JOHN M. LINDSKOG
ATTORNEY AT LAW

October 18, 1994

FEDERAL EXPRESS

Frank J. McGarr, Esquire
Pope, Cahill & Devine, Ltd.
311 South Wacker Drive, Suite 4200
Chicago, Illinois 60606

Re: Arizona v. California

Dear Special Master McGarr:

I have enclosed herewith the original and two copies of the West Bank Homeowners Association's Reply on Motion for Leave to Intervene and Certificate of Service. Please return a file stamped copy of each document to my office in the self-addressed stamped envelope provided for that purpose.

Pursuant to your letter to all parties dated August 11, 1994, this motion is now fully briefed.

Thank you for your consideration in this matter.

Sincerely,

John M. Lindskog
Counsel for Intervenors

cc: court approved Service List

enc. Original & 2 - West Bank Homeowners Reply on Motion for Leave To Intervene, Certificate of Service, SASE

921 E. WHITTIER BOULEVARD, LA HABRA, CALIFORNIA 90631 • (310) 694-5342 • FAX (310) 694-6222

No. 8, Original

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

Before the Special Master

*

State of Arizona,

V.

State of California, et al.

*

WEST BANK HOMEOWNERS ASSOCIATON'S REPLY ON MOTION FOR LEAVE TO INTERVENE

*

John Lindskog
West Bank Homeowners Association
921 E. Whittier Boulevard
La Habra, California 90631

Counsel for Intervenor

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TABLE OF AUTHORITIES

I. INTRODUCTION

The United States and the Colorado River Indian Tribes (hereafter "Tribes") oppose the West Bank Homeowners Association's (hereafter "Association") motion to intervene with poorly reasoned, insupportable, irrelevant and spurious claims.

The United States and the Tribes refuse to acknowledge that this case is first and foremost a **boundary** dispute and the resolution of that controversy is the substratum upon which the amount of irrigable acreage within the reservation is determined as the final factor in the equation this Court sanctioned years ago to ascertain water allocations among the various parties. They have developed a hyperopic view of the primary focus of this case as evidenced by the statement "(t)he issue before the Special Master is whether the Tribes are entitled to an additional allocation of water rights from the Colorado River." Tribes' response at 9. This assertion is plainly wrong. Indeed, a brief review of the case history makes it crystal clear that this Court intended to bring an end to this "litigious marathon" for **all** purposes.

The Special Master's Memorandum Opinion and Order No. 4 (September 6, 1991) (hereafter "Opinion No. 4") is determinative of this issue. In this opinion, the Special Master addresses the question of whether the Supreme Court intended the final determination of the entire western boundary. The position of the United States and the Tribes was that only the northern portion of the boundary was justiciable because the Secretary of Interior's final determination of the lower one third of the western boundary had not been made.

This attempt to limit the Special Master's jurisdiction was unequivocally and soundly rejected. Special Master McGarr pointed out that in Arizona I this Court reserved the boundary issue for future determination. Opinion No. 4 at 11. He also states:

> **"More compelling is the reading of what the Supreme Court intended in its reference in this case as it granted the State parties' motion to reopen the case. The court at that time had before it a history of lengthy litigation which had produced little by way of resolution of issues. Largely as a result of the court's piece-meal limitation of earlier Special Master's jurisdiction, there had been produced a situation which had not only failed to provide any simplification of the case, but had created a litigious marathon which promised to be interminable."**

The special Master goes on to say:

> **"An examination of the pleadings supports the State parties contention that the court finally intended to resolve all boundary issues as a basis for the determination of all consequent water rights issues. ... It is the determination of the Special Master that the entire boundary dispute has been referred, and ... this boundary determination is to create a basis for the allocation of water rights to the claimants in this case."** Opinion No. 4 at 13, 14.

The Special Master later stated "(b)y agreement of the parties, the sole issue to be resolved is the meaning of the Executive Order of 1876 and whether the disputed portion of that order establishing the western boundary of the Colorado River Indian Reservation intended the boundary to be a fixed line or a riparian boundary". Memorandum Opinion and Order No. 14 (September 20, 1993) (hereafter "Order No.14"). The Special Master's words clearly follow the order of this Court declaring "(t)he 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." **Arizona v. California,** 493 U.S. 886 (1989) (emphasis added).

