No. 59 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATES OF NEVADA AND CALIFORNIA, *Defendants*

BRIEF OF THE STATE OF NEVADA IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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SUMMARY OF ARGUMENT

1. The Complaint does not present a "case" or "controversy" against Nevada. As against Nevada, the Complaint alleges: (1) that the State has entered into a Compact which has not yet been approved by Congress; and (2) that the State has issued permits in derogation of the rights now asserted by the Government. Such allegations are premature and, under previous cases decided by the Court, do not present a dispute within the judicial power of the United States.

2. Even if the Court finds that a case or controversy is presented, this is not an appropriate case for the exercise of original jurisdiction. Since the Compact has been submitted for approval by Congress, the Government can assert its views in that forum. Moreover,

numerous public bodies have studied the Pyramid Lake question and are in the process of implementing recommendations to solve the complex problems involving Pyramid Lake. To show that there is no need for judicial intervention, the Government itself, in another pending case, has pointed to the progress being made at Pyramid Lake.

3. The claims asserted in the Complaint are barred by collateral estoppel and/or res judicata. In *United States* v. *Orr Water Ditch Co., et al.,* (Equity A-3, D-Nev.), the Government fully litigated the claims for waters for the Pyramid Lake Reservation which it seeks to assert now.

4. Even if the United States is permitted to relitigate these claims, the proper forum is the Federal District Court of Nevada. The proper parties to such litigation are the hundreds of public and private users in Nevada, who are subject to suit only in that State. Any increase in federal water rights to the Truckee River could be awarded only at the expense of previously adjudicated water rights of those other users, who are thus indispensable parties. In another case, the United States correctly asserted that the same claims it asserts here must be litigated in a court at the situs of the water.

5. There are additional reasons why the Government's motion should be denied. The issues here are complex, and legal questions cannot be separated from factual questions which are disputed. The factual issues here cannot be narrowed by stipulation. Litigation of these issues would require a multitude of parties, and the Complaint presents only one facet of an extraordinarily complex problem. Separate resolution

of the matters presented in the Complaint would only create different but equally difficult problems. The Pyramid Lake problem is not so urgent as to justify intervention by the Court. Recently, the Government itself noted the progress in implementing measures to preserve the Lake, and argued that judicial action was presently unnecessary.

6. Finally, even if the Court decides to exercise jurisdiction, it should appoint a Special Master *now* and not later, as the Government requests. The issues presented by the Complaint cannot be decided in the abstract, but must be considered on the basis of a sound factual record.

INTRODUCTION

By this action, the United States seeks to establish various rights to certain waters in the Truckee River, which flows from Lake Tahoe [1] to Pyramid Lake in Nevada. The principal claim is for waters to maintain Pyramid Lake and the lower reaches of the Truckee River as a fishery for 400 [2] Paiute Indians who reside on the Pyramid Lake Indian Reservation.

Several important facts,[3] not mentioned by the Government's papers or inadequately dealt with, must be understood at the outset. Each is summarized here and dealt with more fully below. First, although the Complaint alleges that the water level of Pyramid Lake has dropped since 1906 and that certain rare fishes are

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[1] Lake Tahoe lies partly in Nevada and partly in California.

[2] Pyramid Lake Task Force Report (1971) (hereinafter "Task Force Report") at 3. A copy of the Task Force Report has been lodged with the Clerk.

[3] The facts are more fully stated in the Brief of the State of California, and they will not be reiterated here.

threatened with extinction, the United States recently made exactly the opposite claims in a pending case,[4] contending by affidavit that the water level of Pyramid Lake had increased from 1966 through 1971, and that the same species of fish are thriving in the Lake.[5]

Second, the United States has participated actively in the negotiation of a Compact to govern the distribution of Truckee River waters between California and Nevada. The United States purports to be dissatisfied with that Compact, even though it is not now effective, since Congress has not yet given its consent thereto. Despite this prematurity, and despite the fact that the United States can seek changes in Congress alleviating its concerns, the Government would choose to press its claims upon this Court rather than upon Congress, which is the proper forum.

Third, in 1913 the United States asserted in the Nevada Federal District Court, in the broadest possible terms, the rights of the Pyramid Lake Paiute Tribe—and of the Newlands Projects established under the Reclamation Act—to Truckee River waters. *United States* v. *Orr Water Ditch Co., et al.,* (Equity A-3, D. Nev.).[6] Presenting the Indians' claims under precisely the same theory of implied reservation[7] now

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[4] *Pyramid Lake Paiute Tribe* v. *Morton,* Civ. No. 2506-70 D.D.C. (hereinafter "*Pyramid Lake* v. *Morton*"). See note 34, *infra.*

[5] *Pyramid Lake* v. *Morton, supra,* Memorandum in Response to Plaintiff's Memorandum of Points and Authorities in Opposition to Motions to Dismiss at 13-14. A certified copy of the pleadings in *Pyramid Lake* v. *Morton* referred to herein has been lodged with the Clerk.

[6] The importance of the *Orr Water Ditch* case is developed in Section III, *infra.*

[7] This theory was based upon *Winters* v. *United States,* 207 U.S. 564 (1908).

argued to this Court, the United States obtained a decree in 1944, after 31 years of litigation, establishing the rights of the Pyramid Lake Indians to Truckee waters. At the same time, the decree necessarily and explicitly determined the separate rights of thousands of other private and public water users in Nevada, as among themselves and as relative to the Indians.[8] While the United States attempts to avoid this decree by arguing that Nevada and California were not parties to that action, this contention is flawed by the fact that the necessary parties in any case properly instituted would be the other water users involved in *Orr Water Ditch,* and not Nevada or California.

The effect of granting the United States' Motion would be to embroil this Court in one small part of an extraordinarily complex problem, requiring the presence of hundreds or even thousands of additional parties who assert legitimate, adjudicated claims to Truckee waters. Intricate issues of local law will abound, and the Court will be required to make hundreds of factual determinations. Furthermore, factual and legal questions will intertwine, so that hearings before a Special Master will not ease the burden on the Court. Nor will this be an isolated case, for it will serve as precedent for hundreds of similar local disputes which happen to involve interstate waters. Like the present case, these disputes, certain to arise in the future, may well be subject to resolution in some federal court, but certainly not this one.

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[8] The Federal District Court appointed a Water Master to administer the decree. To this date, the Water Master is charged with the overall responsibility of controlling diversions from the Truckee River.

A certified copy of the decree has been lodged with the clerk.

ARGUMENT

I.

THE COMPLAINT DOES NOT PRESENT A CASE OR CONTROVERSY TO WHICH NEVADA IS A PARTY.

While the Court has original, but not exclusive, jurisdiction of a claim by the United States against a State, *e.g., United States* v. *Texas,* 339 U.S. 707 (1950), this jurisdiction extends only to disputes within the judicial power of the United States. A complaint against a State is not within the judicial power unless it presents a "case" or "controversy." *United States* v. *West Virginia,* 295 U.S. 463 (1935).

While it may highlight a dispute between water users in Nevada, the Complaint does not present a "case" or "controversy" against the State of Nevada.[9] In Paragraphs XX-XXII, the United States alleges that California and Nevada have negotiated a proposed interstate Compact for the apportionment, *inter alia,* of waters of the Truckee River. The United States complains that the proposed Compact would not allot to the Pyramid Lake Indian Reservation any more water than the Reservation has been awarded by the Nevada Federal District Court in the *Orr Water Ditch* decree.

Despite the Government's attempts to obtain changes in the Compact, the Complaint continues, Nevada and California have refused to recognize claims of the Pyramid Lake Paiute Tribe above and beyond those awarded by the *Orr Water Ditch* decree. Paragraph XX acknowledges, however, that the Compact has not been approved by Congress.[10] Finally, the Complaint

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[9] Similarly, the Complaint states no case or controversy against the State of California. See pages 9, 26-27, *infra.*

[10] Bills designated H.R. 6078 and S.703 to approve the Compact were introduced on Mach 15, 1971 and June 13, 1972, respectively.

alleges that the States have issued permits for appropriation of waters from the Truckee River in derogation of rights now asserted by the United States for the maintenance of Pyramid Lake, and the Complaint charges that those rights are currently being violated. Paragraph XXIII. There are no allegations that the State of Nevada uses waters from the Truckee.

Under principles well-settled by this Court, these allegations do not present a "case" or "controversy" against Nevada. As the Court stated early, "The duty of this court, as of every judicial tribunal, is limited to determining rights * * * which are actually controverted in the particular case before it." *California* v. *San Pueblo and Tulare RR,* 149 U.S. 308, 314 (1893); *e.g., Texas* v. *Interstate Commerce Comm'n,* 258 U.S. 158 (1922); *Muskrat* v. *United States,* 219 U.S. 346 (1911). *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). By its terms, the proposed California-Nevada Compact shall become effective "when, but only if * * * it shall have been consented to by act of Congress of the United States * * *." Art. XXII.[11] As a constitutional matter, too, the Compact could have no effect absent congressional assent. *E.g., Virginia* v.

(A copy of H.R. 6078, which sets forth the Compact, has been lodged with the Clerk.)

