



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

SUPPLEMENTAL REPLY BRIEF FOR THE UNITED STATES

ERWIN N. GRISWOLD,

Solicitor General,

KENT FRIZZELL,

Assistant Attorney General,

HARRY R. SACHSE,

Assistant to the Solicitor General,

Department of Justice,

Washington, D.C. 20530.

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1. In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, this Court, while recognizing that the case before it was within its original jurisdiction, declined to exercise that jurisdiction. Both California and Nevada rely on that case in urging the Court to decline jurisdiction here (Nev. Br. pp. 15, 19, 35, 43; Calif. Br. pp. 10, 11, 12, 18, 27).

In *Wyandotte* the State of Ohio sought to use the original jurisdiction of this Court in a suit against several out of state business firms to abate an alleged nuisance resulting in the contamination of Lake Erie. The considerations leading the Court to decline jurisdiction in *Wyandotte* are totally absent here. In

(1)

Wyandotte the Court first noted its own limitations as a fact finder, 401 U.S. at 498, and pointed out that "what is in dispute is not so much the law as the facts", *id.* at 503, and that the factual issues (with respect to mercury pollution) are "ones of first impression to the scientists", *id.* at 504. The Court also pointed out as "vitally important" to its decision to decline jurisdiction that (*ibid.*):

* * * we are not called upon by this lawsuit to resolve difficult or important problems of federal law and that nothing in Ohio's complaint distinguishes it from any one of a host of such actions that might, with equal justification, be commenced in this Court.

The Court also focused on the reason for its original jurisdiction in cases between a State and a non-resident, *i.e.*, the belief that no State should have to resort to the tribunals of other states for redress and that the only outside forum with jurisdiction would be the Supreme Court. But the Court found that the suit Ohio sought to bring could be brought in the courts of Ohio and thus the State would not be required to seek redress in a court in another state. Therefore an outside tribunal was unnecessary, *id.* at 500.

In the case brought by the United States here, by contrast, the essential issues are issues of law, not fact. As we pointed out in our reply brief (pp. 4-5) the facts, including the amount of water needed to preserve Pyramid Lake, are largely undisputed or already established in compiled form. What is disputed is whether the United States, for and on behalf of the Pyramid Lake Paiute Tribe, has the legal right to

the water it claims. The disputed questions of law (Reply Br. p. 4) are questions of federal law—reserved water rights for an Indian Tribe and the effect of the establishment of a federal reclamation project.

Moreover, this suit is in the heart, not the periphery, of the original jurisdiction of this Court. The Truckee River is an interstate stream. Both California and Nevada claim rights to its use and the right of one is conditioned on the restraint of the other. The rights claimed by the United States necessarily limit the water available to both. This is the kind of problem of international law between States and the United States where this Court's original jurisdiction is most important and most traditional. There is no equally capable alternative forum as there was in *Wyandotte*.

2. Both California and Nevada emphasize the small interest that California has in this case to suggest that the Court should not take jurisdiction or that the matter could be settled in a Nevada district court. We have attached as an appendix to this Brief a decision of the California State Water Rights Board as an illustration of the reality of the dispute with California.

The application there is for a fairly large diversion of water from Lake Tahoe. The State of California permitted the diversion. In order to do this it had to find that the diversion would not interfere with decreed water rights in the Truckee River. The California Board held that there was surplus water in the Truckee River in that all water that flowed into Pyramid Lake is unappropriated water which California water users are free to appropriate.

Every time a new night club or subdivision is built around Lake Tahoe which takes water that would otherwise flow down the Truckee, it is the State of California which authorizes the taking and the effect is further to diminish Pyramid Lake.

It is for this reason that one element of the relief we ask is to set a maximum amount of water which California may take from the Truckee River system. If we tried to do this without joining the State of California, it would be the first to object. Moreover, it is only by obtaining the decreed rights for Pyramid Lake that we seek in this suit that other water users can be kept from taking whatever savings are made in the Newlands Project and elsewhere.

CONCLUSION

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

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

KENT FRIZZELL,
Assistant Attorney General.

HARRY R. SACHSE,
Assistant to the Solicitor General.

APRIL 1973.

