No. 8, Original

In the Supreme Court of the United States

OCTOBER TERM, 1983

STATE OF ARIZONA, PLAINTIFF

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

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

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The State Parties having, for the most part, adhered to the form of Decree previously tendered to the United States and the Indian Tribes, we have little to add to the comments already submitted to the Court. We respectfully refer the Court to the Memorandum in Support of the Decree Proposed by the United States, filed on September 19, 1983. Very briefly, we now confine ourselves to applying those

observations to the several "Articles" of the Decree offered by the State Parties.

However, because, in two respects, we have adopted the suggestions of the State Parties (their Articles III(H) and VII(V?), *infra*), we have appended hereto a complete Revised Decree Proposed by the United States for the Court's convenience. Pp. 1a-5a, *infra*. Except for relettering, no retained provision has been changed, but former Paragraphs B and C have been deleted and the two cited provisions from the State Parties' Decree have been added.[1]

Article I

This definitional provision seems to us wholly unnecessary. It is, moreover, inaccurate insofar as Paragraph (E) omits from the category of "Boundary Lands" areas which Special Master Rifkind did not treat as included within the Reservations but which this Court has finally determined to enjoy Reservation status by virtue of final court judgments or (in the case or the Cocopah Reservation) an Act of Congress. The obvious difficulty the State Parties have encountered in dealing with these areas, which they apparently exclude from both the definition of "Omitted Lands" and "Boundaries Lands," argues for deleting this Article entirely.

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[1] With a view to avoiding unnecessary delay, we disclosed our supporting reasons together with the form of Decree submitted on September 19, 1983. To the same end, we have served the present Comments and Revised Decree in typescript on the State Parties on October 24, affording them every opportunity to take this filing into account when they submit their own Comments on or before November 10. The State Parties' have returned the courtesy and made available to us their Comments. See nn.2 & 3, *infra*. In the circumstances, we do not anticipate the need for any further filing.

Article II

In our view, the Court's ruling in favor of tribal intervention is sufficiently memorialized in the Court's Opinion and in the Preamble to our proposed Decree. See p. 1a, *infra*. We see no need for a special provision reciting the grant of intervention.

What is more, the proposed Article may imply an undue restriction on the status of the Tribes as parties. As we understand the Court's decision, the several Tribes have now become full-fledged parties, entitled to participate in any future proceedings permitted by the Decree about to be entered, including any application concerned with implementing the present Decree or the prior Decrees.

Article III(A)

For our part, we do not appreciate the appropriateness of repeating the Court's Opinion in the Decree. Our more straightforward suggestion is reflected in Paragraphs C and H of our Revised Proposed Decree. Pp. 4a-5a, *infra*. See U.S. Memo. 6.

Article III(B)

Once again, it seems unnecessary to attempt to summarize the Court's decision. Moreover, for the reasons stated in our previous Memorandum (at 6-8), we believe it is appropriate, *for the future*, to treat published final administrative rulings as effective unless judicially challenged within a year. Also, insofar as this proposed provision casts doubt on any boundaries accepted by Special Master Rifkind and by this Court for the purposes of allocating water rights in the 1964 Decree, we resist the suggestion. See U.S. Memo. 3-6. To avoid these potential problems, we would omit Article III(B).

Article III(C)

As we understand the purpose of the proposed Decree, it is to identify any changes in water allocations now to be ordered, not to specify claims subject to further litigation. Accordingly, this provision seems superfluous. There is, moreover, no occasion for the Court to rule on the status of the lands restored to the Chemehuevi Indian Reservation, since no claim for additional water rights was advanced on that basis by either the United States or the Tribe. And, finally, we note that Paragraph (2) (b) is inconsistent with the agreed allocation of additional water rights for a part of this area. See U.S. Memo. 3. For these several reasons, Article III(C) should be rejected.

Article III(D) and (E)

Given that the additional diversion rights attributable to these recognized boundary adjustments are elsewhere specified, we see no need for these redundant provisions. Again, the agreed incremental water rights resulting from the surveyed accretions to the "Checkerboard area" of the Fort Mojave Reservation are inadvertently omitted.

Article III(F)

We agree with the figures recited in the proposed amendments to the 1964 Decree. Compare our Paragraph A, pp. 1a-3a, *infra*. As a matter of form, however, it seems to us inconsistent to divide the allocation for the Cocopah Reservation according to priority dates when the same course is not followed for the Colorado River Reservation. This is in any event accomplished by the 1979 Decree, as now proposed to be amended (our Paragraph B, p. 3a, *infra*), and need not be repeated here.

