No. 8, Original

In The

Supreme Court of the United States

STATE OF ARIZONA,

Plaintiff,

vs.

STATE OF CALIFORNIA, et al.,

Defendants.

MOTION OF THE WEST BANK HOMEOWNERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE WEST BANK HOMEOWNERS ASSOCIATION

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December 18, 1999

MOTION OF THE WEST BANK HOMEOWNERS ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The West Bank Homeowners Association (hereafter "Association") is an unincorporated organization representing approximately 650 families who live on a full or part time basis along a 17 mile stretch of the bank of the Colorado River in California in the area described as the "disputed lands" throughout the proceedings before the Special Master to determine the western boundary of the Colorado River Indian Reservation (hereafter "Reservation").

The Association and its members are deeply concerned about the legal ramifications of the proposed stipulation and agreement dated March 4, 1999 (hereafter "stipulation") in that it (1) violates the Act of Congress dated April 30, 1964, Public Law 88-302, 78 Stat. 188, (hereafter "1964 Act") that specifically prohibits the Secretary of Interior from exercising any authority whatsoever on behalf of the Reservation in the disputed area until "... determined to be within the reservation." *Id.* at section 5; (2) does not satisfy the requirements of the Court's previous holdings throughout the entire series of *Arizona v. California* decisions; (3) does not comply with the Court's order reopening an earlier decree; and (4) ignores the findings of fact, the conclusions of law and the boundary determination by this Special Master, which involved nine years of extensive litigation and included a thorough trial on the merits.

The Association's brief *amicus curiae* examines foundational legal issues and other relevant matters which the stipulating parties prefer to avoid further scrutiny thereof by this Court by way of a settlement agreement. Indeed, Special Master McGarr expressed his dissatisfaction with this outcome because it "... does not totally satisfy the concerns of the Special Master that the settlement does not fully address the issue referred to him." *Report and Recommendation of the Special Master*, July 28, 1999, at page 11 (hereafter "McGarr Report").

Additionally, the Association's brief details the magnitude of the consequences of closing this case without a boundary resolution and states several reasons why a final boundary determination must be made. As an example, in the United States Claims Court case *Colorado River Indian Tribes v. The United States* (Docket No. 699-88L) (hereafter "Claims Court case"), in which the Colorado River Indian Tribes (hereafter "Tribes") seek to recover damages from the United States for its supposed mismanagement of the Tribes' land in the disputed area, the parties convinced the judge to stay the matter for the last ten years until a final boundary determination is made in this proceeding.

Furthermore, there is no equitable or practical reason why the Special Master's determinations should be rendered nugatory and thereby relegated to the status of a mere footnote in this never ending litigious quagmire. California's insistence on reserving the right to challenge the boundary again at some unspecified time in the future, even though it prevailed at trial, illustrates just how climacteric and substantial this controversy is and weighs heavily in favor of finally determining the boundary in this forum.

Although the United States and the Tribes are cooperating with each other to avoid further review of the boundary issue by this Court, the Tribes have exercised full authority in the disputed area with the concurrence and assistance of the United States since the issuance of the infamous *ex-parte* secretarial order on January 17, 1969 (hereafter "secretarial order"). Solely on the basis of an administrative order tainted by a governmental object of self-relief, quiet title actions were instituted in the United States District Court for the Central District of California [1] against those persons whose fee title originated from land patents granted by the state of California. None of the defendants could afford a protracted legal battle against the United States and the Tribes, and as a result there was no trial on the merits of the secretarial order in those cases. Other occupants who had been paying rent to the Bureau of Land Management were suddenly at the mercy of the Tribes. The Bureau of Indian Affairs claims unfettered authority on behalf of the Tribes and it has terminated the occupation permits of at least one hundred and ten of the Association's members. *West Bank Homeowners Association v. Acting Phoenix Area Director, Bureau of Indian Affairs*, Interior Board of Indian Appeals, Docket No. IBIA 97-8-A.

The United States and the Tribes have established by administrative fiat what it has been unable to achieve elsewhere - a boundary *de facto*. The proposed stipulation is a last desperate attempt to preserve their purported authority over the disputed lands which they assert is derived from the secretarial order. A previous attempt before Special Master McGarr was unequivocally and soundly dismissed in his Memorandum Opinion and Order No. 4 at page 13 (September 6, 1991) wherein he 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 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. (Hereafter, all Memorandum Opinion and Orders of Special Master McGarr are referred to as "Order No. ___").

