

No. 10, Original

In the Supreme Court of the United States

OCTOBER TERM, 1956 1961

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

UNITED STATES OF AMERICA, INTERVENOR

RESPONSE BY UNITED STATES OF AMERICA, INTERVENOR, TO MOTION FOR LEAVE TO FILE REPRESENTATION OF INTEREST AND REPRESENTATION OF INTEREST BY THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION, ARIZONA AND CALIFORNIA; GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA; HUALAPAI INDIAN TRIBE OF THE HUALAPAI RESERVATION, ARIZONA; NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA AND NEW MEXICO; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER RESERVATION, ARIZONA; THE SAN CARLOS APACHE TRIBE, ARIZONA; AND THE FORT McDOWELL MOHAVE-APACHE INDIAN COMMUNITY OF THE FORT McDOWELL RESERVATION, ARIZONA

HERBERT BROWNELL, JR.,
Attorney General,

SIMON E. SOBELOFF,
Solicitor General,

J. LEE RANKIN,
PERRY W. MORTON,
Assistant Attorneys General,

DAVID R. WARNER,
S. BILLINGSLEY HILL,
Attorneys,

Department of Justice, Washington 25, D. C.

TABLE OF AUTHORITIES

Cases:

	Page
<i>Cherokee Nation v. Georgia</i> , 5 Pet. 1	8
<i>Cherokee Nation v. Hitchcock</i> , 187 U. S. 294	2
<i>Conner v. Cornell</i> , 32 F. 2d 581	4
<i>Heckman v. United States</i> , 224 U. S. 413	4
<i>Lane v. Pueblo of Santa Rosa</i> , 249 U. S. 110	8
<i>Lone Wolf v. Hitchcock</i> , 187 U. S. 553	2
<i>Mars v. McDougal</i> , 40 F. 2d 247, certiorari denied, 282 U. S. 850	6
<i>McGugin v. United States</i> , 109 F. 2d 94	4
<i>Missouri, Kansas & Texas Ry. Co. v. Roberts</i> , 152 U. S. 114	7
<i>Nadeau v. Union Pacific R. R. Co.</i> , 253 U. S. 442	2
<i>Pueblo of Picuris in State of New Mexico v. Abeyta</i> , 50 F. 2d 12	6
<i>Sadler v. Public National Bank & Trust Co. of New York</i> , 172 F. 2d 870	6
<i>Tiger v. Western Investment Co.</i> , 221 U. S. 286	2
<i>United States v. Adamic</i> , 54 F. Supp. 221	4
<i>United States v. Anglin & Stevenson</i> , 145 F. 2d 622, certiorari denied, 324 U. S. 844	2
<i>United States v. Kagama</i> , 118 U. S. 375	2
<i>United States v. Ramsey</i> , 271 U. S. 467	2
<i>United States v. Winston</i> , 170 U. S. 522	3
<i>White v. Sinclair Prairie Oil Co.</i> , 139 F. 2d 103	4
<i>Worcester v. Georgia</i> , 6 Pet. 515	2

Constitution:

Art. 1, sec. 8, cl. 1	2
Art. 1, sec. 8, cl. 3	2
Art. 1, sec. 8, cl. 11	2
Art. 2, sec. 2, cl. 2	2
Art. 4, sec. 3, cl. 1	2
Art. 4, sec. 3, cl. 2	2

Statutes:

Act of June 22, 1870, 16 Stat. 164, as amended Septem- ber 3, 1954, 68 Stat. 1229, 5 U. S. C. 306	4
Act of March 3, 1893, 27 Stat. 631, 25 U. S. C. 175	4
Act of June 18, 1934, sec. 6, 48 Stat. 984, 25 U. S. C. 466	2

II

Statutes—Continued

	Page
Reorganization Plan No. 2 of May 14, 1950, 64 Stat.	
1261, as amended July 5, 1952, 66 Stat. 121, 5	
U. S. C. following Section 291-----	4
28 U. S. C. 507 (b)-----	3
 Miscellaneous:	
Cohen, <i>Handbook of Federal Indian Law</i> (1942), p.	
370-----	4
Executive Order No. 6166 of June 10, 1933, Section 5,	
5 U. S. C. following Section 132-----	4
Federal Rules of Civil Procedure, Rule 15 (a)-----	7

