No. 8, Original

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

DECREE PROPOSED BY THE UNITED STATES AND MEMORANDUM IN SUPPORT THEREOF

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MEMORANDUM IN SUPPORT OF THE SUPPLEMENTAL DECREE PROPOSED BY THE UNITED STATES

Unfortunately, all the parties have been unable to agree upon a form of decree to implement the Court's decision of March 30, 1983 in this case. In compliance with the Court's direction (slip op. 35), we therefore submit our own proposed decree. We are authorized to state that the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes, the Quechan Indian Tribe, and the Cocopah Indian Tribe join the United States in this submission.

1. Assuming the State Parties adhere to the proposal they have tendered to the United States and the Tribes, there is a substantial disagreement as to the appropriate style and form of the decree that should now be entered. For our part, we understand the objective of a decree to be to state as concisely and clearly as possible the legal consequences of the Court's decision. The path by which those results were reached, fully articulated in the Court's

opinion, are no longer relevant. Accordingly, we have confined our proposal to operative provisions, omitting incidental rulings on motions and the unnecessary recitation of what has gone before.

As it is, the proposed Decree is unavoidably cumbersome. Like the Special Master (and, indeed, the State Parties), we have eschewed the attempt to write a self-contained judgment pertaining to the water rights attributable to the five Indian Reservations. The reason is simply that repeating all the relevant provisions of the 1964 and 1979 decrees would produce a document of wholly disproportionate length and complexity, considering the relatively modest changes effected. We have therefore followed the course of referring to the prior decrees, indicating the necessary amendments. This approach is seen in Paragraphs A, B, C and E of the proposed Decree now tendered (pages 1a-5a, *infra*).

On the other hand, we have attempted to draft a complete Decree, leaving no point of potential controversy unresolved, except the boundary questions which, under this Court's ruling, another court must determine. Indeed, we have sought and obtained an agreed resolution of some of those boundary adjustments. See Point 2, *infra*. But, unlike the State Parties who would literally track the Court's opinion and, where it is silent, would leave the dispute for another day, we deem it important to avoid perpetuating ambiguities that invite disagreement and likely will stir future litigation in this Court or the lower courts. The whole theme of the Court's decision is that water rights ought, so far as possible, be secure against later challenge. We therefore resist the notion of postponing any matter that properly can now be settled. See Points 3, 4, 5 and 6, *infra*.

2. The increased diversion rights now to be adjudicated in favor of two of the Indian Reservations are particularized in Paragraph C of the attached Decree — and are also

reflected in the new totals recited in Paragraph A. There is no disagreement on this score and we simply summarize the additional allocations.

In the case of the Fort Mojave Reservation, the increases result from: (a) assigning water rights (3,372 acre-feet per year) to 522 net irrigable acres in the "LaFollette tract" covered by a judgment which the Court recognized as a final "boundary adjustment" (slip op. 29-30 & n.26, 33-35 & nn.30-31); (b) assigning water rights (3,224 acre-feet) to 499 net irrigable acres determined by survey to constitute net accretions to the "Checkerboard area" of the Reservation; and (c) assigning water rights (523 acre-feet) to some 81 net irrigable acres of "boundary lands" just north of the "LaFollette tract," being portions of Parcels FM-10 and FM-129. Although free to do so (slip op. 29-30 n.25, 33 n.29), the State Parties have determined not to challenge the two latter boundary adjustments.

In the case of the Cocopah Reservation, the increases result from: (a) assigning water rights (4,937 acre-feet per year) to 775 net irrigable acres of accretions covered by a judgment which the Court recognized as a final "boundary adjustment" (slip op. 29-30 & n.26, 34-35); and (b) assigning water rights (2,026 acre-feet) to 318 net irrigable acres within the lands added to the Reservation by the Act of June 24, 1974 (slip op. 27, 35). In light of the Court's decision, there can be no dispute as to the appropriateness of making these adjustments.

3. Although the objections seem to us wholly without merit, we understand the State Parties to oppose Paragraphs D and H of the attached proposed Decree. The principal issue is whether the State Parties should be foreclosed (as our Decree suggests) from attempting to relitigate water allocations already adjudicated in favor of the several Indian Reservations on the basis of assumed boundaries

that have gone unchallenged at least since this Court's decision of 1963. Presumably, the State Parties will invoke the literally unconfined provision of Article II(D)(5) of the 1964 Decree, 376 U.S. at 345, repeated in the 1979 Decree, 439 U.S. 421, to the effect that the tribal water allocations there specified would be "subject to appropriate adjustment * * * in the event that the boundaries of the respective reservations are finally determined" (see slip op. 24, 27-28), together with the present holding that a "final determination" requires judicial approval (slip op. 29-33). In combination; these rulings are apparently read as authorizing a challenge to *any* Reservation boundary, no matter how long accepted, if not endorsed by a final court judgment. In our view, that approach grossly distorts the Court's intention and the original understanding of the parties and ought to be firmly rejected.

