ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-2056

TITLE ESCONDIDO MUTUAL WATER COMPANY, ET AL., Petitioners
v.
LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA BANDS OF MISSION INDIANS, ET AL.

PLACE Washington, D. C.

DATE March 26, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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ESCONDIDO MUTUAL WATER COMPANY, :

ET AL., :

Petitioners, :

v. : No. 82-2056

LA JOLLA, RINCON, SAN PASQUAL, :

PAUMA AND PALA BANDS OF MISSION :

INDIANS, ET AL. :

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Washington, D.C.

Monday, March 26, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 o'clock a.m.

APPEARANCES:

PAUL D. ENGSTRAND, ESQ., San Diego, California; on behalf of the petitioners.

JEROME M. FEIT, ESQ., Solicitor, FERC, Washington, D.C.; on behalf of FERC.

ELLIOTT SCHULDER, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Secretary of the Interior.

ROBERT S. PELCYGER, ESQ., Boulder, Colorado; on behalf of the respondent Mission Indian Bands.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Escondido Mutual Water Company against LaJolla.

Mr. Engstrand, you may proceed whenever you are ready.

ORAL ARGUMENT OF PAUL D. ENGSTRAND, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. ENGSTRAND: Mr. Chief Justice, and may it please the Court, it is an honor today for us to share our time with Solicitor Feit of the Commission, who will explain why Section 4(e) of the Federal Power Act does not give the Secretaries authority to veto licensing decisions of the Commission by imposing unreasonable conditions.

I shall background the case and explain why the Indian bands have not been given the right by Congress to veto licensing decisions of the Commission, and I shall discuss why water rights are not similar to reservation lands.

In southern California, between Los Angeles and San Diego, at Oceanside, the San Luis Rey River empties a 565-square mile watershed into the Pacific Ocean. In 1895, western movement pioneers constructed an intake in a deep canyon in the LaJolla Reservation

and a canal over precipitous moutain terrain to Lake Woford near Escondido.

In 1915, they added a power plant at Bear Valley, and in 1916, a power plant at the Rincon site. The canal and its works traverses three Indian reservations and occupies a tiny fraction, less than 1 percent of those reservation lands. The project -- In 1922 Henshaw Dam was constructed, and later the canal was enlarged in order to convey the water stored by the dam as well as the natural flow of the river above the intake and below the dam.

These physical works were constructed by reason of legal arrangements made with the bands and the Secretary of the Interior on their behalf by contracts made in 1894, 1914, and 1922, a permit from the Secretary of the Interior in 1908, and a Federal Power Commission license in 1924.

Prior to 1969-1970, the bands or Interior made no objection to these works except by the filing of a claim before the Indian Claims Commission which was opposed by the government. In 1971, Escondido sought relicensing, and at that time the bands sought to revoke our license, sought a non-power license for themselves. Interior fully support the bands' position and even recommended that the United States recapture.

In accordance with their authority under Section E, they sought to impose conditions which would have molded the project into a non-power contract not best adapted for development of the river as found by the Commission, but in the words of the Administrative Law Judge, to destroy the project.

Interior candidly admits that it is not acting in the scope of its role in the best interests of the United States, but that it is totally blinded by its role as a guardian for the bands. The project and its works are small, on average 14,500 acre feet of water and four million kilowatt hours of power produced, but in this semi-arid region, the water is important and the power in these energy-short times is consegential.

The Commission in 1979 in two orders granted a license jointly to Escondido and Vista. Petitions for review were heard by the Ninth Circuit, who reversed and remanded, and in October you granted cert. There is no rational basis for the benefits of Project 176 to be taken away from the 110,000 citizens of Escondido and Vista.

The bands bottom their contentions in notions about tribal sovereignty. But this is a false bottom, because we all recognize the plenary power of Congress over these tribal lands, and we know that Congress in

the public interest has long determined that tribal bands' lands are frequently necessary for use by non-tribal interests.

Congress has provided for railroads, tramways, canals, reservoirs, electric lines, hot water power projects to use tribal lands. We know that the broad plan and purpose of Congress in the Federal Power Act was to centralize and provide for the development of the water power resources of the country. We know that under the Act of March 3rd, 1891, the general right-of-way statute, Congress provided for the use of tribal lands to encourage the western development.

We know that under the Mission Indian Relief Act, MIRA, Congress provided that canal companies and citizens could use tribal lands for canal right-of-ways.

The conflict here before Your Honors is, who did Congress designate as the final decision-maker about these tribal lands? I do not choose to forsake the many amici who have appeared on our behalf before Your Honors by focusing on tribal lands. The result would be the same if we were dealing with any other reservations, for if the Commission is not the final arbiter, the final decision-maker, then we will have to return to the same processes that were followed before the turn of the century, when special bills had to be introduced for the

development of water power projects and use of tribal lands.

The first hydro plant was built in 1890. We all know the Congressional struggle that eventuated in the 1920 Power Act. In Tuscarora, this Court noted that the Congress did not overlock, did not exclude, but specifically dealt with the tribal lands. The question: Who should be the final arbiter?

The Congress provided in Section 3(2) that tribal lands were to be covered by water power development. Section 4(e) gave to the Commission the authority to license project works on tribal lands. We know that the Senate amendment specifically was rejected by Congress, which would have given Indians tribal consent necessary.

The Congress also followed the traditional safeguards for Indian lands. In Section 4(e) there is a requirement of the non-interference finding. In Section 10(e) there is a requirement that reasonable compensation be paid for the use of tribal lands. In Section 10(i), where the Commission is given authority to waive conditions for other projects, they cannot do that over tribal lands. And we know that under Section 17(a) they provided that proceeds from the compensation for the use of tribal lands is assigned to the tribes

involved.