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 10, Original

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

UNITED STATES OF AMERICA, INTERVENOR

*RESPONSE BY UNITED STATES OF AMERICA, INTERVENOR, TO MOTION FOR LEAVE TO FILE REPRESENTATION OF INTEREST AND REPRESENTATION OF INTEREST BY THE COLORADO RIVER INDIAN TRIBES OF THE COLORADO RIVER INDIAN RESERVATION, ARIZONA AND CALIFORNIA; GILA RIVER PIMA-MARICOPA INDIAN COMMUNITY, ARIZONA; HUALAPAI INDIAN TRIBE OF THE HUALAPAI RESERVATION, ARIZONA; NAVAJO TRIBE OF INDIANS OF THE NAVAJO RESERVATION, ARIZONA AND NEW MEXICO; SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY OF THE SALT RIVER RESERVATION, ARIZONA; THE SAN CARLOS APACHE TRIBE, ARIZONA; AND THE FORT McDOWELL MOHAVE-APACHE INDIAN COMMUNITY OF THE FORT McDOWELL RESERVATION, ARIZONA*¹

I

The United States is authorized by law and committed by tradition to represent the Indians and In-

¹ The untimeliness of the "Motion for Leave to File * * *" is apparent from the fact that it has been presented more than 2½ years after the filing of the Petition of Intervention by the United States and well after the commencement of the trial before the Special Master.

dian tribes in litigation affecting their property rights. Such representation is an established aspect of the plenary power to manage the affairs of Indians assumed by Congress and approved by the Courts under several constitutional provisions.² *Worcester v. Georgia*, 6 Pet. 515; *United States v. Kagama*, 118 U. S. 375; *United States v. Ramsey*, 271 U. S. 467. "The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts." *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 308; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 565; *Tiger v. Western Investment Co.*, 221 U. S. 286, 311.

Congress has generally delegated to the Secretary of the Interior the management of Indian property and to the Attorney General the conduct of litigation affecting that property. Thus, as to the authority of the Secretary of the Interior, it was said in *United States v. Anglin & Stevenson*, 145 F. 2d 622, 628-629 (C. A. 10), certiorari denied, 324 U. S. 844:

² The Constitution grants to Congress authority over commerce with Indian tribes (Art. 1, sec. 8, cl. 3), expenditures for the general welfare (Art. 1, sec. 8, cl. 1), property of the United States (Art. 4, sec. 3, cl. 2), treaties (Art. 2, sec. 2, cl. 2), the waging of war (Art. 1, sec. 8, cl. 11) and the admission of new states and the terms of such admission (Art. 4, sec. 3, cl. 1). The power of Congress extends from the control of the use of the lands (e. g., grazing, Act of June 18, 1934, sec. 6, 48 Stat. 984, 986, 25 U. S. C. 466), through the grant of adverse interests in the lands (*Nadeau v. Union Pacific R. R. Co.*, 253 U. S. 442), to the sale and removal of the Indians' interests (*Lone Wolf v. Hitchcock*, 187 U. S. 553).

We do not forget that historically and traditionally the Secretary of the Interior has been selected as the executive arm of the Government to execute the declared Congressional policy with the Indians. As such, he and his subordinates have the responsibility of discharging the obligation of the Government to its Indian wards, and in that respect, he is given wide discretionary powers to deal with the individual Indians who are dependent upon the Government for tutelage and protection. [Cases omitted.] In the discharge of these duties, he acts as supervisor, agent, guardian, and trustee of the Indian and his property, whether in the nature of lands or restricted funds. While exercising the powers and duties imposed by law, he is clothed with sovereign immunity, and ordinarily is not amenable to judicial processes or bound by judicial decrees absent legislative consent. * * * It is not the judicial function to administer the affairs of incompetent Indians, and courts should be at pains not to invade the trust or encroach upon the prerogative which has been traditionally assigned to the Secretary.