Therefore, it is within the purview of this Court to consider claims that bear a direct and substantially proximate relationship to the subject matter of this dispute regardless of whether such claims have "no water right component". U.S. response at 3. The motion to intervene should be granted for this reason and on the basis of the additional rationale provided herein.

II. INTERVENTION WILL NOT UNDULY BROADEN SCOPE OF LITIGATION

The true scope of this litigation is set forth above. The Association seeks, at a minimum, on its own behalf and on behalf of the general public, to ensure the final decree defines the boundary as the westerly most limit of the reservation as established by the 1876 Executive Order. This objective, and the negation of any remaining ambiguities that may exist as a result of the Secretary of Interior's 1969 ex parte order, is within the scope of this Court's jurisdiction because it deals directly with the boundary claims. Furthermore, it is within the province of this Court's review of the boundary question to consider the constitutionality or applicability of any orders the United states or the Tribes proclaim to resolve, limit, affect or alter the Court's final determination on this pivotal issue in order to promote judicial economy and thereby bring closure to this litigious quagmire. The Court's examination of these questions, therefore, will not result in an undue broadening of the scope of this case.

III. INTERVENTION IS NOT IN CONFLICT WITH PRIOR RULING ON JOINDER MOTION

The Tribes' motion under Federal Rule of Civil Procedure 19 sought to join all individuals and entities with claims to land in the disputed territory. The Special Master determined that the "(a)ddition of an unknown number of private entities as defendants for the purpose of litigating individual title claim would further delay a final resolution of the litigation." Memorandum Opinion and Order No. 8 at 6 (September 21, 1992). To allow a review of each and every title claim would have been an incomprehensible nightmare for all parties in this case. Indeed, the granting of that motion would have delayed a final resolution of this litigation until sometime in the next millennium.

The Association's challenge, however, presents a different issue in that it does not deal with any claim of title. It concerns the expressed limitation of the boundary under the Executive Order of 1876 as interpreted by this Court and the constitutionality or applicability of any orders that may affect those bounds. The Special Master has not previously been presented

with or ruled on this exact issue. Judicial review of this concern is in the public interest and will not unreasonably delay these proceedings.

IV. THE ASSOCIATION SATISFIES THE CRITERIA FOR INTERVENTION UNDER RULE 24

A. Brief Accompanying Motion is Sufficient Pleading Under Rule 24(c).

The United States and the Tribes contend the Association has not met the procedural requirements under Federal Rule of Civil Procedure 24(c) in that "a pleading setting forth the claim or defense for which intervention is sought" did not accompany the motion. U.S. response at 2, Tribes' response at 3, 4.

A substantial amount of consideration went into determining how best to meet this requirement. After consulting with, among others, two well known law school professors considered experts in Federal Civil Procedure, two federal court practitioners, one of the authors of **Supreme Court Practice** (7th edition) and a former clerk of the United States Supreme Court, it was decided that the brief accompanying the motion would meet the requirements of the rule since the boundary dispute was already before the Court. In fact, the Association's brief resembles in format the April 10, 1978 Motion of the Colorado River Indian Tribes and the Cocopah Indian Tribe for Leave to Intervene in this case in that it too was not accompanied by a separate pleading. Based upon the responses of the United States and the Tribes, it is obvious that they are well aware of the nature of the Association's claim for which intervention is sought.

B. Rule 24 (a)(2) Requirements for Intervention as of Right are Fully Satisfied.

Contrary to the assertions of the United States and the Tribes, the Association fully satisfies each of the four criteria required for intervention as of right as reiterated below.

1. The Association's Motion is Timely.

The question of timeliness lies within the ambit of the Court's discretion and it encompasses the consideration of all circumstances surrounding the case and the filing of the motion. The age of the case itself is often of no consequence. For example, the Tribes point out that "(t)his action was originally filed forty-two years ago in 1952." Tribes' response at 6. However, the Tribes' motion to intervene in this case was not filed until **twenty-six years later** as noted on page 5 supra.

