No. 8, ORIGINAL

In the Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON MOTION FOR LEAVE TO INTERVENE

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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CITATIONS

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In May 1977, Arizona, Nevada, California and seven California public agencies (the state parties) filed a joint motion for a determination of their present perfected rights under Article VI of the decree entered in this case on March 9, 1964, 376 U.S. 340, 351–352, and amended on February 28, 1966, 383 U.S. 268. The United States, which has participated throughout this litigation on behalf of the five tribes along the lower Colorado River, responded to this motion in November 1977. The issues raised in the Joint Motion and the response of the United States are restricted to matters relating to the determination of the non-Indian present perfected rights under Article VI.

Now three of the five lower Colorado River tribes—the Quechan Tribe of the Fort Yuma Reservation, the Fort Mojave Tribe, and the Chemehuevi Tribe (the Three Tribes)—have moved to intervene as "[i]ndispensable [p]arties." Their motion states the following grounds: the tribes are the real parties in interest; the representation of their interests by the United States is and has been inadequate; the proposed supplemental decree is patently ambiguous; the United States' response does not set forth the status of certain boundary disputes; the United States' response fails to make any claims for certain lands "omitted" from the Court's original decree; and the present perfected rights claimed by the movants have no basis in fact. The applicants in intervention did not attach a proposed complaint in intervention to their motion (see Rule 9 of this Court and Rule 24, Fed. R. Civ. P.), and their motion requested (Mot. 18) that they be permitted to file such a petition within sixty days after the grant of their motion.

I. THE TRIBES' CLAIM TO BE INDISPENSABLE PARTIES

The Three Tribes contend that they should be permitted to intervene because they are the real parties in interest (and thus indispensable parties), and that the government's representation of their interests is and has been wholly inadequate.

The United States is fully in accord with the Three Tribes' assertion that they are the beneficial owners of water rights reserved by the United States at the time it established their reservations. See *Winters* v.

United States, 207 U.S. 564. As the Three Tribes acknowledge (see Br. 5–6), the United States' complaint in intervention stated that the United States "as trustee for the Indians and Indian Tribes" claimed "on their behalf rights to the use of the water from the Colorado River and its tributaries in the River Basin" (Complaint, ¶ 27). As this Court's opinion demonstrates, the United States successfully contended that the Tribes were entitled to substantial reserved water rights. See *Arizona* v. *California,* 373 U.S. 546, 595–601.

However, although we agree that the Three Tribes have a beneficial interest in the water rights claimed by the government on their behalf, we do not agree that this interest establishes that they are indispensable parties. To the contrary, the decisions of this Court recognize that the United States as trustee has standing to bring suit to protect or enforce such rights, and that at least in the absence of conflict of interest [1] this representation of the tribal interests is "complete." *Heckman* v. *United States,* 224 U.S. 413, 444–445.

The Three Tribes recognize the United States' trusteeship status (Br. 14–15), but they urge that they should be permitted to intervene and represent their own interests because the representation of the United States has been inadequate due to pervasive conflicts of interests in both the Department of Justice and

[1] Compare *State of New Mexico* v. *Aamodt,* 537 F. 2d 1102 (C.A. 10), with *Pueblo of Picuris* v. *Abeyta,* 50 F. 2d 12 (C.A. 10).

the Department of the Interior. Although they allege that the government's conduct of the case from the outset has been inadequate,[2] the Tribes' primary submission is that the government's response to the Joint

