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No. 59 Original

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

UNITED STATES OF AMERICA, *Plaintiff*

v.

STATES OF NEVADA AND CALIFORNIA, *Defendants*

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS
CURIAE, AND BRIEF OF ASSOCIATION ON AMERI-
CAN INDIAN AFFAIRS, INC., AS AMICUS CURIAE,
IN SUPPORT OF MOTION FOR LEAVE TO FILE COM-
PLAINT

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The Association on American Indian Affairs, Inc. respectfully moves the Court pursuant to Rule 42(3) for leave to file the attached brief *amicus curiae* in support of the motion for leave to file the complaint in the above-captioned case. Plaintiff, the United States of America, has consented to the filing of this brief; defendants have refused so to consent.

The Association on American Indian Affairs is a non-profit membership corporation, organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The largest Indian-interest organi-

zation in the country, the Association's membership of over 50,000 is made up of both Indians and non-Indians, and is nationwide in scope. Over the years, the Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of *amicus curiae* briefs with this Court in *Puyallup Tribe v. Department of Game of the State of Washington*, 391 U.S. 392 (1968), in *Warren Trading Post Co. v. Arizona State Tax Comm.*, 380 U.S. 685 (1965), and most recently in *Affiliated Ute Citizens of the State of Utah, et al. v. United States, et al.*, — U.S. —, 31 L.Ed.2d 741 (1972); *Agua Caliente Band of Mission Indians, et al. v. County of Riverside*, — U.S. —, 31 L.Ed.2d 491 (1972); and *Mescalero Apache Tribe v. Jones, et al.*, — U.S. —, 31 L.Ed.2d 815 (1972).

The primary question presented in this case is whether the United States has the right, for the benefit of the Pyramid Lake Paiute Tribe of Indians, to use sufficient waters from the Truckee River to fulfill the purposes for which the Pyramid Lake Reservation was created, including restoration and maintenance of the Pyramid Lake fishery. The parties hereto, of course, are concerned in only a limited, although highly important, context with this question. The interests of the Paiute Tribe are being represented by the United States as plaintiff, and by the Native American Rights Fund as *amicus curiae* by consent of all the parties. The Association, on the other hand, is interested in demonstrating to the Court that proper resolution of the primary question here presented will have broad and ever-increasing national significance as Indian tribes throughout the United States continue in their efforts to develop subsistence economies which are

based, for many tribes, on the planned use of natural resources, including water, appurtenant to reservation lands. Representation herein of the interests of Indians generally should assist the Court in reaching the result which history has committed to it the duty to reach.

The Association is interested also, on behalf of itself and all Indians, in supporting the United States, and urging the Court to support the United States, in what appears to be a new, or renewed, effort on its part to protect and promote Indian interests by deed, and not, as so often has been the case in the past, by words alone. Filing of the Motion for Leave to File a Complaint may, of itself, mark a major turning point in United States Indian policy “from the question of *whether* the Federal government has a responsibility to Indians to the question of *how* that responsibility can best be fulfilled”—a reformation in Indian policy promised by President Nixon in July, 1970. *Indian Affairs, The President's Message to the Congress*, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 849, 906 (1970). The disposition by the Court of the United States' motion, and the outcome of the case, may have a deep impact on the future course of the fiduciary relationship between the United States and all Indian tribes.

The facts which have given rise to this case are a particular and justifiable source of grievance to the Pyramid Lake Paiute Tribe. Nonetheless, the genesis of the suit is but one example of the persistent failure of the federal government to keep its word to Indian tribes throughout the United States. That word seldom has been backed by the kind of action which might be expected from a government which professes to feel

a "generous and protective spirit"¹ towards its Indian population, and to adhere to the "highest standards of fair dealing"² in controlling Indian affairs. This deep dichotomy between words and deeds of the United States in relation to Indian affairs led the Court of Appeals for the Ninth Circuit, in 1956, in considering a case very similar to the one at bar, to characterizing the benevolent expressions of Congress, of public officials and of the courts, in relation to Indian affairs, as "but demonstrations of a gross national hypocrisy." *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321, 338 (9th Cir. 1956), *cert. den.*, 352 U.S. 988 (1957).

