No. 8, Original

In The

Supreme Court of the United States

October Term, 1994

STATE OF ARIZONA,

Plaintiff,

vs.

STATE OF CALIFORNIA, ET AL.,

Defendants.

MOTION OF THE WEST BANK HOMEOWNERS ASSOCIATION FOR LEAVE TO INTERVENE AND BRIEF FOR THE WEST BANK HOMEOWNERS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES AND RULES:

ORDERS OF THE SECRETARY OF THE INTERIOR:

MOTION OF THE WEST BANK HOMEOWNERS ASSOCIATION FOR LEAVE TO INTERVENE

The West Bank Homeowners Association ("Association" or "occupants") is an unincorporated association representing approximately 650 families who live on a full or part time basis along a 17 mile stretch of the bank of the Colorado River in California in the area known in this case as the "disputed lands". These lands are the subject of a boundary dispute involving the Colorado River Indian Reservation ("Reservation") that is now pending in this Court before a Special Master. The Association fully satisfies the criteria of Fed. R. Civ. P. 24(a)(2) for intervention as a matter of right. Individually and collectively, and as members of the general public, they hereby move this Court for leave to intervene in this case as a matter of right and to file the accompanying brief. In support thereof, the Association states as follows:

I.

INTRODUCTION

The Colorado River Indian Reservation was established by the Act of March 3, 1865, 13 Stat. 541, 559, and for the following 104 years every federal agency, including the Bureau of Indian Affairs, treated the Colorado River as the western boundary in the disputed area. Sometime in the early 1960's a controversy arose within this case over the exact location of that boundary. Congress, by the Act of April 30, 1964, 78 Stat. 188, expressly prohibited the Secretary of the Interior from transferring control of the disputed lands, which were then in the public domain and under the administration of the

Bureau of Land Management, to the Reservation until "determined to be within the reservation." 78 Stat. 188, sec. 5.

The Secretary of the Interior and the officials under him unconstitutionally violated this statute (and certain other statutes as detailed in the brief annexed hereto) by issuing an *ex parte* ruling on January 17, 1969 purporting to determine the western boundary and thereafter transferred the disputed lands out of the public domain to the Bureau of Indian Affairs for the benefit of the Reservation. The Department of the Interior and other federal agencies have since forced the occupants of these lands to submit to the dominion and control of the Reservation in direct contravention of 78 Stat. 188, sec. 5.

The current case is before the Special Master to determine, *inter alia,* the location of the western boundary of the Reservation. The Association, if allowed by this Court to intervene, will file the accompanying brief to seek enforcement of Congress' clearly expressed intent to protect the integrity of the public lands in the disputed territory by seeking to restore to the public domain those lands determined to be outside the Reservation.

II.

THE ASSOCIATION IS A REAL PARTY IN INTEREST

The members of the West Bank Homeowners Association lawfully occupy the lands in the disputed area and many resided thereon long before the boundary claim was raised by the Colorado River Indian Reservation. They have invested substantial monies and labor in improving the properties and several members are retired

and living on fixed incomes and these homes are their only residences. Additionally, as members of the general public, they have a compelling interest in preserving access to what Congress expressly intended to remain public land and ensuring that income generated by activities thereon is tendered for the benefit of the United States.

III.

THE ASSOCIATION'S INTERVENTION IS JUSTIFIED TO PREVENT FURTHER IRREPARABLE HARM

Members of the Association and the general public are forced by the United States government to submit to the control of the Reservation. They have no legal rights or remedies whatsoever that are associated with federal laws pertaining to public lands. They must pay whatever fees the Reservation desires to access the land for leasing, hunting, fishing, camping, recreating, constructing buildings or conducting business thereon. Failure to remit the required fees to the Reservation exposes these persons to legal action through citation into a tribal court or, in the event of a lease dispute, eviction or trespass proceedings in the federal courts filed on behalf of the Colorado River Indian Tribes by the Department of Justice of the United States.

An Indian reservation is a sovereign nation under the law and as such it possesses sovereign immunity. When a party files suit against a reservation or attempts to raise an affirmative defense in an eviction proceeding to litigate the issue of whether the lands are in fact legally

established reservation lands, the United States successfully moves to dismiss the action based on lack of standing, the absence of indispensable parties (the reservation), and sovereign immunity. In *Metropolitan Water District v. United States,* Civ. No. 81-0678-GT(M) (Apr. 28, 1982), from which this case is derived, the United States stalled a trial on the merits of this boundary dispute until this Court granted the State Parties motion to reopen an earlier decree. *Arizona v. California,* 493 U.S. 886 (1989). The United States is currently employing this tactic with success in *Havasu Landing Homeowners Association, et al. v. Manual Lujan, Jr., et al.,* Civ. No. CV 92-6184-TJH (CTx) (Sept. 3, 1992). As a result, the principal issue of whether the Department of Interior legally empowered an Indian reservation to exercise control over the land is never judicially reviewed and resolved on the merits.