Today January 3, 1973 the Compact was reintroduced in the 93rd Congress by Representative Harold Johnson and by Representative David Towell, H.R. 15 .

[11] The Compact also provides that it shall not become effective unless and until Congress provides in its consent or by other legislation that certain provisions of the compact shall be binding upon the agencies, wards and instrumentalities of the United States. With respect to the Truckee River Basin, the United States would be bound by its provisions relating to water allocations not set by judicial decree, except for one provision relating to water with a priority as set forth in California State Water Rights Permit 11666.

Tennessee, 148 U.S. 503 (1893). Since Congress has authority to attach conditions to such consent, *Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959), the Compact when approved could—if Congress rejected the views of Nevada and California—include provisions relating to matters alleged in the Complaint.[12]

Because the Compact now has no force and effect, the Complaint is premature.[13] In *Arizona* v. *California,* 283 U.S. 423 (1931), for example, Arizona complained that the Boulder Canyon Project Act was unconstitutional, basing its claim in part upon the Act's almost certain effect upon future water appropriations. The Court ruled that such allegation did not present a justiciable controversy, and that if the dam should in fact affect water rights when completed, appropriate remedies were available. Here, of course, we do not even have an act of Congress, but only an agreement which may or may not affect or resolve the various problems posed by the United States, when approved by Congress. See *Chicago & Southern Airlines Inc.* v. *Waterman steamship Corp.,* 333 U.S. 103 (1948), where the Court ruled that Civil Aeronautics Board orders requiring Presidential approval before becoming effective were not reviewable prior to such approval.

In another example, *Eccles* v. *Peoples Bank,* 333 U.S. 426 (1948), the Board of Governors of the Federal Re-

[12] The Complaint is illusory in this regard, however, since any increased rights awarded to the Government would simply be taken from the allocation to Nevada in the Compact. See page 27, *infra.*

[13] This is not to suggest that the United States could not sue later, if the Compact were to become effective and to interfere or threaten to interfere with protected federal interests.

serve System ("FRS") granted membership in the System to a bank on the condition that a particular holding company would own no shares of the bank. Later, the holding company obtained some shares of the bank and the bank sought relief from the condition. The FRS refused relief but disavowed any present intent to revoke the bank's membership. The Court held that the bank's attack on the condition was premature, stating, "Courts should avoid passing on questions of public law even short of constitutionality that are not immediately pressing." *Id.* at 432. Here, of course, the Compact about which the federal executive branch complains will have no force unless and until the federal legislative branch approves it.

The Complaint, accordingly, does not present an actual dispute, nor a "case" or "controversy" against Nevada.[14] Particularly where, as here, the rights of different sovereigns are involved, the Court has been careful not to intervene unless a justiciable controversy is clearly presented. See *United States* v. *Appalachian Power Co.*, 311 U.S. 377, 423 (1940), and *Massachusetts* v. *Missouri*, 308 U.S. 1 (1939); *cf. Colorado* v. *Kansas*, 320 U.S. 383, 393 (1943).

The Complaint also charges that Nevada has issued permits in derogation of the rights newly asserted by the United States, and that those rights are now being

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[14] Another case is also instructive. In *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), the Court ruled that:

> The pronouncements, policies and program of the Tennessee Valley Authority and its directors, their motives and desires, did not give rise to a justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or threatened interference with the rights of the persons complaining. [*Id.* at 324.]

violated. Paragraph XXIII. The Complaint must allege more than this to state a case or controversy against Nevada.[15] *United States* v. *West Virginia,* 295 U.S. 463 (1953), controls this point. In that case, the United States brought an original action against West Virginia, Union Carbide & Carbon Corporation, and certain of Union Carbide's subsidiaries, alleging that the construction of a dam by the corporate defendants violated various federal statutes. As to West Virginia, the charges were that the State denied that the river in question was "a navigable stream," and that the State had issued a license for construction of the dam.

The Court granted West Virginia's motion to dismiss. On the first point—similar to assertions here that Nevada has refused to accommodate the Government's desires in the Compact—the Court observed that the Complaint alleged only a "difference of opinion between the officials of the two governments" (*id.* at 473) as to whether the waters were navigable.[16] The Court stated:

> There is no support for the contention that the judicial power extends to the adjudication of such differences of opinion. Only when they become the subject of controversy in the constitutional

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[15] If other parties are interfering with federal rights under state permits, those parties can of course be sued by the United States in the Federal District Court for the District of Nevada. 28 U.S.C. § 1345. This is precisely what the United States did in the *Orr Water Ditch* case. In addition, Nevada statutes (*Nev. Rev.* ch. 533) establish administrative procedures for water use permits, including provisions for protest, 533.465, and for judicial review, 533.450-455.

[16] That in substance is what Paragraph XXII of the Complaint herein charges.

> sense are they susceptible of judicial determination. [*Id.* at 474.]

On the second point, the Court held that allegations that the State had issued permits were also insufficient. In so concluding, the Court observed that the only participation by the State was the issuance of a permit.[17] As the Court stated:

> The control of navigation by the United States may be threatened by the imminent construction of the dam, but not by [the State's] permission to construct it. [*Id.* at 475.]

This is all that the instant Complaint alleges against Nevada. The Complaint contains no claim that the State of Nevada itself uses water from the Truckee River, nor are there any allegations that the State itself has actually interfered with any such use by the United States.[18] In fact, as shown by the Affidavit of Mr.

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[17] The Court concluded:

> There is no allegation that the State is participating or aiding in any way in the construction of the dam or in any interference with navigation; or that it is exercising any control over the corporate defendants in the construction of the dam; or that it has directed the construction of the dam in an unlawful manner, or without a license from the Federal Power Commission; or has issued any permit which is incompatible with the Federal Water Power Act; or, indeed, that the State proposes to grant other licenses, or to take any other action in the future. [295 U.S. at 472.]

[18] Actually, of course, there are no present adjudicated water rights of the United States in addition to those fully recognized by Nevada. If at some subsequent date some court granted the United States the rights it seeks here, those rights, under the *Winters* doctrine, would have a priority date of 1859 and, under Nevada law, would have priority over any permits being issued by Nevada. Until such rights may be recognized, they do not exist. No application for a water permit for those rights has been denied by Nevada.

Roland Westergard, Nevada State Engineer,[19] Nevada has issued only fourteen permits to Truckee waters, the most recent permit having been issued in 1962. In total, these permits and certificates authorize annual diversions of only 1610 acre feet from the Truckee River and its tributaries.[20] Moreover, the Water Master appointed by the Nevada Federal District Court has overall supervision over all diversions from the Truckee, including operations within the Truckee-Carson Irrigation District (hereinafter "TCID").[21] In view of the *Orr Water Ditch* decree, the control of the State of Nevada over the Truckee River is minimal. Indeed, the State of Nevada would have no authority to implement any decree of the Court relating to the river. Just as in *United States* v. *West Virginia, supra,* the allegations that Nevada has issued permits are not

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[19] See generally Affidavit of Mr. Roland Westengard, Appendix A hereto.

[20] For convenient reference, the figures in the affidavit have been converted from cubic feet per second ("CFS") to acre feet by applying the standard conversion formula (1 CFS = 724 acre feet) with adjustments where permits are limited to irrigation and thus authorize only a 3 month use.

While the total of water use authorized by all the permits is 1,128,487 acre feet, the bulk of this water adds no burden to the Truckee. Thus 123,413 acre feet of water are authorized only for non-consumptive uses; all of these waters must be returned to the source. An additional 1,003,464 acre feet are "waste waters"—water first used pursuant to higher priority permits which would otherwise not be put to another use or returned to the source. Since the *Orr Water Ditch* decree, Nevada has basically limited its permits to waste water or to permits for non-consumptive use, and has therefore placed no additional burden on the waters available for Pyramid Lake.

[21] The Truckee-Carson Irrigation District is a non-profit public corporation which operates the Newlands Project (a United States-owned reclamation project) pursuant to a contract dated December 18, 1926, with the Government.

sufficient to create a case or controversy within the judicial power.[22]

The parallel allegations against California are similarly defective.[23] Thus, the Complaint states a case or controversy against neither of the defendants. And since the United States' major claim for the exercise of original jurisdiction rests upon its prayer for the equitable apportionment by the Court of the Truckee River's waters between Nevada and California,[24] the fact that a case is stated against neither of them, as well as the fact that there is no dispute between the two states,[25] has obvious bearing on that aspect of the Government's Complaint. Indeed, the defects in this regard are so clear that the prayer for equitable apportionment must be considered a transparent attempt to bootstrap other claims into the Supreme Court.[26]

II.

THE COURT SHOULD DECLINE TO EXERCISE ITS JURISDICTION BECAUSE OF LONG-STANDING AND CONTINUING EFFORTS BY THE SOVEREIGN STATES TO RESOLVE THE ISSUES WITHOUT RESORT TO LITIGATION.

While the proposed Nevada-California Compact has not yet received Congressional sanction and any neces-

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[22] See also *Arizona* v. *California*, *supra*, 283 U.S. 423, where the Court ruled that the award of permits and the planning of projects did not create a justiciable controversy unless there was a threatened or present interference with the use of *previously* appropriated waters.

