongoing original action, the principles upon which these rules are founded should inform the Supreme Court's decision with respect to a preclusion claim.

[4] Judgment 228 ⇐948(1)

228 Judgment
228XXII Pleading Judgment as Estoppel or Defense
228k948 Pleading in General
228k948(1) k. Necessity of Pleading Former Adjudication in General. Most Cited Cases
The principles upon which the technical rules of preclusion are founded rank res judicata an affirmative defense ordinarily lost if not timely raised. Fed.Rules Civ.Proc.Rule 8(c), 28 U.S.C.A.

[5] Judgment 228 ⇐633

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(C) Persons Who May Take Advantage of the Bar
228k633 k. Waiver of Bar. Most Cited Cases
Under preclusion principles, a party may not wake up because a "light finally dawned," years after the first opportunity to raise a defense, and effectively raise it so long as the party was, though no fault of anyone else, in the dark until its late awakening.

[6] Judgment 228 ⇐948(1)

228 Judgment
228XXII Pleading Judgment as Estoppel or Defense
228k948 Pleading in General
228k948(1) k. Necessity of Pleading Former Adjudication in General. Most Cited Cases
Supreme Court would not raise sua sponte issue whether claims of Quechan Tribe for increased rights to water from Colorado River for disputed boundary lands of Fort Yuma Reservation were precluded by earlier Supreme Court decision determining water rights of States of Arizona and California, United States, and various Indian Tribes, inasmuch as Supreme Court plainly had not previously decided the issue presented.

[7] Judgment 228 ⇐948(1)

228 Judgment
228XXII Pleading Judgment as Estoppel or Defense
228k948 Pleading in General
228k948(1) k. Necessity of Pleading Former Adjudication in General. Most Cited Cases
If a court is on notice that it has previously decided the issue presented, the court may dismiss the action sua sponte, even though the defense has not been raised; this result is fully consistent with the policies underlying res judicata, in that it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste.

[8] Judgment 228 ⇐948(1)

228 Judgment
228XXII Pleading Judgment as Estoppel or Defense
228k948 Pleading in General
228k948(1) k. Necessity of Pleading Former Adjudication in General. Most Cited Cases
Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar sua sponte, thereby eroding the principle of party presentation so basic to our system of adjudication.

[9] Judgment 228 ⇐567

228 Judgment
228XIII Merger and Bar of Causes of Action and Defenses
228XIII(A) Judgments Operative as Bar
228k567 k. Judgment by Confession or on Consent or Offer. Most Cited Cases
Claims of Quechan Tribe for increased rights to water from Colorado River for disputed boundary lands of Fort Yuma Reservation were not precluded by consent judgment entered in prior Court of Claims proceeding in which Tribe had challenged 1893 Agreement providing for Tribe's cession of such disputed lands, inasmuch as consent judgment was ambiguous as between mutually

exclusive theories of recovery, i.e., taking and trespass, and settlement thus did not necessarily relinquish Tribe's claim to title. U.S.C.A. Const.Amend. 5.

[10] Compromise and Settlement 89 ⇐17(1)

89 Compromise and Settlement
89I In General
89k14 Operation and Effect
89k17 Conclusiveness
89k17(1) k. In General. Most Cited Cases
Settlements ordinarily occasion no issue preclusion, sometimes called collateral estoppel, unless it is clear that the parties intend their agreement to have such an effect.

[11] Judgment 228 ⇐651

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k651 k. Judgment by Confession or on Consent or Offer. Most Cited Cases
In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented; thus consent judgments ordinarily support claim preclusion but not issue preclusion.

[12] Judgment 228 ⇐720

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k716 Matters in Issue
228k720 k. Matters Actually Litigated and Determined. Most Cited Cases

Judgment 228 ⇐724

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(C) Matters Concluded
228k723 Essentials of Adjudication
228k724 k. In General. Most Cited Cases
Generally, issue preclusion attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment. Restatement (Second) of Judgments § 27.

[13] Judgment 228 ⇐651

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k651 k. Judgment by Confession or on Consent or Offer. Most Cited Cases

Judgment 228 ⇐652

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(A) Judgments Conclusive in General
228k652 k. Judgment by Default. Most Cited Cases
In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated, and therefore, the principle of issue preclusion does not apply with respect to any issue in a subsequent action. Restatement (Second) of Judgments § 27.

[14] Compromise and Settlement 89 ⇐61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited Cases
Settlement of claim for additional water from Colorado River for Fort Mojave Reservation, arising out of dispute over accuracy of survey, which, inter alia, specified location of disputed boundary and precluded United States and Tribe from claiming additional water rights from River for lands that were subject of disputed survey, would be approved.

[15] Compromise and Settlement 89 ⇐61

89 Compromise and Settlement
89II Judicial Approval
89k56 Factors, Standards and Considerations; Discretion Generally
89k61 k. Particular Applications. Most Cited

Cases
Settlement of claim for additional water from Colorado River for Colorado River Indian Reservation, stemming principally from dispute over location of Reservation's boundary, and providing, inter alia, for award of additional water to Tribe and preclusion of United States or Tribe from seeking additional reserved water rights from River for lands in California, would be approved.

****2306 *392 Syllabus*** FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

This litigation began in 1952 when Arizona invoked this Court's original jurisdiction to settle a dispute with California over the extent of each State's right to use water from the Colorado River system. The United States intervened, seeking water rights on behalf of, among others, five Indian reservations, including the Fort Yuma (Quechan) Indian Reservation, the Colorado River Indian Reservation, and the Fort Mojave Indian Reservation. The first round of the litigation culminated in *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542*(Arizona I),* in which the Court held that the United States had reserved water rights for the five reservations, *id.,* at 565, 599-601, 83 S.Ct. 1468; that those rights must be considered present perfected rights and given priority because they were effective as of the time each reservation was created, *id.,* at 600, 83 S.Ct. 1468; and that those rights should be based on the amount of each reservation's practicably irrigable acreage as determined by the Special Master, *ibid.* In its 1964 decree, the Court specified the quantities and priorities of the water entitlements for the parties and the Tribes, *Arizona v. California,* 376 U.S. 340, 84 S.Ct. 755, 11 L.Ed.2d 757, but held that the water rights for the Fort Mojave and Colorado River Reservations would be subject to appropriate adjustment by future agreement or decree in the event the ****2307** respective reservations' disputed boundaries were finally determined, *id.,* at 345, 84 S.Ct. 755. The Court's 1979 supplemental decree again deferred resolution of reservation boundary disputes and allied water rights claims. *Arizona v. California,* 439 U.S. 419, 421, 99 S.Ct. 995, 58 L.Ed.2d 627*(per curiam).* In *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318*(Arizona II),* the Court concluded, among other things, that various administrative actions taken by the Secretary of the Interior, including his 1978 order recognizing the entitlement of the Quechan Tribe (Tribe) to the disputed boundary lands of the Fort Yuma Reservation did not constitute final determinations of reservation boundaries for purposes of the 1964 decree. *Id.,* at 636-638, 103 S.Ct. 1382. The Court also held in *Arizona II* that certain lands within undisputed reservation boundaries, for which the United States had not sought water rights in *Arizona I*-the so-called "omitted lands"-were not entitled to water under res judicata principles. 460 U.S., at 626, 103 S.Ct. 1382. The Court's 1984 supplemental decree again declared that water rights for all five reservations would be subject to appropriate adjustments if the reservations' boundaries were finally determined. ***393***Arizona v. California,* 466 U.S. 144, 145, 104 S.Ct. 1900, 80 L.Ed.2d 194. In 1987, the Ninth Circuit dismissed, on grounds of the United States' sovereign immunity, a suit by California state agencies that could have finally determined the reservations' boundaries. This Court affirmed the Ninth Circuit's judgment by an equally divided vote.

