No. 8, Original

In the Supreme Court of the United States

STATE OF ARIZONA, PLAINTIFF

v.

STATE OF CALIFORNIA, ET AL.

ON MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a private party should be granted leave to intervene in a suit within this Court's original jurisdiction, where the party seeks to reopen a final decree adjudicating interstate water rights in order to litigate a private land title dispute.

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INTRODUCTION

Movant Billy Wayne Andrews seeks leave to intervene in an original action, *Arizona* v. *California*, No. 8, Original, to quiet title to lands located within the boundary of the Fort Mojave Indian Reservation. This Court issued a decision in *Arizona* v. *California*, 530 U.S. 392 (2000), which resulted in the entry of a supplemental decree that finally determined the Fort Mojave Tribe's water rights for lands that movant seeks to place at issue. See *Arizona* v. *California*, 531 U.S. 1, 2-3 (2000). Special Master McGarr is currently conducting proceedings in this case addressing the water rights of another Indian Tribe, which presents the only outstanding dispute among the parties in this case. Although movant claims no entitlement to water in that current proceeding, he alleges that it would be appropriate for this Court to exercise jurisdiction over his claim because there is "no forum in which resolution of this boundary can be had." Mot. A12; see Mot. A14.

STATEMENT

The *Arizona* v. *California* litigation addresses the rights of the Colorado Basin States, the United States, and Indian Tribes to use of the waters of the Colorado River. The case has resulted in three major decisions from this Court. See *Arizona* v. *California*, 373 U.S. 546 (1963) (*Arizona I*); *Arizona* v. *California*, 460 U.S. 605 (1983) (*Arizona II*); *Arizona* v. *California*, 530 U.S. 392 (2000) (*Arizona III*). Those decisions and related proceedings have led to the issuance and supplementation of a final decree. See 376 U.S. 340 (1964); 383 U.S. 268 (1966); 439 U.S. 419 (1979); 466 U.S. 144 (1984); 531 U.S. 1 (2000).

1. In 1952, the State of Arizona initiated this original action against California and its public agencies to confirm Arizona's entitlement to the use of water in the Colorado River Basin and to limit California's consumption of that water. See *Arizona I*, 373 U.S. at 550-551; see also *Arizona II*, 460 U.S. at 608-612; *Arizona III*, 530 U.S. at 397. The States of Nevada, Utah, and New Mexico became parties to the suit, by intervention or joinder, and the United States intervened on behalf of various federal establishments that are entitled, under federal law, to use the Colorado River's waters. See *Arizona II*, 460 U.S. at 608. Those establishments include five Indian reservations: (1) the Colorado River Indian Reservation; (2) the Fort Mojave Indian Reservation; (3) the Fort Yuma (Quechan) Indian Reservation; (4) the Chemehuevi Indian Reservation; and (5) the Cocopah Indian Reservation. *Id.* at 609; see *Arizona III*, 530 U.S. at 397-398.

The Court appointed a Special Master, Simon Rifkind, who conducted extensive proceedings and recommended a division of the Colorado River's waters.

Among other things, the Master determined that the United States had reserved water rights for the five Indian reservations in accordance with the Court's decision in *Winters* v. *United States*, 207 U.S. 564 (1908). See *Arizona I*, 373 U.S. at 598-600; see also *Arizona II*, 460 U.S. at 609. Under *Winters*, the United States' creation of an Indian reservation to provide an agriculture-based homeland includes a reservation of sufficient water to irrigate those reservation lands that are capable of growing crops. See *Arizona I*, 373 U.S. at 601; see also *Arizona II*, 460 U.S. at 609-610.

In the case of the water rights claims of the United States for the benefit of the Fort Mojave Indian Reservation, Special Master Rifkind received evidence on the location of the western boundary of the "Hay and Wood Reserve" and concluded that it was best described by a 1928 survey of the United States General Land Office (GLO), which relied upon calls to artificial monuments in the notes of survey accompanying the Executive Order that established the Reservation. In doing so, the Master rejected the United States' contention that the boundary was located farther to the west, as described in the courses and distances contained in the Executive Order. *Arizona II*, 460 U.S. at 632.

The Court adopted the Master's findings respecting the amounts of practicably irrigable lands on the various reservations, the corresponding amounts of water that the Tribes were entitled to withdraw from the mainstream of the Colorado River, and the priority dates of those "present perfected rights." *Arizona I*, 373 U.S. at 601; *Arizona II*, 460 U.S. at 609-610. The Court did not finally resolve several aspects of the Tribe's water rights, however, holding that "it is unnecessary to resolve those disputes here" and that

"[s]hould a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time." *Arizona I*, 373 U.S. at 601; see also *Arizona II*, 460 U.S. at 610-611 & n.3.

