IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 8, Original

STATE OF ARIZONA,

Complainant,

v.

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

Defendants;

THE UNITED STATES OF AMERICA, STATE OF NEVADA, COLORADO RIVER INDIAN TRIBES, FORT MOJAVE INDIAN TRIBE, CHEMEHUEVI INDIAN TRIBE, COCOPAH INDIAN TRIBE, AND FORT YUMA (QUECHAN) INDIAN TRIBE,

Intervenors;

STATE OF UTAH AND STATE OF NEW MEXICO,

Impleaded Defendants.

COMMENTS ON THE DECREE PROPOSED BY THE UNITED STATES AND REVISED DECREE PROPOSED BY THE STATE PARTIES

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STATE OF ARIZONA,

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STATE OF CALIFORNIA, *et al.*,

COMMENTS ON THE DECREE PROPOSED BY THE UNITED STATES AND REVISED DECREE PROPOSED BY THE STATE PARTIES

INTRODUCTION

The State Parties[1] submit these comments in opposition to the proposed decree of the United States, joined in by the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma (Quechan) and Cocopah Indian Tribes, because portions of that decree would adjudicate certain issues

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[1]The State of Arizona, State of California, State of Nevada, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley Water District, The Metropolitan Water District of Southern California, City of Los Angeles, California, City of San Diego, California, and County of San Diego, California.

which, with one exception,[2] were neither litigated by the parties, ruled upon by the Special Master, nor addressed by this Court's March 30, 1983 opinion.

The State Parties have reviewed the United States' comments on our proposed decree and continue to adhere to the form and substance of our proposed decree. However, we have modified Articles III(C) and (D) to reflect an agreement among the parties with respect to certain Fort Mojave Reservation lands (U.S. Memorandum, p. 3), broadened the definition of "boundary lands" in Article I(E) in light of the United States' comments, and renumbered several articles.[3] Our revised decree is set out as an appendix to these comments.

The State Parties note that there is agreement upon the amount of additional water which should be allocated to the Cocopah and Fort Mojave Indian Tribes as a result of the Court's decision. The points of difference arise out of three additional provisions contained in paragraphs (D), (E) and (H) of the United States' proposed decree.

Paragraphs (D) and (H) would limit any adjustment of the 1964 decreed reservation water allocations resulting from final boundary determinations to only upward adjustments and would preclude a diminution of those allocations in the event that it is finally determined that the reservation boundaries are smaller than those used as the basis of the 1964 allocations. Paragraph (D)(2) provides that unilateral administrative decisions by the Secretary of the Interior which remain unchallenged for more

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[2]See p. 9, n. 9 *infra*.

[3]Articles III(H), VI and VII have been changed to III(G), IV and V respectively.

than one year will constitute final determinations of boundaries for water allocation purposes.

Paragraph (E) would generally extend the subordination clause of the 1979 Supplemental Decree, by which the State Parties voluntarily conceded a paramount priority to the 1964 allocations to the Tribes, to any subsequent decree of this Court which adjudicates additional water rights for those Tribes. The United States specifically requests that the subordination language include the additional statutory allocation to the Cocopah Tribe, which the Court assigned a 1974 priority date.

The referenced provisions are a blatant effort to obtain an unwarranted advantage for the Tribes from its unjustified attempt to relitigate, on a selective basis, the measure of the Tribes' previously adjudicated water rights. It is nothing more than a further display of the United States' overreaching which would distort the Court's March 30, 1983 opinion into the basis for a proposed no-lose proposition for the United States and the Tribes, and a no-win proposition for the State Parties with respect to any future final boundary determinations.

1. The "no reduction" issue

There is absolutely no basis for the contention by the United States that the amount of water allocated to the Tribes under the 1964 Decree should never be reduced even if it is "finally determined" that the boundaries on which that decree was based were erroneous. This Court's 1963 opinion rejected Special Master Rifkind's attempt to determine certain boundaries and left such determinations and consequent adjustment of water rights to future adjudication:

> "We disagree with the Master's decision to determine the disputed boundaries of the Colorado River

> Indian Reservation and the Fort Mojave Indian Reservation. We hold that it is unnecessary to resolve those disputes here." 373 U.S. 546, 601.