As the Court's current decision recites (slip op. 23-24), in 1960 Special Master Rifkind ruled "for the most part in California's favor" with respect to the boundaries of the Colorado River Reservation, and he "entirely agreed with the State's position" in the Fort Mojave boundary dispute. In turn, the Court's 1964 decree "limited the water rights of the two Reservations to those awarded by the Master, based on the irrigable acreage within the boundaries as he had found them." Against that background, it is reasonably obvious that the proviso to Article II(D)(5) of the 1964 Decree (slip op. 24) — then applicable to these two Reservations alone — contemplated only an *upward* "adjustment" in the event the larger boundaries claimed by the United States were "finally determined" to be correct.

But, at all events, any lingering doubt was removed by the 1979 Decree. By that time, futher boundary disputes, affecting all five Reservations, had emerged. But all these were claims for more *expansive* boundaries, and a corresponding

"upward adjustment of [the Tribes'] water rights" (slip op. 24-27). The State Parties were unwilling to concede the effectiveness of intervening Secretarial orders and district court judgments recognizing these enlarged boundaries, but they were not remotely reserving the right to challenge the boundaries accepted by Special Master Rifkind — for the most part never questioned —or the water allocations based thereon. On the contrary, the consent decree entered in 1979 expressly contemplates only the award of "[a]dditional present perfected rights" as the kind of "adjustment" that will result in the event of "finally determined" boundaries and provides the formula for that task. 439 U.S. at 421-422. And all the subsequent pleadings and proceedings before this Court have addressed these additional boundary claims, not potential retrenchment of Reservation acreage that has enjoyed adjudicated water rights since the 1964 Decree. See slip op. 24-27.

It is far too late in the day to go backwards and re-open what has been accepted as finally settled for two decades. Presumably, the State Parties can be excused for failing promptly to challenge in appropriate court proceedings administrative decisions expanding Reservation boundaries which did not, without further action by this Court, affect their diversion rights. But there can be no like explanation for delaying so long in respect of lands that have been assigned water rights since 1964 as within Reservation boundaries. Laches and estoppel aside, the same principles of finality that the Court invoked against the plea for considering the "omitted lands" claims apply with equal force here. Since almost none of the Reservation boundaries have been judicially determined, there is no obvious stopping place if boundaries accepted for twenty years as sufficiently fixed to support decreed water allocations for the included acreage are now open to challenge. As the Court most recently wrote, "the urge to relitigate, once loosed, will not

be easily cabined" (slip op. 19). Here, also, "[i]t would be counter to the interests of all parties to this case to open what may be a Pandora's Box, upsetting the certainty of all aspects of the Decree" (*ibid.*).

We accordingly ask the Court to make clear by its Decree that the diversion rights already adjudicated are final. Strictly speaking, this does not entail any ruling on the underlying Reservation boundaries. But, by depriving the State parties of any incentive (or, indeed, standing) to question the boundaries so long accepted, such a declaration will avoid burdensome and unsettling litigation in other courts. Now that the issue has been raised by the State Parties, it would be wholly wasteful to leave it unresolved. This Court alone authoritatively can say whether its own Decrees are final in this respect. The responsible course, we submit, is now to close the door to what otherwise must be wholly unproductive litigation, inevitably reaching this Court at some future date.

4. There is, we suppose, no quarrel with the second objective of our proposed Paragraphs D and H: to foreclose the United States and the Tribes from seeking any additional water rights for the Reservations except as a final boundary determination may add lands that, for purposes of this Court's Decrees, have thus far been considered outside Reservation boundaries. We are advised, however, that the State Parties demurr to our proposed stipulation in Paragraph D (2) which, for the future, treats as final any boundary adjustment effected by an administrative decision that remains unchallenged for more than a year. In our view, such a provision is necessary.

