IN THE

Supreme Court of the United States

October Term 1977
No. 8, Original of
October Term 1965

STATE OF ARIZONA,

Complainant,

vs.

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

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the States of California and Nevada, the Coachella Valley County Water District, and the Imperial Irrigation District to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene

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TABLE OF AUTHORITIES CITED

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STATE OF CALIFORNIA, COACHELLA VALLEY COUNTY WATER DISTRICT, IMPERIAL IRRIGATION DISTRICT, Defendants, and STATE OF NEVADA, Intervener (hereinafter referred to as the "Responding Parties"), hereby respond to the Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe (hereinafter referred to as the "Applicant Tribes") for Leave to Intervene, dated April 10, 1978.

ARGUMENT

I

A Grant of Intervention Would Authorize a Suit by the Applicant Indian Tribes Against the States of Arizona, California, and Nevada and Therefore Requires Their Consent

States of the Union are immune from suit in the federal courts without their consent except where that immunity has been surrendered by the adoption of the Constitution of the United States. There has been such a surrender of immunity by the states with respect to original actions in the Supreme Court only (1) by one state against another and (2) by the United States against a state. (*Principality of Monaco v. Mississippi* (1934) 292 U.S. 313; *Duhne v. New Jersey* (1920) 251 U.S. 311; *Smith v. Reeves* (1900) 178 U.S. 436; *Hans v. Louisiana* (1890) 134 U.S. 1.)

Since there has been no such surrender of immunity with respect to suits against a state by individual Indians or by Indian tribes, the sovereign immunity of the states extends to suits by Indian tribes. (*United States v. Minnesota* (1926) 270 U.S. 181, 193; *Cherokee Nation v. Georgia* (1831) 30 U.S. (5 Pet.) 1; cf. *Skokomish Indian Tribe v. France* (9th Cir. 1959) 269 F.2d 555, 560-562.)

The Cocopah Indian Reservation is located in Arizona. Such immuntiy exists as against the Cocopah Indian Tribe whether it is regarded as a citizen of Arizona or not. If it is regarded as a citizen of the State of Arizona, this Court is without jurisdiction

to entertain its suit against Arizona because the judicial power of the federal courts does not extend to a suit brought against a state without its consent by its own citizens. (*Hans v. Louisiana* (1890) 134 U.S. 1.) It would also be barred from suit against the States of California and Nevada by the Eleventh Amendment of the Constitution, which provides that "the Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state . . ." (See *Ford Motor Co. v. Treasury Department* (1945) 323 U.S. 459, 464.) On the other hand, if the Cocopah Tribe is not regarded as being a citizen of any state, then it may not prosecute a suit against Arizona, California, or Nevada because the "States of the Union, still possessing attributes of sovereignty, . . . [are] immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the' " Constitution. (*Principality of Monaco v. Mississippi, supra,* 292 U.S. 313, 322-323) (quoting from The Federalist No. 81 (Hamilton).) No such surrender has been made respecting suits in the federal courts by Indian Tribes.

The same rules bar suit without state consent by the Colorado River Indian Tribes even though the Colorado River Indian Reservation is located in both Arizona and California. If the Colorado River Indian Tribes are deemed citizens of no state, then they may not sue any of the three states under the *Principality of Monaco* rule. If they are deemed citizens of both Arizona and California, they may not sue either state under the *Hans* rule and may not sue Nevada under the Eleventh Amendment and *Ford Motor* rule. If

they are deemed citizens of either Arizona or California, but not both, they may not sue the state of which they are citizens under *Hans* and may not sue the states (Nevada and either Arizona or California) of which they are not citizens under the Eleventh Amendment and *Ford Motor* rule.

It is clear that intervention by the applicant Indian Tribes would constitute a suit against the States of Arizona, California, and Nevada. Whether or not a suit is one against a state is not to be determined by formalities of the law of parties but by the actual effect a judgment in favor of the applicants would have against the states. "[T]he nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding. *Ex Parte Ayers,* 123 U.S. 443, 490-99; *Ex Parte New York,* 256 U.S. 490, 500; *Worcester County Trust Co. v. Riley,* 302 U.S. 292, 296-98." (*Ford Motor Co. v. Treasury Department, supra,* 323 U.S. 459, 464.)