The present phase of the litigation concerns claims by the Tribe and the United States on the Tribe's behalf for increased water rights for the Fort Yuma Reservation. These claims rest on the contention that the Fort Yuma Reservation encompasses some 25,000 acres of disputed boundary lands not attributed to that reservation in earlier stages of the litigation. The land in question was purportedly ceded to the United States under an 1893 Agreement with the Tribe. In 1936, the Department of the Interior's Solicitor Margold issued an opinion stating that, under the 1893 Agreement, the Tribe had unconditionally ceded the lands. The Margold Opinion remained the Federal Government's position for 42 years. In 1946, Congress enacted the Indian Claims Commission Act, establishing a tribunal with power to decide tribes' claims against the Government. The Tribe brought before the Commission an action, which has come to be known as Docket No. 320, challenging the 1893 Agreement on two mutually exclusive

grounds: (1) that it was void, in which case the United States owed the Tribe damages essentially for trespass, and (2) that it constituted an uncompensated taking of tribal lands. In 1976, the Commission transferredDocket No. 320 to the Court of Claims. In the meantime, the Tribe asked the Interior Department to reconsider the Margold Opinion. Ultimately, in a 1978 Secretarial Order, the Department changed its position and confirmed the Tribe's entitlement to most of the disputed lands. A few months after this Court decided in *Arizona II* that the 1978 Secretarial Order did not constitute a final determination of reservation boundaries, the United States and the Tribe entered into a settlement of Docket No. 320, which the Court of Claims approved and entered as its final judgment. Under the settlement, the United States agreed to pay the Tribe $15 million in full satisfaction of the Tribe's Docket No. 320 claims, and the Tribe agreed that it would not further assert those claims against the Government. In 1989, this Court granted the motion of Arizona, California, and two municipal water districts (State parties) to reopen the 1964 decree to determine whether the Fort Yuma, Colorado River, and Fort Mojave Reservations were entitled to claim additional boundary lands and, if so, additional water rights. The State parties assert here that the Fort Yuma claims of the Tribe and the United States are precluded by *Arizona I* and by the Claims ****2308** Court consent judgment in Docket No. 320. The Special Master has prepared a report recommending that the Court reject the first ground for preclusion but accept the second. The State parties have filed exceptions to the Special Master's ***394** first recommendation, and the United States and the Tribe have filed exceptions to the second. The Master has also recommended approval of the parties' proposed settlements of claims for additional water for the Fort Mojave and Colorado River Reservations, and has submitted a proposed supplemental decree to effectuate the parties' accords.

Held:

1. In view of the State parties' failure to raise the preclusion argument earlier in the litigation, despite ample opportunity and cause to do so, the claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation are not foreclosed by *Arizona I.* According to the State parties, those claims are precluded by the finality rationale this Court employed in dismissing the "omitted lands" claims in *Arizona II,* 460 U.S., at 620-621, 626-627, 103 S.Ct. 1382, because the United States could have raised the Fort Yuma Reservation boundary lands claims in *Arizona I,* but deliberately decided not to do so. In rejecting this argument, the Special Master pointed out that the Government did not assert such claims in *Arizona I* because, at that time, it was bound to follow the Margold Opinion, under which the Tribe had no claim to the boundary lands. The Master concluded that the 1978 Secretarial Order, which overruled the Margold Opinion and recognized the Tribe's beneficial ownership of the boundary lands, was a circumstance not known in 1964, one that warranted an exception to the application of res judicata doctrine. In so concluding, the Special Master relied on an improper ground: The 1978 Secretarial Order does not qualify as a previously unknown circumstance that can overcome otherwise applicable preclusion principles. That order did not change the underlying facts in dispute; it simply embodied one party's changed view of the import of unchanged facts. However, the Court agrees with the United States and the Tribe that the State parties' preclusion defense is inadmissible. The State parties did not raise the defense in 1978 in response to the United States' motion for a supplemental decree granting additional water rights for the Fort Yuma Reservation or in 1982 when *Arizona II* was briefed and argued. Unaccountably, the State parties first raised their res judicata plea in 1989, when they initiated the current round of proceedings. While preclusion rules are not strictly applicable in the context of a single ongoing original action, the principles upon which they rest should inform the Court's decision. *Arizona II,* 460 U.S., at 619, 103 S.Ct. 1382. Those principles rank res judicata an affirmative defense ordinarily lost if not timely raised. See Fed. Rule Civ. Proc. 8(c). The Court disapproves the notion that a party may wake up and effectively raise a defense years after the first opportunity to raise it so long as the party was (though no fault of anyone ***395** else) in the dark until its late awakening. Nothing in *Arizona II* supports the State parties' assertion that the Court expressly recognized the possibility that future Fort Yuma boundary lands claims might be precluded. 460 U.S., at 638, 103 S.Ct. 1382,

distinguished. Of large significance, this Court's 1979 and 1984 supplemental decrees anticipated that the disputed boundary issues for all five reservations, including Fort Yuma, would be "finally determined" in some forum, not by preclusion but on the merits. The State parties themselves stipulated to the terms of the 1979 supplemental decree and appear to have litigated the *Arizona II* proceedings on the understanding that the boundary disputes should be resolved on the merits, see, *e.g.*,*id.*, at 634, 103 S.Ct. 1382. Finally, the Court rejects the State parties' argument that this Court should now raise the preclusion question *sua sponte*. The special circumstances in ****2309** which such judicial initiative might be appropriate are not present here. See *United States v. Sioux Nation*, 448 U.S. 371, 432, 100 S.Ct. 2716, 65 L.Ed.2d 844 (REHNQUIST, J., dissenting). Pp. 2314-2318.

2. The claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation are not precluded by the consent judgment in Docket No. 320. The Special Master agreed with the State parties' assertion to the contrary. He concluded that, because the settlement extinguished the Tribe's claim to title in the disputed lands, the United States and the Tribe cannot seek additional water rights based on the Tribe's purported beneficial ownership of those lands. Under standard preclusion doctrine, the Master's recommendation cannot be sustained. As between the Tribe and the United States, the settlement indeed had, and was intended to have, claim-preclusive effect. But settlements ordinarily lack issue-preclusive effect. This differentiation is grounded in basic res judicata doctrine. The general rule is that issue preclusion attaches only when an issue is actually litigated and determined by a valid and final judgment. See *United States v. International Building Co.*, 345 U.S. 502, 505-506, 73 S.Ct. 807, 97 L.Ed. 1182. The State parties assert that common-law principles of issue preclusion do not apply in the special context of Indian land claims. They maintain that the Indian Claims Commission Act created a special regime of statutory preclusion. This Court need not decide whether some consent judgments in that distinctive context might bar a tribe from asserting title even in discrete litigation against third parties, for the 1983 settlement of Docket No. 320 plainly could not qualify as such a judgment. Not only was the issue of ownership of the disputed boundary lands not actually litigated and decided in Docket No. 320, but, most notably, the Tribe proceeded on alternative and mutually exclusive theories of recovery, taking and trespass. The consent judgment embraced all of the Tribe's claims with no election by the Tribe of one ***396** theory over the other. The Court need not accept the United States' invitation to look behind the consent judgment at presettlement stipulations and memoranda purportedly demonstrating that the judgment was grounded on the parties' shared view, after the 1978 Secretarial Order, that the disputed lands belong to the Tribe. Because the settlement was ambiguous as between mutually exclusive theories of recovery, the consent judgment is too opaque to serve as a foundation for issue preclusion. Pp. 2318-2321.

3. The Court accepts the Special Master's recommendations and approves the parties' proposed settlements of the disputes respecting additional water for the Fort Mojave and Colorado River Reservations. P. 2321.

Exception of State parties overruled; Exceptions of United States and Quechan Tribe sustained; Special Master's recommendations to approve parties' proposed settlements respecting Fort Mojave and Colorado River Reservations are adopted, and parties are directed to submit any objections they may have to Special Master's proposed supplemental decree; Outstanding water rights claims associated with disputed Fort Yuma Reservation boundary lands remanded.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. REHNQUIST, C.J., filed an opinion concurring in part and dissenting in part, in which O'CONNOR and THOMAS, JJ., joined, *post*, p. 2323.

Jeffrey P. Minear, Washington, DC, for United States.
Mason D. Morisset, Seattle, WA, for Quechan Indian Tribe.
Jerome C. Muys, Washington, DC, for State parties.
****2310 *397** Justice GINSBURG delivered the opinion of the Court.

In the latest chapter of this long-litigated original-jurisdiction case, the Quechan Tribe (Tribe) and the

United States on the Tribe's behalf assert claims for increased rights to water from the Colorado River. These claims are based on the contention that the Fort Yuma (Quechan) Indian Reservation encompasses some 25,000 acres of disputed boundary lands not attributed to that reservation in earlier stages of the litigation. In this decision, we resolve a threshold question regarding these claims to additional water rights: Are the claims precluded by this Court's prior decision in *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963)(*Arizona I*), or by a consent judgment entered by the United States Claims Court in 1983? The Special Master has prepared a report recommending that the Court reject the first ground for preclusion but accept the second. We reject both grounds for preclusion and remand the case to the Special Master for consideration of the claims for additional water rights appurtenant to the disputed boundary lands.

