

In the

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Supreme Court of the United States

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATES OF NEVADA AND CALIFORNIA,

Defendants.

No. 59 Original

Washington, D. C.
April 16, 1973

Pages 1 thru 55

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Washington, D. C.,

Monday, April 16, 1973.

The above-entitled matter came on for argument at
10:05 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ERWIN N. GRISWOLD, ESQ., Solicitor General of the
United States, Department of Justice, Washington,
D. C. 20530; for the Plaintiff.

E. BARRETT PRETTYMAN, JR., ESQ., Special Deputy
Attorney General of Nevada, 815 Connecticut Avenue,
N. W., Washington, D. C. 20006; for the State of
Nevada.

APPEARANCES [Cont'd.]:

RODERICK WALSTON, ESQ., Deputy Attorney General of California, 6000 State Building, San Francisco, California 94102; for the State of California.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 59 Original, the United States against the States of Nevada and California.

Mr. Solicitor General, you may proceed whenever you are ready.

ORAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. GRISWOLD: May it please the Court:

This case is here on a motion by the United States for leave to file an original complaint against the States of Nevada and California.

The United States appears primarily in a fiduciary capacity on behalf of the Pyramid Lake Indians of the Paiute Tribe.

The United States does allege the ownership of certain lands and water rights in its own right, but it would not be here if that was its only claim.

The basic claim relates to the Pyramid Lake Indian Reservation in Nevada. The general location is indicated by the map which we have included in the pocket at the back of our Complaint and Brief, and this is referred to in the complaint.

MR. CHIEF JUSTICE BURGER: Unfortunately, Mr. Solicitor General, in the shuffling of papers, my map got lost.

If you happen to have an extra one --.

Yes, the Clerk has supplied another one now.

MR. GRISWOLD: The map will show that Pyramid Lake is in the upper center. It is fed by the Truckee River, which rises in Lake Tahoe. Lake Tahoe is partly in California and partly in Nevada. The river runs for twenty miles in California, where it obtains most of its water, and then it flows for 65 miles in Nevada until it empties into Pyramid Lake.

At Pyramid Lake, --

QUESTION: Mr. Solicitor General, mine was missing, too. Would you mind stating that again?

MR. GRISWOLD: Pyramid Lake is fed by the Truckee River, which has its outlet -- which is the outlet of Lake Tahoe. Lake Tahoe is located partly in California and partly in Nevada. Now, the river runs for 20 miles in California, where it gets most of its water, and then it flows for 65 miles in Nevada until it empties into Pyramid Lake.

The part we note on the map, just above the center, the Derby Diversion Dam, and then the Truckee Canal, which diverts a substantial part of the water of the Truckee River into the Carson River System; and the Carson River System, with the water from the Truckee River, produces the Newlands Irrigation District, which is the green area in the right part of the map.

The way the map appears, one could get the

impression that the Carson River is also an outlet of Lake Tahoe, but that is wrong. The Carson River rises in the mountains to the east of Lake Tahoe, and the water from Lake Tahoe gets to the Newlands Irrigation District through the Truckee Canal from the Truckee River, and thereby represents water which does not flow on to Pyramid Lake.

Pyramid Lake is 30 miles north of Reno. It's a remarkable lake; some say it's the finest desert lake in the country.

The Pyramid Lake Indian Reservation originated on November 29th, 1859, and was confirmed by President Grant by an executive order issued on March 23rd, 1874.

The Pyramid Lake Indians had a culture which was based primarily on fish, on which they lived and for which they used for barter. And the lake provided a large and remarkable fishery, and the purpose of including the lake in the reservation was to maintain the source of the Indians' livelihood.

QUESTION: Two fish are mentioned somewhere in these papers: a variety of cutthroat trout and then another fish I'd never heard of. What's that fish?

MR. GRISWOLD: Yes, Mr. Justice, that -- I heard of it in connection with this case. It's spelled c-u-i hyphen u-i.

QUESTION: Yes.

MR. GRISWOLD: And is pronounced "quee-wee".

QUESTION: Say that again.

MR. GRISWOLD: C-u-i hyphen u-i; and it's pronounced "quee-wee".

QUESTION: Now, is that a variety of trout?

MR. GRISWOLD: That is a fish which is peculiar to the Pyramid Lake. The Lahontan cutthroat trout --

QUESTION: Right.

MR. GRISWOLD: -- was a very large and successful, commercially and otherwise, fish, which was peculiar to Pyramid Lake.

Pyramid Lake is the geological residue of an older lake called Lahontan, and, indeed, the reservoir created in the Carson River is now called Lahontan Lake.

And the fish in Pyramid Lake, and that's part of the complaint here, the cutthroat trout in Pyramid Lake have been unable to maintain themselves because with the fall in the level of the lake the fish are unable to get up the Truckee River to spawn.

Now, the fish have been taken out and put into fish hatcheries and now are planted in Pyramid Lake, and they are also found in some of the other lakes; but without the help of man, the Lahontan cutthroat trout would be extinct now. It and the cui-ui are both on the list of endangered species of the appropriate body of the government.

QUESTION: Are cui-ui found anywhere else, do you

know?

MR. GRISWOLD: As I understand it, not any place else; no place else, unless they have been taken out and planted, but --

QUESTION: All right. Is that a member of the trout family, or is that something quite different?

MR. GRISWOLD: I'm not enough of a biologist to say that. I believe so, but I do not know; except that I think that it has a -- I think it would go back millions of years before you would find a --

QUESTION: A common ancestor.

QUESTION: Do the cui-ui have to go upstream, too?

MR. GRISWOLD: As I understand it, they do not. The cui-ui can apparently --

QUESTION: Reproduce in the lake.

MR. GRISWOLD: I am told that they are of the sturgeon family, the cui-ui is,

QUESTION: That's quite different, then.

MR. GRISWOLD: In 1903, after the passage of the Reclamation Act in 1902, the Newlands Reclamation Project was established by the Secretary of the Interior, named after a Senator from Nevada.

In 1905, the Derby Dam was completed, with the consequent diversion of much of the water from the Truckee River to the Carson River system. As a result of this and

other activities, the water flowing down the Truckee River to Pyramid Lake has been reduced to about 250,000 acre-feet, while 375,000 to 400,000 acre-feet are required to replace evaporation losses and maintain the level of the lake.

Because of this annual deficit of 125,000 to 150,000 acre-feet, the level of the lake dropped more than 80 feet since 1906.

QUESTION: Mr. Solicitor General, does your complaint show what the annual flow in acre-feet was before the Newlands diversion?

MR. GRISWOLD: I'm not sure that the complaint does. The material referred to in the complaint, particularly the Pyramid Lake Task Force Report, of which copies have been distributed to the Court, give figures going back to the 1860's as to the flow into Pyramid Lake.

QUESTION: Mr. Solicitor General, has the lowering of the level of the water in the lake resulted solely from the diversion to the other river?