The occupants of the disputed lands are currently being threatened by representatives of various federal agencies and the Reservation with unlawful and unconstitutional efforts to terminate their rights by eviction if they do not continue to pay exorbitant lease rates. In light of the procedural blockade noted above, the occupants lack a legal avenue to protect their interests in an eviction proceeding by having the constitutional issues presented herein subjected to judicial review.

Under these unjust and unfair circumstances, the case at bar is the only forum in which the Association's claim can be heard. A disposition of this case in the absence of the Association will absolutely prevent it from protecting its compelling interest and that of the general public. Hence, it is submitted that the Association has a

direct stake in this controversy and intervention in this matter is justified to prevent further irreparable harm.

IV.

THE ASSOCIATION'S INTEREST IS INADEQUATELY REPRESENTED BY EXISTING PARTIES

Throughout the course of this action the representatives of the government have had the awkward and perhaps impossible task of fully representing the United States and its agencies while simultaneously honoring its responsibilities to the Indian tribes, whose interests in certain respects appear to be adverse to those of the United States and its agencies. Consequently, the responsible legal representatives of the United States are placed in an untenable position in attempting to adequately protect all of the differing interests. The Secretary of Interior's 1969 *ex parte* order created a conflict of interest for the government that it cannot now fairly dispose of. The government has failed in its fiduciary duty to uphold the laws established by Congress and to protect the interests of the public in safeguarding public lands.

The state parties are only interested in this action in so far as it relates to the amount of water the various parties are entitled to withdraw from the Colorado River. This reservation boundary dispute concerns them because the final determination of the boundary establishes the amount of irrigable acreage that is the basis for the calculation of water quantities. None of the parties to the action have submitted a claim to protect the public interest in these lands and restore them to the public domain if determined to be outside the Reservation.

Therefore, it is clear that the existing parties to the action inadequately represent the interest of the Association and the general public. Intervention by the Association will allow full exposition of the issues related to a final boundary determination.

V.

INTERVENTION IN A PENDING ORIGINAL ACTION BY PRIVATE INDIVIDUALS AND ORGANIZATIONS IS PERMISSIBLE

With respect to cases already pending, this Court has allowed certain persons to participate in the proceedings in order to protect their interests, regardless of whether they were parties or intervenors below. In *United States v. Terminal Railroad Association,* 236 U.S. 194, 199 (1915), the Court allowed certain parties, who had been denied intervention below, to intervene in pending appeals before the Court "to ask a modification of the decree" insofar as it operated prejudicially to their rights. In *Mullaney v. Anderson,* 342 U.S. 415, 416-17 (1952), the Court granted a motion to add two new party plaintiffs after the merits of the case were before the Court to "remove this matter from controversy" after finding that the addition would in no way "embarrass the defendant" and would avoid the "needless waste" of having to start the case over again in the lower courts. Also, in *Labor Board v. Acme Industrial Co.,* 384 U.S. 925 (1966), 385 U.S. 432 (1967), the Court permitted a union, which had not participated in the judicial review proceedings in the court of appeals below, to intervene as a party before the Supreme Court and to file a brief in support of its interests in the labor controversy.

Intervention in original actions before the Court by private individuals and organizations is not unusual. In *Maryland v. Louisiana,* 451 U.S. 725, 745-46 n.21 (1981), the Court approved the intervention of 17 pipeline companies because the direct imposition on them of the challenged state tax gave them "a direct stake in this controversy" and would lead to "a full exposition of the issues" involved; in this context, the Court stated "that it is not unusual to permit intervention of private parties in original actions." *Ibid.* In a previous ruling in this case, the Court permitted five Indian tribes to intervene. *Arizona v. California,* 460 U.S. 605 (1983). Also, in *Oklahoma v. Texas,* 258 U.S. 574, 581 (1922), the Court allowed numerous private parties to intervene to assert rights to portions of land in dispute between two states.

VI.

