No. 8, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, *et al.*

MOTION OF THE STATE PARTIES TO REOPEN DECREE TO DETERMINE DISPUTED BOUNDARY CLAIMS WITH RESPECT TO THE FORT MOJAVE, COLORADO RIVER AND FORT YUMA INDIAN RESERVATIONS AND SUPPORTING MEMORANDUM

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The State of California, the State of Arizona, The Metropolitan Water District of Southern California, and the Coachella Valley Water District ("State Parties") move the Court to reopen *Arizona v. California*, 373 U.S. 546 (1963) ("*Arizona I*"), pursuant to Article II(D)(5) and Article IX of the Court's Decree in that case, 376 U.S. 340 (1964), in order to finally determine (1) the disputed boundaries of the Fort Mojave and Colorado River Indian Reservations which were left unresolved in *Arizona I* and (2) the amount and priority of the water rights for those reservations as a result of such determinations.

The State Parties also request the Court (1) to determine whether the United States' claim for addi-

tional water for the Fort Yuma Indian Reservation resulting from a 1978 redetermination of the boundary of that reservation and asserted in *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*"), is precluded by the doctrine of *res judicata* and (2) if not, to determine the proper boundary of that reservation and the amount and priority of additional water rights, if any, to which the reservation may be entitled. Such determinations are necessary in order to finally establish the water entitlements of the three reservations and to remove the clouds on the entitlements of non-Indian users on the Lower Colorado River caused by the United States' claims.

These three boundary disputes were before this Court in *Arizona II*. However, the Court directed the State Parties to pursue their then pending action in the United States District Court for the Southern District of California for a determination of the disputed boundaries, which they did. After the district court invalidated the Secretary of the Interior's 1974 Fort Mojave boundary redetermination order, the United States and the Tribes took an interlocutory appeal to the Ninth Circuit, which held that the United States had not waived its sovereign immunity and ordered the case dismissed for lack of jurisdiction. (*The Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987)). This Court granted the State Parties' petition for a writ of certiorari, and on June 12, 1989, the Ninth Circuit's decision was affirmed by an equally divided Court in *California v. United States*, ___ U.S. ___, 109 S.Ct. 2273 (1989).

In its *Arizona II* decision the Court stated that "[t]here will be time enough, if any of [the United

States'] grounds for dismissal [of the district court action] are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this court." (460 U.S. at 638). For the reasons detailed below the State Parties contend that *Arizona v. California* should promptly be reopened and the three boundary issues and attendant water rights consequences resolved by this Court.

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July 19, 1989

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MEMORANDUM IN SUPPORT OF MOTION TO REOPEN DECREE

This motion is prompted by the urgent need for the State of California, the State of Arizona, The Metropolitan Water District of Southern California ("Metropolitan"), and the Coachella Valley Water District ("Coachella") (all collectively "State Parties") to obtain a determination of the Fort Mojave and Colorado River Indian reservation boundary disputes left unresolved in this Court's 1963 decision in *Arizona v. California*, 373 U.S. 546 (1963) (*"Arizona I"*), and a boundary dispute underlying a claim for additional water for the Fort Yuma Indian Reservation subsequently asserted by the United States in *Arizona v. California*, 460 U.S. 605 (1983) (*"Arizona II"*). Such determinations are essential so that the reservations' water rights may be finally established in order to facilitate necessary water planning in California and Arizona. The amount of water at issue is about 104,000 acre-feet of diversions in California, which is

enough water to supply about 500,000 people annually in Metropolitan's service area.

Metropolitan imports water to the Southern California coastal plain and wholesales that water to its twenty-seven member public agencies in an area stretching from Ventura to the Mexican border and encompassing over one-half the population of the state. A major portion of Metropolitan's water is obtained from the Colorado River pursuant to contracts with the Secretary of the Interior for the storage and delivery of Colorado River water pursuant to the Boulder Canyon Project Act (43 U.S.C. § 617 *et seq*).