MR. GRISWOLD: Yes, Mr. Justice. The level of the lake probably would have fluctuated because of variations in annual rainfall which -- the natural runoff of the river varies apparently from 200,000 to 1.1 million. It averages enough to maintain the level of the lake at the level where it was in 1860.

Apparently there has been a constant slight diminution

in the lake, but this has become very marked since the diversion of the water by the Derby Dam and the Newlands --

QUESTION: But I understand that that trend has now been arrested, hasn't it?

QUESTION: Reversed.

MR. GRISWOLD: It has been arrested, but it has not been -- necessarily, we can't foresee the future, that it would be stopped because of various actions which have occurred; part of which is a substantial rainfall in recent years. But under a suit brought by the Indians, if I may say so, in their desperation, in the United States District Court for the District of Columbia, to compel the Secretary to follow his own regulations and to avoid and prevent wastage of water, there has been a considerable increase in the amount of water, and it is true that in the past six years the level of the lake has risen by about ten feet. So that the net fall of the lake, at this point, is about 70 feet.

There is a picture of the -- from the Truckee River flowing into the lake, in the Task Force Report, on page 17, which has been distributed to the Court, or at least made available to the Court in enough copies.

QUESTION: Has that been circulated?

MR. GRISWOLD: Well, I'm now told only one copy was filed with the Clerk; I thought one had been made for each member of the Court. I would suggest you look at page 17.

You will find a picture of the Truckee River entering in what amounts to a big delta into the lake. The drop of 70 feet makes it impossible for the fish to get up the river and spawn.

This has destroyed the fisheries; it threatens extinction of the trout native to the lake; it increases the salinity of the lake; causes land erosion; and threatens continued existence of the lake as a useful body of water.

On behalf of the Indians, through this suit, the United States contends that when the Pyramid Lake Reservation was established in 1859, the United States, by implication, reserved for the benefit of the Pyramid Lake Indians sufficient water from the Truckee River for the maintenance and preservation of Pyramid Lake. And for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish.

The United States claims these rights for the Pyramid Lake Indians with a priority date of November 29th, 1859. Whether this claim is warranted, whether the Indians have these rights, is the principal issue before the Court in this case.

Now, the complaint also contains reference to a suit which the United States brought in connection with the Newlands Project.

QUESTION: Mr. Solicitor General, that Newlands Project is the one in the Carson River setup, isn't it? I don't see the name "Newlands" on here.

MR. GRISWOLD: Perhaps it is not, but that is what it is known by, and it is so referred to in the complaint.

QUESTION: Yes.

MR. GRISWOLD: That whole project --

QUESTION: I'm just trying to identify it on the map.

MR. GRISWOLD: That whole project -- do you have one that's colored?

QUESTION: No, we don't.

MR. GRISWOLD: Well, I'm sorry. That whole project in the right half, right third of the map is the Newlands Project.

QUESTION: Yes.

MR. GRISWOLD: It obtains water from the Carson River, as to which there also is a suit in the Nevada courts, one which, over a period of 30, 40 years, operates on the basis of a temporary injunction. That's all that has ever been issued.

The diversion of the water from the Truckee River to the Newlands Project --

QUESTION: Could you hold up that map, Mr. Solicitor General? None of the four of us on this side have the green one.

QUESTION: None of us have it.

QUESTION: That's upside-down.

MR. GRISWOLD: Oh, it's upside-down.

How's that?

QUESTION: Does Newlands drain into the Colorado?

MR. GRISWOLD: Oh, no, Mr. Justice, the Newlands drains into what they call a sink out there and disappears. In fact, the sink has greatly augmented because of the undue diversion from the Truckee River, the runoff water from the Newlands Project goes into the sink, and that has made a new wildlife refuge where there are ducks and where hunters go, we would say, using the Indians' water for the purpose of erecting a new sporting and non-commercial activity.

QUESTION: Where is that, out in Stillwater Point?

MR. GRISWOLD: That is on the map at -- beyond Stillwater Point, --

QUESTION: Oh. At the slough?

MR. GRISWOLD: -- and finally, when you get to Stillwater Wildlife Management Area, near the upper righthand corner, and the slough which is at the right edge of the map.

Now, there's quite a lot of water there. That water will presumably be cut down and allowed to go down the Truckee River as a result of the decision of the District of Columbia Court in the case requiring the Secretary to conduct a more careful and efficient operation of the Orr River Project.

QUESTION: Is the water in the sump saline?

MR. GRISWOLD: The water --?

QUESTION: In the sump, is the water in the sump salt

water or fresh water?

MR. GRISWOLD: In Pyramid Lake?

QUESTION: You were talking about the Stillwater sump.

MR. GRISWOLD: That is essentially fresh, Mr. Justice. I suppose that in -- that is, in the water that goes into the wildlife refuge is essentially fresh. I suppose that having percolated through the land it has picked up some salt. But the water that goes down the Truckee River is particularly fresh, is remarkably fresh.

QUESTION: I was just wondering about the end product of the sump, whether that's salt water --.

MR. GRISWOLD: As I understand it, it is essentially fresh water. And it finally percolates into the ground and disappears.

Pyramid Lake is more saline than fresh-water lakes we are used to in this part of the country, but it is remarkably non-saline when it has an adequate water supply.

QUESTION: Does the complaint or other materials before us indicate the extent of the fishing rights that the Indians are claiming? Is it just broadly to maintain the lake and the fish as they were when the reservation was created, or is it --

MR. GRISWOLD: Well, it isn't even quite that far, Mr. Justice. We don't ask for enough water to restore the level

of the lake to what it was in 1859. The prayer of the complaint is on page 14, "prays that a decree be entered declaring the right of the United States for the benefit of the Pyramid Lake Paiute Tribe of Indians to the use of sufficient waters of the Truckee River to fulfill the purposes for which the Pyramid Lake Reservation was created, including the maintenance and preservation of Pyramid Lake and the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish."

Incidentally, I am told that --

QUESTION: Well, is the fishing right one for sustenance or is it a commercial --

MR. GRISWOLD: For both.

QUESTION: -- thing?

MR. GRISWOLD: For both, Mr. Justice. That was the way they used it at the --

QUESTION: What is the commercial end of it?

MR. GRISWOLD: The commercial end would be that the Indians would sell large quantities of a very remarkable fish for which they would get money, with which they would buy clothes and other kinds of foods.

QUESTION: Yes. Do they sell the fish to other -- to fish hatcheries, or do they sell it as food, or what?

MR. GRISWOLD: They have historically, Mr. Justice. There have been substantial fishery establishments there,

including the canning of fish. This is all greatly restricted. We're told by counsel for the States that there are only 400 Indians who live there now; but there are 500 who don't live there and have, in effect, been driven away because the economic possibilities of maintaining themselves have gone with the disappearance of the fisheries.

