No. 8 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

STATE OF ARIZONA,
Complainant

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CALIFORNIA, CITY OF SAN DIEGO, CALIFORNIA, AND COUNTY OF SAN DIEGO, CALIFORNIA,
Defendants

THE UNITED STATES OF AMERICA AND STATE OF NEVADA,
Interveners

STATE OF UTAH AND STATE OF NEW MEXICO,
Impleaded Defendants

BRIEF IN SUPPORT OF PETITION OF INTERVENTION ON BEHALF OF THE FORT MOJAVE TRIBE, THE QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, THE CHEMEHUEVI INDIAN TRIBE, THE COLORADO RIVER INDIAN TRIBES AND THE CONFEDERATION OF INDIAN TRIBES OF THE COLORADO RIVER; AND THE NATIONAL CONGRESS OF AMERICAN INDIANS AS AMICUS CURIAE

RAYMOND C. SIMPSON, Attorney for Petitioners, the Fort Mojave Tribe, the Quechan Tribe of the Fort Yuma Indian Reservation, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes and the Confederation of Indian Tribes of the Colorado River; and the National Congress of American Indians as Amicus Curiae

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D.C. 20001

SUBJECT INDEX

See *Subject Index* and *Citations,* Tribes' Motion and Brief, December 23, 1977

CITATIONS

See *Subject Index* and *Citations,* Tribes' Motion and Brief, December 23, 1977

Cases: Page

Miscellaneous:

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INTRODUCTION

A. The Solicitor General Violates The Code of Professional Responsibility In The Case Of Arizona v. California

There is incorporated into this Brief in support of the Petition of Intervention the

> "Motion for Leave to Intervene as Indispensible Parties by the Fort Mojave Indian Tribe, the Cheme-

huevi Indian Tribe, and the Quechan Tribe of the Fort Yuma Indian Reservation; Joined in by the National Congress of American Indians as Amicus Curiae"

and the Brief in support of the Motion, filed December 23, 1977.

In that Motion and Brief filed December 23, 1977, there is fully set forth a review of the pertinent authorities in support not only of that Motion but of this Petition of Intervention of which this Brief is in support. Particular reference is made to Appendix A of the Motion of the Tribes setting forth their rejection of further representation by the Solicitor General and their refusal to be bound by further action of the Solicitor General in the case of *Arizona* v. *California.* That need by the Tribes to take protective measures against the conduct of the Solicitor General of the United States became imperative when the Solicitor General, in disregard of the Tribes' interests, had proceeded to negotiate and to conditionally agree upon a supplementary decree, as proposed by the States and the California Defendants in the Joint Motion filed May 3, 1977.[1] Chronicled in the Tribes' Motion and Brief is the unconscionable conflicts of interest within the Department of Justice in this case.[2] From the inceptive moments when the Department of Justice filed its original petition of intervention in *Arizona* v. *California,* the politically powerful States and the California Defendants imposed their will upon the United States Attorney General forcing him from his originally strong position for the Tribes. So powerful were those non-federal agencies that the original petition of intervention was reviewed by Congressional committees interested in Indian affairs.[3]

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[1] Motion of the Tribes, p. 4, "Imperative Need to have Resolved All Issues in Arizona v. California."

[2] *Ibid.*, p. 5.

[3] Brief of the Tribes, p. 15.

The failure of the Solicitor General to properly represent the Indians, by himself or those under his direction, has resulted in irreparable damage to the Tribes and that damage is continuing to this moment.[4]

B. Specific Violations By The Solicitor General Of The "Code Of Professional Responsibility" In Arizona v. California

The charges directed by the Tribes on December 23, 1977, all as set forth in the Motion and Brief, come clearly within the purview of the code of ethics as adopted by the American Bar Association. It is specifically provided as follows in that code:

> "A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he *should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.*" [5]

As alluded to above, the history of the case of *Arizona* v. *California* is replete with instances where the Solicitor General and the Secretary of the Interior, whom he primarily represents, are diametrically opposed to the petitioning Tribes' interests. This course of conduct by the Solicitor General and the Secretary of the Interior is reviewed in full in the Petition of Intervention of which this Brief is in support.[6]

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[4] Petition of Intervention, pp. 10 *et seq.* See in particular the Affidavit of Charles P. Corke, who has the greatest familiarity and longest experience in regard to the all-pervasive conflicts of interest within the Interior Department. That Affidavit is Appendix B of the Petition of Intervention.