[1] The opinions are unpublished.

The effort of the United States and the Tribes to put off the day of reckoning on this dispute, which has seen the appointment of four Special Masters over the last forty-two years, should be rejected. Indeed, the manifest weight of not only the evidence and the law, but also the equities, the practicabilities and the notion of judicial economy dictate the Special Master's memorandum opinions and orders should be immediately reviewed and decided upon by the Supreme Court thereby bringing closure to the central issue in this matter.

The Colorado River Indian Tribes, the United States, the State of California, the Metropolitan Water District of Southern California and the Coachella Valley Water District (hereafter referred to jointly as the "stipulating parties" or "settling parties") have withheld consent for the filing of the Association's brief.

WHEREFORE, the West Bank Homeowners Association, individually and collectively, and as members of the general public, hereby respectfully moves the Court under Rule 37 to grant this Motion for Leave to File Brief *Amicus Curiae*.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

President Grant issued the Executive Order of May 15, 1876, describing that portion of the western boundary of the Reservation that is the central issue in this case. For ninety-three years thereafter every federal agency, including the Bureau of Indian Affairs, treated the Colorado River's west bank, where the water meets the land, as the western boundary. In 1969 Secretary of Interior Udall issued the infamous *ex-parte* secretarial order purporting to establish a different boundary considerably west of the water's western edge. The United States and the Tribes have since steadfastly asserted that the area taken in by the secretarial order, known as the "disputed lands", is held in trust for the benefit of the Tribes.

The members of the Association[2] occupy lands in the disputed area and many resided thereon long before the boundary claim was raised by the Tribes. They have invested substantial monies and labor in improving the properties and a large percentage of the members are retired and living on fixed incomes and these homes are their only residences.

In August 1994, the Association filed a motion for leave to intervene in this case after the trial on the merits due to concerns the Special Master's boundary determination might fall victim to lengthy settlement discussions or be negotiated into oblivion. That is exactly what has occurred. The Master denied the motion on several grounds, including:

> Third, the Association has not shown that its interest in the boundary's location will not be adequately protected by the existing parties. In fact, the Association does not even argue that its interest in the boundary location is not adequately represented by the existing parties. The reason seems plain: At the 1993 hearing, the State Parties advocated the Association's position and won. The Special Master's ruling excludes the Association's land from the Reservation, and the State Parties continue to represent the Association's interest actively by arguing that the boundary should be moved further east. Order No. 17, March 29, 1995 at 6, 7.

Indeed, the Master ruled in Order No. 14 (September 20, 1993) that the Executive Order of 1876 established the western boundary of the Reservation as a riparian boundary. His detailed findings of fact and conclusions of law reveal the fixed line theory espoused by the United States and the Tribes in support of the secretarial order had no merit whatsoever and was categorically rejected. This opinion comports

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[2] This motion and brief were wholly authored by counsel for the Association and no person or entity, other than the *amicus curiae*, has made any monetary contribution in preparation thereof.

with the ninety – three year historical treatment of the boundary location by all federal agencies.

The members of the Association have a substantial interest in this matter. As occupants of the disputed area, their experience with the Tribes has proven they have little if no rights whatsoever against a sovereign nation even when there has been no final boundary determination in favor of the Tribes as specifically required by Congress before tribal authority can exist. 78 Stat. 188, Sec. 5. Realistically, any rights they may have can only be protected if they are independently wealthy, have the intestinal fortitude to get involved in litigation against two sovereign nations and live long enough to see a conclusion.

As taxpayers who have undoubtedly contributed a portion of the United States' and California's legal expenses, they are concerned that despite nearly a half century of litigation the concept of finality is foreign to these proceedings and the costs keep mounting. They also wonder how much money the taxpayer will be forced to shell out in the Tribes' Claims Court case against the United States for lands, the overwhelming weight of evidence and authority clearly dictates, is outside the reservation. Lastly, as members of the general public, they are concerned about how the Secretary of Interior can arbitrarily and capriciously enlarge the boundary of a reservation without the approval of Congress.