Moreover, the Court wrote that the 1964 Decree:

> ". . . shall be subject to *appropriate adjustment* by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined;" 376 U.S. 340, 345; emphasis added.

Now that the United States and the Tribes have reopened the question of proper boundaries, the State Parties must be allowed to assert all of their claims and defenses as to those boundaries. Fairness dictates that all parties' rights in any future litigation must be equal.

The United States asserts that allowing only an upward adjustment of water when the boundaries are finally determined does not require "strictly speaking . . . any ruling on the underlying Reservation boundaries." (U.S. Memorandum, page 6). This assertion is clearly fallacious. To bar a reduction in the Tribes' 1964 allocations conclusively presumes that the boundaries of the reservations are *at least* as expansive as those found by Special Master Rifkind. This is contrary to the Court's express rejection of those boundary determinations.

Having failed to persuade this Court that it should not permit the State Parties to challenge the expanded boundary proposals which are at the heart of the Tribes' claims for additional water rights, the United States now seeks to set wholly inappropriate, onesided ground rules for the final boundary determinations which this Court has mandated. The United States' "heads I win, tails you lose" proposal is alien to our system of justice and should be firmly rejected. As to its assertion that "it is far too late

in the day to go backwards and re-open what has been accepted as finally settled for two decades" (U.S. Memorandum, page 5), we suppose that this is equally true with respect to the Fort Yuma (Quechan) Reservation boundaries. Yet the United States did not hesitate to attempt to reopen that long accepted boundary in these proceedings. The United States has played fast and loose with the boundaries of the reservations involved here for too long. They have made them a moving target on which neither this Court nor any party can safely rely. Hence it will be beneficial to all concerned to have them finally determined in a judicial, adversary context. Should those determinations uncover some defects in the boundaries on which the 1964 decree was based requiring either an upward or downward adjustment of the 1964 allocations, that is what the law requires and the United States cannot be heard to complain, especially since it bears the responsibility for presenting accurate boundaries to this Court as the basis for its reserved water rights claims.

Nor is the United States' belated embrace of the "Pandora's Box" argument persuasive here. (U.S. Memorandum, page 6). Having rejected the United States' effort to lift the box lid just a trifle for the sole benefit of the Tribes, the Court must have contemplated an end to piecemeal boundary disputes and a wholesale resolution of any challenged reservation boundaries in an appropriate judicial forum.

2. The "one year limitation" issue

The second provision suggested by the United States in Paragraph (D)(2) of its proposed decree is also objectionable. The United States proposes that final administrative decisions which remain unchallenged by judicial proceedings for more than one year should constitute "final

determinations."[4] At the outset, we fail to see what room will be left for further administrative determinations of the boundaries at issue in the pending San Diego litigation after a final judgment in those proceedings, since the purpose of that litigation is to bring finality to those boundaries. Even if there were to be further Secretarial action, however, we note that, to the best of our knowledge, Congress has not established a statute of limitations with respect to judicial challenges to actions of the Secretary of the Interior except for certain oil and gas leasing decisions (30 U.S.C. §226-2), and we do not believe that this Court should establish a rule that appears to run counter to Congressional policy. Furthermore, the United States' proposal suffers from a lack of fundamental understanding of the Court's rationale for its rejection of unilateral administrative actions as the basis for future water allocations in that it would, in effect, shift the burden of establishing accurate reservation boundaries from the United States to the State Parties. Moreover, when certain California agencies did challenge some of these administrative actions in court, the United States asserted that such agencies had no standing to challenge those actions. Although this Court's March 30, 1983 opinion apparently prompted the United States to withdraw its objection to standing, it nevertheless continues to assert that certain claims are barred by the doctrine of sovereign immunity.