[23] The fact that California is not a proper party is also important to the choice of a proper forum for the determination of any issues that still remain to be resolved, if there are any. See pages 37-39, *infra*.

[24] Brief in Support of Motion For Leave to File Complaint 26-27.

[25] See Section II, *infra*.

[26] *Cf. Illinois* v. *Michigan*, 41 U.S.L. Week 3225 (Sup. Ct., Oct. 24, 1972). The other claims asserted in the Complaint are discussed in Section III.

sary additional state ratification—and this case is therefore not ripe for adjudication—the fact that the States have agreed on a Compact to be submitted to Congress underscores the need to honor this Court's long-standing policy to encourage the separate sovereigns in resolving their own disputes.[27] For this reason, the Court should decline to exercise jurisdiction even if it disagrees with us and believes that a case or controversy is presented as to Nevada. Any original jurisdiction in the Court in this case is concurrent, not exclusive, and the Court has full discretion to decline to exercise jurisdiction when it would be appropriate to do so.

Original jurisdiction in the Court must be exercised as a last resort, when the Court is faced with "a clash of interests which * * * could be traditionally settled only by diplomacy or war." *Nebraska* v. *Wyoming,* 325 U.S. 589, 608 (1945). The Court has often observed, however, as it did in *New York* v. *New Jersey,* 256 U.S. 296 (1921), that interstate disputes are better solved by agreement than by litigation:

> We cannot withold 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. [*Id.* at 313.]

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[27] By filing its Complaint herein, the United States is attempting to undercut this Court's preference for resolving such disputes by agreement rather than litigation in this Court.

Similarly, in *Dyer* v. *Sims,* 341 U.S. 22, 27 (1951), the Court stressed "the practical constitutional alternative provided by the Compact Clause."[28]

While the Court has acknowledged its serious responsibility to adjudicate "controversies over how interstate streams should be apportioned among states," *Arizona* v. *California,* 373 U.S. 546, 564 (1963), the Court has also expressed its preference that "where possible States should settle their controversies by 'mutual accommodation and agreement'" (*ibid;* footnote omitted). This preference was amplified in *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493, 499 (1971), where the Court declined to exercise jurisdiction, taking into account "the diminished societal concern in * * * [its] function as a court of original jurisdiction and the enhanced importance of * * * [its] role as the final federal appellate court."

In the *Wyandotte* case, the Court further observed that a number of official bodies were attempting to resolve the dispute which produced the Complaint. The same is equally true here. Pursuant to federal enabling legislation passed over seventeen years ago (Act of August 11, 1955, Ch. 791, Pub.L. No 84–353), Nevada, California and United States representatives have negotiated a proposed interstate Compact.

The need for a Compact between the states of Nevada and California concerning the waters of the Truckee River basin was recognized at least as early

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[28] To the same effect, in *Colorado* v. *Kansas, supra,* the Court stressed that the complexities of interstate water disputes "necessitate expert administration rather than judicial imposition of a hard and fast rule." 320 U.S. at 392-393. See also *Hinderlider* v. *LaPlata Co.,* 304 U.S. 92 (1938).

as 1949.[29] In June 1949, the Nevada and California State Engineers prepared a joint report on water use in the Lake Tahoe watershed, which resulted in the recognition that eventually some sort of an equitable apportionment would have to be made of the waters of the Truckee River. Numerous discussions ensued during the next six years, and, in 1955, state and federal enabling legislation was passed authorizing the negotiation of an interstate compact.[30] During the next seventeen years, the States of Nevada and California expended over $1,500,000 in their efforts to formulate the Compact. In addition the United States, active in the negotiating process,[31] contributed a considerable amount of federal funds and resources to the Compact project.

Negotiations were extensive. The enabling legislation resulted in the creation of the Joint Compact Commission composed of eight members representing Nevada, seven representing California, one representing the United States and one federal legal advisor. From 1956 through 1968 the Joint Compact Commission held sixty-two meetings. In its efforts to formulate the Compact, the Nevada Compact Commission, composed of the eight Nevada members, held one hundred thirty-seven separate meetings from 1955 through

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[29] See generally Affidavit of Mr. Roland Westergard, Appendix B hereto.

[30] Act of Aug. 11, 1955, ch. 791, Pub.L. No 84-353 (federal); 1950 Cal. Stat. 1810, Jan. 18, 1955 (California); Nev. Rev. Stat. 538.270, Mar. 19, 1955 (Nevada).

[31] The federal enabling legislation required a representative of the United States, appointed by the President, to participate in the negotiations, and to report to the President and Congress on the proceedings and any compact.

1972. The California Compact Commission, the counterpart of the Nevada Compact Commission, held seventy-five meetings during the same period.

In order to deal effectively with specific problems associated with the Truckee River Basin, the Joint Commission created the Joint Truckee River Committee. This committee held twenty-two meetings from 1961 through 1964. In total, two hundred ninety-six meetings were held, and all were open to the public.[32] Virtually every interest in and to the waters of the Truckee River was presented to one of these administrative bodies.

As a result of these monumental efforts, the Joint Commission wrote five "final" drafts of the Compact for the consideration of the States and the various federal agencies. The first was completed in 1965 and was submitted for comment to a number of federal agencies (*e.g.,* Bureau of Reclamation, Bureau of Indian Affairs) and state and local interests. The last of the federal agencies' comments were received in early 1968. Thereafter the second "final" draft, including many suggested revisions, was completed. This draft underwent further revision, and the third "final" draft was completed on July 25, 1968. This draft was submitted for comment to the States and federal agencies on September 12, 1968. The third "final" draft was submitted to the two state legislatures for approval in early 1969. Nevada approved the third draft on February 28, 1969 (A.B. No. 60; Nev. Stat. ch 65, 1969). However, California rejected the third draft, and the California legislative committee, along with members of the Joint

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[32] It should be noted that this represents approximately one meeting every three weeks for a period of seventeen years.

Compact Commission, revised the third draft and formulated the fourth "final" draft. The State of Nevada adopted this fourth draft on April 28, 1969 (Nev. Stat., ch. 640 at 1259). However, further revision was found to be necessary. The fifth and last draft was approved by Nevada March 5, 1971 (Nev. Stat., ch. 25 at 29), and approved by California on September 19, 1970 (1970 Cal. Stat. 1480). The Compact as approved by the States was presented to Congress as House Bill H.R. 6078 on March 15, 1971, and as Senate Bill S. 703 on June 13, 1972. No action was taken on either of these bills prior to congressional adjournment in 1972. Representative Harold Johnson of California and Representative David Towell of Nevada have reintroduced the Compact in the present session of Congress.

This brief synopsis of the history surrounding the negotiation of the Compact makes it clear that a tremendous expenditure of time, effort and resources has been made by the States of Nevada and California and by the Federal Government itself in attempting to resolve the Pyramid Lake situation. It should be equally clear that after nearly twenty-four years of investigation, the Compact reflects the carefully considered opinion of numerous experts, actual water users (including Paiute Tribe representatives) and many others who would be affected. This Compact did not spring into being overnight.

The proposed Compact, which specifically reserves to the Indians the rights awarded in *Orr Water Ditch* (Article VI, Section A), has thus now been submitted to Congress for approval. Since the Compact represents an agreement between the States of Nevada and California, the principal basis for an exercise of original jurisdiction, i.e., a dispute between two states, is absent from this case.

Moreover, if the Compact were to prejudice federal rights—which we deny—and if Congress erroneously accepted the Government's contentions in this regard, Congress has authority to withhold consent or to attach conditions deemed necessary to protect alleged federal interests, including the claims asserted in the Complaint. *Petty* v. *Tennessee-Missouri Bridge Comm'n, supra.* While we deny that the Compact should be modified, Congress does have the authority to require modification as a condition to its consent. Congress thus stands available as the appropriate forum in which the Government can seek a solution to the problem it perceives.[33] As illustrated by *Arizona* v. *California, supra,* 373 U.S. at 575-590, Congress has in the past been and can again become an effective instrument for resolving the complexities of state and federal disputes concerning interstate waters. If the Complaint herein is heard by the Court, the result will be an obvious and unwarranted interference with the legislative process.

The matters alleged in the Complaint are only "a small piece of a much larger problem." *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U.S. at 503. Not only have Nevada, California and the United States been attempting to resolve these issues through an interstate compact, but these same issues could be considered by a commission which could be appointed by the President pursuant to the Water Resources Planning Act, 42 U.S.C. §1962, *et seq.* At the present time, however, an intrusion by the Court into the Congressionally-mandated water resource use and conservation would amount to an obstruction of what has been made a legislative duty and responsibility. Such

[33] As a matter of policy, if not of legal requirement, the Compact thus raises a question better suited for legislative than for judicial resolution.

plans must be given an opportunity to be implemented, and time must be taken to measure their effect.