INTERVENTION WILL NOT UNDULY BURDEN THE CURRENT PROCEEDINGS AND IS NOT UNTIMELY

Intervention by the Association will not unduly burden the Court since the Special Master has made a finding as to the proper location of the boundary and the proceedings are at a stage where the parties are briefing issues ancillary to a final boundary ruling. It is appropriate and in the interest of justice to present for contemporary consideration by this Court the issues presented herein which are now ripe for adjudication to ensure the final decree does not operate prejudicially to the rights of the Association and the public.

This Motion to Intervene is being submitted to the Court because representatives of the United States government, through agencies such as the Department of Interior, the Department of Justice, and the Bureau of Indian Affairs, and representatives of the Colorado River Indian Reservation, have recently informed the occupants of the disputed lands that a final decree in this case will not result in transfer of control and management of the lands to a different federal agency and will not restore the lands to the public domain. They maintain that there is nothing in the current proceedings to actively force the United States government to order such a transfer regardless of the nature of the final decree. Therefore, the Association has acted as soon as possible to file this motion to assert its claims.

WHEREFORE, the West Bank Homeowners Association, individually and collectively, and as members of the general public, respectfully prays that this Court grant their Motion for Leave to Intervene and allow them to file the brief annexed to this Motion.

Respectfully submitted,

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BRIEF FOR THE WEST BANK HOMEOWNERS ASSOCIATION IN INTERVENTION

QUESTION PRESENTED

Whether certain Acts of Congress require the Department of Interior to restore to the public domain those lands determined to be outside the Colorado River Indian Reservation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

STATEMENT OF THE CASE

In 1952 this Court exercised the original jurisdiction vested in it under Article III, Section 2 of the United States Constitution to entertain this suit. After preliminary pleadings were filed, the Court referred this case to a Special Master, who filed his report with the Court on January 16, 1961, at 364 U.S. 940 (1961). On June 3, 1963, the Court rendered its opinion in *Arizona v. California*, 373 U.S. 546 (1963) (hereafter "*Arizona I*"), and on March 9, 1964, the Court entered a corresponding Decree (hereafter referred to as the "Decree"), 376 U.S. 340 (1964), which was amended on February 28, 1966, 383 U.S. 268 (1966).

Although the Court then determined the principal issues involved in the suit, it reserved ruling upon several related questions. The Court provided procedures for future determination of those unresolved issues in Article II(D)(5), Article VI and Article IX of the Decree.

At the time the Court entered the Decree, there were known boundary disputes involving the Colorado River Indian Reservation and one other reservation. Recognizing that these reservations would be entitled to additional diversions from the Colorado River upon favorable final determinations of those disputes, the Court expressly provided in Article II(D)(5) of the Decree that the quantities of adjudicated water to which each of those tribes may be entitled "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that boundaries of the respective reservations are finally determined." *Arizona v. California*, 376 U.S. at 345.

The Secretary of the Interior, without prior notice to the parties involved in this case, issued an *ex parte* ruling

on January 17, 1969 purporting to finally determine the western boundary of the Colorado River Indian Reservation. Thereafter the disputed lands, which were in the public domain and being administered by the Bureau of Land Management, were transferred out of the public domain to the Bureau of Indian Affairs for the benefit of the Reservation.

This Court determined in 1982 that " . . . we in no way intended that *ex parte* secretarial determinations of the boundary issues would constitute 'final determinations'. . . . " *Arizona v. California,* 460 U.S. 605, at 636 (1983). On July 19, 1989, the State Parties moved the Court to reopen the 1964 Decree in *Arizona I.* On October 10, 1989 the Court issued the following order:

> 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 Reservations is granted. Justice Marshall took no part in the consideration of this motion. *Arizona v. California,* 493 U.S. 886 (1989).

The Court then referred the matter to Special Master McGarr. The Special Master conducted a trial on the merits and issued his findings of fact and conclusions of law in Memorandum Opinion and Order No. 14 on September 20, 1993. The Special Master determined that the western boundary of the Colorado River Indian Reservation in the disputed territory is "where the water and the land meet, subject, as it must be, to the rules of erosion, accretion and avulsion." Special Master's Order No. 14 at page 10. This final boundary determination contradicts

the Secretary's 1969 *ex parte* ruling and places the disputed lands outside the Reservation.

ARGUMENT

THE SECRETARY OF INTERIOR ACTED ILLEGALLY AND UNCONSTITUTIONALLY IN ISSUING THE 1969 EX PARTE RULING AND TRANSFERRING THE LANDS OUT OF THE PUBLIC DOMAIN

The Secretary of Interior's 1969 *ex parte* ruling and subsequent transfer of the disputed lands out of the public domain was illegal and void as it violated the United States Constitution, Art. IV, Sec. 3, cl. 2, which grants only Congress the authority to dispose of federal property. Placing these public lands under control of the Reservation, which is a sovereign nation, without congressional approval is a disposition of federal property in violation of this constitutional provision.

