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## The Continuing Saga of Pyramid Lake: Nevada v. United States

William C. Scott

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## NOTES AND COMMENTS

### THE CONTINUING SAGA OF PYRAMID LAKE: *NEVADA v. UNITED STATES*

#### WATER LAW *NEVADA v. UNITED STATES*

WATER LAW—RES JUDICATA—The United States Supreme Court holds that res judicata prevents the United States and the Pyramid Lake Paiute Tribe from litigating their claim to additional water rights to 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 spawning ground for fish. *Nevada v. United States*, \_\_\_ U.S. \_\_\_, 103 S. Ct. 2906 (1983).

#### BACKGROUND: FACTS AND PROCEDURE

Nevada's Pyramid Lake has long been considered "the most beautiful of North America's desert lakes."<sup>1</sup> Widely renowned for its superb fishery,<sup>2</sup> the lake provides the principal source of livelihood for the members of the Pyramid Lake Paiute Tribe.<sup>3</sup> The lake has no outlet and but one inlet at its south end where the mouth of the Truckee River empties. Situated in the middle of the desert, the lake "depends largely on Truckee River inflow to make up for evaporation and other losses."<sup>4</sup>

In 1859, the Secretary of the Interior set aside 322,000 acres in and around Pyramid Lake as a reservation<sup>5</sup> for the Paiute Indians. Fifteen years later, President Grant signed an executive order confirming the

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1. R. HERMANN, *THE PAIUTES OF PYRAMID LAKE* 1 (1972).

2. See S. WHEELER, *THE DESERT LAKE* 90-92 (1967). The lake is perhaps best known for its native species of cutthroat trout and the cui-ui, which exists nowhere else. When Captain John C. Fremont and his party camped near the lake in 1844, the Indians brought in fish to trade with the Whites. According to Captain Fremont, the fish "were of extraordinary size—about as large as the Columbia river salmon—generally from two to four feet in length." 1 *THE EXPEDITIONS OF JOHN CHARLES FREMONT* 609 (1970).

3. *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 254 (D.C. Cir. 1973).

4. *Id.* at 255.

5. A reservation is a tract of land to which an American Indian Tribe retains its original title to ownership or which has been set aside for its use out of the public domain. Some reservations were created by treaty. In such treaties, the Indians would agree "to keep the peace with the dominant race and with other Indian bands and acknowledge dependence on the white man's government." W. BROPHY & S. ABERLE, *THE INDIAN: AMERICA'S UNFINISHED BUSINESS* 24 (1966). Generally, by the terms of such treaties, the tribe "ceded all its territory except for a part retained for its own use." *Id.* Sometimes, however, reservations were created "in lieu of land the tribes surrendered elsewhere, or, if the Indians had failed to keep back enough for subsistence, Congress or the Executive might later add to their holdings." *Id.*

withdrawal as the Pyramid Lake Indian Reservation.<sup>6</sup> Today the "reservation includes Pyramid Lake, the land surrounding it, the lower reaches of the Truckee River, and the bottom land alongside the lower Truckee."<sup>7</sup> The government established the reservation, in part, "to enable the Tribe to take advantage of the Pyramid Lake fishery."<sup>8</sup>

Shortly after the creation of the Pyramid Lake Reservation, the federal government implemented a policy encouraging the development of arid western land. Beginning with the Desert Land Act of 1877,<sup>9</sup> Congress sought to foster the development of irrigated agriculture in the West "by providing water rights and land at a modest price (25 cents per acre)."<sup>10</sup> The relatively high cost involved in establishing irrigation systems, however, prevented the rapid development which Congress had anticipated. To alleviate that problem, Congress passed the Reclamation Act of 1902.<sup>11</sup> That Act established a reclamation fund<sup>12</sup> which was to be used "as a source for loans to farmers primarily for irrigation development."<sup>13</sup> More important, the Act empowered the Secretary of the Interior to withdraw arid lands from the public domain and initiate irrigation projects to develop such lands. Once developed, the lands were to be restored to entry pursuant to the homestead laws and certain conditions imposed by the Reclamation Act itself.

Just 15 days after the passage of the Reclamation Act, the Secretary of the Interior set aside 200,000 acres in western Nevada for development as the Newlands Reclamation Project (Project). To provide sufficient water for the proposed irrigation, the Project planned to acquire water from both the Carson and the Truckee Rivers. Plans for the Project called for the diversion of Truckee River water into the Lahontan Reservoir in the Carson River basin.<sup>14</sup> Several years passed, however, before the works contemplated by the Project went into operation. In the interval a number

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6. Executive Order of March 23, 1874, in EXECUTIVE ORDERS RELATING TO INDIAN RESERVATIONS, FROM MAY 14, 1855 TO JULY 1, 1912 (1912).

7. *Nevada v. United States*, \_\_\_U.S.\_\_\_, 103 S. Ct. 2906, 2910 (1983).

8. *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1290 (9th Cir. 1981).

9. 43 U.S.C. §§ 321-323 (1982) (originally enacted as Act of March 3, 1877, ch. 107, §§ 1-3, 19 Stat. 377).

10. Burness, Cummings, Gorman, & Lansford, *United States Reclamation Policy and Indian Water Rights*, 20 NAT. RES. J. 807, 808 (1980) [hereinafter cited as *Reclamation Policy*].

11. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C.).

12. 43 U.S.C. § 391 (1982). The fund was established through the sale of public lands.

13. *Reclamation Policy*, *supra* note 10, at 808.

14. The Project diverted water from the Truckee River to the Carson River by constructing the Derby Diversion Dam on the Truckee, and by constructing the Truckee Canal through which the diverted waters are carried to the Carson River. As the Supreme Court noted, experience "in the early days of the Project indicated the necessity of a storage reservoir on the Carson River, and accordingly Lahontan Dam was constructed and Lahontan Reservoir behind the dam was created." 103 S. Ct. at 2911. Today, water from the Reservoir is distributed for irrigation by means of lateral canals within the Project.

of private landowners, land and water companies, and power generating companies established water rights in the Truckee. Moreover, many people believed that the Pyramid Lake Indian Reservation had an as yet unquantified reserved water right in the Truckee by virtue of the Supreme Court's 1908 decision in *Winters v. United States*.<sup>15</sup> The government thus concluded that the water rights to the Truckee would have to be adjudicated in order to determine the quantity of water available for the Project.<sup>16</sup>

The United States therefore filed a complaint in the United States District Court for the District of Nevada in 1913, commencing what became known as the *Orr Ditch* litigation. In its complaint the government, "for the benefit of both the Project and the Pyramid Lake Reservation, asserted a claim to 10,000 cubic feet of water per second for the Project and a claim to 500 cubic feet per second for the Reservation."<sup>17</sup> All the water users on the Truckee River were named as defendants in the suit.

After filing its complaint, "the government initiated extensive surveys of the land and ditches of all claimants."<sup>18</sup> For almost six years the government and the defendants gathered and exchanged information about water right claims in the Truckee.<sup>19</sup> Those years of discovery culminated in an evidentiary hearing conducted by a special master<sup>20</sup> in 1919. Following several years of hearings, the special master issued a report and

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15. In *Winters v. United States*, 207 U.S. 564 (1908), the Supreme Court was asked to construe the documents creating the Fort Belknap Indian Reservation. None of the documents in question expressly claimed a water right in the nearby Milk River for the benefit of the Reservation. Nonetheless, the Supreme Court held that the federal government had impliedly reserved a right to a sufficient amount of water from the river to effectuate the purposes of the agreements. At the time that *Winters* was decided, it was unclear whether the reserved rights doctrine would apply to reservations like Pyramid Lake which were created by executive order rather than treaty. In 1963, the Supreme Court finally announced that *Winters* applies to reservations created by executive order. *Arizona v. California*, 373 U.S. 546 (1963).

16. 649 F.2d at 1291.

17. 103 S. Ct. at 2911.

18. 649 F.2d at 1291.

19. During this time, the government's claims for the Reservation began to take shape. A principal concern for the government attorneys was a 1904 Congressional provision, Act of April 21, 1904, ch. 1402, § 26, 33 Stat. 225, which authorized the Secretary of the Interior to include in the Newlands Reclamation Project lands located in the Pyramid Lake Indian Reservation. Part of that land was to be allotted to the Indians in five-acre allotments. Since "there were relatively few Indians on the Reservation, a large land surplus was anticipated. These surplus irrigable lands were to be sold to settlers, the proceeds to be used for the Indian's benefit." 649 F.2d at 1290. In the view of the government's attorneys there were two categories of irrigable Reservation land. First, there were roughly 19,000 acres of bench land. This was the land contemplated in the 1904 Act. Second, there were some 2,400 acres of bottom land along the Truckee. That land was already "to a very considerable extent being farmed by the Indians. . . ." *Id.* at 1291. With that in mind the government decided to "press a claim for water sufficient to irrigate about 5,400 acres: 3,000 acres of bench lands (to account for 600 five-acre allotments) and 2,400 acres of delta lands." *Id.* at 1292.

20. A special master is an individual appointed by the court to assist with specific judicial duties. The powers and duties of a special master vary according to the terms of appointment and the relevant court rule. Typically, a special master's duties include the taking of testimony and discovery

proposed decree in the summer of 1924. The report awarded the Reservation an 1859 priority date<sup>21</sup> in the Truckee for 58.7 cubic feet per second and 12,412 acre feet of water annually to irrigate 3,130 acres of delta land.<sup>22</sup> The Project, on the other hand, was awarded a 1902 priority date for 1,500 cubic feet per second to irrigate to the extent possible 232,800 acres of land.<sup>23</sup> In 1926 the district court issued a temporary restraining order declaring the water rights as proposed in the report. The court issued the order "to allow for an experimental period during which modifications of the declared rights could be made if necessary."<sup>24</sup>

A prolonged drought stimulated interest in concluding the *Orr Ditch* litigation and led to the commencement of settlement negotiations in 1934. At the settlement negotiations, the United States acted on behalf of the Reservation's interests. The Project, on the other hand, was represented by the Truckee-Carson Irrigation District (TCID) which had signed a contract with the government in 1926 under which it was to operate the Project for the government. During the negotiations, the United States demanded an increase in the Reservation's water rights to allow for the irrigation of an additional 2,745 acres of land.<sup>25</sup> Both TCID and the other defendants in the case accepted the demand after some initial resistance, and the parties signed a settlement agreement in 1935. The district court entered a final decree adopting the agreement in 1944.<sup>26</sup>

The diversion of a substantial amount of Truckee River water into the Carson River Basin practically destroyed Pyramid Lake and its fishery.<sup>27</sup>

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of evidence. A special master prepares a report on his findings and proceedings for the court. See, e.g., Fed. R. Civ. P. 53.