It is not only the Compact and the commission that are persuasive against an exercise of jurisdiction by this Court. As noted by the United States in another proceeding:[34]

> [T]he Department of the Interior is and has been taking action designed to resolve the complicated dispute between the various water users of the Truckee and Carson Rivers including the Pyramid Lake Tribe of Paiute Indians, for the purpose of ascertaining and protecting the rights of that tribe. [*Affidavit of Raymond C. Coulter,* dated February 4, 1971, in *Pyramid Lake* v. *Morton, supra.*]

According to Mr. Coulter, Deputy Solicitor of the Department of Interior, the United States, having actively participated in negotiations for the Compact, also joined with Nevada and California in the creation of a field task force—named the Pyramid Lake Task Force—charged with the duty of recommending ways to "provide sufficient water to preserve Pyramid Lake and to satisfy the beneficial needs of other users."

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[34] *Pyramid Lake* v. *Morton, supra.* By citing this case, we do not mean to suggest that the Court had jurisdiction over the subject matter or that the Secretary of the Interior has the power to take the action ordered by the Court. The fact remains that the positions taken by the United States in that case are in direct conflict with the positions the United States takes before this Court.

The significance of this conflict of positions is not affected by the fact that the *Pyramid Lake* case complaint was against a United States official rather than against the United States itself, since the Government argued that the complaint was "in effect, a claim against the United States." More important, the Government actively defended the official's actions as proper and fully justified by conditions at Pyramid Lake and other circumstances.

The Pyramid Lake Task Force was a joint federal-state task force appointed as a result of a meeting in July 1969 between the Secretary of the Interior and the Governors of California and Nevada. Thirteen members were appointed—four from the Government, seven from Nevada,[35] and two from California. Task Force members were government officials responsible for water rights in the Truckee River and the welfare of Pyramid Lake, as well as public and private citizens who represented the interests of *all* users of waters from the Truckee River. The Task Force held twenty-six meetings, all of which were publicly attended, as well as two formal public hearings, at which it received testimony and/or written statements from a total of thirty-seven witnesses. The Task Force submitted various progress reports, and its Final Report was not submitted until December 31, 1971.

The Task Force compiled and studied existing data and reports, and it engaged in further studies of its own. These studies were conducted by seven different study groups created by the Task Force. Each study was keyed to the Task Force purpose of formulating ways to preserve Pyramid Lake. These new studies were conducted in the following subject areas: weather modification; ground water availability; water importation; engineering and mechanical solutions; water rights and the enforcement thereof; economic studies; and water salvage studies.[36]

Each of the seven study groups was directed to submit at least three progress reports to the Task Force. This permitted active supervision by the Task Force while the studies were in progress. Some of the study groups were authorized to, and did, contract with ex-

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[35] One Nevada member, a representative of the Pyramid Lake Tribe of Paiute Indians, resigned on April 10, 1970.

[36] Task Force Report at 11.

pert consultants to assist with the studies. One conclusion of the Task Force was that part of the Pyramid Lake problem was due to geologic forces rather than increased water usage: "Geologic evidence indicates that the lake has been slowly receding due to long-term climatic changes during the past few centuries * * *" Task Force Report at 1. A general comment highlights the complexity of the Pyramid Lake problem:

> The growing demands for water in these areas together with the limited water resources available have led, of course, to strong competition for water and complex water problems.[37]

Nonetheless, the Task Force concluded that, if its recommendations were implemented, 95,150 acre feet of water could be salvaged each year to supplement normal inflow and aid significantly in the preservation of Pyramid Lake.

In its final report, submitted in December 1971, the Pyramid Lake Task Force made a number of specific recommendations relating to such matters as better water management, enforcement of existing decrees, and the importation of waters from outside the Truckee-Carson River Basins. The implementation of such proposals, including a pilot cloud seeding "weather modification" project already in operation,[38] will take time, but, according to the United States itself, substantial progress has already occurred.

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[37] *Id.* at 3.

[38] *Pyramid Lake Paiute Tribe* v. *Morton*, *supra*, Affidavit of Charles R. Renda dated March 24, 1971 at p. 3. This is a five-year project at an estimated federal cost of $900,000. *Ibid.* According to the Pyramid Lake Task Force, the conclusions from the first year's operations are extremely encouraging:

> If the tentative conclusions reached from the first year's operation of this project are borne out at the conclusion of the five-year period, it may well be that implementing weather modification as a continuing program may result in more than ade-

Previously, the Secretary of the Interior had, in 1964, appointed an Interior Department task force to study Pyramid Lake. As a result of the conclusions of this task force, the Secretary established operating criteria and procedures for the Truckee-Carson Irrigation District.[39] These operating criteria have produced beneficial results, and contributed to the following "estimated increases in inflow to Pyramid Lake," as found by the Pyramid Lake Task Force:

Water Year	*Increased Inflow acre-feet*
1967	94,000
1968	106,000
1969	100,000
1970	75,000
1971	100,000[40]

These increases of inflow have had a substantial impact upon the level of Pyramid Lake,[41] as can be seen from the twelve-foot increase over a four-year period:

PYRAMID LAKE ELEVATIONS

Date	*Elevation*
Low point, February and March, 1967	3,783.9
September 3, 1967	3,788.5
September 3, 1970	3,794.0
September 2, 1971	3,795.4

quate water for at least all present demands, including that of maintaining Pyramid Lake at relatively its present level. [Task Force Report at 37.]

[39] Under Section 34 of the contract dated December 18, 1926 with TCID, the Secretary of the Interior reserved the right to issue rules and regulations for the operation of the project. See 43 C.F.R. §418.

[40] Task Force Report at 9.

[41] *Id.* at 10.

That progress is in fact being made and that an urgent need for judicial action is entirely unnecessary is attested to by statements made by the United States to the court in *Pyramid Lake* v. *Morton, supra.* As early as February of 1971, the United States was assuring that court:

> Contrary to the allegations of plaintiffs, progress has been made in stabilizing Pyramid Lake and in restoring the fishery. As is reflected in the enclosed affidavits and attachments, recently imposed measures have resulted in increased inflow into Pyramid Lake. * * * At the present time, cutthroat trout and cui-ui fish are thriving in the Lake. Plans are projected to improve the channel of the Truckee River and install fish ways on the dams on the stream so that the cut-throat trout may go upstream to spawn. Some spawning upstream has occurred during the past year.
>
> It is recognized that the problems are far from solved. Further action is necessary to protect the water supply for Pyramid Lake. These problems, however, do not present the dire emergency plaintiffs would lead the Court to believe they do. * * * [42]

On the same date, the Deputy Solicitor of the Interior Department filed an affidavit in that case in which he stated under oath, in reference to an Interior Department report:

> It was estimated that the implementation of that report would provide an annual increase in the flow of the Truckee River into Pyramid Lake of 42,000 acre-foot per annum. I am advised that the

[42] Memorandum in Response to Plaintiff's Memorandum of Points and Authorities in Opposition to Motions to Dismiss, filed February 5, 1971, pp. 13-14.

> actual increase in the level of the lake, since implementation of that report, has substantially exceeded the estimate * * *. [43]

Nor were these isolated assertions. The next month, the United States told the court that:

> * * * in all probability there will be more than 400,000 acre feet of water flow into Pyramid Lake this year, so the water level of Pyramid Lake should rise slightly again this year.
>
> * * * We have been advised that the cut-throat trout and the cui-ui fish continue to thrive in the lake and that the salinity of the lake has decreased with the rise in the water level.[44]

And four months later, the United States, again arguing that there was no need for judicial intervention, assured the Federal District Court that "There is every reason to believe that the level of Pyramid Lake will be higher at the end of the water year than it was at the beginning."[45]

We fail to understand how the Government can make these factual statements and legal arguments before one court while at the same time presenting diametrically opposed statements and arguments to this Court. Not only are the Government's allegations of urgency in the Complaint here (Paragraph XXIV) entirely refuted by its own words in the other case, but its declarations there also demonstrate that the

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[43] Affidavit of Raymond C. Coulter, filed February 5, 1971, p. 2.

[44] Memorandum in Response to Plaintiff's Amended Complaint and In Support of Motions to Dismiss, filed March 30, 1971, p. 6.

[45] Memorandum of Points and Authorities in Support of Motion to Dismiss, filed July 21, 1971, p. 6.

various officials now tackling Truckee River issues are making real progress toward resolving the problems giving rise to the Complaint.

As we have seen, Congress is available as the appropriate forum in which the United States can pursue its interests with respect to the proposed Nevada-California Compact. While we suggest that the matter should therefore be remitted to Congress,[46] we do not intend thereby to imply that the United States is in any position to complain about the Compact. Despite the fact that the Truckee River is a "navigable stream," *e.g., Reno Brewing Co.* v. *Packard,* 31 Nev. 433, 437-438 (1909); *Shoemaker* v. *Hatch,* 13 Nev. 261, 267 (1878); *Boardman* v. *Lake,* 8 Nev. 76, 85 (1873), the United States has not rested any of its claims herein on that base. Therefore, this is not a case like *Arizona* v. *California,* 298 U.S. 558 (1936), where the United States was held to be an indispensable party. The United States' rights, as asserted in the Complaint, are thus not necessarily paramount to the rights of all other public and private users.

