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RULING ON Tribes
motion for SUMMARY
JUDGMENT re- BOUNDARY
of RIVER.

UNITED STATES SUPREME COURT
BEFORE THE SPECIAL MASTER

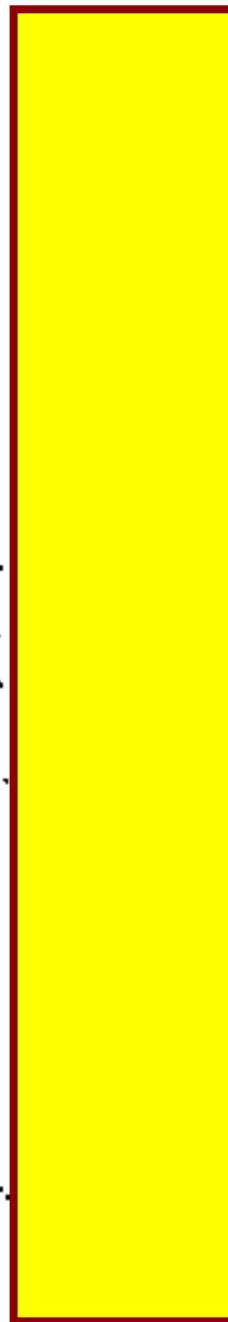
STATE OF ARIZONA,
Plaintiff,
v.
STATE OF CALIFORNIA, et al.,
Defendants.

)
)
) No. 8 Original
)
)
) MEMORANDUM
) OPINION AND ORDER NO. 19
)
)

I

The Colorado River Indian Tribes ("Tribes") filed a Rule 56 motion seeking summary judgment that the Executive Order of May 15, 1876 ("1876 Order") in conjunction with Section 830 of the California Civil Code ("Section 830") established a fixed boundary in the northern portion of the disputed area at the ordinary high watermark on the west side of the Colorado River ("River") as it existed in 1876 and an upward adjustment in the Tribes' water rights based on this boundary determination. The United States joined in the Tribes' motion. The State Parties admit that no genuine issue of fact exists, but oppose the motion and have filed a cross-motion for summary judgment asking the Special Master to rule that Section 830 has no application to this dispute and does not establish a fixed boundary as argued by the Tribes and United States.

The Tribes and the United States' argument is as follows. Before 1872 the United States owned the land on the west side of the River to the ordinary high watermark, and California owned the land east of the ordinary high watermark to the middle of the



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River. In 1872, California enacted Section 830 which granted the land between the ordinary high watermark and the low watermark on the west side of the River to the United States. In 1876, President Grant issued the 1876 Order which, by its call to the River's west bank, established the ordinary high watermark on the west side of the River as the Reservation's western boundary, thereby including the strip of land between the ordinary high and low watermarks within the Reservation. By including this strip of land within the Reservation, the 1876 Order divested the lands above the ordinary high watermark of their riparian character and deprived them of their right to accretions under the normal rules of erosion and accretion. Instead, all subsequent accretions accrued to the benefit of the strip of land between the ordinary high and low watermarks which was held in trust for the Tribes. Thus, regardless of the 1876 Order's intent to create a riparian boundary, its effect was to create a fixed boundary along the ordinary high watermark as it existed in 1876.

As a necessary predicate to the Tribes and United States' argument, the Special Master must determine that the western boundary of the Reservation, the "west bank" of the River, is the ordinary high watermark. If the western boundary is the low watermark, the mean watermark, or the actual edge of the water wherever it might exist, the Tribes and United States' argument fails because there could be no strip of land to divest the upland of its riparian character and to which subsequent accretions might accrue.

After an evidentiary hearing to determine the intended nature of the boundary and the definition of the term "west bank" as used in the 1876 Order, the Special Master ruled that the intended boundary was a riparian one at the "line formed where the water meets the land." (Mem. and Order No. 14 at 3, 7.) In their motion for judgment, the Tribes and United States argue that this ruling was equivalent to ruling that "west bank" means the ordinary high watermark.