In *Arizona I*, California's share of the 7.5 million acre-feet of consumptive use of Colorado River water which was allocated to Arizona, Nevada, and California by the Secretary pursuant to the Boulder Canyon Project Act was limited to 4.4 million acre-feet a year, plus one-half of any surplus. In addition, five Indian reservations along the lower Colorado River were awarded "implied" water rights based upon the *Winters* doctrine, *i.e.*, enough water to satisfy the "reasonable needs" of the reservations. (*Winters v. United States*, 207 U.S. 564 (1908)). The "reasonable needs" of the Indians were measured by the amount of "practicably irrigable acreage" on each reservation multiplied by a unit diversion duty for such acreage. (*Arizona I*, at 600-01). The reservations' priority dates are their dates of creation or the dates of any subsequent additions. Each reservation was created long before Metropolitan's water contracts with the Secretary.

Special Master Simon H. Rifkind had recommended an award to the five mainstream reservations of 905,498 acre-feet of diversions for 135,636 acres of

"practicably irrigable acreage," even though the maximum annual irrigated acreage on those reservations never exceeded 36,000 acres.[1] California had contested whether certain lands for which *Winters* rights were sought by the United States for the Colorado River and Fort Mojave Reservations were actually within their boundaries. No dispute was raised as to the boundary of the Fort Yuma Reservation since the United States' claim was consistent with long-standing Departmental interpretation of that boundary, which is contrary to the later 1978 Secretarial order on which the United States relied in making its claim for additional water for that reservation in *Arizona II*.[2]

The Fort Mojave and Colorado River boundary issues were tried before Special Master Rifkind, who largely rejected the United States' boundary claims, adopted the California positions, and recommended water allocations for those reservations based upon his boundary determinations. This Court, in otherwise adopting the recommendations of the Special Master with respect to the United States' Indian claims, found it "unnecessary to resolve those [boundary] disputes here." (*Id.* at 601)[3]. The Court's 1964 Decree never-

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[1] California Proposed Findings 4C:104, 4D:103, 13D:104, 14C:108, 18E:104, and 18F:104, *Arizona v. California* (No. 8, Orig., Oct. Term 1958).

[2] Because the United States failed to make a claim in *Arizona I* for the lands which it purported to add to the Fort Yuma Reservation in 1978, the State Parties believe that the United States' claim for water for those lands is precluded for the same *res judicata* reasons that its claims for so-called "omitted lands" were rejected in *Arizona II*.

[3] Special Master Rifkind had recommended "practicably irrig-

theless awarded water rights to the two reservations based upon the Special Master's boundary determinations, "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)). There was no similar qualification of the decreed rights of the Fort Yuma Reservation.

The quantities awarded to Indian reservations by the Court's 1964 decree are charged to the allocation of the state in which the reservation is located. Because of Metropolitan's junior priority, any additional water rights for the reservations in California will necessarily reduce Metropolitan's supply during any year when California's entitlement is restricted to 4.4 million acre-feet. That limitation is no more than several years away now that the Central Arizona Project is on line. Metropolitan has been heavily engaged for a number of years in efforts to obtain a replacement supply for the water that will be diverted to Arizona and must know whether it faces an additional future curtailment in the amount of some or all of the 104,000 acre-feet of diversions involved in the boundary disputes. For example, it has obtained Congressional legislation that would authorize the lining of the All American Canal in California to conserve as much as 100,000 acre-feet of water annually, most of which would become available to Metropolitan. (Pub.

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able acreage" as the measure of the reserved water rights because, *inter alia*, it would "provide certainty for both the United States and non-Indian users." Report of Special Master Simon H. Rifkind at 265 (December 5, 1960). That objective has been frustrated by the unresolved reservation boundary disputes which are the subject of this motion.