The Association cited, in its motion to intervene at page 6, three cases wherein intervention was granted long after the merits of the case were before the court. Those cases involved motions to intervene in pending original actions before this Court by private individuals and organizations and are directly on point in supporting the motion at bar. The Tribes' authority cited at page 6 of their response is so far removed from these circumstances and so unrepresentative of this action as to not warrant any serious consideration by this tribunal.

The Tribes claim that "the Association has been represented in this stage of the proceedings since the Arizona v. California I decree was reopened in 1989." Tribes' response at 8. This assertion is absolutely false. The Association was not formed until November of 1991. Due to a lack of funds, the Association was unable to retain counsel on a permanent basis until just prior to the March 1993 trial on the boundary dispute.

The issue of the ultimate impact of this case on the Association's and the general public's interests has been an obscure question for the United States and the Tribes at least since the Special Master's Order No. 14 was handed down. Shortly after that September 20, 1993 ruling, counsel for the Justice Department told the Association's counsel during a telephone conversation that this case only concerned water rights. During a subsequent telephone conversation two weeks later, the same Justice Department counsel made a 180 degree reversal of that statement and specifically stated the effect of Order No. 14, if adopted by the Court, is the Tribes had in fact lost any rights whatsoever to administer the lands west of the river and (the) their only recourse was to seek legislation in Congress.

Counsel for the Association sent the Department of Justice a letter on November 19, 1993 requesting a specific written response to this question. (A copy of this letter is included herewith as Exhibit 1). A reply to that letter was never received nor were numerous messages responded to that were left for opposing counsel at the Department of Justice in January and February of 1994.

In April of 1994, during a meeting with the in-house counsel of the Tribes at their offices, it was quite obvious the United States and the Tribes were going to do everything possible to continue this charade until forced by a higher authority to do otherwise. This motion to intervene was precipitated by the lack of cooperation from the Department of Justice and the Tribes to expressly agree to honor the boundary as established by this Court.

The Tribes' claim that intervention will prejudice the existing parties because "the Special Master will be forced to revisit the boundary location issue" and "if the Association has its way, the case will shift into reverse", are spurious at best. Tribes' response at 7, 8. No such dire consequences will arise as a result of judicial review of these issues.

It is well within the Court's discretion to determine, in weighing all the circumstances and considering the public interest, that no satisfactory degree of prejudice to the parties exists to deny intervention and the motion is timely.

2. The Association Has A Substantial Interest In The Subject Matter of this Litigation.

Once again, the United States and the Tribes' assertions that the subject matter of this case is purely water rights leads them to the erroneous conclusion the Association has no interest in this litigation. The Tribes' contention that the concerns expressed in the Association's moving papers are those of "mere lessees of lands within the disputed area" is an affront to the constitutional issues raised therein and the notions of due process. Tribes' response at 10.

The Tribes contempt for the rights of others is illustrated by their absurd observation that "the Association's members will have to pay rent regardless of who has jurisdiction over the lands covered by the Secretary's Order." Tribes response at 11. The Association and the general public have a substantial interest in protecting the integrity (of) and access to public lands and the legal rights and remedies afforded them under the publicland laws, rights and remedies which do not exist on reservation land.

Lastly, another example of the Tribes disdain to honor the judicial process can be shown by contrasting their statement "(t)he Association's real complaint in its motion is that its members feel 'forced . . . to submit to the dominion and control of the (Tribes) . . . '" with their conduct. Tribes' response at 11 quoting the Association's motion at 2. Since this motion was filed last August, more than thirty-eight of the Association's members received notices to vacate by December 31, 1994 the residences they have occupied for as long as the last thirty years. (A copy of one of these notices is attached hereto as Exhibit II). The Tribes provided the nugatory claim that certain safety concerns "expose the Tribes to liability." Exhibit II at 1. Everyone knows the Tribes have **no liability whatsoever.**

For these Association members, the dominion and control of the Tribes is more than a "feeling"; it is a powerful force that can end a family tradition with no real, affordable legal remedies and it is backed up with the threat "all necessary legal action will be taken to assure compliance." Exhibit II at 2. The potential that a travesty of justice will result with the ejectment of these members by an entity that, as a result of this case, may be acting beyond its legal boundary with no valid legal basis is great. Therefore, the Association's interest in this boundary dispute is substantial and it is in the public interest that its claim be judicially reviewed.

