

FILE COPY

No. 59 Original

Supreme Court, U. S.
FILED

JAN 18 1973

MICHAEL ROBAK, JR., CLERK

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 PYRAMID LAKE PAIUTE TRIBE OF
INDIANS AS AMICUS CURIAE IN SUPPORT
OF MOTION FOR LEAVE TO FILE COMPLAINT**

ROBERT S. PELCYGER
DAVID H. GETCHES
1506 Broadway
Boulder, Colorado 80302

ROBERT D. STITSER
575 Mill Street
Reno, Nevada 89502

*Attorneys for Amicus Curiae
Pyramid Lake Paiute Tribe*

Of Counsel:

NATIVE AMERICAN RIGHTS FUND
ROBERT D. STITSER, LTD.



TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	1
ARGUMENT	3
I. THE PYRAMID LAKE CONFLICT IS RIPE FOR ADJUDICATION BECAUSE ALL OTHER ATTEMPTS TO RESOLVE IT HAVE FAILED	3
1. The Task Force	3
2. The Compact	5
3. The Proposed Legislation	7
II. THE COURT SHOULD NOT RULE NOW ON THE RES JUDICATA AND COLLATERAL ESTOPPEL DEFENSES ..	8
III. ONLY THIS COURT CAN EXERCISE JURISDICTION OVER THE ENTIRE SUBJECT MATTER OF THIS CASE	12
IV. THE <i>Pyramid Lake v. Morton</i> LITIGATION DOES NOT RAISE OR RESOLVE THE ISSUES IN THIS CASE	14
V. MISCELLANY	17
CONCLUSION	21

TABLE OF AUTHORITIES

CASES:

<i>Albion-Idaho Land Co. v. Naf Irr. Co.</i> , 97 F.2d 439 (10th Cir. 1938)	13
<i>Arizona v. California</i> , 373 U.S. 546 (1963)	1
<i>Blonder-Tongue Labs. v. University Foundation</i> , 402 U.S. 313 (1971)	11
<i>Carpenter v. Strange</i> , 141 U.S. 87 (1891)	13
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831)	11
<i>City of Elsinore v. Temescal Water Co.</i> , 36 Cal.App.2d 116, 97 P.2d 274 (1939)	20
<i>Clarke v. Clarke</i> , 178 U.S. 186 (1900)	13
<i>Ellenwood v. Marietta Chair Co.</i> , 158 U.S. 105 (1895) .	13

	Page
<i>Gila River Pima-Maricopa Indian Community v. United States</i> , 29 Ind.Cl.Comm. 144 (1972)	11
<i>Humble Oil & Refining Co. v. Copeland</i> , 398 F.2d 364 (4th Cir. 1968)	13
<i>Iselin v. Meng</i> , 269 F.2d 345 (5th Cir. 1959), <i>cert. denied</i> 361 U.S. 913	13
<i>Los Angeles v. Aitken</i> , 10 Cal.App.2d 460, 52 P.2d 585 (1935)	20
<i>Menominee Tribe v. United States</i> , 391 U.S. 404 (1968)	21
<i>Pyramid Lake Paiute Tribe of Indians v. Morton</i> , — F.Supp. —, 4 E.R.C. 1714 (D. D.C. 1972)....	2, 14, 15, 16, 17
<i>United States v. Alpine Land & Reservoir Co.</i> , 431 F.2d 763 (9th Cir. 1970), <i>cert. denied sub nom Pyramid Lake Paiute Tribe v. United States</i> , 401 U.S. 909	2
<i>United States v. Minnesota</i> , 305 U.S. 382 (1939)	2
<i>United States v. Orr Water Ditch Co., et al.</i> , U.S.D.C., Equity No. A-3 (D.C. Nev. 1944)....	5, 8, 11, 12, 14, 21
<i>Wilbour v. Gallagher</i> , 77 Wash.2d 306, 462 P.2d 232 (En banc, 1969)	20

STATUTES AND REGULATIONS:

25 U.S.C. § 175	3
28 U.S.C. § 1391(b)	13
28 U.S.C. § 1392(b)	13
42 Stat. 849 (1922)	13
43 C.F.R. § 418	3, 15

MISCELLANEOUS:

The Administrative Conference of the United States, 1971-1972 Annual Report, p. 79	10
Assembly Joint Resolution No. 49 (Resolution Chapter 130), 1970 Regular Session, 1970 Statutes and Amendments to the Codes (California) 3655	18
6 Clark, Waters and Water Rights, § 511.1	13
119 Cong. Rec. S. 587 (January 12, 1973)	7
70 Harv. L. Rev. 708 (1957)	14

Hearings on Administrative Practices and Procedures Relating to Protection of Indian Natural Re- sources Before the Subcommittee on Administra- tive Practice and Procedure of the Committee on the Judiciary, U.S. Senate, 92nd Cong., 1st Sess. (1971)	7, 9, 10
Hutchins, California Law of Water Rights 19 (1956) .	20
Josephy, "Here in Nevada a Terrible Crime," <i>Amer- ican Heritage</i> (June, 1970), 93	19
I Moore's Federal Practice ¶ 0.142 (2d Ed. 1965)	13
President's Message on Indian Affairs, 116 Cong. Rec. S. 10894 at 10896 (July 9, 1970)	9
Pyramid Lake Task Force, Final Report (1972)	3, 4, 7
United States Department of the Interior, Bureau of Outdoor Recreation, "Pyramid Lake Recreation Study," pp. 15-16	19, 20

IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 59 Original

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATES OF NEVADA AND CALIFORNIA, *Defendants*

**BRIEF OF THE PYRAMID LAKE PAIUTE TRIBE OF
INDIANS AS AMICUS CURIAE IN SUPPORT
OF MOTION FOR LEAVE TO FILE COMPLAINT**

INTEREST OF AMICUS

The United States and the States of Nevada and California have consented to the filing of this amicus brief.

