IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 8 Original

STATE OF ARIZONA,

Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Impleaded Defendants.

Response of the California Defendants to the Motion for Leave To Intervene, Tendered by the Navajo Indian Tribe, September 25, 1961

October 30, 1961

(See list of attorneys on next page.)

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

For the State of California

STANLEY MOSK
Attorney General
State Building
Los Angeles 12, California

NORTHCUTT ELY
Special Assistant
Attorney General
Tower Building
Washington 5, D. C.

CHARLES E. CORKER
Assistant Attorney General
State Building
Los Angeles 12, California

BURTON J. GINDLER
Deputy Attorney General

GILBERT F. NELSON
Assistant Attorney General
909 South Broadway
Los Angeles 15, California

HOWARD I. FRIEDMAN
523 West Sixth Street
Los Angeles 13, California

C. EMERSON DUNCAN II

JEROME C. MUYS
Tower Building
Washington 5, D. C.

For Palo Verde Irrigation District

FRANCIS E. JENNEY

STANLEY C. LAGERLOF
Special Counsel
500 South Virgil Avenue
Los Angeles 5, California

For Imperial Irrigation District

HARRY W. HORTON
Special Counsel

R. L. KNOX, JR.
General Counsel
Law Building
El Centro, California

For Coachella Valley County Water District

EARL REDWINE
Special Counsel
207 Lewis Building
Main Street at 10th
Riverside, California

For The Metropolitan Water District of Southern California

JAMES H. HOWARD
Special Counsel

CHARLES C. COOPER, JR.
General Counsel

H. KENNETH HUTCHINSON
Deputy General Counsel
306 West Third Street
Los Angeles 13, California

FRANK P. DOHERTY
Special Counsel
433 South Spring Street
Los Angeles 13, California

For the City of Los Angeles

ROGER ARNEBERGH
City Attorney
City Hall
Los Angeles 12, California

GILMORE TILLMAN
Chief Assistant City Attorney
for Water and Power
207 South Broadway
Los Angeles 12, California

For the City of San Diego

ALAN M. FIRESTONE
City Attorney
Civic Center
San Diego, California

For the County of San Diego

HENRY A. DIETZ
San Diego County Counsel

ROBERT G. BERREY
Deputy County Counsel
Court House
San Diego, California

RESPONSE OF THE CALIFORNIA DEFENDANTS TO THE MOTION FOR LEAVE TO INTERVENE, TENDERED BY THE NAVAJO INDIAN TRIBE, SEPTEMBER 25, 1961

October 30, 1961

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REQUEST FOR 90 DAYS TO ANSWER NAVAJO PETITION AND EXCEPTIONS, IF NAVAJO MOTION IS GRANTED

If the Court grants the motion for leave to intervene tendered by the Navajo Indian Tribe on September 25, 1961,[1] and orders filed its petition of intervention annexed thereto and accompanying exceptions to the Special Master's Report, the California defendants request at least 90 days to respond to the proposed petition and exceptions of the Navajo Indian Tribe.

Unless this request is granted, the inexcusable and substantial delay of the Navajo Indian Tribe in presenting its contentions made in the foregoing documents would result in substantial prejudice to the California defendants.

STATEMENT IN SUPPORT OF REQUEST

The following facts support the foregoing request of the California defendants:

1. *Indian motion of June 28, 1956, denied by Special Master*[2]

On June 28, 1956 (during the first month of the trial before the Special Master (Rep. 3)), Mr. Justice Douglas referred to the Special Master a motion presented to the Justice by the Navajo Indian Tribe, as well as by six other Indian tribes and communities within the lower Colorado River basin.[3] Tr. 2638,

[1]Cited hereafter as "Navajo Motion of September 25, 1961."

[2]For the convenience of the Court, a copy of the Master's opinion and ruling from the transcript is appended hereto (cited hereafter as "app.").

[3]"Motion for Leave To File Representation of Interest and Representation of Interest," submitted by seven Indian tribes and communities, cited hereafter as "Indian Motion of June 28, 1956."