The end to this gross national hypocrisy, if the distinction between words and deeds can be fairly termed as such, may be hastened by the action taken by the United States and by the Court in this case. So that the Association on American Indian Affairs may do its part in hastening this end, by covering important facets of this case which the immediate parties are not likely to discuss, the Association requests that its motion for leave to file the attached brief as *amicus curiae* be granted.

Respectfully submitted,

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¹ *Oklahoma Tax Comm. v. United States*, 319 U.S. 598, 607 (1943).

² *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 48 (1946).

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**BRIEF OF ASSOCIATION ON AMERICAN
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INTEREST OF AMICUS CURIAE

Here in Nevada a Terrible Crime *

The interest of the Association on American Indian Affairs, Inc. in the primary question presented in the case at bar is fully set forth in the attached motion

* The quotation is from the title of an article written by Alvin M. Josephy, Jr. for the July, 1970 issue of American Heritage Magazine (p. 93). The article was based on over 10 years' study of the Pyramid Lake situation. The article's prize-winning author is General Editor of the American Heritage Book Division and author of the renowned work "The Indian Heritage of America."

for leave to file this brief as *amicus curiae*, and is not here repeated. The Association, in short, is concerned with many aspects of this case. While the survival of one of America's unique and most beautiful assets may be at stake herein, no question exists but that the continued existence of the Pyramid Lake Paiute Tribe of Indians, as a viable social unit, on the lands set aside for the Tribe by the United States, is certainly at stake. The economic life of the Tribe has depended on the fishery of Pyramid Lake since time immemorial. With the gradual destruction of this resource in recent decades, ever-increasing numbers of Paiutes have been forced to leave their homelands and to seek elsewhere the necessities of life for themselves and their families. The Association wants the Court to assist in bringing a halt to this forced exodus.

The Association is also interested in seeing that no Indian tribe is deprived of sufficient water, or other natural resources appurtenant to reservation lands, to make its reservation a liveable home as promised by the United States. The efforts of many Indian tribes to develop even subsistence economies cannot succeed if this promise is not fulfilled. Finally, the Association is interested, on behalf of itself and all Indians, in supporting the reformation in United States' policy towards enforcement of Indian rights which is evidenced in this case thus far.

REASONS FOR GRANTING THE MOTION OF THE UNITED STATES

A number of decisions of this Court, beginning with that rendered in the case of *Winters v. United States*, 207 U.S. 564 (1908), have established and confirmed the proposition that Indian tribes, when they agreed

to establish their homes on reservation lands, reserved by implication, if they did not do so expressly, sufficient waters to make their reservations "liveable" and "to satisfy the future as well as the present needs" of those reservations. *Arizona v. California*, 373 U.S. 546, 600 (1963); see also *United States v. Powers*, 305 U.S. 527 (1939).

In all of these cases, the question presented was whether the Indians had the right to sufficient water for irrigation and domestic uses. The Court has never considered directly the question of whether this Indian water right extends to sufficient waters to maintain a fishery. This question is presented in this case in the context of an Indian tribe which has depended on fishing for its livelihood since time immemorial, and for which the United States set aside lands encompassing a lake for the very reason that tribal members might continue to secure their livelihood from their accustomed fishing place. *United States v. Walker Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939).

