IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 8 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,
Intervener

STATE OF NEVADA,
Intervener

STATE OF NEW MEXICO,
Impleaded Defendant

STATE OF UTAH,
Impleaded Defendant

BRIEF OF ARIZONA IN OPPOSITION TO MOTION OF THE NAVAJO TRIBE OF INDIANS FOR LEAVE TO INTERVENE

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BRIEF OF ARIZONA IN OPPOSITION TO MOTION OF THE NAVAJO TRIBE OF INDIANS FOR LEAVE TO INTERVENE

This brief is submitted by the State of Arizona in opposition to the motion of the Navajo Tribe of Indians for leave to intervene.

Several separate and independent reasons exist for the denial of intervention. First, the motion is untimely. Second, to grant the Navajo Tribe leave to intervene would in effect authorize a suit by the Indians against the State of Arizona without its consent. Finally, since the United States has elected to represent the interests of the Indians in this litigation, the Indians are without power to intervene and to adopt positions which would derogate from their complete representation by the United States.

ARGUMENT

I

The motion for leave to intervene should be denied as untimely.

This motion of the Navajo Tribe for leave to intervene comes almost nine years after the commencement of this suit by Arizona, more than five years after the commencement of the trial before the Master and almost a year after the issuance of the Master's Report. Coming at so late a date, the motion should be denied as untimely.

This action was commenced on January 19, 1953, when the Court granted Arizona's motion for leave to file its Bill of Complaint. 344 U. S. 919 (1953). On the same day the United States was granted leave to intervene. Both the United States' brief supporting its application for leave to intervene and its petition of intervention filed in December 1953 clearly indicated that the United States regarded the existence and extent of Indian water rights on the Colorado River and its tributaries to be in issue in the litigation. The Navajo Tribe in its brief upon this motion makes clear that it was aware of these facts and of the

intention of the United States to represent the interests of the Indians, including the Navajo Tribe, in the litigation.

Not until June 1956 did hearings begin before the Master. Nearly a month after the commencement of the trial, the Navajo Tribe, along with a number of other Indian tribes, filed a motion for leave to file a "representation of interest". No motion for leave to intervene was made, even though the Indians then asserted that their interests had not been, and would not be, adequately represented by the United States without the appointment of separate counsel to act on their behalf. The motion was referred by Mr. Justice Douglas to the Master, who heard argument and on July 18, 1956 delivered an oral opinion denying the motion.[1] The Master, however, authorized the movants to file a brief with him upon the conclusion of the trial stating their views of the issues affecting them.[2] In denying the application the Master also stated:

> "If any party wants to use this transcript as a basis for presenting the question to the Supreme Court I shall be glad to certify it."[3]

Neither the Navajo Tribe nor any of the other tribes that had sought leave to file a representation of interest took advantage either of the opportunity afforded them to file a brief at the close of trial or of the Master's suggestion that they present the question of their right to file a representation of interest to the Court.

Approximately two and one half years elapsed from the conclusion of the trial until the promulgation of the Master's Final Report. During all of this time the Navajo Tribe took no steps to obtain intervention in the action.

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[1] Tr. 2638-46.

[2] Tr. 2645.

[3] Tr. 2646.

Not until after all of the parties had filed their exceptions to the Master's Report, had filed their Opening and Answering Briefs with the Court and were about to file their Reply Briefs did the Navajo Tribe make this motion. Plainly, the Navajo Tribe has delayed much too long to be permitted to intervene at this juncture.

The Navajo Tribe seeks to excuse its delay by pointing to its efforts to obtain a representation of interest in 1956 and to its request made in February of this year to the Attorney General that the United States take exception to the Master's Report in various respects as it was thought to affect the Navajo's interests. But neither of these steps explains nor excuses the failure of the Navajo Tribe to seek intervention in the four years from the commencement of the action to the beginning of the trial or at the time the representation of interest was sought or during the five years that have elapsed since the denial of the motion for leave to file a representation of interest. Nor can the Navajo Tribe justify its failure to submit a brief to the Master, as he suggested, or to seek review in this Court of the Master's denial of the motion for leave to file a representation of interest. Finally, a letter written to the Attorney General only a few weeks before exceptions to the Master's Report were to be filed and after many years of litigation can hardly qualify as a sufficient effort to protect the interests of the Navajo Tribe.