I

This litigation began in 1952 when Arizona invoked our original jurisdiction to settle a dispute with California over the extent of each State's right to use water from the Colorado River system. Nevada intervened, seeking a determination of its water rights, and Utah and New Mexico were joined as defendants. The United States intervened and sought water rights on behalf of various federal establishments, including five Indian reservations: the Chemehuevi Indian Reservation, the Cocopah Indian Reservation, the Fort Yuma (Quechan) Indian Reservation, the Colorado River Indian Reservation, and the Fort Mojave Indian Reservation. The Court appointed Simon Rifkind as Special Master.

The first round of the litigation culminated in our opinion in *Arizona I.* We agreed with Special Master Rifkind that ***398** the apportionment of Colorado River water was governed by the Boulder Canyon Project Act of 1928, 43 U.S.C. § 617*et seq.,* and by contracts entered into by the Secretary of the Interior pursuant to the Act. We further agreed that the United States had reserved water rights for the five reservations under the doctrine of *Winters v. United States,* 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). See *Arizona I,* 373 U.S., at 565, 599-601, 83 S.Ct. 1468. Because the Tribes' water rights were effective as of the time each reservation was created, the rights were considered present perfected rights and given priority under the Act. *Id.,* at 600, 83 S.Ct. 1468. We also agreed with the Master that the reservations' water rights should be based on the amount of practicably irrigable acreage on each reservation and sustained his findings as to the relevant acreage for each reservation. *Ibid.* Those findings were incorporated in our decree of March 9, 1964, which specified the quantities and priorities of the water entitlements for the States, the United States, and the Tribes. *Arizona v. California,* 376 U.S. 340, 84 S.Ct. 755, 11 L.Ed.2d 757. The Court rejected as premature, however, Master Rifkind's recommendation to determine the disputed boundaries of the Fort Mojave and Colorado River Indian Reservations; we ordered, instead, that water rights for those two reservations "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Id.,* at 345, 84 S.Ct. 755.

In 1978, the United States and the State parties jointly moved this Court to enter a supplemental decree identifying present perfected rights to the use of mainstream water in each State and their priority dates. The Tribes then filed motions to intervene, and the United States ultimately joined the Tribes in moving for additional water rights for the five reservations. ****2311** Again, the Court deferred resolution of reservation boundary disputes and allied water rights claims. The supplemental decree we entered in 1979 set out the water rights and priority dates for the five reservations ***399** under the 1964 decree, but added that the rights for all five reservations (including the Fort Yuma Indian Reservation at issue here) "shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona v. California,* 439 U.S. 419, 421, 99 S.Ct. 995, 58 L.Ed.2d 627 (*per curiam*). The Court then appointed Senior Circuit Judge Elbert P. Tuttle as Special Master and referred to him the Tribes' motions to intervene and other pending matters.

Master Tuttle issued a report recommending that

the Tribes be permitted to intervene, and concluding that various administrative actions taken by the Secretary of the Interior constituted "final determinations" of reservation boundaries for purposes of allocating water rights under the 1964 decree. (Those administrative actions included a 1978 Secretarial Order, discussed in greater detail *infra,* at 2313-2314, which recognized the Quechan Tribe's entitlement to the disputed boundary lands of the Fort Yuma Reservation.) Master Tuttle also concluded that certain lands within the undisputed reservation boundaries but for which the United States had not sought water rights in *Arizona I*-the so-called "omitted lands"-had in fact been practicably irrigable at the time of *Arizona I* and were thus entitled to water. On these grounds, Master Tuttle recommended that the Court reopen the 1964 decree to award the Tribes additional water rights.

In *Arizona v. California,* 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)(*Arizona II*), the Court permitted the Tribes to intervene, but otherwise rejected Master Tuttle's recommendations. The Secretary's determinations did not qualify as "final determinations" of reservation boundaries, we ruled, because the States, agencies, and private water users had not had an opportunity to obtain judicial review of those determinations. *Id.,* at 636-637, 103 S.Ct. 1382. In that regard, we noted that California state agencies had initiated an action in the United States District Court for the Southern District of California challenging***400** the Secretary's decisions, and that the United States had moved to dismiss that action on various grounds, including sovereign immunity. "There will be time enough," the Court stated, "if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court." *Id.,* at 638, 103 S.Ct. 1382. The Court also held that the United States was barred from seeking water rights for the lands omitted from presentation in the proceedings leading to *Arizona I;* "principles of res judicata," we said, "advise against reopening the calculation of the amount of practicably irrigable acreage." 460 U.S., at 626, 103 S.Ct. 1382. In 1984, in another supplemental decree, the Court again declared that water rights for all five reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona v. California,* 466 U.S. 144, 145, 104 S.Ct. 1900, 80 L.Ed.2d 194.

The District Court litigation proceeded with the participation of eight parties: the United States, the States of Arizona and California, the Metropolitan Water District of Southern California, the Coachella Valley Water District, and the Quechan, Fort Mojave, and Colorado River Indian Tribes. The District Court rejected the United States' sovereign immunity defense; taking up the Fort Mojave Reservation matter first, the court voided the Secretary's determination of that reservation's boundaries. ****2312***Metropolitan Water Dist. of S. Cal. v. United States,* 628 F.Supp. 1018 (S.D.Cal.1986). The Court of Appeals for the Ninth Circuit, however, accepted the United States' plea of sovereign immunity, and on that ground reversed and remanded with instructions to dismiss the entire case. Specifically, the Court of Appeals held that the Quiet Title Act, 28 U.S.C. § 2409a, preserved the United States' sovereign immunity from suits challenging the United States' title "to trust or restricted Indian lands,"§ 2409a(a), and therefore blocked recourse to the District***401** Court by the States and state agencies. *Metropolitan Water Dist. of S. Cal. v. United States,* 830 F.2d 139 (1987). We granted certiorari and affirmed the Ninth Circuit's judgment by an equally divided Court. *California v. United States,* 490 U.S. 920, 109 S.Ct. 2273, 104 L.Ed.2d 981 (1989) (*per curiam*).

The dismissal of the District Court action dispelled any expectation that a "final determination" of reservation boundaries would occur in that forum. The State parties then moved to reopen the 1964 decree, asking the Court to determine whether the Fort Yuma Indian Reservation and two other reservations were entitled to claim additional boundary lands and, if so, additional water rights. Neither the United States nor the Tribes objected to the reopening of the decree, and the Court granted the motion. *Arizona v. California,* 493 U.S. 886, 110 S.Ct. 227, 107 L.Ed.2d 180 (1989). After the death in 1990 of the third Special Master, Robert McKay, the Court appointed Frank J. McGarr as Special Master. Special Master McGarr has now filed a report and recommendation (McGarr Report), a full understanding of which requires a discussion of issues and

events specific to the Fort Yuma Indian Reservation. We now turn to those issues and events.

II

The specific dispute before us has its roots in an 1884 Executive Order signed by President Chester A. Arthur, designating approximately 72 square miles of land along the Colorado River in California as the Fort Yuma Indian Reservation (Reservation) for the benefit of the Quechan Tribe. The Tribe, which had traditionally engaged in farming, offered to cede its rights to a portion of the Reservation to the United States in exchange for allotments of irrigated land to individual Indians. In 1893, the Secretary of the Interior concluded an agreement with the Tribe (1893 Agreement), which Congress ratified in 1894. The 1893 Agreement provided for the Tribe's cession of a 25,000-acre tract of boundary lands on the Reservation. Language in the agreement, ***402** however, could be read to condition the cession on the performance by the United States of certain obligations, including construction within three years of an irrigation canal, allotment of irrigated land to individual Indians, sale of certain lands to raise revenues for canal construction, and opening of certain lands to the public domain.