[2] In addition to general allegations that the government has succumbed to adverse political pressures (Br. 5–6), the brief contains two specific allegations of past malfeasance by government attorneys. First, the Tribes quote an affidavit alleging that government attorneys "abandoned the Tribes' interests and vigorously advocated the conflicting claims of joint movants Yuma and Gila Federal Reclamation Projects" (Br. 7); second they cite a memorandum allegedly proving "beyond a question" that conflicts of interest precluded the Tribes from having their day in court (Br. 29 and n. 61). Although both the affidavit and the memorandum to which the Tribes refer were prepared by Bureau of Indian Affairs employees, the views expressed in these documents do not represent the position of the Department of the Interior. Nor, in our view, do these charges reveal an actual conflict of interests. The United States' primary undertaking in the instant case was the presentation of the Indian claims. The only other rights advanced by the United States and ultimately determined by the Court were for the Imperial National Wildlife Refuge, the Lake Mead Recreation Area, the Havasu Lake National Wildlife Refuge, and the satisfaction of the United States' obligations under its treaty with Mexico dated February 3, 1944, 59 Stat. 1219. Of those claims, only the treaty claim involved a substantial amount of water (normally 1.5 million acre-feet per year, half of which would be supplied by the upper basin in times of shortage). 59 Stat. 1237. However, the rights of United States to water to satisfy its treaty obligation was virtually indisputable; indeed no party in the litigation sought to challenge that claim. Moreover, that right could conflict with the tribal rights only in the event of extreme shortage.

We therefore believe that the motion to intervene is grounded less on charges of conflicting interests than on disagreements with the wisdom of various judgments necessarily made in the course of developing a litigation strategy. Although we believe that the government's conduct of this litigation has been competent and fully in accord with its fiduciary obligations, we do not believe it would

Motion demonstrates the gross inadequacy of its representation of their interests. We therefore address in turn each of the points upon which they rely to establish this inadequacy.

II. ALLEGATIONS OF PATENT AMBIGUITIES

The Tribes' chief argument (Mot. 6–9; Br. 16–22) is that the proposed supplemental decree is patently ambiguous. The Tribes argue that paragraph 5 of the proposed decree, the subordination agreement, does not ensure the priority of their present perfected rights. That paragraph provides that,

> "In the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II(B)(3) of said decree, the Secretary of the Interior shall * * * first provide for the satisfaction in full of all the rights of the * * * Tribes.

The Tribes contend (Br. 16), however, that the final decree contains "no provision relating to 'insufficient mainstream water to satisfy present perfected rights,'" and therefore a patent ambiguity exists which leaves their rights open to challenge.

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be feasible or appropriate at this stage of the proceedings to describe fully and seek to justify the judgments made regarding the strategy of the litigation and method of presentation of evidence to the Special Master approximately twenty years ago. A separate action presenting any such claims of breach of trust, if timely and authorized by statute, would be the appropriate forum for the development of the necessary record to permit the adjudication of such charges. See *United States* v. *Mason*, 412 U.S. 391, 398–399; 28 U.S.C. 1505.

In our view there is no ambiguity. Article II(B) provides for all possible contingencies. Articles II(B)(1) and (2) of the decree, 376 U.S. 342, provide for all instances in which sufficient mainstream water exists to satisfy 7,500,000 acre-feet of annual consumptive use. Where Article II(B)(1) and (2) apply, Article II(D) provides for the satisfaction of the Tribes' present perfected rights out of the 7,500,000 acre-feet. Article II(B)(3) provides for the remaining instances—in which insufficient mainstream water is available to satisfy 7,500,000 acre-feet of consumptive use—and in that circumstance Article II(B)(3) requires the Secretary to provide for the satisfaction of all present perfected rights before apportioning the remaining available water.[3] Although Article II(B)(3) provides that the Secretary is to provide for present perfected rights "in order of their priority date without regard to state lines," paragraph 5 of the proposed supplemental decree alters this order of priority by providing

[3] Article II(B)(3) provides:

"If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights."

that the Tribes' rights shall be satisfied "first." Accordingly, in our view no ambiguity exists, and the proposed supplemental decree provides for the priority of the affected Indian water rights without regard to their priority date in all cases where there is a shortage of mainstream water, and Indian rights, though perfected, might not otherwise be satisfied.

The State parties' response to the Tribes' motion to intervene indicates that they concur in this interpretation of the subordination agreement. They represent that the proposed supplemental decree "with [the United States'] modifications, * * * through subordination language * * * allows all Indian present perfected rights to be satisfied ahead of all major non-Indian rights in time of shortage" (St. Resp. 17).