2640-41 (app. at A1, 2-4). That motion requested, in effect, that the Special Master require the Attorney General of the United States, because of a purported conflict of interest, to appoint separate and independent counsel to represent the Indian petitioners. Indian Motion of June 28, 1956, pp. 10-11; Tr. 2640-42 (app. at A3-4). The motion also recited in part that "there is doubt whether petitioners may intervene as separate parties since their interests are committed to adjudication by the intervention of the United States . . . ." Indian Motion of June 28, 1956, p. 2, par. 6. Counsel for the Navajo Indian Tribe was Norman M. Littell, Esq., who is one of counsel on the pending application.

After receiving a brief from the United States and hearing oral argument, the Master denied the 1956 motion. Tr. 2638-46 (app. hereof). No attempt was made by the Navajo Indian Tribe or by any of the

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The Navajo Indian Reservation is located above Lake Mead "within the northeast corner of Arizona, the northwest corner of New Mexico and the southeast corner of Utah" and thus is "in part located within the drainage basin of the Colorado River and of the Little Colorado River, a tributary of the Colorado River" within the lower basin. Navajo Motion of September 25, 1961, pp. 1-2, par. I.

The other six Indian petitions in 1956 (and their general locations) were: Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California (on the Colorado River below Lake Mead); Gila River Pima-Maricopa Indian Community, Arizona (on the Gila River system, a lower basin tributary of the Colorado River); Hualapai Indian Tribe of the Hualapai Reservation, Arizona (on the Colorado River between Lee Ferry and Lake Mead); Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona (on the Gila River system); San Carlos Apache Tribe, Arizona (on the Gila River system); and Fort McDowell Mohave-Apache Indian Community of the Fort McDowell Reservation, Arizona (on the Gila River system).

See U.S. Ex. 100 (Tr. 12,493), a map showing Indian irrigated lands and proposed ultimate development within the lower Colorado River basin, March 1956.

other Indian petitioners to secure a review of the Master's ruling by this Court. See Tr. 2646 (app. at A-7). The Special Master also ruled that the Indian petitioners could file a brief with the Special Master after the hearings. Tr. 2645 (app. at A-6). Neither the Navajo Indian Tribe nor any of the other Indian petitioners filed any such brief during the 10 months from the end of the trial (August 28, 1958) until the matter was finally submitted to the Special Master (July 1, 1959) after the parties had exchanged three rounds of briefs, together with their proposed findings and conclusions. Rep. 3.

The United States proposed findings and conclusions and supporting brief before the Special Master, submitted in April 1959, made most of the contentions about Indian water rights to which the Navajo Indian Tribe now objects. *Compare* Navajo Exceptions II-IV (pp. 3-7) *with* (*1*) U.S. Findings 4.0.2 (p. 51) and 4.2.1 through 4.2.10 (pp. 57-59); Conclusions 4.2 (p. 61), 11.1(c) (p. 227), and 11.5 through 11.8 (pp. 230-35); (*2*) U.S. Brief in Support of Findings of Fact and Conclusions of Law Proposed by the United States (April 1959), pp. 22-31.

2. *Draft Report of Special Master*

On May 5, 1960, the Special Master released a Draft Report which he circulated among the parties for their comments. Rep. 3. The Draft Report contained the same determinations which the Navajo Indian Tribe now attacks. See DR 219-20, 221-56, 265-67, 275-76, 279-87, 316 (Decree art. VII(B)).

3. *Comments on Draft Report*

On June 10, 1960, the comments on the Draft Report submitted by the United States did not object to determinations which the Navajo Indian Tribe now attacks. The Navajo Indian Tribe did not submit to the Special Master any comments on the Draft Report.

4. *Oral argument before Special Master on Draft Report*

On August 17-19, 1960, oral argument was held in New York City on the Draft Report. Rep. 3; Tr. 22,-594-23,113. No time for argument was even requested by the Navajo Indian Tribe.