Doubts about the validity and effect of the 1893 Agreement arose as early as 1935. In that year the construction of the All-American Canal, which prompted the interstate dispute in *Arizona I,* see 373 U.S., at 554-555, 83 S.Ct. 1468, also sparked a controversy concerning the Fort Yuma Reservation. When the Department of the Interior's Bureau of Reclamation sought to route the canal through the Reservation, the Department's Indian Office argued that the Bureau had to pay compensation to the Tribe for the right-of-way. The Secretary of the Interior submitted the matter to the Department's Solicitor, Nathan Margold. In 1936, Solicitor Margold issued an opinion (Margold Opinion) stating that, under the 1893 Agreement, the Tribe had unconditionally ceded the lands in question to the United States. 1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs 596, 600 (No. M-28198, Jan. 8, 1936). The Margold Opinion remained the position of the Federal Government for 42 years.

****2313** In 1946, Congress enacted the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. § 70 *et seq.* (1976 ed.), establishing an Article I tribunal with power to decide claims of Indian tribes against the United States.[FN1] See generally ***403** *United States v. Dann,* 470 U.S. 39, 105 S.Ct. 1058, 84 L.Ed.2d 28 (1985). The Tribe filed an action before the Commission in 1951, challenging the validity and effect of the 1893 Agreement. In that action, referred to by the parties as Docket No. 320, the Tribe relied principally on two mutually exclusive grounds for relief. First, the Tribe alleged that the 1893 Agreement was obtained through fraud, coercion, and/or inadequate consideration, rendering it "wholly nugatory." Petition for Loss of Reservation in Docket No. 320 (Ind.Cl.Comm'n), ¶¶ 15-16, reprinted in Brief for United States in Support of Exception, pp. 11a-27a. At the very least, contended the Tribe, the United States had failed to perform the obligations enumerated in the 1893 Agreement, rendering the cession void. *Id.,* at ¶ 31. In either event, the Tribe claimed continuing title to the disputed lands and sought damages essentially for trespass. Alternatively, the Tribe alleged that the 1893 Agreement was contractually valid but constituted an uncompensated taking of tribal lands, an appropriation of lands for unconscionable consideration, and/or a violation of standards of fair and honorable dealing, for which §§ 2(3)-(5) of the Act authorized recovery. *Id.,* at ¶¶ 19, 22, 25. According to this theory of recovery, the 1893 Agreement had indeed vested in the United States unconditional title to the disputed***404** lands, and the Tribe sought damages as compensation for that taking. During the more than quarter-century of litigation in Docket No. 320, the Tribe vacillated between these two grounds for relief, sometimes emphasizing one and sometimes the other. See *Quechan Tribe of Fort Yuma Reservation v. United States,* 26 Ind. Cl. Comm'n. 15 (1971), reprinted in Brief for United States in Support of Exception, at 29a-34a.

> FN1. The Act conferred exclusive jurisdiction on the Commission to resolve Indian claims solely by the payment of compensation. Section 2 of the Act gave the Commission jurisdiction over, among other things, claims alleging that agreements between a tribe and the United States were vitiated by fraud, duress, or uncon-

> scionable consideration, 25 U.S.C. § 70a(3) (1976 ed.), claims arising from the unlawful taking of Indian lands by the United States, § 70a(4), and claims based upon fair and honorable dealings not recognized by law or equity, § 70a(5). The Commission's "[f]inal determinations," § 70r. were subject to review by the Court of Claims, § 70s(b), and, if upheld, were submitted to Congress for payment, § 70u. Section 15 authorized the Attorney General to represent the United States before the Commission and, "with the approval of the Commission, to compromise any claim presented to the Commission." 25 U.S.C. § 70n (1976 ed.). The Act provided that such compromises "shall be submitted by the Commission to the Congress as a part of its report as provided in section 70t of this title in the same manner as final determinations of the Commission, and shall be subject to the provisions of section 70u of this title." *Ibid.* Section 22(a) of the Act provided that "[t]he payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." 25 U.S.C. § 70u(a) (1976 ed.). Pursuant to statute, § 70v, the Commission ceased its operations in 1978 and transferred its remaining cases to the Court of Claims.

The Commission conducted a trial on liability, but stayed further proceedings in 1970 because legislation had been proposed in Congress that would have restored the disputed lands to the Tribe. The legislation was not enacted, and the Commission vacated the stay. In 1976, the Commission transferred the matter to the Court of Claims.

In the meantime, the Tribe had asked the Department of the Interior to reconsider its 1936 Margold Opinion regarding the 1893 Agreement. In 1977, Interior Solicitor Scott Austin concluded, in accord with the 1936 opinion, that the 1893 Agreement was valid and that the cession of the disputed lands had been unconditional. Opinion of the Solicitor, No. M-36886 (Jan. **2314 18, 1977), 84 I.D. 1 (1977) (Austin Opinion). It soon became clear both to the Tribe and to interested Members of Congress, however, that the Austin Opinion had provoked controversy within the Department, and, after the election of President Carter, the Department revisited the issue and reversed course. In 1978, without notice to the parties, Solicitor Leo Krulitz issued an opinion concluding that the 1893 Agreement had provided for a conditional cession of the disputed lands, that the conditions had not been met by the United States, and that "[t]itle to the subject property is held by the United States in trust for the Quechan Tribe." Opinion of the Solicitor, No. M-36908 (Jan. 2, 1979), 86 I.D. 3, 22 (1979) (Krulitz Opinion). On December 20, 1978, the Secretary of the Interior issued a Secretarial Order adopting the Krulitz Opinion and confirming the Tribe's entitlement to the disputed lands, with the express*405 exception of certain lands that the United States had acquired pursuant to Act of Congress or had conveyed to third parties.

The 1978 Secretarial Order caused the United States to change its position both in Docket No. 320, which was still pending in the Claims Court, and in the present litigation. Because the Secretarial Order amounted to an admission that the 1893 Agreement had been ineffective to transfer title and that the Tribe enjoyed beneficial ownership of the disputed boundary lands, the United States no longer opposed the Tribe's claim for trespass in Docket No. 320. In the present litigation, the Secretarial Order both prompted the United States to file a water rights claim for the affected boundary lands and provided the basis for the Tribe's intervention to assert a similar, albeit larger, water rights claim. See *Arizona II,* 460 U.S., at 632-633, 103 S.Ct. 1382. Those water rights claims are the subject of the current proceedings.

In August 1983, a few months after this Court decided in *Arizona II* that the 1978 Secretarial Order did not constitute a final determination of reservation boundaries, see *supra,* at 2311, the United States and the Tribe entered into a settlement of Docket No. 320, which the Court of Claims approved and entered as its final judgment. Under the terms of that settlement, the United States agreed to pay the Tribe $15 million in full satisfaction of "all rights, claims, or demands which plaintiff [*i.e.,* the Tribe] has asserted or could have as-

serted with respect to the claims in Docket 320." Final Judgment, Docket No. 320 (Aug. 11, 1983). The judgment further provided that "plaintiff shall be barred thereby from asserting any further rights, claims, or demands against the defendant and any future action on the claims encompassed on Docket 320." *Ibid.* The United States and the Tribe also stipulated that the "final judgment is based on a compromise and settlement and shall not be construed as an admission by either party for the purposes of precedent or argument in any other case." *Ibid.* Both ***406** the Tribe and the United States continue to recognize the Tribe's entitlement to the disputed boundary lands.

III

Master McGarr has issued a series of orders culminating in the report and recommendation now before the Court. He has recommended that the Court reject the claims of the United States and the Tribe seeking additional water rights for the Fort Yuma Indian Reservation. The Master rejected the State parties' contention that this Court's *Arizona I* decision precludes the United States and the Tribe from seeking water rights for the disputed boundary lands. He concluded, however, that the United States and the Tribe are precluded from pursuing those claims by operation of the 1983 Claims Court consent judgment. The State parties have filed an exception to the first of these preclusion recommendations, and the United States and the Tribe have filed exceptions to the second. In Part III-A, *infra,* we consider the exception filed by the State parties, and in Part III-B we address****2315** the exceptions filed by the United States and the Tribe. The Special Master has also recommended that the Court approve the parties' proposed settlements respecting the Fort Mojave and Colorado River Indian Reservations. No party has filed an exception to those recommendations; we address them in Part III-C, *infra.*

A

The States of Arizona and California, the Coachella Valley Water District, and the Metropolitan Water District of Southern California (State parties) argued before Special Master McGarr, and repeat before this Court, that the water rights claims associated with the disputed boundary lands of the Fort Yuma Reservation are precluded by the finality rationale this Court employed in dismissing the "omitted lands" claims in *Arizona II.* See *supra,* at 2311-2312. According to the State parties, the United States could have ***407** raised a boundary lands claim for the Fort Yuma Reservation in the *Arizona I* proceedings based on facts known at that time, just as it did for the Fort Mojave and Colorado River Reservations, but deliberately decided not to do so, just as it did with respect to the "omitted lands." In *Arizona II,* this Court rejected the United States' claim for water rights for the "omitted lands," emphasizing that "[c]ertainty of rights is particularly important with respect to water rights in the Western United States" and noting "the strong interest in finality in this case." 460 U.S., at 620, 103 S.Ct. 1382. Observing that the 1964 decree determined "the extent of irrigable acreage within the uncontested boundaries of the reservations,"*id.,* at 621, n. 12, 103 S.Ct. 1382, the Court refused to reconsider issues "fully and fairly litigated 20 years ago,"*id.,* at 621, 103 S.Ct. 1382. The Court concomitantly held that the Tribes were bound by the United States' representation of them in *Arizona I.* 460 U.S., at 626-627, 103 S.Ct. 1382.