The Pyramid Lake Paiute Tribe of Indians (the Tribe) is the duly recognized governing authority of the Pyramid Lake Indian Reservation. The United States is the legal owner of the Pyramid Lake Indian Reservation, holding title in trust for, and for the benefit of, the Tribe. See, *e.g.*, *Arizona v. Califor-*

nia, 373 U.S. 546 at 595 *et seq.* (1963); *United States v. Minnesota*, 305 U.S. 382 (1939). By its motion for leave to file its complaint, the United States is seeking to invoke this Court's original jurisdiction to adjudicate the rights of the government and the Tribe to the waters of the Truckee River. Included among the claims asserted, and probably the most substantial of them, are the rights appurtenant to the Pyramid Lake Indian Reservation to maintain the level of Pyramid Lake and to maintain the lower reaches of the Truckee River as a natural spawning ground for fish.

Pyramid Lake and its fishery are now and always have been the heart of the Pyramid Lake Indian Reservation, and the Truckee River its lifeline. During the past twenty years, the Tribe has been engaged in continuous efforts, which have taken the major part of its meager resources, to assure sufficient flows of Truckee River water to preserve the lake and restore its fishery.¹ Throughout this period, the Tribe has repeatedly called upon the government to initiate appropriate legal proceedings aimed at adjudicating the full extent of the water and fishery rights appurtenant to the reservation. The filing of this action by the United States in September, 1972 represents the culmination of these efforts. Indeed, the United States Attorney General was originally named as a defendant in the *Pyramid Lake v. Morton* litigation as the Tribe sought

¹ See, e.g., *United States v. Alpine Land & Reservoir Co.*, 431 F.2d 763 (9th Cir. 1970), *cert. denied sub nom. Pyramid Lake Paiute Tribe v. United States*, 401 U.S. 909, and *Pyramid Lake Paiute Tribe of Indians v. Morton*, — F.Supp. —, 4 E.R.C. (Environmental Reporter Cases) 1714 (D. D.C. 1972) (hereinafter referred to as *Pyramid Lake v. Morton*). California has lodged a copy of the District Court's Memorandum Opinion with the clerk as its Exhibit D. California Brief, p. 9, n. 15.

mandamus, pursuant to 25 U.S.C. § 175,² to require the Attorney General to initiate such action. The District Court dismissed the Attorney General and the mandamus claim against him, and the action proceeded against the Secretary of the Interior involving the implementation of his regulations, 43 C.F.R. § 418.³

The Tribe files this amicus brief for two reasons, to apprise the Court that it fully supports the government's action and to respond to some of the contentions advanced by Nevada and California in their respective oppositions to the motion for leave to file the complaint.

A R G U M E N T

I

THE PYRAMID LAKE CONFLICT IS RIPE FOR ADJUDICATION BECAUSE ALL OTHER ATTEMPTS TO RESOLVE IT HAVE FAILED

1. The Task Force

Despite their frequent references to the Final Report of the Pyramid Lake Task Force,⁴ Nevada and Cali-

² This statute provides:

In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.

³ The regulations are incorrectly cited as 43 C.F.R. § 372 and 43 C.F.R. § 374 in California's Brief, p. 8.

⁴ Lodged with the Court as California's Exhibit A. The Tribe declined to participate as a member of the Task Force for two reasons, because it would have required an enormous investment of time and money the Tribe felt was better expended elsewhere and because virtually every member of the Task Force represented interests adverse to the Tribe.

fornia neglect the most relevant finding and recommendation of all:

Until the claim of the Indians [to a right to waters of the Truckee River for the purpose of preserving Pyramid Lake] is either confirmed or denied in some binding form, there will continue to be great uncertainty as to the legal status of the water rights of the Truckee River, and the base inflow to Pyramid Lake.

. . . It is the recommendation of the Task Force that this uncertainty concerning the claim of the Indians to Truckee River water be resolved by whatever means at the earliest possible time.⁵

One of the possibilities specifically mentioned by the Task Force for resolving the uncertainty was that a lawsuit be initiated by the Tribe or the United States to ascertain the Tribe's water rights.⁶ Members of the Task Force included Mr. Roland D. Westergard, the State Engineer of Nevada, and Mr. Robert G. Eiland, Assistant Director of California's Department of Water Resources, as well as Mr. James D. Wood, Project Manager of the Truckee-Carson Irrigation District.

When these representatives of the States of Nevada and California got together with representatives of the Federal Government to try to settle the Pyramid Lake problem, they recommended that a lawsuit be initiated to resolve the existing legal uncertainties. Now that such a lawsuit has in fact been filed, the attorneys for the respective states urge the Court to decline to exercise its jurisdiction so as to permit the parties to

⁵ Final Report, p. 38.