However, in Memorandum Opinion and Order No. 18 ("Order No. 18"), the Special Master clarified his previous ruling by explaining that "west bank" does not mean the ordinary high watermark, but instead means:

[T]he line formed where the water meets the land -- the edge of the water. To phrase this in terms of a watermark, it is the mean, normal, or ordinary watermark: that place where the water meets the land in ordinary and normal circumstances, absent an avulsive change. It is a riparian boundary that changes as the Colorado River's course and level changes and, at any given time, may be found anywhere between the then existing ordinary high and low watermarks where the water meets the land.

(Mem. and Ord. No. 18 at 4.)

This clarification necessarily defeated the Tribes and United States' motion and required that the Special Master grant the State Parties' cross-motion for summary judgment.

II

The Tribes and United States now move the Special Master to reconsider Order No. 18, arguing that it conflicts with Order No. 11 and with established law interpreting the use of the word "bank" when defining a boundary.

Order No. 11 was the Pretrial Order issued before the evidentiary hearing on the intent of the 1876 Order. It outlined the issues to be resolved at the hearing and reserved the issue of the precise location of the boundary until after its intended character was determined. The Tribes argue that the Special Master's ruling that "west bank" means the line formed where the water meets the land in its ordinary course is contrary to Order No. 11 because it determines the location of the boundary.

Order No. 18 does not conflict with Order No. 11. It clarifies Order No. 14 by further defining the term "west bank." It does not purport to chart the current location of the boundary. Moreover, the parties were fully advised that one of the primary issues to be resolved by the evidentiary hearing was the definition of the term "west bank." For example, in Memorandum Opinion and Order No. 9 ("Order No. 9"), when ruling on the State Parties' Motion for Summary Judgment, the Special Master stated:

The central issue is whether 'down said west bank' is a riparian or a direct line, and a subsidiary issue is what 'bank' means and therefore where the point of beginning on the west bank is.

While the question is a close one, it must be concluded that in deference to the requirement of interpreting Executive Orders determining Indian land rights by considering the real goals of the parties to the agreement, and additionally in recognition of the dispute over the definition of the word 'bank', a hearing is required to determine and consider material facts relevant to the question whether the 1876 Executive Order intended to restore the river as a boundary, or to establish a fixed boundary determined by the west bank of the river at that time. Additionally, in either instance, the meaning of the word 'bank' and its location in 1876 remains to be resolved.

(Order No. 9 at 4 (emphasis added).) Also in Order No. 9, when ruling on the Tribes and United States' cross motions for summary judgment on the application of Section 830 (the same issue presented in the most recent motions for summary judgment), the Special Master noted:

As stated in the memorandum of the United States (at p. 29), the Motion for Summary Judgment of the United States and the Tribes is based upon a principle which becomes operative '... if, and only if, this court finds that the Western boundary of the [Reservation] is the mean high watermark of the Colorado River.' The cross motions for summary judgment discussed above must await consideration until such time as that principal underlying issue has been resolved, and as has been held herein, that resolution must follow and depend upon a hearing and the resolution of factual disputes.

(Order No. 9 at 9-10 (emphasis added).)

Order No. 11 includes much of the foregoing quoted language, reiterating that the definition of "west bank" was to be resolved at the hearing. (Order No. 11 at 2.) The parties themselves included this language in their Proposed Pretrial Order and actually argued this issue before the Special Master during the evidentiary hearing, offering several definitions of the word "bank". (See Transcript of Closing Arguments, June 28, 1993, Mr. McElroy at 710-14, 717, 720, 722, 828, 830; Mr. Muys at 751-53; Mr. Barry at 799, 802, 805.) The Tribes and United States argued that "bank" meant high bluff or geologic bank. The State Parties argued that "bank" meant the edge of the water. No party argued that "bank" meant the ordinary high watermark. That the Tribes argued for a definition of "bank" that was rejected does not mean that the definition of "bank" was not at issue.

Order No. 18 clarifies the Special Master's ruling on one of the very issues that Order No. 11 contemplated resolving through the evidentiary hearing. Order No. 18 does not conflict with Order No. 11 and will not be reconsidered for that reason.