21. The priority date was set as of the date of the original withdrawal of the land for the Reservation.

22. 103 S. Ct. at 2911. The report further provided that the Reservation would be entitled to additional water rights if the five-acre allotments were made pursuant to the 1904 Act. *Id.* at 2911 n.2.

23. *Id.* at 2911-12.

24. *Id.* at 2912.

25. The government's demand was, in part, prompted by congressional consideration of the Wheeler-Howard Bill in early 1934. That Bill (which was restructured and adopted as the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461-479 (1982)) sought to prohibit further allotments of Indian lands, thereby nullifying the 1904 Act. Rather than accept a reserved right for only 3,130 acres of reservation land, the government decided to press for a greater right. Though some people inside the government suggested that the government seek a reserved right for all 19,000 acres of irrigable reservation land, the government only acquired a right for an additional 2,745 acres.

26. *United States v. Orr Water Ditch Co.*, Equity No. A-3 (D. Nev. Sept. 8, 1944) (unpublished final decree).

27. The diversion of water for Project use has caused the level of the Lake to drop more than 70 feet. 354 F. Supp. at 255. The decreased river flow combined with refuse from upstream sawmills built up a delta at the mouth of the Truckee which prevented the Lake's fish from reaching their upstream spawning grounds. 649 F.2d at 1292. "By the early 1940s, the strain of cut-throat trout indigenous to the Lake was extinct." *Id.* at 1294. The cui-ui barely survived. Beginning in the early 1940s efforts were undertaken to restore the fishery. Initial efforts at restoration included the construction of a dam and a fishway. By the late 1940s the State of Nevada had begun to stock the

As a consequence, in 1973, the United States filed suit in the federal District Court on behalf of the Reservation seeking additional rights to the Truckee River. The Pyramid Lake Paiute Tribe intervened in support of the United States. In the complaint the Government claimed not to dispute the rights established in the *Orr Ditch* decree. Instead, the government alleged that *Orr Ditch* determined "only the Reservation's right to 'water for irrigation,' . . . not the claim now being asserted for 'sufficient waters 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.'"<sup>28</sup> The government's complaint named as defendants all persons currently claiming water rights to the Truckee River and its tributaries in Nevada, including the defendants in the *Orr Ditch* litigation and their successors, individual farmers who owned land in the Project, and TCID.

All of the defendants raised the affirmative defense of *res judicata*, claiming that the *Orr Ditch* decree precluded both the United States and the Tribe from litigating their claim. The district court held a separate trial on the issue and sustained the defense. The court then dismissed the complaint in its entirety.<sup>29</sup> The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part.<sup>30</sup> The Ninth Circuit found that the *Orr Ditch* decree barred claims against the defendants to the *Orr Ditch* action, their successors in interest, and subsequent appropriators who reasonably relied on the finality of that decree. Relying on the rule that a judgment does not conclude an action between parties who were not adversaries under the pleadings, the court further held that the *Orr Ditch* decree could not act as a bar to claims against TCID since both the Tribe and the Project had been represented by the government in the prior

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Lake. Those early efforts met with modest success and, over the next thirty years, were followed by more expensive and elaborate restoration projects. In 1956, the Washoe Project Act was enacted. Pub. L. No. 858, 70 Stat. 775. Section 4 of the Act made it clear that the restoration of the Pyramid Lake fishery to its full potential value was deemed to be of national interest and importance. See Pub. L. No. 858, § 4, 70 Stat. 775, 777. Since that time a number of cutthroat trout hatcheries have been established. The fish therefrom are used to stock the Lake. In 1976 the Marble Bluff Dam and Fishway was completed and enabled the fish to bypass the delta on their way to their upstream spawning ground.

Despite those restoration efforts "the level of the lake has continued to drop since 1940." 649 F.2d at 1294. The Tribe sued the Government for damage to the fishery in 1951. In 1973 the Indian Claims Commission found the government liable. *Northern Paiute Nation v. United States*, 30 Ind. Cl. Comm'n 210 (1973). In 1975, the Commission approved a compromise settlement of \$8,000,000 in the Tribe's favor. *Pyramid Lake Paiute Tribe v. United States*, 36 Ind. Cl. Comm'n 256 (1975). Today, the cui-ui is classified as an "endangered species," and the Lahontan cutthroat as a "threatened species," under federal law. 50 C.F.R. § 17.11 at 82-83 (1984).

28. 103 S. Ct. at 2912.

29. *Pyramid Lake Paiute Tribe v. Truckee-Carson Irrigation Dist.*, Civil No. R-1987-JBA (D. Nev. Dec. 8, 1977).