As relevant here, the Court awarded water rights to the United States on behalf of the Fort Mojave Indian Tribe based upon the Master's location of the Reservation boundary set forth in the 1928 GLO Survey. *Arizona II*, 460 U.S. at 630 ("The decree that we entered limited the water rights of the [Fort Mojave Indian Reservation] to those awarded by the Master * * * within the boundaries as he had found them."). The Court did not, however, finally determine the boundaries of the Reservation. Instead, as stipulated by the parties, Article II(D)(5) of the resulting decree provided that the Tribe's entitlement to water "shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 376 U.S. at 345; see *Arizona III*, 530 U.S. at 398.

2. Between 1969 and 1978, the Secretary of the Interior issued orders determining the boundaries of the Fort Yuma, Fort Mojave, and Colorado River Indian Reservations. See *Arizona II*, 460 U.S. at 631-634. The five Indian Tribes that the United States had represented in the previous proceedings also moved to intervene and made claims for additional water. *Id.* at 612. The Court postponed definitive resolution of those motions to intervene. See *id.* at 612, 633-634. The Court later entered a supplemental decree setting out the "present perfected rights" to the use of the mainstream water "in each State and their priority dates." 439 U.S. at 420-421. The supplemental decree described the Indian Tribes' water rights, but also noted

that those rights "shall continue to be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." *Id.* at 421. At the United States' suggestion, the Court referred the matters that the Tribes had raised to a Special Master, Senior Judge Elbert P. Tuttle. See *Arizona II*, 460 U.S. at 611-612; *Arizona III*, 530 U.S. at 398-399.

Master Tuttle issued a preliminary and a final report. See *Arizona II*, 460 U.S. at 612-613. He granted the Tribes leave to intervene, and he determined that the Secretary of the Interior's administrative actions had determined, with finality, the boundaries of the Fort Yuma, Fort Mojave, and Colorado River Indian Reservations for purposes of Article II(D) of the 1964 decree. See *id.* at 613. Those "boundary lands" determinations resulted in an enlargement of the reservations, entitling the Tribes to additional water. *Ibid.* Master Tuttle also determined that there were additional lands—so-called "omitted lands"—within the recognized 1964 boundaries that were entitled to water under the practicably irrigable acreage standard. He therefore recommended that the Court reopen the 1964 decree to award the Tribes additional water rights. *Ibid.*; see *Arizona III*, 530 U.S. at 399.

The States filed exceptions to Master Tuttle's recommendations. See *Arizona II*, 460 U.S. at 613-642. The Court overruled the States' objection to the Master's determination that the Tribes should be allowed to intervene in the action, *id.* at 613-615, but sustained their objection to his award of water for the "omitted lands," *id.* at 615-628. The Court then addressed the States' exception to the Master's conclusion that the Secretary of the Interior's determination of the three Tribes' reservation boundaries was a "final determi-

nation" of those boundaries, entitling the Tribes to additional water. *Id.* at 628-641. The Court ruled that the Secretary's determinations were not, in themselves, final determinations of the boundary disputes, because the States had not had an opportunity to obtain judicial review of the Secretary's decisions. *Id.* at 636-638. The Court noted that California's agencies had initiated a judicial action in district court challenging the Secretary's determinations, *Metropolitan Water District of Southern California* v. *United States*, Civ. No. 81-0678-GT(M) (S.D. Cal. Apr. 28, 1982), and it stated that the litigation "should go forward, intervention motions, if any are to be made, should be promptly made, and the litigation expeditiously adjudicated." *Arizona II*, 460 U.S. at 638-639; *Arizona III*, 530 U.S. at 399-400.

In light of those ongoing proceedings, the Court expressly declined to intimate an opinion "as to the Secretary's power or authority to take the actions that he did or as to the soundness of his determinations on the merits." *Arizona II*, 460 U.S. at 637. Furthermore, the Court noted that the United States had moved to dismiss the action on various grounds, including sovereign immunity. *Id.* at 638. The Court stated that "[t]here will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court." *Ibid.* See *Arizona III*, 530 U.S. at 399-400.

