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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 59 Original

UNITED STATES OF AMERICA,

Plaintiff,

vs.

STATES OF NEVADA AND CALIFORNIA.

California's Brief in Opposition to Motion for Leave to File Complaint

EVELLE J. YOUNGER
Attorney General of California
CARL BORONKAY
Assistant Attorney General
RODERICK WALSTON
Deputy Attorney General
BERTRAM G. BUZZINI
Deputy Attorney General
DENNIS ANTENORE
Deputy Attorney General
6000 State Building
San Francisco, CA 94102

*Attorneys for State of
California.*

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STATEMENT OF THE FACTS

This brief is in response to the motion of the United States for leave to file a complaint (hereinafter "Complaint") against Nevada and California under the original jurisdiction of the Supreme Court.

The Truckee River System

The Truckee River is an interstate stream which originates in Lake Tahoe, flows through parts of California and Nevada, and terminates in Pyramid Lake in Nevada. After leaving Tahoe Basin, the river courses through California for about 20 miles, where minor diversions are made. The

river then enters Nevada at the Truckee Meadows area, where diversions are made for the benefit of the Reno-Sparks area. The river continues on in Nevada to a diversion dam at Derby, about 25 miles downstream from Reno. Substantial amounts of the river's waters are diverted by this dam through the Truckee Canal to the Lahontan Reservoir, a storage reservoir located in the Nevada portion of the Carson River Basin in Nevada. This reservoir also receives water from the Carson River. Water from the reservoir is dispatched for use on the Newlands Reclamation Project, a federal reclamation project principally located in the Carson River Basin in Nevada. The project is operated by the Truckee-Carson Irrigation District (TCID), a district formed by water users in the project; the district signed a contract with the United States in 1926 which provided for the use of water from the canal and reservoir to meet the needs of the district. Most of the return flow from the Newlands project, that is, water from Lahontan Reservoir which is diverted but not consumed, is used for the benefit of wildlife refuges, principally the Stillwater National Wildlife Refuge, located below the Newlands project in Nevada.

The water of the Truckee River which is not diverted at the Derby diversion dam is allowed to flow northward to Pyramid Lake, a lake completely encircled by a reservation established for the Paiute Indian tribe (hereinafter the "Pyramid Indians").¹ The river is the sole inlet of the lake, and thus the level of the lake is primarily dependent on the inflow from the river. The lake is an historic habitat for certain varieties of fishlife.

Most of the water in the Truckee River is diverted to the Newlands project, or is allowed to flow to Pyramid

1. Lands for the reservation were withdrawn from public use in 1859, and the reservation was formally established by presidential executive order in 1874. About 400 members of the tribe currently reside on the reservation. Task Force report, 3.

Lake. The average annual flow of the river, when crossing the boundary between California and Nevada, is 510,000 acre-feet, based on the 53-year period from 1918 to 1970. See Report of Pyramid Lake Task Force, Final Report, December 1971 (hereinafter "Task Force report"), 2, 5-6, App. A-2.² After diversions in the Truckee Meadows area, the average flow which reaches the diversion dam at Derby each year is 480,000 acre-feet. *Id.* at 2, Apps. A-2, A-4.³ The average annual flow diverted by the dam to the Newlands project is 248,000 acre-feet, and the average annual flow allowed to continue to Pyramid Lake is 249,000 acre-feet. *Id.* at 2, App. A-4.⁴ The flow from both the Truckee and Carson Rivers which is used in wildlife refuges below the Newlands project averages 230,000 acre-feet each year. *Id.* at 5.

California's use of the waters of the Truckee River is miniscule. California only diverts about 26,000 acre-feet of water from the river each year,⁵ and only consumes about half that amount. Such water is largely used for domestic purposes by the small communities that have sprung up around Lake Tahoe and along the Truckee River, and are

2. An original copy of the Task Force report has been lodged with the Clerk as California's Exhibit A.

3. These and other flow figures herein, except where otherwise indicated, are similarly based on the period from 1918 to 1970, and are derived from the report of the Task Force.

4. The discrepancy between the total of these flow figures and the overall flow figure of 510,000 acre-feet derives from the spillage of diverted water into the river below the dam. Task Force report, App. A-2.

5. This total diversion figure is based upon the use in California of 12,000 acre-feet in the Tahoe Basin and 8000 acre-feet in the Truckee Basin, and upon the additional use of 6000 acre-feet in the Truckee Basin by the Sierra Valley Water Company under judicial decree. See *U. S. v. Sierra Valley Water Co.*, U.S.D.C., Civ. No. 5597 (N.D. Cal. 1958).

dependent on these water sources. Thus, the waters of the river, although largely originating in California,⁶ are primarily used in Nevada.

The inflow of the Truckee River into Pyramid Lake has not been sufficient in the last few decades to replace evaporative losses in the lake. At its present level, the lake needs an inflow of 385,000 acre-feet each year in order to replace these losses,⁷ as compared with its average annual inflow of 249,000 acre-feet. Task Force report, 3-4. Thus, the imbalance between the lake's current supply and demand is 135,000 acre-feet each year.⁸ This imbalance has resulted in a decline in the lake's level by 86 feet since the 1880's. *Id.* at 1, 3, App. A-23. However, the level of the lake has gradually increased in recent years, due to increased precipitation and runoff in the Truckee Basin and to improved management of the river. *Id.* at 10.⁹

6. Most of the water in the Truckee River system originates from the runoff of waters from mountains in California downstream from Lake Tahoe, not from Lake Tahoe itself. The average annual release into the river from Lake Tahoe is 148,000 acre-feet, but the river reaches an average annual flow of 510,000 acre-feet by the time it crosses the border between California and Nevada. Task Force report, 2, 5-6, App. A-2.

