Water Rights: Is the Quechan Tribe Barred from Seeking a Determination of Reservation Boundaries in Indian Country

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W A T E R   R I G H T S

Is the Quechan Tribe Barred From Seeking a Determination of Reservation Boundaries and Water Rights?
by Judith V. Royster

FACTS
The facts and procedural history of this case include both the legal history of the Fort Yuma Reservation of the Quechan Tribe and the history of the litigation between the states of Arizona and California over rights to water in the Colorado River. Like the facts of most Indian law cases, this story begins in the 19th century.

The Fort Yuma Reservation. The Quechan Tribe (Yuma Indians), indigenous to the southwest, today occupies the Fort Yuma Reservation. The Reservation, straddling the Colorado River where it forms the Arizona-California border, was established by executive order in 1884. Executive Order, President Chester A. Arthur (Jan. 9, 1884); see Charles J. Kappler, I Indian Affairs Laws and Treaties 832 (1904). In 1893, the Tribe and the federal government negotiated an

ISSUES
Do the Supreme Court’s prior decisions in the Arizona v. California litigation over rights to water in the Colorado River preclude the Quechan Tribe from seeking additional water rights for its “boundary lands”? Does a judgment of the Claims Court, approving a stipulated settlement between the Quechan Tribe and the United States, bar the Tribe and the United States from seeking a determination of the boundaries of the Tribe’s reservation and the attendant reserved water rights?

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agreement calling for the Tribe to cede “all their right, title, claim, and interest in and to” approximately 25,000 acres in California “upon the conditions hereinafter expressed.” 1893 Agreement with the Yuma Indians in California, Art. I. The agreement was ratified by Congress the following year. Act of Aug. 15, 1894, 28 Stat. 286, 332.

The conditions upon which the Tribe agreed to cede its lands included the construction of an irrigation canal within three years, the allotment of irrigated lands to tribal members, the sale of most non-allotted lands to raise funds to help pay for the canal, and the opening of the non-irrigable lands to settlement. 1893 Agreement, Arts. III-VII.

However, the irrigation canal was not constructed, some of the non-allotted irrigable lands were not sold (and thus revenues for the canal were not realized), and the lands not irrigated were not opened to non-Indian settlement. See Opinion of the Solicitor, No. M-36908 (Dec. 20, 1978), 86 Int. Dec. 1 (1979).

In the early years of the 20th century, a federal irrigation system was constructed on portions of the Fort Yuma Reservation pursuant to a special authorization under the Reclamation Act of 1904. See 32 Stat. 388 (codified as amended at 43 U.S.C. § 371 et seq.). The project provided irrigation by 1910 for some 6,500 acres sold to non-Indians, and by 1917 for approximately 2,000 acres of Indian lands. In the mid-1930s, the Bureau of Indian Affairs requested permission from the Tribe for a right-of-way across the Reservation for construction of the All-American Canal. In 1936, the Solicitor of the Department of Interior issued an opinion that under the 1893 Agreement, title to the non-irrigable lands, now needed for the All-American Canal, had vested immediately in the United States. The opinion concluded that the 1893 Agreement was an unconditional cession of the Quechan lands. Accordingly, the Solicitor opined, no tribal consent was necessary for canal construction. Yuma Reservation—Title to Lands, I Opinions of the Solicitor 596 (No. M-28198 Jan. 8, 1936).

In 1951, the Tribe filed a claim, known as Docket 320, with the Indian Claims Commission (ICC). The Tribe claimed that the federal government had taken the lands pursuant to the 1893 Agreement without just compensation and that the United States had violated its duty of “fair and honorable dealings” in negotiating and implementing the 1893 Agreement. See Indian Claims Commission Act, § 2, 60 Stat. 1050. In 1958, the Tribe amended its claim to assert the alternative theory that the 1893 Agreement was never implemented, that the Tribe therefore retained beneficial title to the 25,000 acres, and that the Tribe was owed trespass damages for unlawful use of the lands. (The ICC, like the United States Claims Court, where cases pending before the ICC were transferred when the ICC ceased operations in 1978, had the authority to award only damages as a remedy.) In 1978, the Solicitor of the Department of the Interior issued a new opinion reversing the 1936 opinion. No. M-36908 (Dec. 20, 1978), 86 Int. Dec. 3 (1979). The 1978 opinion concluded that the Tribe’s cession of lands was dependent upon the conditions stated in the 1893 Agreement. Because those conditions had never been met, the land cession had not taken place. The Secretary of the Interior issued an order that same day that the boundaries of the Fort Yuma Reservation were thus those established by the 1884 Executive Order, as amended by Executive Order of Dec. 19, 1900. See Secretarial Determination and Directives of December 20, 1978, published at 46 Fed. Reg. 11,372 (1981).