⁶ *Id.*

negotiate a solution. This kind of contentiousness is typical of the vicissitudes that have plagued the Pyramid Lake situation for the past two decades.

2. The Compact

The original draft of the Compact produced by the Joint Compact Commission and passed by the Nevada Legislature⁷ would have limited for all time the rights of the United States for the Pyramid Lake Reservation to the wholly inadequate 30,000 acre feet annually for irrigation specified in the *Orr Water Ditch* decree. This result was too harsh for the California Legislature to swallow.⁸ The Tribe pressed California to amend the Compact to recognize the right of the United States and the Tribe to Truckee River water for the purpose of maintaining Pyramid Lake. California refused, contending that it was appropriate for the Compact to allocate specific quantities of water to the respective states but not to any specific uses, including government or Indian uses, within the states. The Compact was then amended so as to permit anyone to perfect their claims to the use of water within the respective states, and was passed in that form by California and then Nevada.⁹ Thus the States of California and Nevada have themselves opted for a judicial resolution of the controversy presented here. Indeed both states admit in their respective briefs the allegation of the United States¹⁰ that an adjudication to determine the Tribe's

⁷ A.B. No. 60; Nev. Stat., ch. 65, 1969. Nevada Brief, p. 17, refers to this Compact as the "third draft."

⁸ Nevada Brief, pp. 17-18; California Brief, p. 13.

⁹ Article XVIII(C), Nevada Brief, p. 18; California Brief, p. 13.

¹⁰ Complaint, paragraph XXI, p. 13.

water and fishery rights would be necessary with or without the Compact.¹¹

The complaint of the United States is obviously not intended to thrust upon this court the obligation of apportioning the water of the Truckee River between California and Nevada when the states are able to reach their own accommodation.¹² The United States seeks only to insure that the states' apportionment does not infringe on the rights of the government or the Tribe and that the decree entered by the Court define the rights of the United States, the Tribe, and the states so as to be enforceable. Complaint, paragraph XXIV, p. 14. If the states are able to agree, by stipulation or otherwise, on a formula that satisfies these objectives, the Tribe and, we assume, the United States will have no grounds or standing on which to object, nor would there be any reason to do so.

It is more than a little odd, perhaps even disingenuous, that Nevada should now be arguing in this Court for a resolution of the Pyramid Lake Tribe's water and fishery rights by Compact or by Congress¹³ when both states were given the opportunity to pursue such an approach but refused to do so. There has to come a time when the failure of negotiations must be acknowledged. The Tribe submits that after twenty-four years of effort,¹⁴ that time has now come, par-

¹¹ California Brief, pp. 6-7 and 13; Nevada Brief, p. 27.

¹² Nevada Brief, p. 18; California Brief, pp. 17-18.

¹³ Nevada Brief, p. 26.

¹⁴ Nevada Brief, pp. 15-16.

ticularly when the Compact the states have submitted to Congress does not even address itself to the Pyramid Lake problem.¹⁵

3. The Proposed Legislation

Nevada argues that this Court should decline to exercise jurisdiction for the additional reason that the Interior Department is also contemplating an approach to Congress.¹⁶ But the Interior Department letter relied upon by Nevada specifically states that:

Nothing in the [proposed] 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.¹⁷

Thus, the issue could not be more ripe for judicial resolution. The States of Nevada and California,¹⁸ the

¹⁵ It does not take much sophistication or clairvoyance to see that the prospects for Congressional ratification of the Compact are not good. The Interior and Justice Departments have publicly stated their opposition, *Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary*, U.S. Senate, 92nd Cong., 1st Sess., on Administrative Practices and Procedures Relating to Protection of Indian Natural Resources, p. 462. California's two Senators have recently gone on record stating that any Congressional action would be premature in the absence of a binding judicial determination of the Tribe's rights. 119 Cong. Rec. S. 587 (January 12, 1973), Appendix A to this Brief.

¹⁶ Nevada Brief, p. 26, n. 46; Appendix C, p. 5a. No such legislation has yet been submitted.

¹⁷ Nevada Brief, Appendix C, p. 6a.

¹⁸ Obviously, California and Nevada have contended before this Court that the matter is not appropriate for judicial resolution, but the states have taken the contrary view in the Pyramid Lake Task Force Report (see pp. 4-5, *supra*) and in their approach to the Compact (see p. 6, *supra*).

Pyramid Lake Task Force, the Interior and Justice Departments, the Pyramid Lake Tribe, California's two Senators, all concur, after having thoroughly exhausted all other approaches, that there is simply no other alternative. An adjudication of the Tribe's water and fishery rights is essential to break the stalemate.

II

THE COURT SHOULD NOT RULE NOW ON THE RES JUDICATA AND COLLATERAL ESTOPPEL DEFENSES

The tribe urges the Court not to rule at this time on merits of the *res judicata* and/or collateral estoppel effect of the *Orr Water Ditch* decree on the claims asserted in this action. Granting leave to file the complaint and requiring the defendants to answer will not prejudice the merits of either these, or any other, defenses. They can and should be disposed of once the Court has taken jurisdiction.