30. 649 F.2d at 1311.

action. The Supreme Court then granted certiorari to consider the matter.<sup>31</sup> In a unanimous decision the Court affirmed in part and reversed in part, holding that *res judicata* barred the government and the Tribe from litigating their claim against all the defendants.<sup>32</sup>

#### LEGAL BACKGROUND: WATER LAW AND RES JUDICATA

During the early stages of western settlement, "Congress permitted water distribution and water rights determinations to pass to the states in order to encourage Western migration and settlement."<sup>33</sup> Since that time most western water rights have been administered by the states under state law. Today the majority of the arid western states allocate water use rights on the basis of prior appropriation. Though defined differently in each of those states, "the prior appropriation system has always contained two essential principles: (1) the first user (appropriator) in time has the right to take and use water; and (2) that right continues as against subsequent users as long as the appropriator puts the water to beneficial use."<sup>34</sup> Once an appropriator puts the water to beneficial use in accordance with the laws of the state where the water is found, the appropriator has a vested real property 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."<sup>35</sup> Thus, in times of shortage, a senior appropriator's right will be satisfied in full before a junior appropriator may receive his share. Though many view this system of water law as harsh and pragmatic, it "rests on basic and fundamental assumptions about the value of using, presently, a scarce and important resource."<sup>36</sup>

Ironically, Congress' attempt to foster western migration also gave rise to a system of water rights which are superior to appropriations under state law. As part of the program to encourage white settlement in the West, the federal government began to confine the Indians to reservations. Often times, however, the documents or treaties creating those reservations failed to expressly reserve water rights for the benefit of the Indians.

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31. \_\_\_ U.S. \_\_\_, 103 S. Ct. 205 (1983).

32. 103 S. Ct. at 2926.

33. R. FOREMAN, *INDIAN WATER RIGHTS: A PUBLIC POLICY AND ADMINISTRATIVE MESS* 58 (1981).

34. DuMars, *New Mexico Water Law: An Overview and Discussion of Current Issues*, 22 NAT. RES. J. 1045, 1045 (1982). Beneficial use is commonly defined as the "application of water to a lawful purpose which is useful to the appropriator and at the same time is a use consistent with the general public interest in having water utilized to its maximum." *Id.* Most prior appropriation states recognized beneficial use as the basis, the measure, and the limit of the right to use water. *Id.*

35. *Arizona v. California*, 283 U.S. 423, 459 (1931).

36. M. PRICE, *LAW AND THE AMERICAN INDIAN* 310 (1973).

In the landmark case of *Winters v. United States*,<sup>37</sup> though, the Supreme Court ruled that when the government created those reservations, it also reserved the right to use sufficient water from included and adjacent streams and rivers to make those reservations productive. Under this reserved rights doctrine Indian water rights "legally do not depend on beneficial use, nor do they derive from or depend upon compliance with state law."<sup>38</sup> Indeed, "reserved rights never have to be exercised and are capable of remaining dormant indefinitely in undetermined quantities to meet unspecified future needs."<sup>39</sup>

Today *Winters* rights "are increasingly a focus of litigation as many western states seek to inventory and quantify all water rights, including those reserved for Indian use."<sup>40</sup> The most common method for quantifying those rights is through a general stream adjudication.<sup>41</sup> Such proceedings bring the conflict between prior appropriations and the reserved rights doctrine clearly into focus. In an adjudication proceeding, private appropriators seek to guarantee their rights to water which they are currently putting to beneficial use while the Indians hope to guarantee enough water for both their present uses and their future needs.

As is true of other final judgments, final decrees in water adjudication suits are subject to the doctrine of *res judicata*. In general, *res judicata* provides that

when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."<sup>42</sup>

The doctrine of *res judicata* recognizes that lawsuits are meant not only to do substantial justice but also to bring an end to controversy.<sup>43</sup> The rule thus promotes the goal of stability and certainty in court judgments. By preventing parties from relitigating the same claim, the doctrine allows the parties and others to rely on the judgment in ordering their practical

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37. See *supra* note 15.

38. BROPHY & ABERLE, *supra* note 5, at 89.

39. FOREMAN, *supra* note 33, at 59.

40. Brookshire, Merrill, & Watts, *Economics and the Determination of Indian Reserved Water Rights*, 23 NAT. RES. J. 749, 749 (1983).

41. A general stream adjudication is "a judicial proceeding in which all users of and claimants to water from a particular source (usually a river system) must appear and prove their claims or lose their rights." *Id.*

42. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948) (citing *Cromwell v. County of Sac*, 94 U.S. 351 (1877)).

43. HAZARD & JAMES, *CIVIL PROCEDURE* 532 (1965).



affairs and prevents the moral force of court judgments from being undermined.<sup>44</sup>

### THE COURT'S OPINION

To determine whether *res judicata* barred the claim for additional water rights, the Court first considered whether the government's cause of action was "the same 'cause of action' that was asserted in *Orr Ditch*."<sup>45</sup> The Tribe argued that the Court should employ the "same evidence" standard in deciding the matter because it was the prevailing standard at the time of the *Orr Ditch* proceedings. Under that test, causes of action are deemed to be the same "if the evidence needed to sustain the second action would have sustained the first action."<sup>46</sup> According to the Tribe, different evidence would be required to establish a fishery water right than to establish an irrigation water right. Thus, they argued that they were not seeking to litigate the same cause of action. The Court, however, rejected the Tribe's argument. Writing for the Court, Justice Rehnquist acknowledged that the definition of "the same cause of action" has changed over time.<sup>47</sup> He nonetheless found it unnecessary to "parse any minute differences which these differing tests might produce," since under any standard "the only conclusion allowed by the record in the *Orr Ditch* case is that the Government was given an opportunity to litigate the Reservation's entire water right to the Truckee, and that the Government intended to take advantage of the opportunity."<sup>48</sup> After reviewing both the government's complaint and the final decree in the *Orr Ditch* case, Rehnquist concluded that the government could not be said to have presented anything less than "a claim for the full 'implied-reservation-of-water' rights that were due the Pyramid Lake Indian Reservation."<sup>49</sup> Hence, he decided that the government was seeking to litigate the same cause of action.