SUMMARY OF ARGUMENT

The proposed stipulation (1) violates the Act of Congress dated April 30, 1964, Public Law 88-302, 78 Stat. 188, that specifically prohibits the Secretary of Interior from exercising any authority on behalf of the Reservation in the disputed area until a final boundary determination is made; (2) does not satisfy the requirements of the Court's earlier rulings throughout the entire series of the *Arizona v. California* cases; (3) is not in compliance with the Court's unambiguous Order reopening an earlier decree; and (4) will close this matter without a boundary determination resulting in a myriad of unconscionable consequences.

ARGUMENT

I.

THE UNITED STATES AND THE COLORADO RIVER INDIAN TRIBES ARE WITHOUT AUTHORITY TO ENTER INTO THE PROPOSED STIPULATION AND AGREEMENT

The Act of Congress dated April 30, 1964, Public Law 88-302, 78 Stat. 188, fixed the beneficial ownership of real property interests of the Reservation in the Tribes. However, Congress expressly denied reservation status for the disputed lands and the Secretary of Interior's appurtenant authority until the boundary was determined:

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

Regardless of how the settling parties characterize the proposed stipulation, it is the result of and is inextricably fused with the *res* of this case – the United States' and the Tribes' assertion of a boundary claim that encompasses the disputed lands. Under the detailed description of the Reservation's limits in Section 5 above, unless and until there is a boundary determination locating those lands within the reservation, the authority of the Secretary of Interior and the Tribes terminates at the westerly edge of the present course of the Colorado River. There is no ambiguity in this congressional mandate.

Furthermore, any assertion that the secretarial order satisfies the final determination requirement is wholly without merit. The Supreme Court previously ruled that the Secretary's Order was not a binding determination of the boundary issue stating: "... we in no way intended that *ex-parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies or private water users holding priority rights." *Arizona v. California,* 460 U.S. 605, 636 (1983).

Despite the Court's rejection of this argument thirteen years earlier, the United States and the Tribes continued to assert the supremacy of the secretarial order before Special Master McGarr. The Master ruled on January 18, 1996: "The Tribes and United States rely heavily on an Order issued by the Secretary of the Interior on January 17, 1969 which is based on an opinion from the Solicitor of the Department of the Interior

issued that same day .... [T]he reasoning underlying the Secretary's Order is not sound. It misinterprets the definition of bank and the nature of accretions. Moreover, the Secretary's conclusion that the 1876 Order created a fixed boundary is directly contrary to the 1876 Order's intent to create a riparian boundary." Order No. 19 at 16 – 18.

Additionally, the Master refuted the claim of the United States and the Tribes that the 1964 Act implicitly authorized the Secretary to determine the Reservation boundary: "The Tribes' argument that the 1964 Act implicitly authorized the Secretary to determine the Reservation's boundary is unfounded. ... To the contrary, the 1964 Act states, "the authorization granted herein . . . shall not be construed to affect the resolution of any controversy over the location of the boundary of the Colorado River Reservation ... In light of this explicit statement, it is clear that the 1964 Act did not authorize the Secretary to resolve the boundary dispute." Order No. 19 at 17, 18.

The most probative evidence of congressional intent is the statutory language itself. The presumption that the proposed stipulation falls within the purview of what Congress intended is insurmountable. It follows *a fortiori* from this conclusion that the United States and the Tribes have no authority to enter into the proposed stipulation and agreement.

II.

THE PROPOSED STIPULATION AND AGREEMENT DOES NOT SATISFY THE REQUIREMENTS OF THE COURT'S PREVIOUS RULINGS

The answer to the question of how to ensure a high degree of finality and certainty to all Lower Basin interests in the allocation of Colorado River water was first proposed by Special Master Rifkind and was adopted by the Court in 1963, *Arizona v. California*, 373 U.S. 546 at 600-601:

> "[T]he most feasible decree that could be adopted in this case ... would be to establish a water right for each of the five Reservations in the amount of water necessary to irrigate all of the practicably irrigable acreage on the Reservation. . . . This will preserve the full extent of the water rights created by the United States and will establish rights of fixed magnitude and priority so as to provide certainty for both the United States and non-Indian users." Rifkind Report at 265.

The Reservation boundary dispute was tried before Special Master Rifkind, who rejected the United States' boundary claim and adopted the California position. The Court found it "unnecessary to resolve those [boundary] disputes here", 373 U.S. at 601, but the Court's 1964 Decree did not award any water rights to lands which Special Master Rifkind did not find to be within the reservation. More importantly, the Decree provided for "appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Arizona v. California*, 376 U.S. 340 at 344 (1964) (hereafter "1964 Decree").