7. Evaporation losses in the lake approximate 440,000 acre-feet each year, but the lake receives an annual average of 55,000 acre-feet of water from precipitation and runoff, leaving a shortage of 385,000 acre-feet. Task Force report 3-4.

8. At the current rate of decline, the level of the lake would stabilize at an elevation of 3645 feet, or 149 feet lower than its present elevation of 3794 feet, by the year 2430. *Id.* at App. A-23. Such eventual stabilization is attributable to the fact that evaporative losses would decrease the surface area of the lake, to the point where the current inflow would offset future evaporative losses.

9. The level of the lake increased by seven feet from 1967 through 1971. *Ibid.*

The Orr Ditch Decree

In 1913, the United States commenced an action in the federal district court in Nevada to quiet title to the waters of the Truckee River in Nevada. The parties to the action were the United States acting on behalf of the Pyramid Indians, TCID and individual claimants in Nevada. California, and individual water claimants in California, were not named in the action. The suit resulted in an agreement between the parties, the Truckee River Agreement, for allocation of the river's waters in Nevada. This agreement was the basis for a final decree, the *Orr Ditch* decree, entered in 1944. See *U.S. v. Orr Water Ditch Co., et al.*, U.S.D.C., Equity No. A-3 (D.C. Nev. 1944). The decree noted that, when the Pyramid Lake reservation was established, "thereby and by implication . . . , a reasonable amount of water of the Truckee River . . . became reserved for the needs of the Indians on the reservation." *Orr Ditch* decree (hereinafter "decree"), 10.¹⁰ To satisfy these needs, the decree awarded the Indians the right to an annual flow of approximately 30,000 acre-feet of water from the river. *Ibid*; Task Force report, 7. The decree also provided for an allocation of water to the Newlands project, and to other water claimants in Nevada. The decree constituted a final adjudication of these conflicting claims, as it provided that the parties thereto are "forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River or its tributaries . . . except the rights, specified, determined and allowed by this decree." Decree, 87.

10. A copy of relevant portions of the decree has been lodged with the Clerk as California's Exhibit B. The United States lodged a copy of the entire decree with the Clerk when filing its complaint. Complaint, 19, n. 1.

The Interstate Compact

In the late 1940's, California and Nevada undertook to apportion the waters of the Truckee River between the States. After many years of intensive study and negotiation, a compact was worked out which comprehensively apportioned the waters of the Truckee River and Lake Tahoe, and also the Carson and Walker Rivers. The compact provides for the creation of an interstate commission to administer its provisions. The compact has been passed by the legislatures of both California and Nevada, and is now awaiting congressional approval. See 1970 Cal. Stat. 2924; 1971 Nev. Rev. Stat. 538-600; H.R. 6078 (92d Cong., 1st Sess. 1971).

Under the terms of the compact, a first priority to the waters of the Truckee River is given to the State of Nevada for the Pyramid Indians in the amount awarded under the *Orr Ditch* decree, that is about 30,000 acre-feet. California-Nevada Interstate Compact (hereinafter "Compact"), art. VI(A).¹¹ California is then given the right to divert up to 45,000 acre-feet annually. *Id.* at arts. V(D), VI(B), (1), (2), (3).¹² With minor exceptions, the remaining waters of the river are apportioned to Nevada. *Id.* at art. VI(D). No allocation is made to specific water uses in Nevada.¹³ But the compact provides that the existing rights of the Pyramid Indians and the United States shall not be affected thereunder. *Id.* at art XXI(A), (B). Thus, the allo-

11. A copy of the compact has been lodged with the Clerk as California's Exhibit C.

12. This figure is based upon California's right under the Compact to divert 23,000 acre-feet from the Tahoe Basin (*id.* at art. V (D)), to divert 10,000 acre-feet from the Truckee Basin (*id.* at art. VI(B)(1), to contract with the United States for use of 6000 acre-feet from Stampede Reservoir (*id.* at art. VI(B)(3), and is also based upon the right of the Sierra Valley Water Company to divert approximately 6000 acre-feet under an existing judicial decree (*id.* at art. VI(B)(2)).

13. However, the compact gives Nevada a maximum consumptive use of 11,000 acre-feet of water from Lake Tahoe. *Id.* at art. V(D).

cations of water to Pyramid Lake and the Newlands project are left open for further determination. The compact only provides that these allocations, once determined, shall be charged against the apportionment given to the State in which the water is used. Art. III(C).

The Task Force Report

The compact does not purport to provide a scheme for halting the decline in the level of Pyramid Lake. But California and Nevada have joined with the United States in seeking a solution to this problem by other means. After a 1969 meeting between the U.S. Secretary of the Interior and the Governors of California and Nevada, a task force was created to find a means for preventing a further decline in the lake's level without destroying the economies dependent on the river's waters. The Task Force was composed of representatives of the United States, California and Nevada. After extensive study, the Task Force issued its report in December 1971.