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[46] Indeed, the Government appears to have plans to seek a congressional solution to the Pyramid Lake problem. In a letter dated November 28, 1972 (Appendix C hereto) to the Nevada State Engineer, a Department of Interior official outlined "major principles" which may be incorporated into a legislative proposal for the Newlands Project. Two of these are authorization for the Secretary of the Interior to execute an amendatory contract to the TCID contract of 1926, and to execute a rehabilitation and betterment contract with TCID. The proposal continues:

> 2. All water salvaged by virtue of measures contained in the two foregoing contracts shall reach Pyramid Lake and be used by the Paiute Indians for recreation and fish and wildlife. Salvaged water shall not be available for appropriation by other water users.

This is important because the Compact, by its terms as now proposed, would accommodate any increased federal rights without any disruption whatever of the agreement between Nevada and California. The basic scheme of the proposed Compact, like many others,[47] is to allocate the waters between the States, with federal uses charged to the States in which the uses are made. Compact, Article III, Section C. In Article VI, Section A, Nevada is thus allocated water for the Pyramid Lake Indian Reservation in amounts provided to the United States for that use in the *Orr Water Ditch* decree.[48] In Sections B and C, the Compact makes allocations to California, but in Section D the Compact allocates to Nevada any water not specifically provided for in the Compact. In sum, any additional rights awarded to the Indians by the claims herein under *Winters* v. *United States, supra,* 207 U.S. 564,[49] or pursuant to the other claims herein, would simply constitute new charges to Nevada under Article VI, Section D, of the Compact as now proposed.[50] Relief, if any, against Nevada is thus appropriately available in the United States District Court for Nevada.

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[47] *E.g., Arizona* v. *California, supra,* 373 U.S. 546; *Nebraska* v. *Wyoming, supra,* 325 U.S. 589.

[48] Presumably, the allocation under this section would be increased by any amount of increase the United States could gain if it moved successfully to reopen the decree in that case.

[49] See pages 30-33 *infra.*

[50] In Article XXI, Paragraph A, the Compact provides that nothing in the Compact should be construed as affecting the obligations of the United States to the Indians, or rights owned on behalf of the Indians. This provision opens the door for Congressional action specifically providing water for the Paiute Tribe at Pyramid Lake.

III.

THE CLAIM OF THE UNITED STATES IS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL.

Despite allegations concerning the proposed Compact, the principal claim asserted in the Complaint relates to the amount of waters reserved to the Indian Reservation. This claim has previously been fully and fairly litigated by the Government, and, therefore, the United States is precluded from reasserting the same claim herein by the doctrines of res judicata and collateral estoppel.[51]

In major part,[52] the Complaint is grounded upon the theory that, under *Winters* v. *United States, supra,* 207 U.S. 564, the creation of the Pyramid Lake Indian Reservation in 1859 implied a reservation of sufficient waters for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish and for the other needs of the inhabitants of the Reservation, such as irrigation and domestic use. Paragraph VIII. Though the Complaint acknowledges (Paragraph XVII) that the United States previously asserted a right to the use of the Truckee waters for irrigation on the Reservation in *United States* v. *Orr Water Ditch Co., supra,* the Government contends that

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[51] Indeed, the *Orr Water Ditch* decree enjoined the parties from asserting new rights:

> The parties * * * are * * * hereby forever enjoined and restrained from asserting or claiming any rights in or to the waters of the Truckee River * * * except the rights, specified, determined and allowed by this decree. [Decree, at 87.]

[52] In other paragraphs, the Complaint asserts rights to waters for national forests (XIV), public water holes, hot springs and mineral springs (XV) and in various wells, ponds and other places of use. (XVI). It is evident, however, that the *Winters* right claim for Pyramid Lake is paramount. (IV-VII.)

the decree therein does not "foreclose recognition of the additional rights now asserted by the United States." Paragraph XVIII. In fact, the Government's new claims are foreclosed thereby. It should be noted preliminarily that if the other requirements for estoppel are met, the Government, like a private party, can be precluded from raising issues which it has litigated before. The United States is fully subject to the rules of res judicata and collateral estoppel. *Tait* v. *Western Md. R. Co.,* 289 U.S. 620 (1933). See also *Drummand* v. *United States,* 324 U.S. 316 (1945), and *Sunshine Coal Co.* v. *Atkins,* 310 U.S. 381, 403 (1940).

As another preliminary matter, it is clear that the Government's claims can be barred by res judicata and collateral estoppel even though the defendants here are not the same as the defendants in *Orr Water Ditch.* Under principles recently accepted by the Court, the discredited rule of mutuality of estoppel no longer permits the United States to relitigate matters already decided in another case, even if all the parties are not the same. In *Blonder-Tongue* v. *University Foundation,* 402 U.S. 313 (1971), the Court, in a unanimous opinion, overruled the mutuality of estoppel doctrine in the context of patent litigation. The Court stated, "[W]e conclude that * * * [*Triplett* v. *Lowell,* 297 U.S. 638 (1936)] should be overruled to the extent it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid." 402 U.S. at 350.

In so holding, the Court considered the fact that the doctrine of mutuality of estoppel had long been under fire. *Id.* at 322. Significantly, the Government had urged, as *amicus curiae,* that *Triplett* "was based on uncritical acceptance of the doctrine of mutuality of

estoppel." *Id.* at 319. The Court observed that many state and federal courts had rejected the mutuality requirement, particularly when the first judgment was raised by a defendant in a second action against a plaintiff who had litigated the issue and lost it as plaintiff in the first case. *Id.* at 324. In such instances, many courts have held that "only the party against whom the plea of estoppel was asserted had to have been in privity with a party in the prior action." *Id.* at 322.

Noting this trend away from rigid application of the mutuality doctrine, the Court questioned whether "it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Id.* at 328. Here, as we shall show, the Government litigated its claims on behalf of the Paiute Indians in the *Orr Water Ditch case.* Even though the defendants here are not all the same as in that case,[53] under *Blonder-Tongue* the United States is precluded from relitigating the same issues previously decided at its behest in *Orr Water Ditch.*

The pleadings in the *Orr Water Ditch* case reveal that the matters litigated there are identical to the *Winters'* doctrine claims asserted here. See *Bernhard* v. *Bank of America Nat. Trust & Savings Assoc.,* 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942). In *Orr Water Ditch,* the Government alleged, in the Amended Complaint filed on July 25, 1914, that the Pyramid Lake Paiute Indian Reservation was set aside by the United States for the benefit of the Paiute Tribe on November 29, 1859, for the reason that the Government

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[53] In contrast to the defendants named in the Complaint here, the proper parties were before the court in *Orr Water Ditch.*

sought to protect members of the Paiute Tribe in their "homes, fields, pastures, fishing, and their use of said lands and waters, and * * * in affording to them an opportunity to acquire the art of husbandry and other arts of civilization, and to become civilized." Paragraph 16. These claims were not, as the Government contends, based solely on the Indians' needs for irrigation water, but rather were stated in the broadest possible terms, including a specific claim for waters to support the Indians fishing culture.[54]

The scope of issues already litigated is illustrated further by the United States' portrayal of the *Orr Water Ditch* suit as "occasioned * * * by the necessity of determining the amount of water flowing in the Truckee River available for the use of the Pyramid Lake Indian Reservation * * * and to protect the rights of the Government in these waters."[55] The claims and purposes of the action in *Orr Water Ditch* are thus virtually identical to the claims and purposes of the Complaint herein.[56] See Complaint, Paragraph VII.

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[54] In its Prayer for Relief in the Amended Complaint, United States asked the court to decree that the Pyramid Lake Indian Reservation has an appropriated right to 500 cubic feet of water per second of time from the Truckee River with a priority date of November 29, 1859. The Prayer for Relief also asked that the court quiet title, in the United States, to the water rights set forth in the Complaint.

[55] *United States* v. *Orr Water Ditch, supra,* Reply Brief of United States, p. 1. (A certified copy of all *Orr Water Ditch* pleadings referred to herein has been lodged with the Clerk.)

[56] In its Brief in Support of Motion For Leave To File Complaint, the Government states as to the instant suit.

> The purpose of this litigation is to establish the right of the United States to the use of a portion of the waters of the Truckee River system for the maintenance of Pyramid Lake and for the other purposes shown in the Complaint. [*Id.* at 17.]

In this action, the Government rests its claims to additional waters of the Truckee on the doctrine of *Winters* v. *United States, supra,*[57] which holds that, in certain circumstances, the creation of an Indian reservation also impliedly reserves certain waters to the use of the reservation. But the Government, in *Orr Water Ditch*, had already asserted *Winters* rights on behalf of the Tribe. In its Brief there, the United States first cited *Winters*—along with numerous other cases applying the doctrine [58]—and then argued that the circumstances surrounding the creation of the Pyramid Lake Indian Reservation required the application of *Winters*. The Special Master agreed and was later upheld by the court. The Special Master declared that the reservation of Indian lands "necessarily implied withdrawal of a reasonable amount of waters for the needs of the Indians." [59]

In 1914, when the *Orr Water Ditch* complaint was filed, there were 527 Indians on the Pyramid Lake Reservation. The Special Master's recommendations, and the award of water rights by the Nevada District Court, were keyed to that number of Indians, and the ruling that waters had been impliedly reserved under *Winters* was based upon the same broad claims of right as are now asserted by the United States in this Complaint. Since 1944, when the *Orr Water Ditch* decree was entered, however, several important events have occurred. The number of Indians actually living

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[57] Brief in Support of Motion For Leave to File Complaint, pp. 21-22.

