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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

ON MOTION FOR LEAVE TO FILE COMPLAINT

REPLY BRIEF FOR THE UNITED STATES

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This suit seeks to establish the right of the United States to sufficient water from the Truckee River to preserve Pyramid Lake and its fishery and to satisfy the other federal rights asserted in the complaint. The suit is properly brought against the States as *parents patriae*—as representatives of their water users—rather than against a lengthy list of individual water users. See our Brief in Support of Motion, pp. 25–26. See also *Arizona v. California*, 373 U.S. 546, 595–601; *Nebraska v. Wyoming*, 325 U.S. 589, 607–611. The reality of the controversy presented is that if the United States for and on behalf of the Pyramid Lake Paiute Tribe secures sufficient water for the maintenance of Pyramid Lake and the preservation of the Lake fishery, governmental and other water users in

Nevada and California will be called upon to make more careful and balanced use of irrigation and other water uses and to make some expenditures for modernization of these systems.

In their briefs the States of Nevada and California essentially argue that this case is not ripe for adjudication by this Court because (1) the matter is already being solved by interstate compact, (2) the factual issues are too complex, and (3) the case can be handled adequately without invoking the jurisdiction of this Court. Somewhat inconsistently, the States also deny that the United States has the rights (which are both for the Pyramid Lake Tribe of Indians, and for specific federal uses) urged in its complaint.

1. *The legal issues are ripe for decision by this Court.*

Both States suggest that the problems raised in the United States' complaint will be solved by a proposed Interstate Compact. But after 24 years (see Nevada Br. p. 16) no compact has been approved by Congress. Moreover, the proposed compact does not recognize the rights asserted by the United States in this suit, and it is highly doubtful that Congress will approve the compact without such recognition. And even if it were approved, the compact itself contemplates litigation to establish federal rights and accordingly provides: "* * * nothing in this compact shall be construed as: A. Affecting the obligations of the United States to the Indians and Indian tribes or, any right owned or held by or for Indians and Indian tribes which is subject to the jurisdiction of the United States"

Proposed Compact, Article XXI; see also Article XVIII (S. 24, 93d Cong., 1st Sess.).

Because the rights claimed by the United States are significant and not protected by the proposed compact, a judicial determination of these rights would not be an obstacle to a successful conclusion of this controversy, but is, instead, a prerequisite to such a conclusion. The fact that the States are ready to resolve many issues not affecting federal rights indicates the ripeness of this case for judicial determination, not that its resolution should be further delayed.

Indeed, the final report of the Pyramid Lake Task Force, in which representatives of California and Nevada participated, specifically noted "uncertainty" as to water rights for the preservation of Pyramid Lake and suggested that to resolve this uncertainty "[T]he Pyramid Lake Tribe or the United States on its behalf might institute a lawsuit to ascertain the water rights of the Pyramid Lake Indian Tribe." Final report, p. 38.¹ This is exactly what the United States has done.

¹The Task Force Final Report has been lodged with the Clerk. See, also, the letter of December 31, 1971, transmitting the Task Force Report to the Secretary of the Interior and the Governors of Nevada and California, Final Report, pp. 5-6:

"The task force goes on to suggest that before implementation of its recommendations, certain basic procedures for implementation should be determined. One such procedure should be a guarantee that whatever waters are salvaged by implementation of the recommendations will in fact reach Pyramid Lake and not be subject to appropriation by other users. It is also recommended that the uncertainty pertaining to the Pyramid Lake Indians' claim to waters of the Truckee River for the purpose of preserving Pyramid Lake itself should be resolved as soon as possible."

Essentially, in addition to recognition of the purely federal rights asserted in this suit, the questions to be resolved are:

(1) When the Pyramid Lake Indian Reservation was established was a right to the use of sufficient water from the Truckee River to maintain Pyramid Lake and the lower Truckee River as a viable fishery reserved by implication?

(2) If such a right was reserved, was this right diminished by the action of the Secretary of the Interior in establishing the Newlands Reclamation Project.

(3) What effect did the adjudication of rights to the use of some of the waters of the Truckee River within the State of Nevada in the case of *United States v. Orr Water Ditch Company* have on rights which were not asserted in that suit?