The Special Master rejected the State parties' preclusion argument. He brought out first the evident reason why the United States did not assert water rights claims for the Fort Yuma Reservation boundary lands in *Arizona I.* At that point in time, the United States was bound to follow the 1936 Margold Opinion, see *supra,* at 2312-2313, which maintained that the Tribe had no claim to those lands. "[I]t is clear," the Master stated, "that the later Secretary of the Interior opinion arbitrarily changing [the Margold] decision was a circumstance not known in 1964, thus constituting an exception to the application of the rule of *res adjudicata.*" Special Master McGarr Memorandum Opinion and Order No. 4, pp. 6-7 (Sept. 6, 1991). Characterizing the question as "close," the Master went on to conclude that "the Tribe is not precluded from asserting water rights based on boundary land claims on [*sic*] this proceeding, because although the U.S. on behalf of the Tribe failed to assert such claims in the proceeding leading to the 1964 decree, a later and then unknown circumstance***408** bars the application of the doctrine of *res judicata* to this is-

sue." *Id.*, at 7.

[1] While the Special Master correctly recognized the relevance of the Margold Opinion to the litigating stance of the United States, he ultimately relied on an improper ground in rejecting the State parties' preclusion argument. The Department of the Interior's 1978 Secretarial Order recognizing the Tribe's beneficial ownership of the boundary lands, see *supra,* at 2313-2314, does not qualify as a "later and then unknown circumstance" that can overcome otherwise applicable preclusion principles. The 1978 Order did not change the underlying facts in dispute; it simply embodied one party's changed view of the import of unchanged facts. Moreover, the Tribe can hardly claim to have been surprised by the Government's shift in assessment of the boundary lands ownership question, for the Tribe had ****2316** been advocating just such a shift for decades.

[2] The United States and the Tribe, however, urge other grounds on which to reject the State parties' argument regarding the preclusive effect of *Arizona I.* The United States and the Tribe maintain that the preclusion rationale the Court applied to the "omitted lands" in *Arizona II* is not equally applicable to the disputed boundary lands,[FN2] and that, in any event, the State parties have forfeited their preclusion defense. We agree that the State parties' preclusion defense***409** is inadmissible at this late date, and therefore we do not reach the merits of that plea. The State parties could have raised the defense in 1979 in response to the United States' motion for a supplemental decree granting additional water rights for the Fort Yuma Reservation. The State parties did not do so then, nor did they raise the objection in 1982 when *Arizona II* was briefed and argued.[FN3] Unaccountably, they raised the preclusion argument for the first time in 1989, when they initiated the current round of proceedings. See Exception and Brief for State Parties 16; Motion of State Parties to Reopen Decree in *Arizona v. California,* O.T.1989, No. 8 Orig., p. 6, n. 2. The State parties had every opportunity, and every incentive, to press their current preclusion argument at earlier stages in the litigation, yet failed to do so.[FN4]

FN2. The United States and the Tribe point to the holding in *Arizona I* that Special Master Rifkind had erred in prematurely considering boundary lands claims relating to the Fort Mojave and Colorado River Reservations, see 373 U.S., at 601, 83 S.Ct. 1468; they contend that consideration of the Fort Yuma Reservation boundaries would have been equally premature. They further stress that in *Arizona II* we held the omitted lands claims precluded because we resisted "reopen[ing] an adjudication ... to reconsider whether initial factual determinations were correctly made,"460 U.S., at 623-624, 103 S.Ct. 1382; in contrast, they maintain, the present claims turn on the validity of the 1893 Agreement and the 1978 Secretarial Order, questions of law not addressed in prior proceedings.

FN3. Noting that in *Arizona II* we "encouraged the parties to assert their legal claims and defenses in another forum," THE CHIEF JUSTICE concludes that the Court probably would have declined to resolve the preclusion issue at that stage of the case even had the State parties raised it then. *Post,* at 2323 (opinion concurring in part and dissenting in part). One can only wonder why this should be so. If this Court had held in *Arizona II* that the United States and the Tribe were precluded from litigating their boundary lands claims, it would have been pointless for the Court to encourage pursuit of those claims "in another forum"; further assertion of the claims in any forum would have been barred. In any event, a party generally forfeits an affirmative defense by failing to raise it even if the relevant proceeding is ultimately resolved on other grounds.

FN4. The dissent's observation that "the only 'pleadings' in this case were filed in the 1950's,"*post,* at 2323, is beside the point. The State parties could have properly raised the preclusion defense as early as February 1979, in their response to the United States' motion for modification of the decree, yet did not do so. See Response of the States of Arizona,

> California, and Nevada and the Other California Defendants to the Motion of the United States for Modification of Decree, O.T.1978, No. 8 Orig. Alternatively, it was open to the State parties to seek leave to file a supplemental pleading "setting forth ... occurrences or events which have happened since the date of the pleading sought to be amended." Fed. Rule Civ. Proc. 15(d). In such a supplemental pleading, and in compliance with Rule 8(c), the preclusion defense could have been raised. No such supplemental pleading was ever presented, and by 1989 a reasonable time to do so had surely expired.

The State parties' tardiness in raising their preclusion defense is hard to account for, while the United States' decision not to assert claims for the disputed boundary lands until 1978 can at least be explained by the continued vitality of the Margold Opinion, see *supra,* at 2312-2313. It is puzzling that the dissent should go to such lengths to excuse the former delay while relentlessly condemning the latter.

[3][4][5] ***410** "[W]hile the technical rules of preclusion are not strictly applicable [in the context of a single ongoing original action], the principles upon which these rules are founded should inform our decision." *Arizona II,* 460 U.S., at 619, 103 S.Ct. 1382. Those principles rank res judicata an affirmative defense ordinarily lost if not timely raised. See ****2317**Fed. Rule Civ. Proc. 8(c). Counsel for the State parties conceded at oral argument that "no preclusion argument was made with respect to boundary lands" in the proceedings leading up to *Arizona II,* and that "after this Court's decision in *Arizona II* and after the Court's later decision in [*Nevada v. United States,* 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983)], the light finally dawned on the State parties that there was a valid preclusion-or *res judicata* argument here with respect to Fort Yuma." Tr. of Oral Arg. 46-47. We disapprove the notion that a party may wake up because a "light finally dawned," years after the first opportunity to raise a defense, and effectively raise it so long as the party was (though no fault of anyone else) in the dark until its late awakening.

The State parties assert that our prior pronouncements in this case have expressly recognized the possibility that future boundary lands claims for the Fort Yuma Reservation might be precluded. If anything, the contrary is true. Nothing in the *Arizona II* decision hints that the Court believed the boundary lands issue might ultimately be held precluded. Rather, the Court expressly found it "*necessary* to decide whether any or all of these boundary disputes have been 'finally determined' within the meaning of Article ***411** II(D)(5) ...." 460 U.S., at 631, 103 S.Ct. 1382 (emphasis added). That *Arizona II* contains no discussion of preclusion with respect to the disputed lands is hardly surprising, given that the State parties neglected to raise that issue until six years later.