QUESTION: There are no treaty fishing rights that are depended upon here at all, as I understand it. You're relying upon the implied reservation of water for the Indian Reservation, alone.

MR. GRISWOLD: Yes, Mr. Justice. But the Indians own the lake, so that they --

QUESTION: Yes, but it's not like a lot of these cases where we're dealing with fishing rights.

MR. GRISWOLD: -- they would have the fishing rights if there were adequate fishing.

QUESTION: Yes, but they weren't given any fishing rights, this was a reservation originally, in 1859, confirmed by President Grant in the 1870's, and you're relying on the Arizona doctrine of an implied reservation of water, isn't that it?

MR. GRISWOLD: Yes, Mr. Justice. That's exactly it.

QUESTION: And telling us that historically these people lived by fishing, that was their economy. There are no fishing rights.

MR. GRISWOLD: That is exactly our position.

QUESTION: That's what I thought.

MR. GRISWOLD: I would suppose that the only question here apparently arises because of this Court's decision in Ohio v. Wyandotte Chemical Company, and more recently in Illinois v. Milwaukee, and it will be my purpose to try to show that the approach taken in those cases is not applicable here and that the motion for leave to file a complaint should be granted.

This case does not raise questions of State or local law, as was the situation in Wyandotte. The questions here are Federal questions, of the sort which this Court has traditionally considered in original suits. The United States appears as a trustee for an Indian Tribe, exercising one of its greatest responsibilities under the Constitution. The questions involved are Federal questions, essentially the effect of the establishment of an Indian Reservation by Federal authority and the application to that Reservation of the rule of the case of Winters v. United States, and the very closely comparable case of Arizona v. California, to which Mr. Justice Stewart referred, where the United States intervened in an original suit on behalf of Indian Tribes, and this Court made essentially the same sort of adjudication that we're seeking here.

The order in Arizona v. California provides that a

million acre-feet of water shall be made available to the Indians at the suit of the United States.

And there is also involved the effect, if any, on the rights of the Indians on the establishment of the Newlands Irrigation Project under the Reclamation Act. The claim made by the --

QUESTION: When was that established, Mr. Solicitor General? When was the Newlands Project begun?

MR. GRISWOLD: The Newlands Project was authorized in 1903. There was a suit called the Orr Water Ditch suit filed in 1913, in which a final decree was entered in 1944, and one of the questions in this case is: What is the effect of that on the rest of the Indians?

We contend that it does not bar the rights of the Indians, but that's one of the issues which would be heard if the leave to file the complaint was granted.

The claim made by the United States relates to the waters of an interstate stream, and thus presents the kind of question appropriate for decision by this Court.

And moreover, and most important, this Court is the only tribunal which can make a definitive and final adjudication of the right claimed on behalf of the Indians.

Nevada suggests in its brief that the suit could proceed in the District Court for Nevada, despite the fact that most of the water comes from California, and an adjudication

with respect to the rights of the Indians made by the Nevada court would not be binding on California or on California citizens.

Nevada says that the Nevada District Court could reach California and its citizens through some sort of a long-arm approach. Perhaps Congress could authorize this, and for a period of four years, from 1922 to 1926, Congress did authorize what amounts to interstate suits in the District Courts with respect to water and other matters, and some of the cases cited here began in that period, notably the Brooks case, which was a contempt case for violating a decree which was -- involved Arizona and New Mexico in a suit brought during the period when the Arizona court was given jurisdiction over parties in New Mexico.

Congress could authorize it, but it hasn't done so, and I know of no basis for such jurisdiction in a case like this.

Incidentally, in the careful and thoughtful brief filed on behalf of California here, there is no such suggestion. California does not come forward and say it wants to appear in a Nevada District Court.

QUESTION: Is there any possibility for parallel suits in Federal courts in California and Nevada and then be having them thrown into the multi-district panel?

MR. GRISWOLD: I know of no way; the multi-district

deals with cases where the court has jurisdiction with respect to the issue. Here the Nevada Court would not have jurisdiction over the California water rights; the California Court would not have jurisdiction over the Nevada water rights. And I know of no authority under the multi-district suit to require them to get together and to come to the same conclusion on the questions of fact or of law.

This Court may be concerned, if it takes jurisdiction of the case, that it will be involved in a multitude of factual determinations with respect to individual water rights. Perhaps if thousands of persons, both in Nevada and in California -- I think that concern is unwarranted.

The basic question here is an important one, and it may present some legal difficulties. But the problem is one which the Court is well equipped to resolve.

The question raised here is whether the United States has any right on behalf of the Pyramid Lake Indians and, if so, what is the extent of that right?

If it is established that the Pyramid Lake Indians are entitled to a definite amount of water, with a fixed temporal priority, then it will be known what water remains for use in California and in Nevada. At that point it may well be that the two States can agree on their relative portions of the remaining water, as they have agreed in a Compact, which is pending before Congress but not approved by

Congress, but based on the assumption that the Indians have no rights. The Compact does say that it doesn't deprive anybody of any rights, but it doesn't recognize that there are any such rights.

The United States has no interest whatever in how the allocation to California and Nevada is divided among their individual water users. And the District Court in Nevada can make the appropriate allocations among Nevada users, if that question, too, is not settled by agreement.

Now, I have mentioned the Compact, and I don't have time to discuss it. It obviously is of no legal significance, because it has not been approved by Congress.

Incidentally, both Senators from California have joined in a statement -- I mention this because it indicates the unlikelihood that Congress is going to approve the contract, if both Senator from California oppose it. They have joined in a statement in which they conclude: "We therefore support the efforts of the Tribe and Federal Government to obtain a judicial determination in the Supreme Court."

QUESTION: Well, if we grant your motion, this would necessitate the appointment of a Master, would it not?

MR. GRISWOLD: Eventually it might, but it seems to me that this basic question, whether the Indians have any right and, if so, its extent -- it would be helpful to have it heard before a Master. But it would be a relatively simple

matter before a Master, and not the question of allocating water rights among all the people in a great --

QUESTION: More like the Tidelands decisions?

MR. GRISWOLD: It would be very much like the Tidelands, although perhaps somewhat simpler than that, and not involving the massive historical considerations that were there.

QUESTION: Mr. Solicitor General, do I gather from your answer to Mr. Justice Douglas' question that the government doesn't really seriously press the idea that the case ought to be partially adjudicated here before it's referred to a Master?

MR. GRISWOLD: I don't think it makes a great deal of difference. I think what we are trying to say on that is that it ought to be adjudicated here on the basic issue, do the Indians have a right or not, before there is any consideration given to the problem of how you allocate the remaining water.

Now, whether --

QUESTION: Excuse me. What we have here is -- this is an argument on a motion for leave to file a bill of complaint, as I understand it.

MR. GRISWOLD: Yes, sir.

QUESTION: And there haven't even been responsive pleadings on it, no answers.

MR. GRISWOLD: There haven't even been answers.