[5] American Bar Association, Code of Professional Responsibility, EC 7-14. (Emphasis Supplied)

[6] Petition of Intervention:

> p. 10, para. IV—"The United States Has Willfully Failed to Maintain Communications with the Tribes Who Are Clients/ Beneficiaries."

[Footnote continued on page 4]

The Biblical injunction that no man can serve two masters is especially applicable to the Solicitor General in *Arizona* v. *California.* Primarily, that high official of the Department of Justice is the lawyer before the Supreme Court for the Secretary of the Interior in the case in question. As a consequence, the Solicitor General appears primarily to represent the Interior Department's interests, which are in *Arizona* v. *California* widely disparate from the interests of the Tribes which are here involved. That unconscionable conflict of interest is well known to both the Solicitor General and to the Secretary of the Interior.

It is most relevant in regard to those conflicts of interest that both the Executive Branch and the Legislative Branch of the United States Government have been confounded by the magnitude of the conflicts of interest and have endeavored to take corrective action. So serious have been the conflicts of interest within the Department of Justice, including specific reference to *Arizona* v. *California,* that there was introduced into the Congress a bill "To Provide For The Creation Of The Indian Trust Counsel Authority, And For Other Purposes." [7] In the

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[6] [Continued]

p. 10—"Interior's Policy to Limit or Prevent the Exercise of Indian 'Present Perfected Rights' on the Lower Colorado River—the Essence of All-Pervasive Conflicts of Interest." See in that connection, Affidavit of Charles P. Corke, Appendix B attached to the Petition of Intervention.

p. 12—"The United States' Refusal to Establish Boundaries on the Indian Reservations, A Corollary to Interior's Policy to Preclude Exercise of Indian 'Present Perfected Rights.' "

p. 17, para. XI—"Irrigable Lands for which the Tribes Are Entitled to 'Present Perfected Rights' Are Arbitrarily and Capriciously Abandoned in Arizona v. California."

[7] Indian Trust Counsel, Hearings before the Subcommittee on Indian Affairs of the Committee on Interior and Insular Affairs, United States Senate, 92nd Congress, 1st Session on S. 2035 "A Bill To Provide For The Creation Of The Indian Trust Counsel Authority, And For Other Purposes." November 22 and 23, 1971.

report referred to below is a copy of the bill originally proposed. Most significant is the letter from the then Secretary of the Interior Rogers C. B. Morton. That letter, dated April 28, 1971, reviewed in detail the seriousness of the problem confronting the Indian people. On the subject, Secretary Morton had this to say:

> "The Indians of our country have for years felt that the Federal government, because of the inherent conflict of interests that the President discussed in his message, has not given their rights adequate legal protection. We believe that this bill will restore the confidence of the American Indian in the ability of our government to give their natural resource rights legal protection to which they are entitled. This will make it clear to the American Indian that the United States is meeting the legal obligation it has as trustee to advance the interest of the beneficiaries of the trust without reservation and to the highest degree of its ability and skill." [8]

Similarly, by a letter dated November 26, 1971, the then Deputy Attorney General of the Department of Justice wrote to the Chairman of the Senate Committee on Indian Affairs, United States Senate, declaring that: "The Department of Justice recommends enactment of this legislation." It is most pertinent that both the Secretary of the Interior and the Attorney General of the United States endorsed the legislation. In fact, the then Attorney General stated:

> "*We in the Justice Department fully support this legislation.* We believe that our current position is untenable and regardless of the practice of bureaucracies in the past maintain each and every vestige of power representation that they can, we in this particular case are glad to give it up." [9]

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[8] *Ibid.*, p. 12.