Winters, and the line of federal cases subsequent to that decision, all support the proposition that in 1859 the United States, on behalf of the Pyramid Lake Paiute Indians, reserved sufficient waters from the Truckee River to maintain Pyramid Lake as a viable fishery, and to fulfill any other purpose for which the Pyramid Lake Reservation was set aside by the United States. The Court in *Winters* placed no limitation upon the nature of the uses to which Indians could dedicate their water rights. In *Arizona v. California*, *supra*, at 599-600, furthermore, the Court adopted the rule that the amount of waters to which a tribe is entitled depends upon the purpose for which the reserva-

tion lands were set aside.¹ See also *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. den.*, 352 U.S. 988 (1957); *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir. 1908). As stated previously, one of the very purposes for which the United States set aside the Pyramid Lake Reservation for the Paiute Indians was so that the Indians could use Pyramid Lake as a fishery. See *United States v. Sturgeon*, 27 F.Cas. 1357 (D.Nev. 1879). This Court, furthermore, has recognized that fishing may be as necessary to some Indian tribes as the very atmosphere they breathe. *United States v. Winans*, 198 U.S. 371, 381 (1905); see also *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

Once waters are reserved by the United States for the use of Indians to fulfill purposes for which Indian reservations were set aside, these waters are "exempt . . . from appropriation² under state laws." *Winters*,

¹ The Court noted that the same rule applies to all federal enclaves. For example, areas reserved by the United States such as Lake Mead Recreational Area and The Havasu Lake National Wildlife Refuge are entitled, under the same principle, to have sufficient water to meet the present and future requirements of these areas. 373 U.S. at 601. Obviously, these areas have a greater need for water to maintain the lakes than for irrigation or domestic purposes. The Court recently affirmed the application of this principle to all federal enclaves in *United States v. Dist. Ct. of Eagle County*, 401 U.S. 520, 523 (1971). Since the purpose of the federal enclave is the measure of the water right, the proposition is self-evident that the right in a given case may extend to other than domestic or irrigation uses.

² To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations. *Arizona v. California*, 283 U.S. 423, 459 (1931).

supra, at 577; see also *Arizona v. California*, *supra*, at 598; *Walker River Irr. Dist.*, *supra*, at 336. The controversy in the case at bar surrounds the allegations by the United States that the defendant States have paid no heed to this exemption.

The United States alleges herein that both of the defendants have issued permits for the appropriation under state law of waters from the Truckee River, and that these permits, and current appropriations of water pursuant thereto, are in derogation of federal and Indian rights to the use of water for the maintenance of Pyramid Lake. The United States also alleges that the States of California and Nevada have refused to recognize any rights of the United States, or of the Pyramid Lake Paiute Tribe of Indians, to the use of waters of the Truckee River for the maintenance and preservation of Pyramid Lake.³ These allegations underline the current dispute between the United States and the defendant States, and establish, irrespective of the many other averments of the Complaint herein, a controversy which clearly falls within the scope of the judicial power, and which this Court should resolve by exercise of the power conferred upon it by the Constitution and by statute.⁴

A justiciable controversy exists herein under the principle established in *Wyoming v. Colorado*, 259 U.S. 419 (1921), that "where the claims to the water of a river exceed the supply a controversy exists appropri-

³ Complaint of the United States at pp. 13-14.

⁴ U.S. CONST., Art. 3, § 2, cl. 1; Act of June 25, 1948, 62 Stat. 927, 28 U.S.C. § 1251(b)(2).

ate for judicial determination.”⁵ See also *Nebraska v. Wyoming*, 325 U.S. 589, 610 (1945); *Kansas v. Colorado*, 206 U.S. 46 (1907). The controversy is also clearly with the defendant States both in their proprietary capacities [*United States v. California*, 332 U.S. 19, 25 (1947); *Georgia v. Penn. R. Co.*, 324 U.S. 439 (1945)] and in their capacities as *parens patriae*.⁶ *New Jersey v. New York*, 345 U.S. 369, 373 (1953); *Wyoming v. Colorado*, 259 U.S. 419, 468 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1906); *Missouri v. Illinois*, 180 U.S. 208, 242 (1900).