The Tribes also suggest (Br. 20–22) that a second ambiguity arises from a comparison of the language of the proposed supplemental decree as to use in diversion, with the language of Article II(D)(1)–(5), which in the case of each of the Tribes describes the entitlements to "present perfected rights" as follows:

> * * * in annual quantities not to exceed (i) * * * acre feet of diversions from the main stream or (ii) the quantity of main stream water necessary to supply the consumptive use required for irrigation of * * * acres and for satisfaction of related uses, whichever of (i) (ii) is less, with a priority date of * * *.

The amendment to paragraph 5 proposed in the United States' response to the Joint Motion (U.S. Resp. 3), however, provides that main stream water for additional areas determined to be within tribal reservations shall not exceed the quantities—

> * * * necessary to supply the consumptive use required for irrigation of the irrigable acres * * *.

The language in the proposed supplemental decree, instead of the language in the original decree, was adopted for the very practical reason that the parties are unable at this time to specify the number of practicably irrigable acres included within the areas subject to boundary disputes resolved since the entry of the Court's decree. As a result, the total number of acre feet of diversions cannot be specified. The use of the proposed language, in our view, provides a workable definition in the absence of the information required to compute the total number of acre feet of diversions. We believe that the Tribes' entitlement to water under the proposed language (which is based upon the second test of the original decree) cannot be less than it would be under the dual standard of the original decree, since the decree specifies that the Tribes are entitled only to the application of whichever of the two formulas provides less. The language proposed is used only because of lack of the proper data to enable the parties to use the dual standard set forth in the original decree.

III. BOUNDARY DISPUTES

The Tribes also contend (Mot. 9–15; Br. 23–28) that the government's response to the Joint Motion is inadequate in that it fails to address the issue of disputes concerning the boundaries of tribal lands. The Tribes argue that the supplemental decree should make provision for water rights in areas recognized

as part of the tribal reservations[4] as a result of the resolution of boundary disputes occurring since the filing of the original decree. We agree that these rights ultimately must be determined, and we intend at an appropriate time to file a motion with this Court seeking a determination of these rights. Such a motion would not, however, be brought under Article VI, but rather under Article II(D) and Article IX of the original decree. The present proceeding is limited to issues involving Article VI of that decree. In our view, substantial benefits will accrue to the Tribes if the present efforts to resolve the controversy under Article IV succeed, and tribal rights that may be subject to future proceedings are in no way jeopardized or affected.

Indeed, the State parties' response to the Tribes' motion to intervene expressly acknowledged that the proposed decree does not affect the Tribes' rights to raise claims resulting from boundary disputes under Articles II and IX (St. Resp. 15–16). As the State parties note (*id.* at 16–17), the proposed decree is explicit on this point. Paragraphs 2 and 3 provide:

> (2) This determination shall in no way affect future adjustments resulting from determinations relating to settlement of Indian reservation boundaries referred to in Article II(D)(5) of said Decree.

[4] In large part the motion of the Three Tribes concerns the boundaries of the Colorado River Indian reservation (Mot. 11–13); the Colorado River Tribe, however, has not at this time moved to intervene.

(3) Article IX of said decree is not affected by the list of present perfected rights.

Moreover, as noted in our original response to the Joint Motion (U.S. Resp. 4–5), the language proposed by the United States for paragraph 5 (the subordination agreement) is intended to apply to additional areas determined to be within the boundaries of the reservations. The State parties accept this interpretation; in their response to the intervention motion they state that the Indian rights "advantaged" by the subordination "include not only those present perfected rights already quantified in the decree, *but also any present perfected rights quantified in the future as a result of boundary dispute resolutions*" (St. Resp. 17; emphasis added).

We believe that treating Article VI matters separately from rights affected by boundary disputes is in accord with this Court's distinction between Article VI matters, as to which it directed the parties to file lists of their claims within three years, 383 U.S. 268–269, and boundary disputes, upon which the Court declined to rule. *Arizona* v. *California,* 373 U.S. 546, 601.