QUESTION: No.

MR. GRISWOLD: And I should think that --

QUESTION: So the issues haven't been filed.

MR. GRISWOLD: -- after the answers have been filed and we know what is denied and what needs to be proved --

QUESTION: Right. Exactly.

MR. GRISWOLD: -- it would be possible at that point to -- it could well be that the answers will be filed in such form as to raise only a legal question, at least at the threshold.

QUESTION: Exactly.

MR. GRISWOLD: And that threshold question, do the Indians have a right or don't they, can be presented as a purely legal question. It becomes a little more complicated when you say, Yes, they have a right, but what is its extent?

QUESTION: Yes.

MR. GRISWOLD: For example, the Indians do not claim that they are entitled to 375,000 acre-feet every year. Sometimes the water goes down. I think their position would be that they are entitled to an average of 375,000 acre-feet over a period of, let's say, ten years; so that if it goes down one year, some water can be made available to the Newlands Project, and it can be made up in subsequent years.

It's undoubtedly true that there have been differ-

ences of opinion and conflicts of interest within the Interior Department about this claim of the Pyramid Lake Indians, the Bureau of Reclamation and the Bureau of Indian Affairs do not always see eye to eye. It's equally true that the Department of Justice has not advanced this claim in prior proceedings. The Indians should not be bound by that.

There will be argument about res judicata and merger in bar, and our position is that the Indians should not be bound to their great loss by reason of defaults which may have occurred on the part of officers of the United States in the past -- and I don't criticize them, because they were reflecting a national attitude at that time. It was a great step when the Secretary of the Interior requested the Department of Justice to start this case in this Court. It would be something of a tragedy for the Indians if this Court should now refuse to consider the claim made on their behalf.

MR. CHIEF JUSTICE BURGER: Mr. Prettyman.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,

ON BEHALF OF THE STATE OF NEVADA

MR. PRETTYMAN: Mr. Chief Justice, and may it please the Court:

I am Barrett Prettyman, and I represent the defendant State of Nevada in this Original action.

In the few minutes allotted to me, I am not going to be able to discuss some of the purely legal questions in our

briefs, such as res judicata and collateral estoppel and even case or controversy against the State. I am going to have to rely on our brief for those points.

Instead, my argument here is going to be restricted to the reasons why this Court should not in its discretion, assuming that it has jurisdiction, why it should not exercise that original jurisdiction in this case.

In case after case after case this Court has emphasized the States should work out problems relating to mutual boundaries or interstate streams themselves, if they can do it. And in case after case it was only after such attempts at reconciliation between the States had failed that this Court had agreed to exercise its original jurisdiction.

Now, here, what do we have?

We have the two States where the disputed water is located agreeing, after more than 15 years of negotiations, on an equitable apportionment of the waters involved.

We have a Joint Task Force that the government participated in, after long study, finally agreeing on recommendations which, as has already been noted, have already begun to increase the water for Pyramid. As a matter of fact, the water level has risen some 11 or 12 feet in the last few years, ever since the Interior Department has begun concentrating on their operating criteria and putting them more in shape.

QUESTION: How do the rights of the Indians, Mr.

Prettyman, figure in this negotiation that you've just described?

MR. PRETTYMAN: Well, in the first place, the Indians originally participated in the Task Force; they withdrew; then submitted statements and witnesses in regard to the Compact. They specifically made some objections to the Compact as it was originally drafted, and those objections were taken into consideration. And this is quite important.

Let me give you two examples. Originally, California was given an unlimited right to create extra flow, to create extra water, after the original tidal basin was taken care of. The Indians objected to that, and a 10,000 acre-foot limit was put on California's right.

In another example, the Indians were given a maximum right, based on Orr Water Ditch, plus municipal and other use, which was actually being put to beneficial use; they could not get any more water after that. That was eliminated because of their objection.

So that after their Orr Water Ditch commitment now, and after California's share comes out, then the use goes back to Nevada again, and the Indians have a full right to get the amount of money -- the amount of water that they can show that they need from that.

These are two examples of objections which the Indians had to the Compact and which were taken care of in the

Compact.

QUESTION: Of course the Constitution provides for interstate compacts, it doesn't provide, to the best of my knowledge, for compacts between the States and the United States. I suppose your point is that Congress wouldn't approve, as it has to do under the Constitution, of an interstate compact that wasn't satisfactory to the United States; but I would suppose the response to that would be, well, in this case it's not the Congress that is the guardian of the Indian wards, but it's the Executive Branch of the Government that's the guardian. And we can't leave this matter to the self-interest, if you will, of States like California and Nevada, that are represented in the Congress by Senators and Representatives representing those States; but, rather, to the Executive Branch.

And there's no room, under the Constitution at least, for a compact among States and the Executive Branch of the Government, is there?

MR. PRETTYMAN: Well, the Compact will not become operative until Congress approves it, --

QUESTION: Congress. The Congress.

MR. PRETTYMAN: -- and we think that in view of the fact that the Federal Government has been intimately involved in the development of the Compact, and in view further of the fact that the State of Nevada is also concerned about the

Indians' rights in making sure that this level, that the lake is kept at a certain level.

QUESTION: Yes.

MR. PRETTYMAN: We think that they should be presenting their arguments to Congress rather than here, in view of this long history of negotiations between the States where finally, unlike these other cases which you've had where the States are unable to come to agreement, we have been able to come to an agreement; and the agreement is such that the Indians could not possibly be damaged. The United States doesn't claim that they're going to be damaged by this Compact.

QUESTION: Do the Indians agree with --

MR. PRETTYMAN: Pardon me, sir?

QUESTION: Do you have any evidence that the Indians agree with this Compact?

MR. PRETTYMAN: Well, I think the Indians, obviously, would much prefer a declaration by this Court that they have a Winters right to X amount of water; they undoubtedly would prefer that to the Compact.

On the other hand, our position is that if the Compact is approved, California's share is so small, it's a maximum of 45,000 acre-feet, you've got five hundred sixty or eighty thousand acre-feet of water here involved, that they could not possibly be harmed by California's share. You are

going to have plenty of water coming into Nevada, and if a problem arises later, then the Indians can sue at the appropriate time, either in Nevada -- they could sue in Nevada --

QUESTION: Sue against the Compact?

MR. PRETTYMAN: No. They would not be suing against the Compact, Mr. Justice Marshall, because the Compact would leave plenty of water in Nevada for their share.

You understand that the Indians, at the very --

QUESTION: The only thing I understand is that the fish are gone.

MR. PRETTYMAN: Well, sir, I beg to differ with you. The fish, the United States has told Judge Gesell, are thriving.

QUESTION: In the other lawsuit?

MR. PRETTYMAN: Yes, sir. The fish are thriving today because of great improvement in the level of Pyramid Lake, and other things which are taking place there through the Secretary of Interior's operating criteria.