5. *Report of Special Master*

On December 5, 1960, the Report of the Special Master, which makes no material changes in the decision proposed by the Draft Report, was submitted to this Court, and was received and ordered filed by the Court on January 16, 1961 (364 U.S. 940). The schedule for filing exceptions, and opening, answering, and reply briefs was established in the notice accompanying that order of the Court.[4]

6. *Exceptions to Special Master's Report*

On February 27, 1961, all parties submitted to this Court their exceptions to the Report of the Special Master. The Navajo Indian Tribe tendered no exceptions.

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[4]The schedule was: exceptions on February 27, 1961; opening briefs on May 22, 1961; answering briefs on August 14, 1961; and reply briefs on October 2, 1961.

California Exception IV-5 (p. 25) excepted to the Master's determinations of (1) the quantities of water reserved by the United States for Indian reservations (Rep. 254-87) and for other federal lands and purposes (Rep. 291-300), (2) the priorities accorded to such federal reservations, and (3) the bases upon which the Report predicated water rights for such federal reservations. However, we also announced (Calif. Exceptions, p. 25 n.9) that although we disagreed in principle with these determinations of the Master, we did not plan to brief the point for two reasons:

First, the quantities of Indian water in dispute in California are relatively small.

Second, the Master correctly decided (Rep. 247-48) that federal uses in Arizona and Nevada are chargeable to those states out of water from which California users are excluded by the California Limitation Act. As the Master said, "All of the parties seem to agree to this accounting . . . ." Rep. 247.

We further stated that if this latter decision were attacked by any party, we reserved our challenge to the determinations which sustain the federal claims. Calif. Exceptions, p. 25 n.9.

No party excepted to the Master's determination that federal rights and uses are chargeable to those states in which the use is made (Rep. 247-48) or to his corollary determination that the federal rights within each state are limited by the interstate allocation to each state (Rep. 300-02). See also Rep. 312-13 and proviso to Decree art. II(C) (Rep. 353).

7. Opening briefs

On May 22, 1961, opening briefs in support of their exceptions were filed by the parties. The Navajo Indian Tribe tendered no brief.

No party challenged therein the Master's determination that federal rights and uses are chargeable to and limited by the allocation to the state in which the use is made. California's opening brief repeated the reasons given in our exceptions why we did not brief the Indian issues although we disagreed with those determinations. Calif. Op. Br. 31 n.6, 283-84.

8. Answering and reply briefs

On August 14, 1961, answering briefs filed by the parties made no change in the situation described above; nor did the reply briefs filed October 2, 1961. The Navajo Indian Tribe tendered none.

9. Pending application of Navajo Indian Tribe

On September 25, 1961, the pending application tendered by the Navajo Indian Tribe contended that allocations to Indian tribes should be made separate and apart from any allocation to the states. See Navajo Motion of September 25, 1961, pp. 5-6; Brief in Support of Motion, pp. 36-41; Navajo Petition of Intervention, p. 51, par. V; Navajo Exception III, pp. 4-5.

In conjunction with the foregoing contention, the application of the Navajo Indian Tribe also claimed a super-senior aboriginal priority to a quantity of water which is indefinitely expansible in the future. See Navajo Motion of September 25, 1961, pp. 4-5, 6; Brief in Support of Motion, pp. 30-36, 41-46; Navajo Peti-

tion of Intervention, pp. 50-51, pars. II-IV; Navajo Exceptions II, pp. 3-4, and IV, pp. 5-7.

Presumably, the foregoing contentions would be applicable to all Indian tribes throughout the entire Colorado River basin. *Cf.* U.S. Ex. 100 (Tr. 12,493), a map showing Indian irrigated lands and proposed ultimate development within the lower Colorado River basin, March 1956.

10. *Delay by Navajo Indian Tribe and prejudice to California defendants*

The Navajo Indian Tribe has inexcusably failed to brief its claims before the Special Master for his recommendation to this Court.

The Navajo Indian Tribe has inexcusably delayed in presenting its claims to this Court; those claims should have been submitted consistently with the schedule for exceptions and briefs established by the Court in this cause. (See notice accompanying the order of the Court (364 U.S. 940), dated January 16, 1961, summarized p. 4 *supra* note 4.)