IV. OMITTED LANDS

The Tribes also contend (Mot. 16) that the government's response to the Joint Motion is inadequate in that it fails to make any claims for "omitted" lands, *i.e.,* those for which no evidence was presented to the Special Master. At present there is not sufficient hydrological and technical data to adjudicate these

claims. However, we believe, as in the case of lands ultimately determined to be within reservation boundaries, that adoption of the proposed supplemental decree under Article VI in no way forecloses a later claim for such lands under Article IX.

V. TRIBAL OBJECTIONS TO PRESENT PERFECTED RIGHTS CLAIMED BY THE STATE PARTIES

The Tribes deny (Mot. 17) the validity of the State parties' claims to present perfected rights. We do not agree with the Tribes' allegations that the dates and amounts claimed are patently false; however, as noted in our response to the Joint Motion, we accept these claims only conditionally as part of a stipulation including an agreement subordinating all these state rights to the Tribes' present perfected rights.

VI. CONCLUSION

As the foregoing demonstrates, the United States has no governmental interests which conflict with those it is asserting on behalf of the Tribes in this proceeding under Article VI.[5] Throughout the negotiations on this subject over the past several years, the primary aim of the United States has been to insure that the rights of the five lower Colorado River tribes, including those of the applicants in intervention, are fully protected. The purpose of the proposed sub-

[5] The only federal present perfected rights (other than those claimed on behalf of the tribes) listed in the proposed supplemental decree are a diversion right of 1,140 acre feet (with a priority date of 1915) for a parcel of land in Arizona (Pro. Supp. Decree 8), and a diversion right of 500 acre feet (with a priority date of 1929) for the Lake Mead Recreation Area (*id.* at 18). We do not believe that the Three Tribes suggest the assertion of these minor claims creates any conflict.

ordination agreement is to establish by decree that the rights of the five tribes will be satisfied in times of shortage prior to all other present perfected rights except for a few miscellaneous rights.[6] The United States is continuing its negotiations with the State parties seeking to achieve that purpose, consulting with the Tribes, and considering all the Tribes' comments as efforts to resolve this matter continue.

In light of the lack of conflict between the United States' interests and those of the Tribes, we believe their intervention at this late stage in the proceeding is unwarranted. An important additional consideration is the States' assertion (St. Resp. 4–7) of sovereign immunity. See *United States* v. *Minnesota,* 270 U.S. 181; *Cherokee Nation* v. *Georgia,* 5 Pet. 1. It may be that Arizona (the plaintiff) and Nevada (an intervenor), by asserting title to the water rights at issue and submitting that question for adjudication, have consented to determination of adverse claims with respect to the same *res* or asset. But that argument would not apply to California, New Mexico, or Utah, who were involuntarily made parties.

Accordingly, since the Tribes' interests are (and have been) fully represented by the United States and since the intervention of the Tribes at this late date might frustrate the complete adjudication of the competing claims, the motion to intervene should be denied. We urge the Court, however, in light of the

[6] The proposed supplemental decree does not subordinate the Miscellaneous Present Perfected Rights (Pro. Supp. Decree 7–11, 12–18) to the rights of the Tribes. Those rights, however, total only 17,504 acre-feet of diversions, part of which are for municipal and industrial purposes. Most of those rights are minimal and not all are senior to the tribal rights.

Tribes' obvious interest in these proceedings, to permit the Tribes to submit their views as *amici curiae*.[7]

Respectfully submitted.

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[7] Allowing the Tribes to participate as *amici curiae* is consistent with an earlier ruling by the Special Master on the request of several tribes other than the Three Tribes that the Attorney General be directed to appoint separate counsel for them, although they expressly disclaimed any desire to intervene (6 Tr. 2644). The Special Master ruled that although "[t]he legal power of the Attorney General to represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action," there was "some room for accommodation"; he concluded that the tribes could submit a brief at the conclusion of the hearing that would be similar to an *amicus curiae* brief (6 Tr. 2644–2646). We know of no instance in these proceedings in which a tribe did so.

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