The authority of the Attorney General to control litigation affecting Indian property is equally broad. This is, of course, necessary in order to effectuate the foregoing responsibility of the Secretary of the Interior. It is provided in 28 U. S. C. 507 (b) that "The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party * * *."³ That means that "the

³ "In all States and Territories where there are reservations or allotted Indians the United States district attorney shall repre-

full responsibility and control are imposed directly upon him as the head of the Department of Justice.” *United States v. Winston*, 170 U. S. 522, 525. “If the United States is entitled to institute an action on its own behalf and on behalf of the Indians, the Indians cannot determine the course of the suit or settle it contrary to the position of the Government.” Cohen, *Handbook of Federal Indian Law* (1942), p. 370; *Conner v. Cornell*, 32 F. 2d 581, 584–585 (C. A. 8); *McGugin v. United States*, 109 F. 2d 94 (C. A. 10); *White v. Sinclair Prairie Oil Co.*, 139 F. 2d 103, 106–107 (C. A. 10); *United States v. Adamic*, 54 F. Supp. 221, 223 (W. D. N. Y.)

This Court announced the complete control of the United States over Indian litigation in *Heckman v. United States*, 224 U. S. 413, wherein the United States sued to set aside conveyances of allotted lands by restricted Indians, as follows (pp. 444–446):

It is further urged that there is a defect of parties, on account of the absence of the Indian grantors. It is said that they are the owners of the lands and hence sustain such a relation to the controversy that final decree cannot be made without affecting their interest. *Shields v. Barrow*, 17 How. 130, 139; *Williams v. Bankhead*, 19 Wall. 563.

sent them in all suits at law and in equity.” Act of March 3, 1893, 27 Stat. 631, 25 U. S. C. 175. See also Act of June 22, 1870, 16 Stat. 164, as amended September 3, 1954, 68 Stat. 1229, 5 U. S. C. 306; Executive Order No. 6166 of June 10, 1933 (Reorganization of Executive Agencies), Section 5, 5 U. S. C. following Section 132; Reorganization Plan No. 2 of May 14, 1950, 64 Stat. 1261, as amended July 5, 1952, 66 Stat. 121, 5 U. S. C. following Section 291.

The argument necessarily proceeds upon the assumption that the representation of these Indians by the United States is of an incomplete or inadequate character; that although the United States, by virtue of the guardianship it has retained, is prosecuting this suit for the purpose of enforcing the restrictions Congress has imposed, and of thus securing possession to the Indians, their presence as parties to the suit is essential to their protection. This position is wholly untenable. There can be no more complete representation than that 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 representation which traces its source to the plenary control of Congress in legislating for the protection of the Indians under its care, and it recognizes no limitations that are inconsistent with the discharge of the national duty.

When the United States instituted this suit, it undertook to represent, and did represent, the Indian grantors whose conveyances it sought to cancel. It was not necessary to make these grantors parties, for the Government was in court on their behalf. Their presence as parties could not add to, or detract from, the effect of the proceedings to determine the violation of the restrictions and the consequent invalidity of the conveyances. As by the act of Congress they were precluded from alienating

their lands, they were likewise precluded from taking any position in the legal proceedings instituted by the Government to enforce the restrictions which would render such proceedings ineffectual or give support to the prohibited acts. The cause could not be dismissed upon their consent; they could not compromise it; nor could they assume any attitude with respect to their interest which would derogate from its complete representation by the United States.

* * * * *

And when the United States itself undertakes to represent the allottees of lands under restriction and brings suit to cancel prohibited transfers, such action necessarily precludes the prosecution by the allottees of any other suit for a similar purpose relating to the same property.