3. Denial of Intervention Will Bar Protection of the Associations' Interests.

The Tribes complain the Association is using intervention as a "backdoor method to introduce issues that are not within the Special Master's jurisdiction" and "to raise issues which are otherwise barred by the United States' and the Tribes' sovereign immunity." Tribes' response at 2, 3. The United States, on the other hand, believes "(n)othing in this action will impair or impede the Association's ability to seek relief against the federal

government in the proper forum when its claims are ripe." U.S. response at 7. It's interesting that one opponent asserts these issues are barred by sovereign immunity while the other opponent, who in fact is charged with fiduciary duties to the former, believes relief can be sought but only when the claim is ripe.

The Association clearly established in its motion at pages 3 through 5 why disposition of this action in its absence will absolutely prevent it from protecting its interests. The financial burden of battling the United States starting at a lower court can not be sustained by this group. All one has to do is consider the incredible number of years and the unimaginable costs borne by the State parties to get where they are now. The price of justice to conquer the will of the crown, with its limitless resources, is far beyond the reach of all but the most financially well endowed parties. This is precisely the reason why the United States is able to violate the Constitution and congressional acts with impunity when the harm it generates thereby is thrust upon those of lesser means.

The doctrine of sovereign immunity should never be allowed to be used as a shield to prevent judicial review of the acts of government employees who exercise limited powers bestowed on them by Congress. To fail to rule on the greater constitutional issues destroys the historical "checks and balances" that were built into our system of government to enable it to survive and enure to the benefit of future generations. Furtheremore, it is repugnant to the doctrine of judicial supremacy established by this Court in **Marbury v. Madison**, 1 Cranch 137, 5 U.S. 137 (1803). Sovereign immunity simply cannot exist when the underlying basis upon which it is claimed is in violation of the Constitution.

This is truly the only forum in which the Association's claim can be heard. Its claims are ripe. It has a direct stake in the controversy. The threat of further irreparable harm is real and immediate. Without a hearing before this tribunal on its claims, the Association's compelling interests and that of the general public will not be protected.

4. Inadequate Representation.

The refusal of the opposing parties to properly characterize the core issue in this case leads them like lemmings to another erroneous conclusion that there can be no inadequate representation because the issues raised by the Association are outside the scope of this case. The Association's rendition of the true scope of this case and its review of this question at pages 5 and 6 of the motion to intervene satisfies this requirement.

C. The Association is Also Entitled to Permissive Intervention Under Rule 24 (b)(2).

Rule 24(b)(2) permits intervention when the movant's claim and the main action have a question of law or fact in common. The Association's claim in this boundary dispute as detailed herein focuses on the intent of the Executive Order of 1876 and is in common with the agreement of the existing parties on the central issue that was determined during the March 1993 trial, which is the subject of the Special Master's Order No. 14. Therefore, the Association is entitled to permissive intervention.

V. CONCLUSION

The certain strategy of the United States to continue to assert any authority it can get away with on behalf of the Tribes beyond the bounds of the reservation as determined by this Court must be struck down before it is implemented. The arguments it employs to support the legal right to do so are reminiscent of the pretzel logic put forth by the United States in their claims in the Fort Yuma Indian Reservation litigation. In a blistering ruling in that case, the Special Master soundly rejected the notion that extra-judicial documents can be read to "modify the final order in that case." Memorandum Opinion and Order No. 5 (January 20, 1992).

A similar treatment should be accorded this case. Otherwise, where are the checks and balances to ensure justice? The United States, according to its arguments, can transfer all the public land it wants to a Tribe on the order of the Secretary of Interior based on a solicitor's opinion and that act is not subject to judicial review because of sovereign immunity. The United States can also sufficiently cloud the title of private landowners who cannot afford a protracted legal battle and who end up losing by default, as has happened here in this area. Where does it stop? It stops here - in the Supreme Court of the United States.