The Task Force's report found that an additional 95,150 acre-feet of water could be made available for use in Pyramid Lake each year by a more efficient use of water in the Truckee and Carson Basins. Task Force report, 34-36. This figure represents an annual saving of 85,650 acre-feet which would result from improvements in the operations and facilities of TCID, and an annual saving of 9500 acre-feet which would result from strict enforcement of water rights decrees and restraining orders concerning the Truckee and Carson Rivers. *Ibid.* The Task Force also found that additional water might be made available for Pyramid Lake by the importation of water from outside Truckee Basin, such as by the diversion of surplus waters from nearby Honey Lake in California or even from the Columbia River to the north. *Id.* at 36-37. Finally, the Task Force found, additional water savings might

result from the development of long-range scientific techniques aimed at increasing the water supply by weather modification, or reducing the water loss by evaporation suppression. *Id.* at 37-38. Acting on this recommendation, the U.S. Bureau of Reclamation is conducting a weather modification study in the Truckee Basin, a study which the Task Force believes might sufficiently augment the water supply to meet all the conflicting demands for water from the Truckee River. *Ibid.*

The Paiute Indian Lawsuit

In 1967, the Secretary of the Interior established the Operating Criteria and Procedures (OCP) Committee for for the purpose of recommending criteria and procedures for the management of the Truckee and Carson Rivers. The committee is required to maximize the use of the Carson River for the benefit of the Carson Basin, and particularly the Newlands Project. 43 C.F.R. 372. Correspondingly, it is required to minimize the use of the Truckee River for this purpose, and thus to maximize the flow to Pyramid Lake. *Ibid.* Acting on the committee's recommendations, the Secretary decreed in 1967 that 406,000 acre-feet of water should be diverted annually to TCID from both river systems. *Id.* at 374.¹⁴

The Pyramid Indians brought an action against the Secretary in 1971 in the federal district court for the District of Columbia, seeking to compel the Secretary to reduce diversions to TCID sufficiently to provide for an annual flow to Pyramid Lake of 385,000 acre-feet, which is the amount necessary to stabilize the lake's current level. The

14. The committee's management of these rivers is apparently one of the reasons for the recent reversal in the decline of Pyramid Lake. Task Force report, 10. The committee estimates that its operations will increase the inflow into Pyramid Lake by 42,000 acre-feet each year. *Id.* at 9.

Secretary thereupon reduced the annual flow to TCID from 406,000 acre-feet to 378,000 acre-feet. 37 Fed. Reg. 19838. The district court ruled that this reduction was insufficient. The court ordered the Secretary to prepare a new regulation by January 1, 1973, which would provide the necessary inflow into Pyramid Lake, or to explain why he is unable to do so. *Pyramid Lake Paiute Tribe v. Morton*, U.S.D.C., Civ. No. 2506-70 (D.D.C.), Memorandum Opinion (hereinafter "Opinion"), 9-10.¹⁵

The court noted that the Indians were bound by the *Orr Ditch* decree, and hence could not assert claims inconsistent with the decree. Opinion, 7. The court also observed that the Secretary was bound by his contractual commitments with TCID. *Id.* at 5, 7. But the court ruled that the Secretary, in his fiduciary duty to the Indians, was obligated to maintain the fishery in Pyramid Lake, within the limitations of his power and the limitations imposed by outstanding judicial decrees and contractual commitments. *Id.* at 5.

The district court found that the Secretary had failed in his fiduciary duty. First, the court found, the Secretary had indulged in wasteful and inefficient management of the waters of the Truckee River. The court suggested various methods for reducing such waste, methods similar to the recommendations of the Task Force. Secondly, the court found that the Secretary had failed to maximize the use of water in the Carson River for the benefit of TCID. An existing judicial order defining water rights on the Carson River¹⁶ had not been properly implemented and enforced,

15. A copy of the district court's memorandum opinion has been lodged with the Clerk as California's Exhibit D.

16. This order resulted from an action brought by the United States in 1925 to adjudicate its right to store water in, and release water from, the Lahontan Reservoir. A temporary restraining order has been entered in the case, and the matter is still pending. A proposed decree has been submitted to the Court which, if adopted, would change the pattern of water use in the Carson River and the supply from that river to the Newlands project. See *U. S. v. Alpine Land & Reservoir Co., et al.*, U.S.D.C., Civ. No. D-813 (D.C. Nev.).

the court said. Therefore, it was concluded, the Secretary improperly and “irrationally” relied on the Truckee River to serve the needs of TCID. Opinion, 6-9.

STATEMENT OF THE CASE

Even though the action of the Pyramid Indians is pending against the Secretary, the United States has sought to file the present action against California and Nevada, urging the Supreme Court to exercise its original jurisdiction in the matter. The United States is apparently asserting that the water rights of the Indians for the maintenance of their fishery is superior to the water rights of TCID. Complaint, 14-15, 23. This is directly contrary to the position taken by the United States in defending the action brought by the Indians in the district court.

After fulfillment of the Indians’ rights, the United States urges here, the next priorities should be given to various federal uses, apparently including the Newlands project. Only after these priorities are satisfied, the United States claims, should the remaining water in the Truckee River be apportioned between California and Nevada. It is respectfully submitted that this Court should refuse to exercise its original jurisdiction to support this endeavor.