The Tribes and United States present another basis for reconsideration. They argue that Order No. 18 conflicts with case law interpreting the word "bank" to mean the ordinary high watermark, absent a contrary intent. The Tribes, United States, and State Parties all agree with this legal principle. Thus, the issue is whether the 1876 Order evidenced a contrary intent.

The special master conducted an extensive hearing on the intent of the 1876 order: a hearing that sought to determine the intended meaning of the term "bank;" a hearing at which evidence was presented regarding the appropriate definition of "bank;" a hearing at which the United States and Tribes argued that "bank" does not mean ordinary high watermark, but means the high bank or geologic bluff; a hearing at which no party argued that "bank" means the ordinary high watermark. After the hearing, the Special Master determined that the intended meaning of "bank" was the line formed where the water meets the land, without regard for either the low or high watermark because neither side advocated a position based on such terminology. Thus, it would seem consistent with case law and the parties' arguments for the Special Master to determine that the 1876 Order evidenced an intent to establish the line formed where the water meets the land as the boundary, rather than the ordinary high water mark.

After close consideration of the 1876 Order as well as the pleadings and arguments in this case, however, it appears that the 1876 Order, while clearly intending to establish a riparian boundary at the water's edge, did not clearly express an intent that the water's edge should not be defined by the water's ordinary high watermark. Therefore, because the weight of authority holds that, absent a contrary intent, "bank" means ordinary high watermark and because the 1876 Order does not evidence a contrary intent, the Special Master has reconsidered his ruling in Order No. 18. Taking the motion to reconsider as a motion for clarification, the Special Master now rules that the 1876 Order intended to establish a riparian boundary along the west bank at the ordinary high watermark. The west bank is defined as "the water-washed and relatively permanent elevation or acclivity at the outer line of the river bed which separates the bed from the adjacent upland." Oklahoma v. Texas, 260 U.S. at 631-32, 43 Sup. Ct. at 225. The Reservation's boundary runs along the bank at the ordinary high watermark, which is the mark formed at the outer line of the riverbed by the wash of the water during its normal flow, when the water reaches the bank without overflowing it. Id.

Of course, this ruling does not dispose of the parties' motions for summary judgment on the applicability of Section 830.

III

In 1872, the United States owned the land on the west side of the River to at least the ordinary high watermark.¹ That year, the California Legislature enacted Section 830 which provides in pertinent part:

Except where the grant under which the land is held indicates a different intent, the owner of the upland ... when it borders upon a navigable lake or stream ... takes to the edge of the lake or stream, at low water mark ...

Thus, in 1872, the United States, as owner of the upland, took title to the riverbed down to the low watermark by operation of Section 830.² Four years later, President Grant issued the 1876 Order establishing the ordinary high watermark as the Reservation's western boundary. It was intended to be a riparian boundary, subject to the rules of erosion, accretion, and avulsion.

Despite his intent to do so, the Tribes and United States argue that Section 830 prevented President Grant from creating a

¹This is not a quiet title action, and to the extent possible, the Special Master will determine the boundary without deciding questions of title. It is not necessary to decide whether title to the west half of the River's bed passed to California under the equal footing doctrine to decide the pending motions. For the purposes of argument only, the Special Master assumes that California obtained title to the west half of the riverbed upon admission to the Union under the equal footing doctrine.

²The State Parties argue that Section 830 applies only to private landowners and not to the United States. It is unnecessary for the Special Master to decide this issue to rule on the pending motions and therefore will not do so. For the purposes of argument only, it is assumed that Section 830 applies equally to all landowners, including the United States, and effectively transferred title to the riverbed between the ordinary high and low watermarks to the United States.

riparian boundary. They argue that by including the "strip of land" between the ordinary high and low watermarks in the Reservation, President Grant segregated the United States' upland from the River, thereby divesting the upland of its right to accretions. Under the Tribes and United States' argument, all future accretions attached to the "strip of land" between the ordinary high and low watermarks, and over time, this "strip of land" grew through accretion, while the boundary, the ordinary high watermark, never changed.