It is difficult to conceive how the drafters of Congressional will could be more specific. As Judge Leventhal in the Montana Power case said, Congress was aware of the conflict of the Secretary of Interior between the landowners of the tribal lands and the interests of licensees. The Commission was meant to be the arbiter of the general interest. If the Commission is not -- decisions are not final, Congress's whole plan will be frustrated. It will be like an orchestra without strings, like a baseball team without a pitcher. Tribal consent would be destructive and not helpful.

MIRA in 1891 provided for the use of tribal lands. It provided in 1891 that the consent of the tribal bands were necessary, and the approval of the Secretary of Interior, but three months later, in the general right-of-way statute of March, 1891, the Congress provided that right-of-ways could be given with only the requirement from the Secretary of Interior.

In 1898, the Secretary of Interior interpreted this to apply to tribal lands, and the Ninth Circuit in 1914 approved this interpretation. Ever since 1898, under the Act of 1891, and under the 1920 Power Act, the administrative officials charged with the responsibility to enforce these Acts have consistently interpreted the

provisions as applying to tribal lands.

And, Your Honors, I choose to reserve five minutes, if I may, for closing.

CHIEF JUSTICE BURGER: Mr. Feit.

ORAL ARGUMENT OF JEROME M. FEIT, ESQ.,

ON BEHALF OF FERC

MR. FEIT: Mr. Chief Justice, and may it please the Court, as has been stated, this case involves the reach and scope of the proviso, the licensing proviso in Section 4(e) of the Federal Power Act. Of principal concern to the Commission today is the context involving the distribution of authority under that proviso between FERC and Interior.

The proviso is set out at Pages 2 and 3 of our main opening brief, and requires that before issuing a license over reservation lands, the Commission must find that the license, and I quote, "will not interfere or be inconsistent with the purpose for which such reservation was created or required, and should be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall be deemed necessary for the adequate protection and utilization of such reservation."

The majority of the Court of Appeals below, purporting to rely on, and we believe erroneously, on

the plain language test, held that the Commission may not alter those conditions in any way. If the Commission is of the view that the terms are inappropriate or improper for the license it wishes, it may simply not issue the license.

The court further held that this conclusion did not grant the Secretary "an unconditional veto power" since the reasonableness of the conditions was subject to judicial review under Section 313 of the Federal Power Act.

It is our view that the position of Interior and the court below seriously misapprehends the intent underlying the Section 4(e) proviso and undercuts in that regard the thrust and purpose of the Act, the licensing thrust. Surely at most times there is no problem. Both provisions work together. The Commission protects the physical homeland, and that is what the inconsistency and interference finding is all about, the security of the physical land, the population, the number of homes in the area, the overall impact on the reservation qua a place for Indians to live.

The Secretary, on the other hand, in our view has a lesser but -- not a lesser in importance, certainly, but lesser in scope. He must see to it that the project works, the project works be not so placed

which would interfere with the health, safety, recreation, water flow, access roads, all of those things to protect the reservation and see that the works are properly utlizied.

But beyond this, and there is an inherent tension between the two provisos, the interference, inconsistency proviso and the protection proviso. The tension arises because in a sense they both work with another. That is, the Secretary supports the absolutist thecry, saying that the conditioning power has no bearing on the interference, inconsistency authority. The two functions are separate.

That is not true as we read those two provisions. One may well be at war with the other, and it seems to us the protection provision may try to take over the interference, inconsistency provision. Two examples suffice, I think.

The Pidgeon River case, which is an old administrative case in which Secretary Ickes wished that a dam not be built on an Indian reservation, and he submitted evidence in support of the view that the inference, inconsistency determination should be exercised by the Commission in a way against issuance of a license, but he said in any event I am going to submit conditions which will not permit the dam to be built at

all.

This case, I think, also further illustrates where the Secretary seeks to impose upon the authority, the inconsistency, interference authority of the Commission. What has happened here is, Proviso 4, for example -- excuse me, Condition 4 submitted by the Secretary would require the Commission to recognize the reserved water rights of the Indians.

Well, the water rights issue is essentially not our business in terms of defining rights. That question is now in the Federal District Court, where it has been since 1969. We have an open-ended condition in the license which provides that the ultimate resolution of that issue by the District Court will ultimately inform the license that we issue, so it is hard for us to perceive how this case involved a proper invocation of a power by the Secretary.

Let me just turn --

QUESTION: Mr. Feit, what effect would such a recognition have on the water rights litigation that is peding in the District Court?

MR. FEIT: A recognition of the reserve interest rights? I don't think anything in that sense of the word. I think that our statute precludes us from making such a finding. It would be ultra viries of our

authority. To that extent, I think the District Court opinion would be the one that is cold sway in the day, that is, that courts make that determination, and this Commission, if it tried to do so, it seems to me, would be exercising absolute power that it just doesn't have.

I would like to turn to the legislative history which I think supports our view. First of all, I want to point out there is an error at Page 5 of our second supplemental brief in which we attribute to Congressman -- excuse me, to Senator Walsh a statement made by Congressman Walsh in an effort to distinguish Senator Walsh's apparent approval of the veto authority.