Whether or not petitioner's application for leave to intervene in an original action in this Court is governed by Rule 24 of the Federal Rules of Civil Procedure and whether or not the application is regarded as of right or permissive, it is clear that the application should not be granted if it is untimely. *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.*, 112 F. 2d 669 (2d Cir. 1940); 4 MOORE'S FEDERAL PRACTICE 97-100

(2d ed. 1950). Whether a motion to intervene is timely depends first upon the time that has elapsed and the legal proceedings that have taken place since the commencement of the action, see *Distinti* v. *Cunningham,* 272 F. 2d 528 (D. C. Cir. 1959), and second upon the extent to which the party seeking intervention has foregone the opportunity to protect his known interests by intervention earlier in the litigation. See *Kelley* v. *Summers,* 210 F. 2d 665, 673-74 (10th Cir. 1954); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co., supra; United States* v. *Schofield,* 175 F. Supp. 654, 656-57 (E. D. Pa. 1959).

Arizona does not dispute movant's many authorities which hold that timeliness must be determined by the particular facts and circumstances in each case. However, "where there has been much litigation by way of motions, depositions and discovery, taking of testimony before a Master, etc., tardy intervention will usually be denied." 4 MOORE'S FEDERAL PRACTICE at 99.

II

Petitioner's motion for leave to intervene should be denied, since the grant of intervention would authorize a suit by petitioner against the State of Arizona without its 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,* 292 U. S. 313 (1934); *Duhne* v. *New Jersey,* 251 U. S. 311 (1920); *Smith* v. *Reeves,* 178 U. S. 436 (1900); *Hans* v. *Louisiana,* 134 U. S. 1 (1890).

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 Indians and Indian tribes. *United States* v. *Minnesota,* 270 U. S. 181, 193 (1926); *Cherokee Nation* v. *Georgia,* 30 U. S. (5 Pet.) 1 (1831); *cf. Skokomish Indian Tribe* v. *France,* 269 F. 2d 555, 560-62 (9th Cir. 1959).

Such immunity exists whether the Navajo Tribe is regarded as a citizen of the State of Arizona or as a citizen of New Mexico or of Utah or as a citizen of all or none of these states. If the Navajo Tribe is regarded as a citizen of a state other than Arizona, it is barred from prosecuting its claims against the State of Arizona by the Eleventh Amendment to 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,* 323 U. S. 459, 464 (1945). If the Navajo Tribe 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,* 134 U. S. 1 (1890). If the Navajo Tribe is regarded as not being a citizen of any state, it may not prosecute a suit against the State of Arizona 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,* 292 U. S. 313, 322-23 (1934) (quoting from THE FEDERALIST No. 81 (Hamilton)). No such surrender has been made respecting suits in the federal courts by Indian tribes.

That an Indian tribe cannot be a party litigant in any case within the original jurisdiction of the Supreme Court has been recognized by leading authorities on Indian law. Thus, Professor Cohen stated:

> "As already seen, the Indian tribes within the territory of the United States, while having some of the attributes of sovereignty usually possessed by independent communities, have been declared by the Supreme Court not to be either states of the Union or foreign nations within the meaning of Article III, Section 2, of the United States Constitution giving original jurisdiction to the Supreme Court in controversies in which a state of the Union or a citizen thereof, and a foreign state or subjects and citizens thereof are parties. Consequently, an Indian tribe as such cannot sue, be sued, or intervene in any case where the original jurisdiction of the Supreme Court is invoked." COHEN, HANDBOOK OF FEDERAL INDIAN LAW 371 (1945) (footnotes omitted); see also UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 341 (1958).

It is clear that intervention by the Navajo Tribe in this litigation would constitute a suit against the State of Arizona. Whether or not a suit is one against a state is not to be determined by niceties of the law of parties but by the actual effect a judgment in favor of the private litigant would have against the state. "[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,* 323 U. S. 459, 464 (1945).

By its petition for intervention the Navajo Tribe seeks a determination that it is entitled to large quantities of

water for use on its reservation. It requests a decision that its rights to water are prior in time and hence superior to those of other users in the State of Arizona. It further seeks a determination that its allotment of water is to be independent of and not drawn from the water apportioned to Arizona pursuant to the Boulder Canyon Project Act.[4] In seeking this relief the Navajo Tribe asserts interests directly in conflict with the interests of all other users, represented by Arizona as *parens patriae.* Only an affirmative judgment in favor of the Navajo Tribe and against the State of Arizona, as representative of its other water users, will accomplish the purposes of the Navajo's prayer for relief. Such a judgment would, in essence, be one in favor of the Navajos, as plaintiffs, and against the State of Arizona, as defendant.