In 1983, the Quechan Tribe and the United States entered into a stipulated settlement of the Tribe’s Docket 320 claim filed with the Indian Claims Commission (now before the Claims Court). Because the Secretarial Order of 1978 amounted to an admission by the United States that the Tribe owned the disputed land, the parties jointly stipulated that the boundaries established in 1884, as modified by executive order in 1900, remained the present reservation boundaries. Joint Memorandum Re: Stipulation, ¶ 4 (May 26, 1983), reprinted in Exception of the United States and Brief for the United States in Support of Exception, No. 8, Orig. (Dec. 20, 1999) at App. E. Under the settlement, the Tribe received $15 million “for damages for the taking of parts of the Reservation after 1893 and the loss of use of other parts of the Reservation from 1893 to 1978.” Stipulation for Settlement and Entry of Final Judgment (Aug. 9, 1983), App. A, quoted in Exception of the Quechan Indian Tribe to the Report and Recommendation of the Special Master and Supporting Memorandum, No. 8, Orig. (Dec. 20, 1999) at 14.

In addition, the parties stipulated that “[t]he final judgment entered pursuant to this stipulation shall be construed to be a compromise and settlement and shall not be construed as an admission by either party for the purpose of precedent or argument in any other case.” Joint Motion for Approval of Settlement and Entry of Final Judgment, ¶ 2 (July 27, 1983), reprinted in Exception of the United
The Arizona v. California Litigation. In the meantime, Arizona had sued California over rights to the water in the Colorado River. The case was filed in 1952 as an original action in the United States Supreme Court. Arizona v. California (Arizona I), 373 U.S. 546, 550-51 (1963), decree entered, 376 U.S. 340 (1964). The Constitution provides that certain types of lawsuits, including lawsuits to which a state is a party, are within the original jurisdiction of the Court, that is, those actions can be filed directly in the Supreme Court rather than in federal district court. U.S. Const. Art. III, § 2. Although the Court's original jurisdiction is seldom invoked today, it is exclusive in cases of disputes between states, 25 U.S.C. § 1251(a)(1), which generally concern boundaries or rights to interstate waters.

When an original jurisdiction case is filed, the Court refers the case to a "special master," who takes evidence, finds facts, states conclusions of law, and recommends a decree. See Arizona I, 373 U.S. at 551. The special master files a report and recommendations with the Court, and the parties to the action may file "exceptions" to the master's report along with supporting briefs. If exceptions are filed, the Court sets the case for oral argument the same as it does for cases it takes under its appellate jurisdiction.

When Arizona sued California in the Supreme Court, the United States intervened, in part in its capacity as trustee for Indian lands and property rights. The United States asserted the water rights of five Indian reservations in Arizona, California, and Nevada, including the Fort Yuma Reservation of the Quechan Tribe. Arizona I, 373 U.S. at 595. The tribal water rights were asserted on the basis of Winters v. United States, 207 U.S. 564 (1908), which held that when an Indian reservation is created, sufficient water is impliedly reserved to fulfill the purposes for which the reservation was set aside. In Arizona I, the Court determined that this doctrine of tribal reserved water rights, or "Winters rights," applied not only to reservations created by treaty or statute, but also to those such as Fort Yuma created by executive order. The Court held that water rights were reserved to tribes regardless of whether the reservation was created before or after statehood, and that the usual measure of a tribe's right to water to fulfill the agricultural purpose of a reservation was enough water to irrigate all the practicably irrigable acreage (PIA) of the reservation. 373 U.S. at 596-601.

In addition, the Court in Arizona I found it "unnecessary" to determine the disputed boundaries of two of the Indian reservations at issue: Colorado River and Fort Mojave. Id. at 601. As a result, when the decree was entered in 1964, see 376 U.S. 340 (1964), it provided for future adjustments of water rights for those two reservations "in the event that the boundaries of the respective reservations are finally determined." 376 U.S. at 345.