The Applicant Tribes claim additional present perfected rights above those quantified in the 1964 Decree (376 U.S. 340) in this matter. In so doing, they seek a judgment that would be contrary to the interests of all three states. All of the additional claims are for present perfected rights to the use of water in either Arizona or California. These claims are contrary to the interest *parens patriae* of Nevada since in times of extreme shortage, there would be more, high priority claims for use of water in the other two states. Similarly, those additional claims for use of water in Arizona are contrary to the interest of California, and those for use of water in California are contrary to the interest of Arizona.

It is clear that the Applicant Tribes seek a judgment that would be contrary to the respective interests of Arizona, California, and Nevada. The intervention sought would therefore constitute a suit against those states and would require their consent.

II

The Responding Parties Are Willing to Accede to the Position of the United States on the Question of Intervention; if the United States Supports (or Does Not Oppose) Intervention, the States of California and Nevada Will Consent and the Other Responding Parties Not Oppose, but Only Subject to Certain Reservations and Conditions

The States of California and Nevada have already declined to consent to, and the other Responding Parties have opposed, intervention by the Chemehuevi, Fort Mojave, and Quechan Indian Tribes. (See Responses of the Arizona, California, and Nevada parties, dated January 25, 1978 and May 22, 1978.) The attempts to intervene filed on behalf of these three Tribes (hereinafter referred to as the "Fort Mojave pleadings") are totally inappropriate and legally unsound.

The Fort Mojave pleadings seek intervention in proceedings under Article VI of the Court's Decree and assertion therein of additional water rights claims of the Tribes. However, Article VI is not only the wrong vehicle for asserting such claims, but proceedings to implement its mandate had been underway for fourteen years before the Tribes ever sought to intervene. The Fort Mojave pleadings seek to destroy the Proposed Supplemental Decree resulting from those fourteen years of effort and now agreed upon by the United States

as well as the Arizona, California, and Nevada parties.[1] The Proposed Supplemental Decree does not prejudice any presently quantified or potential water rights of the five Lower Colorado River Indian Tribes and, in fact, confers a legal benefit on such rights by means of subordination language. Nevertheless, the Fort Mojave pleadings attack it. As a result, the opposition of the Responding Parties to the Fort Mojave pleadings has been and remains unequivocal.

By contrast, the Motion of the Colorado River and Cocopah Indian Tribes seeks to assert additional Indian water rights claims by means of the appropriate vehicles, Articles II (D)(5) and IX of the Court's Decree. The Applicant Tribes seek to initiate proceedings under these Articles, not to intervene in proceedings long underway. Furthermore, they do not attack the Proposed Supplemental Decree for implementing Article VI, but support its entry by the Court and distinguish the Article VI proceedings from those designed to assert additional Indian claims under Article II (D) (5) and IX.

The Applicant Tribes assert, as do the Fort Mojave pleadings, two types of claims to additional water rights: (1) claims that quantification of irrigable acreage within reservation boundaries existing as of the 1964 Decree was incorrect; and (2) claims to water rights associated with enlarged reservation boundaries that have been recognized since 1964. The Responding Parties continue to contend that the former type of claims are barred by *res judicata* since they were fully litigated

[1]A Joint Motion for Entry of a Supplemental Decree, the Proposed Supplemental Decree, and a Memorandum in Support, dated May 26, 1978, were filed with the Court by the United States and the Arizona, California, and Nevada parties.

by competent counsel and quantified by the Court in the 1964 Decree. Nevertheless, if such recalculation of irrigable acreage were appropriate, Article IX would be the proper vehicle.

Thus, the Applicant Tribes are seeking to assert their claims through the proper Articles of the Decree and apart from the proceedings under Article VI that do not prejudice them. The question, nevertheless, is whether the Applicant Tribes should be allowed to intervene, with private counsel, to assert these claims or whether the United States should continue to represent them with the ability to assert the claims under the same Articles of the Decree.