The United States, acting through the Attorney General, "may in cases brought by restricted Indians, when it is served with notice, enter its appearance and take over the general management of the case without consulting such Indians * * *." *Sadler v. Public National Bank & Trust Co. of New York*, 172 F. 2d 870, 874 (C. A. 10); *Mars v. McDougal*, 40 F. 2d 247 (C. A. 10), certiorari denied, 282 U. S. 850. In *Pueblo of Picuris in State of New Mexico v. Abeyta*, 50 F. 2d 12 (C. A. 10), the Indians sought to present contentions of their own in litigation instituted by the United States to quiet title to land in their behalf. The court refused to permit this, stating (p. 14):

The statutory power of the United States to initiate actions for the Pueblo Indians necessarily involves the power to control such litigation. If the private attorneys of the pueblo could dictate the averments of the bill, or could prevail in questions of judgment in the introduction of evidence, there would be no substance to the guardianship of the United States over the Indians. There cannot be a divided authority in the conduct of litigation; divided authority results in hopeless confusion.

It is plain, therefore, that the United States has full and exclusive authority to control the presentation of the Indians' interests in the instant case. The Attorney General, acting for the United States, has undertaken to present those interests. It "is to be presumed" that "the United States will be governed by such considerations of justice as will control a Christian people in their treatment of an ignorant and dependent race." *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U. S. 114, 117.⁴

Thus the granting of movants' request for "separate and independent counsel" would require that the Attorney General abdicate the responsibility clearly

⁴There is no substance to the intimations by the movants (pp. 7-9, 10) that the Attorney General will not fully protect their rights. The amendment of the petition of intervention was not "unauthorized", as alleged. Rule 9 of this Court provides that the Federal Rules of Civil Procedure are applicable as a guide in original actions. Rule 15 (a), F. R. C. P., allows a party to "amend his pleading once as a matter of course at any time before a responsive pleading is served." The phrasing of the petition and the request to proceed last at the trial are no indication of an intention not to protect fully the rights of the Indians.

laid upon him by law and tradition to represent the Indians in litigation affecting their property rights.

II

But there is another compelling reason why the movants' request cannot be granted. For the Indians to present their own case (or cases) at the trial by "separate and independent" counsel would not only result in unseemly confusion and conflict⁵ but would require the legislative consent of the States of Arizona and California, because the sovereign immunity of states extends against Indian tribes. *Cherokee Nation v. Georgia*, 5 Pet. 1; *Lane v. Pueblo of Santa Rosa*, 249 U. S. 110. Movants themselves admit this, in effect, by their statement that "There is doubt as to whether petitioners may intervene as

⁵ The motion does not and cannot establish that movants are *all* the Indians whose rights may be affected by this litigation. Only the Attorney General can represent *all* Indian rights. Additionally, no basis is either suggested or imaginable upon which the Master could, without extensive testimony, determine (as prayed) "whether a conflict exists between the Indian interest and the interests of the United States apart from those of the Indians." Indeed, it is quite likely that there may be, in some respects, conflicts between the movants themselves. It is by no means unusual for the Attorney General to represent possibly conflicting interests. This is inherent in the very nature of much Government litigation. Thus, within a particular case, the position of the Bureau of Reclamation of the Department of the Interior may be in actual or apparent conflict with the Forest Service of the Department of Agriculture, or with the obligations of the United States under an international treaty, or with the Corps of Engineers of the Department of the Army. But it is essential to orderly government and judicial procedure that there shall be one and only one law officer—the Attorney General—representing, in ultimate responsibility, all the interests of the United States in all of their various and relative aspects.

separate parties. * * *” Accordingly, in the face of this clear legal obstacle to the consideration of movants’ request, the Attorney General has no choice, as a matter of law, but to continue upon the course already taken. The responsibilities of his office compel him to supervise and control the presentation of all interests of the United States in this litigation. These responsibilities he has properly undertaken to discharge pursuant to the petition of intervention by the United States.

CONCLUSION

For the reasons stated, the terms of reference to the Master should not be expanded to comply with the prayer of the movants and the motion should be denied.

Respectfully submitted,

HERBERT BROWNELL, Jr.
Attorney General.

SIMON E. SOBELOFF,
Solicitor General.

J. LEE RANKIN,
PERRY W. MORTON,
Assistant Attorneys General.

DAVID R. WARNER,
S. BILLINGSLEY HILL,
Attorneys.

JULY 1956.