In 1978, recall, the Interior Solicitor issued an opinion reaffirming the 1884 boundaries of the Fort Yuma Reservation. The following day, the United States moved to modify the 1964 Decree for that reservation, arguing for an equitable modification of water rights for the Quechan lands. The Supreme Court entered a Supplemental Decree in 1979 that described the water rights for the five reservations at issue in the Arizona litigation but also provided that the quantities of water for all the reservations, including Fort Yuma, "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." Arizona v. California, 439 U.S. 419, 421 (1979).

In 1983, the Court reviewed findings of the special master regarding two types of Quechan lands: "boundary lands" (lands determined to be within the Fort Yuma Reservation because of a final boundary determination) and "omitted lands" (lands that should have been declared practicably irrigable acreage in the 1964 Decree but weren't). Arizona v. California, 460 U.S. 605 (1983). The Court held that the 1964 Decree barred a redetermination of water rights for the omitted lands, under general principles of res judicata (claim preclusion). Id. at 626. As to the boundary lands, the Court found that the 1978 Secretarial Order was not a final determination of the reservation boundaries because the State parties had not had the opportunity to obtain judicial review of the administrative decision. Id. at 637-38. In its 1984 Supplemental Decree, the Court again provided that the quantities of water reserved for the five Indian reservations "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined." 466 U.S. 144, 145 (1984).

In a judicial challenge to the Secretarial Order brought by California and its agencies, the district court invalidated the Order. Metropolitan Water District of

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**Southern California v. United States**, 628 F.Supp. 1 (S.D. Cal. 1986). The court of appeals reversed on the ground that the Quiet Title Act, 28 U.S.C. § 2409a, grants the United States sovereign immunity from suit challenging its title to Indian lands held in trust. 

**Metropolitan Water District of Southern California v. United States**, 830 F.2d 139 (9th Cir. 1987). The United States Supreme Court affirmed the court of appeals by an equally divided Court. 

The United States counters that there are "fundamental distinctions" between the omitted lands issue and the boundary lands question. First, the United States asserts that unlike the omitted lands issue, the boundary lands question turns on the validity of the 1978 Secretarial Order rather than on a redetermination of factual matters resolved in **Arizona I**. Next, the United States argues that the boundary lands claim could not have been decided in **Arizona I** because the Court ruled in that case that the special master had erred in reaching the boundary question for two other tribes. And finally, the United States asserts that the 1979 and 1984 Supplemental Decrees expressly provided for modification of water rights based on the final determination of the reservation boundaries but made no equivalent provision for modification of water rights for omitted lands. Thus, the United States argues, the Court left the boundary lands issue open for later resolution. 

The United States disagrees on both the waiver and timeliness issues, insisting that preclusion is an affirmative defense, which the State parties were obligated to raise in a timely manner. The United States contrasts the State parties' assertion of a preclusion defense to the Tribe's omitted lands claims with the State parties' lack of a preclusion defense at that time to the boundary lands issue. Moreover, the United States notes that the State parties stipulated to the language in the 1979 Supplemental Decree that the water rights of all five reservations would be subject to modification "in the event that the boundaries of the respective reservations are finally determined," a stipulation that the United States asserts is consistent with the State parties' waiver of a preclusion defense.

**Case Analysis**

**The State Parties' Exception.** The State parties in this proceeding (Arizona, California, and certain state agencies) filed an exception to the special master's conclusion that the Quechan Tribe was not precluded from seeking additional water rights by prior decisions in the **Arizona** litigation.

First, the State parties note that in **Arizona II**, the Court refused to reconsider water rights for the "omitted lands" of the Fort Yuma Reservation, 460 U.S. 605, 617-26 (1983), because the claim could have been raised earlier based on facts known at that time. The same principle, the State parties argue, applies to the boundary lands: the United States could have raised the issue of water rights for the boundary lands at an earlier proceeding.

The United States counters that there are "fundamental distinctions" between the omitted lands issue and the boundary lands question. First, the United States asserts that unlike the omitted lands issue, the boundary lands question is finally determined, "shall continue to be subject to appropriate adjustment ... in the event that the boundaries of the respective reservations are finally determined," 439 U.S. 419, 421, does not require any final boundary determination and thus cannot be read as a waiver of State defenses.