Throughout their briefs, the Tribes and United States intermingle rules of state and federal law. Although the relevant federal and state rules do not conflict, this dispute is governed by federal law. It is between the United States, the States and various State agencies, and the Tribes. It concerns the interpretation of an Executive Order establishing a boundary for an Indian Reservation authorized by Congress, involves land owned by the United States outright and land held in trust for the Tribes, and requires a determination of whether there has been accretion to federal land. These questions are controlled by federal law. California ex rel. State Land Comm'n v. United States, 457 U.S. 273, 283, 102 S.Ct. 2432, 2438 (1982); Huches v. Washington, 389 U.S. 290, 292-93 (1967); California ex rel. State Lands Comm'n v. United States, 805 F.2d 857, 860 (9th Cir. 1986).

Even though federal law applies, the Special Master could determine as a matter of choice of law that a state rule of law

should be borrowed to provide the substantive rule of decision for certain questions (California, 457 U.S. at 283); however, given the overwhelming federal interests present in this case, federal law controls. In any event, California law does not differ from federal law in any significant respect on any issue. California law is noted herein in conjunction with federal law where appropriate.

The Tribes and United States' contend that Section 830 established a fixed boundary; however, Section 830 in and of itself could not have that effect. Section 830 does not purport to alter the nature of riparian rights, to redefine the location of the bank or riverbed, or otherwise divest upland owners of their right to accretions. Section 830 simply conveys title to a portion of California's riverbeds to the upland owners.

Moreover, Section 830 transferred ownership of the riverbed between the ordinary high and low watermarks to the United States four years before the President signed the 1876 Order. As a result, the United States already owned the land on both sides of the ordinary high watermark when the President issued the 1876 Order. Therefore, the issue is not whether Section 830 created a fixed boundary, but whether the 1876 Order, despite the President's intent to establish a riparian boundary, divested the upland of its right to accretions and established a fixed boundary because the United States owned a portion of the riverbed and included it in the reservation.

It is undisputed that, prior to 1876, the United States, as owner of the upland, was entitled to accretions under both federal and California law. E.g., California ex rel. State Land Commission v. United States, 457 U.S. 273, 280, 285, 102 S.Ct. 2432, 2436, 2439 (1982); Bess v. County of Humboldt, 5 Cal. Rptr. 2d 399, 404 (Cal. Ct. App. 1992); Cal. Civil Code Section 1014. The Tribes and United States argue that the 1876 Order divested the United States of its right to accretions by segregating and transferring to the Tribes a "strip of land" between the ordinary high and low watermarks, thereby separating the United States' upland from the river. Under the Tribes' analysis, "the inland parcel [the United States' upland] no longer has uninterrupted access to the water, and without such direct access [the United States] is no longer a riparian landowner." (Tribes Mem. In Support of Mtn. at 43.) The Tribes and United States' argument disregards the very definition of "bank" on which they rely.

By definition, the bank, the ordinary high watermark, separates the upland from the riverbed. Oklahoma v. Texas, 260 U.S. at 631-32, 43 Sup. Ct. at 225; Howard v. Ingersoll, 54 U.S. 381, 417 (1851). See also California v. Super. Ct., 625 P.2d 239, 246 (Cal. 1981); Bess v. County of Humboldt, 5 Cal. Rptr. 2d 399, 402 n. 2 (Cal. Ct. App. 1992). The land above the ordinary high watermark is upland; the land below the ordinary high watermark is riverbed. Oklahoma, 260 U.S. at 631-32, 43 S.Ct. at 225; Howard, 54 U.S. at 416. Again by definition, the land below the ordinary high watermark is ordinarily covered by water. It

must be "kept practically bare of vegetation by the wash of the waters of the river..." Oklahoma, 260 U.S. at 631-32, 43 S.Ct. at 225. Thus, the "strip of land" between the ordinary high and low watermarks is part of the riverbed and is ordinarily under water. It is not a parcel of land between the United States' upland and the River. It is the River. Thus, the 1876 Order did not divest the United States' upland of its riparian character by including the "strip of land" in the Reservation.

The Tribes attempt to avoid this incongruity by arguing that the "strip of land" between the high and low watermarks is the "shore" rather than the riverbed. (Tribes' Reply at 7-8.) Whether or not the "strip of land" is designated as the "shore," it is part of the riverbed. The Tribes and United States' own argument aptly demonstrates this point.