The California defendants have not briefed the Indian issues; but, given timely notice of the contentions of the Navajo Indian Tribe that the Indian allocations should be separate and apart from the allocations to each state, we would have briefed all Indian issues extensively. Consequently, the inexcusable and substantial delay of the Navajo Indian Tribe in presenting its contentions have prejudiced California's rights by, in effect, preventing our briefing of the Indian issues, which have become even more important because of the extremity of the present contentions of the Navajo Indian Tribe.

11. *Merits of the Navajo Indian Tribe's contentions*

The water right claimed by the Navajo Indian Tribe (see item 9 *supra* pp. 6-7) is based on unsound premises and cannot be sustained. All arguments and contentions on the merits are reserved.

12. *Status of Navajo Indian Tribe to intervene*

We do not consider herein the question whether the Navajo Indian Tribe can intervene as a separate party in this suit in which, in effect, it already is a party represented by the United States acting as guardian for Indian tribes. See Indian Motion of June 28, 1956, p. 2, par. 6, quoted *supra* p. 2; *cf.* Tr. 2643-45 (app. at A5-7).

The State of California does not waive any immunity from suit in the original jurisdiction of this Court by the Navajo Indian Tribe. See U.S. CONST. amend. XI; *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831); *Texas-Cherokees & Associate Bands v. Texas,* 257 U.S. 615 (1921) (per curiam order denying motion for leave to file original bill of complaint, upon authority of *Cherokee Nation v. Georgia, supra*); U.S. DEP'T OF THE INTERIOR, OFFICE OF THE SOLICITOR, FEDERAL INDIAN LAW 341 (1958). *Cf. New Jersey v. New York,* 345 U.S. 369, 372 (1953).

CONCLUSION

For the foregoing reasons, if the Court grants the motion of the Navajo Indian Tribe, the Court should grant to the California defendants not less than 90 days within which to file their responses to the petition of intervention and exceptions of the Navajo Indian Tribe.

Dated: October 30, 1961

Respectfully submitted,

[Signatures follow.]

For the State of California

STANLEY MOSK
Attorney General
State Building
Los Angeles 12, California

NORTHCUTT ELY
Special Assistant Attorney General
Tower Building
Washington 5, D. C.

CHARLES E. CORKER
Assistant Attorney General
State Building
Los Angeles 12, California

BURTON J. GINDLER
Deputy Attorney General

GILBERT F. NELSON
Assistant Attorney General
909 South Broadway
Los Angeles 15, California

HOWARD I. FRIEDMAN
523 West Sixth Street
Los Angeles 13, California

C. EMERSON DUNCAN II

JEROME C. MUYS
Tower Building
Washington 5, D. C.

For Palo Verde Irrigation District

FRANCIS E. JENNEY

STANLEY C. LAGERLOF
Special Counsel
500 South Virgil Avenue
Los Angeles 5, California

For Imperial Irrigation District

HARRY W. HORTON
Special Counsel

R. L. KNOX, JR.
General Counsel
Law Building
El Centro, California

For Coachella Valley County Water District

EARL REDWINE
Special Counsel
207 Lewis Building
Main Street at 10th
Riverside, California

For The Metropolitan Water District of Southern California

JAMES H. HOWARD
Special Counsel

CHARLES C. COOPER, JR.
General Counsel

H. KENNETH HUTCHINSON
Deputy General Counsel
306 West Third Street
Los Angeles 13, California

FRANK P. DOHERTY
Special Counsel
433 South Spring Street
Los Angeles 13, California

For the City of Los Angeles

ROGER ARNEBERGH
City Attorney
City Hall
Los Angeles 12, California

GILMORE TILLMAN
Chief Assistant City Attorney for Water and Power
207 South Broadway
Los Angeles 12, California

For the City of San Diego

ALAN M. FIRESTONE
City Attorney
Civic Center
San Diego, California

For the County of San Diego

HENRY A. DIETZ
San Diego County Counsel

ROBERT G. BERREY
Deputy County Counsel
Court House
San Diego, California

APPENDIX

Opinion and Ruling of Special Master Denying Indian Motion of June 28, 1956 (Tr. 2638-46)

Morning Session—Wednesday, July 18, 1956—
10 A.M.