The Pyramid Lake Tribe was not a party to the *Orr Water Ditch* litigation. In analyzing the litigation and the resultant decree, one fact stands out: The United States undertook to represent the two major adverse and directly competing Truckee River users, the Tribe and the Newlands Reclamation Project. The attorneys representing the United States had a direct and immediate conflict of interest. The *Winters* rights of the Tribe were never adjudicated in *Orr Ditch*—if they were involved at all—they were surrendered by attorneys nominally representing the Tribe but in reality representing the Tribe's principal adversary, the Newlands Project. The position of the Interior and Justice Departments in the Pyramid Lake controversy is the classic example of the conflict of interest in In-

dian water rights cases addressed and condemned by President Nixon:

The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people; frequently they are also the subject of extensive legal disputes. In many of these legal confrontations, the Federal government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the government holds as trustee.

Every trustee has a legal obligation to advance the interests of the beneficiaries of the trust without reservation and with the highest degree of diligence and skill. Under present conditions, it is often difficult for the Department of the Interior and the Department of Justice to fulfill this obligation. No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. There is considerable evidence that the Indians are the losers when such situations arise. More than that, the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists.¹⁹

¹⁹ President's Message on Indian Affairs, 116 Cong. Rec. S.10894 at 10896 (July 9, 1970), also published 1970 U.S. Code Cong. & Admin. News, 2965 at 2972 and H. Doc. 91-363, 91st Cong., 2d Sess. at pp. 9-10. Emphasis in original.

The government's conflict of interest in Indian water rights litigation has received a great deal of attention in recent years. See generally *Hearings Before the Subcommittee on Administrative Practice and Procedure*, *supra* n. 15, Parts 1 and 2 (Comm. Print 1972). In his testimony before the Senate Subcommittee on Indian

The Government's direct and immediate conflict of interest in the Orr Water Ditch case, standing alone, is sufficient reason for not applying either *res judicata* or collateral estoppel as a bar to the Pyramid Lake claims asserted in this action. The Indian Claims Commission has recently had an opportunity to rule on this precise subject, that is the *res judicata* or collateral estoppel effect of a water rights decree entered by a United States District Court in a suit brought by the United States in which the United States purported to represent the conflicting interests of an Indian Tribe in an irrigation project. The Commission stated:

If the interests of plaintiff [Indian Tribe] and defendant [United States] were adverse in the Gila River litigation we are left with the inescapable conclusion that [the Tribe] was not adequately represented in that suit. The adversity of interests would have made it impossible for [United States] attorneys to advocate the rights of the United States without at the same time arguing against the rights of the Indians. Since these same attorneys were the only attorneys representing the interests of the [Tribe] it is clear that

Affairs of the Committee on Interior and Insular Affairs in support of the Administration's bill to create an Indian Trust Counsel Authority, S.4165 (91st Cong.), former Secretary Hickel cited Pyramid Lake as "a good example of such a conflict [of interest]." See *Hearings Before the Subcommittee on Administrative Practice and Procedure*, *supra* n. 15, p. 229. Senator McGovern, the Subcommittee Chairman, referred to Pyramid Lake as the "outstanding example of the conflict of interest situation." *Id.* at 231. And then Secretary Hickel later called it "a perfect example of that internal conflict." *Id.* The Administrative Conference of the United States similarly recognizes the government's conflict of interest in litigating Indian claims, and recommends the establishment of the Indian Trust Counsel Authority. *Recommendations of the Administrative Conference of the United States*, 1971-1972 Annual Report, p. 79.

[the Tribe] could not have been adequately represented. The underlying rationale of the rule of collateral estoppel, as well as that of *res judicata*, is that when a party has had an opportunity to present his case and has been fully heard, and a court has rendered a decision on an issue, he may not seek to relitigate that issue in another tribunal. See *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946); 1B *Moore's Federal Practice* ¶ 0.405, at 623 (2nd Edition 1965). If [the Tribe's] cause was not adequately presented before the Arizona District Court the doctrine of collateral estoppel does not apply. [The Tribe] has not yet had its day in court.²⁰

In view of the government's conflict of interest in *Orr Water Ditch*, the Court may wonder why the Tribe so enthusiastically supports the government's prosecution of the current action. There are several reasons.

First, once the Tribe concludes that an adjudication of its water and fishery rights is essential, as a practical matter there is no alternative to governmental initiation and prosecution. The Tribe cannot invoke this Court's original jurisdiction. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The Tribe might or might not be able to sue the States as representatives of their various water users. The Tribe simply cannot afford to initiate and prosecute one or two lawsuits involving all the users of Truckee River water.

Second, perhaps as a result of President Nixon's condemnation of governmental conflicts of interest in

²⁰ *Gila River Pima-Maricopa Indian Community v. United States*, 29 Ind.Cl.Comm. 144 at 164-165 (1972). See *Blonder-Tongue Labs. v. University Foundation*, 402 U.S. 313 (1971), especially at pp. 329-330 (test for applying collateral estoppel is whether there has been "a full and fair opportunity to litigate").

Indian water rights cases, the Tribe has noted an increased sensitivity and responsiveness on the part of government attorneys to Indian rights and interests. Indeed, the government's filing in this case is perhaps the best example of its increased concern and dedication to protecting Indian resources. The Tribe considers this suit to be the most appropriate vehicle for resolving the legal issues that have plagued it for so long.

Third, the Tribe will closely watch these proceedings and will take whatever action is necessary to protect and assert its own interests at the appropriate time.