STATEMENT OF THE LAW

1. The Court Should Decline to Act as a Fact-Finding Body in a Case Involving Technical Factual Issues.

This Court has recently embraced the view that, in the absence of the “strictest necessity”, it should refrain from exercising its power to grant original jurisdiction. *Ohio v. Wyandotte Chemicals Corp.*, 401 U. S. 493, 505 (1971). In the *Ohio* case, the Court noted that it was particularly reluctant to grant such jurisdiction where it would be required to function as a fact-finding body in highly complicated technical areas. The Court declared:

“[T]his Court has found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with—and perhaps not infrequent deference to—other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society’s interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity” *Id.* at 504-05.

Because of the complex hydrological problems involved in an apportionment of the waters of the Truckee River, the *Ohio* decision strongly militates against the Court’s exercising its original jurisdiction here.

2. The Court Should Give Congress an Opportunity to Approve the Compact.

This Court has frequently encouraged States to settle their differences by negotiation rather than litigation, and has encouraged the use of interstate compacts for this purpose. E.g., *Arizona v. California*, 373 U.S. 546, 564 (1963); *Colorado v. Kansas*, 320 U.S. 383, 392 (1943); *New York v. New Jersey*, 256 U.S. 296, 313 (1921). “Resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent.” *Hinderlider v. La Plata Co.*, 304 U.S. 92, 105 (1938). This Court has frequently cited Justice Clarke’s admonition,

“We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.” *New York v. New Jersey*, 256 U.S. at 502.

In the *Ohio* case, the Court observed that its denial of original jurisdiction was partially based on its view that the matter could be solved by further negotiation and conciliation between the parties. 401 U.S. at 502-03.

In apportioning the waters of an interstate stream between States, the Court seeks to achieve an “equitable apportionment.” *Nebraska v. Wyoming*, 325 U.S. 589, 616-18 (1945); *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922). A major factor considered in such an apportionment is the extent to which appropriative rights have been developed in each of the States. *Nebraska v. Wyoming*, 325 U.S. at 618; *Arizona v. California*, 373 U.S. at 555-56. Such States have a natural incentive to develop their water uses as rapidly as possible, regardless of the efficiency of the uses, in order to establish appropriative rights before such rights are established in other states. As the *Arizona* Court noted, an interstate compact has the advantage of removing this incentive, and thus freeing the States to develop their uses gradually. 373 U.S. at 556, n. 17.

In an effort to avoid competing for water in the Truckee River, California and Nevada have agreed on a compact for the apportionment of these waters between the States. The avowed purpose of the compact is to provide an “equitable apportionment,” which is the standard applied by the courts in interstate water disputes. Compact, art. I. The

States have thus attempted to solve their differences without judicial involvement. The United States is asking the Court to upset their agreement and destroy the compact, by having the Court substitute its own apportionment for that agreed on by the States.

The compact preserves the existing rights of the United States and the Pyramid Indians. Compact, arts. XXI, XVIII(C). The California Legislature undertook to provide further protection of the Indians' rights, however. In order to maximize the flow of the Truckee River into Pyramid Lake, the Legislature inserted a provision which limits the amount of additional water in the Truckee Basin which California can develop for its own uses. *Id.* at art. VI(B) (4); Interim Study of Assembly Committee on Water (hereinafter "Interim Study"), 4-5.¹⁷ Also, the Legislature struck a provision from the compact which effectively limited the inflow to Pyramid Lake. *Ibid.* The Legislature noted that, although the stabilization of the lake was beyond the compact's purview, the compact as amended afforded maximum protection of the Indians' rights to seek such stabilization. *Id.* at 7-8.¹⁸

The compact, aside from preserving the rights of the Pyramid Indians, provides for an apportionment of the river's waters which is most advantageous to their needs. The compact imposes a ceiling on California's uses of these waters, and thus averts the possibility that California, as an upstream appropriator, could use such water without regard for downstream needs. More significantly, the ceiling limits California to a relatively minor share of this

17. A copy of this study, which consists of a legislative report on the compact, has been lodged with the Clerk as California's Exhibit E.

18. The compact limits the exercise of existing water rights to the basin in which the use occurs. Compact, art. XVIII(C). But the California Legislature also amended the compact to define the "Truckee River Basin" as including Pyramid Lake, in order to provide further protection for the Indians. *Id.* at art. II(D).

water. Under the compact, California is allowed a maximum use of 45,000 acre-feet of such water each year.¹⁹ Since the river has a flow of approximately 536,000 acre-feet in the average hydrologic year,²⁰ California's share amounts to less than 9% of its historic flow. It is perhaps unusual that a State which supplies nearly the entire flow of a river system has so generously agreed to receive such a limited benefit from its waters. In any event, California's share under the compact is not sufficient to stabilize the existing level of Pyramid Lake, or even to substantially affect its level.²¹

The compact, by limiting California to such a miniscule share of the Truckee River, assigns the overwhelming bulk of its waters for use in Nevada. Since Nevada is to receive the balance of the flow unused in California, Nevada should receive a minimum of 491,000 acre-feet of water in the average hydrologic year, or more than 91% of the river's

19. The compact does not provide an allocation for federal uses in California. These uses currently require less than 5000 acre-feet of water annually. There is no dispute between California and the United States concerning these uses, as California recognizes the right of the United States to such water.