[9] *Ibid.*, p. 15.

Incongruously, seven years later, the Tribes on the Lower Colorado River are being harassed by the grossly inadequate representation of the Solicitor General of the United States. Reference is again made to the shocking violations of the precepts of proper professional conduct as formulated by the American Bar Association. There it is provided, among other things, that:

> "If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. *A lawyer should never represent in litigation multiple clients with differing interests, and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests.*" [10]

Underscoring that major tenet of professional conduct by lawyers—especially one of the status of the Solicitor General—is the precept of conduct so flagrantly violated by that official:

> "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." [11]

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[10] American Bar Association, Code of Professional Responsibility, EC 1-15. (Emphasis supplied)

[11] *Ibid.*, EC 5-1.

THE TRIBES' "PRESENT PERFECTED RIGHTS" ARE INVALUABLE INTERESTS IN REAL PROPERTY

The issues here are not academic. Involved are some of the most valuable interests in real property on the face of the earth.[12] Moreover, the Tribes' rights are not Federal rights. Rather, full equitable title resides in the Tribes with the interest of the United States being that of a trustee whose sole obligation is to preserve and protect the Tribes' rights.[13] That the title to those rights was long ago recognized by the Congress is beyond successful challenge.[14]

EFFORTS TO APPROVE THE "PRESENT PERFECTED RIGHTS" OF THE DEFENDANTS BUT NOT THOSE OF THE TRIBES ARE A BREACH OF TRUST

While agreeing conditionally to the grossly inflated claims of the Defendants, the Department of Justice lamely explains its failure to protect the "present perfected rights" of the Tribes in these terms:

> "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." [15]

It is manifest that the Department of Justice would first prefer to allow the Court to render and enter an

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[12] See Tribes' Brief in support of Motion, p. 10.

[13] *Ibid.*, p. 11.

[14] Arizona v. California, 373 U.S. 546, 599-601 (1963); see Tribes' Brief in support of Motion, pp. 10, *et seq.*

[15] See Response of the United States in Opposition to the Tribes' Motion, pp. 10-11.

erroneous and inadequate decree before it applies to the Court for a correct decree. And, given the past conduct of the Department of Justice in asserting tribal claims, the fact that it will indeed apply for a correction to the decree cannot be taken for granted. Instead, if tribal lands are omitted from the final decree, future generations will be saddled with the burden of prodding a reluctant trustee into securing relief.

It is the position of the Tribes that as parties they will be able to be assured of representation which is competent, free from conflicts and of their own choosing. They have rejected the proposed settlement on "present perfected rights." The Tribes' rejection underscores [16] the need for independent representation free from bureaucratic conflicts of interest.

FAILURE OF THE UNITED STATES TO CONSULT WITH THE TRIBES

Chairman Llewellyn Barrackman of the Fort Mojave Indian Tribe and the Confederation of Indian Tribes of the Colorado River has set forth in his affidavit a full chronicle of the failure of the United States to consult or confer with the Tribes. That failure cannot be attributed to mere oversight. For years, the Solicitors Office of the Department of the Interior and the Department of Justice conferred with the States in regard to the issues of "present perfected rights." Ultimately, the resolution was presented to the Tribes as a *fait accompli.* The rejection by the Tribes of the negotiated settlement of all "present perfected rights" except those of the Indians (as set forth in the Petition of Intervention) demonstrates the magnitude of the error on the part of the trustee United States.[17]

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[16] See Petition of Intervention, pp. 6 *et seq.*

[17] *Ibid.*, p. 6.