[58] *United States* v. *Orr Water Ditch Co.*, Brief in Support of United States' Claim, p. 13.

[59] *United States* v. *Orr Water Ditch Co.*, Special Master's General Explanatory Report, June 12, 1925.

on the Reservation has decreased to about 400, and the number of other people dependent on the water has increased dramatically. All concerned have relied upon the continued validity of the *Orr Water Ditch* decree. Particularly in circumstances like these, the United States should be barred from relitigating its Truckee River water rights.[60] As the Court stated in another case which involved Indian claims, "Where questions arise which affect title to land it is of great importance to the public that when they are once decided they should no longer be considered open." *United States* v. *Title Ins. Co.,* 265 U.S. 472, 486 (1924). In a part of this country where water is fully as precious as land, the principle applies with equal if not paramount force. The *Orr Water Ditch* decree should not be disturbed.[61]

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[60] The United States must have been satisfied with the results of *Orr Water Ditch*, since it did not take an appeal from the decree.

[61] In support of its Motion, the Government argues that the needs of the Reservation were not "fully appreciated" when the *Orr* suit was brought. As we have seen, however, that complaint was filed in 1913 and the decree was not entered until 1944. In fact, the level of Pyramid Lake declined significantly from 1868 to 1904. S. T. Harding, *Recent Variations in the Water Supply of the Western Great Basin,* Archives Series Report 16, fig. 32, Center Archives, University of California (1965). From 1910 to 1942, the level of Pyramid Lake dropped from elevation 3870 feet to 3815 feet. *Ibid.* This drastic drop of 55 feet occurred drring the pendency of all of the proceedings in the *Orr* case. It cannot be disputed that the United States was aware of this drastic decline during the pendency of the *Orr* case, yet it took no action to amend its pleadings to protect what the United States now claims is a "right."

In view of these circumstances and public reliance upon the *Orr* decree, this is the kind of case in which the Goverment's present claims should also be barred by laches or estoppel. See *United States* v. *Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970).

The effect of failure to apply res judicata or collateral estoppel here would be nothing more than to encourage forum shopping and multiple litigation, much of it attempted by appeals to this Court for the exercise of its original jurisdiction.

There is another, separate reason why the *Orr Water Ditch* decree should not be disturbed. The decree represents a full and proper application of the *Winters* doctrine in litigation which lasted almost thirty years. In applying *Winters*, the court in *Orr Water Ditch* properly examined the intent of both parties (the Government and the Indians) in the creation of the Pyramid Lake Indian Reservation. The decree takes full "account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved." *United States* v. *Walker River Irr. District,* 104 F.2d 334, 336 (9th Cir. 1939). The water rights were awarded with full consideration of the future as well as present needs of the Reservation. See *Arizona* v. *California, supra,* 373 U.S. at 600. These rights have thus been permanently fixed.[62] The *Winters* issues having once been correctly resolved by the Nevada Federal District Court, there would be no useful purpose served by resurrecting them in this Court.

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[62] Accepting, for purposes of argument only, the theory that a decree awarding *Winters* rights to water is always open to modification if needs increase, see *Conrad Inv. Co.* v. *United States,* 161 Fed. 829 (9th Cir. 1908), the Government's proper course at this stage would be to move to modify the *Orr Water Ditch* decree on the basis of its newly discovered *Winters* right assertions. That is what the Government recently suggested in another case, see page 39 *infra*.

IV.

THIS COURT SHOULD DECLINE JURISDICTION BECAUSE ANOTHER JUDICIAL FORUM IS PROPERLY AVAILABLE AND BECAUSE INDISPENSABLE PARTIES ARE ABSENT HERE.

Even if the United States is permitted to relitigate these claims, we respectively suggest that this Court is not the proper forum. In determining in its discretion whether to exercise original jurisdiction, the Court must look to the constitutional policies underlying the grant of original jurisdiction. One of these was that original jurisdiction should lie in the Supreme Court when no other forum is available for a fair resolution of the controversy. See *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U.S. at 500. Where other courts are open to the parties the Court should decline to exercise jurisdiction. As the Court stated in *Georgia* v. *Pennsylvania RR. Co.,* 324 U.S. 439, 464-465 (1945):

> The Court in its discretion has withheld the exercise of its jurisdiction where there has been no want of another suitable forum to which the cause may be remitted in interests of convenience, efficiency and justice.

In this case there is another forum—the Nevada Federal District Court—and the Court should therefore deny the Government's Motion.

In support of its Motion,[63] the Government contends that "this is the only Court in which jurisdiction can be obtained over all of the necessary parties to grant the relief so urgently needed if Pyramid Lake is to be saved." This contention is without merit.

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[63] Brief in Support of Motion for Leave to File Complaint, p. 26.

First, although it is not necessary for us to take a definitive position on the point, there would appear to be solid basis for the contention that the State of California is amenable to suit by the United States on the allegations in the Complaint in the Federal District Court for Nevada. Subject matter jurisdiction is conferred by 28 U.S.C. §1345, as held in *United States* v. *California,* 328 F.2d 729 (9th Cir.), *cert. denied,* 379 U.S. 817 (1964), as well as by 28 U.S.C. §1331(a) (federal question jurisdiction).[64] Venue is proper in Nevada by virtue of 28 U.S.C. §1391(b), since some if not all of the Government's claims arise in Nevada. *In personam* jurisdiction over California clearly can be achieved by the Nevada Federal Court. *E.g., Hanson* v. *Denckla,* 357 U.S. 235 (1958); *McGee* v. *International Life Ins. Co.,* 355 U.S. 220 (1957) (minimum contacts—negotiations for compact, water uses in California having impact in Nevada, etc., sufficient). Finally, service of process on California can be accomplished pursuant to Rule 4(b)(6) of the Federal Rules of Civil Procedure.[65] The arguments could thus be made that California and Nevada can be sued together in the Nevada Federal District Court, and that the Government is wrong when it asserts that the

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[64] Clearly, the scope of rights conferred by *Winters* v. *United States, supra,* as well as claims arising under the several federal statutes recited in the Complaint, *e.g.,* the Reclamation Act of 1902, 32 Stat. 388, raise questions within the purview of §1331(a) jurisdiction.

[65] The only case intimating a contrary result, *Clark County, Nevada* v. *City of Los Angeles,* 92 F. Supp. 28 (D. Nev. 1950), has been severely, thoroughly and persuasively criticized by Wright & Miller, FEDERAL PRACTICE AND PROCEDURE §1109 at 430-435 (1969).

Supreme Court is the only forum in which its claims can be heard.[66]

In any event, whether or not that argument is valid, California is not a necessary party to the adjudication of the claims asserted by the government. California is not such a necessary party to this adjudication because any federal *Winters* use award would be deducted from the Nevada allocation whether that share is awarded to Nevada by compact or equitable apportionment. "All uses of main stream waters within a state are to be charged against that state's apportionment, which, of course, includes uses by the United States." *Arizona* v. *California, supra,* 373 U.S. at 601. See also *Kansas* v. *Colorado,* 206 U.S. 46 (1907); *Wyoming* v. *Colorado,* 259 U.S. 419 (1922); *Hinderlider* v. *La Plata Co., supra,* 304 U.S. 92 at 102, 106; *Nebraska* v. *Wyoming, supra,* 325 U.S. 589.

The previous *Winters* determinations were suits by the United States against the individual water users of the intra-state portion of a stream system. *Winters* v. *United States, supra; United States* v. *Orr Water Ditch Co., supra; United States* v. *Powers,* 305 U.S. 527 (1939). It is clear that the general law relating to federal *Winters* uses should be affirmed and that the controversy should be resolved between the United States as a water user and the other individual water users within the State of Nevada. The federal *Winters* uses are not paramount, but are merely other uses accorded status under the applicable state determination of water rights. The federal *Winters* uses are

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[66] Moreover, the Nevada Federal District Court could exercise jurisdiction over the various California users of waters of the Truckee River. *Finney Co. Water Users Ass'n* v. *Graham Ditch Co.,* 1 F.2d 650 (D. Colo. 1924.)

junior in priority to some water rights acquired under state law and senior to other water rights also acquired under state law. See, *Arizona* v. *California, Report of Simon Rifkind, Special Master,* December 5, 1960, p. 301. Pyramid Lake itself lies solely in Nevada, and the Indian residents of the Pyramid Lake Indian Reservation are Nevada citizens. The future administration of the stream system can be most easily accomplished by administration within the state.

For all these reasons it is apparent that the Federal *Winters* claims made herein are claims which involve only Nevada or its individual water users. This being so, there can be no jurisdictional bar to suit in the Nevada court since the State of Nevada and the individual water users are obviously amenable to suit there.[67] E.g., *United States* v. *California, supra,* 328 F.2d 729.