It suffices to remember the past. As early as 1969, the Secretary of the Interior, in a formal published ruling, determined that the western boundary of the Colorado River Reservation had been erroneously plotted (see slip

op. 25). Although private landowners judicially challenged the action as it effected them and failed (*ibid.*; slip op. 30 n.26), the Court has held that the Secretary's order is not "final" in the present case (*id.* at 30 n.26). In effect, the State Parties here have been permitted to ignore the boundary adjustment for a dozen years because the United States did not go to court to vindicate its action against them. Indeed, but for the recent suit filed by two of the State Agencies (see slip op. 31-33), it appears the State Parties would be free to sit quietly by indefinitely, without even indicating any ground for disputing the Secretary's boundary adjustment. This is plainly not a scenario that ought to be encouraged for the future.

One other example makes the point. As the Court recounted in its opinion (slip op. 25), "in the course of establishing the western boundary [of the Colorado River Reservation in 1969], the Secretary corrected what he deemed to be an error in an old survey. He approved the corrected plat adding 450 acres to the Reservation on December 12, 1978." This is the so-called "Northwest Boundary" adjustment, wholly separate from the much more substantial "Benson Line" issue. See Special Master's Final Report 60-61. As it happens, by virtue of a stipulation entered into before the Master (see Report 107 n.4, 196), it is agreed that 50% of the irrigable acreage claimed by the United States in the relevant parcels (the western portions of CR-4 and CR-16) should be allowed in computing water allocations for those parcels if the boundary is adjusted, and the upshot is that only 61 net acres and 407 acre-feet of additional diversions are at stake. To this day, the State Parties have not judicially challenged the survey plat affecting this Northwest Boundary area, nor indicated any ground for doing so. Yet they are unwilling that this Court now adjudicate this minor increase of water rights in favor of the Colorado River Reservation. It seems to us most

extraordinary to suppose that this impasse must be resolved, if at all, by the United States instituting judicial proceedings to vindicate an unchallenged final survey.

Indeed, we find some indication that the Court shares our concern in its direction to the State Parties to amend their pleadings in the district court litigation if they "wish to challenge the recently-finalized administrative action regarding the 'Checkerboard area' [of the Fort Mojave Reservation]" (slip op. 33 n.29). That matter has now been resolved by agreement. See page 3, *supra*. But we assume that if the State Parties had not acquiesced or sought judicial review within a reasonable time, the federal survey would be deemed final without requiring the United States to seek —with questionable propriety in the absence of any real controversy — a novel judicial declaration confirming the administrative action. All we suggest is that this principle be generalized for the future. It is hardly the imposition of an improper burden on States and other public agencies to require them to contest a final published administrative decision within a year if they wish to avoid the water allocation consequences that naturally flow. The alternative of insisting on a gratuitous lawsuit by the United States or the affected Tribe to confirm what is not contested is contrary to orderly procedure and wasteful of limited judicial resources.

5. Perhaps a word should be said about Paragraph E of the proposed Decree. So far as we are aware, the State Parties do not dispute the accuracy of our restatement of some of the provisions of the 1979 Decree. Nor have they indicated any doubt that *all* tribal diversion rights now or previously adjudicated — by definition, appertaining to "boundary lands" after 1964 — enjoy the benefit of the special priority conceded in that Decree. We mention the point explicitly only because this Court's opinion may be read as excepting the water allocation for the lands added to

the Cocopah Reservation by Act of Congress in 1974. See slip op. 35. Notwithstanding that dictum, we assume the State Parties are bound by their representations to the Court at the oral argument preceding the entry of the 1979 Decree (see Special Master's Final Report 105 n.4), by the terms of that Decree, and by failure to except to the Master's conclusion that the water rights appertaining to the Cocopah 1974 addition are embraced by the so-called "subordination agreement" (*id.* at 104 & n.2). In order to forestall any possible future controversy, however, we deem it prudent to ask the Court to include the explicit provison set out in our proposed Paragraph E.

6. We conclude by stressing, once again, the importance of entering, as promptly as possible, an unequivocal Decree that will leave no tempting opening for unnecessary controversy. In light of the cases involving Indian water rights claims decided at the last Term, the Court is well aware that, in this context, the vital stakes involved for all concerned create irresistible pressures to exploit every arguable ambiguity. For the sake of all the parties, as well as the district court now charged with resolving the remaining boundary disputes, we urge this Court not to postpone decision of any question now ripe for adjudication. The Decree we tender is framed to that end and we invite the Court to adopt it.

Respectfully submitted.