The Secretary's ruling was also illegal in that it violated other statutes clearly establishing Congress' authority in dealing with Indian reservation lands and boundaries. The Act of June 30, 1919, now 43 U.S.C. Sec. 150, specifically states "Hereafter [after June 30, 1919] no public lands of the United States shall be withdrawn by Executive Order, proclamation, or otherwise, for or as an Indian reservation except by act of Congress." Congress also exercises exclusive control over reservation boundaries by the Act of March 3, 1927, now 25 U.S.C. Sec. 398d, which states "Changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be

made except by Act of Congress." These Acts of Congress demonstrate that the Secretary of Interior does not have the statutory authority to add *any* lands to a reservation or alter a reservation boundary without an act of Congress.

Furthermore, the Secretary's ruling was a direct violation of a congressional act specifically established to protect the lands in the disputed territory in the case at bar. By the Act of April 30, 1964, 78 Stat. 188, Congress established beneficial ownership of real property interests of the Reservation in the Colorado River Indian Tribes and it authorized the Secretary of the Interior to approve leases of lands on the Reservation. However, it expressly denied the Secretary authority to take *any* lands in the disputed territory:

> *Provided, however,* That the authorization herein granted to the Secretary of the Interior shall not extend to any lands lying west of the present course of the Colorado River and south of section 25 of the township 2 south, range 23 east, San Bernardino base and meridian in California, and shall not be construed to affect the resolution of any controversy over the location of the Colorado River Reservation: *Provided further,* That any of the described lands in California shall be subject to the provisions of this Act when and if determined to be within the reservation." 78 Stat. 188, Sec. 5.

The Court of Appeals recognized "Congress' constitutional power over the proper administration and disposition of the public lands is without limitation" and "[o]nce Congress has acted in that regard, both the courts and the executive agencies have no choice but to follow

strictly the dictates of such statutes." *Kidd v. United States Department of Interior, Bureau of Land Management,* 756 F.2d 1410, 1411 (CA9 1985). Officials in executive agencies "are without that power, save only as it has been conferred upon them by Act of Congress. . . . " *Royal Indemnity Co. v. United States,* 313 U.S. 289, 294 (1941).

The Secretary of Interior's 1969 order, issued when there was ongoing litigation in this case to which it was a party, without notice to the other parties in that litigation and an opportunity to be heard, without authorization by Congress, and in direct defiance of Congress's expressed prohibition against taking *any* land in the disputed area for the benefit of the reservation until the boundary was finally determined, was nothing more than an illegal ploy by the Executive branch to usurp the authority of Congress with the stroke of a pen and attempt to influence the outcome of this boundary dispute.

As was so aptly stated by this Court in *Confederated Bands of the Indians v. United States,* in holding that an 1880 act moving the Utes from the Colorado reservation did not incorporate an agreement to convert the reservation from an executive order reservation to a congressionally enacted reservation so as to entitle the Indians to compensation "[We] cannot, under the guise of interpretation, create presidential authority where there was none, nor rewrite congressional acts to make them mean something they obviously were not intended to mean. We cannot, under any acceptable rule of interpretation, hold that the Indians owned the lands merely because they thought so." 330 U.S. 169, 179 (1947).

CONCLUSION

The established constitutional grant of authority to Congress in this area and statutory provisions noted above support the conclusion that the Secretary acted without any authority whatsoever and his 1969 order was unconstitutional and illegal and is void as a matter of law. Therefore, none of the lands in the disputed territory are, or ever were, reservation lands held in trust by the Federal government for the Colorado River Indians or any other Indians and the Association is entitled to a declaratory judgment to that effect.

The Secretary of Interior, and all federal officials acting under him, and all other federal officials acting on his behalf or on behalf of the Colorado River Indian Reservation, are unlawfully neglecting and failing to carry out their official duties with respect to the administration of public lands by continuing to treat said lands as reservation lands. The Association is entitled to relief in the nature of mandamus against said federal government officials ordering and directing them to cease attempting to administer the lands in question as if the lands were held in trust for the Colorado River Indian Reservation, and, instead, mandating that they, and those acting through or under them, administer the lands as public lands under all applicable public land laws.

Respectfully submitted,

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