The refusal to keep the Tribes informed was a simple—but now known to be—futile effort on the part of the trustee to hide the overwhelming conflicts of interest which pervade the attempt to settle some of the "present perfected rights" but not those of the Tribes.

THE INADEQUATE REPRESENTATION OF THE UNITED STATES IN ARIZONA v. CALIFORNIA ON BEHALF OF THE TRIBES IS A MANIFEST BREACH OF TRUST REQUIRING INDEPENDENT REPRESENTATION OF THE TRIBES

> "The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recoginzed by this Court on many occasions." [18]

The life-blood of our Anglo-American concept of trust relationships centers upon the fiduciary duties of the trustee toward the beneficiary. It is elementary that fiduciaries are obligated to observe the utmost loyalty to those with whom they are in a fiduciary relationship and to refrain from all manner of self-dealing whereby the fiduciary may be tempted to place the interests of his beneficiaries second to his own.[19]

Besides the obligation to remain loyal to the beneficiary and refrain from self-dealing, it is well settled that the officers of the United States are obligated to exercise care, skill and diligence in protecting, preserving, utilizing and conserving the invaluable "present perfected rights" of the Tribes to the Colorado River waters.[20]

As detailed elsewhere in this Brief and the Tribes' Motion and Brief, the performances of the Solicitors

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[18] Morton v. Ruiz, 415 U.S. 199, 236 (1974).

[19] Restatement 2d, Trusts Secs. 170 *et seq.*

[20] "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," in Toward Economic Development for Native American Communities, Joint Economic Comm., 91st Cong., 1st Sess., pp. 484, 490.

Office of the Interior Department and the Justice Department are permeated with conflicts of interest which prejudice the interests of the tribal beneficiaries.[21] This intolerable situation is further aggravated by the incompetency demonstrated by allowing the ambiguities, errors, defects and distortions of the Joint Motion to go uncorrected. Indeed, it may very well be that the failure to adequately represent the tribal interests is due in large part to the conflicts of interest of the government.

In other cases, the violations of the Tribes' rights by the Solicitors Office have been carefully reviewed, checked and rechecked in response to Congressional inquiries.[22]

It is obvious even now that the breaches of trust by the United States will be of a continuing nature as illustrated by the Response filed to the Proposed Decree. Therein, also mentioned elsewhere in this Brief, the United States "conditionally accepted" a stipulation which contains numerous significant ambiguities with full knowledge that in the future the ambiguities would inevitably bring controversy.[23]

The Court has had the opportunity on numerous occasions to adjudicate the grounds for removal and substitution of a trustee.

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[21] *Supra,* pp. 1 *et seq.*; see Tribes' Motion, p. 9, para. XVIII *et seq.* and Brief pp. 14 *et seq.*

[22] "Federal Protection of Indian Resources," Hearings before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, U.S. Sen., 92d Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, Part 1, Oct. 19 & 20, 1971, pp. 233 *et seq.*

[23] See "Response of the United States to Joint Motion for a Determination of Present Perfected Rights and Entry of a Supplemental Decree," filed November 10, 1977, by Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, p. 1.

For example, the Court has stated that where the acts or omissions of a trustee are such as to show a want of reasonable fidelity, a court of equity will remove him.[24]

Additionally, the power of a court of equity to remove a trustee and to substitute another in his place is incidental to its paramount duty to see that trusts are properly executed and may properly be exercised whenever such a state of mutual ill feeling, growing out of his behavior, exists between the trustees or between the trustee in question and the beneficiaries, so that the trustee's continuation in office would be detrimental to the execution of the trust, even if for no other reason than that human infirmity would prevent the co-trustee or the beneficiaries from working in harmony with him, and although charges of misconduct against him are either not made out or are greatly exaggerated.[25]

THE TRIBES ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT OR AT THE DISCRETION OF THE COURT

By ignoring the Court's own inherent power to grant the relief requested by the Tribes, it has been suggested by the State parties in their response to Petitioners' Motion [26] that the Tribes adhere to the Federal Rules of Civil Procedure Rule 24.[27] The Tribes disagree with this con-

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[24] Cavender v. Cavender, 114 U.S. 464, 472 (1885).