QUESTION: So if we grant this motion, we certainly would have to give it to a Master, just to find out if the fish are thriving, would we not?

MR. PRETTYMAN: You undoubtedly would have to appoint a Master; if you accept this case, let me tell you what's going to happen.

First of all, the Compact is going to come to a halt.

Congress obviously is not going to approve the Compact while the issue is now pending before this Court.

QUESTION: Well, it's been there how many years, Mr. Prettyman?

MR. PRETTYMAN: The Compact has been -- it's almost 17 years, sir.

QUESTION: That's what I thought; several years.

MR. PRETTYMAN: No. 2 --

QUESTION: Just one question, Mr. Prettyman. If Congress approves a compact that's inconsistent with some Indian claim, I would take it the congressional action would supersede whatever Indian claim might have existed, wouldn't it?

MR. PRETTYMAN: If you were to take an extreme case, where so much water was given to California that it in effect obliterated the Indians' right, I think that there would be authority to do that in the same way that you could take away a man's land through an international treaty with, say, Canada or Mexico.

I think that it would supersede. But I want to emphasize again that there's no question of that in this case. Because if you look at what the Indians are asking, when they say Winters right, they're not talking about some esoteric theory where this Court says Winters right, and puts a stamp on it; they're asking for enough water to maintain

the lake, namely 385,000 acre-feet.

QUESTION: You call it -- what -- Winters right or rights, or winners' rights?

MR. PRETTYMAN: Winters right, yes, sir. That comes from the Winters case, Mr. Justice, where you --

QUESTION: Oh.

MR. PRETTYMAN: -- first discussed the fact that there was an implied reservation --

QUESTION: Right.

MR. PRETTYMAN: That there was an implied reservation of water along with an Indian Reservation.

QUESTION: That's what you mean by Winters rights, then; I see.

MR. PRETTYMAN: Yes, sir.

QUESTION: Mr. Prettyman, going back to the vindication of the Indians' rights after an allocation is made of the greater proportion of this to the State of Nevada, would you enlarge a little bit for me on how they vindicate that right. Is that a suit in the District Court against the State?

MR. PRETTYMAN: Let me show you exactly how it would work. The Compact is approved; at that point California takes out, as I say, at a maximum -- and this really is a maximum -- 45,000 acre-feet. So you now have over 300,000 acre-feet flowing into Nevada. If thereafter the Indians were

not getting their sufficient share, in view of your ruling that their share would be allocated to the State, they would then sue the State of Nevada in the Nevada Federal District Court to get their portion of the 300,000 that was part of the State's use.

In other words, they would sue Nevada because the only disagreement would be between the Indians on the one hand, and the amount of water that Nevada has now collected on the other. There would be no conflict or controversy with California.

QUESTION: But you don't suggest that there's any other court right now in which a suit could be filed and would settle this matter?

MR. PRETTYMAN: We do, although I'm not going to take the time to argue it here; we do claim that California could be brought into the State of Nevada. There's a recent case by the California Supreme Court, called Hall vs. University of Nevada, which we say supports that idea. But I don't have to take that position now, Mr. --

QUESTION: You think the more persuasive one is to wait on the Compact and then sue?

MR. PRETTYMAN: Well, our point is this: that if you allow Congress to act -- Now, what's happened here, the Compact has been placed in the Congress, the appropriate committees have asked for the comments of the United States --

QUESTION: What's held it up for 17 years?

MR. PRETTYMAN: Negotiations on what the shares were going to be.

QUESTION: Well, it hasn't been before Congress all that time?

MR. PRETTYMAN: No, sir. No, no, no. It's only been before Congress the last Session and this Session. That's the only time it's been before Congress.

All of these, some 15 years, --

QUESTION: Well, what is it the Solicitor General suggested that the Senators of California would prefer?

MR. PRETTYMAN: Well, there are two Senators which have made statements on behalf of the Indians in California. I would prefer that Mr. Walston, speaking for California, address himself to that. But I don't think, obviously, that's going to control here.

QUESTION: Well, I would suppose, as a practical matter, if the Senators from one of the contracting States opposed it, there's no chance that Congress will approve it, is there?

MR. PRETTYMAN: We would hope that they would see the light, Mr. Justice; and particularly after you don't allow the claim here.

QUESTION: Well, Mr. Prettyman, filing the case wouldn't necessarily keep the parties to the case, including

the United States, from settling it, would it?

MR. PRETTYMAN: Mr. Justice, if you take this case, I can assure you, as a practical matter, that a number of things are going to happen.

First of all, Congress is going to stop dead in its tracks in trying to approve the contract.

Secondly, the various recommendations that have been made by the Task Force for improving the lake are going to stop, because nobody is going to know how much water has to go to the Indians. The Interior Secretary's operating criteria, which he is now under order to improve here, and which is going to produce still more water if he has the jurisdiction to do it for Pyramid Lake, are going to come to a complete halt, again, because nobody is going to know what we're talking about here in terms of these Winters rights.

I emphasize to you that a Winters right is not some definite, specific figure; you have to go back and find out what the situation was in 1859, at the time the Reservation was created, what the Indians were doing; we're not as all sure as the Solicitor General that they were engaged in all this much fishery, for example. And we have to go through that entire business.

Orr Water Ditch, which is a case which adjudicated, we say, the very rights that are under consideration here, took, I think it was something like 20 years for them to come

to any conclusion.

Now, Orr Water Ditch, you understand, already gives the Indians 30,000 acre-feet a year; that is adjudicated. And we say that that actually covers this case and is fully determinative.

But even if it isn't, the fact of the matter is that what the Indians want they are either getting or are about to get. They want 385,000 acre-feet. That's what their brief says. That's what the United States says. Because 385,000 acre-feet is going to sustain that lake at its present level. That's what they want.

Now, when we turn to that, what do we find?

We find that there has been a tremendous amount of water, increasing recently, into Pyramid Lake because of the changes that I've talked about, and we also have these specific recommendations of the Task Force, some of which are being carried out.

Let me give you an example. One of the things that the Task Force represented was a cloud-seeding project. Well, that sounds a little far out, but in truth we're now into the third year, because of that recommendation, of the cloud-seeding project; and they found in the first two years that there was a 14 percent and a 10 percent increase in precipitation as a result of that.

In hard, cold fact, that 14 percent produces 140,000

acre-feet of water, 120,000 of which goes to Pyramid. This is one of the reasons why Pyramid, we think, has started back up again.

There are other recommendations that the Task Force made. They said, for example, if you enforce your present decrees, if you will go into the District Court with decrees that you have right now and enforce them, that you'll find -- and they gave a specific figure of how much that would produce. 9500 acre-feet there.