20. This figure represents the total of California's current use of 26,000 acre-feet from the river and the river's average historical flow of 510,000 acre-feet when crossing the boundary between California and Nevada.

21. Thus, there is no basis for the United States' assertion that its water rights in Nevada are dependent on "restrained uses and timely releases" in California as well as Nevada. See Complaint, 26. In fact, the federal government owns and operates all major storage reservoirs in California which release water into the Truckee River system, except for Lake Tahoe. Lake Tahoe serves as a storage reservoir for the Newlands project. A dam at the lake's outlet controls the lake's level within a range of 6.1 feet, and permits storage of 732,000 acre-feet of water. Task Force report, 6. This dam is owned by the United States as the result of a condemnation action. See *U. S. v. Truckee River General Electric Co.*, U.S.D.C., Civ. No. S 643 (E.D.Cal. 1915). But the dam is operated, under an agreement with the United States, by TCID for the benefit of the Newlands project. California does not control releases from this and other reservoirs in the Truckee River system.

historic flow. This is more than adequate to meet the needs of Pyramid Lake for an annual inflow of 385,000 acre-feet.

The flow of the Truckee River in Nevada might not be sufficient to match evaporative losses in Pyramid Lake in an abnormally dry year, however, when the river's flow would be drastically reduced. But the needs of the lake do not require that it receive an inflow sufficient to maintain its level each year. Unlike the needs of those who use water for domestic or irrigation purposes, the lake does not need a steady and predictable water supply. Because of the size of the lake, its fishery can tolerate annual fluctuations in the flow from the Truckee River. In fact, this flow has historically fluctuated anyway. It should be parenthetically noted that, because of these historical fluctuations, the United States, in seeking a minimum yearly inflow for the lake (Complaint, 15), is seeking relief which hydrologic conditions have historically denied the lake. In any event, the critical factor in stabilizing the lake is its average, rather than its actual, yearly inflow. Therefore, the needs of the lake could be met by systematically dispatching surplus water in the Truckee River to the lake in wet years to compensate for excessive losses in dry years, so that the lake receives an average overall inflow capable of maintaining its level over a given hydrologic period. This approach is consistent with the decision in *Hinderlider v. La Plata Co.*, 304 U.S. 92, 108 (1938), where the Court upheld an interstate compact which provided for alternating rather than continuous inflow of water for irrigation purposes in Colorado. Clearly, the compact provides a sufficient flow to Nevada to meet the needs of the lake, and thus affords optimum protection of the Indians' rights.

The fulfillment of the Indians' demands might inhibit the satisfaction of other water demands in Nevada, since the Truckee River may lack sufficient water to meet all such demands. If so, this inhibition is imposed by the

limited size of the river, not by the compact. The compact itself, by limiting California to a modest apportionment of these waters, poses no obstacle to water uses in Nevada. The compact does not allocate water to specific uses in Nevada, however, and the United States thus claims that the compact fails to recognize its rights. Complaint, 13. This argument misses the point, for the compact, in preserving these and other claimed rights, provides means for their later recognition. More importantly, the compact maximizes the flow of the river in Nevada, and thus provides optimum conditions for the satisfaction of federal and other rights in Nevada. Therefore, rather than conflicting with federal rights, the compact facilitates their fulfillment. The compact thus provides a partial solution to the problem occasioned by the multiple demands upon the Truckee River.

In *Arizona v. California*, 373 U.S. 546 (1963), the States similarly devised an interstate compact to achieve a partial settlement of their differences, and thus relieved this Court from the necessity of adjudicating all dimensions of the conflict. There, the States of the Lower Basin of the Colorado River were unable to reach agreement on apportionment of waters in the Lower Basin. But they reached agreement with the States of the Upper Basin for an apportionment of water between the two basins, under which each basin was to receive 7,500,000 acre-feet of water each year. Thus, the States apportioned the water between the basins, and left unresolved the apportionment of water in the Lower Basin. The Court, exercising its original jurisdiction, then adjudicated the conflict between the States of the Lower Basin.

The compact here, as the compact in the *Arizona* case, apportions water between States and recognizes the need for a further determination of water rights within one of

the affected areas. This compact is different from that in the *Arizona* case only in that the apportionment between California and Nevada is based on an interstate agreement, and the compact in the *Arizona* case was based on an interbasin agreement. Otherwise, the situations are identical. The Court surely would not have tolerated an action by the United States in the *Arizona* case which sought to destroy the States' agreement for an interbasin division of the Colorado River; the Court should not tolerate this action by the United States which seeks to destroy California and Nevada's agreement for an interstate division of the Truckee River. The Court took no action to disturb the compact in the *Arizona* case, and it should take no such action here.

Under the *Arizona* decision, it is not necessary that an interstate compact recognize the validity of rights asserted by the United States. The compact in the *Arizona* case did not recognize the validity of federal rights, but the Court nonetheless ruled that such rights were chargeable against the apportionment given to the State in which the rights are used. 373 U.S. at 601; accord, *Hinderlider v. La Plata Co.*, 304 U.S. at 102, 106. A provision in the compact here similarly charges federal water rights against the apportionment given to the State in which the rights are used. Compact, art. III(C). The *Arizona* decision thus approves the manner in which this compact carves federal rights out of each State's apportionment, and defers the delineation of such rights.