That is an unfortunate error. I am sorry for it. But in any event it seems to us that Senator Walsh's statement is not all that persuasive. It was made in terms of a discussion with regard to the appropriateness of giving the Indians the authority to stop a project and the Senator was responding to that. Also, Congressman Walsh, the statement we attribute to the Senate, did make that statement. He made it to Congresman Rayka, who in fact was the House proponent of the Administration's bill and made clear that he thought one vote could not terminate a project with two votes on the Commission, which was then comprised of the three

Secretaries, War, Agriculture, Interior.

There are statements in the Secretary's brief regarding the notion in the debate for the '20 Act indicating that there was the view that a Secretary could veto it. On the other hand, we think the evidence of legislative intent is spelled out more in our favor by other remarks which we have adduced in our brief, and it seems to us that this one aspect, this aspect, we think, as our brief points out, we have the better of the day.

The one area of the legislative history which is not referred to at all in the Secretary's brief, it seems to us, is that the legislative history focuses again on no water control, no water control by the Commission, a focus on property rights, property rights, not broad interests, Indian concerns in the broadest sovereignty sense, and I think one illustration again here is good.

The legislative history stems from the rights-of-way statute. It is clear that the 1920 Act tooks those rights-of-way statutes as their base, developed on them, built on them, provided for them in the Act. At that time, under those rights-of-way statutes, the particular Secretary had control over what we call now the interference, inconsistency finding

within those particular statutes. He also had the conditioning authority, but the conditioning authority, of course, was not meant to overcome the broad licensing authority that that rights-of-way statute provided. On the contrary, it was to be exercised reasonably, and that is all we say here, that when Congress enacted the 1920 Act, what was a single power in each of the Secretaries under the statutes they enforced became bifurcated. The Commission was given the licensing power. The Secretary was to retain the conditioning power, the impact of the project works on the reservation, that power to be exercised with reason.

The Secretary says, however, yes, we agree with the reasonableness approach to this case. However, that is a matter for the Court of Appeals to deal with, and all the Commission has to do is simply include the Secretary's condition, and if it is unreasonable or arbitrary, the Court of Appeals will remedy the situation.

We don't think this really answers the question. In our view, it turns the review statutes on its head. Section 313 of the Power Act, A and B, deals with review. The court -- I might say the court below realized the difficulty of using 313. Initially on the opinion it relied upon the APA saying the Secretary's

condition will be reviewed under the APA, the Commission's under the Power Act. On rehearing, the court retreated, saying, well -- recognizing that under this Court's decision in the City of Takoma case that the review provisions of Section 313 are absolute, unconditional, and all issues must be resolved therein.

Let me illustrate the problems of such a review provision. Under 313(a), the Commission in its own judgment may take a case back before a record is filed from a Court of Appeals. What do we do? Does Interior -- We obviously can't do that. The Commission may change its rule on rehearing. We have a statute which requires a rehearing requirement after the issuance of the order.

The Commission -- the language is absolute in the statutory provision. Obviously we can't do that. We have an obligation under the statute to establish a record evidence, substantial evidence test. The Secretary's conditioning authority, if it is unalterable, imposes no requirement of a hearing or a discussion of any sort. How do we determine that? We have the obligation to enforce our orders as well as our statute. How do we do that? The Secretary says, well, the third party may raise the issue. The third party doesn't represent the public interest. The Commission

does, and the Commission is, it seems to us, in a bifurcated, unreal position, a distortion of the statutory terms.

In sum, it is our position that the licensing authority of the Commission is the central power to weigh and balance those interests which the Congress in its wisdom gave the Commission to decide in determining whether to issue a license. The Commission is obligated under statutory terms to make a determination that the license is not inconsistent with nor does it interfere with the purpose for which the reservation was created or acquired. That is the central power of the Commission. The Secretary, it seems to us, has the lesser power, which we normally give great deference to, and the problem rarely arises to make such conditions which relate to the way the project works impact on the reservation, and it seems to us that that kind of decision-making resting with the Commission, at that time, the Secretary having made a record the other way, can seek review.

QUESTION: Mr. Feit, you haven't said much about the statutory language. It is pretty strong. It is mandatory language, "shall be subject to and contain such conditions as the Secretary shall deem necessary."

MR. FEIT: Yes, I will turn to that right now,

Your Honor. It seems to us, of course, that this Ccurt has said, the statutory language must really -- even the use of "shall" may nct be absolute. People were saying --

QUESTION: It doesn't even have the word "reasonable" in it.

MR. FEIT: They didn't put the word "reasonable" in, but I think it was implicit in the situation in which the statute was enacted. It seems to us what happens is this. Tc the extent that the Secretary performs in this area where there is no tension, and most of the situations are not, we will accept that condition, and I think that is what they were trying to say in the '20 Act.

It seems to me if they were trying tc say something else than that, then they would have said that. They wouldn't have give the Commission the licensing authority. And the way the Commission -- the Commission must have the power, it seems to us, to assure that the conditioning authority is not used tc defeat the interference, inconsistency determination. It is there where the statute is not absolute. It is there where "shall" does not mean a veto. That is where "shall" simply means in the context of the exercise cf clear authority. Otherwise, Mr. Justice, as I said,

313(b) is turned on its head.

QUESTION: May I ask this question?

MR. FEIT: Sir.

QUESTION: One of the briefs suggests that Section 15 of the Federal Power Act controls with respect to relicensing.

MR. FEIT: That is issue we believe is not properly before the Court in this case, since the Commission specifically treated this license as an original license. And under the Chenery case and other cases, it seems to us the Court cannot reach out and decide that case where the Commission has not decided it.

Thank you.

CHIEF JUSTICE BURGER: Mr. Schulder?