If the Applicant Tribes are allowed to intervene, such intervention must be permissive and not as a matter of right. Rule 24(a) of the Federal Rules of Civil Procedure (FRCP)[2] imposes four requirements for intervention as a matter of right, one of which is that the applicants must show that their interest is not adequately represented by an existing party. The Responding Parties contend that the Applicant Tribes cannot meet this requirement. In discussing the adequacy of United States representation, the Responding Parties cannot presume to know the legal judgments, strategy, and tactics used by the United States

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[2]The Supreme Court Rules do not address intervention, but Rule 9 applies to matters of original jurisdiction, such as this lawsuit. Section 2 of Rule 9 provides:

> "The form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this court."

Rule 24 of the FRCP concerns intervention, and there would seem to be nothing in this action which would render inappropriate its application to Applicant Tribes' motion.

in representing the Applicant Tribes' interest. The Responding Parties can, however, attest to the general conduct of the litigation and to the results of that conduct.

Throughout this lawsuit, the United States has strongly espoused the Indian Tribes' interest. The Court's 1963 Opinion (373 U.S. 546) and 1964 Decree (376 U.S. 340) reflected this advocacy in a decision considered favorable to the Tribes. The Court reaffirmed the *Winters* doctrine of reserved water rights and awarded the five Lower Colorado River Indian Tribes water rights to approximately 900,000 acre-feet of annual diversions, even though much of this quantity had never been put to use.

In the post-1964 developments under Article VI of the Decree, the United States has continuously taken positions in support of the interest of the Tribes. The Proposed Supplemental Decree finally agreed upon by the United States and the Arizona, California, and Nevada parties is testimony to the adequacy of United States representation. A subordination agreement included therein allows presently quantified and potential water rights of the Tribes to be satisfied ahead of all major, non-Indian claims in time of water shortage.

In sum, the Responding Parties do not agree with the Applicant Tribes that the United States representation has been inadequate in the past. Furthermore, we have no reason to believe that United States representation will be inadequate in the future or that any conflict of interest exists that would render it so. We believe that the United States could and would adequately represent the Applicant Tribes as to additional water rights claims. Therefore, intervention as a matter of right does not lie.

If intervention is granted, it must be permissive intervention, and pursuant to Federal Rules of Civil Procedure 24(b), must not cause undue delay or prejudice. First, if intervention were to cause any delay in entry by the Court of the Proposed Supplemental Decree under Article VI, that delay would be undue and prejudicial. Now that the United States and the Arizona, California, and Nevada parties have agreed upon and filed a Proposed Supplemental Decree with the Court, there is no reason to delay its entry. Many present perfected rights claimants, especially those without contracts for water with the Secretary of the Interior, are anxiously awaiting court recognition of their claims. Furthermore, the Applicant Tribes approve the Proposed Supplemental Decree and request its entry (Applicant Tribes' Motion, p. 2). While the pendency of proceedings under Article VI should be no bar to assertion of claims under other Articles, similarly, that assertion should not bar the conclusion of proceedings under Article VI.

Second, intervention could also cause prejudice unless it is granted only for limited purposes. The Applicant Tribes seek to intervene for purposes of asserting additional Indian claims under Articles II (D)(5) and IX, and if intervention is granted, it should be so limited. The Responding Parties have no reason to doubt the good faith of the Applicant Tribes but recognize that unlimited intervention, particularly under Article IX, could be used not only to assert additional Indian claims but also to attack other, previously quantified claims, or other parts of the Decree, to the prejudice of the existing parties.

Finally, intervention could cause undue delay and prejudice if it resulted in multiple legal representation

of the Applicant Tribes. If intervention is denied, then the United States would continue to represent the Applicant Tribes as trustee and would have the sole and determining voice in speaking for their interests. However, if intervention is allowed and the Applicant Tribes are represented by private counsel, then the possibility exists that the United States, still a party in the case, might also attempt to speak for the Applicant Tribes. In the view of the Responding Parties, such a situation would cause confusion and undue delay and might well prejudice any attempts to resolve whatever disputes arise short of full litigation. We believe that we are entitled to know who speaks for and legally commits the Applicant Tribes and that each Tribe, if a party to the suit, should have but one voice, just like the other parties. We believe that if intervention is granted, undue delay and prejudice can be avoided only if each Tribe is represented by private counsel and not also by the United States.