There are a number of other problems with the United States' proposal which dictates that the Court should not

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[4]It is unclear from the United States' proposal what would constitute a "final" administrative decision. As shown by the history of the boundary controversies in this case, "finality" of Secretarial orders is an elusive concept, since they appear readily subject to change.

accept the United States' beguiling invitation to enter such uncharted waters. For example, it is not at all clear that there are "water allocation consequences that naturally flow" from an administrative boundary decision. (U.S. Memorandum, page 8). For a variety of reasons the Secretary may decide not to assert a water right for the added lands, but this might not be known at the time of the boundary action and raises a number of serious problems. Should the States be put to the burden and expense of challenging a boundary determination that may never be the predicate for a water right claim? Should the Secretary be required to give actual notice to the State Parties of his intention to claim a water right at the time of his boundary determination? Would the affected Tribes be bound by his decision not to assert such a claim? Should the Tribes have to challenge the Secretary's failure to claim a water right within a time certain? These are only a few of the pitfalls associated with the United States' proposal, but they suffice to demonstrate its impracticality and inequity.

The United States suggests that the advantage of such a proposal is that it will foreclose the possibility that the State Parties will sit idly by for years before challenging an administrative action, pointing to the State Parties' failure to contest the 1969 Secretarial order regarding the Colorado River Indian Reservation.[5] (U.S. Memorandum, page 8). Once again, the United States misses the point of the Court's decision on the boundary issues. The burden is not upon the State Parties to challenge such orders.

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[5]The United States also urged in these proceedings that there was an "advantage" to accepting unilateral administrative orders as final, but the Court was able to discern none, at least none consistent with basic notions of fair play and due process.

Rather, the responsibility remains with the United States to show the true extent of the boundaries of the reservations.[6] Moreover, until the United States and the Tribes made their recent claims in 1978 that these lands were entitled to water, there was no basis for any legal action by the State Parties. Indeed any such action would have raised ripeness issues.

In an attempt to bolster their reasoning that a one year limitation is appropriate, the United States also faults the State Parties for not agreeing at this time to a 1978 survey change in the location of the northwestern boundary of the Colorado River Indian Reservation, the effect of which is to add additional acreage to the reservation which was not claimed in the original proceedings. The State Parties believe that this issue is more appropriately decided within the context of the pending District Court litigation in San Diego where the Secretary's 1969 order which was the basis for the resurvey approved in 1978 is being challenged. Consequently, the State Parties' reluctance to stipulate to the accuracy of the resurvey at this time will not require the United States "instituting judicial proceedings to vindicate an unchallenged final survey," as it suggests (U.S. Memorandum, page 8).

3. The "subordination" and "change of use" issues

Finally, in Paragraph (E) of its proposed decree the United States requests this Court to place the additional allocation to the Cocopah Tribe based on a 1974 Act of

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6 "The United States, on the other hand, the intervenor with the burden of proving reserved rights, might have instituted appropriate judicial proceedings in the District Courts, in which event the issues tried by the Special Master would presumably have been relitigated." Slip Op. p. 31.

Congress ahead of all other priorities, except those miscellaneous present perfected rights set forth in the 1979 Supplemental Decree. This, of course, is directly contrary to this Court's opinion that:[7]

> "The right accorded dates from June 24, 1974, and hence will not disturb the prior rights of the States or the other parties in this case." Slip Op. p. 35.

The provision requested by the United States, in essence, would mean that *any* additions to a reservation, no matter when or how made, would have a priority ahead of present perfected rights. The subordination clause of the 1979 Supplemental Decree cannot be stretched that far. That clause was a voluntary concession by the State Parties to the Tribes and only applies to those disputed boundary lands which are finally determined to be within a reservation as it had been established at the time of the original proceedings. It was not intended to be applied to lands subsequently added to the reservation, and the State Parties are unwilling to stipulate that it should be so construed. For similar reasons, the State Parties are unwilling to concede that any water allocated to subsequent reservation additions may be used for other than agricultural purposes, as they voluntarily did with respect to pre-1964 reservations in the 1979 Supplemental Decree.

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[7]The State Parties recognize that the Special Master, in his report at p. 104, n. 2, indicated his belief that the 1974 addition to the Cocopah Reservation would be entitled to take the paramount priority under the subordination language of the 1979 Supplemental Decree.

