

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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SUPREME COURT, U.S.

No. 8, Original

STATE OF ARIZONA, PLAINTIFF

v.

STATE OF CALIFORNIA, ET AL.

ON EXCEPTIONS OF THE REPORT OF
THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES RESPECTING
THE COURT'S PROPOSED SUPPLEMENTAL DECREE

The proposed Supplemental Decree submitted to counsel by the Clerk of the Court invites two comments on the part of the United States.

1. We assume the rejection of our proposed Paragraph C, together with the re-instatement (in revised form) of the proviso to Article II(D)(5) of the 1964 Decree, effectively leaves up in the air the question whether the State Parties are free, at any time in the future, to challenge allocations of water rights in favor of the five Indian Reservations that have been accepted as finally settled for more than two decades. In our view (as we have previously indicated, U.S. Memorandum in Support of Proposed Decree 4-5), any such attempt to go backwards, is foreclosed by the 1979 Decree. But the State Parties disagree, and the Court's refusal to end the debate can only give them encouragement. The issue will not go away and it must reach this Court in due course. It seems to us wasteful to invite burdensome and unsettling litigation on this score if, as we believe, the answer is clear and can be given now. See U.S. Memo. 3-6; U.S. Comments 6-7 n.3.

Much the same considerations led us to propose a "statute of limitations" as Paragraph C(2) of the Decree. See U.S. Memo. 6-8; U.S. Comments 4a. In both instances, however, we have previously made our submission and cannot usefully add to what has been said. If the Court has decided to reject our proposals on these points, we have no quarrel with the form selected.

2. The proposed treatment of the water rights appertaining to the 1974 Addition to the Cocopah Reservation creates problems. Although we would argue otherwise, the State Parties predictably would assert that the effect of not including this allocation in the amended 1979 Decree, without more, is to exempt it from the special provisions of that Decree, including the so-called "subordination agreement." We cannot suppose the Court wishes to impose that result when the State Parties expressly conceded the application of the subordination clause to these water rights in 1978 and impliedly did so in 1982 by not excepting to the Special Master's Report on this point. See U.S. Memo. 9; U.S. Comments 6 n.2. Nor can we assume the Court means to leave the matter in doubt, for resolution in some future proceeding. Accordingly, we make two alternative suggestions.

The Clerk's letter is of course correct in noting that water rights enjoying a priority date later than June 25, 1929, are not "Present Perfected Rights" within the definition given in the 1964 Decree. Art. I(H), 376 U.S. at 341. There is, therefore, some apparent untidiness in listing this allocation in the 1979 Decree, which purports to deal only with "Present Perfected Rights." Nevertheless, all the parties, including the State Parties, proposed doing so. That was presumably a recognition that, by virtue of the agreement reached in 1978 and approved by the 1979 Decree, these water rights were entitled to the same treatment as Present Perfected Rights, and there is, of course, no reason why the parties should not be free to so agree. Thus, the simplest course is to adhere to what all the parties proposed: to include

the water allocation attributable to the 1974 Cocopah Addition in the amendment to the 1979 Decree notwithstanding the priority date.

The alternative solution, in our view, is to leave Paragraphs B and C as they now appear in the Court's proposed Decree, but to add our Paragraph D. See U.S. Comments 5a. Only in that way can the ambiguity attributable to treating the Cocopah Addition separately be removed by making clear that the result is the one accepted by the State Parties since 1978 and adhered to until after the Court's Opinion on March 30, 1983.

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

Respectfully submitted.

REX E. LEE
Solicitor General

MARCH 1983.