Certainly, the Tribe's claims as against the Newlands Project cannot possibly be barred by *res judicata* or collateral estoppel whatever the effect may be as against the other parties in *Orr Water Ditch*. The Tribe and the Newlands Project were not adversaries in the *Orr Water Ditch* litigation. In any event, the issue has not been fully briefed. Its resolution should be deferred until after this Court determines whether it will exercise or decline jurisdiction.

III

ONLY THIS COURT CAN EXERCISE JURISDICTION OVER THE ENTIRE SUBJECT MATTER OF THIS CASE

Nevada argues that this action against the two states could be maintained in the Federal District Court for Nevada.²¹ Significantly, California does not join in this argument. Nevada appears to be mistaken.

The critical issue is venue, though it is a peculiar species of venue that rises to a jurisdictional dimen-

²¹ Nevada Brief, p. 36.

sion.²² Nevada contends that venue as to both California and Nevada in Nevada is proper pursuant to 28 U.S.C. § 1391(b). But this statute relates only to “transitory” or *in personam* actions, not to ones “local” or *in rem*.²³ Local actions must be commenced in the district where the property is located.²⁴ Where property is located in different districts in the *same state*, 28 U.S.C. § 1392(b) provides that the action may be brought in any of such districts. However, there is no law permitting local actions involving property located in *different states* to be brought in any one federal district court. Congress has, on at least one occasion, specifically legislated to authorize such suits,²⁵ but that authorization has expired and none presently exists.

This action is one to quiet title to real property, in this case water rights. It is the classic case of a local or *in rem* proceeding. *Albion-Idaho Land Co. v. Naf Irr. Co.*, 97 F.2d 439 (10th Cir. 1938); 1 *Moore’s Federal Practice* § 0.142[2.-1] (2d Ed. 1965); 6 Clark, Waters and Water Rights, § 511.1. A decree entered by a court cannot operate directly upon property not within its jurisdiction, nor can a decree affect the title of such property. *Clarke v. Clarke*, 178 U.S. 186 (1900); *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105 (1895); *Carpenter v. Strange*, 141 U.S. 87 (1891); *Humble Oil & Refining Co. v. Copeland*, 398 F.2d 364 (4th Cir. 1968); *Iselin v. Meng*, 269 F.2d 345 (5th Cir.

²² 1 *Moore’s Federal Practice* ¶ 0.142[2.-2], at 1463 (2d Ed. 1965).

²³ 1 *Moore’s Federal Practice* ¶ 0.142[2.-1] (2d Ed. 1965).

²⁴ *Id.*

²⁵ Act of September 19, 1922, 42 Stat. 849.

1959), *cert. denied* 361 U.S. 913. Thus a decree entered by the Nevada Federal District Court could not affect titles to land and appurtenant water in California. See generally 70 Harv. L. Rev. 708 (1957).

This action seeks to adjudicate the water rights appurtenant to government and Indian land in both Nevada and California²⁶ as against the water users and landowners in the two states.²⁷ No other court can exercise jurisdiction over the entire subject matter of this case consistent with the rules and principles governing local actions discussed above. Proceeding in separate actions before the district courts of Nevada and California will make the litigation far more cumbersome with no guarantee that the resulting decrees will be either consistent with one another or enforceable together. There is also no guarantee that bifurcating the Truckee River into two suits will permit the assertion of the full extent of the Tribe's claims against the waters of, and water users in, both states.

IV

THE PYRAMID LAKE V. MORTON LITIGATION DOES NOT RAISE OR RESOLVE THE ISSUES IN THIS CASE

Nevada and California utterly distort the meaning of the *Pyramid Lake v. Morton* litigation. The District Court did not "note" or hold that the Indians were bound by the *Orr Water Ditch* decree.²⁸ By no stretch of anyone's imagination can it be said that the

²⁶ See, e.g., Complaint, paragraphs IV, VI and XIII. It is unclear from the face of the allegations of paragraphs XV and XVI whether the lands and waters described in those paragraphs are located in California or Nevada or both states.

²⁷ Here the states represent, as *parens patriae*, their own water users and landowners.

²⁸ California Brief, p. 9.

District Court litigation and this case involve adjudication of “the same issues.”²⁹

Pyramid Lake v. Morton sought judicial review of the administrative action of the Secretary of the Interior pursuant to 43 C.F.R. § 418. Title to water and fishery rights was not, and could not be, in issue. The Secretary’s regulations are specifically predicated on existing water rights under existing decrees.³⁰ 43 C.F.R. §418.5.³¹ These existing decrees do not provide any entitlement to water for the purpose of maintaining Pyramid Lake or a fishery in the lower Truckee River. They do provide a water entitlement to the Newlands Project³² and numerous other Truckee River users. Consistent with this framework provided by these existing decrees, the Secretary’s regulations allocate a maximum quantity of water for the Newlands Project with the remainder, or leftover, going to Pyramid Lake. If there is only sufficient water to satisfy the beneficial needs of the Newlands Project, Pyramid Lake gets nothing. Neither the Secretary’s regulations nor the decision of the District Court establishes any entitlement, or defines any right, to Truckee River water for the Tribe. Both the regulations and the decisions have one basic objective, maximizing the leftover. They do not even purport to have any effect on any users of Truckee River water other than those within the Newlands Project.

²⁹ *Id.* at p. 27.

³⁰ The “existing decrees” are defined in 43 C.F.R. § 418.2(b) and (c).