They talked about certain TCID improvements, the Truckee-Carson Irrigation District improvements, which would produce another 85,000. And so we have these recommendations, part of which are being implemented right now, and part of which will be if the Court doesn't take things over, which we say is already beginning to sustain the lake, and which certainly will sustain the lake if you don't take this case, and which, if everybody is allowed to proceed -- for example, if you don't take this case, and I might say we think the United States is suing the wrong party here, we think they ought to be suing themselves, because Judge Gesell took the position that the Secretary of the Interior was not properly carrying out his responsibility in his own operating criteria.

And we say that if you combine these various factors, if you combine the Compact, if you combine the recommendations

that have been made, some of which are already being carried out, if you add into that Judge Gesell's order about improving these operating criteria, you're going to have more than enough water for Pyramid Lake.

We hope -- obviously I can't guarantee this -- but we say until these things have had an opportunity to show themselves, until we've had an opportunity in good faith to carry out what's gone on here, why should we stop the whole thing right now, after these 17 years, bring it all to a halt, and suddenly have this Court appoint a Special Master and go back and begin determining for I don't know how many additional years what the Winters rights is.

If there was a question about what they really wanted from these Winters rights, I would take a different position, but there's no question, they want 385,000 acre-feet.

QUESTION: Has the filing of this motion for leave to file interrupted anything?

MR. PRETTYMAN: Well, in the first place, the United States has not responded to Congress' request for comments, I am sure because of this case, and won't until there is some decision here. That's No. 1.

No. 2, there are projects which have been recommended by the Task Force which require money, and obviously I don't think the State can be expected to commit any funds if it were willing to, with not knowing what the Indians were

eventually going to get.

And also I don't think there's any question but that Judge Gesell's order would, in effect, be ignored if this Court were to take jurisdiction, because, obviously, a ruling here would, in effect, override much of what he's done.

So I think there's no question about what the practical effect would be.

QUESTION: The Compact is in the Judiciary Committee, is it?

MR. PRETTYMAN: Yes, sir. Yes.

QUESTION: Does it go to the committees of both houses?

MR. PRETTYMAN: Yes, sir. It's S. 24 and H. R. 15 at the moment.

QUESTION: Mr. Prettyman, if a Special Master were appointed at some stage, not necessarily right away, if this relief were granted, would this necessarily mean that the Special Master would have to retread all of this ground, or could he not draw on what the Task Force and what the negotiations have flushed out in the way of evidence?

MR. PRETTYMAN: Mr. Chief Justice, in the United States District Court in Nevada there is a room full of records relating to Orr Water Ditch. It's perfectly true, he could go through them; but he's got a long, hard, difficult task ahead of him.

I don't want to mislead you for a moment that this is a question of sitting down and reading a few papers and coming to a conclusion. Everybody who has dealt with this problem has found it extraordinarily difficult, it's taken an awful long time.

May I just end by quoting to you something that was said just last year by the National Water Commission that was appointed by the President. It said: The future utilization of Indian rights on fully appropriated streams will divest prior uses initiated under State law and, curiously enough, often financed with Federal funds, and will impose economic hardship amounting to disaster in some cases on users with large investments made over a long period of time.

That's the reason that the State of Nevada is concerned, because, obviously, we have an interest in the Indians, in preserving the some 400 Indians; but we're also terribly concerned about the water that goes in the Newlands, that irrigates some 64,000 acres of land; we're concerned about the quarter of a million people in the area who --

QUESTION: Are you talking about the ducks?

MR. PRETTYMAN: Pardon me, sir?

QUESTION: Are you talking about the ducks? You're concerned about the ducks in the Wetlands?

MR. PRETTYMAN: Well, sir, if -- when you get to wildlife --

QUESTION: Is the Solicitor General correct about that, that it's all it's used for is the ducks?

MR. PRETTYMAN: Oh, no, sir. You mean -- Newlands used for ducks? No, sir.

Newlands, the spilloff from Newlands helps the Stillwater Wildlife Refuge, but you've got 64,000 acres of land out there under irrigation, sir. You've got 5,000 farmers, you have a quarter of a million people in the area who are depending upon water from the Truckee. We're not talking about protecting ducks.

QUESTION: Approximately how much is the wetlands? What percentage would it be?

MR. PRETTYMAN: Well, but it's spilloff, sir, it's what's left over after --

QUESTION: What percentage?

MR. PRETTYMAN: I'm sorry, I can't give you the actual percentage, but it's not the original use at all, sir; it's the runoff that goes down to Stillwater. But we're talking about --

QUESTION: In any irrigation district, isn't it that you get a certain amount of runoff?

MR. PRETTYMAN: Yes, sir. That's correct.

That's the reason for our concern here, that, yes, there are the Indians' interests, and obviously they have some rights. We're not trying to do away with those rights.

We didn't in the Compact, as the United States agrees. But there's also the interest of an awful lot of other people here that we want to make sure are also represented.

We think we, in good faith, after these negotiations, this tremendous amount, a million and a half dollars spent on getting this Compact. We think we're entitled now to proceed and if, by any chance, it doesn't work, if the lake goes down again, they can come back; they can come back.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Mr. Walston.

ORAL ARGUMENT OF RODERICK WALSTON, ESQ.,

ON BEHALF OF THE STATE OF CALIFORNIA

MR. WALSTON: Mr. Chief Justice, and may it please the Court:

California basically agrees with the arguments which have been advanced by the State of Nevada, and we feel that very basically the Pyramid Lake problem is presently being solved by many alternative methods, at the legislative level, the judicial level, the administrative level. And we want the Court -- as far as California is concerned, the real basic question between the Federal Government and the States of California and Nevada is not really how, whether we're going to solve the Pyramid Lake problem, but, rather, how we's going to proceed to solve it.

Now, the Federal Task Force has come in with a

report, about two years ago, and said that vast amounts of water were being wasted in the Truckee River Basin by the Federal Government's own mismanagement of its own reclamation project, the Newlands Project.

The Task Force made a number of recommendations whereby the Federal Government could improve the facilities and improve the management of the system and make additional water available for use in Pyramid Lake. And if these recommendations are followed and are applied by the Federal Government, the problem of Pyramid Lake will be solved.

Now, this same approach was taken more recently in a lawsuit, or in a decision rendered in the Federal District Court in Washington, D. C., Judge Gesell presiding. This lawsuit was brought by the Indians against the Federal Government, the Indians claiming that the Federal Government was violating its fiduciary obligation to the Indians by wasting all this water in the river, and thus failing to maximize the flow of the Truckee River into Pyramid Lake.

And Judge Gesell upheld the position of the Indians, and he said that vast amounts of water were in fact being wasted in the Truckee River by the mismanagement of the Newlands Project, and he then ordered the Federal Government to devise a regulation that will provide for salvage water, which can go into Pyramid Lake. And so if Judge Gesell's decision is implemented by the Federal Government and is

followed, and the water thus required to be made available to Pyramid Lake is actually made available, again Pyramid Lake would receive all the water it needs and the problem would be solved.

So there would be no need for this Court, or any other court, to really get involved with the question which is being posed by the Federal Government in this case.