3. The district court litigation went forward with eight of the parties from the prior proceedings: the United States, the States of Arizona and California, the Metropolitan Water District of Southern California, the Coachella Valley Water District, and the Quechan, Fort Mojave, and Colorado River Indian Tribes. Among

other rulings, the district court rejected the United States' sovereign immunity defense and, on cross-motions for summary judgment, voided the Secretary's determination of the Fort Mojave Reservation's boundaries. *Metropolitan Water Dist. of S. Cal.* v. *United States*, 628 F. Supp. 1018 (S.D. Cal. 1986).

The Tribes obtained permission to take an interlocutory appeal pursuant to 28 U.S.C. 1292(b), and the court of appeals remanded the case with directions to dismiss for lack of jurisdiction. *Metropolitan Water Dist. of S. Cal.* v. *United States*, 830 F.2d 139 (9th Cir. 1987). The court of appeals concluded that the Quiet Title Act, which preserves the United States' sovereign immunity from suits challenging the government's title "to trust or restricted Indian lands," 28 U.S.C. 2409a(a), barred the plaintiffs' suit. 830 F.2d at 143-144. This Court granted a petition for a writ of certiorari to review the court of appeals' judgment and affirmed that judgment by an equally divided Court. *California* v. *United States*, 490 U.S. 920 (1989). See *Arizona III*, 530 U.S. at 400-401.

4. On October 10, 1989, this Court granted the motion of Arizona and California to reopen this original action to resolve questions of water rights arising out of disputed boundary claims with respect to the Fort Mojave, Colorado River, and Fort Yuma Indian Reservations. See *Arizona* v. *California*, 493 U.S. 886 (1989). The United States, the Metropolitan Water District of Southern California, and the Coachella Valley Water District, as well as the two States and the three Indian Tribes that occupy those reservations, participated as parties in that litigation. The Court appointed Professor Robert B. McKay as Special Master, to conduct the reopened proceedings. 493 U.S. 971 (1989). Professor McKay died in 1990, and the Court appointed Special

Master Frank J. McGarr to succeed him. 498 U.S. 964 (1990). See *Arizona III*, 530 U.S. at 401.

5. Over the next ten years, the parties engaged in negotiations that, among other things, resulted in a settlement stipulation that would resolve the water rights claims for the Fort Mojave Indian Reservation and the Colorado River Indian Reservation. Mot. App. A78-A79. The principal provisions of the Fort Mojave settlement: (1) specify the boundary of the Reservation in the vicinity of the Hay and Wood Reserve; (2) preserve the claims of the parties respecting title to and jurisdiction over the bed of the last natural course of the Colorado River within the specified boundary; (3) entitle the Tribe to divert the lesser of an additional 3022 acre-feet of water or enough water to supply the needs of 468 acres; (4) preclude the United States and the Tribe from claiming additional water rights from the Colorado River for lands within the Hay and Wood Reserve; and (5) disclaim any intent to affect any private claims to land or to determine title to or jurisdiction over such land. See *id.* at A79.

The Master recommended approval of the Fort Mojave settlement stipulation and entry of a supplemental decree that would effectuate the resulting agreement. Mot. App. A82, A83-A84. He stated:

> The achievement of these proposed settlements is to the credit of the parties and is the result of extensive negotiation. They resolve the water rights allocation issues which were at the heart of the disputes between the parties. It is a salutary result. The Fort Mojave settlement includes the boundary determination, and no boundary issue remains.

Id. at A82. This Court approved the parties' settlement, *Arizona III*, 530 U.S. at 418 ("We accept the

Master's uncontested recommendation and approve the proposed settlement."). The Court entered a corresponding supplemental decree, 531 U.S. at 2-3.[1]

ARGUMENT

The United States submits that the motion to intervene should be denied. Movant is not entitled to invoke this Court's original jurisdiction. See 28 U.S.C. 1251. He nevertheless seeks to reopen a final decree of this Court and litigate an issue respecting the boundaries of the Fort Mojave Reservation that, for purposes of these original proceedings, has already been decided. The boundary issue that movant presents is not relevant to the remaining proceedings in this case, which involve the water rights of a different Indian Tribe and a different reservation. And the motion, in any event, is untimely. Although the United States would not oppose referring the instant motion to the Special Master for a recommended resolution, we believe that it would be most expedient for the Court itself to deny the motion, since there is no basis for it to be granted.

1. This Court does not ordinarily allow private parties to intervene in suits brought within its original jurisdiction. As a general matter, this Court does not allow private parties to intervene in original actions.