The Tribes and United States argue that California obtained title to the "strip of land" by operation of the equal footing doctrine when California was admitted to the Union. Of course, under the equal footing doctrine, California obtained title only to the beds of the navigable waters within its territory, up to the high water mark. California v. Super. Ct., 625 P.2d 239, 246 (Cal. 1981) (emphasis added). The "strip of land" below the high watermark must have been within the bed of the River or California would not have obtained title to it under the equal footing doctrine.

In a further effort to remove the "strip of land" from the riverbed, the United States argues that California has

statutorily declared that the beds of navigable rivers begin at the low watermark rather than the ordinary high watermark.

(United States Reply at 9-10.) In support, the United States cites Section 670 of the California Civil Code which provides that California "is the owner ... of all land below the water of a navigable lake or stream..."

The United States' argument fails for three reasons.³ First, as discussed above, the location of the boundary in this case is determined by federal, not state, law. Second, the United States' interpretation of Section 670 is not supported by the plain language of Section 670, which, on its face, does not define where the beds of navigable rivers begin or end or even use the word "bed." Third, the United States' argument is flatly contradicted by California case law, which defines the high watermark as the point where the bed of a navigable water ends and its bank begins. Bess v. County of Humboldt, 5 Cal. Rptr. 2d 399, 402 n. 2 (Cal. Ct. App. 1992); Lyon v. Western Title Ins. Co., 224 Cal. Rptr. 385, 393 (Cal. Ct. App. 1986).⁴ Not even

³The United States position is also contradicted by its Motion to Reconsider Order No. 18. In its motion, the United States argues that the line of ordinary high water separates lands held by riparian owners from the riverbed, thereby conceding that the "strip of land" between the ordinary high and low watermarks is within the riverbed. (U.S. Mtn. To Recon. at 5.)

⁴Arguably, if California law applied and if California law had in fact redefined the location of the riverbed to begin at the low watermark, then it would logically follow that the "bank" of the river would be similarly redefined to begin at the low watermark. Thus, there still would be no "strip of land" which would separate the upland from the River or to which accretions could attach.

the case on which the United States relies, County of Lake v. Smith, 278 Cal. Rptr. 809 (Cal. Ct. App. 1991), supports its position. County of Lake v. Smith does not hold that Section 670 defines the outer edges of riverbeds by their low watermarks. County of Lake v. Smith simply explains that the phrase "below the water" in Section 670 must be read in conjunction with Section 830's use of the term "low-water mark," and that together Sections 670 and 830 define the low watermark as the boundary between state and privately owned property. Id. at 816.

In sum, the Reservation's boundary is the ordinary high water mark; the land above the ordinary high watermark is upland owned by the United States; the land below the ordinary high watermark is part of the riverbed. There is no "strip of land" between the upland and the River. Therefore, the 1876 Order did not divest the United States' upland of its riparian nature and deprive the United States' of its right to accretions.

The Tribes and United States' argument that accretions attached to the "strip of land" between the high and low watermarks is similarly faulty. Under both federal and California law, accretions attach to the upland adjacent to the navigable water and belong to the owner of the upland. E.g., California ex rel. State Land Comm'n v. United States, 457 U.S. 273, 280, 285, 102 S.Ct. 2432, 2436, 2439 (1982); Cal. Civ. Code § 1014; Bess v. County of Humboldt, 5 Cal. Rptr. 2d 399, 404 (Cal. Ct. App. 1992). Accretions do not attach below the ordinary high watermark to the riverbed. California ex rel.

State Land Comm'n v. United States, 457 U.S. at 285-86, 102 S.Ct. at 2439-40. The "strip of land" is part of the riverbed; therefore, accretions do not attach to it.