Therefore, this Court should be reluctant to assume the arduous burden of apportioning the waters of the Truckee River between California and Nevada. These States have enlisted considerable expertise, and devoted many years, to a technical study of the problem, and have reached an agreement after lengthy negotiation. The Court should not,

especially in light of the *Ohio* decision, duplicate and thus nullify their efforts, and should not substitute its judgment for that of the States.

Instead, the Court should affirm its historic policy of encouraging the settlement of interstate differences by negotiation rather than litigation. It should give Congress an opportunity to approve the compact, before adjudicating, if necessary, the balance of the conflict. There is no immediacy in such an adjudication, as the level of Pyramid Lake has steadily risen in recent years. Hopefully, Congress should give favorable consideration to the compact, since it protects the Indians' rights and even contributes to their fulfillment. In any event, Congress, in acting on the compact, will certainly give full recognition to these and other federal rights in Nevada, since Congress is one of the voices which speaks for the plaintiff, the United States. Therefore, until Congress acts on the compact, the matter is not ripe for adjudication, and the Court should decline to exercise its original jurisdiction.

3. There Is No Legal Basis for the Claims Asserted on Behalf of the Pyramid Indians.

California feels that there is a humanitarian and ecological imperative for the preservation of the fishery in Pyramid Lake, if such is possible without destruction of other uses dependent on the waters of the Truckee River. As will be seen, there are administrative, and perhaps legislative, means by which the fishery can be so preserved. But there is no legal basis for the assertion of a water right for such a purpose, and thus the Court should decline to address itself to this question.

Existing law prevents the assertion of the claims raised on behalf of the Indians. First, these claims are barred by the decree in the *Orr Ditch* case. Under the doctrines of *res judicata* and collateral estoppel, a party cannot litigate

the merits of a claim adjudicated in a prior litigation, or a claim related thereto which might have been so adjudicated. E.g., *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1877). The *Orr Ditch* decree made no provision for a water right based on the needs of the fishery. The decree expressly "forever enjoined and restrained" the parties thereto from claiming water rights in excess of those awarded by the decree (Decree, 87), and thus contemplated a final adjudication of the Indians' rights in the river. There is no legal basis for now asserting claims for additional water for the maintenance of the fishery.²²

Neither California nor its citizens were parties to the *Orr Ditch* litigation. But this Court recently ruled that a party can assert the doctrine of collateral estoppel although he was not a party to the prior action, as long as the party against whom the doctrine is asserted was a party, or in privity with a party, to the prior action. *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971). Thus, California can assert the doctrine to bar litigation of the United States' claims for water for maintenance of the fishery. Otherwise, the United States could assert claims against California which could not be asserted against Nevada, which might lead to an

22. The United States' claim for a water right based on the needs of the fishery in Pyramid Lake was also denied in *United States v. Sierra Valley Water Co.*, U.S.D.C., Civ. No. 5597 (N.D. Cal. 1958). The United States brought that action against a water company located in California, and the action was concluded in 1958. There, the water company had diverted water from the Little Truckee River in California, above the Boca Reservoir, and the United States sought to enjoin further such diversions. In its complaint, the United States alleged that it held title to reservation lands for the Pyramid Indians, and that the diversions interfered with the water rights of the Indians in the Truckee River. A decree was entered in favor of the water company. The decree did not recognize any water rights for the Indians with respect to the fishery in Pyramid Lake, or with respect to the stabilization of its level. A copy of the complaint and decree in that case has been lodged with the Clerk as California's Exhibit F.

incongruous and hence inequitable apportionment of the Truckee River between the States. In fact, there is no reason for the United States to pursue its claims solely against California, since California does not receive sufficient water from the river to even remotely satisfy these claims. Moreover, California has developed its water uses in the Truckee Basin in reliance on the allocations of the *Orr Ditch* decree, and the United States should be estopped, equitably as well as collaterally, from now asserting, nearly 30 years after the decree was rendered, claims which are inconsistent with the decree. By whatever theory, the Court should not exercise its original jurisdiction to permit the United States to advance its new theory at this late date.

Secondly, the claims of the United States are lacking in merit, aside from the *Orr Ditch* decree. In *Winters v. United States*, 207 U.S. 564 (1908), the Court held that Congress, in creating an Indian reservation, intended to provide water to the Indians for irrigation purposes. The United States is seeking to extend this decision to require that water similarly be made available for maintenance of the Indians' fishery. Such an extension of the decision is not defensible, as will be seen, from either an historical or economical viewpoint.

During the last century, Congress encouraged the rapid growth and development of the West, and the efficient use of its limited water supply. The Pre-Emption Act of 1841 and the Homestead Act were passed to encourage settlement of the western states. 5 Stat. 453 (1841); 12 Stat. 392 (1862). To provide water for such settlements and other purposes, Congress passed the Desert Lands Act in 1877, which provided for the issuance of federal patents to those who irrigated and developed the arid land in the western desert states, including California and Nevada; the act also limited such persons to the efficient use of

water, and provided that unappropriated water in the desert states should be made available for other irrigation and industrial uses. 19 Stat. 377; *California Oregon Power Co. v. Portland Cement Co.*, 295 U.S. 142 (1935). To provide additional water for development, Congress passed the Reclamation Act in 1902, authorizing the federal government to build irrigation systems in the western states. 32 Stat. 388; *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958). It was pursuant to this latter act that the Newlands project was created.