APPENDIX

STATE OF CALIFORNIA, STATE WATER RIGHTS BOARD

Decision D 1262

IN THE MATTER OF APPLICATION 22173 OF EARL B. AND ETHEL B. MARR TO APPROPRIATE FROM LAKE TAHOE IN PLACER COUNTY

DECISION APPROVING APPLICATION IN PART

Earl B. and Ethel B. Marr, having filed Application 22173 for a permit to appropriate unappropriated water; protests having been received; the applicants and protestants having stipulated to proceedings in lieu of hearing as provided for by Title 23, California Administrative Code, Section 737; an investigation having been made by the State Water Rights Board pursuant to said stipulation; the Board, having considered all available information and now being fully advised in the premises, finds as follows:

1. Application 22173 is for a permit to appropriate two cubic feet per second (cfs) by direct diversion year-round for domestic use from Lake Tahoe in Placer County. The point of diversion is to be located on the shore of Lake Tahoe about 600 feet north of the Placer-El Dorado County line.

2. Applicants have been doing business since 1932 as Tahoe Cedars Water Company, a public utility. Their certificated service area contains a little less than a square mile, and has a frontage of about three-quarters of a mile on Lake Tahoe. The lake has been their only source of water except for a well used in

the colder months to avoid freezing damage. The only water right claimed by the applicants is an adjudicated prescriptive right based on use of water from Lake Tahoe for domestic purposes since 1930.

3. The key issues to be considered may be summarized by quoting from Decision D 1152 (adopted December 19, 1963), at page 3:¹

The evidence and issues relative to water supply, vested rights, unappropriated water, interstate division of interstate waters, and conditions and limitations to be imposed in the public interest are to a large extent identical with the evidence and issues discussed by the Board in its Decision D 1056, adopted February 15, 1962, of which the Board takes official notice. *In that decision the Board assumed to be surplus and unappropriated the water from Lake Tahoe and the Truckee River, stream system 'flowing by Derby Dam which is not required to satisfy decreed downstream Indian rights and which wastes into Pyramid Lake.'* An analysis of studies of the Department of Water Resources indicated the availability of unappropriated water. *The same conclusion is indicated by the 'Joint Report on the Use of Water in the Lake Tahoe Watershed,' prepared by the State Engineers of Nevada and California, and dated June 1949 (Staff Exh. 3).* As was the case in Decision D 1056, careful consideration must be given to quantitative diversion limitations expected to be imposed by the California-Nevada Compact, covering allocation of water in the Lake Tahoe Basin. Accordingly, individual applications will be considered on their own merits and then with respect to maximum monthly and annual limitations based on requirements.

Because no long-term water development projects are involved, and because of anticipated Compact di-

¹ Italics are added in two passages.

version limitations, maximum requirements will be based on the year 1975. To ensure progress of this project with due diligence, the permit will require completion of full beneficial use by December 1, 1970.

4. The applicants estimated their average daily consumption requirements for months of maximum use to be:

August 1965—150,000 gallons

August 1975—500,000 gallons

The present summer population of 1,750 is expected to triple by 1975. We find these estimates to be reasonable. The August 1975 daily requirement of 500,000 gallons corresponds to diversion at a continuous rate of 0.78 cubic foot per second and a maximum month of 47.5 acre-feet. Annual requirements are expected to be about 625 percent of the maximum month or about 297 acre-feet. This is based on the analysis in Decision D 1152 of a comparable subdivision located four miles to the north.

5. There is unappropriated water available to supply the applicants, and, subject to suitable conditions, such water may be diverted and used in the manner proposed without causing substantial injury to any lawful user of water.

6. The intended use is beneficial.

From the foregoing findings, the Board concludes that Application 22173 should be approved in part and that a permit should be issued to the applicants subject to the limitations and conditions set forth in the following Order.

The records, documents, and other data relied upon in determining the matter are: Application 22173 and all relevant information on file therewith, particularly the report of the field investigation made July 21, 1966; the files and applications with respect to which the Board issued its Decisions D 1056, D 1152 and

D 1207; and U.S.G.S. Water Supply Papers and topographic maps covering the Lake Tahoe area.

ORDER

IT IS HEREBY ORDERED that Application 22173 be, and it is, approved in part, and that a permit be issued to the applicants subject to vested rights and to the following limitations and conditions:

1. The water appropriated shall be limited to the quantity which can be beneficially used and shall not exceed 0.78 cubic foot per second by direct diversion year-round. The instantaneous rate of diversion under the permit may exceed said rate, provided that the quantity of water appropriated shall not exceed 47.5 acre-feet in any month (equivalent to a continuous diversion at 0.78 cfs). Total appropriation under this permit shall not exceed 297 acre-feet in any one year.