ORAL ARGUMENT OF ELLIOTT SCHULDER, ESQ.,

ON BEHALF OF THE SECRETARY OF INTERIOR

MR. SCHULDER: Mr. Chief Justice, and may it please the Court, I would like to begin my remarks by focusing on the reservation proviso of Section 4(e) of the Power Act. The language of that proviso clearly shows in our view that Congress sought to ensure that reservations would be protected from the adverse effects of power development. It is only after considering the import of the Section 4(e) proviso that the legal issues

presented here can be properly addressed.

It is the Secretary's position here that the statute, Section 4(e), means exactly what it says. The statute provides that licenses may be issued for projects on reservations, but only if the Commission make a finding that the license will not interfere or be inconsistent with the purposes for which the reservation was created, but also licenses are specifically made to be subject to and to contain such conditions as the Secretary of the department under whose supervision the reservation falls shall deem necessary for the adequate protection and utilization of the reservation.

QUESTION: Mr. Schulder, do you still concede that if you are correct, that the conditions imposed by Interior have to be reasonable conditions?

MR. SCHULDER: Absolutely, Your Honor.

QUESTION: And how is the -- what is the process for review of the legality of those conditions? How does it work in light of Section 313? It is very unclear to me how you think the issue would be raised. Does it go to the Commission in the first place, the Power Commission in the first place to decide? And how is the judicial review triggered?

MR. SCHULDER: The issue could not go to the Commission to decide, because that would negate the

clear intent of Section 4(e). Section 4(e), which is the substantive grant of authority that is before the Court in this case clearly provides that it is the Secretary who shall determine which conditions should be included within the license, so it makes no sense to say that the Secretary can merely recommend conditions to the Commission. That would read the second part of the reservation proviso out of the Act.

Now, it is true that the Commission and the petitioners have argued that this would create some problems for judicial review. There are several responses that I have to that. First of all, it seems to me that this would be a case of the tail wagging the dog. I mean, it is the substantive provision in 4(e) that gives the Secretary the power. If there are any difficulties, and I don't concede that there are in terms of reviewing the Secretary's condition, it seems to me that the accommodation should be made on the judicial review end of the spectrum rather than cutting back the Secretary's authority.

QUESTION: Well, as a practical matter, how do you see the review taking place, and how mechanically would it work?

MR. SCHULDER: Okay. The Secretary's conditions must be included in the license that the

Commission issues. The Commission's order issuing the license is subject to review in the Court of Appeals under Section 313 of the Power Act.

QUESTION: Well, suppose the Commission thinks that they are unreasonable. How is the issue joined and put before the Court?

MR. SCHULDER: Well, the Commission can do one of two things at the licensing stage. The Commission can either issue the license with the conditions and make clear in its order that it does not agree with the reasonableness of those conditions. The applicant at that point certainly could challenge -- the applicant for the license certainly could challenge those conditions in the Court of Appeals, and the Secretary would be obligated to defend those conditions under the statutory standard that is laid out in 4(e).

In other words, the Secretary must show that the conditions that he prescribes are reasonably related to the purpose of ensuring that the purposes of the reservation are adequately protected, and that the reservation is adequately utilized.

QUESTION: The review in the Court of Appeals contemplates some sort of a record having been made somewhere, doesn't it? If the Commission can't examine it all under the reasonableness of the Secretary's

conditions, where would the record be made on which the Court of Appeals would review reasonableness?

MR. SCHULDER: Well, the record, as in this case, would be the same record that was before the Court of Appeals. In other words, the applicant could present whatever evidence or information with respect to the adequacy of the conditions --

QUESTION: Presented to the Commission?

MR. SCHULDER: Presented as part of his case.

QUESTION: Where?

MR. SCHULDER: Well, there are several ways in which this could be done. First of all, the Secretary, as he did in this case, notified the parties of the proposed conditions that he intended to issue. He then asked for comments upon those conditions, and I believe one of the applicants did file certain comments. That is one way in which the parties would have an opportunity at the administrative level to make their views known.

Second, in the course of presenting evidence to the Commission on other aspects of the license, the parties would be, certainly with respect to the interference, inconsistency finding, would present evidence that would be relevant to the Secretary in his determination of whether the conditions that he proposes to include are proper. In fact, in this case the

Secretary modified the initial conditions in order to take into account the evidence that had been brought out before the Adminsistrative Law Judge.

QUESTION: Well, you are suggesting that all the evidence would be presented to the Commission, but that the Commission can't make a finding on it. They can't weigh it. They can't consider it. They can't make a finding. So what is the Court of Appeals review? It is just confusing to see how it would work.

MR. SCHULDER: It may be confusing, but the problem here is with -- the problem here is not with 4(e). If there is any problem, it may be with the judicial review provision of the statute. Now, it seems to me that --

QUESTION: Well, you do agree there is a problem, don't you, on judicial review?

MR. SCHULDER: Well, the Commission under 4(e) has no power to make any finding with respect to the Secretary's conditions, and has no power to alter or modify those conditions, if you look at the language of 4(e) itself. It seems to me that it would be permissible or proper for the Secretary's conditions to be reviewable before the Court of Appeals under the APA review standards as part of the same procedure in which the Court of Appeals is considering the Commission's

order issuing the license.

QUESTION: But APA review ordinarily goes to the District Court.

MR. SCHULDER: It ordinarily does, but it does not in every case, Your Honor. The provisions of the APA specifically provide that it would go to the appropriate court to hear that matter, and here, since the whole case is going to the Court of Appeals to review the Commission's order, it certainly seems appropriate that it would be the Court of Appeals that would pass upon in the first instance the reasonableness of the Secretary's conditions.