More importantly, we would delete the proposed proviso to sub-paragraph (5) of Article II(D) of the 1964 Decree. That ambiguous stipulation was one of the causes of the recent proceedings and ought not be repeated. Our solution is incorporated in Paragraph C of the Revised Decree we have submitted. Pp. 4a-5a, *infra*.

Article III(H)

On reflection, we believe the State Parties are correct in suggesting a specific amendment to the 1979 Decree to reflect the revised water allocations. The proposed provision would stand in the place of Paragraphs B and C of our Decree, as originally proposed. See U.S. Memo. 3a. If that substitution is made, the following paragraphs of our Decree must, of course, be re-lettered ("D," becoming "C," etc.) as our revised Decree indicates. Pp. 4a-5a *et seq.*, *infra*. Our only revisions to the State Parties' Article (III)(H) would be: (1) to rewrite the introductory sentence to read:

> B. Paragraph I(A) of the Decree of January 9, 1979 (439 U.S. 419, 423) is hereby amended to read as follows (footnotes omitted):

and (2) to delete the recitation "such rights having been decreed in Article II"—since some of them are only now decreed.

Article VI(IV?)

Once again, this provision, repeating procedural rulings already recited in the Court's decision and of no continuing importance, seems to us superfluous.

Article VII(V?)

We accept the appropriateness of this provision and have included it (with only a stylistic change) in our

Revised Decree as Paragraph E. P. 5a, *infra*. However, for the reasons stated in our previous Memorandum (at 8-9), we deem it important to retain former Paragraph E, now relettered D. P. 5a, *infra*.[2]

In conclusion, we stress once again the practical importance of avoiding lingering ambiguities that invite wasteful litigation in the future. See U.S. Memo. 3-8, 9. Accordingly, we renew our plea for inclusion in the Decree of the provisions now identified as Paragraphs C and H. Pp. 4a-5a, *infra*.[3]

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[2] The State Parties' Comments (which we have seen in typescript) confirm the need for our provision dealing with what they label "the 'subordination' and 'change of use' issues." Although conceding that the Special Master concluded that the 1974 Cocopah Addition was embraced by the "paramount priority" agreement incorporated in the 1979 Decree and that they filed no Exception from this ruling, they invoke the Court's Opinion as rejecting this negotiated arrangement. For our part, we cannot suppose the Court meant to set aside an essential provision of the 1979 Decree without even a request from the State Parties. The objection relating to any future additions to these Reservations accomplished by Act of Congress is a red herring. No such action is contemplated and, in the event Congress should someday add new areas to any Reservation, the priority of attendant water rights can be specified at that time.

[3] The State Parties' objection to the "one year limitation" provision of our Paragraph C seems to us wholly contrived and we rest on our previous submission. See U.S. Memo. 6-8. With respect to the "no reduction" issue, we add only the following observation. Since 1964, when some of the Reservation "boundary" questions were first left open for later resolution, through this Court's decision of March 30, 1983, "boundary lands" have been understood to refer to areas *beyond* the boundaries which were accepted by Special Master Rifkind

We are authorized by counsel to state that the five Indian Tribes, intervenors in the case, join in this submission.

Respectfully submitted.

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OCTOBER 1983

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and which delimited the Reservations for the purpose of the water allocations made by this Court's 1964 and 1979 Decrees. By contrast, the requested adjustments relating to lands *inside* the Rifkind boundaries have been denominated "omitted land" claims. The Court has now firmly rejected the plea of the Tribes and the United States to re-open the prior adjudication with respect to lands within the Rifkind boundaries. The same reasons, it seems to us, likewise foreclose the belated attempt by the State Parties to relitigate the water allocations for the same areas under the guise of "boundary retrenchment claims." We fail to appreciate why this is not even-handed justice. The appropriate aphorism is not "heads I win, tails you lose," but, rather, "what is sauce for the goose is sauce for the gander." At all events, we read the 1979 Decree to settle the matter and the Court's more recent decision to confirm that result. See U.S. Memo. 4-6. But, since the State Parties feel free to ask a district court (and ultimately this Court) to re-open the long decreed water rights of the five Reservations, it seems to us necessary to ask the Court now, by its Decree, to end this wasteful relitigation effort before it goes further.

REVISED 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 necessary 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. Paragraph I(A) of the Decree of January 9, 1979 (439 U.S. 419, 423) is hereby 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:

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

C. 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 quanties 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 diversion 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 er-

roneously excluded from the Reservation's boundaries.

D. The provisions of Introductory Paragaphs (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.

E. Except as otherwise provided herein, the Decree entered on March 9, 1964, and the Supplemental Decree entered on January 9, 1979, shall remain in full force and effect.

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 C hereof, no application from any party shall be received to vary the allocations of mainstream water provided for herein.

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