As a matter of fact, perhaps we'll find, after Judge Gesell's decision is applied and after the Task Force recommendations are followed, that there is in fact enough water in the Truckee River right now to satisfy all the demands which are being made upon it.

QUESTION: Well, then, this -- assuming that nothing that Judge Gesell ordered would be interrupted by the filing of this lawsuit, the filing of the lawsuit might turn out to be an unnecessary act but it wouldn't really be very bothersome, would it?

MR. WALSTON: I think it would, Justice White, --

QUESTION: But not in terms of whether the water would be available or not? If Judge Gesell's orders were carried out, as you say they could be.

MR. WALSTON: If Judge Gesell's decision was carried out, then Pyramid Lake would probably receive, on the average, about 385,000 acre-feet of water per year. And this is all the Federal Government is really asking for on behalf of the

Indians in this case.

But it's very interesting, Justice White, how Judge Gesell's approach to the problem, and how the Task Force approach to the problem really differs from the approach taken by the Federal Government.

Judge Gesell's approach and the Task Force approach is based on the assumption that we have to preserve existing water uses in the upstream area in the Truckee River Basin. And this is diametrically opposite from the approach being urged on this Court by the Federal Government.

Suppose, for instance, the 385,000 acre-feet of water were flowing through the Truckee River in a very dry year, when less than a normal amount of rainfall occurs in the Sierras, the approach taken by the Federal Government would take the entire 385,000 acre-feet of water and put it solely for use in Pyramid Lake. Thus there would be no water left over for any upstream uses.

QUESTION: They would be permitted a diversion for the Newlands Project?

MR. WALSTON: Not according to the prayer in the Government's complaint, which I believe is found at pages 14 and 15 of its complaint; they're asking for a set minimum yearly flow in terms of --

QUESTION: Well, but I didn't understand the Solicitor General to say that that's what they were demanding,

in his argument.

MR. WALSTON: Well, the Solicitor General's remarks, I think, vary somewhat from his prayer. If you look at his prayer, Justice White, on pages 14 and 15, you'll find that they're asking for a minimum flow measured in terms of acre-feet to Pyramid Lake.

QUESTION: Well, if the solution of the problems are so -- I wouldn't say they are simple, but if you think Judge Gesell has seized upon an adequate solution, it shouldn't be very difficult, I wouldn't think, if you're right, for -- even if this suit were filed, even to arrive at a similar result here; or to dismiss it and leave it to Judge Gesell's decree.

MR. WALSTON: That's possibly true, Your Honor, but I strongly suspect that if the Court takes the case, if this Court takes the case and proceeds to exercise its original jurisdiction in the matter, then the whole Task Force will come to a halt.

QUESTION: Well, not if -- I suppose, we've taken cases in which we've specifically said we didn't intend to interrupt a lot of other things going on in other courts, in the same case.

MR. WALSTON: Yes. Well, if so, Your Honor, then you're really, by taking the case, merely duplicating -- this is our whole point -- you're really duplicating what Judge

Gesell has already found, and you're duplicating what the Task Force has already recommended.

If the problem is actually being solved by administrative and other judicial means, then I see no basis or justification for this Court's actually exercising its discretion in the case.

QUESTION: Has any judicial review been sought of Judge Gesell's orders?

MR. WALSTON: No, Justice Brennan. I understand that the Federal Government is not going to take an appeal from Judge Gesell's decision and thus, presumably, it should apply Judge Gesell's decision and thus provide Pyramid Lake with all the water it needs.

QUESTION: Well, your point is if we accept this case, that enforcement of Judge Gesell's decree will stop; is that it?

MR. WALSTON: I frankly don't know how the Solicitor General would respond to Judge Gesell's decree if the Court takes the case.

QUESTION: Well, they're both the same party, here's the fellow who is under Judge Gesell's order now wants another solution.

MR. WALSTON: Yes.

QUESTION: Is that it?

QUESTION: There are two different groups within the

Department of Interior is what we're talking about, aren't we?

MR. WALSTON: That's correct, Justice Stewart.

QUESTION: We're talking about the conservation group and we're talking about the BIA.

MR. WALSTON: That's true.

QUESTION: But it's the Secretary of Interior in either event, isn't it?

MR. WALSTON: Yes, that's correct, Justice White.
In other words, --

QUESTION: Is he -- he's the one who is under order, Judge Gesell's order?

MR. WALSTON: Yes, that's correct.

QUESTION: And he's the one who recommended the filing of this lawsuit, if I understand?

MR. WALSTON: The filing of the lawsuit which we're arguing now?

QUESTION: Yes.

MR. WALSTON: Yes, that's correct.

So, in effect, the Federal Government is coming before this Court and really asking for a solution to the problem that I think has already been found. If the Court applies Judge Gesell's decision, I think the problem should be solved.

QUESTION: Well, you don't mean if the Court applies it, you mean if it's applied and enforced by the Secretary; is

that it?

MR. WALSTON: Yes, that's correct.

QUESTION: And what you're suggesting, as I understood you, was that if we take this case, the Secretary will not apply Judge Gesell's order but will wait on the outcome of this case. Is that right?

MR. WALSTON: Well, as I say, Justice Brennan, I'm not sure what reaction the Solicitor General will take to Judge Gesell's decision, if the Court takes the case. Certainly I don't think that they will follow through with the Task Force recommendations.

As a matter of fact, the Task Force made a number of recommendations, and the Federal Government, I would assume, would not comply with those recommendations if the Court takes the case.

As a matter of fact, these recommendations haven't been complied with so far. The Federal Government is in effect trying to implement a weather modification scheme which the Task Force suggested, but that's the only Task Force suggestion that's been followed by the Federal Government in this case.

The Task Force found a number of other things the Federal Government could do. The Federal Government has taken no action on those other recommendations, and I would assume that the reason is that it prefers to seek a judicial solution

in this Court, in which the Winters doctrine question is adjudicated.

The underlying assumption behind Judge Gesell's approach to the problem, and behind the Task Force approach, is that the Federal Government itself really controls the lion's share of water flowing through the Truckee River.

QUESTION: Of course Judge Gesell was limited, wasn't he, in that he didn't have the water users before him, so that that was really the only approach he could take.

MR. WALSTON: That's the only approach he could do, that's right, Justice Rehnquist; but that still is sufficient, a sufficient solution to the problem, we believe.

In other words, Judge Gesell was in effect saying that there is a vast amount of water which is being wasted in the reclamation project, that the Federal Government has the power to control this waste and has the power to eliminate the waste. And if it follows the suggestions of, or the order of Judge Gesell and the Task Force and makes this water available for use in Pyramid Lake, then the whole problem is solved,

I would remind the Court that all the parties who are receiving water now in the Newlands Reclamation Project, and all the other parties who are receiving water in Nevada, and all the parties who are receiving water in California are not before this Court, either.

QUESTION: They weren't before Judge Gesell, either?