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[1] The Master likewise determined that the Court should approve the parties' proposed settlement of the dispute respecting the Colorado River Indian Reservation. See Mot. App. A79-A81, A82-A84. Under the terms of that settlement, the parties agreed to leave the reservation boundary unadjudicated in that litigation and would instead recognize that the Tribe is entitled to a fixed amount of water in resolution of the Tribe's underlying water rights claim. See *ibid.* The Court approved that settlement as well. *Arizona III*, 530 U.S. at 419; see 531 U.S. at 2 (decree).

Congress has conferred exclusive original jurisdiction over "controversies between two or more States," 28 U.S.C. 1251(a), and non-exclusive original jurisdiction over "controversies between the United States and a State," 28 U.S.C. 1251(b)(2), and "actions or proceedings by a State against the citizens of another State," 28 U.S.C. 1251((b)(3). But Congress has not expressly authorized private parties to intervene in original proceedings before this Court. Instead, this Court generally expects that the United States and the individual States, as *parens patriae*, will represent the interests of private parties who may be affected by the litigation. See *New Jersey* v. *New York*, 345 U.S. 369, 372-373 (1953); *Kentucky* v. *Indiana*, 281 U.S. 163, 173-174 (1930); see also *Nebraska* v. *Wyoming*, 515 U.S. 1, 21-22 (1995); *Utah* v. *United States*, 394 U.S. 89, 95-96 (1969).

This Court has noted that exceptional circumstances may warrant a departure from that general practice. See *New Jersey* v. *New York*, 345 U.S. at 373. But movant has identified no "compelling interest" (*ibid.*) that would justify allowing a private party to intervene in this case to resolve a private land dispute. As explained below, the Court in this case has already entered a supplemental decree that conclusively resolves the boundary issue for purposes of the interstate dispute that was before this Court and "disclaims any intent to affect any private claims to title to or jurisdiction over any lands." *Arizona III*, 530 U.S. at 418; see Mot. App. A82.

2. The Fort Mojave Settlement resolved the Hay and Wood Reserve boundary dispute that was at issue in this water rights litigation. Movant seeks to intervene to relitigate the determination of the "proper location of the boundary of the Hay and Wood Reserve." Mot. A30. The Court has already resolved that issue as it

pertains to this original action, which involves the water rights of Arizona, California, the United States, and the Fort Mojave Indian Tribe. See *Arizona III*, 530 U.S. at 418; 531 U.S. at 2-3.

Article II(D) of this Court's 1964 decree stated in pertinent part that the United States, on behalf of the Fort Mojave Indian Tribe, is entitled to divert from the Colorado River the lesser of "(i) 122,648 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 18,974 acres," subject to the proviso that "the quantities fixed in this paragraph * * * shall be subject to 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, 345 (1964).

Consistent with Article II(D), the parties "by agreement" thereafter reached a settlement that determines, with finality, the western boundary of the Hay and Wood Reserve. Their stipulation provides that, for purposes of this litigation and subject to specified conditions not relevant here:

> The western boundary of the Hay and Wood Reserve portion of the Fort Mojave Indian Reservation shall be the boundary, as resurveyed by the Bureau of Land Management in 1975 * * * that locates the western boundary of the Hay and Wood Reserve to conform to the acreage description of 9,114 acres in the Executive Orders of March 30, 1870, and September 19, 1890, all in accordance with the June 3, 1974 Order of the Secretary of the Interior.

Arizona v. *California*, No. 8., Original, Stipulation and Agreement 4-5 (Jan. 14, 1998). As the Master explained, "[t]he Fort Mojave settlement includes the boundary determination, and no boundary issue remains." Mot. App. A82. See *Arizona III*, 530 U.S. at 418 (the Fort Mojave settlement "specifies the location of the disputed boundary"). This Court has approved that settlement, *ibid.*, and its supplemental decree implements that resolution, 531 U.S. at 2-3. There is accordingly no further boundary issue respecting the Hay and Wood Reserve that remains to be determined in this case, and there is no basis for reopening a matter that has been conclusively determined among the parties and by the Court in this litigation.[2]

3. The movant's claim of title has no bearing on the water rights at issue in this original action. Movant's request to intervene is predicated upon the misconception that this Court should exercise its original jurisdiction to resolve private title disputes. Mot. A14, A30.