QUESTION: Mr. Schulder, it seems to me that there is nothing in 4(e) that prevents the Commission from making -- giving its opinion as to the reasonableness of the Secretary's or -- I thought you said that a while ago --

MR. SCHULDER: That's correct.

QUESTION: -- that they could voice a disagreement.

MR. SCHULDER: Absolutely.

QUESTION: And I would suppose the parties before the Administrative Law Judge could introduce any evidence going to the reasonableness of the Secretary's conditions.

MR. SCHULDER: I agree with you.

QUESTION: And I would think 4(e) would be satisfied if the Commission said, we have to incorporate these conditions. We have hassled around with the Secretary. He won't give an inch. These are the conditions he insists on, so we have put them in the license, but we think they are improvident, unreasonable, and that they will in effect destroy this project.

MR. SCHULDER: Well, that is precisely what Congress intended when --

QUESTION: Well, you agree with that.

MR. SCHULDER: That's correct.

QUESTION: So why do you say they have no power to make a finding about -- or to -- as to reasonableness?

MR. SCHULDER: Well, I was just talking in terms of the technical language of the statute.

QUESTION: Well, so you concede that based on the evidence in the record as the Commission reads it, it could say the Secretary is out of his mind.

MR. SCHULDER: Certainly.

QUESTION: And then the Court of Appeals would be in a position to review it.

MR. SCHULDER: That's right, and this is

precisely, if we look at the legislative history of the Federal Water Power Act prior to its enactment in 1920, this is exactly what Congress had in mind. If we look at the statements on Pages 26 and 27 of the --

QUESTION: So where does that leave us in this case, Mr. Schulder?

MR. SCHULDER: Where does --

QUESTION: The Commission didn't include those conditions. Is that right?

MR. SCHULDER: That's right. The Court of Appeals remanded the case to the Commission with directions that it follow the statute and include the Secretary's conditions.

QUESTION: And if it does, there would still be left over the reasonableness of those conditions.

MR. SCHULDER: That's correct.

QUESTION: So we shouldn't reach that issue now, I take it.

MR. SCHULDER: Oh, it is absolutely not before the Court at this point, Your Honor.

QUESTION: But sooner or later it likely will be.

MR. SCHULDER: That's correct. But the Secretary's conditions have not been -- they are not part of the Commission's order, because the Commission

refused to include them.

QUESTION: I understand.

QUESTION: Well, Mr. Schulder, no one else wants to initiate review of the Commission's order, including now, as you tell us you must, the Secretary's conditions. May the Commission, disagreeing with the reasonableness of the conditions, initiate that review?

MR. SCHULDER: No, Your Honor, because the whole process under 4(e) is a process in which an applicant goes to the Commission requesting the license. Presumably if the applicant is not sufficiently interested to pursue the matter, then that is the end of it. The Commission has no affirmative authority to issue licenses where there are no applicants.

QUESTION: So it is disagreement with the conditions. It is fearing that they are unreasonable. It is not something that the Commission can ask the Court of Appeals to review.

MR. SCHULDER: Not on its own initiative. It can certainly make its views know.

QUESTION: The applicant can.

MR. SCHULDER: That's correct.

QUESTION: If the applicant wants to accept the conditions, of course, that -- I suppose there won't be any case left.

MR. SCHULDER: That's correct.

QUESTION: But you would say the Commission could appear in the Court of Appeals.

MR. SCHULDER: Oh, certainly.

QUESTION: And give its view.

MR. SCHULDER: Absolutely.

QUESTION: And here.

MR. SCHULDER: In this regard, I would like to point out that of course Section 4(e) refers not only to reservations within the jurisdiction of the Secretary of the Interior, but also to reservations within the jurisdiction of the Secretary of Agriculture and the Secretary of Defense.

In fact, if Your Honors would take a look at the map that has been provided by Petitioners, it does not appear on the map, but several miles north of Oceanside is a very large Marine base called Camp Pendleton. It seems to us that if there were any adverse effects of any project with respect to Camp Pendleton, the Secretary of Defense should be free --

QUESTION: Well, but Mr. Schulder, what about the word "within" in 4(e)? Camp Pendleton is not -- the power project is not within Camp Pendleton, nor is it within three of the reservations here, as I understand the record.

MR. SCHULDER: That's correct.

QUESTION: You rely on the plain language for part of your argument, but I don't suppose you do for those three reservations.

MR. SCHULDER: It is not exactly that we don't rely on the plain language. The problem is that the plain language doesn't really make sense. When you think of the broad definition of the term "reservation" in the statute, the term "reservation" includes tribal lands, but it also includes interests in lands owned by the United States, and a water right, as the Court of Appeals held in this case, at Pages 25 to 26 of the appendix to the petition, a water right clearly is an interest in land.

Now, certainly there is an ambiguity. It doesn't sound right to say that a license is issued within a water right.

QUESTION: It is your position that the plain language is plain when it helps you, and is ambiguous when it doesn't help you?

(General laughter.)

MR. SCHULDER: Not exactly, Your Honor.

QUESTION: Not exactly. But close.

MR. SCHULDER: Well, I think that there is a real ambiguity here, because of the broad definition of

the term "reservations" in the definitional section of the Act. And if you take that into consideration with Section 23(b), which states that the Commission shall issue licenses where a project will have an effect on a reservation, that suggests to us that in fact given the protective nature of the definition of reservations, the protective nature of Section 4(e) itself, that in fact the Secretary of Defense would be entitled to impose conditions on a license if an upstream project were threatening to impair the utilization of that military base.