The Responding Parties believe that permissive intervention could be conditioned in such a way as to resolve the aforementioned problems and prevent undue delay or prejudice. Because of this and because the Applicant Tribes are attempting to assert their additional claims under appropriate Articles of the Decree, we do not necessarily oppose intervention. Rather, we believe that the United States, as trustee for the Applicant Tribes, is in the best position to make that decision, and subject to certain reservations and conditions, we will accede to that decision, whatever it may be.

However, the Responding Parties do have one major reservation. As noted earlier, we do not believe that United States representation of the Applicant Tribes has been inadequate in the past or that any conflict

of interest exists that could render it inadequate in the future. Therefore, we would not accede to United States support of intervention based on such an assertion. On the other hand, we have doubts as to whether the United States, as trustee for the Applicant Tribes, can, in effect, delegate away its duty to act as their counsel in the absence of a conflict of interest.

Under the traditional law of trusts, the trustee owes the beneficiary (here the Tribes) the duty not to delegate to others the performance of acts in the administration of the trust which the trustee ought personally to perform. See *Scott on Trusts,* Third Edition, section 171, p. 1388. In general, those acts requiring skill or judgment must be exercised by the trustee personally. See Bogert, *Law of Trusts,* 5th Edition, section 92, p. 331. In this regard, legal representation of Indian Tribes by the United States is an aspect of the plenary power of the United States to manage the affairs of Indians and Indian Tribes. *Worcester v. Georgia* (1832) 6 Pet. 515; *United States v. Kagama* (1886) 118 U.S. 375; *United States v. Ramsey* (1926) 271 U.S. 467. This Court has recognized the complete control of the United States over Indian litigation and the underlying duty of Congress to protect Indians under its care:

> "There can be no more complete representation than on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage. Its efficacy does not depend upon the Indian's acquiescence. It does not rest upon convention, nor is it circumscribed by rules which govern private relations. It is a representa-

> tion which traces its source to the plenary control of Congress in legislating for protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty." *Heckman v. United States* (1912) 224 U.S. 413, 444-445.

It therefore seems that legal representation of Indian Tribes may not be delegable without action of Congress. We recognize, however, that the relationship between the United States and all Indian Tribes is a unique one, and the Court may determine that assent of the United States to Indian intervention and private representation would not violate the United States' fiduciary duty.

Therefore, assuming that the United States asserts no conflict of interest, but, as trustee, can and does support (or does not oppose) intervention, then the States of California and Nevada will consent to intervention and the other Responding Parties will not oppose it, but only on the following three conditions, designed to prevent undue delay and prejudice:

> 1) that the Proposed Supplemental Decree to implement the mandate of Article VI, offered in the Joint Motion of the United States and the Arizona, California, and Nevada parties, dated May 26, 1978, be entered forthwith or not later than concurrently with the grant of intervention;
>
> 2) that intervention be granted to the Cocopah and Colorado River Indian Tribes for the limited purpose of asserting additional water rights claims under Articles II (D)(5) and/or IX and not for any other purpose or under any other Article of the 1964 Decree;

3) that private counsel for each intervening Tribe be designated as the only counsel for said Tribe as to the limited purpose for which intervention is granted; that the United States not be allowed to concurrently represent or speak for said Tribe as to such limited purpose.

On the other hand, if the United States opposes intervention, then the Responding Parties will do likewise and the States of California and Nevada will not consent. In such case, however, the Responding Parties believe that it would be appropriate for the Court to accept Amicus Curiae briefs from the Applicant Tribes in support of their claims in whatever proceedings might be initiated by existing parties to the suit.

Conclusion

In closing, the Responding Parties want to emphasize that their position in this Response in no way alters their unequivocal opposition to the unreasonable and inappropriate intervention attempts of the Fort Mojave pleadings. The present Motion for Leave to Intervene of the Cocopah and Colorado River Indian Tribes, however, is a significantly different approach to the problem of additional Indian claims and has thus elicited from the Responding Parties a significantly different response.

If intervention is granted, the Responding Parties request at least an additional ninety (90) days to reply to the Petition of Intervention.

DATED: June 1, 1978.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of June, A.D. 1978.

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