Furthermore, it defies logic to argue that accretions can attach below the ordinary high watermark and form new, dry land. Land below the ordinary high watermark is ordinarily under water. That is its defining characteristic. Land that is too high to be washed by the water on a regular basis is, by definition, above the ordinary high watermark and part of the upland. It is the movement of the ordinary high watermark that creates accretions. Accretions form when accumulations of sand, rock, and dirt build up and "push the water line back, thereby creating new land." California ex rel State Lands Comm'n v. United States, 805 F.2d 857, 860 n.1 (9th Cir. 1986). As the line of ordinary high water shifts new upland is exposed. Accretion is not possible if the ordinary high watermark does not move. Therefore, the ordinary high watermark, the boundary, had to move before new land could be exposed, and if new land was exposed, the boundary must have moved.

The Tribes cite Chicago, B. & O.R. Co. v. Porter, 34 N.W. 286 (Iowa 1887), as authority for their position; however, Chicago, B. & O.R. is distinguishable. In Chicago, B & O.R., Iowa enacted legislation authorizing railroads to appropriate and build on land within the beds of Iowa's navigable rivers. The Iowa Supreme Court ruled that the lawful appropriation of such land cut off the riparian owner's right to accretions. Id. at

289. Unlike the legislation at issue in Chicago, B. & O.R., Section 830 does not authorize third parties to appropriate the riverbed adjacent to a riparian owner's land and cut off the riparian owners' right to accretions. See Bess v. County of Humboldt, 5 Cal. Rptr. 2d 399, 404 (Cal. Ct. App. 1992); Cal. Civil Code § 1014. Section 830 simply granted a portion of the riverbed to the riparian owner. After Section 830 was enacted in 1872, accretions continued to attach to the upland at the line of ordinary high water and belong to the riparian owner. Cal. Civ. Code § 1014; Bess, 5 Cal. Rptr. 2d at 404; Lyon v. Western Title Ins. Co., 224 Cal. Rptr. 385, 393 (Cal. Ct. App. 1986).

The President could have intended the 1876 Order to segregate the right to accretions from the upland and transfer the right to accretions to the Tribes, even without transferring a portion of the upland, cf. Deering v. Gahm, 84 N.W.2d 223, 225-26 (Iowa 1957); Caples v. Taliferro, 144 Fla. 1, 197 So. 861, 862 (Fla. 1940), but he did not. The President intended the 1876 Order to establish a riparian boundary. He could not have also intended the 1876 Order to convey the right to accretions, thereby establishing a fixed boundary. The two positions are diametrically opposed. Under the 1876 Order, the United States retained its upland with its attendant right to accretions and reserved the riverbed for the Tribes' benefit.

* The Tribes and United States rely heavily on an Order issued by the Secretary of the Interior on January 17, 1969 ("Secretary's Order"), which is based on an opinion from the

* Solicitor of the Department of the Interior issued that same day
* ("Solicitor's Opinion"). The Secretary's Order purports to
establish the Reservation's boundary as a fixed line along the
ordinary high water mark as it existed in 1876 based on reasoning
identical to that expressed by the Tribes and United States in
their motion. The Tribes argue that the Act of April 10, 1964,
Public Law 88-302, 78 Stat. 188 ("1964 Act"), implicitly
authorized the Secretary to determine the Reservation's boundary
and that therefore, under Chevron, U.S.A., Inc. v. Natural
Resources Defense Council, Inc., 467 U.S. 837, 104 S.Ct. 2778
(1984), the Special Master must defer to the Secretary's
interpretation of the 1876 Order unless the interpretation is
unreasonable or contrary to congressional intent.

* Although the Special Master has given due consideration to
the Secretary's Order, he is not required to defer to the
Secretary's conclusions under Chevron.⁵ Under Chevron, courts
defer to administrative agencies' interpretations of statutes
where those agencies are authorized to administer the statute and
the statute is silent or ambiguous with respect to a given issue.
467 U.S. at 843-44, 104 S.Ct. at 2782. If Congressional intent
is clearly expressed on an issue, there is no room for agency
interpretation and congressional intent must be effected. Id.

* The Tribes' argument that the 1964 Act implicitly authorized
the Secretary to determine the Reservation's boundary is
unfounded. The 1964 Act declared that land and improvements

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⁵In Arizona v. California, 460 U.S. 605, 636, 103 S.Ct.
1382, 1400 (1983), the Supreme Court ruled that the Secretary's
Order was not a binding determination of the boundary issue.