L. No.. 100-675, Title II, 102 Stat. 4005; H.R. Rep. No. 780, 100th Cong., 2d Sess. 20-28 (1988)). Similarly, Metropolitan has been in negotiations with Imperial Irrigation District to finance the improvement of Imperial's distribution system to conserve presently wasted water which would be made available to Metropolitan. In a recent decision the California Water Resources Control Board noted that Metropolitan had a substantial present need for the conserved water:[4]

> As the result of wet conditions on the Colorado River since 1983, MWD has been able to divert close to the 1.3 million acre-foot capacity of its Colorado River aqueduct in each of the last five years. . . . Due to the development of the Central Arizona Project and other factors, however, the quantity of Colorado River water available for diversion by MWD on a dependable basis will be restricted to the quantity available under its fourth priority right of 550,000 acre-feet per annum. This quantity is reduced further by approximately 30,000 acre-feet per annum due to current levels of use by other holders of present perfected rights. There is a possibility of additional reductions in the quantity of water available to MWD due to increased use by Indian tribes. . . . The Central Arizona Project began deliveries in 1985 and is expected to utilize its full apportionment in about 1992. . . . *Without the development of additional supplies, the record*

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[4] *In the Matter of Waste and Unreasonable Use of Water By Imperial Irrigation District* at 10 (September 7, 1988) (Record citations omitted, emphasis added).

indicates that MWD faces a potential system-wide shortfall during dry periods of 560,000 acre-feet per annum by the year 2000, increasing to 980,000 acre-feet per annum by 2010.

In addition to Metropolitan's imminent problems, any additional water rights for that portion of the Fort Yuma Reservation in Arizona will necessarily reduce the supply available to other users in Arizona holding junior rights within Arizona's fixed entitlement of 2.8 million acre-feet.

The three Secretarial Orders which are in dispute were issued in 1969 (Colorado River), 1974 (Fort Mojave) and 1978 (Fort Yuma). There is no disagreement that the proper location of the reservation boundaries is the essential first step in establishing the measure of any implied water rights to which these reservations may be entitled under *Arizona I* or that the Secretary's Fort Mojave and Colorado River reservation boundary orders were based on the same interpretations which Special Master Rifkind had rejected in *Arizona I*. Nor is there any dispute that the 1978 Fort Yuma boundary redetermination overturned three earlier Departmental decisions on that boundary issue dating from 1936. The undisputed result of these unilateral boundary redeterminations was to give each reservation additional acres upon which to base a claim for additional water rights with an earlier priority than Metropolitan's.

The culmination of the Secretary's ex parte boundary determinations was the United States' motion filed in December 1978 to reopen *Arizona I* and, *inter alia*, allocate additional water rights to the three reservations for the practicably irrigable acreage within

the added areas. Special Master Elbert P. Tuttle, who was appointed to hear those claims, refused to consider the merits of the Secretary's ex parte orders, accepting the United States' argument that they constituted "final determinations" of the boundaries. Over the objections of the State Parties, he conducted a trial solely on the issue of the irrigability of the added lands and recommended an award to the three Tribes of an additional 104,000 acre-feet of diversions annually.[5] Faced with the denial of their day in court, Metropolitan and Coachella sought review of all three Secretarial boundary orders in the United States District Court for the Southern District of California.

It was against that background that this Court rejected Special Master Tuttle's boundary recommendations and directed the State Parties to pursue their district court action:

> . . . we in no way intended that ex parte secretarial determinations of the boundary issues would constitute 'final determinations' that could adversely affect the States, their agencies or private water users holding priority rights.
>
> * * *
>
> It is clear enough to us, and it should have been clear enough to others, that our 1963

[5] If any of the United States' boundary claims are sustained, the State Parties propose that the trial record developed before Special Master Tuttle be used as the basis for the determination of the practicably irrigable acreage within the added areas, but that all parties have the opportunity to present their views on the amount of practicably irrigable acreage in such areas to the new Special Master.

> opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums. At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes. We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and are not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court. (*Arizona II*, at 636, 638 (footnote omitted)).

Upon resumption of the district court litigation the parties agreed to address the boundary disputes individually, starting with Fort Mojave. The district court voided the Secretary's Fort Mojave order on the grounds that (1) the Secretary could not exercise his authority to correct allegedly erroneous surveys under 43 U.S.C. § 772 in a manner that would impair Metropolitan's water rights because Metropolitan was a "claimant" protected by the proviso to that statute and (2) in any event, Metropolitan's water supply contracts entitled it to procedural due process protection, which it is had been denied. The district court also held that a de novo trial as to the proper boundary was appropriate under the criteria set forth in *Citi-*

zens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). (*The Metropolitan Water District of Southern California v. United States*, 628 F.Supp. 1018 (S.D. Cal. 1986)).