As we have noted,[68] under the Compact itself, any additional grant of water rights to the Government on its claims in the Complaint would be deducted from the Nevada share of the Truckee's waters. The California share would be undisturbed, and, therefore, neither the State of California nor individual California water users are necessary or proper parties to the adjudication of these claims. In addition, since adjudication of

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[67] We have already shown, however, that the Complaint states no case or controversy against the State of Nevada. See pages 6-12, *supra.* Accordingly, the State of Nevada also is not a proper or necessary party to a determination of *Winters* doctrine claims. Moreover, with appropriation rights to the Truckee established in the *Orr Water Ditch* decree, Nevada's role has been limited to issuing and administering permits in conformity with the decree. Under the decree, the Water Master actually manages appropriations from the river.

[68] See page 27, *supra.*

Winters' right claims would not disrupt the agreement between California and Nevada represented by the Compact, the United States' prayer for equitable apportionment of the Truckee's waters is completely without basis.

Moreover, the principal act in California affecting the Truckee River is the release of waters from Lake Tahoe. These releases are governed by the provisions of a final decree entered in 1915 by the California Federal District Court in *United States* v. *Truckee River General Electric Co.,* et al., Civil No. 18461. Accordingly, California can exercise no independent discretion in its sovereign capacity over the primary California factor relating to the Truckee River. This is another reason why California is not a necessary party.

The proper parties here are the same people who were defendants in the *Orr Water Ditch* case, and they can be sued only in a federal or state court in Nevada.[69] Since no claims rest on the fact that the

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[69] The United States told the court in the *Pyramid Lake* v. *Morton* case: "The defendant contends that this action is an improper attempt by the tribe to obtain an adjudication of its rights to the use of waters of the Truckee River and/or to obtain an interpretation and enforcement of the *Orr Water Ditch* Decree. Defendant contends that this Court lacks jurisdiction in either case, for the reason that indispensable parties have not and cannot be joined and that the United States District Court for the District of Nevada has jurisdiction to enforce the *Orr Water Ditch* Decree. * * *" Defendants' Pretrial Statement, filed November 9, 1972, pp. 4-5.

Immediately after the quoted passage, the Government referred to "steps * * * now being taken * * * to obtain an adjudication of the Tribe's water rights." The Government was apparently referring to the Complaint herein, which—we show in this brief—represents a choice by the Government of an inappropriate forum in which to assert its alleged claims against inappropriate parties.

Truckee River is "navigable," the United States' rights to the waters are not necessarily paramount.[70] The Government's rights are limited in quantity and dated in terms of priority. The Pyramid Lake Indian Reservation's water rights under the *Winters* doctrine thus stand in a position of relative priority among other water users in Nevada.

The priorities were established in the *Orr Water Ditch* case, and the Government's real opponents are thus the other users whose rights were also set out in the *Orr Water Ditch* decree. These parties must be joined in the ruling sought here. As the Court has stated, "We may assume that the rights of the appropriators *inter se* may not be adjudicated in their absence," *Nebraska* v. *Wyoming, supra,* 325 U.S. at 627.

Moreover, under Nevada law, water rights are deemed property rights in the nature of real property. *Carson City* v. *Estate of Simone Lompa,* 88 Nev. Adv. Op. 139 (1972). Such personal rights cannot be taken away without due process; the State's exercise of its *parens patria* role would not suffice. The United States cannot be given the relief it seeks without depriving existing water users of an equivalent amount of water rights. Due process would be clearly denied if such deprivation occurred in a proceeding to which these users were not parties and in which they were not given an opportunity to be heard.[71] The failure to join

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[70] See page 17, *supra.*

[71] Another court stated the principle concisely:

> [I]t is essential [to water rights adjudication] that everyone whose rights are involved or may be affected be made parties to the proceeding; that they be required to assert whatever rights they contend they are entitled to; and that they be bound by

such indispensable parties here is, in fact, another reason why the Court should deny the Government's Motion. *Minnesota* v. *Northern Securities Co.,* 184 U.S. 199, 235 (1902).

The United States virtually admitted as much in *Pyramid Lake* v. *Morton, supra,* when it contended that the District of Columbia court "lack[ed] jurisdiction over necessary parties to this action, i.e. the other claimants to rights to the use of water from the Truckee River." [72] In that case, a number of the claims were similar to those asserted herein. Accordingly, the United States characterized the claims in *Morton* as grounded on the *Winters* case, and suggested appropriately that those additional *Winters* rights claims should be submitted to the Nevada Federal Court, which the Government stated had continuing jurisdiction over the *Orr Water Ditch* decree.[73]

Not only are the proper parties amenable to suit only in Nevada, but also, common sense requires that any litigation be conducted in that State, which is the location of the Pyramid Lake Indian Reservation and the pertinent stretches of the Truckee River. All the witnesses would be from Nevada or its neighbor California. Relative water rights are matters steeped in local law, with which the local Federal District Court is

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the result for the same sound reasons that justify the doctrine of res judicata in other classes of cases. [*Green River Adjudication* v. *United State,* 17 Utah 2d 50, 404 P.2d 251, 252 (1965).]

[72] *Pyramid Lake* v. *Morton,* Memorandum in Response to Plaintiff's Amended Complaint and in Support of Motions to Dismiss, p. 4.

[73] *Pyramid Lake* v. *Morton,* Memorandum of Points and Authorities in Support of Defendant John N. Mitchell's Motion to Dismiss filed October 2, 1970, p. 11.

fully familiar. The Government also conceded this point in the *Morton* case, when it declared flatly:

> The rights of the use of waters may only be adjudicated within a court of competent jurisdiction at the situs of the water.[74]

The Government was right in *Morton*. If the claims asserted now are to be litigated at all, the proper forum is a federal or state court[75] in Nevada, and not the Supreme Court in Washington, D.C.

V.

ADDITIONAL REASONS FOR DECLINING JURISDICTION.

The points set forth above suggest additional important reasons why the Motion For Leave To File Complaint should be denied. This case is totally unlike other cases in which the Court has made the discretionary decision to exercise original jurisdiction. For example, this case is not like *United States* v. *Louisiana,* 339 U.S. 699 (1950), or *United States* v. *Texas,* 339 U.S. 707 (1950), where the issues were legal in nature, with factual matters not in dispute. Nor is this a case like *Utah* v. *United States,* 394 U.S. 89 (1969), where the parties could narrow the factual issues by stipulation.

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[74] *Pyramid Lake Paiute Tribe v. Morton,* Memorandum in Response to Plaintiff's Amended Complaint and in Support of Motions to Dismiss, p. 5. See also Defendants' Pretrial Statement, p. 4.

[75] Nevada statutes provide administrative procedures, including judicial review, for application for water rights in the Truckee. See note 15, *supra.* Accordingly, the Government could apply for a permit for water rights for recreational and fishery purposes for Pyramid Lake. The Government has taken this course in other situations, as illustrated by California State Permit Number 11,666 —referred to in Article VI(C) of the proposed Compact—relating to Prosser Creek Reservoir.

And this case bears no resemblance to *Arizona* v. *California, supra,* 373 U.S. 546, where Congress had apportioned the water rights between the parties, and the Court's task was simply to construe the controlling statute.

Standing in stark contrast, this Complaint presents matters peculiarly ill-suited to initial adjudication in the Supreme Court. The action here would necessarily involve a multitude of parties. The Court is not an appropriate forum for multi-party litigation, as it has recognized in the past. *Utah* v. *United States, supra* (denial to Morton Salt Company of leave to intervene). The Complaint does not raise issues of law which, when decided, will dispose of the factual questions. Even decision of the *Winters* claims, which the Government suggests should be decided first, without even a Special Master, would involve the Court in a detailed appraisal of such disputed facts as the early habits, occupations and aspirations of the Paiute Indians, as well as the intent of both parties in creating the Pyramid Lake Reservation. Other crucial issues are clearly factual, and involve the resolution of the competing and conflicting rights of the Pyramid Lake Indians and the 13,000 other licensed users of waters from the Truckee River, as well as the quarter of a million Nevada citizens dependent on a fair apportionment of the waters of the Truckee River. These matters cannot be reduced to convenient scope by stipulation.

This Complaint presents only one aspect of a many-faceted problem. See *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U.S. 493. Resolution of the issues presented in the Complaint would only create different but equally difficult problems. The numerous

officials, state and federal, who have been diligently and productively working on these matters for many years stand a far better chance of solving them than does any court, including this one.

Water rights under the doctrine of *Winters* v. *United States* have been litigated in literally hundreds of cases; in many instances, these rights have been determined by final decree entered years ago. If the Court grants the Government's Motion, it will establish a precedent which will encourage the reopening of hundreds of such decrees, not only by petitions in the federal district courts where they were decided in the first place, but also—more importantly—by application to this Court for the exercise of its original jurisdiction. And if the Court in its discretion exercises jurisdiction in the circumstances of this case, it will be haunted by the ruling in the hundreds of similar cases which will be filed in the future on the basis of such a ruling herein.