The Court next sought to determine which of the parties before the Court was bound by the earlier decree. The Court quickly concluded that the United States was a party to the *Orr Ditch* proceedings and could not therefore "relitigate the Reservation's 'implied-reservation-of-water' rights with those who can use the *Orr Ditch* decree as a defense."<sup>50</sup> The Court further held that the Tribe, "whose interests were represented in *Orr*

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44. *Id.*

45. 103 S. Ct. at 2918.

46. RESTATEMENT OF JUDGMENTS § 61 (1942); *See also* United States v. The Haitian Republic, 154 U.S. 118 (1894).

47. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) adopted a more pragmatic definition of the same cause of action. Under the new definition causes of action are deemed to be the same if they arise from the same transaction.

48. 103 S. Ct. at 2919.

49. *Id.* at 2920.

50. *Id.* at 2921.

*Ditch* by the United States, can be bound by the *Orr Ditch* decree."<sup>51</sup> In so deciding, the Court relied heavily upon its earlier decision in *Heckman v. United States*.<sup>52</sup> In *Heckman* the Court stated that "it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question."<sup>53</sup>

The Court in *Nevada* recognized that the government owes the Indians a "distinctive obligation of trust,"<sup>54</sup> but found that it would be unrealistic to expect the government to conform to the "fastidious standards of a private fiduciary"<sup>55</sup> in its dealings with the Indians. Expressing the opinion of the Court, Justice Rehnquist reasoned that the Reclamation Act of 1902<sup>56</sup> and the Indian Reorganization Act of 1934<sup>57</sup> required the Secretary of the Interior to "carry water on at least two shoulders."<sup>58</sup> According to Rehnquist, those two Acts delegated to the Secretary both "the responsibility for the supervision of the Indian tribes and the commencement of reclamation projects in areas adjacent to reservation lands."<sup>59</sup> Since Congress elected to delegate both of those tasks to the Secretary, Justice Rehnquist felt that it would be "unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well."<sup>60</sup>

Having decided that both the government and the Pyramid Lake Tribe were bound by the *Orr Ditch* decree, the Court turned to consider which of the defendants to the 1973 action could use the *Orr Ditch* decree as a defense. The Court quickly stated that there was "no dispute but that the *Orr Ditch* defendants were parties to the earlier decree and that they and their successors can rely on the decree."<sup>61</sup> The Court then considered the effect of the decree as between the Tribe and TCID. Though Justice Rehnquist acknowledged that, as a general rule, a judgment does not conclude an action between parties who were not adversaries under the pleadings,<sup>62</sup> he agreed with the court of appeals that a "strict adversity

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51. *Id.*

52. 224 U.S. 413 (1912).

53. *Id.* at 446.

54. 103 S. Ct. at 2917.

55. *Id.*

56. Act of June 17, 1902, ch. 1093, 32 Stat. 388 (codified in scattered sections of 43 U.S.C.).

57. 25 U.S.C. §§ 461-479 (1982).

58. 103 S. Ct. at 2917.

59. *Id.*

60. *Id.*

61. *Id.* at 2922.

62. *See Dobbins v. Barnes*, 204 F.2d 546 (9th Cir. 1953); RESTATEMENT (SECOND) OF JUDGMENTS § 38 (1982).

requirement does not necessarily fit the realities of water adjudications."<sup>63</sup> He disagreed, however, with the lower court's assertion that the Tribe and TCID were neither parties nor co-parties but rather were "non-parties represented simultaneously by the same government attorneys."<sup>64</sup>

Justice Rehnquist noted that courts in western states have generally held that "the successors in interest of parties who are not adversaries in a stream adjudication nevertheless are bound by a decree establishing priority of rights in the stream."<sup>65</sup> With this rule in mind, Justice Rehnquist examined the relationship between the government, the Tribe, and TCID. In *Orr Ditch*, the government, as a single entity, sought water rights for both the Project and the Tribe. The government, though, "separately pleaded the interests of both the Project and the Reservation."<sup>66</sup> During the settlement negotiations, TCID represented the Project's interests while the Bureau of Indian Affairs represented the Reservation's interests. Thus, in Justice Rehnquist's view, the interests of the Tribe and TCID appeared "sufficiently adverse for the latter to oppose the Bureau's claim for additional water rights for the Reservation during the settlement negotiations."<sup>67</sup>