In response to motions by the United States and the Tribes, the district court certified its decision for an interlocutory appeal to the Ninth Circuit Court of Appeals, which held that the United States had not waived its sovereign immunity and ordered the district court to dismiss the case for lack of jurisdiction. (*The Metropolitan Water District of Southern California v. United States*, 830 F.2d 139 (9th Cir. 1987)).

This Court granted the State Parties' petition for a writ of certiorari, and on June 12, 1989 the Ninth Circuit decision was affirmed by an evenly divided court in *California v. United States*, ___ U.S. ___ , 109 S.Ct. 2273 (1989). The effect of the Court's decision is to leave the disputed boundaries unresolved. Until the boundaries are finally determined, the Tribes may not petition this Court for an increase in their Colorado River entitlements, and the State Parties, in particular Metropolitan, will be unable to engage in meaningful water supply planning for the future.

Although the Secretary's boundary decisions *per se* have not yet caused an actual reduction in Metropolitan's supply under its water delivery contracts, they were the basis for the United States' claims for additional water in *Arizona II* and have caused great uncertainty as to Metropolitan's legally available Colorado River water supply and seriously complicated its planning efforts. Thus they clearly present the kind of "threatened injury" which is adequate to sustain jurisdiction under this Court's recent standing decisions abandoning any rigid requirement of "cer-

tainty" of injury to a more liberal "probability" of injury. (Davis, 4 *Admin. Law Treatise*, § 24.12 (1983); *Bryant v. Yellen*, 447 U.S. 352 (1980)). Similarly, the Secretarial orders are "ripe" for review even though they have not yet been applied to actually reduce Metropolitan's Colorado River water rights. (*Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); Davis, 4 *Admin. Law Treatise*, § 25.6-25.10 (1983)). This is particularly true inasmuch as (1) the Fort Mojave Tribe conceded in *California v. United States*, *supra*, that it is currently diverting and using substantial quantities of water on the disputed area on that reservation[6] and (2) the Colorado River Tribes have circulated for public comment a land use development plan for the disputed area on that reservation.[7]

The State Parties expect the United States and the Tribes to support this motion. The United States told this Court in *California v. United States*, *supra*, that it "has no interest in delaying a final resolution of the boundaries of the three Reservations" and "if, as we urge, the Court affirms the court of appeals' judgment ordering dismissal of this case, the United States will promptly consider what further steps should be taken to bring about an expeditious resolution of these issues." (Brief for the Federal Respondents at 16-17, *California v. United States*, *supra*). It specifically suggested reopening *Arizona v. California* (*id.* at 49, note 36):

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[6] Brief of the Tribal Respondents, *California v. United States*, U.S. ___, 109 S.Ct. 2273 (1989).

[7] The State Parties' assertion of this development in *California v. United States* (Brief for the Petitioners at 17) was not disputed by the Colorado River Tribes in their brief in response.

> One possibility would be for the parties to file a joint motion in *Arizona v. California* requesting the Court to resolve the boundary issue as part of a final resolution of the United States' claim of water rights for the Fort Mojave and other Reservations. Indeed, petitioners presumably could file such a motion on their own behalf, since the United States has already submitted its water-right claims for the Fort Mojave Reservation to this Court for resolution in *Arizona v. California* and sovereign immunity therefore would not bar the Court from proceeding to a resolution of those claims for the 3500 acres at issue here on the motion of another party to that case.

The Tribes agreed that "such a course of action might be the most expeditious way to resolve the boundary issues." (Brief of the Tribal Respondents at 28, *California v. United States*, *supra*).

CONCLUSION

The State Parties urge the Court to reopen *Arizona v. California* for the purpose of resolving the disputed boundary issues on the Fort Mojave and Colorado River Indian Reservations, as well as the Fort Yuma Indian Reservation claim, so that the water rights entitlements of those reservations may be finally determined in order to facilitate necessary water development planning by the State Parties.

Respectfully submitted,

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