III

Since the United States has elected to represent the interests of the Indians in this litigation, the Navajo tribe is without power to intervene.

The United States is authorized by law and obligated by long-standing custom to represent the interests of the Indians and the Indian tribes in litigation in the courts of the United States. Both Congress and the courts have recognized this traditional moral obligation to the Indians and have embodied it into law. Thus, Congress has provided that "in all States and Territories where there are reservations or allotted Indians the United States district attorney shall represent them in all suits at law and in equity."[5]

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[4] 45 Stat. 1057 (1928), 43 U. S. C. §§617-617u (1958).

[5] Act of March 3, 1893, 27 Stat. 631, 25 U. S. C. §175 (1958).

Similarly, this Court has recognized when the United States has elected to prosecute or intervene in a suit on behalf of individual Indians or of an Indian Tribe, it is entitled to exercise complete and exclusive control over the litigation to the exclusion of the Indians themselves. *Heckman* v. *United States,* 224 U. S. 413 (1912).

In the *Heckman* case Mr. Justice Hughes, writing for the Court, stated:

> "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." 224 U. S. at 444-45.

Since the decision in the *Heckman* case, the right of the United States to "enter its appearance and take over the general management of the case without consulting" its Indian wards has been acknowledged by the lower federal courts on numerous occasions. *E.g., Sadler* v. *Public National Bank & Trust Co.*, 172 F. 2d 870, 874 (10th Cir. 1949); *United States* v. *Adamic*, 54 F. Supp. 221 (W. D. N. Y. 1943). This right of the Government has also been recognized by the leading treatise writers. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 370 (1945); UNITED STATES DEPARTMENT OF THE INTERIOR, FEDERAL INDIAN LAW 336 (1958). Questions of intervention by Indians, similar to that presented here, have been raised and decided adversely to the intervenor. Thus, in *Pueblo of Picuris* v. *Abeyta*, 50 F. 2d 12, 14 (10th Cir. 1931), the right of an Indian pueblo to intervene and present contentions inconsistent with those of the United States was denied, the court stating:

> "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. If the United States has power to dismiss with prejudice prior to trial, as has been held, it certainly has power to decline to appeal after trial, if it believes the decision of the trial court is without error."

Earlier in this litigation the Navajos and other Indian tribes sought to file a representation of interest, discussed earlier. The Master regarded the application as one seeking intervention in all but name and held that it should be denied. He stated:

> "The trusteeship of the United States in behalf of the Indians is the creation of a plenary legislative power. It is beyond the power of the courts to disqualify this trustee. The relationship between this trustee and its Indian wards is not 'circumscribed by rules which govern private relations,' Heckman v. U. S., 224 U. S. 413. It rests on the presumption that 'The United States will be governed by such considerations of justice as will control a christian people in their treatment of a (n) * * * dependent race,' Missouri, Kansas & Texas Railway Company v. Roberts, 152 U. S. 114, 117.
>
> "The foregoing considerations lead to these conclusions.
>
> "1. The unconventional status sought by the petitioners in this litigation is one not likely to promote the orderly development of the issues and proof and the forging of a suitable decree. This is underscored by the circumstance that a substantial portion of the proofs has already been taken on the issues as framed by the pleadings; and the magnitude of the case is such that permission to take part in the case without a substantial adjournment to permit adequate preparation would amount to an empty ritual.
>
> "2. The legal power of the Attorney General to represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action."[6]

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[6] Tr. 2644-45.

Thus, all of the authorities make clear that intervention by the Navajo Tribe in the circumstances of this case would be beyond the power of the Court to authorize, a fact which the Indian tribes themselves appear to have recognized at the time that leave to file a representation of interest was sought.[7]

Moreover, the grant of a right of intervention in these circumstances would be unwise as well as unauthorized. Not only might conflict arise between the views of the Government and those of its Indian wards, but such intervention would also necessarily imply the right on the part of the Indians to reach a settlement or compromise of the litigation without the consent of the United States.

Further, acknowledgment of the right of the Navajo Tribe to intervene in this litigation could precipitate the filing of many more applications for intervention by other tribes claiming the right to the use of water of the main stream or of tributaries of the Colorado River and having perhaps different or conflicting views from those of the Navajos. Plainly, the United States as the traditional guardian of Indian rights is the only party who can properly represent the interests of all of these Indian tribes.

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[7] See Tr. 2639.

CONCLUSION

The motion of the Navajo Tribe for leave to intervene should be denied.

Respectfully submitted,

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