THE MASTER: I should like first to make an informal disposition of the application which has been argued on behalf of the Indian Tribes. I will read it into the record.

An application on behalf of the Colorado River Indian tribes of the Colorado River Indian Reservation in Arizona and California; the Gila River Pima-Maricopa Indian community, Arizona; Hualapai Indian Tribe of the Hualapai Reservation, Arizona; the Navajo Tribe of Indians of the Navajo Reservation, Arizona and New Mexico; Salt River Pima-Maricopa Indian Community of the Salt River Reservation, Arizona; the San Carlos Apache Tribe, Arizona; and the Fort McDowell Mohave-Apache Indian Community of Fort McDowell Reservation, Arizona.

There has been presented by their respective attorneys an application for leave to file a "representation of interest." Accompanying this application is a petition on behalf of the same Indian Tribes submitted by the respective attorneys. The petition in part alleges:

That the petitioners are American Indian tribes, each with a tribal organization recognized by the Secretary of the Interior as authorized to represent its tribe. Each of the tribes resides within the lower Colorado River Basin and is the beneficial owner of land and the right to the use of [2639] water within the basin.

That this case; that is, Arizona v. California, et al., presents for adjudication the relative rights of the parties litigant and of petitioners and other Indian wards of the United States to divert water from the Lower Colorado River Basin.

That Indian rights in the water stem from treaties with Indian tribes, executive action, the creation of Indian reservations and various acts of Congress.

That the United States has intervened in this case and has placed the rights of petitioners in issue. As a result, petitioners are precluded from asserting their rights in their own names and on their own behalf. They have no control over the course of the suit nor any participation in the trial.

That the United States has interests which are in conflict with the interests of the petitioners. These conflicting interests arise out of its treaty with Mexico and out of its contractual obligations to deliver water and electricity. The conflict is emphasized by the circumstance that the Attorney General is under the obligation to defend the United States before the Indian Claims Commission and the Court of Claims in suits brought by the Indian tribes seeking compensation for loss of water rights. (It is not clear whether such suits are now pending or whether such [2640] suits are a future possibility. The latter is the probable intention of the allegation.)

Additional allegations give illustrations of the operation of the conflict in the prosecution of this case.

So much for the allegations.

The prayer for relief is as follows:

Wherefore Petitioners pray as follows:

1. That cognizance be taken of this representation in view of the helpless position in which these petitioners find themselves;

2. That the Attorney General be called upon to explain his unauthorized amendment of the petition of intervention.

3. That the Special Master be instructed as follows: (a) To determine whether a conflict exists between the Indian interests and the interests of the United States apart from those of the Indian; (b) to determine whether the Indian interests are or can be adequately represented by the Attorney General of the United States; (c) to recommend whether the interests of justice and fair dealing require separate and independent counsel for the Indians.

On June 28, 1956, the application and the accompanying petition were presented to Mr. Justice Douglas, who endorsed them "Referred to the Special Master, Honorable Simon Rifkind, [2641] for appropriate action."

On the request of the petitioners, argument on the petition before the Special Master was adjourned to July 6th. In the course of the argument, counsel for the petitioners particularized the relief sought by the petitioners as follows:

1. To order the Attorney General to reinstate the pleading withdrawn from the Supreme Court file.

2. To request the Attorney General to arrange for private counsel for the Indians.

3. Such private counsel should have the status of special assistant to the Attorney General with full power to act on behalf of the Indians and with instructions from the Attorney General which would give him independence of action.

4. The fees of such private counsel and his expenses to be paid by the Attorney General.

5. That the Court might privately and informally recommend such a course of action to the Attorney General.

6. That the petitioners have time for preparation for trial, and

7. To have during the trial the right of examination and cross-examination of witnesses.

It was made clear beyond doubt that the petitioners [2642] did not seek or desire to intervene as parties.