2. *The factual issues are ripe for decision by this Court.*

Contrary to the impression the States would create (Calif. Br. pp. 10-11; Nev. Br. pp. 42-45; but see *id.* at 21-23), the factual data necessary for a determination of the issues raised in our complaint are readily available and have already been compiled and refined in the Task Force reports.² One of the essential factual propositions—that to maintain the present level of Pyramid Lake an average inflow of 385,000 acre-

² We are lodging with the Clerk a copy of the Final Report on Water-Use Improvement Study of the Truckee-Carson River Basin of Clyde-Criddle-Woodward, Inc., consulting engineers, prepared for the Pyramid Lake Task Force, dated September 30, 1971.

feet per year is required and that the “imbalance between the lake’s current supply and demand is [on the average] 135,000 acre-feet each year”—is admitted by California (Br. p. 4) and apparently also admitted by Nevada which adopts the statement of facts made by California (Nev. Br. p. 3 note 3). Questions of water needs of the Newlands Project under present or improved irrigation techniques and of the needs of other water users have been thoroughly studied and documented in the Clyde-Criddle Engineering Report prepared for the task force. See note 2, *supra*.

Nor is there a problem of anthropological data in this case. That this Tribe has historically lived by the Lake, that it depended upon the abundant fishery of the Lake for its livelihood and that this was recognized in the very acts establishing the Reservation, are all matters of public record (see our Brief in Support of Motion, App. A, pp. 30–32).

We do not suggest that there will be no disputed facts in this case or that a master will not be required at some stage, but we do submit that both the legal and the factual issues have been refined and focused and are ready for presentation to this Court.

3. *This Court is the only court with jurisdiction to decide these issues.*

a. Nevada and California minimize the importance of California water uses. As we state in our original complaint and brief, however, this is an interstate stream; it originates in California; Lake Tahoe is used as a reservoir for the Truckee River; and Nevada uses and federal uses depend upon restrained uses and timely releases in California (Complaint pp. 3–4; Br.

p. 18). Moreover, though California may presently use only 26,000 acre-feet of Truckee water per year (Cal. Br. p. 3), it claims a total of 45,000 acre-feet per year for present and future use in California in the proposed compact without recognizing the federal reserved rights to water for national forests, public water holes, etc., located in California. These uses would consume approximately one-third of the 135,000 additional acre feet needed for the maintenance of the level of Pyramid Lake. The United States' claim for the Pyramid Lake Tribe and for its own national forest uses are made against California as well as Nevada.

b. Nevada suggests that this litigation could be brought in the federal district court in Nevada (Nev. Br. 35-42). Significantly, California does not join Nevada in this suggestion. California, moreover, has previously taken the position that citizens of California are not bound by decrees such as the *Orr Ditch* decree to which neither California nor California water users were a party.³

We know of no legal support for the proposition that this case could, much less should, be brought in the Nevada district court with jurisdiction over the State of California, *United States v. State of California*, 328 F. 2d 729 (C.A. 9), certiorari denied, 379 U.S. 817, on which Nevada relies, merely holds that the United States may sue the State of California in a federal district court in California for a common tort committed against the United States in Cali-

³ See, e.g., Calif. Att. Gen. Opinions, Vol. 30, Opinion No. 57-186, Nov. 22, 1957, pp. 262 *et seq.* ("Subject: Lake Tahoe").

for California by an agent of the State of California. The opinion in that case does not suggest that the United States could sue the State of Nevada in California. Nor does it suggest that an action to quiet title to land or water in one State can be brought by the United States in another State.⁴ Actions asserting rights to water use are generally considered local or *in rem* actions and, in the absence of special legislation, must be brought in a court with jurisdiction over the water and the parties.⁵

4. *Litigation presently pending in the United States District Court for the District of Columbia provides no basis for denying leave to file the complaint here.*

California urges the pendency of *Pyramid Lake Paiute Tribe of Indians v. Rogers C. B. Morton*, Civil Action No. 2506-70 in the United States District Court for the District of Columbia (Cal. Br. p. 26), as a reason why this Court should deny leave to file the present complaint. That case, however, involves only the Secretary's administrative regulations as to the diversions allowed to the Newlands Project under

⁴ Moreover, the opinion concludes with the statement: "Common sense dictates that those suits [between the United States and a State] which involve routine, largely factual disputes be litigated in the district courts." 328 F. 2d at 739. Our complaint here is obviously not in that category.