Third, the State parties argue that their preclusion defense is not untimely. Although the State parties concede that they did not raise the defense in opposition to the 1978 motion by the Tribe and the United States to reopen the 1964 Decree, they claim that the issue could be raised by the Court *sua sponte* (on its own). The State parties also assert that the Tribe and the United States have had a full opportunity to litigate the question before the special master and that the State parties' failure to raise the preclusion issue earlier has not prejudiced the Tribe.

The United States disagrees on both the waiver and timeliness issues, insisting that preclusion is an affirmative defense, which the State parties were obligated to raise in a timely manner. The United States contrasts the State parties' assertion of a preclusion defense to the Tribe's omitted lands claims with the State parties' lack of a preclusion defense at that time to the boundary lands issue. Moreover, the United States notes that the State parties stipulated to the language in the 1979 Supplemental Decree that the water rights of all five reservations would be subject to modification "in the event that the boundaries of the respective reservations are finally determined," a stipulation that the United States asserts is consistent with the State parties' waiver of a preclusion defense.
In addition, the United States relies on the Court's statement in *Arizona II* that "if at all possible, the boundary disputes would be settled in other forums [than the Court].” See 460 U.S. at 638. The government argues that the Court would not have so directed the parties if the Court believed that the boundary issue was precluded from litigation. Similarly, the United States insists that the Court would not have reiterated in its 1984 Supplemental Decree that tribal water rights "shall be subject to appropriate adjustments by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined,” 466 U.S. 144, 145 (1984), if the Quechan Tribe was in fact precluded from litigating the boundary lands question.

Finally, the State parties note that the special master rejected the State parties' preclusion claim on the ground that water rights for the Quechan boundary lands were based on "new facts" not available or ascertainable at an earlier time. The State parties argue that no new facts were at issue, only a change in legal theory based on the Interior Solicitor's 1978 opinion reversing the 1936 opinion. The State parties maintain that the Tribe and the United States should be precluded from pursuing a different legal theory that is based on the same facts already adjudicated.

The United States maintains that although the Court can modify its decrees in response to changed circumstances, the federal government "does not rely on that rationale in this case." Instead, the government relies on its other reasons for claiming the boundary lands issue is not precluded and argues that "there is no occasion to explore the more difficult and fact-specific question of what types of 'changed conditions' would justify the modification of this Court's water rights decrees." Reply Brief for the United States, at 21.

**The Tribe's and United States' Exceptions.** The Quechan Tribe and the United States both filed exceptions to the conclusion of the special master that the 1983 judgment of the Court of Claims, approving the settlement of the Tribe's claims against the United States, bars adjudication of the Fort Yuma Reservation boundaries. Both the tribal and federal parties raise two interrelated arguments in exception to the master's determination.

First, the Tribe and the government argue that nothing in the claims judgment indicates that the judgment precluded subsequent litigation of the Tribe's reservation boundaries. The two parties both fundamentally claim that the special master misunderstood the purpose and import of the judgment.

Both the Tribe and the United States focus on the language of their joint stipulation that was incorporated in the final judgment of the Claims Court, which said the judgment "shall not be construed as an admission by either party for the purpose of precedent or argument in any other case." The parties argue that this language indicates their clear joint intent that the settlement not preclude either of them from litigating related issues against other parties in other forums.

In addition, both parties dispute the special master's apparent assumption that the claims judgment accorded the Tribe $15 million for the cession of its boundary lands in 1893. The parties state that the federal government's payment to the Tribe was primarily to compensate the Tribe for the temporary deprivation, from 1936 to 1978, of the boundary lands at issue. The payment was not and could not have been payment for cession of the boundary lands, the parties assert, because both the Tribe and the United States stipulated that the Tribe retained beneficial ownership of those lands.