The interests of the public and the promotion of judicial economy necessitate judicial review of these issues to terminate the tyrannical practices of the United States and bring an end to this "litigious marathon." The West Bank Homeowners Association is the only party striving to champion this cause. On its own behalf and on behalf of the general public, it hereby respectfully requests that this Court grant the motion for leave to intervene.

Dated this 18th day of October, 1994.

Respectfully submitted,

(s/John Lindskog)
Counsel for Intervenor
West Bank Homeowners Association
921 E. Whittier Boulevard
LaHabra,California 90631
(310) 694-5342

NOTE: This document is a re-typed version of the actual legal document to cut down on printing and postal costs. The only difference is the spacing.

November 19, 1993

Mr. Patrick Barry
Deputy Assistant Section Chief
DEPARTMENT OF JUSTICE
Environment and Natural Resources Division
Indian Resources Section - Room 6702
601 Pennsylvania Ave. N.W.
Washington, D.C. 20004

Reference: 1. AZ v.CA No.3
2. MEMORANDUM OPINION AND ORDER NO.4
3. MEMORANDUM OPINION AND ORDER NO.14

Subject: **Legal effect of the final determination of the disputed western boundary of the Colorado River Indian Reservation by the United States Supreme Court.**

Dear Mr. Barry:

I appreciate your continued assistance and cooperation in regards to matters concerning the disputed area of the western boundary of the Colorado Indian Reservation. Those of us who occupy this area have been looking forward to a final resolution of this dispute by the United States Supreme Court ever since Secretary of the Interior Udall issued his ex parte order on January 17, 1969 and the subsequent transfer of control of the land from the Bureau of Land Management to the reservation. We were pleased to hear that Special Master McGarr's Memorandum Opinion and Order No.14 dated September 20, 1993 clearly settled this issue for the states parties.

However, I was quite surprised to discover that some persons associated with the Tribes are steadfastly asserting that this was a "water rights" case only and did not affect the right of the Tribes to administer the lands in question for the purposes of collecting rents and other fees associated with the exercise of jurisdictional control. Even you, Mr. Barry, considered this to be an accurate assessment when the Special Master's Opinion No.14 was handed down. You have since indicated that such a result is legally incorrect and the Tribes have in fact lost any rights whatsoever to administer the lands west of the river. This is why you have advised the tribes that their only recourse is to seek legislative action in Congress.

It is my firm conviction that this self-serving "spin" on the legal effect of this case by the Tribes is void of any legal merit and is being espoused by persons who not only have no knowledge of the history of the case but are ignoring the historical doctrine of Judicial Supremacy established in **Marbury v. Madison**, 1 Cranch,

137, 2 L. Ed. 60. Indeed, a brief review of the case history makes it quite clear that the Supreme Court intended to bring an end to this continuing litigation for all purposes.

Special Master McGarr's Opinion No.4 is determinative of this issue. In this opinion, the Special Master addresses the question whether the Supreme Court intended the final determination of the entire western boundary. The position of the United States and the Tribes was that only the northern portion of the boundary was justiciable because the Secretary's final determination of the lower one third of the western boundary had not been made.

This attempt to limit the jurisdiction of the Special Master was unequivocally and soundly rejected. Special Master McGarr pointed out that in Arizona I the Supreme Court reserved the boundary issue for future determination. McGarr also stated:

> "More compelling is the reading of what the Supreme Court intended in its reference in this case as it granted the State parties' motion to reopen the case. The court at the time had before it a history of lengthy litigation which had produced little by way of resolution of issues. Largely as a result of the court's piece-meal limitation of earlier Special Master's jurisdiction, there had been produced a situation which had not only failed to provide any simplification of the case, but had created a litigious marathon which promised to be interminable."

McGarr goes on to say:

> "An examination of the pleadings supports the State parties contention that the court finally intended to resolve all boundary issues as a basis for the determination of all consequent water rights issues. ...It is the determination of the Special Master that the entire boundary dispute has been referred, and ... this boundary determination is to create a basis for the allocation of water rights to the claimants in this case."

It is clear that the determination of the Special Master noted above coupled with the doctrine of Judicial Supremacy necessitates the obvious conclusion that the Supreme Court action in this case would nullify the 1969 ex parte order of Secretary Udall. (The Secretary's Order was based upon Solicitor Weinberg's flawed and excessively bootstrapped opinion).

