No. 8, Original

In The

Supreme Court of the United States

October Term, 1989

State of Arizona,

Complainant,

v.

State of California, *et al.*

RESPONSE OF THE TRIBES TO THE 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

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I. INTRODUCTION

This Memorandum is filed by the Fort Mojave Indian Tribe, the Colorado River Indian Tribes and the Quechan Indian Tribe of the Fort Yuma Indian Reservation (hereinafter "the Tribes") in response to the motion to reopen the Decree in *Arizona v. California*,[1] filed on July 19, 1989 by the States of California and Arizona, the Metropolitan Water District of Southern California, and the Coachella

[1] 373 U.S. 546 (1963), *Decree*, 376 U.S. 340 (1964), *Supplemental Decree*, 439 U.S. 419 (1979), 460 U.S. 605 (1983), *Second Supplemental Decree*, 466 U.S. 144 (1984).

Valley Water District (hereinafter "the State Parties"). The State Parties seek to ascertain the impact on their Colorado River water supply of three orders of the Secretary of the Interior. Those orders recognized the proper location of the historical boundaries of the Colorado River, Fort Mojave and Fort Yuma Indian Reservations and resulted in the inclusion of additional lands, formerly considered to be part of the public domain, in the Reservations to be held in trust for the benefit of the Tribes. The Tribes support the reopening of the Decree to determine the effect of the Secretary's actions on the tribal water rights.

II. POSITION OF THE TRIBES

The Tribes request the referral of this controversy to a Special Master to make a recommendation to the Court whether the quantity of present perfected rights allocated for use on the Reservations should be increased to reflect the additional lands now held in trust for the benefit of the Tribes. In 1978, the Tribes, joined by the United States, asked the Court to reopen the Decree in this case in order to recognize additional water rights for use on these lands. *See* 460 U.S. at 612. The reasons underlying the Tribes' prior request remain valid today. Until the water rights issues surrounding these lands are resolved and Article II(D) of the Decree is amended, the Tribes will not be able to utilize the lands for the purposes for which they were reserved.

Although the Court rejected the Tribes' prior request, stating that "if at all possible" the boundary disputes

should be settled in "other forums", 460 U.S. at 638, future consideration of the issue was left open. The Court referred to a then-pending action in district court filed by the Metropolitan Water District and stated that if that action was dismissed on jurisdictional grounds, "there will be time enough . . . to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court." 460 U.S. at 638. The attempt to obtain review in another forum proved unsuccessful. The Court's recent *per curiam* order affirmed the Ninth Circuit Court of Appeals' dismissal of the district court action. *California v. United States*, ___ U.S. ___, 109 S. Ct. 2273 (1989).

As a result, the Tribes respectfully request the Court to decide whether the inclusion of these lands in the Reservations warrants the recognition of additional present perfected rights for use on the Reservations. No other forum is available to determine the ultimate issue of the water rights for these lands. Nor can the issues be narrowed or limited by ancillary proceedings elsewhere. For these reasons, as the State Parties suggest, it is appropriate to reopen the Decree.

At the same time, the Tribes do not agree with many of the contentions in the State Parties' Motion and Supporting Memorandum. First, it is entirely proper to address the water rights for all three Reservations. There is no *res judicata* bar with respect to the Fort Yuma (Quechan) boundary. This Court's 1979 Supplemental Decree – to which the State Parties agreed – expressly provided that the water allocations for use on all the Reservations, including those for the Fort Yuma Reservation, are subject to adjustment "in the event that the boundaries of the

respective reservations are finally determined." 439 U.S. at 421.[2] Thus, the State Parties are plainly mistaken in arguing that the doctrine of finality precludes consideration of the claims at Fort Yuma.

The State Parties also err to the extent that they ask this Court to determine the boundaries of the Reservations or the title to the lands within the boundaries recognized by the Secretary. The boundaries of the Reservations and the title to the lands within those boundaries are simply not part of this litigation and have been finally determined. Since the State Parties concede that they have no interest in the disputed lands, they may not challenge the Secretary's treatment of the lands as part of the Reservations. *See, e.g., Knight v. United States Land Ass'n*, 142 U.S. 161, 176-78 (1891); *Cragin v. Powell*, 128 U.S. 691, 699 (1888). At the urging of California, this Court previously refused to address the so called "title" question. 373 U.S. at 601, 460 U.S. at 636; *see also California v. United States, supra*. There is no reason to deviate from that refusal now.

The sanctity of the Secretary's orders recognizing the disputed lands as part of the Reservations does not preclude the adjudication of the critical contours of the water rights for the Reservation lands. Indeed, the State Parties are fully protected. For the Tribes to receive additional present perfected rights, this Court must agree with the

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[2] The State Parties' present motion is the first time in the ten years in which this issue has been before the courts that the State Parties have asserted that *res judicata* bars consideration of the water rights involving the lands subject to the Secretary's order at Fort Yuma.

Secretary's conclusion that the questioned lands have always been part of the Reservations and are therefore entitled to present perfected rights. *See* 376 U.S. at 341, 343-45. In short, even though they may not dispossess the Tribes from their lands, the State Parties will have ample opportunity to challenge the reasoning of the Secretary's decisions with which they disagree. The State Parties, however, insist on blurring the distinction between adjudicating the title to the lands and determining the priority date for the associated water rights. That distinction is critical to the Tribes who do not believe that they are required to jeopardize their interests in the lands in order to seek a dependable water supply. *See* 28 U.S.C. § 2409a (1982 & Supp. V 1987).

Finally, the Tribes share the view of the State Parties that the record established before Special Master Tuttle on the amount of practicably irrigable acres within the disputed areas is sufficient for the resolution of that question.[3] At most, the parties only need to present further argument on this issue to a newly appointed Master. The irrigability of these lands was thoroughly litigated before the previous Special Master during nearly eight weeks of trial and his comprehensive report fully explains the differing presentations. There is no need to repeat that costly and time consuming effort.[4]

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[3] There is no dispute over the quantification standard to be applied. According to the 1979 Supplemental Decree, the rights for the disputed lands are to be quantified based on the amount of practicably irrigable acreage within the newly recognized boundaries. 439 U.S. at 421-22.

[4] The State Parties conceded the irrigability of much of the disputed lands before both Special Master Tuttle and Special Master Rifkind.

III. CONCLUSION

For these reasons, the Tribes support the referral to a Special Master of the limited question of whether the Decree in this case should be amended to increase the present perfected rights decreed for the benefit of the Tribes in order that a dependable water supply will be available for use on the additional lands now recognized as part of the Reservations.

Dated: September 1, 1989

Respectfully submitted,

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