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[2] Movant mistakenly suggests (Mot. A28, A31) that the Fort Mojave Settlement does not resolve the Fort Mojave boundary dispute. Movant relies on statements in the Special Master's Report that address a different settlement involving a different boundary dispute. See Mot. A31 (quoting Mot. App. A81). The Master specifically observed, with reference to the Colorado River Indian Reservation settlement, that the proposed accord "'does not address that aspect of the Court's reference to a Special Master intended to remove the clouds on the titles of non-Indian users'" (Mot. A31, quoting Mot. App. A81). That observation has no bearing on the Fort Mojave Indian Reservation. See Mot. App. A81-A82 (discussing the objections of the West Bank Home Owners Association to the Colorado River Reservation settlement); *id.* at A83 (noting that the proposed resolution "finally determines boundary claims as to the Fort Yuma and Fort Mojave reservations" but does not "lay to rest the Colorado River Reservation boundary dispute"); see also *Arizona III*, 530 U.S. at 419 & n.6.

This Court's original jurisdiction is generally reserved for resolving inter-sovereign controversies. See 28 U.S.C. 1251. The Court granted leave to file this original action specifically to resolve a dispute among the States over "how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries." *Arizona I*, 373 U.S. at 551. See also *Arizona II*, 460 U.S. at 608 ("Today we conclude another chapter in this original action brought to determine rights to the waters of the Colorado River."). In the course of those proceedings, the parties concluded that they needed to determine the proper location of the Indian reservation boundaries in order to calculate the reserved water rights of individual Indian Tribes. But neither the Court nor the parties have viewed this original action as a proper forum for resolving private land claims.

The Fort Mojave settlement correspondingly does not address any private claims respecting title. To the contrary, the settlement specifically "disclaims any intent to affect any private claims to title to or jurisdiction over any lands." *Arizona III*, 530 U.S. at 418. Movant is not entitled to expand this suit to encompass a private land dispute. Instead, movant must rely on those judicial remedies that are generally available outside of this Court's original jurisdiction. In doing so, movant, like any other person who may have a title dispute with the United States, is subject to the conditions that Congress has prescribed with respect to "trust or restricted Indian lands." See Quiet Title Act, 28 U.S.C. 2409a(a).[3]

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[3] To the extent that movant seeks to have the Court set aside a settlement and supplemental decree that resolved the boundary dispute as among the parties, his request would be an extra-

The current proceedings before the Special Master, which are limited to determining the water rights of the Quechan Tribe, have no bearing whatsoever on the Fort Mojave Indian Reservation's Hay and Wood Reserve. The Quechan Tribe's water rights claims "are the only ones that remain to be decided in *Arizona* v. *California*; their resolution will enable the Court to enter a final consolidated decree and bring this case to a close." *Arizona III*, 530 U.S. at 420. There is no warrant for adding new issues respecting unrelated private land claims that will delay the resolution of this case.

4. The motion to intervene is not timely. Even if movant's request to intervene in these proceedings were otherwise appropriate, it should be denied. The Federal Rules of Civil Procedure, which serve as a guide for procedure in original actions, require a "timely application" for intervention. Fed. R. Civ. P. 24(a) and (b). Movant's motion, which comes after this Court's entry of a supplemental decree respecting the boundary of the Hay and Wood Reserve, plainly comes too late.[4]

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ordinary measure to be taken at the behest of a private citizen and total stranger to an original action among sovereign governments. To the extent movant seeks to quiet title to a tract of land between himself and the United States, that action could not be brought in this Court, any more than in the district court, if it is barred by the Quiet Title Act.

[4] According to movant (Mot. A10), he purchased the property in question on April 10, 2000. That was more than two months before the Court issued its decision in *Arizona III*, 530 U.S. at 392, and six months before the Court entered its supplemental decree on October 10, 2000, that resolved, as among the parties, the issue concerning the Hay and Wood Reserve boundary, 531 U.S. at 1-2. Yet movant made no effort to intervene during that period prior to entry of the supplemental decree, which constitutes the Court's

As a general matter, courts are reluctant "to allow intervention after the action has gone to judgment." Charles Alan Wright, et al., *Federal Practice and Procedure: Civil 2d* § 1916, at 444-445 (West 1986) (footnotes omitted). As this Court specifically stated in *Arizona II*, "permission to intervene does not carry with it the right to relitigate matters already determined in the case, unless those matters would other wise be subject to reconsideration." 460 U.S. at 615. The movant's request, which seeks to reopen this Court's decree and litigate new issues concerning the Hay and Wood Reserve boundary, would prejudice the rights and interest of the parties to this litigation, who reached a settlement of the issues through "extensive negotiation." Mot. App. A82. The movant's attempt to upset a final decree at this late date should not be allowed.

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final judgment on the matter. See *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-396 (1977).

CONCLUSION

The motion for leave to intervene and file an answer should be denied. In the alternative, the matter may be referred to the Special Master for resolution.

Respectfully submitted.

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