This case is in fact a boundary dispute. The allocation of water rights is an ancillary consequence of the final determination of the boundary issue. Therefore, I would appreciate your written response to the following question:

> Upon the Supreme Court's certification of the Special Master's decree in this case, will the Department of Justice notify the Department of Interior that the Secretary's 1969 ex parte order is void and of no legal effect and therefore the continued administration of the lands west of the Colorado River in the disputed area by the Tribes is a violation of 25 C.F.R. Section 151.3?

Mr. Barry, it is time to put an end to this "litigious marathon". The Department of Interior wrongfully allowed the Tribes to administer the lands in the disputed area for over twenty-three years with the below noted unconscionable results:

1. The taxpayers of the United States were deprived of the benefits of the mesne profits generated by this asset.

2. The taxpayers also paid the tremendous legal costs for all parties to resolve this dispute.

3. Many persons were wrongfully ejected from the area and the improvements they made were seized without due process for the benefit of the Tribes. The Tribes have been generating revenue from these assets ever since.

4. The persons remaining on the land were left with no legal recourse whatsoever due to the doctrine of sovereign immunity, which continues to be the foundation for the impervious "buckskin curtain".

Please review this matter and respond at your earliest convenience. Thank you.

Sincerely,

_____

John Lindskog
Attorney at Law
(310) 694-5342

cc: M. Cooper - West Bank Homeowners Association

COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

ROUTE 1, BOX 23-B
TELEPHONE (602) 669-9211
PARKER, ARIZONA 85344

August 25, 1994 In reply, refer to: .. **Legal**

CERTIFIED MAIL

Mr. & Mrs. Ronald Smith
17699 San Bernardo Circle
Fountain Valley CA 92708

Dear Mr. & Mrs. Smith:

As you may know, the Colorado River Indian Tribes ("Tribes") received confirmation of their rights to the land and business of the Red Rooster Resort on November 22, 1993. This resulted from a lawsuit brought by the United States of America on behalf of the Tribes against Mr. William Booth and Mr. Stanley Burson.

After many years of the Red Rooster Resort being controlled by non-Tribal interests, the Tribes conducted a feasibility study to determine the condition of the Red Rooster Resort's infra-structure. The Tribes learned that significant electrical, septic and lay-out problems exist. The problems expose the tenants to safety threats and the Tribes to liability.

The significance of the problems required the Tribes to make an immediate decision regarding the Red Rooster Resort's viability as a continuing operation. Because of the amount of capital and extent of the renovations, the Tribes decided to close the Red Rooster Resort on December 31, 1994. The Tribes wish that the condition of the Red Rooster Resort was less dilapidated so that its operation could continue. Sadly, this is not the reality and the Tribes cannot expose you and themselves to such risks.

The Tribes recognize that you have visited and enjoyed the Red Rooster Resort for many, many years. The Tribes also appreciate the support you have given them. Regrettably, however, the Tribes inform you that your tenancy at the Red Rooster Resort will terminate effective December 31, 1994.

Please remove all personal property by that date. Be advised that you have a continuing responsibility for rent and utility payments and storage and garage fees. These payments can be remitted to the Tribes or through Mr. Craig Chute at Aha Quinn. All checks and/or money orders should be made payable to the Colorado River Indian Tribes. Should you fail to maintain current payments or fail to promptly and properly remove your personal property from the Red Rooster Resort and Tribal lands, all necessary legal actions will be taken to assure compliance.

The Tribes intend to explore further development at the Red Rooster Resort in the future. At this time, however, public safety is of the first importance. Therefore, we appreciate your past cooperation and look forward to your continuing cooperation.

Sincerely,

Daniel Eddy, Jr. Chairman
COLORADO RIVER INDIAN TRIBES

Enclosure: Public Notice

cc:
Tribal Council
Business Enterprise Board
Carolyn McBryde, Tribal Comptroller
Agresta Hooper, Collections Officer
Dyan Flyzik, Associate Tribal Attorney
Jonathan Speier, Realty Commerical Manager
Craig Chute, Manager