QUESTION: Mr. Schulder, is there an issue before us as to the power of the tribes to veto?

MR. SCHULDER: Well, the issue about whether Section 8 of the Mission Indian Relief Act has been impliedly repealed by the Federal Power Act is the third issue in the case, and it is our position, as we stated in our brief, that it has not been repealed by the Federal Power Act.

QUESTION: And if it hasn't been, what is the authority of the tribe?

MR. SCHULDER: If it has not been, than any water conveyance facility that will be going across a reservation land must be approved by the bands before that facility can be operated.

QUESTION: Well, if you are right in that regard, does that render the rest of the case almost beside the point?

MR. SCHULDER: It might as a practical matter, Your Honor.

QUESTION: It might? What could they vetc in this case?

MR. SCHULDER: Well, they could state that they do not agree to the canal going across their reservations. That is --

QUESTION: You mean to the extent it is going to be changed? There is already a canal across their reservations, isn't there?

MR. SCHULDER: That's correct, but to the extent that it is going to continue in operation, and also to the extent that it may be changed in the future.

QUESTION: So you treat this as a new licensing.

MR. SCHULDER: That's correct. We agree with the Commission that this case should be treated as an original license.

QUESTION: So that if the tribes have a veto, why, the case is really over.

MR. SCHULDER: That's correct.

Thank you, Your Honors.

QUESTION: Mr. Schulder, I am a little bothered by the posture of the case that Justice White just adverted to. It seems to me that if one is seeking an original license for a project that has never been built before, it is one thing to say that the Indian reservation, federal reservations generally should have a veto power, and shouldn't -- you shouldn't put it in where they don't want it, and that sort of thing, if it is basically their jurisdiction. But if substantial outlays have already been made for pipes and canals and that sort of thing, then is the inquiry exactly the same at the relicensing stage?

MR. SCHULDER: Well, we believe that it is, because every applicant at the relicensing stage is at an equal level. Congress specifically provided in the Federal Power Act that there would be a 50-year term to the license, and I believe the bands' brief in its introduction to the summary of argument sets out the statutory scheme. In fact, the Commission in this case concluded that the net investment in severance would have to be paid to the license. The original licensee in this case was zero, because --

QUESTION: It had all been returned.

MR. SCHULDER: That's correct.

Thank you.

CHIEF JUSTICE BURGER: Mr. Pelcyger.

ORAL ARGUMENT OF ROBERT S. PELCYGER, ESQ.,

ON BEHALF OF RESPONDENT INDIAN MISSION BANDS

MR. PELCYGER: Mr. Chief Justice, and may it please the Court, I would like to begin by addressing a few of the issues that were raised previously.

First of all, with regard to the judicial review question, I agree with Justice White's analysis of that. Let me just add that I see no difference between the Court of Appeals' review of the Secretary's conditions as opposed to the Commission's own conditions.

The record is compiled before the Federal Power Commission -- the Federal Regulatory Commission, and an applicant, based on that record, can contest either the Commission's conditions based on their lack of reasonableness, or the Secretary's conditions based on their lack of reasonableness, so I don't see that it presents any problems or any difficulties.

With regard to relicensing, Justice Rehnquist, I would point out that Section 15, which is their relicensing provision, specifically says that the Commission is authorized to issue a new license to --

QUESTION: Is that in one of the briefs, the section you are quoting from?

MR. PELCYGER: Is the --

QUESTION: What you are just reading, is it in one of the briefs where one could find it?

MR. PELCYGER: I think I have a footnote on my brief on that, Your Honor. I can put my --

QUESTION: What section are you quoting from?

MR. PELCYGER: I am quoting Section 15(a). It is 16 USC Section 808(a).

QUESTION: Of what Act?

MR. PELCYGER: It is in the -- I'm sorry. It's in the petitioners' appendix.

QUESTION: What Act are you --

MR. PELCYGER: Of the Federal Power Act. It's in the petitioner's appendix at Page 386.

QUESTION: Thank you.

MR. PELCYGER: And this is the relicensing provision, and I don't understand why there's a controversy about whether this is an original licensing or a relicensing, because the relicensing provision specifically says that the Commission can issue either a new license or an original license under the then existing laws and regulations, and obviously the reservation proviso is an existing law.

So, as the Court of Appeals for the District of Columbia Circuit held in the Lac Courte Oreilles case, which is cited in the briefs, the whole concept of

relicensing was that it would be a new proceeding, and it would take place under the terms of existing laws, and this Court -- this Court's only decision dealing with this relicensing question was United States against Appalachian Electric Power Company in 311 USC 76, where the Court specifically referred to the relicensing provisions and upheld their constitutionality against the claim that they would constitute an unlawful taking of land without providing just compensation.

Justice O'Connor, the Secretary's conditions would not be an adjudication of water rights by the back door. The whole point of the Secretary's conditions is to set forth that which would be necessary to provide for the adequate protection and utilization of the reservation. Those conditions can be considered as if one assumed that there were no water rights of the reservations. The Secretary is simply saying, this is what is necessary to protect those reservations and to ensure their adequate utilization.

QUESTION: And it would have no effect on the pending water rights litigation?

MR. PELCYGER: That's right, unless the petitioners -- it would not affect the existing water rights dispute unless the petitioners were not able to utilize their water right, in which case the dispute

would not be resolved, but would become moot essentially.