4. Conclusion

The proposed Decree of the United States goes far beyond implementing this Court's opinion of March 30, 1983. It seriously distorts that opinion and attempts to usurp the State Parties' rights to litigate issues which have not yet been adjudicated. The United States would have this Court, without the benefit of trial, argument or briefing, rule upon critical issues never presented to the Court. Consequently, the United States' proposed Decree should not be adopted. In contrast, the proposed decree of the State Parties sets forth provisions which encompass only those issues actually ruled upon by the Court. It appropriately leaves other important issues to a later date when they have been appropriately framed by boundary litigation elsewhere. Therefore, we urge its adoption.

Respectfully submitted,

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November 10, 1983

REVISED DECREE PROPOSED BY THE STATE PARTIES

It is ORDERED, ADJUDGED AND DECREED:

I. *For Purposes of this Decree:*

(A) "State Parties" means the State of Arizona, State of California, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley Water District, The Metropolitan Water District of Southern California, City of Los Angeles, California, City of San Diego, California, County of San Diego, California and State of Nevada.

(B) "Tribes" means the Colorado River, Fort Mojave, Chemehuevi, Cocopah and Fort Yuma (Quechan) Indian Tribes and the "five reservations" refers to the respective reservations of the above Tribes.

(C) "Prior Proceedings" means the proceedings in Docket Number 8 Original, before Special Master Simon H. Rifkind, which culminated in the 1964 Decree (376 U.S. 340) and proceedings culminating in the 1979 Supplemental Decree (439 U.S. 419).

(D) "Omitted Lands" means lands within the Colorado River and Fort Mojave reservation boundaries as determined by Special Master Rifkind in the prior proceedings or lands which in the prior proceedings were within undisputed reservation boundaries of the Colorado River, Fort Mojave, Chemehuevi, Cocopah and Fort Yuma (Quechan) Reservations which were not claimed to be practicably irrigable in the prior proceedings, but which the United States and/or the Tribes have asserted in the present proceedings are practicably irrigable.

(E) "Boundary Lands" means lands not within the undisputed boundaries of the Colorado River, Fort Mojave, Chemehuevi, Cocopah and Fort Yuma (Quechan) Reservations, but which were purportedly established as reser-

vation lands by virtue of certain orders of the Secretary of the Interior, judicial determinations or acts of Congress subsequent to the 1964 Decree.

II. *Intervention*

The motions of the Tribes to intervene in these proceedings for the purpose of asserting claims for additional reserved water rights for their respective reservations are granted.

III. *Claims of Additional Reserved Water Rights*

(A) "Omitted" Lands

(1) The issue of the reserved water rights of each of the five reservations was fully and fairly adjudicated in prior proceedings resulting in the 1964 Decree of this Court. The principles of finality of judgments bar relitigation of the reserved water rights of the five reservations, subject to adjustment upon final determination of the reservation boundaries as provided in numbered paragraph 5 of the 1979 Supplemental Decree.

(2) The motions of the United States and those of the Tribes to reopen this case for the purpose of presenting claims of additional reserved water rights based upon omitted lands are denied.

(B) Boundary Lands

(1) The 1979 Supplemental Decree provides for appropriate adjustment of the reserved water right determinations of the reservations "in the event that the boundaries of the respective reservations are finally determined."

(2) The term "finally determined" as used in Article II(D)(5) of the 1964 Decree and numbered paragraph 5 of the Supplemental Decree entered on January 9, 1979, means reservation boundary lines determined by a final, non-appealable judicial decision or decree.

(3) Boundary lands added to the reservations with priority dates retroactive to the date of creation of the reservations, by order or other administrative action of the Secretary of the Interior or his delegate, are not "finally determined" within the meaning of Article II(D)(5) of the 1964 Decree or numbered paragraph 5 of the 1979 Supplemental Decree.

(C) The following boundary land claims have not been "finally determined" within the meaning of that term in the 1964 Decree and the 1979 Supplemental Decree. Hence, claims to reserved water rights based upon those lands are denied.

(1) *Colorado River Indian Reservation*

Boundary lands added to the Colorado River Indian Reservation by orders of the Secretary of the Interior issued January 17, 1969 and December 12, 1978 or any judgments based on those orders.

(2) *Fort Mojave Indian Reservation*

Boundary lands added to the Fort Mojave Indian Reservation as a result of the order of the Secretary of the Interior issued June 3, 1974 and the departmental survey approved November 6, 1978.