Finally, the Court considered the government's argument that they were merely seeking to reallocate the water decreed to them in *Orr Ditch* "from reclamation uses to a Reservation use with an earlier priority."<sup>68</sup> Relying on their earlier decisions in *Ickes v. Fox*<sup>69</sup> and *Nebraska v. Wyoming*,<sup>70</sup> the Court squarely rejected the government's argument. Both *Ickes* and *Nebraska* dealt with the beneficial ownership of water rights in irrigation projects constructed under the Reclamation Act of 1902. In *Ickes*, the Court made it clear that the mere acquisition "of the government title to a parcel of land was not to carry with it a waterright."<sup>71</sup> Instead the water right was to be acquired under state law by "perfecting an appropriation, i.e., by an actual diversion followed by an actual application within a reasonable time of the water to a beneficial use."<sup>72</sup> In light of those cases, the Court concluded that once "lands were acquired by settlers in the Project, the Government's 'ownership' of the water rights was at most nominal; the beneficial interest in the rights confirmed to the Government resided in the owners of the land within the Project to which these water

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63. 103 S. Ct. at 2923.

64. 649 F.2d at 1309.

65. 103 S. Ct. at 2923 (citing *Morgan v. Udy*, 58 Idaho 670, 79 P.2d 295 (1938)).

66. *Id.*

67. *Id.*

68. *Id.* at 2914.

69. 300 U.S. 82 (1937).

70. 325 U.S. 589 (1945).

71. 300 U.S. at 95.

72. 325 U.S. at 614.

rights became appurtenant upon the application of Project water to the land."<sup>73</sup>

### ANALYSIS

The Court's decision that the government was seeking to assert the same cause of action as was asserted in *Orr Ditch* is sound. The ruling accords with the basic concept of *res judicata* that a person who has "once had an opportunity to litigate a matter may justly be denied an opportunity to litigate it on another occasion."<sup>74</sup> In *Orr Ditch*, the government could have sought "an adjudication for certain water uses . . . leaving open the possibility of expanding the Tribe's water right. . . ."<sup>75</sup> Instead, the government sought a comprehensive adjudication. Because the government failed to split its *Winters* cause of action, it should not be allowed to relitigate the matter. To allow the government to do so would undermine the finality of the court's judgment and would harm private appropriators who rely upon judicial decrees to determine the allocation of scarce water resources.

Justice Rehnquist's conclusion that the Tribe should be bound by the *Orr Ditch* decree, however, is not as well reasoned. In reaching his conclusion, Justice Rehnquist placed undue reliance upon *Heckman v. United States*.<sup>76</sup> In *Heckman*, the United States brought suit to cancel certain conveyances of allotted lands made by members of the Cherokee Nation.<sup>77</sup> The Indians challenged the suit on the grounds that the United States lacked the capacity to maintain the suit and that there was a defect of parties since the Indians were not joined as parties to the suit.<sup>78</sup> The Supreme Court, however, rejected the Indians' arguments. Addressing the Indians' points, the Court stated that "[t]here can be no more complete representation than that on the part of the United States in acting on behalf of these dependents—whom Congress, with respect to the restricted lands, has not yet released from tutelage."<sup>79</sup> Thus, *Heckman* established the general rule that a ward is bound by representation provided by a guardian.

Today the rule from *Heckman* has lost much of its vitality. Courts generally acknowledge that a party will not be bound by a judgment for or against a purported representative if "there was such a substantial divergence of interest between him and the members of the class, or a

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73. 103 S. Ct. 2916.

74. HAZARD & JAMES, *supra* note 43, at 536.

75. 649 F.2d at 1302.

76. 224 U.S. 413 (1912).

77. The conveyances from tribal members to private individuals were in violation of Congressional restrictions on the power of alienation. See Act of July 1, 1902, ch. 1375, §§ 11–15, 32 Stat. 716, and Act of April 26, 1906, ch. 1876, § 19, 34 Stat. 137.

78. 224 U.S. at 420.

79. *Id.* at 444.

group within the class, that he could not fairly represent them with respect to the matters as to which the judgment is subsequently invoked."<sup>80</sup> In recent years courts have begun to apply this rule when evaluating the adequacy of government representation of Indian interests. When that representation is found to be inadequate, the Tribe is allowed to intervene to help protect their interests. Thus, in *Manygoats v. Kleppe*,<sup>81</sup> the Tenth Circuit Court of Appeals ruled that when "there is a conflict between the interests of the United States and the interests of the Indians, representation of the Indians by the United States is not adequate."<sup>82</sup>

Despite this trend the Supreme Court in *Nevada* ruled that the mere presence of dual, conflicting interests would not necessarily render government representation inadequate. Indeed, according to Justice Rehnquist, it would be "unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obliged it to represent other interests as well."<sup>83</sup> Justice Rehnquist's deference to Congress, however, should not resolve the matter. In *United States v. Mitchell*,<sup>84</sup> decided just three days after *Nevada*, the Court ruled that a statute or regulation defining the federal government's responsibility for the management of Indian resources establishes a fiduciary relationship and defines the contours of the government's fiduciary responsibilities. Once such a relationship is established the adequacy of the government's representation must be assessed according to the most exacting fiduciary standards.<sup>85</sup> For the purposes of the controversy in *Nevada*, portions of the Indian Reorganization Act would establish just such a relationship. Contrary to Justice Rehnquist's assertion, the Indian Reorganization Act did not delegate to the Secretary of the Interior the "responsibility for the supervision of the Indian Tribes. . . ."<sup>86</sup> Instead, the purpose of the Act was to prevent the allotment of Indian reservation land and to promote self-government of the various Indian tribes.<sup>87</sup> Toward that end the Act extended the periods of trust and the restrictions on alienation placed on Indian lands.<sup>88</sup> Moreover, the Act empowered the Secretary of the Interior to acquire land and water rights "in the name of the United States in trust for the Indian tribe[s]. . . ."<sup>89</sup> Thus, under

80. RESTATEMENT (SECOND) OF JUDGMENTS § 42(d) (1982). See also *Hansberry v. Lee*, 311 U.S. 32 (1940).

81. 558 F.2d 556 (10th Cir. 1977).