The Court did note in *Arizona II* that in the District Court proceedings the United States had asserted defenses based on "lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations," and added that "[t]here will be time enough, if any of *these grounds for dismissal* are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such [lower court] action are *nevertheless* open for litigation in this Court." 460 U.S., at 638, 103 S.Ct. 1382 (emphasis added). This passage, however, is most sensibly read to convey that the defenses just mentioned-standing, indispensable parties, sovereign immunity, and the statute of limitations-would not necessarily affect renewed litigation in this Court. The passage contains no acknowledgment, express or implied, of a lurking preclusion issue stemming from our *Arizona I* disposition.

Moreover, and of large significance, the 1979 and 1984 supplemental decrees anticipated that the disputed boundary issues for all five reservations, including the Fort Yuma Reservation, would be "finally determined" in some forum, not by preclusion but on the merits. See 1984 Supplemental Decree, Art. II(D)(5), *Arizona v. California,* 466 U.S., at 145, 104 S.Ct. 1900 (Water rights for all five reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined."); 1979 Supplemental Decree, Art. II(D)(5), *Arizona v. California,* 439 U.S., at 421, 99 S.Ct. 995 (same).

The State parties themselves stipulated to the terms of the supplemental decree we entered in 1979. They also appear to have litigated the *Arizona II* proceedings on the understanding***412** that the boundary disputes should be resolved on the merits. See 460 U.S., at 634, 103 S.Ct. 1382 ("[The State parties] argued ... that the boundary controversies were ripe for judicial review, and they urged the Special Master to receive evidence, hear legal arguments, and resolve each of the boundary disputes, but only for the limited purpose of establishing additional Indian water rights, if any."); Report of Special Master Tuttle, O.T.1981, No. 8 Orig., p. 57 (describing the State parties' contention "that the boundaries [of all five reservations] have not been finally determined and that I should make a de novo determination of the ****2318** boundaries for recommendation to the Court"). As late as 1988, the State parties asked the Court to appoint a new Special Master and direct him "to conclude his review of the boundary issues as expeditiously as possible and to submit a recommended decision to the Court." Brief for Petitioners in *California v. United States,* O.T.1987, No. 87-1165, p. 49.

[6][7][8] Finally, the State parties argue that even if they earlier failed to raise the preclusion defense, this Court should raise it now *sua sponte.* Judicial initiative of this sort might be appropriate in special circumstances. Most notably, "if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte,* even though the defense has not been raised. This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *United States v. Sioux Nation,* 448 U.S. 371, 432, 100 S.Ct. 2716, 65 L.Ed.2d 844 (1980) (REHNQUIST, J., dissenting) (citations omitted). That special circumstance is not present here: While the State parties contend that the Fort Yuma boundary dispute could have been decided in *Arizona I,* this Court plainly has not "previously decided the issue presented." Therefore we do not face the prospect of redoing a matter once decided. Where no judicial resources have been spent on the resolution of a question, trial courts must ***413** be cautious about raising a preclusion bar *sua sponte,* thereby eroding the principle of party presentation so basic to our system of adjudication.

In view of the State parties' failure to raise the preclusion argument earlier in the litigation, despite ample opportunity and cause to do so, we hold that the claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation are not foreclosed by our decision in *Arizona I.*

B

[9] The State parties also assert that the instant water rights claims are precluded by the 1983 consent judgment in the Claims Court proceeding, Docket No. 320. Special Master McGarr agreed, noting the consent judgment's declaration that the Tribe would "be barred thereby from asserting any further rights, claims or demands against the defendant and any future action encompassed on docket no. 320." See Special Master McGarr Memorandum Opinion and Order No. 4, at 9-10. On reconsideration, the Special Master provided a fuller account of his recommendation. The settlement, he concluded, had extinguished the Tribe's claim to title in the disputed boundary lands, vesting that title in the United States against all the world: "The only viable basis for a damage or trespass claim [in Docket No. 320] was that the 1893 taking was illegal and that title therefore remained with the Tribe. When the Tribe accepted money in settlement of this claim, it relinquished its claim to title." *Id.,* No. 7, at 5 (May 5, 1992). See also *id.,* No. 13, at 3 (Apr. 13, 1993) ("[T]he relinquishment of all future claims regarding the subject matter of Docket No. 320 in exchange for a sum of money extinguished the Tribe's title in the subject lands ...."). Because the settlement extinguished the Tribe's title to the disputed boundary lands, the Master reasoned, the United States and the Tribe cannot now seek additional***414** water rights based on the Tribe's purported beneficial ownership of those lands.

[10][11][12][13] Under standard preclusion doctrine, the Master's recommendation cannot be sustained. As already noted, the express terms of the consent judgment in Docket No. 320 barred the Tribe and the United States from asserting against each other any claim or defense they raised or could have raised in that action.

See *supra,* at 2314. As between the parties to Docket No. 320, then, the settlement**2319 indeed had, and was intended to have, *claim-preclusive* effect-a matter the United States and the Tribe readily concede. Exception and Brief for United States 36; Exception and Brief for Quechan Indian Tribe 20. But settlements ordinarily occasion no *issue preclusion* (sometimes called collateral estoppel), unless it is clear, as it is not here, that the parties intend their agreement to have such an effect. "In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion." 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4443, pp. 384-385 (1981). This differentiation is grounded in basic res judicata doctrine. It is the general rule that issue preclusion attaches only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." Restatement (Second) of Judgments § 27, p. 250 (1982). "In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this Section [describing issue preclusion's domain] does not apply with respect to any issue in a subsequent action." *Id.,* comment *e,* at 257.

This Court's decision in *United States v. International Building Co.,* 345 U.S. 502, 73 S.Ct. 807, 97 L.Ed. 1182 (1953), is illustrative. In 1942, the Commissioner of Internal Revenue assessed deficiencies *415 against a taxpayer for the taxable years 1933, 1938, and 1939, alleging that the taxpayer had claimed an excessive basis for depreciation. *Id.,* at 503, 73 S.Ct. 807. After the taxpayer filed for bankruptcy, however, the Commissioner and the taxpayer filed stipulations in the pending Tax Court proceedings stating that there was no deficiency for the taxable years in question, and the Tax Court entered a formal decision to that effect. *Id.,* at 503-504, 73 S.Ct. 807. In 1948, the Commissioner assessed deficiencies for the years 1943, 1944, and 1945, and the taxpayer defended on the ground that the earlier Tax Court decision was preclusive on the issue of the correct basis for depreciation. We disagreed, holding that the Tax Court decision, entered pursuant to the parties' stipulations, did not accomplish an "estoppel by judgment," *i.e.,* it had no issue-preclusive effect:

"We conclude that the decisions entered by the Tax Court for the years 1933, 1938, and 1939 were only a *pro forma* acceptance by the Tax Court of an agreement between the parties to settle their controversy for reasons undisclosed.... Perhaps, as the Court of Appeals inferred, the parties did agree on the basis for depreciation. Perhaps the settlement was made for a different reason, for some exigency arising out of the bankruptcy proceeding. As the case reaches us, we are unable to tell whether the agreement of the parties was based on the merits or on some collateral consideration. Certainly the judgments entered are *res judicata* of the tax claims for the years 1933, 1938, and 1939, whether or not the basis of the agreements on which they rest reached the merits.... Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel *416 is concerned, than any judgment entered only as a compromise of the parties." *Id.,* at 505-506, 73 S.Ct. 807 (citations omitted).

The State parties, perhaps recognizing the infirmity of their argument as a matter of standard preclusion doctrine, assert that common-law principles of issue preclusion **2320 do not apply in the special context of Indian land claims. Instead, they argue, § 22 of the Indian Claims Commission Act created a special regime of "statutory preclusion." [FN5] According to the State parties, the payment of a Commission judgment for claims to aboriginal or trust lands automatically and universally extinguishes title to the Indian lands upon which the claim is based and creates a statutory bar to further assertion of claims against either the United States or third parties based on the extinguished title. The State parties point to several decisions of the Ninth Circuit in support of this contention. See Reply Brief for State Parties 17 (citing *United States v. Pend Oreille Pub. Util. Dist. No. 1,* 926 F.2d 1502 (C.A.9 1991)); Reply Brief for State Parties 15 (citing *United States v. Dann,* 873 F.2d 1189 (C.A.9 1989)); Reply Brief for

State Parties 11 (citing *United States v. Gemmill,* 535 F.2d 1145 (C.A.9 1976)).