MR. WALSTON: No; that's correct, Your Honor. The judge just had the Federal Government before him, and he ordered the Federal Government to adopt regulations which I think should solve the problem.

QUESTION: Could they be brought into this suit?

MR. WALSTON: They could be. I suppose that they could be. That raises a very interesting question. The Federal Government is in effect trying to have a water right adjudicated on behalf of the Indians, and this is a water right which would be taken out of the share of water which is allocated to the State of Nevada.

Well, I don't see how this Court can adjudicate the right of one water user in the Truckee River --

QUESTION: Did it in Winters, didn't it?

MR. WALSTON: Pardon me?

QUESTION: Did it in Winters, didn't it? Didn't it say that the admission of Montana did not supersede an implied reservation of water when a Reservation was created just a year before?

MR. WALSTON: That's correct. In that case, Justice White, all the -- my understanding of the case is that all the competing water users were before the Court, and there were the Indians before the Court, and all the other water users were before the Court.

In this case the Federal Government is asserting a

water claim on behalf of the Indians in seeking to have this Court adjudicate that water claim, even though there's many conflicting, or supposedly conflicting water claims in Nevada, which deserve some consideration also.

I don't see how this Court can really adjudicate the water claim which is asserted by one user in the Truckee Basin without asserting the water claims adjudicated by all the Truckee users.

So we respectfully urge this Court to let the matter proceed apace, and to let the decision of Judge Gesell be implemented, and the recommendations of the Task Force be followed.

We think that this provides a constructive solution to the problem which will effectively preserve the rights and the uses of the upstream water users, the people out in the Reno area need water every year for drinking purposes, the farmers in the Newlands Project need water for agricultural purposes. And Judge Gesell, I think, has pointed to a constructive solution of the problem, and so has the Task Force. If they're right, the problem is solved.

So the matter, I think, is prematurely brought by the Federal Government at this time.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Walston.

Mr. Solicitor General, we've gone over a little bit and we've heard some estimates as to the impact of what might

happen if the relief you seek was granted, and perhaps you could spend about three minutes enlightening us on your view of those estimates. And perhaps answer some questions.

REBUTTAL ARGUMENT OF ERWIN N. GRISWOLD, ESQ.,

ON BEHALF OF THE PLAINTIFF

MR. GRISWOLD: Mr. Chief Justice, the suit pending in the District of Columbia, it was the responsibility of the Solicitor General to decide whether an appeal should be taken, and the decision has been made that no appeal will be taken.

Nevertheless, that case involves only the left-over, only the runoff, only the water which does not go to someone else by right. It leaves -- it does undertake to maximize the left-over, and it will help the Indians; but it gives them no right. That water can be appropriated by somebody else. It remains surplus water in the river, and it can be appropriated in California, it can be appropriated in Nevada.

The only way that the Indians can be protected is by having an adjudication that they have a right under the Winters doctrine, as applied by this Court most recently in Arizona v. California.

I am also advised that the Office of Management and Budget has authorized the filing with Congress of a statement that the Federal Government opposes the ratification of the Compact until this question is resolved.

I would point out, too, that in the Compact itself,

in Article XVIII(C), it is provided that the Compact does not deal with the rights of any parties which are not specified in the Compact, and that was intended to leave open the question of what would happen if there was an adjudication of the rights of the Indians.

QUESTION: A District Court, a Federal District Court, or even a State Court, would have jurisdiction over intrastate water adjudication if the United States was noticed as to what its claimed rights might be, you would have to enter that, to that decree.

MR. GRISWOLD: Under the case in Colorado, --?

QUESTION: Yes.

MR. GRISWOLD: That would be true. That was an intrastate stream in that case.

QUESTION: Well, all right, with respect to the competing claims of Newlands and Pyramid Lake, these are intrastate claims.

MR. GRISWOLD: With respect to the competing claims in Newlands, these are intrastate claims; but with respect to the claims in California, and I would point out that they are substantial, we have filed a supplemental reply brief here which recounts or sets out the text of an order of the State Water Rights Board in California, which granted a substantial additional amount out of Lake Tahoe, as saying that in that decision the Board assumed to be surplus and unappropriated

the water from Lake Tahoe and the Truckee River flowing by Derby Dam, which is not required to satisfy decreed downstream Indian rights, and which wastes in the Pyramid Lake. The only decreed rights the Indians have is 30,000 feet for irrigation.

We are seeking here to establish decreed rights in support, in favor of the Indians to maintain the level of Pyramid Lake --

QUESTION: May I ask, Mr. Solicitor General: I thought you said originally, did you not, that we would not have to get in, or bring in these other claimants within Nevada?

MR. GRISWOLD: I think that is entirely right, Mr. Justice.

QUESTION: Well, what's your observation on that?

MR. GRISWOLD: All this Court needs to do here is to determine whether the Indians have a right with a priority, and --

QUESTION: But that would not decide, would it, vis-a-vis the other claimants, those claimants' interests?

MR. GRISWOLD: All that this Court needs to do here, Mr. Justice, is to determine whether the Indians have a right with a certain priority --

QUESTION: Well, I know, but if that priority happens to mean that other water users in an area get half the

water they used to, you are foreclosing them.

MR. GRISWOLD: No, Mr. Justice.

QUESTION: The question is --

MR. GRISWOLD: And --

QUESTION: Well, I thought I understood what a priority --

MR. GRISWOLD: -- all that they need to do is to determine whether the Indians have a right with a certain priority, and to allocate the waters of the stream between California and Nevada, who appear as parens patriae and who will represent the water users in those States, just as they did in Arizona v. California, where exactly this was done, in the --

QUESTION: But that was initiated by the State, Mr. Solicitor General. Arizona and California asserted claims of parens patriae. Here you're insisting that they assert them, even though they're defendants.

MR. GRISWOLD: The suit was instituted by the States, but the intervention by the United States on behalf of the Indians was against the -- the suit was instituted by the States, but the intervention by the United States on behalf of the Indians was by the United States and against the States. And this Court adjudicated the rights, and adjudicated that the Indians were entitled to a million acre-feet in that case.

If the Court here adjudicates that the Indians are

entitled to a right with a certain priority, and allocates that between the two States, which is what it did in Arizona v. California, then the question of allocating the water to the individual users, which is allocated to Nevada in the one case, can be handled in the Nevada courts, and allocation to California users can be handled in the California courts.

QUESTION: But all these farmers would lose their rights as a result of that adjudication, if it were favorable to the Indians, without ever having had a day in this Court.

MR. GRISWOLD: They are represented by their respective States, as has been the case in, I think I'm safe in saying, dozens of cases involving interstate water rights before this Court, where the States appear as parens patriae.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Solicitor General.

Thank you, Mr. Prettyman and Mr. Walston.

The case is submitted.

[Whereupon, at 11:14 o'clock, a.m., the case in the above-entitled matter was submitted.]