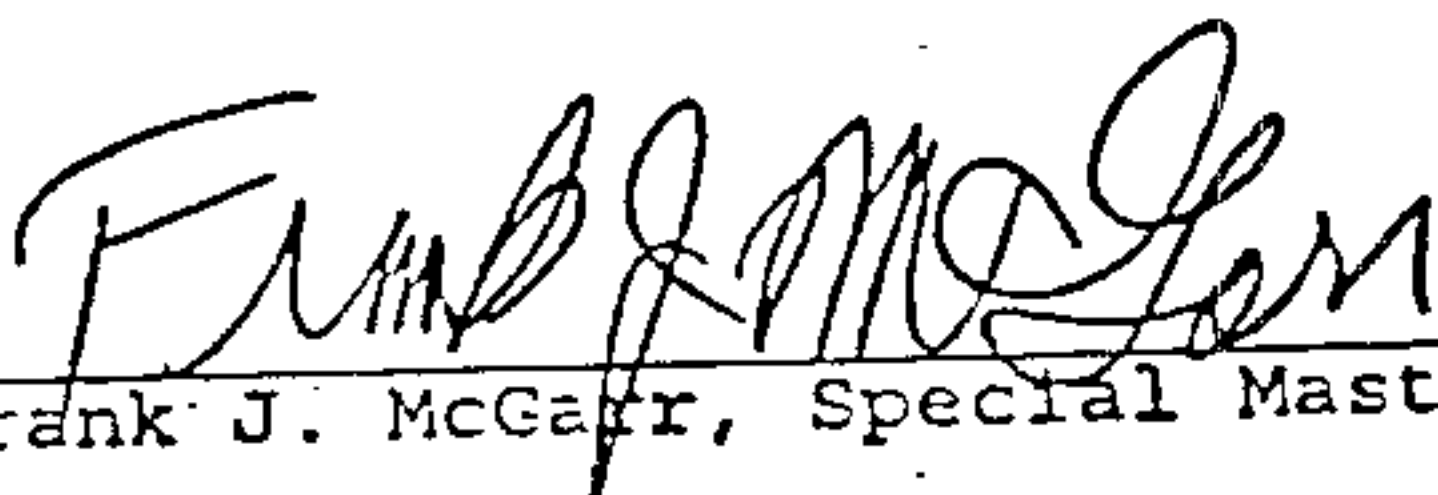
* within the Reservation are tribal property held in trust by the United States for the Tribes' benefit and authorized the Secretary to approve leases of Reservation land. 1964 Act at §§ 1, 5. It did not, however, authorize the Secretary to determine the location of the boundary. To the contrary, the 1964 Act states, "the authorization herein granted ... shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation ..." Id. at § 5. In light of this explicit statement, it is clear that the 1964 Act did not authorize the Secretary to resolve the boundary dispute. Thus, the Secretary's Order is not entitled to deference under Chevron.

* Nevertheless, given the Secretary's broad powers over federal land, the Secretary's Order is entitled to consideration. As discussed above, however, the reasoning underlying the Secretary's Order is not sound. It misinterprets the definition of bank and the nature of accretions. Moreover, the Secretary's conclusion that the 1876 Order created a fixed boundary is directly contrary to the 1876 Order's intent to create a riparian boundary. Therefore, even if Chevron applied, the Special Master would not be required to defer to the Secretary's conclusion.

When President Grant issued the 1876 Order, the United States owned the upland, the accretions thereto, and the riverbed to the low watermark. By the 1876 Order, President Grant intended to divide the United States' land at the River's ordinary high watermark, reserving the riverbed for the Tribes'

benefit and retaining the upland and accretions thereto for the United States. The boundary was intended to be riparian, subject to the rules of erosion, accretion, and avulsion. Neither Section 830 nor any other authority cited by the Tribes or United States prevented President Grant from establishing the boundary as he intended. It was the United States' land. The President was authorized to divide it as he saw appropriate. Therefore, the Tribes and United States' motion for summary judgment is denied, and the State Parties' cross-motion for summary judgment is granted.

Dated: Jan 18, 1996


Frank J. McGarr, Special Master