(3) *Fort Yuma (Quechan) Indian Reservation*

Boundary lands added to the Fort Yuma (Quechan) Indian Reservation as a result of the December 20, 1978 order of the Secretary of the Interior, which approved the December 20, 1978 opinion of the Solicitor of the Department of the Interior.

(4) *Chemehuevi Indian Reservation*

Boundary lands added to the Chemehuevi Indian Reservation as a result of the August 15, 1974 order of the Secretary of the Interior.

(D) The boundary lands determinations made in *Fort Mojave Tribe v. LaFollette,* Civil Action No. 69-324MR (D. Arizona, February 7, 1977) and *Cocopah Tribe of Indians v. Morton,* Civil Action No. 70-573PHX-WEC (D. Arizona, May 12, 1975) are "final determinations" within the meaning of the 1964 and 1979 decrees. In addition, certain other lands are recognized to be part of the Fort Mojave Reservation by agreement of the parties. Adjustment of the water rights of the Fort Mojave and Cocopah Reservations based upon practicably irrigable acreage on such boundary lands are made herein.

(E) Lands added to the Cocopah Indian Reservation by virtue of an Act of Congress of June 24, 1974, 88 Stat. 266, are recognized to be part of the Cocopah Indian Reservation with a priority date of June 24, 1974. Adjustment to the water rights determination of the Reservation based upon practicably irrigable acreage on such boundary lands are made herein.

(F) To implement the findings in Article III(D)(E) herein, paragraphs (2) and (5) of Article II(D) of the 1964 Decree are amended to read as follows:

(2) The Cocopah Indian Reservation in annual quantities:

(a) Not to exceed (i) 7,681 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for the irrigation of 1,206 acres and for the satisfaction of related uses, whichever of

(a)(i) or (a)(ii) is less, with a priority date of September 27, 1917;

(b) Not to exceed (i) 2,026 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for the irrigation of 318 acres and for the satisfaction of relates uses, whichever of (b)(i) or (b)(ii) is less, with a priority date of June 24, 1974.

(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 the 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; provided, further, that the quantities fixed in this paragraph, and paragraphs 1, 2, 3 and 4 shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined.

(G) To implement the findings in Article III(D)(E), paragraph IA of the 1979 Supplemental Decree is amended to read as follows (footnotes omitted):

(I) ARIZONA

A. Federal Establishments' Present Perfected Rights.

The federal establishments named in Art. II, subdivision (D), paragraphs (2), (4) and (5), of the Decree entered March 9, 1964, in this case, such rights having been decreed in Article II:

Defined Area of Land	*Annual Diversions (Acre-feet)*	*Net Acres*	*Priority Date*
1) Cocopah Indian Reservation	7,681	1,206	Sept. 27, 1917
	2,026	318	June 24, 1974
2) Colorado River Indian Reservation	358,400	53,768	March 3, 1865
	252,016	37,808	Nov. 22, 1873
	51,986	7,799	Nov. 16, 1874
3) Fort Mojave Indian Reservation	27,969	4,327	Sept. 18, 1890
	75,566	11,691	Feb. 2, 1911

IV. Except as specified above or as specified in the 1979 Supplemental Decree, the motion of the United States to reopen and modify the Decree, dated December 1978, the motion of the Fort Mojave, Chemehuevi and Fort Yuma (Quechan) Indian Tribes for leave to intervene as indispensable parties, dated December 23, 1977, the petition of intervention on behalf of the Fort Mojave Tribe, the Quechan Tribe of the Fort Yuma Indian Reservation, the Chemehuevi Indian Tribe, the Colorado River Indian Tribes and the Confederation of Indian Tribes of the Colorado River; and the National Congress of American Indian as Amicus Curiae, dated April 7, 1978, and the motion of the Colorado River Indian Tribes and the Confederation of Indian Tribes of the Colorado River; and the National Congress of American Indians as Amicus Curiae, dated April 7, 1978, and the motion of the Colorado River Indian Tribes and the Cocopah Indian Tribes to intervene dated April 10, 1978 are denied.

V. Except as modified above, the 1964 Decree and the 1979 Supplemental Decree shall remain in full force and effect.