³¹ This section provides:

The regulations in this part prescribe water uses within existing rights. The regulations in this part do not, in any way, change, amend, modify, abandon, diminish, or extend existing rights.

³² Memorandum Opinion, p. 7.

If this action succeeds, Pyramid Lake will have a decreed right with an 1859 priority against all Truckee River users. Pyramid Lake will no longer be consigned the leftover waters, if any. It will be a full partner with an entitlement, a right to use the flow of the Truckee River to maintain itself and its fishery. In the absence of a judicial declaration of the Tribe's rights, titles and interest, its unadjudicated claims will be up for grabs, just as they have been throughout this century. Administrative action, by its very nature, provides no protection in the long run and only limited benefits in the short run.

Nevada has taken several statements out of context from the filings in *Pyramid Lake v. Morton* to show that the government there claimed to have the situation well under control.³³ As Nevada later admits,³⁴ in making these statements the government was assuming that the Tribe's water and fishery rights would be established as a result of either the Compact negotiations or, if that did not work, this adjudication. In other words, the most vital part of what the government called its "complete and bold approach to problems of preserving Pyramid Lake"³⁵ was its commitment, conveyed to the District Court, to take appropriate legal action, if that proved necessary, to establish a legal entitlement for Pyramid Lake and its fishery.

The Tribe argued, and the District Court agreed,³⁶ that filing this action was not enough, that the Secre-

³³ Nevada Brief, pp. 20, 24 and 44.

³⁴ Nevada Brief, p. 39, n. 69.

³⁵ See Nevada Brief, p. 44.

³⁶ Memorandum Opinion, p. 6.

tary was obligated to take further administrative action to provide more water for Pyramid Lake. But neither the Tribe, nor the Secretary, nor the District Court ever said that an adjudication of the full extent of the Tribe's water and fishery rights, was unnecessary or that it could be delayed any longer. Indeed the one constant in the government's position since the *Pyramid Lake v. Morton* litigation was initiated was its contention that the *sine qua non* for resolution of the Pyramid Lake problem was a determination of title.

Nevada and California may very well prefer Pyramid Lake without a decreed right. That we can understand. That will leave them free to allocate the waters of the Truckee River entirely as they see fit. That is how they have structured their Compact. What we cannot understand is how the Tribe's thus far successful challenge of the Secretary's administrative allocation within the framework of existing decrees somehow precludes, as a practical or legal matter, the need for a determination of the underlying titles.

V

MISCELLANY

There are several other points raised by California and Nevada which require some response.

1. The Tribe does not disagree with California's analysis of the nature and scope of the water rights necessary to fulfill the purposes for which the Pyramid Lake Reservation was created,³⁷ nor do we believe that California's position is inconsistent with the relief requested by the United States. The Tribe hopes to

³⁷ California Brief, p. 15.

achieve two concrete results from this litigation, the right to an *average* annual Truckee River inflow into Pyramid Lake of not less than 385,000 acre feet over a period of years and the right to minimum seasonal rates of flow, not yet quantified but totaling less than 385,000 acre feet annually, sufficient to maintain a fishery in the lower Truckee River. The Tribe certainly recognizes that the inflow to Pyramid Lake has fluctuated historically and will continue to fluctuate.

2. The Tribe takes exception to California's effort to belittle the importance of Pyramid Lake and its fishery.³⁸ Whether defined in economic or ecologic

³⁸ California Brief, pp. 21-22.

The position of California's Attorney General in this respect appears to be at variance with the position of the California Legislature which adopted a resolution expressing, *inter alia*, its convictions that:

Pyramid Lake in the State of Nevada is a unique and beautiful national asset deserving of preservation and protection for the enjoyment of present and future generations;

The potential recreational and economic value of Pyramid Lake to the people of the State of Nevada and particularly to its owners, the Paiute Indian people whose reservation encompasses the lake, is beyond question;

The unique recreational and economic resources of Pyramid Lake are being endangered as its level declines due to the diversion of water from the Truckee River system to meet the many competing demands;

Uses of water from the Truckee River system in California unquestionably have some adverse effect upon Pyramid Lake;

Stabilization of the water level of Pyramid Lake and the provision of minimum flows necessary to sustain fish life and spawning in the Truckee River below Derby Dam would enhance the lake's fishery resources and create economic benefits to the Paiute Indian people who own the lake; and

A properly developed Pyramid Lake would provide high quality recreation for large numbers of residents of California.

Assembly Joint Resolution No. 49 (Resolution Chapter 130), 1970 Regular Session, 1970 Statutes and Amendments to the Codes (California) 3655.

terms, or in terms of its worth to the public at large, a viable Pyramid Lake with a restored fishery represents an asset of inestimable value.

The average gross crop value of the Newlands Project amounts to no more than \$4,500,000 per year. . . . These figures assume significance when matched as achievements of "progress" against what is being denied to the Indians. If the decline of the lake were halted and recreational facilities built on its shores, for instance, it is estimated that recreational income would soon exceed the annual crop value of the irrigation project and that within fifteen years this income would increase to more than three times the annual value of the project.³⁹

Thus a reallocation of the flows of the Truckee River would enhance the overall economy of the region.