The Court re-affirmed the requirement of granting additional water rights for the Reservation only for lands found to be located therein in its 1979 Supplemental Decree:

"[T]he quantities [of water] fixed in [the 1964 decree sections setting forth the water rights of each of the five Tribes] shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event the boundaries are finally determined." *Arizona v.* California, 439 U.S. 419 (1979) at 421.

The Court thoroughly stated this requirement again in its 1983 decision:

> It must be remembered that while we did not accept Master Rifkind's boundary decisions, water allocations to the Tribes under our decree were limited to the irrigable lands within the reservation boundaries as the Master had determined them to be. ... The United States ... might have instituted appropriate judicial proceedings in the District Courts, in which event the issues tried by the Special Master would presumably have been relitigated. Instead, the Secretary chose to bring matters to a head by a series of secretarial orders, culminating with the 1978

> motion in this Court moving for a determination of the irrigable acreage within the boundary lands recognized by the Secretary of Interior, and for appropriate additional water allocations. ... Because of our disposition of the above issues, it is not necessary to resolve the other exceptions brought by the States and state agencies pertaining to the amount of irrigable acreage within the so-called omitted lands or within the boundaries that we have not recognized as finally determined at this time. *Arizona v. California*, 460 U.S. 605 (1983) at 637, 638, 641.

Special Master McGarr also acknowledged the link between lands and ancillary water rights stating "It is true that boundaries determine acreage and acreage determines water rights ..." (McGarr Report at 11).

The long held view of this Court clearly demands a boundary determination to allocate further water rights to the Reservation. The stipulation intentionally avoids this requirement. There is no legal reason for the Court to stray from its well entrenched pre-requisite and surrender to the proposed stipulation merely to satisfy the goals of the settling parties, who apparently prefer to prolong this boundary dispute *ad infinitum*.

III.

THE PROPOSED STIPULATION AND AGREEMENT DOES NOT COMPLY WITH THE COURT'S ORDER REOPENING THE 1964 DECREE

On July 19, 1989, the State Parties moved the Court to reopen the 1964 Decree for the following purposes:[3]

> [in] order to finally determine (1) the disputed boundaries of the Fort Mojave and Colorado River Indian Reservations which were left unresolved in *Arizona I* and (2) the amount and priority of the water rights for those reservations as a result of such determinations. ... Such determinations are necessary in order to finally establish the water entitlements of the three reservations and to remove the clouds on the entitlements of non-Indian users on the Lower Colorado River caused by the United States' claims.

The United States and the Tribes did not oppose the State Parties' motion and on October 10, 1989 the Court issued the following order (493 U.S. 886):

> The motion of the State Parties to reopen decree to determine disputed boundary claims with respect to the Fort Mojave, Colorado River and Fort Yuma Reservations is granted. Justice Marshall took no part in the consideration of this motion.

Despite the crystal clear language of the Court's order, the United States and the Tribes continued to resist a final boundary determination before the Special Master. They attempted to limit the Master's jurisdiction with the claim 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.

Special Master McGarr's Order No. 4 is determinative of this issue. Therein the Master addressed the question of whether the Supreme Court intended the final determination of the entire western boundary. He pointed out that in the 1964 Decree this Court reserved the boundary issue for future determination. Order No. 4 at 11. He also states:

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[3] Motion of the State Parties to Reopen Decree to Determine Disputed Boundary Claims With Respect to the Fort Mojave, Colorado River and Fort Yuma Indian Reservations 1-2 (July 19, 1989).

> 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. Order 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." Order No. 14 at 1.

The proposed stipulation and agreement disregards the order of the Court and the Special Master's determinations of the intent of that order. The Court would be remiss in approving a stipulation and agreement that is purposefully and contemptuously prescribed to ignore the unambiguous terms of its' order.

IV.

THERE ARE FAR REACHING AND INTERMINABLE CONSEQUENCES IN NOT RESOLVING THE BOUNDARY DISPUTE

The settling parties have presented to this Court a joint memorandum in support of the proposed stipulation and agreement that grotesquely understates what transpired before Special Master McGarr. The totality of several years of litigation with a trial on the merits over the boundary location is reduced to the revelation that "In the course of addressing the issue of water rights for the disputed lands before the Special Master, the parties have discussed questions relating to the proper location of the Colorado River Indian Reservation ... western boundary (which in turn raises issues of the extent of tribal, federal, and state jurisdiction over the disputed lands) and the ownership of the west half or the bed of the Colorado River, as well as a host of other issues." Joint memorandum at 2. This cavalier summation of the proceedings is as weak as this dispute is boundless.

