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 MOTIONS FOR LEAVE TO INTERVENE

MEMORANDUM FOR THE UNITED STATES

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Washington, D.C. 20530.

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I. INTRODUCTION

The United States originally intervened in this action in December 1953 "as trustee for the Indians and Indian Tribes" claiming "on their behalf rights to the use of water from the Colorado River and its tributaries in the Lower Basin" (Petition of Intervention, ¶ 27). As this Court's opinion demonstrates, the United States successfully contended that the five lower Colorado River tribes—the Fort Mohave Tribe, Quechon Tribe of the Fort Yuma Reservation, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and the

Colorado River Indian Tribes—were entitled to substantial reserved water rights. See *Arizona* v. *California*, 373 U.S. 546, 595-601. The decree entered in 1964 allotted more than 900,000 acre-feet to the tribes annually. *Arizona* v. *California*, 376 U.S. 340, 344-345.

Now each of these tribes seeks to intervene.[1] On December 23, 1977, three of the tribes, the Fort Mojave Tribe, the Chemehuevi Tribe, and the Quechon Tribe ("the Three Tribes"), filed a motion for leave to intervene (Pet. 2). The United States filed a Memorandum in Opposition on February 17, 1978. However, the Three Tribes' motion was not accompanied by a petition in intervention (see Rule 9 of this Court and Rule 24(c), Fed. R. Civ. P.), and on February 23, 1978, the Court directed the Three Tribes to file their proposed petition in intervention, and requested the response of the United States and the other parties (*ibid.*). On April 7, 1978, the Three Tribes filed their proposed petition in intervention. On April 10, 1978, the two remaining tribes, the Cocopah Tribe and the Colorado River Indian Tribes ("the Two Tribes"), filed a separate motion for leave to intervene accompanied by a petition in intervention.

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[1] The Confederation of Indian Tribes of the Colorado River also joins in the petition for intervention. The petition identifies (Pet. 1-2 n.2) the Confederation as a non-profit corporation organized pursuant to California law "through which the Tribes function." Since the petition states (*ibid.*) that the Confederation makes no claims to present perfected rights, no ground for its intervention has been established.

A closely related matter also pending before the Court is a joint motion filed in May 1977 by Arizona, Nevada, California, and seven California public agencies ("the State parties") seeking a determination of the non-Indian present perfected rights pursuant to Article VI of this Court's 1964 decree, 376 U.S. 340, 351-352, as amended, 383 U.S. 268. The supplemental decree proposed by the State parties listed the priority date and amount of the non-Indian present perfected rights claimed by the various parties, and included a provision giving Indian present perfected rights priority without regard to date of perfection. The objections the United States raised in its November 1977 response to the supplemental decree as first proposed in the joint motion have now been resolved, and on May 30, 1978 all affected parties [2] moved the Court for the entry of an agreed upon supplemental decree. Again, the non-Indian present perfected rights are listed and there is a more generous provision stipulating that the Indian present perfected rights shall have priority over all major non-Indian perfected

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[2] By letter of March 14, 1978, the Attorney General of Utah advised the Court that Utah had no comment on the proposed supplemental decree, which does not affect Utah's rights to water from Colorado River tributaries. No comment has been received from New Mexico, whose rights as an Upper Basin state are unaffected by the proposed decree.

[3] The proposed supplemental decree does not subordinate a limited category of so-called "miscellaneous" present perfected rights to the rights of the Tribes. Those rights total only 17,504 acre-feet of diversions, part of which are for municipal and industrial purposes. Most of those rights, when considered individually, are minimal and not all are senior to the tribal rights (February 1978 Memorandum in Opposition, p. 12 n.6).

rights [3] without regard to date of priority when there is a shortage of mainstream water.[4]

II. INTERVENTION TO OPPOSE THE ENTRY OF SUPPLEMENTAL DECREE

The Three Tribes' opposition to the entry of the proposed supplemental decree is the primary ground for their motion for leave to intervene. The Three Tribes contend that the United States' acceptance of the proposed supplemental decree demonstrates the gross inadequacy of its representation of their interests (Motion, pp. 6-17; Pet. of Intervention, pp. 1-13).[5] The United States' Memorandum in Opposition to the Three Tribes' motion, filed in February 1978, fully responds to these contentions, and demonstrates that the Three Tribes' objections to the proposed supplemental decree neither establish the inadequacy of the United States' representation of the tribal inter-

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[4] The proposed decree also eliminates any possible controversy over the use of tribal rights for other than agricultural purposes.