The Tribe has dedicated its lake for the use of the American public.⁴⁰ In comprehensive studies of the lake's recreation potential, the Bureau of Outdoor Recreation has concluded that:

If Pyramid Lake's recreation resources are properly developed, significant tangible and intangible benefits will accrue to the U.S., Nevada, Washoe County, the Reno-Sparks complex, local interests and the Pyramid Lake Indian Tribe. The direct tangible economic benefits from recreation at Pyramid Lake could total \$1,425,000 in general admission fees, \$15,482,625 in visitor expenditures

³⁹ Josephy, "Here in Nevada a Terrible Crime," *American Heritage* (June, 1970), 93 at 97-98.

⁴⁰ Appendix B to this Brief is the Tribe's Resolution No. Pl. 33-71, adopted on July 20, 1971, which sets forth in general terms its plan for the development of Pyramid Lake "in perpetuity for the benefit of the Tribe and the American public."

at the lake and over one-half million dollars in jobs annually by the year 2000. In the 32-year interim between today and the turn of the century, a total gross income from the admission fees and visitor expenditures generated by a developed Pyramid Lake would accumulate to an impressive \$202,380,000.⁴¹

There is more at stake than water for "about 400 Indians."⁴²

3. California denies that there is any cognizable legal right to use the water for the purposes of sustaining a lake or its fishery.⁴³ California neglects to mention that its own law recognizes such a right. *City of Elsinore v. Temescal Water Co.*, 36 Cal. App. 2d 116, 97 P.2d 274 (1939); *Los Angeles v. Aiken*, 10 Cal. App. 2d 460, 52 P.2d 585 (1935); Hutchins, *California Law of Water Rights* 19 (1956). See also *Wilbour v. Gallagher*, 77 Wash. 2d 306, 462 P.2d 232 (En banc, 1969).

4. Nevada contends that a very detailed inquiry into such matters as the "aspirations of the Indians" in 1859 and "their expectations as to present and future needs and uses of water" is required before this Court can even rule on the question of whether, in establishing the Pyramid Lake Reservation, the United States reserved by implication the waters necessary to maintain the lake and its fishery.⁴⁴

⁴¹ United States Department of the Interior, Bureau of Outdoor Recreation, "Pyramid Lake Recreation Study," pp. 15-16.

⁴² California Brief, p. 21.

⁴³ California Brief, pp. 20-21.

⁴⁴ Nevada Brief, p. 45.

The official documents quoted in Appendices A and B of the Motion of the United States constitute more than a sufficient basis on which to infer the Government's intention in establishing the Pyramid Lake Reservation.⁴⁵ The Tribe therefore supports the recommendation of the United States that the Court first consider and rule on the critical legal questions involving Pyramid Lake (*e.g.* whether there is a reserved right for the maintenance of Pyramid Lake and its fishery, the *res judicata* effect of the *Orr Water Ditch* decree, the effect of the establishment of the Newlands Project on Pyramid Lake) before appointing a master to rule on the other matters raised in the suit. Once there is a determination of these matters, the respective Briefs of the parties and of the Tribe⁴⁶ indicate that they may very well then be able to negotiate a quantification by Compact or other appropriate means.

CONCLUSION

Since the turn of the century, everyone's needs (real and imagined, beneficial and wasteful) for water from the Truckee and Carson River systems in Nevada and California have been met, except those of the Pyramid Lake Indians. The problem has literally been studied and negotiated to death—the death of the Pyramid Lake fishery. Admittedly, the actions and inactions of the federal government have been largely responsible for this tragic history. But now, for the first time, following years of effort by the Tribe and its friends who share its concern for restoration of the ecology

⁴⁵ See *Menominee Tribe v. United States*, 391 U.S. 404 (1968), in which this Court ruled, on the basis of a more ambiguous record, that hunting and fishing rights were included in the 1854 Treaty of Wolf River despite the absence of any reference to such rights.

⁴⁶ See particularly *supra*.

of Pyramid Lake, the United States has moved to correct the injustices of the past and to control the future by its filing in this Court. As we trust and believe we have shown in this Brief, there is no other satisfactory solution in sight. The Tribe respectfully urges the Court to take jurisdiction and to follow the procedure for its resolution recommended by the Solicitor General.

Respectfully submitted,

ROBERT S. PELCYGER
DAVID H. GETCHES
1506 Broadway
Boulder, Colorado 80302

ROBERT D. STITSER
575 Mill Street
Reno, Nevada 89502

*Attorneys for Amicus Curiae
Pyramid Lake Paiute Tribe*

Of Counsel:

NATIVE AMERICAN RIGHTS FUND
ROBERT D. STITSER, LTD.

January, 1973

APPENDIX A

January 12, 1973

119 CONGRESSIONAL RECORD—SENATE 587

JOINT STATEMENT OF SENATORS KENNEDY,
TUNNEY, AND CRANSTON REGARDING PYRA-
MID LAKE

Mr. ROBERT C. BYRD. Mr. President, I ask unanimous consent to insert in the RECORD a joint statement by Senators KENNEDY, TUNNEY, and CRANSTON.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

JOINT STATEMENT OF SENATORS KENNEDY, TUNNEY, AND
CRANSTON REGARDING PYRAMID LAKE

In 1859 the United States created the Pyramid Lake Indian Reservation in Nevada for the Pyramid Lake Paiute Tribe of Indians. The heart of the Reservation—geographically, culturally, and economically—is Pyramid Lake. The lake is not only the single most important asset of the Tribe, which has lived on its shores and depended on its fishery but it is also a natural resource from time immemorial, of unique importance to the country generally. But presently Pyramid Lake, and the Tribe, are in trouble.

