No. 98-1115

# In the Supreme Court of the United States

OCTOBER TERM, 1998

MARICOPA-STANFIELD IRRIGATION AND DRAINAGE DISTRICT, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether petitioner irrigation districts were deprived of property without just compensation when Congress reallocated certain water, which it had earlier made available to the Central Arizona Project "on an interim basis" (Pub. L. No. 98-530, § 2(k), 98 Stat. 2701), to other uses.

TABLE OF CONTENTS



TABLE OF AUTHORITIES

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 158 F.3d 428. The opinion of the district court (Pet. App. 23a-48a) is unreported. The order of the court of appeals granting interlocutory review (Pet. App. 22a) is unreported.

### JURISDICTION

The court of appeals initially entered its judgment on July 7, 1998. Petitioners then filed a petition for rehearing and a suggestion of rehearing en banc. The court of appeals withdrew its original opinion and substituted a revised opinion on October 14, 1998. The petition for a writ of certiorari was filed on January 12,

1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. By federal law and interstate compact, the right to use water from the Colorado River has been legally apportioned among the seven States through which the river and its tributaries pass: Wyoming, Colorado, Utah, Nevada, New Mexico, Arizona, and California. See generally *Arizona* v. *California*, 373 U.S. 546 (1963). In the Boulder Canyon Project Act of 1928, Congress allocated to Arizona water users 2.8 million acre-feet per year of the Colorado River's normal annual flow of approximately 15 million acre-feet. 43 U.S.C. 617c, 617*l*(a); see also *Arizona* v. *California*, 373 U.S. at 561, 565.

The distribution of most of that water within Arizona is governed by the Colorado River Basin Project Act of 1968, 43 U.S.C. 1501-1556, and Arizona law. The Basin Project Act authorized the Bureau of Reclamation, an agency within the United States Department of the Interior, to construct a 335-mile-long system of canals, siphons, pumping plants, and tunnels known as the Central Arizona Project (CAP). 43 U.S.C. 1521. The Act further authorized the Secretary of the Interior to contract for the repayment of CAP construction costs with a single political subdivision in Arizona, 43 U.S.C. 1524, and Arizona created the Central Arizona Water Conservation District (CAWCD) for that purpose. Not all Colorado River water used in Arizona is part of the CAP supply. When Congress authorized construction of the CAP, it required the Secretary to respect the rights of entities with preexisting, senior entitlements to Colorado River water within Arizona's allocation. See 43 U.S.C. 1521(b).

On December 15, 1972, the United States entered into a combined water service and repayment contract with the CAWCD. That so-called Master Contract provides for delivery by the United States of CAP water to various subcontractors and obligates the CAWCD to repay $1.2 billion in costs for the construction of the delivery facilities. Pet. App. 24a; *Central Ariz. Irrigation & Drainage Dist.* v. *Lujan*, 764 F. Supp. 582, 584-585 (D. Ariz. 1991).[1]

2. The Basin Project Act authorizes the Secretary to allocate Arizona's CAP water supply among categories of users within the State. 43 U.S.C. 1524.[2] In a March 1983 decision, see 48 Fed. Reg. 12,446, the Secretary allocated a total of 309,000 acre-feet per year to Arizona Indian Tribes, 640,000 acre-feet per year to "municipal and industrial" users, and the remainder of the CAP water to non-Indian agricultural users. Pet. App. 3a-4a & n.3. The Secretary determined, and petitioners do not now contest, that, during water shortages, Indians and "municipal and industrial" users take priority over non-Indian agricultural users. *Ibid.* Within the 309,000 acre-feet allocated to the Indian Tribes, the Secretary included a specific contractual obligation to provide 58,300 acre-feet of water each year to the Ak-Chin Tribe. *Id.* at 6a.

Shortly after the allocation decision, the Secretary and the CAWCD entered into separate contractual

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[1] The 1972 Master Repayment Contract was amended in 1988. All references to the Master Repayment Contract in this brief are to the amended contract. The provisions relevant to this case are materially the same in each contract.

[2] An allocation "is an offer to contract." 45 Fed. Reg. 81,265 (1980). It does not commit the Secretary to deliver water. Water delivery is based on a party's specific contract. *Ibid.*; see also Pet. App. 4a.

agreements with each of the petitioners in this case, which are Arizona irrigation districts involved in the provision of CAP water to non-Indian agricultural concerns. Those agreements entitled petitioners and other non-Indian agricultural users to a percentage of the "CAP residual pool," which is the portion of CAP water not allocated to Indian Tribes or to "municipal or industrial" users. Petitioners agreed to reimburse the federal government for the cost of constructing the facilities that deliver CAP water to them. Pet. App. 4a-5a.