[5] The Three Tribes' petition repeats their allegation that the government's conduct of all stages of this litigation has been tainted by a pervasive conflict of interest (Pet. 3-4, 22-23). They rely in part on a new affidavit (Pet. App. B) by the same Bureau of Indian Affairs employee whose prior affidavit was quoted in the initial brief of the Three Tribes. That view, like the documents cited in the initial motion and brief, does not represent the position of the Department of the Interior. See our February 1978 Memorandum in Opposition, p. 4 n. 2.

ests nor justify the Three Tribes' intervention.[6] We respectfully refer the Court's attention to that memorandum, to which we adhere.

III. INTERVENTION TO PRESENT NON-ARTICLE VI CLAIMS REGARDING BOUNDARY DISPUTES AND OMITTED LANDS

The Two Tribes' Motion for Leave to Intervene, in contrast, is not grounded on objections to the proposed supplemental decree. To the contrary, their motion states (Motion, p. 2) that the Cocopah and Colorado River Indian Tribes "approve and request the entry of a Supplemental Decree" as proposed in the ~~United States'~~ February 1978 response of the State parties.

The Two Tribes seek to intervene to raise matters which they recognize do "not fall within the scope of the procedure set forth in Article VI of the Decree and the disposition of the pending Joint Motion [for the entry of the proposed suplemental decree]" (Motion, p. 6), but which, they urge, should be considered contemporaneously (*id.* at 10). First, the Two Tribes seek (*id.* at 5-9) to raise claims for additional present perfected water rights for lands that have been finally determined to be within the boundaries of their res-

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[6] We note that after the completion of the Special Master's reports, the Navajo Tribe sought leave to intervene, and the United States opposed this motion in November 1961 on the grounds, *inter alia,* that our representation of the Navajo tribal interests had been adequate and that their motion was untimely. The Court denied the motion without opinion. *Arizona* v. *California,* 368 U.S. 917, reconsideration denied, 368 U.S. 950.

ervations since the entry of this Court's decree. Article II(D)(5) of that decree provided that the quantity of water to which the tribes were entitled should be "subject to appropriate adjustment by agreement or decree of this Court in the event that boundaries of the respective reservations are finally determined." 376 U.S. at 345.[7] Second, the Two Tribes also seek to intervene in order to raise claims for lands within their reservations for which the United States "for reasons unknown to the two Tribes * * * failed or declined to present [claims] to the Special Master or to the Court" (Motion, p. 9).

Similar claims also form a second basis for the Three Tribes' Motion for Leave to Intervene (Motion, pp. 9-16).

Contrary to the Three Tribes' arguments, claims resulting from the resolution of boundary disputes and claims for "omitted" lands, *i.e.*, those for which no evidence was submitted to the Special Master, would not be affected or foreclosed by the entry of the proposed supplemental decree, which is limited to the issues involving Article VI of the Court's original decree. The Two Tribes expressly seek relief pursuant to Articles II(D)(5) and IX of this Court's

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[7] Article II(D)(5) expressly refers only to boundary disputes regarding the Fort Mohave Indian Reservation and Colorado River Indian Reservation, because disputes regarding these reservations were known to exist at the time of the decree. Subsequently similar disputes involving other reservations have come to light, and the tribes contend that rights for these boundary dispute areas should be decreed under Article IX. See the discussion at pp. 5-6 of the Two Tribes' Motion for Leave to Intervene.

decree (Motion, pp. 5-9), and the relief sought by the Three Tribes would also be under those provisions, not Article VI. Paragraphs 2 and 3 of the proposed decree state:

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

Although the claims regarding boundary disputes and omitted lands will not be foreclosed or affected by the instant proceedings, the tribes contend that their claims are now sufficiently mature and precise to be presented to the Court, and the Two Tribes note (Motion, p. 11) that they "might even be fairly criticized if they failed now to present their claims to the Court and deliberately waited to do so until after consideration of the Joint Motion." They urge that until all their rights are finally determined their "losses inure annually to the benefit of others whose interests are subordinate, but who utilize water to which the Two Tribes would be entitled if their rights were perfected" thereby creating "a dependency which will influence and inflame opposition to the Two Tribes' subsequent efforts to perfect [those] rights" (Motion, p. 3). Accordingly, the Two Tribes assert that presentation of their claims now is essential.