Now, the petitioners are seeking here to enter three Indian reservations to gain use and control of Indian lands without obtaining the Indians' consent for the purpose of diverting water away from six reservations. The reason that they are invoking the Federal Power Act, despite the fact that the hydroelectric aspects of this project are incidental and de minimis, is that without a license from the Commission, they would be required to bargain with the bands and the Secretary of the Interior for the use of reservation lands.

So, they are attempting to use the Power Act to circumvent or avoid the requirements of other laws. This is doubly ironic because in the first place the power aspects of the projects are, as I indicated, so small and incidental, and secondly because the Power Act so explicitly ensures that the interests of Indians as well as other federal reservations will not be sacrified to the development of hydroelectric power.

There are two aspects of this case that I want to stress. The clearly expressed --

QUESTION: You are not challenging, are you, Mr. Pelcyger, the jurisdiction of the Federal Power

Commission --

MR. PELCYGER: No, we do not --

QUESTION: -- because of the thin reed that the power thing is hinged?

MR. PELCYGER: We did not cross-petition on that ground. That is correct. But I think that that issue is still relevant when addressing the question of which Act is controlling in these particular and unique circumstances. The more general statute of the Federal Power Act, which only tangentially applies to this project, if at all, assuming it applies at all, or the much more specific provision of Section 8 of the Mission Indian Relief Act, which is what this case is all about.

QUESTION: Well, I don't think there is any halfway house. It seems to me if you concede that it is before the Federal Power Commission, the Federal Power Act certainly applies. That doesn't say it overrides the Mission Indian Act.

MR. PELCYGER: I agree with that, but the question of whether it overrides the Mission Indian Relief Act may turn in part of whether this case is really a power project, in which case it would come squarely within the Federal Power Act, or whether it is really a water diversion project, and that is its principal effect.

QUESTION: Do you say then if it were 60 percent power and 40 percent water diversion, which I take it this is not, the bands would have a weaker case?

MR. PELCYGER: To put that issue in context, our first position is that the provision of the Michigan Indian Relief Act must be given effect because the reservation proviso specifically protects against interference the purposes of Indian reservations.

The Mission Indian Relief Act defines the purposes of Indian reservations, and therefore pursuant to 4(e) must be given effect, but if the Court disagrees with that, and if the Court concludes that somehow the Indian consent requirement may under some circumstances be inconsistent with the Federal Power Act, then one looks to the particular project involved, and since this case is first and foremost and primarily a water diversion project, the Mission Indian Relief Act should control here even if it wouldn't control if this were a real, true to life, honest to goodness power project. That is our position.

This is not, let me stress, a case in which the Indians must ask the Court to presume that the federasl government intended to deal fairly with the Indians or to implement an assumed solicitous attitude.

Rather, both the Federal Power Act and the Mission Indian Relief Act manifest on their faces and in their histories the clear and specific intent to preserve the integrity of Indian reservations and fully to protect Indian property rights and Indian sovereignty.

QUESTION: What business does the Commission have or what authority does it have over a straight water diversion project? None, does it?

MR. PELCYGER: That's correct. But this project has two minimally --

QUESTION: I understand.

MR. PELCYGER: -- midsized power plants.

QUESTION: But wasn't one of the power plants built and isn't it run by water taken out of a reservoir by a canal?

MR. PELCYGER: Both of them are, yes. One of them is directly from a canal, and one of them is through a reservoir.

QUESTION: And the canal takes water for metropolitan use.

MR. PELCYGER: No, this is --

QUESTION: Just a straight power --

MR. PELCYGER: Well -- Oh, I'm sorry. For municipal use. Yes.

QUESTION: Yes.

MR. PELCYGER: Yes.

QUESTION: Down to Escondido?

MR. PELCYGER: Yes, and to Vista.

QUESTION: And do you say that that project is at risk now too, that -- just the metropolitan water use?

MR. PELCYGER: The canal that crosses the reservations. Yes, we say that the right-of-way was granted, Justice White, in 1924 for 50 years. That right-of-way expired in 1924. They have had it for 60 years. They got all that they bargained for. They got more than they bargained for. Their investment is fully paid off, and now it is a new proceeding --

QUESTION: And this is wholly aside from whether it is a power project or not.

MR. PELCYGER: Yes, although as I explained to Justice Rehnquist, I think that the incidental nature of the power aspect can come into play if the Court concludes that under certain circumstances if this were a true honest to goodness power project, Indian consent would be overridden by the Act.

The fact that this is not a real power project means that effect can and must and should be given to the very specific statute. After all, it was the first and only time that Congress specifically addressed the

issue of what should happen with regard to water conveyance projects across the lands of the Mission Indian reservations. It enacted Section 8, and Section 8 requires the consent of both the Indian tribes and the Secretary of the Interior, and that intent is what is controlling in this case.

QUESTION: Was the original 50-year license for the water project at that time tied up with the power project too, or wasn't it?

MR. PELCYGER: Yes. The conveyance system is the same. The water is conveyed, and it both generates --

QUESTION: Well, this was long before the Federal Power Act.

MR. PELCYGER: Yes, that's right.

QUESTION: And so from whom did the easement for right-of-way run?

MR. PELCYGER: Well, there are a combination of those sources. Originally there was -- the Secretary of the Interior granted a permit in 1908. There was one contract with an Indian band that was approved pursuant to Section 8.

QUESTION: For both the power and the water?

MR. PELCYGER: No, at that time there was no power.

QUESTION: Just water?

MR. PELCYGER: Just water. Let me also point out that both the Escondido and Vista areas, there is no issue in this case that those areas are going to be deprived of their only supply of water. Both of them have alternate sources of water from the Metropolitan Water District of Southern California that bring in the water from the Colorado River and northern California.