These enactments manifest an historic federal policy to utilize the West's limited water resource as a major instrument in its growth. It is thus inconceivable that Congress in the late 1800's intended to devote the major portion of an entire river system to the maintenance of a fishery for a small Indian tribe, especially when ample water was made available from the river to enable the Indians to live off the land. Such a congressional purpose would have limited the development of other uses in the river's watershed, and thus would have stunted rather than stimulated the growth of the western states. Such would have undercut Congress' historic policy to encourage the development of the West's arid lands, by depriving farmers and other groups of water necessary for such development.

The United States pointedly failed in its brief to base its claims on the need for an economical distribution of the Truckee River's waters. In fact, these claims would necessitate the use of more than 70% of the river's historic flow to maintain a fishing resource for about 400 Indians, even though their agricultural needs demand less than 6% of this flow.²³ These claims, if satisfied, might thus entail the

23. These percentages are based on the river's average annual flow of 536,000 acre-feet, the Indians' claim for an annual inflow of 385,000 acre-feet and their right to a minimum yearly inflow of approximately 30,000 acre-feet under the *Orr Ditch* decree.

destruction of other long-established water uses in the Truckee Basin, which benefit tens of thousands of people. Indeed, it is not likely that Congress would have even created the Newlands project if it expected that most of the river's water would be used elsewhere.

Therefore, Congress clearly did not intend to arrange the Truckee River system in the manner urged by the United States. To uphold the United States' position would be to create a dangerous precedent which would enable the United States or others to seek the destruction of other existing economies historically dependent on other river systems. Nothing in the *Winters* decision suggests that it contemplated such a drastic and far-reaching result. therefore, there is no justification for extending the decision in this or similar cases.

4. The United States Has the Power to Resolve Competing Federal Claims to Water in Nevada, and California and Nevada Do Not.

Even if the Indians' claims are valid, this Court should not exercise its original jurisdiction in this case. The United States controls the major portion of the Truckee River system. About 480,000 acre-feet of water, or about 90% of the river's historic flow, reaches the Derby diversion dam each year (Task Force report, 2), where it is consigned to the Newlands project or Pyramid Lake. The United States has the power to allocate the flow between these uses, and California and Nevada do not. Thus, the United States has the power to solve the problem occasioned by the decline in Pyramid Lake, at least to the extent that a solution is possible, and California and Nevada lack such power.

Therefore, the conflict here is not between the United States and the defending States, but rather between competing federal interests in Nevada. The Indians, or their guardians, are essentially seeking a greater portion of the

flow currently allocated to the Newlands project. The United States has failed to resolve this conflict because of internal divisions in the U.S. Department of the Interior. The Bureau of Reclamation, which constructed the Newlands project, seeks water for irrigation of this project. The Bureau of Indian Affairs, which is responsible for the welfare of the Indians, seeks water for the fishery in Pyramid Lake. The Bureau of Sport Fisheries and Wildlife, which operates wildlife refuges near the Newlands project, seeks a return flow of water from the project for these refuges, although this agency also has an interest in the fishery in Pyramid Lake. The Bureau of Land Management holds lands in the Newlands project, and seeks water for irrigation of these lands. Interim Study, 19-20.

Perhaps this internal conflict explains the inconsistent positions taken by the United States here, where it supports the claims of the Indians, and in the case pending in the federal district court, where it opposes those claims. In any event, the conflict springs from internal policies, or lack thereof, within the Department of the Interior, and cannot be resolved by an action against California and Nevada.

There is no precedent for the exercise of the Court's original jurisdiction in this context. Such jurisdiction has historically been exercised to settle disputes between States, or between a State and the United States. Here, there is no dispute between the States. Nor is there a dispute between the States and the United States which, if resolved, will dispose of the problem cited in the complaint. The Court should not lend its adjudicatory facilities to this matter, given its present posture.

There are various means by which the Department of the Interior could seek an administrative solution to the problem without disturbing existing water uses in the Truckee Basin. Primarily, the department could attempt

to augment the available water supply by increasing the efficiency of water uses in the Newlands project, and by strictly enforcing existing water rights decrees on the Truckee and Carson Rivers. The Task Force, it will be remembered, estimated that an additional 95,150 acre-feet of water could be made available each year for use in Pyramid Lake by pursuing these objectives. In the case pending in the federal district court, the court harshly criticized the department for its wasteful use of water in the Newlands project. Also, the Task Force noted that the pursuit of long-range goals, such as weather modification and evaporation suppression, might provide additional water capable of satisfying all the demands for water in the Truckee River.

Also within the department's grasp are other possible solutions involving an adjustment of federal uses dependent on the Truckee River in Nevada. Primarily, the department could scale down the size of the wildlife refuges downstream from the Newlands project; the Task Force recommended such a reduction in their size. Task Force report, 35. Or the department could exercise its power of eminent domain and condemn certain property in the Newlands project, and award compensation to water users affected thereby.²⁴ California appreciated the difficulties, political and otherwise, inherent in an adjustment of such uses in Nevada, particularly one which reduces the size of the Newlands project, but it should be noted that such an alternative is available to the department.