A review of the petition filed by the Three Tribes and their supporting papers indicates that underly-

ing their objection to the proposed supplemental decree is a similar contention that the water rights for boundary dispute areas and omitted lands are now ripe and should be resolved immediately.

IV. THE UNITED STATES' POSITION ON THE BOUNDARY DISPUTES AND OMITTED LANDS

As noted in our February 1978 memorandum in opposition to the Three Tribes' motion (Memorandum in Opposition, p. 9), the United States agrees with the tribes that water rights must ultimately be determined for areas recognized as a part of tribal reservations as a result of the resolution of boundary disputes since the filing of the original decree. As also stated in that memorandum (*ibid.*), the United States intended to file a motion with the Court seeking a determination of these rights in the future, but it is not prepared to do so at the present time. We have not yet completed our review of matters including soil classification, hydrology, and agricultural engineering, and accordingly cannot yet quantify the rights we would assert on behalf of the tribes. In addition, as the Colorado River Indian Tribes themselves acknowledge (Motion, p. 11, n.*), two boundary disputes involving their reservation have not yet been finally resolved.

With regard to the claims of the tribes for lands recognized as within the reservation at the time of the proceedings before the Special Master but for which no claims were asserted (omitted lands), the Department of the Interior has not yet determined

whether it would recommend that the United States should assert any claims on behalf of the tribes, and further study of hydrological and technical data will be necessary before such a determination will be made.

The claims of the tribes themselves for omitted lands are not yet finally formulated. The Cocopah Tribe states (Motion, p. 9) that it is not presently able to specify the number of practicably irrigable acres for which it will assert a claim, although it adds that these figures are now being computed. Appendix C to the Three Tribes' proposed petition in intervention, which sets for their claims for both boundary disputes and omitted lands, also states that the figures supplied "are the most exact that are available," and notes that there is "possible overlapping" (Pet. App. C-1, footnote).

The presentation of claims for water for boundary dispute areas and for omitted lands will begin a new phase of these proceedings. The tribes' prompt effort to raise the boundary dispute matters stands in clear contrast to the Three Tribes' untimely effort to intervene to oppose the proposed supplemental decree in order to challenge non-Indian claims for present perfected rights more than ten years after these claims were first filed with the Court in 1967, and after more than 13 years of negotiations by all parties on this subject. In our view, the tribes' present effort to intervene to assert claims for boundary dispute areas is clearly timely—indeed the nub of the disagreement between the tribes and the United States on this matter is the tribes' dissatisfaction with the United

States' failure to date to complete its preparations to raise these claims.

Accordingly, although we continue to oppose the motion of the Three Tribes to Intervene in order to object to the entry of the proposed supplemental decree under Article VI, we view the tribes' efforts to intervene to raise new non-Article VI matters as standing on a different footing. We do not believe that our representation of the tribes' interests has been inadequate, nor do we believe there is a conflict of interest. Nevertheless, we recognize that the tribes do not agree with our judgment of the degree of preparation necessary before the assertion of their boundary dispute claims (and the speed at which these preparations can be completed). We also recognize that the tribes believe that it is not in their interest to delay the assertion of their claims to omitted lands until the United States determines whether it would raise such claims on their behalf. Therefore, if the Court concludes that the claims the tribes seek to present are sufficiently matured and definite to be entertained at present,[8] we would not oppose the tribes' intervention to present these claims after the current Article VI proceedings have been

[8] Should the Court conclude that it would not entertain these claims until the remaining boundary disputes are finally resolved and the claims of each tribe quantified (see pp. 8-9, *supra*), we would continue our efforts to review and develop these claims on behalf of the tribes. In such circumstances, if the tribes considered the claims and supporting evidence eventually developed by the United States to be satisfactory, there might be no need for intervention.

concluded by the entry of the proposed supplemental decree. Cf. *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 473-474; *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, and cases cited at 370-372.

Should intervention be permitted, our inclination would be to continue to support the tribes' efforts to obtain a declaration of the water rights to which they are entitled. But, of course, the degree and character of continued participation by the United States must depend on our assessment of the proceedings as they develop.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

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