QUESTION: They might also strike a deal with the tribe.

MR. PELCYGER: That's right.

QUESTION: They just might have to pay a little more money.

MR. PELCYGER: That's absolutely right, and the issue here is that the San Luis Rey River supply is somewhat cheaper than the alternate supply that is imported through the Metropolitan Water District, but there is no evidence in this record to indicate that the welfare or the economies of these areas would be adversely affected in the slightest bit if they had to obtain all of their water from the alternate source where they are now obtaining most of their water.

QUESTION: Through how many reservations does the canal go?

MR. PELCYGER: Three.

QUESTION: Three.

MR. PELCYGER: And the project diverts waters away from six reservations -- six Indian reservations.

QUESTION: And how -- what's the total mileage of the canal as it runs through the reservations? Do you know?

MR. PELCYGER: Those figures are -- I don't have them immediately available. They are in the Commission's opinion, I am sure.

Now, so far as the applicability of the Mission Indian Relief Act is concerned, the petitioners' primary contention is that Section 8 can and should be ignored because it was effectively repealed by the Federal Power Act, because they claim that Section 8 is inconsistent with the Federal Power Act, but the fatal flaw in this argument is that it entirely overlooks the reservation proviso itself which expressly prohibits any interference with the purposes for which the reservations were established.

This proviso, as the Court of Appeals pointed out, would be totally meaningless if Congress intended to sanction the abrogation of the rights and powers guaranteed to Indian tribes by preexisting treaties and statutes.

Now, the other --

QUESTION: Of course, even if you are wrong on that, if the Secretary happens to be right on his side of the case, he will have the authority to put all the conditions in he wants to.

MR. PELCYGER: That's correct. There is dual protection, dual safeguards.

The petitioners' other argument on the Mission Indian Relief Act is that Section 8 in the Federal Power Act should be viewed as alternate mechanisms for obtaining canal rights of way across Mission reservations. That makes no sense whatsoever.

The one point on which all parties in this case are agreed is that the use of Indian lands for a power project, and this is assumedly a power project, requires a Commission license. Now, it may also require Indian consent, and that is the issue, but it certainly requires a Commission license.

So since a Commission license would be required and necessary in any event, obtaining the consent of the Indians on the Secretary of the Interior under Section 8 is not a true alternative. It would be entirely superfluous and unnecessary, because it would never be utilized if the Commission's license had to be obtained in any event.

By contrast, requiring, as both the bands and

the Secretary contend, requiring both a Commission license as well as compliance with Section 8 of the Mission Indian Relief Act gives effect to both statutes while preserving their overall sense and purpose, and does not subordinate one to the other.

On the definition of reservations, I agree with Mr. Schulder. The ambiguity that is created here is that water rights are expressly concluded, and there is no doubt about that, within the Act's definition of reservations. That much is clear and unambiguous. The ambiguity arises because the reservation proviso applies to licenses within a reservation, and the question is, how can a license be within a water right?

That doesn't really make sense, and so that is a real true to life ambiguity, and our contention is that that ambiguity has to be resolved in favor of the downstream reservations for several reasons.

First and foremost is that that interpretation carries out and furthers the evident protective purpose toward reservations in the Federal Power Act, both in the reservation proviso itself as well as in the broad definition of reservation in the Act, and secondly, as Mr. Schulder pointed out, because of the provision in Section 23(b) that indicates that the word "effect" -- that uses the word "effect" in a synonymous context with

the word "within" in Section 4(e), and thirdly, because Section 10(e) of the Act expressly uses the term "tribal lands embraced within Indian reservations" in defining when manual charges are to be fixed by the Commission.

So, when Congress wanted to limit the term "Indian reservations" to lands that are physically within reservation boundaries, it knew very well how to do that, and it did it in Section 10(e).

Thank you.

CHIEF JUSTICE BURGER: Do you have anything further?

ORAL ARGUMENT OF PAUL E. ENGSTRAND, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. ENGSTRAND: Your Honor, if I may on this question of water rights, the reason the land needs to be protected is because of a physical imposition on the land. The reason water rights need not be protected is because the courts protect the water rights, and the Congress said in Section 27 that nothing in the Federal Power Act would interfere with the water rights given by the states for the control and use of water.

This complex arrangement that Mr. Schulder talked about, of course, Congress didn't lay that out. Where would the fact-finder be that you were going to weigh the substantial evidence rule against if you don't

read "reasonable" in front of the word "shall." And I think that is what Justice McKinnon said in Lac Courte Oreilles. He said that you must -- probably he was saving that until later. It wasn't ripe for decision. But that Congress must have meant substantially or reasonable in --

QUESTION: Well, I take it the United States agrees the Secretary's conditions must be reasonable.

MR. ENGSTRAND: Yes, Your Honor, and I --

QUESTION: And that even the Commission may say what it thinks about his conditions. They just have to put them in.

MR. ENGSTRAND: Yes. I don't see how that can work, like Justice O'Connor suggested. I think that one thing that is clear that overrides all this is that the Congress was explicit in the role the Commission should play in water power development. The Congress was explicit that tribal lands were to be available for water power projects. The Congress was explicit that the decision-maker should be the Commission, the independent body.

Thank you.

CHIEF JUSTICE BURGER: Thank you, counsel. The case is submitted.

(Whereupon, at 11:02 a.m., the case in the

above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-2056 - ESCONDIDO MUTUAL WATER COMPANY, ET AL., Petitioners
v. LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA BANDS OF MISSION INDIANS, ET AL.

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