Finally, the problem is not so urgent (as the Government has said elsewhere) as to justify intervention by the Court. Sovereign interests are involved, and the Court has been extremely careful in the past to stay its hand when feasible under such circumstances. See *Nebraska* v. *Wyoming, supra.* It is difficult to understand the Government's position here that intervention is imperative when it only recently told another court that Pyramid Lake's water level was rising, that its fish were thriving, and that actions taken by the Government itself, in conjunction with others, represented "a complete and bold approach to problems of preserving Pyramid Lake." [76]

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[76] *Pyramid Lake* v. *Morton,* Defendants' Pretrial Statement, p. 5.

VI.

APPOINTMENT OF A MASTER.

We believe we have demonstrated that the Motion for Leave to File Complaint should be denied. If, however, the Court decides to exercise jurisdiction in this case, it should appoint a Special Master *now,* and not later, as the Government has requested. Complaint, Prayer for Relief.

The Government's request, so far as we can determine, is without precedent. But even more important than the fact that such a procedure would mark a sharp departure from the normal course (*e.g., Arizona* v. *California, supra,* 373 U.S. at 595) is the total confusion that would result. As we have shown above, even the initial determination of rights under *Winters* v. *United States, supra,* would require the resolution of many complex and strongly-disputed factual issues. The intent of the Government and the Indians in establishing the Reservation must be derived not only from the few official documents quoted in appendices to the United States' Motion but also from inquiry into such matters as the living habits, occupations and aspirations of the Indians at the time, and their expectations as to present and future needs and uses of water. In addition, there is an interplay between issues already resolved and those sought to be resolved which must be considered even if the Government's view of outstanding decrees were to be adopted—which we adamantly believe should not be the case. None of these issues can be decided in the abstract, as the Government urges. If the Court takes jurisdiction, at the very least a Special Master should establish a sound factual record before the Court rushes into profoundly serious

and far-reaching conclusions of law that will affect two sovereign States and thousands of their citizens.

CONCLUSION

For each and all of the reasons stated above, we respectfully submit that the Motion For Leave to File Complaint should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Affidavit of Roland D. Westergard

STATE OF NEVADA, }
CARSON CITY. } ss.

ROLAND D. WESTERGARD, being first duly sworn, deposes and says:

1. That he is the State Engineer for the State of Nevada.

2. That his knowledge of the facts recited herein is based upon the official records of the Division of Water Resources, State of Nevada, of which he is the Executive Officer.

3. That the State of Nevada, through the Division of Water Resources, has issued the following water permits and certificates granting rights in and to the waters of the Truckee River and its tributaries:

No.	Cert.	Priority	Permit Approved	Source	CFS	Remarks
1198	579	1/27/08	3/20/09	Bronco Cr.	20	Wood Fluming
1393	181	1/13/09	4/16/11	Truckee R.	2.5	Maint. of Log Ponds
1431	136	9/15/09	3/23/10	Hunter Cr.	4.0	Wood Fluming
1436	137	9/22/09	3/23/10	Hunter Cr.	6.0	Power
19886	6232	6/ 2/61	3/30/62	Truckee R.	135.0	Industrial—Non-Consumptive
20267	6068	1/25/62	6/ 1/62	Truckee R.	2.96	Fish Propagation Non-Consumptive
15469	5009	1/19/54	3/19/57	Truckee R.	910	A. F. Storage
17238	5054	4/11/57	9/13/57	Truckee R.	476	A. F. Storage
						(These latter two Permits owned by Nevada Dept. of Fish and Game for Wildlife Management in Fernley Area. Both store waste-water.)
1393	181	1/13/09	3/20/09	Truckee R.	0.19	
*15561	4566	3/22/54	7/14/54	Truckee R.	1.50	
*15562	4567	3/22/54	7/14/54	Truckee R.	1.50	
*15563	4568	3/22/54	7/14/54	Truckee R.	1.00	
*15723	5136	7/ 1/54	1/31/57	Truckee R.	1.00	
*19595	5552	7/ 1/54	6/21/61	Truckee R.	1.00	

* Waste, Drain and Seep Water.

ROLAND D. WESTERGARD
Roland D. Westergard

Subscribed and Sworn to before me
this 21st day of December, 1972.

MRS. HILDA SHERWOOD
Notary Public

(Seal)

Mrs. Hilda Sherwood
Notary Public — State of Nevada
Ormsby County

My Commission Expires July 1, 1973

APPENDIX B

Affidavit of Roland D. Westergard

STATE OF NEVADA, }
CARSON CITY. } ss.

ROLAND D. WESTERGARD, being first duly sworn, deposes and says:

1. That he was formerly Secretary of the Nevada Compact Commission for the years 1962-1967.

2. That he was appointed State Engineer for the State of Nevada in 1967, and in that capacity became Chairman of the Nevada Compact Commission.

3. That the facts related herein are based upon his personal knowledge or upon his review of the official records of the Nevada Compact Commission in his official capacity.

4. That the Joint California-Nevada Interstate Compact Commission held 62 meetings from January 17, 1956-September 5, 1968.

5. That the Nevada Compact Commission held 137 meetings from September 8, 1955-December 7, 1972.

6. That the California Compact Commission held 75 meetings from December, 1955-December, 1972.

7. That the Joint Truckee River Committee, created by the Joint California-Nevada Interstate Compact Commission, held 22 meetings from May 23, 1961-May 11, 1964.

8. That all of the aforementioned meetings were open to the public and that it appeared to affiant during his attendance at most of said meetings that nearly every interest in and to the waters of the Truckee River and its tributaries was presented at least once to one of these administrative bodies during the time periods aforementioned.

9. That the Joint California-Nevada Interstate Compact Commission produced five final drafts for submission, approval and adoption by the States of Nevada and California and numerous federal agencies within several Executive Departments. Some of these Executive Departments were the United States Department of Commerce, United States Department of Agriculture and the United States Department of Interior and some agencies were the Bureau of Reclamation, the United States Forest Service and the Bureau of Indian Affairs.

10. The first draft submitted by the Joint California-Nevada Interstate Compact Commission was completed in 1965 and was submitted to the States of Nevada and California and agencies thereof, and several federal Executive Departments and agencies thereof.

11. That the last of the comments and suggestions with respect to the first draft were received by the Joint California-Nevada Interstate Compact Commission in early 1968.

12. That in the Spring of 1968, a second draft was completed and submitted for review to the various committees appointed by the Joint California-Nevada Interstate Compact Commission and other various agencies.

13. That further comments were received with respect to the second draft which resulted in the completion of a third draft on July 25, 1968. This draft was submitted to the States of Nevada and California and agencies and departments thereof and to several Executive Departments of the United States and agencies thereof.

14. That the third draft was also submitted for approval to the State Legislatures of Nevada and California in 1969.

15. That as a result of certain suggestions and comments by the California Legislature, a fourth draft was completed in the Spring of 1969 and re-submitted to the State Legislatures, state agencies, and federal Executive Departments and agencies.

16. That the fourth draft was approved by the Nevada State Legislature on April 28, 1969 and by the California State Legislature on September 19, 1970.

17. A fifth and final draft was approved by the Nevada Legislature on March 5, 1971.

ROLAND D. WESTERGARD
Roland D. Westergard

(Seal)
Subscribed and Sworn to before me
this 21st day of December, 1972.

MRS. HILDA SHERWOOD
Notary Public

Mrs. Hilda Sherwood
Notary Public — State of Nevada
Ormsby County

My Commission Expires July 1, 1973

APPENDIX C

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
MID-PACIFIC REGIONAL OFFICE
2800 COTTAGE WAY
SACRAMENTO, CALIFORNIA 95825

Nov 29 1972

In Reply Refer To:
MP-105 511.

Mr. Rolin Westergard
State Engineer
Division of Water Resources
Nye Building
Carson City, Nevada 89701

Dear Mr. Westergard:

Pursuant to your request of November 28, 1972, we are listing below the major principles which may be incorporated in a legislative package for the Newlands Project. The proposed package, as you know, would authorize an amendatory contract and a rehabilitation and betterment contract between the Truckee-Carson Irrigation District and the United States.

1. The Secretary of the Interior is authorized to execute an amendatory contract to the contract dated December 18, 1926, between the Truckee-Carson Irrigation District and the United States and to execute a rehabilitation and betterment contract with Truckee-Carson Irrigation District.

2. All water salvaged by virtue of measures contained in the two foregoing contracts shall reach Pyramid Lake and be used by the Paiute Indians for recreation and fish and wildlife. Salvaged water shall not be available for appropriation by other water users.

3. Water to be salvaged for Pyramid Lake shall not be obtained by elimination of any existing uses which have a valid decreed right.

4. The 64-acre tract of project land at Lake Tahoe is to be transferred to the Secretary of Agriculture for recreational uses.

5. Necessary sums of money are authorized to be appropriated but the Secretary of the Interior is authorized to withhold expenditures until assurances are received that water salvaged will be available for the purposes of the Act.

6. Nothing in the Act will limit the right the United States may have in the use of the water of the Truckee stream system for the benefit of the Pyramid Lake Paiute Tribe nor limit the United States in seeking a judicial determination of such rights.

Sincerely,

/s/ H. E. Horton
H. E. Horton
Acting Regional Director

4425-1-73