In the terms of the stipulation itself lie the seeds of the next "round" of litigation between the settling parties:

> "The United States and the Tribes, but not the other parties to this Stipulation and Agreement, agree that the lands described in the 1969 Secretarial Order, are included within the Reservation ... The State of California disagrees, and expressly reserves the right to challenge the validity, correctness and propriety of the 1969 Secretarial Order." Stipulation at 4.

To quote Justice Brennan: "As this litigation now stands, the considerations of finality are not so strong, nor the interests of justice so weak, as the Court would have them. ... The Court ... guarantees that the original jurisdiction litigation over Lower Basin States' water rights will proceed to another 'round', and possibly still more 'rounds' thereafter, as one-by-one the border questions are settled by litigation." 460 U.S. 605 at 643, 657 (Justice Brennan concurring in part, dissenting in part). The last sixteen years have borne out Justice Brennan's prophecy.

The Claims Court case filed by the Tribes in 1988 concerning lands in the disputed area has been stayed pending this tribunal's decision herein. Counsel for the Tribes succinctly described the dilemma the United States has created for itself when he told the Claims Court judge during a status hearing: "To be candid, I think the tribes are concerned about putting the United States in a position where it might in this case be denying liability because of the ownership status of the land, while at the same time in Arizona v. California it's claiming the land is held in trust for the benefit of the tribes." Claims Court, April 28, 1995 status hearing transcript at 4.

If the Court approves the stipulation, the United States and the Tribes will in the future assert the proceedings herein did not affect the 1969 secretarial determination of the boundary. The citizens of the United States will unfairly pay damages to the Tribes in the Claims Court matter and the Secretary of Interior will continue exercising authority on behalf of the Tribes over lands outside the Reservation boundary in direct violation of the 1964 Act of Congress. Also, as Justice Brennan predicted, the settling parties will be allowed to dance this fandango again.

The financial costs to the public and the incalculable number of hours the courts and federal agencies and all the personnel involved will be forced to commit, as a result of the Pandora's box the United States has opened, is an unconscionable waste of this country's resources.

CONCLUSION

The long, tortured history of this case has produced only one document to support the claims of the United States and the Tribes – the *ex-parte* secretarial order. The United States' issuance of that order attempting to re-define the Reservation boundary as established in the Executive Order of May 15, 1876 greatly exacerbated this dispute. The language of the Executive Order pertinent here establishes the western boundary of the Reservation as a direct line from the top of Riverside Mountain to the west bank of the Colorado River ". . . thence down said west bank to a point opposite the place of beginning. . ."

The Special Master concluded after a thorough trial:

> ... [T]he earlier position of the United States and the Tribes in the Aranson case [*U.S. v. Aranson*, 696 F.2d 654 (9th Cir.) *cert. denied* 464 U.S. 982 (1983)] is a factor which has evidentiary weight in the determination of the issue herein. In the Aranson case the Government and the Tribes unequivocally urged upon the Court the position that the Colorado River was the moving boundary of the reservation, and that contention has relevance here.
>
> It is further evident that despite some resourceful arguments to the contrary, the phrase "west bank" meant in 1876 what it means today; that is that line formed where the water meets the land. . . . Judgment on this issue must be for the State Parties. There is no ambiguity in the Order of 1876 in its call to the "west bank of the Colorado River." The boundary thus described is where the water and the land meet, subject, as it must be, to the rules of erosion, accretion and avulsion.
>
> The Executive Order of 1876, which is controlling in this dispute, established the western boundary of the Colorado River Indian Reservation as a riparian boundary and not as a fixed line. Order No. 14 at 3, 9, 10, 19.

Congress, this Court, the State Parties, the United States, the Tribes and the Claims Court have all either mandated, intended, ordered, requested, agreed to, stipulated to or is otherwise awaiting a final determination of the Reservation boundary in this forum. A final judgment marks a formal point at which considerations of judicial economy, certainty, reliance, comity and justice itself take on strength. **THEREFORE**, the Special Master's Orders should be immediately reviewed and the boundary issue decided upon by this Court.

Respectfully submitted,

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