⁵ See, e.g., *Taylor v. Hulett*, 153 Idaho 265, 97 Pac. 37; *Howell v. Johnson*, 89 Fed. 556 (C.C., D. Mont.); *Brooks v. United States*, 119 F. 2d 636 (C.A. 9). In 1922 Congress enacted Public Law 311, September 19, 1922, 42 Stat. 849, to broaden district court jurisdiction so that certain war fraud cases could be brought in district courts. See S. Rep. No. 892, 67th Cong., 2d Sess. Under this legislation the United States was able to bring interstate stream adjudications concerning the Carson, Walker and Gila Rivers in federal district courts. But this Act expired by its terms in 1926.

the ambiguous and inadequate *Orr Ditch* decree. It does not reach the question whether the United States, for the Tribe, has a right to sufficient water to maintain the level of Pyramid Lake and to preserve it as a fishery nor does it reach the other federal rights asserted in the complaint here. Nor can it, because the district court in the District of Columbia, while having jurisdiction over the Secretary of the Interior, obviously has no jurisdiction over water users in California and Nevada. Moreover, although the Secretary has attempted to comply with the court's order by issuing a regulation requiring stricter control of water use in the Newlands Project, the Truckee-Carson Irrigation District which represents Newlands Project water users has formally informed the Secretary of its unwillingness to be bound by any regulation diminishing, for the purpose of preserving Pyramid Lake, what it considers to be the decreed rights of project water users.⁶

Significantly, none of the other uses involved in the present complaint are subject to the regulation at issue in the district court litigation. Unless this Court grants leave to file the complaint, continued fragmentary and inconclusive litigation and exacerbated feelings between Indians and upstream water users concerning water rights in the Truckee River are to be

⁶ We are lodging with the Clerk copies of the letter dated October 24, 1972, from the Truckee-Carson Irrigation District to Hon. Rogers C. B. Morton.

anticipated. This matter needs to be settled,⁷ and can be settled only in this Court.

5. *The rights the United States asserts are valid.*

Both States contend, inconsistently with their position that the issues presented by the United States' complaint are being solved elsewhere, that the United States has no right to sufficient water to prevent the destruction of Pyramid Lake and presumably that the United States has no right to the independent federal uses asserted in its complaint. On the question of the validity of these rights we refer the Court to our original brief pp. 21-22, 24. We add only that Nevada's brief is incorrect in suggesting that the question of obtaining sufficient water to maintain the level of Pyramid Lake or to preserve it as a fishery was in any way raised in the *Orr Ditch* proceeding. The government's *Orr Ditch* complaint sought for the Reservation only modest irrigation rights (Amended Complaint pp. 21-24).⁸ The government's brief (Brief,

⁷ While Nevada points out that the average elevation of the Lake has increased in the past few years (Nev. Br. pp. 23-24), a comparison with average river volume (Criddle report, App. J, p. 3) indicates that although the Secretary's regulations governing use of waters within the Newlands Reclamation project have improved inflow into Pyramid Lake, the rise in the water level in the lake is attributable primarily to abnormally high precipitation. The respite from continued depletion of the Lake and its fishery created by these favorable conditions provides a valuable opportunity for resolution of the issues presented in our complaint.

⁸ The passage from the complaint quoted at page 31 of Nevada's brief here is merely an abbreviated description of the purpose of the Reservation; it does not assert a right to water to maintain the lake as an issue in the *Orr Ditch* litigation.

pp. 13-19) and reply brief in the case made no claim for the Tribe beyond irrigation rights (Reply Brief pp. 15-16). The Special Master's report refers only to irrigation rights (pp. 38-41) and the decree is concerned only with irrigation rights. See our original brief here, App. D, pp. 35-38. Thus the issues raised in the complaint here were not litigated in the *Orr Ditch* proceeding.⁹

It is a general principle of water law that decrees "are not conclusive as to matters which might have been decided therein, but only as to such matters which were in fact decided." Kinney on *Irrigation and Water Rights*, 2d Ed., pp. 2829-2830 (1912). The government's claim for water to preserve Lake Pyramid is not one that has been "fully and fairly, but unsuccessfully litigated" in a prior suit and thus would be barred by collateral estoppel under *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 329. See also *Cromwell v. County of Sac*, 94 U.S. 351, 352. It is a claim never before litigated, of national importance, and in need of resolution. Similarly, the claims of the government for forest uses have not been presented before and should now be adjudicated.

⁹ The *Orr Ditch* litigation took place prior to this Court's decision in *Arizona v. California*, *supra*, 373 U.S. at 595-601, which clarified the scope of *Winters v. United States* and made clear that reserved rights are not limited to irrigation rights and should be ascertained by reference to the purpose for which the reservation was created.

CONCLUSION

The motion for leave to file the complaint should be granted.

Respectfully submitted.

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