In the Ak-Chin Settlement Act of 1984 (Ak-Chin Act), which was enacted after the Secretary's 1983 allocation decision and after the Secretary had entered into the contracts at issue here, Congress augmented the Ak-Chin's water rights to a general entitlement of between 75,000 and 85,000 acre-feet of water per year, depending on availability. See Act of Oct. 19, 1984, Pub. L. No. 98-530, § 2(a),(b), and (k), 98 Stat. 2698-2701 (Pet. App. 55a-57a). That water is to come from two sources, one within the CAP and one outside it. See Pet. App. 5a-6a & n.7. Under subsection 2(f)(1) of the Ak-Chin Act, the Secretary is first required to give the Ak-Chin Tribe 50,000 acre-feet of water previously assigned to the Yuma-Mesa Division of the Gila Project, 98 Stat. 2699, which has never been part of the CAP and which has a priority date superior to the CAP's. See Pet. App. 5a n.7. Under subsection 2(f)(2), the Secretary must then supply the Ak-Chin Tribe with whatever portion of its previous 58,300 acre-foot allotment of CAP water is necessary to meet the Tribe's new total entitlement (75,000 to 85,000 acre-feet) under the Act. 98 Stat. 2699.

The remainder of that previous 58,300 acre-foot allotment of CAP water described in Subsection 2(f)(2)

of the Ak-Chin Act—known as the "excess Ak-Chin" water, and constituting roughly 23,000 to 33,000 acre-feet per year—is the subject of this litigation. The Ak-Chin Act specified that "the Secretary shall allocate on an interim basis to the [CAP] any of the water referred to in subsection (f) which is not required for delivery to the Ak-Chin Indian Reservation under this Act." § 2(k), 98 Stat. 2701. For eight years, that "interim" arrangement made additional water available to petitioners, which take water from the CAP residual pool. The arrangement ended, however, with the enactment of the San Carlos Apache Tribe Water Rights Settlement Act of 1992 (SCAT Act), Pub. L. No. 102-575, Tit. XXXVII, §§ 3701-3711, 106 Stat. 4740-4752. In Section 3704(a) of the SCAT Act, Congress provided that "[t]he Secretary shall reallocate, for the exclusive use of the [San Carlos Apache] Tribe, all of the water referred to in [Subsection 2(f)(2) of the Ak-Chin Act], which is not required for delivery to the Ak-Chin Indian Reservation under the Act." 106 Stat. 4742.

Petitioners asserted a property interest in the Ak-Chin Act's "interim" allocation of the excess Ak-Chin water to the CAP, and they claimed that the SCAT Act had unlawfully terminated that interest without just compensation. Although Congress did not accept that contention, it created a special jurisdictional provision to ensure efficient disposition of the claim in federal district court. Section 3708(f) of the SCAT Act confers jurisdiction on the district court in Arizona (and concurrent jurisdiction on the United States Claims Court, now the United States Court of Federal Claims) "to hear and decide any claim brought by the Central Arizona Water Conservation District or other contractors of CAP water," and defines "claim" to mean "a claim that the reallocation of water to the Tribe pur-

suant to section 3704(a) of this Act has unlawfully deprived the Central Arizona Water Conservation District or other contractors of CAP water of legal rights to such water." 106 Stat. 4749.

3. The district court granted summary judgment to petitioners on the issue of liability. Pet. App. 23a-48a. After first affirming its jurisdiction over the case (*id.* at 32a-34a), the district court held that the SCAT Act's assignment of water to the San Carlos Apache Tribe deprived petitioners of a constitutionally protected property interest in the excess Ak-Chin water. The court reasoned that, under the 1983 contracts between petitioners and the Secretary, the excess Ak-Chin water could not be used to augment the water rights of Indians or municipal and industrial users because it had been irrevocably committed to the CAP residual pool. *Id.* at 35a-47a. The court then scheduled a hearing to discuss calculation of damages. *Id.* at 48a.

4. The United States filed an interlocutory appeal under 28 U.S.C. 1292(b), and the court of appeals reversed. Pet. App. 1a- 21a. After rejecting a jurisdictional challenge raised by several amici curiae (see *id.* at 8a-12a), the court turned to the merits. The court observed that petitioners could assert a compensable taking only if they could show a protected property right to the excess Ak-Chin water. Although petitioners assert such a right, the court explained, their claim presupposes that allocation of water to the CAP "rather than to a specific user or user class automatically and irrevocably would allocate that water to the non-Indian agricultural pool." *Id.* at 13a. The court rejected that premise as inconsistent both with the Ak-Chin Act itself (*id.* at 13a-17a) and with the government's consistent practice of treating the excess Ak-

Chin water "as remaining in the Indian priority pool" (*id.* at 17a n.16) even before passage of the SCAT Act.