[25] May v. May, 167 U.S. 310, 320 (1897).

[26] Response of the States, January 1978, pp. 9-11, 22.

[27] Rule 24. Intervention

"(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action. . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the

tention since the United States has already successfully intervened on their behalf. The Tribes are effectively real parties in interest to this litigation by virtue of their declared "present perfected rights," although they do not have their own independent counsel.

THE NEED FOR INDEPENDENT COUNSEL FREE FROM CONFLICTS OF INTEREST IN ALL PHASES OF ARIZONA v. CALIFORNIA IS FULLY DOCUMENTED

In the affidavit of Charles P. Corke,[28] there is reviewed in detail the breadth of the damage to the Tribes by the failure of the trustee to perform on behalf of the Tribes or to allow the Tribes to act on their own behalf. Reference is there made to the refusal to provide electrical power on a preferential basis, greatly impeding reservation development of "present perfected rights."

Complementing the threat to the Tribes by the refusal to provide electrical energy, as required by law, is the threat of intentional flooding of tribal irrigable land by the Bureau of Reclamation.[29] That threat by the trustee

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applicant's interest is adequately represented by existing parties.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action. . . . (2) when an applicant's claim or defense and the main action have a question of or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[28] Petition of Intervention, Appendix B.

[29] As summarized by the Bureau of Reclamation in the abstract at page iii in "River Flows Between Davis Dam and Yuma, Arizona; Lower Colorado River; A Forecast of Conditions and Impacts for the period, 1977 to 1986," dated October 1976:

"This report presents data from Bureau of Reclamation water supply forecast studies to evaluate the possibility of high-

demonstrates the disregard of the Tribes' interest in favor of non-Indians who will benefit from the increase of power generated through that type of water management.

CONCLUSION

The ratification of the errors, ambiguities and distortions, together with the proffered concessions contained in the Response of the Solicitor General to the Joint Motion will cause irreparable and continuing damage to the Tribes.

The Court is being asked to consider and incorporate into its Final Decree a document which will be immediately subject to amendment and revision—its Proposed Decree is already obsolete.

Additionally, this Proposed Decree is the result of an unfortunate conflict of interest within the United States Government. Except for the unique posture of the American Indians to the Federal Government, no other law firm or court, would stand long for this type of blatant conflict of interest.

The United States has not maintained meaningful communication with its beneficiaries, it has not remained loyal solely to the Tribes' best interests and it has advocated a Proposed Decree which diminishes the tribal property rights due to its deficiencies.

With such enormous repercussions at stake, the Tribes feel that it is time they be allowed to maintain independent counsel for themselves instead of being represented by the United States. Like other citizens, the Tribes herein should also enjoy the most effective representation possi-

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volume flows below Davis Dam in the 10-year period 1977 to 1986. It is indicated that sustained flows in the range 30,000 to 40,000 ft^3/s are probable. . . . and it is indicated that water levels 4 to 10 feet above normal maximums are probable."

ble. To hold otherwise would be tragic, for it sanctions a discriminatory double-standard of legal representation between Indians and non-Indians.

In closing, the Tribes echo one of their opening quotations:

> "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. . . . A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results." [30]

By granting the Tribes' prayer for relief, the crisis confronting them will be removed.[31]

Respectfully submitted,

RAYMOND C. SIMPSON, Attorney for Petitioners, the Fort Mojave Tribe, the Quechan Tribe of the Fort Yuma Indian Reservation, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes and the Confederation of Indian Tribes of the Colorado River; and the National Congress of American Indians as Amicus Curiae

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DATED: April 7, 1978

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[30] See *supra*, note 5.

[31] Tribes' Petition of Intervention, pp. 22 *et seq.*