Pyramid Lake is the terminus of the Truckee River, which, except for a small amount of precipitation and drainage from surrounding mountains, is the sole source of water for the Lake. Yet, as a result primarily of man-made upstream diversions of Truckee River water, the level of the Lake has dropped more than 70 feet since 1906. This decline in the Lake has devastated its natural fishery, threatens recreation development which would benefit both the Tribe and all citizens of this nation.

Recognizing that the Lake's existence is in peril and with the full support of the Tribe, the Department of Jus-

tice filed suit in the Supreme Court on behalf of the Tribe in September of last year. The suit asked the Court to assume original jurisdiction of a suit against California and Nevada and to declare the Pyramid Lake Tribe's right to Truckee River water in a sufficient amount to stabilize the level of the Lake and to maintain a natural fishery in the Lower Truckee River.

This suit is long overdue. For years, according to testimony and evidence presented in hearings before the Senate Subcommittee on Administrative Practice and Procedure last year, the Justice Department and Interior Department have been passing the buck back and forth, giving lip service to the plight of the Tribe and the demise of the Lake, but refusing to take concrete action to preserve them. In the past the federal government has abdicated its trust responsibilities to the First Americans through incredible conflicts of interest. This suit should become a symbol of the Government's concern for and action in behalf of the best interests of Indian people. It is our hope that at last the Government will act meaningfully to fulfill its trust responsibility to this American Indian Tribe.

It seems that the Tribe cannot fully be protected until there is a judicial determination of the amount of Truckee River water subject to allocation between California and Nevada and the amount to which the Pyramid Lake Paiute Tribe is entitled. Administrative or Congressional action would otherwise be premature, in that it would only be based on a speculative determination of the Tribe's rights. We therefore support the efforts of the Tribe and Federal Government to obtain a judicial determination in the Supreme Court.

APPENDIX B

RESOLUTION No. PL. 33-71

RESOLUTION OF THE PYRAMID LAKE PAIUTE
TRIBE OF THE PYRAMID LAKE RESERVA-
TION, NIXON, NEVADA

WHEREAS, The Tribe desires to develop its natural recreational resources, including its world-renowned Pyramid Lake, in a manner consistent with proper environmental control so as to preserve its Reservation in perpetuity for the welfare of the Tribe and the American public, and desires, as much as possible, that its Tribal members own, control, and profit from any such development; and,

WHEREAS, The Tribe would like to develop its natural recreational resources so as to make them available for the use and enjoyment of all the people of the United States as well as other countries; and,

WHEREAS, The office of the President of the United States, various U.S. Congressmen, and officials of the Department of the Interior are encouraging the Tribe in such development; and,

WHEREAS, The Bureau of Outdoor Recreation of the Department of the Interior, is of the opinion that Pyramid Lake, if preserved as a viable body of water, "offers greater undeveloped potential for supporting high-quality, water-based recreational opportunities than any other lake in Northern Nevada and California"; and,

WHEREAS, The Bureau of Outdoor Recreation estimates that the area population, including the San Francisco area, that could use Pyramid Lake for day and week-end vacation use will number 13,814,253 in the year 2000 and that if Pyramid Lake should be properly developed, consistent with reasonable environmental

controls and placed under a single administration, that the Tribe's unique recreation resources could satisfy 2,375,000 visitor days of recreation in the year 2000; and,

WHEREAS, It would be to the substantial benefit of the Pyramid Lake Tribe to develop its recreational resources for use by the public at large because of the public's apparent need for such a unique facility and because of the many job opportunities that would be created for the Tribal members thereby substantially solving the poverty problem that has plagued the Reservation; and,

WHEREAS, The Bureau of Indian Affairs of the Department of the Interior has indicated to the Tribe that it stands ready to commit its experts and resources in the field of recreation planning to the use of the Tribe in developing such a total recreational plan for the resources of the Tribe, and to assist the Tribe in implementing such a plan;

NOW, THEREFORE, BE IT RESOLVED that the Tribal Attorney, namely, Robert D. Stitser, be directed to accept the offer of the Bureau of Indian Affairs relative to the commitment of the Bureau's experts and resources to develop the said total recreational plan and to accept any other offers of assistance to develop such a plan that the Tribal Attorney thinks are reasonable; and to initiate the development of such a plan with all due haste. It is contemplated by the Tribe that such a plan shall take into consideration the primary requirement that the Tribe and its members own or control the various facilities and concessions which would be part of such a recreation development plan; that such a plan be compatible with the unique and fragile environment of the Pyramid Lake Paiute Reservation so that the environment shall not be materially harmed, and that any plan shall be consistent with the desire

of the Tribe to maintain Pyramid Lake and all of its natural resources in a viable condition in perpetuity for the benefit of the Tribe and the American public.

CERTIFICATION

It is hereby certified that the foregoing resolution, of the Pyramid Lake Paiute Tribal Council, governing body of the Pyramid Lake Paiute Tribe, composed of 10 member of whom 6 constituting a quorum were present at a meeting duly held on July 20, 1971, was adopted by the affirmative vote of 6 to 0 against pursuant to authority contained in the Constitution and By-Laws of the Pyramid Lake Paiute Tribe.

/s/ DORA GARCIA
Dora Garcia, Secretary
Pyramid Lake Tribal Council