82. *Id.* at 558. See also *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976).

83. 103 S. Ct. at 2917.

84. \_\_\_ U.S. \_\_\_, 103 S. Ct. 2961 (1983).

85. *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct. Cl. 1966).

86. 103 S. Ct. at 2917.

87. *Cheyenne River Sioux Tribe v. Kleppe*, 424 F. Supp. 448, *rev'd on other ground*, 566 F.2d 1085, *cert. denied*, 439 U.S. 820 (1977).

88. 25 U.S.C. § 462 (1982).

89. *Id.* § 465.

*Mitchell*, the Indian Reorganization Act would establish a fiduciary relationship between the tribes and the government. The government would therefore have to conform to the standards of a private fiduciary. Such a ruling would clearly accord with the decisions in the Indian intervention cases.<sup>90</sup>

Though the decisions in *Nevada* and *Mitchell* may appear inconsistent at first blush, they can be reconciled. In both cases the Court recognized that an executive agency is bound by the standards of a private fiduciary. But in *Nevada* Justice Rehnquist went one step further by insisting that any *potential* conflict of interest created by Congress will not void the government representation of Indian interests ab initio because Congress is not bound by the duties of a private fiduciary. While Justice Rehnquist's assertion may in fact be true, it provides little guidance in *Nevada*. In that case, the potential conflict between the Secretary's responsibilities to the Indians, on the one hand, and his responsibilities to the reclamation projects on the other had become a reality. The government was thus embroiled in a conflict of interest which should void the government's representation.

In assessing the effect of the *Orr Ditch* decree as between the Tribe and TCID, Justice Rehnquist again rejected the notion that the government must conform to the standards of a private fiduciary. According to Rehnquist, the interests of the Tribe and TCID were "sufficiently adverse"<sup>91</sup> for the decree to be binding upon both parties. Here, however, his analysis confronted the Court of Appeals' admonition that "[i]n representative litigation we should be especially careful not to infer adversity between interests represented by a single litigant."<sup>92</sup> Justice Rehnquist rejected the lower court's holding since it was based on an analogy between the government's position and that of a trustee under the traditional law of trusts.<sup>93</sup> According to Justice Rehnquist, "the government is simply not in the position of a private litigant or a private party under traditional rules of common law or statute."<sup>94</sup>

To support his position, Justice Rehnquist relied upon *Utah Power & Light Co. v. United States*.<sup>95</sup> In *Utah Power & Light* the government brought three suits to enjoin the occupancy of forest reservation land in Utah as sites for the generation and distribution of power. The defendants to the suits raised the defenses of laches and neglect of duty. The Supreme Court, however, stated that as "a general rule laches or neglect of duty

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90. See text accompanying notes 55-57, *supra*.

91. 103 S. Ct. at 2923.

92. 649 F.2d at 1309.

93. 103 S. Ct. at 2923.

94. *Id.* at 2924.

95. 243 U.S. 389 (1917).

on the part of officers of the Government is no defense to a suit by it to enforce a public right or protect a public interest."<sup>96</sup> The Court thus held that the inaction of a minor government official cannot prevent the government from carrying out its trust obligations. The government's immunity from the defenses of laches and neglect of duty in such instances does not, however, mean that the government may be allowed to conform to less rigid standards than a private fiduciary. The case thus does not support Rehnquist's conclusion that the government may be held to the standards of a private fiduciary "where only a relationship between the Government and the tribe is involved,"<sup>97</sup> and to a lower standard when a third party enters that relationship.

Beyond that, Justice Rehnquist's analysis of the government's posture in *Nevada* ignores the analytical framework provided by *United States v. Sioux Nation of Indians*<sup>98</sup> which makes clear that Congress' extensive power over Indian lands is subject to certain constitutional restraints. In *Sioux Nation* the Court held that Congress cannot simultaneously act as trustee for Indian lands and as a sovereign exercising its eminent domain power to take Indian property for other purposes. According to the Court, "the question whether a particular measure was appropriate for protecting and advancing the tribe's interests, and therefore not subject to the constitutional command of the Just Compensation Clause, is factual in nature [and the] answer must be based on a consideration of all the evidence presented."<sup>99</sup> In assessing the evidence, courts "must engage in a thoroughgoing and impartial examination of the historical record."<sup>100</sup> Thus, the crucial inquiry under *Sioux Nation* is whether the government made a good faith effort to defend, protect, and preserve the resources which it holds in trust for the Indians. An examination of the intent or motive behind the government's actions is clearly an integral part of this inquiry.