24. If it were considered impossible or infeasible to preserve the fishery in Pyramid Lake because of the limited water supply in the Truckee River, the department could also exercise its power of eminent domain with respect to the fishery and award compensation to the Indians for the loss of their fishing rights. There is ample precedent for the right of the United States to exercise this power with respect to Indian property, even that based on treaty rights. See, e.g., *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1954).

If the department were to adjust federal uses in Nevada, it could probably achieve a more economical distribution of water than is within the power of the courts. The department could balance the various needs for water in Nevada, but the courts apparently could not. Under the *Winters* decision, the courts must grant the Indians all water necessary for their irrigation needs; they cannot attempt an "equitable apportionment" of such water, and hence cannot consider the Indians' needs in relation to the needs of competing water users. *Arizona v. California*, 373 U.S. at 597. Thus, the *Winters* decision, when applied, must be applied without regard to its consequences. If the decision were extended here, the Court presumably would have to grant the Indians all water necessary to stabilize the level of Pyramid Lake, even if this results in the destruction of long-established upstream uses. Conversely, if the decision were not so extended, the Indians would be denied the right to any water beyond their domestic and agricultural needs; this might unduly encourage upstream development and thus impede the effort to work out an administrative solution which will provide a water supply for all uses. The *Winters* decision thus forces the judiciary to side with one group as against the other, and prevents the judiciary from attempting to reconcile the competing demands for water in the Truckee River.

Therefore, the department is in a better position than the courts to provide a solution which gives fair and equitable consideration to the needs of all groups.

5. The Supreme Court Should Abstain from Its Original Jurisdiction Because the Issues in This Case Are Being Adjudicated in a Collateral Proceeding in a Lower Federal Court.

For the foregoing reasons, the proper solution to the problem cited in the complaint is to be found, if at all, at the administrative level. Perhaps the department might

yet be induced to respond to the need for a solution at that level. Failing that, there is a possibility that Congress might attempt a legislative solution. If both of these avenues are unavailing, however, and a judicial response becomes necessary, this Court should still decline to exercise its original jurisdiction. The basic issues in this case are being adjudicated in a matter pending in the federal district court, and the Court should allow that matter to proceed to final disposition. See *Pyramid Lake Paiute Tribe v. Morton*, U.S.D.C., Civ. No. 2506-70 (D.D.C.)

In the *Morton* case, the district court ruled that the Indians were entitled to the inflow which they claim, and that the Secretary had denied their rights by wasteful management of the Truckee River system. The court ordered the Secretary to propose a regulation by January 1, 1973, for a more efficient use of the water in this system. The Secretary is bound, the court noted, by certain limitations on his power, including the *Orr Ditch* decree and his contract with TCID. But certainly the Secretary has the power to comply with the court's order for an elimination of his wasteful management practices, and such compliance would greatly facilitate the satisfaction of the Indians' claims. Perhaps further litigation, involving TCID, might become necessary to define the nature of its contract with the United States. In any event, this litigation, once finally concluded, should provide an answer to the basic question presented here, to the extent that a judicial answer is possible.

The Supreme Court obviously retains the option of passing upon these questions during the course of an appeal from the lower court proceeding, and could then exercise its normal appellate functions. Since the lower court is currently exercising its normal fact-finding functions, there is no need for these functions to be assumed by the Supreme

Court. Certainly the *Ohio* decision recommends against the Court's involvement at this stage. Moreover, the Supreme Court, in taking the case now, could probably do no more to protect the Indians' rights than to order the Secretary to devise the means for such protection, and the lower court has already issued such an order. Therefore, this Court should decline to exercise its original jurisdiction as long as the issues herein are being adjudicated in a collateral proceeding in a federal court.

CONCLUSION

It is therefore respectfully submitted that the Court should deny the United States' motion for leave to file its complaint. The Court should not involve itself in the difficult task of making factual determinations in a highly complicated, technical area. It should not intervene in the matter until Congress has had an opportunity to act on the proposed compact. It should not assume jurisdiction to adjudicate claims for which there is no legal basis. It should not tolerate an action brought by an entity with power to solve the problem which is the subject of the action, against entities which lack such power. Above all, the Court should not interpose its jurisdiction as long as the same issues are being collaterally adjudicated at the trial level by a federal district court.

It is also respectfully submitted that, if the Court denies the United States' motion, it should indicate the reasons for its denial. These reasons might become probative in determining the capacity of the United States to file the action in a lower federal court. For instance, if the motion is denied merely because of the Court's unwillingness to assume a fact-finding function, the action could be so filed by the United States. But if the motion is denied because of the pendency of a collateral proceeding in the federal

district court, or because Congress should be given an opportunity to act on the compact, the action could not be so filed. By whatever theory, there is ample justification for the Court's refusal to take this action at this time.

EVELLE J. YOUNGER

Attorney General of the State of
California

CARL BORONKAY

Assistant Attorney General

RODERICK WALSTON

Deputy Attorney General

BERTRAM G. BUZZINI

Deputy Attorney General

DENNIS ANTENORE

Deputy Attorney General

*Attorneys for State of
California.*