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SEPTEMBER 1983

Decree Proposed By The United States

The Court having, on March 30, 1983, rendered its decision on the several Exceptions to the Final Report of the Special Master herein, approving his recommendation that the Fort Mojave Indian Tribe, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes, the Quechan Indian Tribe, and the Cocopah Indian Tribe be permitted to intervene, approving some of his further recommendations and disapproving others, all as specified in this Court's opinion, the following supplemental decree is now entered to implement the decision of March 30, 1983.

SUPPLEMENTAL DECREE

It is ORDERED, ADJUDGED AND DECREED:

A. Article II(D) (1)-(5) of the Decree in this case entered on March 9, 1964 (340 U.S. 340, 344-345), is hereby amended to read as follows:

(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 9,707 acre-feet of diversions from the mainstream or (ii) the quantity of water necessary to supply the consumptive use required for irrigation of 1,524 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 27, 1917, for lands reserved by the Executive Order of said date; June 24, 1974, for lands reserved by the Act of June 24, 1974 (88 Stat. 266, 259);

(3) The Fort Yuma Indian Reservation in annual quantities not to exceed (i) 51,616 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 717,148 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necesssary to supply the consumptive use required for irrigation of 107,588 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

(5) The Fort Mojave Indian Reservation in annual quantities not to exceed (i) 129,767 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 20,076 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date

B. The quantities of mainstream diversion rights in favor of the said Indian Reservations specified in Paragraph I(A) of the Decree of January 9, 1979 (439 U.S. 419, 423), shall be deemed amended in accordance with the present Decree.

C. The mainstream diversion rights in favor of the said Indian Reservations specified in Paragraphs I(A), II(A) and III(A) of the Decree of January 9, 1979, to the extent consumptively used, shall be charged against the apportionment of the States of Arizona, California, or Nevada, as there indicated. Additional mainstream diversion rights of the said Reservations recognized by the present Decree, to the extent consumptively used, shall be charged against the State of Arizona as follows:

(1) 7,119 acre-feet for the Fort Mojave Reservation, with a priority date of February 2, 1911; and

(2) 6,963 acre-feet for the Cocopah Reservation, of which 4,937 acre-feet enjoy a priority date of September 27, 1917, and 2,026 acre-feet enjoy a priority date of June 24, 1974;

D. Notwithstanding anything to the contrary in the Decree of March 9, 1964, or the Decree of January 9, 1979, the quantities of mainstream diversion rights specified in this Decree shall in no event be diminished. Nor shall they be increased by supplemental decree of this Court except only on the following terms and conditions:

(1) An appropriate upward adjustment of the quantities of mainstream diversion rights for any of the five Indian Reservations shall be available only if the outer boundaries of the Reservation are determined to include lands assumed for the purposes of the present Decree to lie outside those boundaries;

(2) Such a determination shall be effective for the purpose of allocating additional mainstream rights only if it is endorsed by the judgment of a competent court that has become final and non-appealable or is incorporated in a final administrative decision that has remained unchallenged in judicial proceedings prosecuted with due diligence by any of the parties to this case for more than one year after the decision was published or the date of the present Decree, whichever is later;

(3) Any such adjustment in the quantities of mainstream diversion rights shall be made by applying the appropriate unit diversion requirements listed in the Decree of January 9, 1979 (439 U.S. at 422) to the number of net practicably irrigable acres (as determined by this Court or by agreement) within the lands determined to have been erroneously excluded from the Reservation's boundaries.

E. The provisions of Introductory Paragraphs (1) through (5) of the Decree entered herein January 9, 1979 (439 U.S. 419, 421-423), including the provision requiring first satisfaction in full in time of shortage of all Indian Reservation diversion rights regardless of priority dates except specified "Miscellaneous Present Perfected Rights" enjoying earlier priority dates, and the provision permitting usage of Reservation diversion rights for beneficial uses other than irrigation or other agricultural uses, shall remain in full force and effect and shall apply to all mainstream diversion rights adjudicated in favor of the five named Indian Reservations by the Decree of March 9, 1964, the Decree of January 9, 1979, the present Decree, and any supplemental Decree herein.

F. The allocation of costs previously made by the Special Master is approved and no further costs shall be taxed in this Court, absent further proceedings after entry of this Decree.

G. The Special Master appointed by the Court is discharged with the thanks of the Court.

H. The Court shall retain jurisdiction herein to order such further proceedings and enter such supplemental decree as may be deemed appropriate, but, except as stipulated in Paragraph D hereof, no application from any party shall be received to vary the allocations of mainstream water provided for herein.