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## An Eddy in the Colorado River Litigation

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## *An eddy in the Colorado River litigation*

by Robert H. Abrams

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**State of California**

**v.**

**United States**  
(Docket No. 87-1165)

*Argument Date: Nov. 28, 1988*

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### ISSUES

Although the principal legal issues involve judicial jurisdiction and sovereign immunity, this is a water law case in disguise. The issues arise in the course of ascertaining what forum is available in which to dispute a determination of the secretary of interior that fixed the boundaries of three Indian reservations that adjoin the Colorado River.

This particular case was initiated by two California water districts and later taken up by Arizona and California to review those boundary determinations in ordinary federal litigation commenced in U.S. District Court. The contest has little, if anything, to do with the intrinsic legal significance of the jurisdictional and immunity issues. It has to do with allocating the water of the Colorado River.

### FACTS

Even focusing on this case alone rather than on the Colorado River litigation of which it is a tiny part, the facts are not simple. The secretary of interior is empowered to issue administrative orders that determine the boundaries of Indian reservations. Three such orders, one issued in 1969 fixing the boundaries of the Colorado River Indian Reservation, one issued in 1974 fixing the boundaries of the Fort Mojave Indian Reservations and one issued in 1978 fixing the boundaries of the Fort Yuma Indian Reservation, affect the boundaries of reservations bordering the Colorado River.

Seeking to challenge those orders, in 1981 the Metropolitan (Los Angeles) Water District (MWD) and the Coachella Valley Water District (later joined by the states of California and Arizona) brought suit in the U.S. District Court for the Southern District of California. The United States, joined by the three tribes whose reservation boundaries were under consideration, interposed a variety of defenses to the proceedings themselves as well as to the rectitude of the secretary's action on the merits. During the course of the litigation, the United States, in reaction to events in the U.S.

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Supreme Court litigation over the allocation of the Colorado River (see *Arizona v. California II*, 460 U.S. 605 (1983)), withdrew most of its objections to the instant proceeding.

In 1986 District Judge Brewster, in an unpublished memorandum opinion, rejected the remaining non-merits defenses and set aside the secretary's boundary determination, announcing his intention to determine the boundary *de novo* in the judicial proceeding.

At the same time, the district court certified the case for immediate appeal to the U.S. Court of Appeals for the 9th Circuit because that court and the 11th Circuit had held recently that suits under the Quiet Title Act, and not suits like this one filed pursuant to the Administrative Procedures Act, were the jurisdictional basis on which challenges to reservation boundaries must lie. The waiver of objections to jurisdiction by the United States did not moot the issue because objections to the subject matter jurisdiction of federal courts cannot be waived and can be raised at any time before final disposition by any party or by the court itself.

Based on its recent prior jurisdictional ruling, the 9th Circuit Court of Appeals held that the district court had lacked jurisdiction to hear the case and must therefore dismiss the complaint without reaching the merits of the boundary dispute.

### BACKGROUND AND SIGNIFICANCE

The Colorado River litigation has as venerable a history as does any interstate water dispute. It has continued since 1952, when the state of Arizona invoked the original jurisdiction of the U.S. Supreme Court to determine its share of the Colorado's annual flow. Thirty-six years and one landmark decision (*Arizona v. California I*, 373 U.S. 546 (1963)) later, the case is winding down with many of the water entitlements settled. A truncated account of that litigation and its effect on states' water rights is needed to place this case in context.

The original Supreme Court decision ruled that the water of the Colorado had been allocated among the several states through which the river flows by Congress when it passed the Boulder Canyon Project Act of 1929. The precise allocations are not important here except insofar as California's share, 4.4 million acre-feet (MAF), is less than the amount of water that its water users are able to put to beneficial use. The Court also ruled that under the federal reserved water rights doctrine, a number of federal enclaves along the river, including several large Indian reservations, were also enti-

bled to have their water rights recognized and given legal protection.

To the extent that Indian and other federal reserved rights were recognized, they were to be charged against the allotment of the state in which they were located. Those Indian reservations were deemed to have rights, which traced back to the creation of the reservations, to as much Colorado River water as was necessary to irrigate the "practicably irrigable acreage" found within their boundaries.