The court alternatively held that, even if the Ak-Chin Act could be construed to give petitioners individual interests in the excess Ak-Chin water, they could not claim an "enduring property right unless that interest rose to the level of an entitlement" that was immune from reallocation. Pet. App. 17a-18a. Petitioners have no such entitlement here, the court concluded, because the Ak-Chin Act itself directed the Secretary to allocate the excess Ak-Chin water to the CAP only "on an *interim* basis." *Id.* at 19a (quoting § 2(k), 98 Stat. 2701).

**ARGUMENT**

Although petitioners mistakenly contend (Pet. 14-16) that this dispute has broad implications for water rights throughout the Southwest, the dispute is in fact confined to the excess Ak-Chin water reallocated in the SCAT Act, and its proper resolution is governed by several narrow provisions specific to that water. The court of appeals' construction of those provisions is correct, and the case warrants no further review.

1. Petitioners claim a right under their 1983 contracts to a fixed share of the extra 23,000 to 33,000 acre-feet per year of undesignated CAP water that the Ak-Chin Act made available in 1984. That claim rests on two premises: first, that the Ak-Chin Act *irrevocably* committed that water to the CAP; and, second, that the 1983 contracts bound the Secretary to give petitioners a fixed share of that extra water. Each of those premises is independently essential to petitioners' claim, and each is false.

a. First, there is no merit to petitioners' contention that the Ak-Chin Act irrevocably committed the water at issue to the CAP.

By allocating 50,000 acre-feet of Yuma-Mesa water per year to the Ak-Chin Tribe, the Ak-Chin Act had the provisional effect of increasing the amount of undesignated CAP water by substantially decreasing the previous allocation of CAP water to the Ak-Chin. See Pet. App. 5a-6a & n.7. As the court of appeals determined, that Yuma-Mesa water has always been separate from the CAP. See *ibid.* That factbound determination—which petitioners question but do not directly challenge here (see Pet. 8, 21-23), and which in any event would not warrant this Court's review—is significant for purposes of this case. Because the Yuma-Mesa water entered the equation only after petitioners had entered into their 1983 contracts, the SCAT Act's reallocation of the excess Ak-Chin water to other Indian users did not make petitioners worse off than they would have been under those contracts if Congress had not subsequently enacted the relevant provisions of either the Ak-Chin Act or the SCAT Act.[3]

In alleging a right to have all excess Ak-Chin water allocated to the CAP, therefore, petitioners must rely on the Ak-Chin Act itself, which created that excess water category to begin with, rather than on their contracts with the Secretary, which preceded the Act. By its terms, however, the Ak-Chin Act forecloses, rather than supports, petitioners' claim to an "irrevocabl[e]" (Pet. 24) property interest in that water.

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[3] Petitioners' characterization of the Ak-Chin Act as a "compromise" designed to resolve a dispute about the status of the Yuma-Mesa water (see Pet. 21-25) would not help their position here even if that characterization were accurate. As discussed in the text, any benefits petitioners could claim to have derived from the Ak-Chin Act were explicitly "interim" in character. "Interim" benefits are "interim" whether or not they are part of a "compromise."

Section 2(k) of the Act provides that the extra water shall be "allocate[d] on an *interim* basis to the Central Arizona Project." 98 Stat. 2701 (emphasis added). As the court of appeals explained (Pet. App. 19a-20a), when Congress allocates water rights on an "interim" basis, it may reallocate those rights in later legislation without incurring a constitutional obligation to pay just compensation. Analogously, the government may grant temporary permits to people without thereby obligating itself to compensate them when it needs to revoke those permits.[4]

Without citing relevant authority, petitioners contend that "interim" is a term of art "[i]n the context of western water law" and that here the term confirms only that the Ak-Chin retain senior rights to a portion of the original CAP water that had been allocated to the Tribe before passage of the Act. Pet. 25 n.18. That reading, however, not only defies the plain meaning of the term "interim" (which means "not permanent"), but also deprives it of any independent significance in the Ak-Chin Act. Section 2(k) itself separately makes clear that the "interim" allocation of Ak-Chin water to the CAP is appropriate only when the amount taken "is *not* required for delivery to the Ak-Chin Indian Reservation"—*i.e.*, only when it "*exceeds* the quantity necessary to meet the [Secretary's] obligations" to the Ak-Chin. 98 Stat. 2701 (emphasis added). Under petitioners'

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[4] The combined effect of the Ak-Chin Act and the SCAT Act is essentially the same as if Congress had simply provided in a single Act for the Ak-Chin Tribe to assign a portion of its high-priority CAP water right directly to the San Carlos Apache Tribe, an approach that clearly would not have violated any rights of petitioners. The fact that Congress accomplished that result in two Acts rather than one, and allocated excess water to the CAP during the "interim," does not change the constitutional analysis.

construction, Congress's inclusion of the term "interim" would have added nothing to the rest of the provision. Finally, if there were any ambiguity on the meaning of Congress's "interim" allocation, which there is not, the Secretary's interpretation would be entitled to substantial deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984).

b. The explicitly interim character of Section 2(k) of the Ak-Chin Act is itself a sufficient basis for rejecting petitioners' claim. Even if the Ak-Chin Act's allocation of excess Ak-Chin water to the CAP had been permanent and irrevocable, however, petitioners' claim would be invalid for an independent reason as well: Neither the 1983 allocation decision nor the 1983 contracts compelled the Secretary to allocate a fixed share of the excess Ak-Chin water to petitioners.