FN5. Section 22 provided:

"(a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

"The payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

"(b) A final determination against a claimant made and reported in accordance with this chapter shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy." 25 U.S.C. § 70u (1976 ed.).

We need not decide whether, in the distinctive context of the Indian Claims Commission Act, some consent judgments ***417** might bar a tribe from asserting title even in discrete litigation against third parties, for the 1983 settlement of Docket No. 320 plainly could not qualify as such a judgment. Not only was the issue of ownership of the disputed boundary lands not actually litigated and decided in Docket No. 320, but, most notably, the Tribe proceeded on alternative and mutually exclusive theories of recovery. Had the case proceeded to final judgment upon trial, the Tribe might have won damages for a taking, indicating that title was in the United States. Alternatively, however, the Tribe might have obtained damages for trespass, indicating that title remained in the Tribe. The consent judgment embraced all of the Tribe's claims. There was no election by the Tribe of one theory over the other, nor was any such election required to gain approval for the consent judgment. The Special Master's assumption that the settlement necessarily and universally relinquished the Tribe's claim to title was thus unwarranted. Certainly, if the $15 million payment constituted a discharge of the Tribe's trespass claim, it would make scant sense to say that the acceptance of the payment extinguished the Tribe's title. In contrast, the Ninth Circuit cases cited by the State parties (the correctness of which we do not address) all involved Indian Claims Commission Act petitions in which tribes claimed no continuing title, choosing instead to seek compensation from the United States for the taking of their lands. See, *e.g., Pend Oreille,* 926 F.2d, at 1507-1508; *Dann,* 873 F.2d, at 1192, 1194; *Gemmill,* 535 F.2d, at 1149, and n. 6.

The United States invites us to look behind the consent judgment in Docket No. 320 at presettlement stipulations and memoranda purportedly demonstrating that the judgment was grounded on the parties' shared view, after the 1978 Secretarial Order, that the disputed lands belong to the Tribe. We need not accept the Government's invitation. On the matter of issue preclusion, it suffices to observe that the settlement was ambiguous as between mutually exclusive***418** theories of recovery. Like the Tax Court settlement in *International Building Co.,* then, the consent judgment in the Tribe's Claims Court action is too opaque to serve as a foundation for issue preclusion. Accordingly, we hold ****2321** that the claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation are not precluded by the consent judgment in Docket No. 320.

C

[14] The Special Master has recommended that the Court approve the parties' proposed settlement of the dispute respecting the Fort Mojave Reservation. The claim to additional water for the Fort Mojave Reservation arises out of a dispute over the accuracy of a survey of the so-called Hay and Wood Reserve portion of the Reservation. See *Arizona II,* 460 U.S., at 631-632, 103 S.Ct. 1382. The parties agreed to resolve the matter through an accord that (1) specifies the location of the disputed boundary; (2) preserves the claims of the parties regarding title to and jurisdiction over the bed of the last natural course of the Colorado River within the agreed-upon boundary; (3) awards the Tribe the lesser of an additional 3,022 acre-feet of water or enough water to supply the needs of 468 acres; (4) precludes the United States and the Tribe from claiming additional water rights from the Colorado River for lands within the Hay and Wood Reserve; and (5) disclaims any intent to affect any private claims to title to or jurisdiction over any lands. See McGarr Report 8-9 (July 28, 1999).

We accept the Master's uncontested recommendation and approve the proposed settlement.

[15] The Master has also recommended that the Court approve the parties' proposed settlement of the dispute respecting the Colorado River Indian Reservation. The claim to additional water for that reservation stems principally from a dispute over whether the reservation boundary is the ambulatory west bank of the Colorado River or a fixed line representing *419 a past location of the River. See *Arizona II,* 460 U.S., at 631, 103 S.Ct. 1382. The parties agreed to resolve the matter through an accord that (1) awards the Tribes the lesser of an additional 2,100 acre-feet of water or enough water to irrigate 315 acres; (2) precludes the United States or the Tribe from seeking additional reserved water rights from the Colorado River for lands in California; (3) embodies the parties' intent not to adjudicate in these proceedings the correct location of the disputed boundary; (4) preserves the competing claims of the parties to title to or jurisdiction over the bed of the Colorado River within the reservation; and (5) provides that the agreement will become effective only if the Master and the Court approve the settlement. See McGarr Report 9-10. The Master expressed concern that the settlement does not resolve the location of the disputed boundary, but recognized that it did achieve the ultimate aim of determining water rights associated with the disputed boundary lands. *Id.,* at 10-12, 13-14. We again accept the Master's recommendation and approve the proposed settlement.[FN6]

FN6. A group called the West Bank Homeowners Association has filed a brief *amicus curiae* objecting to the proposed settlement of water rights claims respecting the Colorado River Indian Reservation. The Association represents some 650 families who lease property from the United States within the current boundaries of the Reservation. The Court and the Special Master have each denied the Association's request to intervene in these proceedings. See *Arizona v. California,* 514 U.S. 1081, 115 S.Ct. 1790, 131 L.Ed.2d 720 (1995); Special Master McGarr Memorandum Opinion and Order No. 17 (Mar. 29, 1995). The Master observed that the Association's members do "not own land in the disputed area and [the Association] makes no claim to title or water rights,"*id.,* at 2310, thus their interests will "not be impeded or impaired by the outcome of this litigation,"*id.,* at 2312. Accordingly, we do not further consider the Association's objections.

* * *

For the foregoing reasons, we remand the outstanding water rights claims associated with the disputed boundary *420 lands of the Fort Yuma Indian Reservation to the Special Master for determination on the merits. Those claims are the only **2322 ones that remain to be decided in *Arizona v. California;* their resolution will enable the Court to enter a final consolidated decree and bring this case to a close.

With respect to the Fort Mojave and Colorado River Reservations, the Special Master has submitted a proposed supplemental decree to carry the parties' accords into effect. That decree is reproduced as the Appendix to this opinion, *infra,* at 2322-2323. The parties are directed to submit to the Clerk of this Court, before August 22, 2000, any objections to the proposed supplemental decree.

It is so ordered.

APPENDIX TO OPINION OF THE COURT

Proposed Supplemental Decree

It is ORDERED, ADJUDGED, AND DECREED:

A. Paragraph (4) of Article II(D) of the Decree in this case entered on March 9, 1964 (*Arizona v. California,* 376 U.S. 340, 344-345, 84 S.Ct. 755, 11 L.Ed.2d 757) is hereby amended to read as follows:

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 719,248 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands re-

served by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date.

*421 B. Paragraph (5) of Article II(D) of the Decree in this case entered on March 9, 1964 (376 U.S. 340, 345, 84 S.Ct. 755) and supplemented on April 16, 1984 (*Arizona v. California,* 466 U.S. 144, 145, 104 S.Ct. 1900, 80 L.Ed.2d 194) is hereby amended to read as follows:(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 132,789 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 20,544 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date.

C. Paragraph (5) of the introductory conditions to the Supplemental Decree in this case entered on January 9, 1979 (*Arizona v. California,* 439 U.S. 419, 421-423, 99 S.Ct. 995, 58 L.Ed.2d 627) is hereby amended by adding the following exception at the end of the concluding proviso in the first sentence of that paragraph: "except for the western boundaries of the Fort Mojave and Colorado River Indian Reservations in California."

D. Paragraph II(A)(24) of the Decree of January 9, 1979 (439 U.S. 419, 428, 99 S.Ct. 995) is hereby amended to read as follows:

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

E. Paragraph II(A)(25) of the Decree of January 9, 1979 (439 U.S. 419, 428, 99 S.Ct. 995) is hereby amended to read as follows:

25)			
Fort MojaveIndian Reservation	16,720	2,587	Sept. 18, 1890

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

**2323 *422 G. The Court shall retain jurisdiction herein to order such further proceedings and enter such supplemental decree as may be deemed appropriate.

Chief Justice REHNQUIST, with whom Justice O'CONNOR and Justice THOMAS join, concurring in part and dissenting in part.

I believe that the United States' and the Quechan Tribe's claim for additional water rights is barred by the principles of res judicata, and therefore I dissent. The Special Master concluded that an exception to the general preclusion rule applied and that, therefore, the United States' claim was not barred. The Court rejects

the Special Master's reasoning but concludes that the State parties' res judicata defense is not properly before the Court. While I agree that the Special Master erred in finding the 1978 order of the Secretary of the Interior a "new fact" justifying an exception to the application of preclusion, I disagree with the Court's refusal to reach the merits of the State parties' defense.