In order to quantify the Indian reserved rights, the acreage of lands deemed irrigable is multiplied by the water duty—the amount of water needed to irrigate crops in that locale. A necessary precursor to that determination is the fixing of the precise reservation boundaries. It is that boundary-setting process that gave rise to the instant litigation, with the MWD, Coachella Water District, California and Arizona seeking review of the Secretarial determinations.

The case therefore has an apparent significance to Arizona and California water users, who may find their water rights subordinated to increased Indian claims that would attend the quantification of the Indian rights under the Secretarial orders mentioned above.

This has long been a threat, but until now Arizona had never used its full share of water, and the California users who might be at risk if the Indian allocation is increased have been able to use "Arizona" water to satisfy their entitlements.

With the recent completion of the initial stages of the Central Arizona Project and the scheduled completion of the remainder in prospect, that situation will change and Arizona will begin taking its full share. Historically, the largest single beneficiary of the "extra" flow was the MWD. Threatened by an increase in Indian entitlements under the Secretary's boundary determinations, the MWD asserts that if Indian rights are quantified on the basis of the 1969, 1974 and 1978 orders, it will lose "about 104,000 acre-feet of diversions in California, which is enough water to supply about 500,000 people annually in Metropolitan's service area."

Despite the MWD's thinly veiled assertion that the water supply of one-half million souls is in issue in this case, the Supreme Court is considering only the question of whether this particular proceeding is the proper one in which to obtain review of the boundary determinations.

The high court could agree with the respondents that the congressionally allocated jurisdiction of the federal courts does not permit review in this setting and remit the petitioners to find an alternate avenue for obtaining review. The most likely option would be in the Supreme Court itself as the next installment in the long-playing Colorado River litigation. Alternatively, the Court could reverse the 9th Circuit's ruling and allow the merits of the boundary determination to be reviewed, either *de novo*, as proposed by the district court, or on some other more deferential basis.

#### ARGUMENTS

*For Metropolitan Water District, Coachella Water District and the States of California and Arizona (Counsel of*

*Record, Jerome C. Muys, 1825 Eye St. N.W., Suite 920, Washington, DC 20006; telephone (202) 429-4344)*

1. The United States has by its assertion of claims for reserved water rights to benefit the Indian reservations waived its sovereign immunity in litigation seeking to review the boundary determinations affecting those reservations.
2. The Administrative Procedure Act's (APA) waiver of sovereign immunity applies in this case.
3. Even if the Quiet Title Act (QTA) makes this case an exception to the general APA waiver of immunity, the federal government should have to prove that the lands are "trust or restricted Indian lands" within the meaning of the QTA.
4. The decision of the 9th Circuit frustrates the congressional policy of the McCarran Amendment favoring the orderly determination of Indian water rights claims.
5. The boundary disputes present justiciable controversies.

*For the United States (Counsel of Record, Edwin S. Kneedler, assistant to the solicitor general, U.S. Department of Justice, Washington, DC 20530; telephone (202) 633-2217)*

1. Review of a reservation boundary determination may not be had under the APA because a more specific statute (the QTA) expressly grants consent to suit while forbidding the relief sought in this suit.
2. Intervention by the United States in the *Arizona v. California* Supreme Court litigation to establish the existence of reserved water rights did not waive its immunity to this suit.

*For the Indian Tribes (Counsels of Record, Dale T. White, Whiteing, Thompson & White, 6684 Gunpark Dr., Boulder, CO 80301, telephone (303) 530-1335, for the Fort Mojave Tribe; William E. Strickland, Strickland & Altaffer, 700 Transamerica Bldg., Tucson, AZ 85701, telephone (602) 622-3661, for the Quechan (Fort Yuma) Tribe; Scott B. McElroy, Greene, Meyer & McElroy, 1007 Pearl St., Suite 240, Boulder, CO 80302, telephone (303) 442-2021, for the Colorado River Tribes)*

1. The United States has not waived its immunity.
2. The APA does not waive immunity where the status of trust lands are in issue.

#### AMICUS BRIEFS

##### *In Support of the United States*

The Klamath Tribe, Nez Prince Tribe, Swinomish Tribal Community and other tribes argue that:

1. The QTA prohibits third-party suits which seek to divest the United States of title to Indian lands.
2. Even if the QTA would allow this suit, broad judicial review would violate the historical obligation of the United States to protect Indian lands.
3. The waiver of immunity to assert Indian water rights does not extend to ancillary proceedings.