Based on its reading of the record, the court of appeals correctly held that "post-1983 allocations to the CAP do not fall to a particular user or user class, but remain at the Secretary's discretionary disposal, because the users' allotments were predicated on the amount of water in the CAP in 1983." Pet. App. 16a-17a.[5] That factbound determination warrants no further review. Petitioners' contrary position is particularly problematic here, because, as the court of appeals observed, "the Secretary never treated [petitioners] as having automatic access to this or any other

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[5] As the court of appeals explained, petitioners are incorrect in claiming that the Ak-Chin Act divested the Secretary of that discretion. See Pet. App. 17a-19a. Indeed, Section 8 of the Act itself provided that "[n]othing in this Act shall be construed to enlarge or diminish the authority of the Secretary with regard to the Colorado River." 98 Stat. 2702; see Pet. App. 19a n.19.

water allocated to the 'Central Arizona Project.' Quite to the contrary, the Secretary publicly treated the excess Ak-Chin water as remaining in the Indian priority pool between the Ak-Chin Settlement and the SCAT Acts." *Id.* at 17a n.16 (citing 57 Fed. Reg. 4470, 4476 (1992)); see also Master Repayment Contract, ¶ 8.7 (Appellant's E.R. 149) (addressing Secretary's discretion to protect Indian water rights); cf. 57 Fed. Reg. at 4471 (Pet. App. 80a) (amounts of water for non-Indian agricultural users "are expected to decrease during the project life as the [municipal and industrial] use increases").[6]

2. Petitioners contend that the decision below conflicts with *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996), which addressed the "unmistakability" doctrine in government contract law, and they criticize the court of appeals for not citing *Winstar* in its opinion. See, *e.g.*, Pet. 13, 28. As an initial matter, petitioners themselves never cited *Winstar* either in their merits brief in the court of appeals or in their petition for

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[6] In ¶ 8.12 of the Master Contract, the parties agreed that the United States would be immune from liability "for any damages * * * arising out of or in any way connected with any suspension or reduction in the delivery of water pursuant to this contract or with any shortage in the quantity of water available for delivery hereunder or to any subcontractor for any cause whatsoever." Pet. App. 95a; Appellant's E.R. 158. Petitioners contend that the court of appeals construed that provision to "give[] the Secretary *carte blanche* to relieve the government of any liability—or any actual obligations—under its water supply contracts." Pet. 20. That is incorrect. The court of appeals never even explicitly cited that provision; while the court did allude to ¶ 8.12 in passing, it did so only to support the proposition that the Ak-Chin Act did not limit Congress's power to reallocate the water at issue. Pet. App. 20a. This case therefore presents no issue concerning the full scope of ¶ 8.12.

rehearing. Even if this case could somehow be said to involve a *Winstar* issue, this Court does not ordinarily grant certiorari to review questions that were neither raised in nor addressed by the court of appeals. See, *e.g.*, *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 7-8 (1993).

In any event, no *Winstar* issue is properly presented here to begin with.[7] Recourse to the unmistakability doctrine is of course unnecessary where, as here, a plaintiff has no valid claim against the government under ordinary legal principles. Here the court of appeals needed to rely only on such ordinary principles to determine that, in allocating the excess Ak-Chin water to the CAP "on an interim basis," the government had preserved its authority to reallocate that water later; indeed, the court concluded, petitioners' contrary position is "unthinkable" even on its own terms. Pet. App. 20a. It follows *a fortiori*, the court added, that the United States did not "unmistakably" render itself liable to petitioners' "unthinkable" claim. That statement, however, related at most to an alternative holding, see Pet. App. 18a-19a, 20a-21a, and it warrants no further review.

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[7] Five Justices in *Winstar* disagreed with the plurality's conclusion that the "unmistakability" doctrine was inapplicable on the facts of that case. See 518 U.S. at 919-924 (Scalia, J., concurring in the judgment); *id.* at 924-937 (Rehnquist, C.J., dissenting). *Winstar* therefore does not support a claim that that doctrine is inapplicable in a particular context, although it does of course address the extent to which that doctrine materially affects the outcome of specific cases. See *id.* at 920-922 (Scalia, J., concurring in the judgment). The governmental obligations alleged in this case have virtually nothing in common with the obligations at issue in *Winstar* itself, which involved regulation of financial institutions.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1999