Though *Nevada* is not an eminent domain case, the test announced in *Sioux Nation* should have been used to evaluate the extent to which Indian property can be diminished or extinguished as a result of improper or inadequate representation. A review of *Nevada*'s history reveals that the government was more concerned with acquiring water for the Project than with protecting the Tribe's *Winters*' rights. The *Orr Ditch* proceedings were initially commenced in order to secure water for the Project. As an incident of that adjudication the government had to assert a *Winters* rights claim for the Tribe. Because the government initially intended to

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96. *Id.* at 409.

97. 103 S. Ct. at 2924.

98. 448 U.S. 371 (1980).

99. *Id.* at 415.

100. *Id.* at 416.

include reservation land in the Project,<sup>101</sup> the government decided to press a claim for enough water to irrigate only about one-fourth of the land on the reservation. Once the government learned that reservation land could not be included in the Project, the government had the opportunity to recast their claim so as to preserve the Tribe's full *Winters'* rights in the Truckee. Instead, the government sought to increase the demand to obtain only enough water to irrigate an additional 2,745 acres of land. Thus, the history reveals that the government did not make a good faith effort to preserve the Tribe's full water rights. Therefore, the *Orr Ditch* decree should not preclude the Tribe's claims as against TCID.

Finally, the Court's rejection of the government's reallocation argument clearly conforms with, and was indeed compelled by, the earlier decisions in *Ickes*<sup>102</sup> and *Nebraska*.<sup>103</sup> As the Court pointed out, the government was mistaken in its belief that "the water rights confirmed to it by the *Orr Ditch* decree in 1944 for use in irrigating lands within the Newlands Reclamation Project were like so many bushels of wheat, to be bartered, sold, or shifted about as the government might see fit."<sup>104</sup> The government's argument did, however, raise an interesting point. As both *Ickes* and *Nebraska* make clear, section 8 of the Reclamation Act<sup>105</sup> requires that water be acquired in accordance with state law. Thus, beneficial use would be the basis, the measure, and the limit of the right to use the Project water. One study of the water use within the Project, though, has found that roughly 100,000 acre feet of water are wasted each year by Project users.<sup>106</sup> Such misuse of water certainly does not constitute beneficial use and might even be considered abandoned or forfeited under state law. Thus, there is still the possibility that the Pyramid Lake Indians might be able to press a suit to acquire this wasted water.

## CONCLUSION

The Court's decision in *Nevada* is troublesome in several respects. First, the Court erred in concluding that the *Orr Ditch* decree barred the Pyramid Lake Tribe's claims against TCID. It would have made sense both in terms of res judicata and public policy to allow the Tribe to litigate its claim. The Tribe was not seeking to engraft a new exception on the doctrine of res judicata. Instead, it relied on established exceptions to that doctrine and on traditional fiduciary standards. As a policy matter,

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101. See *supra* note 19.

102. 300 U.S. 82 (1937).

103. 325 U.S. 589 (1945).

104. 103 S. Ct. at 2916.

105. 43 U.S.C. § 416 (1982).

106. See Clyde, Criddle, & Woodward Inc., Report of Lower Truckee-Carson River Hydrology Studies (1968).



the Tribe should have been allowed to proceed since it will need an adequate resource base upon which to build a sound economy and a sturdy tribal government.

Second, since the Tribes are now encouraged to negotiate and settle, rather than litigate, the extent of their water rights,<sup>107</sup> the Court's decision raises some serious questions. The Tribes must now consider whether they will ever be able to raise a claim for additional water rights after having entered into a settlement agreement. Theoretically, a Tribe could make several different water use claims<sup>108</sup> all arising under the *Winters* doctrine and all derived from the same water source.<sup>109</sup> In the future the Tribes should be careful to split their *Winters* claims thereby preserving their right to expand their water rights at a later date. For those Tribes that have already entered into a settlement agreement, the language of the agreement should be carefully studied to determine whether or not they will be able to argue that they have successfully separated their claims.

More importantly, the Tribes will have to decide whether it is wise to pursue their current strategy of settlement if they cannot depend upon the government to provide adequate representation of their interests. As *Nevada* demonstrates, the Tribes can easily lose valuable property rights as a result of inadequate and conflicting representation by the government. Worse still, recent Supreme Court decisions make it clear that adjudications involving Indian water rights may be heard in state courts.<sup>110</sup> Given the shortage of water in the West, it is likely that state courts will look more favorably upon the water right claims of its non-Indian residents than upon those of the Indians. Litigation may therefore be as unattractive an alternative as settlement is. The Indians are thus in a most unenviable position.

WILLIAM C. SCOTT

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107. See, e.g., Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, §§ 301-315, 96 Stat. 1274-1285 (1982).

108. A Tribe could, for instance, raise a claim for irrigation, a claim for fishery purposes, and a claim for industrial use.

109. In *Nevada*, the Supreme Court declined to rule on whether or not a Tribe could sever its *Winters* cause of action. 103 S. Ct. at 2920 n.13. The Ninth Circuit Court of Appeals, though, indicated that such an approach is indeed possible. *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1302 (9th Cir. 1981).

110. See *Arizona v. San Carlos Apache Tribe of Arizona*, \_\_\_ U.S. \_\_\_, 103 S. Ct. 3201 (1983); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).