Second, the Tribe and the government argue that principles of collateral estoppel (issue preclusion) do not bar the special master from determining the boundaries of the Fort Yuma Reservation. Both parties rely primarily on the "actually litigated" standard, which provides that issue preclusion applies only if the issue sought to be precluded was "actually litigated and necessary to the outcome of the first action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); see also *Regions Hospital v. Shalala*, 522 U.S. 448, 463-64 (1998); *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1877). The parties point out that neither the issue of the Quechan boundary lands nor the issue of the Tribe's water rights for those lands had been litigated before the claims tribunal. Instead, the claims judgment was entered "based on a compromise and settlement" of the parties. Both parties cite authorities for the proposition that a consent judgment, because it is not actually litigated, cannot result in issue preclusion. See *Restatement (Second) Judgments § 27 comment e* (1982); *18 Moore's Federal Practice (3d ed.) § 132.01[2][1][1][1]* (1997). The parties assert that this principle applies particularly where, as here, the parties to the judgment expressly stipulated that the judgment "shall not be construed as an admission by either party for the purposes of precedent or argument in any other case."

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The United States also argues that res judicata (claim preclusion) does not bar relitigation of the boundaries of the Tribe's reservation. The United States' exception, at issue here, is the 1978 Secretarial Order representing a federal determination of its ownership of the boundary lands. In the absence of a final judicial determination of its ownership of the boundary lands, the Tribe is foreclosed from any judicial determination of the boundaries of the Fort Yuma Reservation. Based on their exceptions, the United States and the Quechan Tribe ask the Court to remand the case to the special master for a determination of the boundary lands. If the case is remanded, the issues would be whether the 1893 Agreement was a conditional cession of land and, if so, whether the United States failed to fulfill those conditions. If those questions are resolved in favor of the Tribe, it would be entitled to water rights for the boundary lands.

**SIGNIFICANCE**

This case is significant on a number of levels. First, it has obvious significance for the Quechan Tribe. If the Court rules against the Tribe's and the United States' exception, the Tribe is foreclosed from any judicial determination of its ownership of the boundary lands as well as the attendant water rights. In the absence of a final judicial determination, the 1978 Secretarial Order represents a federal determination that the Quechan Tribe retains beneficial ownership of the boundary lands. Those lands are within the Fort Yuma Reservation and subject to tribal and federal jurisdiction. But with only the administrative decision, the Tribe cannot pursue the water rights that otherwise would attach to the trust lands, thus denying to the Quechan Tribe certain rights guaranteed to Indian tribes by federal law. The Tribe's only recourse would be an appeal to Congress for a declaration of tribal ownership of the boundary lands.

The case has equal significance for the State parties. Water is the most precious resource in the Western states. If the Tribe and the United States may pursue water rights for the boundary lands, and if they prevail in asserting those rights, the tribal water rights may displace some state-law water rights. In the Western United States, water is allocated on a "first-come, first-served" basis, with all water rights accorded a "priority date." The priority date of tribal Winters rights to water is the date the reservation was created or, in the case of the Quechan Tribe, 1884. Because most Indian reservations were created in the mid- to late-19th century, before many state-law water rights were perfected, tribal reserved rights to water generally have earlier priority dates than most state-law rights. In times of shortage, therefore, the tribal water rights must be met before subsequent non-Indian rights. Any increase in the Tribe's reserved water rights thus means less water available to subsequent state-law users. Moreover, the Court ruled in *Arizona I* that "all uses of mainstream water within a State are to be charged against that State's apportionment." 373 U.S. at 601.

Thus, any increase in the Quechan Tribe's water rights for lands in Arizona and California decreases the states' shares of Colorado River water by the same amount.

On a procedural level, this case is an opportunity for the Court to rule on the preclusive effect of stipulated judgments. Although the Court's "actually litigated" standard for issue preclusion is well established, the parties do not point to any case in which the Court has applied that standard to a consent judgment. The consensus of treatise writers and lower federal courts appears to be that a consent judgment does not preclude subsequent litigation of related issues against different parties, particularly where the parties to the consent judgment did not clearly intend any such preclusive effect. See Federal Procedure § 51:260 (1997). This case, however, will be the first ruling from the Court on that question.

Finally, the case has significance with respect to bringing the *Arizona* litigation to a close. The only outstanding issue in that litigation is the water rights for the Quechan boundary lands, an issue that the United States is "hopeful" can be brought to a negotiated settlement if the claim is allowed to proceed. Exception of the United States, at 42. The *Arizona v. California* lawsuit was filed in 1952. It has been to the Supreme Court three times prior to this current proceeding and has outlasted several special masters and numerous justices. Bringing the litigation to a close by its 50th anniversary is likely a goal of all the parties.
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