The Court first concludes that the State parties lost the defense because they failed to assert it in a timely manner. While the State parties concede that they did not raise their claim of res judicata until 1989, it does not automatically follow that the defense is lost. Federal Rule of Civil Procedure 8(c) provides that res judicata shall be pleaded as an affirmative defense. But the only "pleadings" in this case were filed in the 1950's, at which time no claim of res judicata could have been made. The motions filed by the State parties in 1977 and 1979 were not in any sense comprehensive pleadings, purporting to set forth all of the claims and defenses of the parties. More importantly, neither Special Master Tuttle nor this Court focused on the merits of the boundary dispute during the proceedings in *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)(*Arizona II*). Rather, the Master only decided whether the Secretary's order was a final boundary determination, and, similarly, this Court simply determined***423** that the Secretary's order was subject to challenge and encouraged the parties to assert their legal claims and defenses in another forum. Consequently, it is likely that the State parties' res judicata claim would not have been resolved in *Arizona II* even if it had been raised.

The State parties did expressly raise the defense of res judicata in their 1989 motion, and neither the United States nor the Tribe objected to its consideration. The Tribe contested the merits of the State parties' res judicata claim and argued that its water rights' claim was not precluded. In so doing, the Tribe asserted that the State parties had not argued res judicata during the *Arizona II* proceedings. But neither the Tribe nor the United States contended, in response to the State parties' motion, that the Court could not decide the res judicata issue because it was not timely raised. We granted the motion, and Special Master McGarr considered the claim on the merits. Under these circumstances, I believe that the State parties did not lose their res judicata defense by failing to assert it in the earlier proceedings.

The Court also concludes that this Court's 1979 and 1984 supplemental decrees "anticipated" that the boundary dispute would be finally resolved in some forum. See *ante,* at 2317. To reach this conclusion, the Court reads too much into the simple language of the supplemental decrees and ignores language in our *Arizona II* opinion. The supplemental decrees stated that water rights for the five reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 1984 Supplemental Decree, Art. II(D)(5), *Arizona v. California,* 466 U.S. 144, 145, 104 S.Ct. 1900, 80 L.Ed.2d 194 (1984); 1979 Supplemental Decree, ****2324** Art. II(D)(5), *Arizona v. California,* 439 U.S. 419, 421, 99 S.Ct. 995, 58 L.Ed.2d 627 (1979) (*per curiam*). These decrees can best be interpreted as merely providing that the reservation's water quantity can be adjusted *if* the boundary changes, without deciding whether ***424** the boundary relied on in the 1964 decree could be properly challenged, and without indicating that the boundary necessarily would be "finally determined" at some future point. This reading is supported by language in *Arizona II.* In discussing the pending District Court action, we explained: "We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. *There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court.*" 460 U.S., at 638, 103 S.Ct. 1382 (emphasis added; footnote omitted). As is evident from this language, we did not "anticipate" that the dispute would be finally resolved. Instead, we explicitly left open the question whether the dispute could be litigated in this Court.

The Court disregards this language in *Arizona II* because it does not mention a potential preclusion defense. However, the point is not that this Court anticipated the State parties' preclusion defense. Rather, it is

that this Court recognized the possibility that the boundary issue would not be judicially resolved at all, and left open the question whether there was some defense precluding this Court's review. What that defense might be was not before the Court.

Now that the question is squarely before us, I would hold that the United States' claim for additional water rights is barred by the principles of res judicata. Res judicata not only bars relitigation of claims previously litigated, but also precludes claims that could have been brought in earlier proceedings. Under the doctrine of res judicata, "when a final judgment has been entered on the merits of a case, '[i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat ***425** the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' " *Nevada v. United States,* 463 U.S. 110, 129-130, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983) (quoting *Cromwell v. County of Sac,* 94 U.S. 351, 352, 24 L.Ed. 195 (1876)).

In *Arizona II,* we recognized that the general principles of res judicata apply to our 1964 decree even though the decree expressly provided for modification in appropriate circumstances. In so doing, we noted the importance of the certainty of water rights in the Western United States. "A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system.... If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a 'gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators.' " 460 U.S., at 620-621, 103 S.Ct. 1382 (quoting *United States v. New Mexico,* 438 U.S. 696, 699, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978)). Thus, we concluded that allowing recalculation of the amount of practicably irrigable acreage "runs directly counter to the strong interest in finality in this case." 460 U.S., at 620, 103 S.Ct. 1382. We also noted that treating the 1964 calculation as final comported with the clearly expressed intention of the parties and was consistent with our previous treatment of original actions, allowing modifications after a change in the relevant circumstances.

****2325** This reasoning is equally applicable to the United States' and the Tribe's claim for additional water for the disputed boundary lands. Even though the exact claim was not actually litigated in *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963)(*Arizona I*), the United States could have raised the boundary claim and failed to do so. Indeed, in the proceedings before Special Master Rifkind, the counsel for the United States affirmatively represented that "[t]he testimony ... as reflected by these maps and by the other testimony will define***426** the maximum claim which the United States is asserting in this case." Earlier in the proceedings, the Master explicitly warned the United States about the preclusive effect of failing to assert potential claims: "In an action or a decree quieting title, you cut out all claims not asserted.... I just want you to be aware of the fact that the mere fact that it has not been asserted does not mean that you may not lose it...." Exception by State Parties to Report of Special Master and Supporting Brief 8-9 (colloquy between counsel for the United States and the Special Master). Thus, under the general principles of res judicata, the United States would clearly be barred from now asserting the claim for additional water rights.

Special Master McGarr concluded that the United States' claim was not precluded because it fell within an exception to the bar of res judicata. Wisely abandoning the Master's reasoning, the United States instead defends the Master's ruling on the ground that these claims "are not precluded, under basic principles of res judicata, because [they] were not decided, and could not have been decided, in the prior proceedings." Reply Brief for United States in Response to Exception of State parties 21. But this argument fares no better.

The issue before the Master in *Arizona I* was the amount of water from the Colorado River to which the Quechan Tribe was entitled. The Master made an allotment to the reservation based on the evidence then before him as to the amount of irrigable acreage within the reservation boundary, which was undisputed at the time. Only years after that decree was confirmed by this

Court in *Arizona I* did the United States assert a larger claim to water for the reservation based on a claim for a larger amount of irrigable acreage-not because of a miscalculation as to the irrigability of acreage already claimed, but because of a claimed extension of the boundaries of the reservation. But, at the time of *Arizona I,* the United States had in its possession all of ***427** the facts that it later asserted in 1979 in *Arizona II,* and it could have litigated the larger claim before Special Master Rifkind.

The United States offers no support for its contention that the boundary dispute could not have been decided in *Arizona I* except for the fact that this Court rejected the Master's resolution of the Fort Mojave Reservation and Colorado River Reservation boundary disputes. However, those boundary disputes are different. While we did not explain in *Arizona I* why we believed it was improper to decide the boundary disputes, California's objection was based on the fact that necessary parties were not participating in the proceedings. Specifically, California argued that it lacked the authority to represent private individuals claiming title to the disputed lands and maintained that "it would be unfair to prejudice any of the parties in future litigation over land titles or political jurisdiction by approving findings on a tangential issue never pleaded by the United States." *Arizona II, supra,* at 629, 103 S.Ct. 1382. The Fort Yuma Reservation boundary dispute, on the other hand, is solely between the United States and the Quechan Tribe-there are no private parties claiming title to the land. Thus, the United States could have raised this claim in *Arizona I,* and the Master could have decided it.

****2326** Because I believe that the State parties' res judicata defense is properly before the Court and that the United States' claim for additional water rights is precluded, I see no need to remand for further proceedings. I agree with the Court that we should approve the proposed settlements of the remaining claims in this case and direct the parties to submit any objections to the proposed supplemental decree.

U.S.,2000.
Arizona v. California
530 U.S. 392, 120 S.Ct. 2304, 147 L.Ed.2d 374, 68 USLW 4553, 30 Envtl. L. Rep. 20,666, 00 Cal. Daily Op. Serv. 4873, 2000 Daily Journal D.A.R. 6445, 2000 CJ C.A.R. 3590, 13 Fla. L. Weekly Fed. S 433

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