In opposition to the application and the petition, the United States filed a brief. Therein it relies upon its plenary power conferred by statute to manage the affairs of Indians. It contends that the manner of exercising this power, which is political and administrative in nature, is a question for the legislative branch to determine and is not one for the courts. It cited many precedents to support its position and relies especially on Heckman v. The United States, 224 U.S. 413.

The other parties expressed varying views of the petition.

In its petition for intervention, the United States has assigned the Indian claims as one of the interests

it seeks to protect and further in this litigation. In the actual prosecution of these hearings before the Special Master, the United States has appeared by a number of attorneys. How the several responsibilities of the United States have been distributed among the several lawyers has not been disclosed to the Special Master, nor, indeed, whether there has been any allocation of function. [2643]

The petitioners do not seek the independent status of parties. They disavow any desire for intervention. They would have the Attorney General designate another lawyer upon whom would devolve a special concern for the claims of the Indians. Such a lawyer would still be the agent of the Attorney General. In effect, the Attorney General would speak with several voices and might occupy conflicting positions. It is unnecessary to elaborate upon all the anomalies, some or all of which would be encountered in such a trial. The Attorney General might at once concede a fact and withhold its concession. In one role he might be content with the testimony of a witness and refrain from cross-examination. In his other role he would be moved to impeach both the witness and the testimony.

In short, the petitioners would in every sense behave like parties but remain non-parties. It may well be that conflict between the general interest of the United States and the special interest of the Indians is inevitable. Indeed, in any single representation by the United States of a general and a special interest there is almost bound to be conflict for in a sense the special interest is always at war with the general interest. Such conflict if governed by the usual rules which obtain between trustee and ward would at times disqualify the trustee,

or would in [2644] any case justify separate intervention on behalf of the ward, but this is not the ordinary case of private trustee and ward.

The trusteeship of the United States in behalf of the Indians is the creation of a plenary legislative power. It is beyond the power of the courts to disqualify this trustee. The relationship between this trustee and its Indian wards is not "circumscribed by rules which govern private relations," Heckman v. United States, 224 U.S. 413. It rests on the presumption that "The United States will be governed by such considerations of justice as will control a Christian people in their treatment of a(n) * * * dependent race," Missouri, Kansas & Texas Railway Company v. Roberts, 152 U.S. 114, 117.

The foregoing considerations lead to these conclusions.

1. The unconventional status sought by the petitioners in this litigation is one not likely to promote the orderly development of the issues and proofs and the forging of a suitable decree. This is underscored by the circumstance that a substantial portion of the proofs has already been taken on the issues as framed by the pleadings; and the magnitude of the case is such that permission to take part in the case without a substantial adjournment to permit adequate preparation would amount to an empty ritual.

2. The legal power of the Attorney General to [2645] represent the petitioners and to manage the litigation in their behalf cannot be curtailed by judicial action.

There is, nonetheless, some room for accommodation. First, if the petitioners are in possession of evidence which would buttress their claims to water I assume that the Attorney General would not reject its proffer to him and that he would not withhold it from the trial. No allegation to the contrary is made in the petition. If this assumption is valid, as I believe it is, the record of this trial should, at its conclusion contain all the substantial evidence which the special representation of the petitioners would produce.

Second, there may however be disagreement between petitioners and the Attorney General concerning the interpretation of the evidence and concerning the rules of law which govern the relief to be awarded in the light of the evidence. I think it is within the judicial power to receive from one not a party a brief which may be helpful to a court in deciding a controversy. The practice of receiving briefs from amici curiae is well established. Indeed, the Supreme Court has at times invited briefs from non-parties.

The appropriate action which, in my opinion, is responsive to this petition is that the petitioners be authorized to file a brief with the Special Master upon the conclusion of the hearings. [2646]

I have given consideration to several arguments advanced by the other parties to this litigation. They are addressed to marginal aspects of this problem and require no further comment.

That disposes of the application. If any party wants to use this transcript as a basis for presenting the question to the Supreme Court I shall be glad to certify it.