The Supreme Court has from time to time refused, on discretionary grounds, to entertain suits which are predicated upon the original but non-exclusive jurisdictional powers of the Court. See, e.g., *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493 (1971). These powers constitute the jurisdictional basis of this suit. However, the Court, in *Wyandotte*, refused to entertain a justiciable controversy, within its non-exclusive jurisdictional powers, primarily because “the issues presented are bottomed on local law;” because the parties “raise no serious issues of federal law;” and because the Court was not called upon “to resolve difficult or important problems of federal law.” *Wyandotte*,

⁵ Any claim of the United States or of the defendant States is not a claim to the surplus of unappropriated water as in *Arizona v. California*, 283 U.S. 423 (1930), or in *Arizona v. California*, 298 U.S. 558 (1936). The allegations of the United States are that there are not sufficient waters in the Truckee River to satisfy all of the rival claims to appropriated water.

⁶ No mere difference of opinion between two governments exists here as in *United States v. West Virginia*, 295 U.S. 463 (1935). The case involves which government has the superior right to take or authorize the taking of waters of the Truckee River and is controlled by *United States v. California*, 332 U.S. 19 (1947).

supra, at 497-98, 504. Once these factors have been present, the Court does not appear to have declined jurisdiction in any case, within its nonexclusive jurisdictional powers, where a justiciable controversy was presented. *See, e.g., New Jersey v. New York City*, 283 U.S. 473 (1931); *New York v. New Jersey*, 256 U.S. 296 (1921); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907).

The case at bar clearly involves issues of federal law sufficient for the Court to exercise its discretion in favor of entertaining the suit. The Court should also entertain the suit as encouragement to the United States to continue fulfilling its trust responsibilities to Indian tribes, responsibilities which the federal government has only too often ignored in the past. The United States has the duty to bring this suit since, as President Nixon recognized recently, it "acts as a legal trustee for the land and water rights of the American Indian" and "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." *Indian Affairs, The President's Message to the Congress*, 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 849, 903 (1970). The power of the United States to protect Indian rights from non-Indian encroachments, and the duty to afford that protection, has also been confirmed by this Court in a long line of decisions dating back to the earliest times. *See, e.g., Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Nice*, 241 U.S. 591 (1916); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Kagama*, 118 U.S. 375 (1886). The effort to exercise the federal Indian power, and fulfill the federal trust obligation, exemplified herein, deserves encouragement

from the institution which, from the earliest times, has done its utmost to guard Indian rights and interests.

CONCLUSION

Economic development of Indian reservations throughout the United States is inextricably tied to the rights of Indians to use natural resources appurtenant to reservation lands. In the arid West particularly, non-Indian demands on a limited water supply are impairing the economic development potential of many reservations. Indian rights to the use of water must be protected, at all costs, if reservation lands are to remain liveable, and if the federal government's promise to alleviate Indian economic deprivation and "to help Indians develop their own economic infrastructure" is to have any meaning. *Indian Affairs, The President's Message to the Congress, supra*, at 900 (1970).

The right of the Paiute Tribe to use waters appurtenant to its reservation lands, in sufficient amounts to sustain the livelihood on which members of the Tribe have depended since time immemorial, has been challenged by two states and by citizens thereof. The federal government has both the power and the duty to withstand that challenge. This case represents the first step in the exercise of that power and in the fulfillment of that duty.

This Court is not unfamiliar with state challenges to Indian rights. For over 150 years, the Court has vigorously guarded and defended the right of Indian tribes to be free from state encroachment upon property and matters in which the tribes have an interest. Often, the Court has rendered a landmark decision,

protective of Indian rights, without any assistance from the party to whom the Constitution directly committed the power and duty to protect Indian rights. That party, the United States, is present as the plaintiff in this case, attempting to fulfill its role as legal trustee of Indian water rights. The motion now before the Court is but the threshold step in fulfillment of that role, however. The Court should grant the United States' motion to file a complaint in this case, and thereby encourage the dawning of a new and better day in the relationship between America and the first Americans.

Respectfully submitted,

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