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Lake Tahoe, the Truckee River, and Pyramid Lake: the Past, Present, and Future of Interstate Water Issues

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> In the opinion of the Conservation Commission—which is shared by the State Water Commission—the waters of Lake Tahoe are too valuable an asset, from every point of view, to permit them to be diverted, without established limit, into any other state. For, if they are to be so diverted, it will be difficult, if not impossible for California to recover her proper share of them. The Conservation Commission, therefore, recommends as strongly as it can, that this State bring suit, before the Supreme Court of the United States, against the State of Nevada to have the waters of Lake Tahoe equitably apportioned to and between the two states, so that, by prescription or otherwise, the people of California may not be deprived of their present, just, legal, equitable and proper share in the waters of the Lake.[1]

The melt waters from snows falling mainly in California drain naturally into Lake Tahoe, which straddles the California-Nevada boundary. Waters from Lake Tahoe flow down the Truckee River to the confluence with the Little Truckee River at a point below the town of Truckee. From there, the River flows through Reno,

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1. *Report of the Conservation Commission of the State of California*, at 82 (transmitted to the Governor and Legislature January 1, 1913). The Conservation Commission recommended adoption of the Water Commission Act, which is the predecessor of California's current laws governing appropriation and beneficial use of water.

Nevada to its end at Pyramid Lake which has no natural outlet. Even after more than a century of effort, the problem of apportionment of its waters between the two states has never been resolved.

Legal and administrative problems for the Truckee River are complicated by other geographic details. Runoff from the Lake Tahoe Basin and the Truckee River Basin is controlled by dams at Lake Tahoe, Fallen Leaf Lake, Echo lake, Marlette Lake, Donner Lake and Independence Lake. It is also controlled by four reservoirs, Prosser Creek, Boca and Stampede Reservoirs, and Martis Creek Reservoir (which is used only to impound flood waters). The Truckee River is the principal water supply for the Reno-Sparks metropolitan area. Derby Dam, located between Reno and Wadsworth, diverts Truckee River water over to the federal Newlands Project near Fallon. Pyramid Lake is entirely within the Pyramid Lake Indian Reservation. Two species of fish that live in the Lake are listed under the federal Endangered Species Act, the threatened Lahontan Cutthroat Trout and the endangered Cui-ui.

Californians and Nevadans had argued over the waters of Lake Tahoe and the Truckee River for nearly forty years before the Conservation Commission recommended in 1913 that they be equitably apportioned. Another forty years would pass before serious efforts began to achieve a division of the waters between the two states. By 1970, thirteen years of negotiation resulted in adoption of the California-Nevada Interstate Compact.[2] This Compact would allocate the interstate waters of Lake Tahoe, the Truckee River, and the Carson and Walker Rivers to the two states. However, continuing controversy over the terms of the Compact, particularly its effect on Federal and Indian claims to water within Nevada, has thwarted obtaining the consent and approval of Congress.[3] The Compact languished before Congress for fourteen years before hearings in 1985 and 1986 demonstrated that the consent and approval of Congress could not be obtained.

In 1988, seventy-five years after the California Conservation Commission recommended a Supreme Court lawsuit, continuing

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2. The California-Nevada Interstate Compact was ratified by the Nevada Legislature in 1969 [hereinafter Interstate Compact]. Acts 1969, pp. 69, 1259. It was ratified by the California Legislature in 1970, with certain modifications. 1970 Cal. Stat. ch. 1480, sec. 1, at 2924. The Nevada Legislature concurred in the modifications in 1971. *See* CAL. WATER CODE § 5976 (West 1971); NEV. REV. STAT. ANN. § 538.600 (Michie 1986) (text of Compact).

3. The consent and approval of Congress is required by United States Constitution, article I, section 10, clause 3.

controversy and uncertainty remain over competing claims to the waters of the Truckee River. These claims may affect each state's equitable share of the waters of Lake Tahoe and the Truckee River. To a lesser extent, there is also uncertainty over respective rights to the waters of the Carson and Walker Rivers. In addition, the cities of Reno and Sparks anticipate shortages of water in the event of a serious drought, and the search for additional sources of water has sparked new controversies over interstate ground water basins.

This article presents an overview of these controversies, past and present. It also considers alternative methods of interstate allocation. Emphasis is placed on the Truckee River and Lake Tahoe since their waters have been central to the interstate allocation issue. Disputes concerning the Truckee River and Lake Tahoe must be resolved or successfully avoided before an effective interstate allocation can be achieved between California and Nevada.

I. Water Allocation Controversies, Past and Present: an Overview

The efforts of California and Nevada to accomplish an interstate allocation has been entangled in other issues. These include: (a) the amount of water which should flow to Pyramid Lake, under federal reserved water rights, or as a result of obligations under the federal Endangered Species Act,[4] (b) release of water from Lake Tahoe in winter for hydroelectric generation, (c) Lake Tahoe levels, both high and low, (d) the amount of water required for the Reno-Sparks area in the event of a critical drought, (e) the amount of water needed for efficient operation of the Truckee-Carson Irrigation District, and (f) the amount of water needed for the Stillwater Wildlife Management Area near Fallon. These issues have been controversial in the past, and unless they can be resolved, their persistence may continue to hinder achieving an interstate allocation.

A. Early Interstate Controversies.

The early interstate controversies arose over schemes to modify Lake Tahoe and divert its waters through tunnels. The first contro-

4. Endangered Species Act of 1973, 81 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1543 (1985)).

versy involved a proposal by Alexis Von Schmidt[5] to divert water from Lake Tahoe to the City of San Francisco, via a tunnel that would also carry transcontinental trains.[6]

In 1870, the California Legislature authorized the Donner Boom and Logging Company to construct a dam at the mouth of Lake Tahoe to develop water to float logs and wood to the mills at Truckee.[7] However, Von Schmidt claimed prior rights and, in the fall of 1870, he completed a crib dam just below the Lake's outlet, raising the lake above its natural level.[8] Von Schmidt's scheme never got started.[9] Ultimately, control of Von Schmidt's dam passed to the Donner Boom and Logging Company.

B. The Truckee River Controlled and Diverted: Impacts on Lake Tahoe and Pyramid Lake

1. The Newlands Project.

The first project authorized under the Reclamation Act of 1902[10] was named for Nevada's Representative (later Senator) Francis G. Newlands. The Project, which was approved by the Secretary of the Interior in 1903, was intended to irrigate 232,000 acres in the vicinity of Fallon with water from the Carson and Truckee Rivers.

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5. Von Schmidt was a civil engineer who also surveyed the California-Nevada boundary in the area. *See* California v. Nevada, 447 U.S. 125, 129, 133 (1980) (affirming the Von Schmidt line).

6. For the early history of the interstate dispute see W. JACKSON AND D. PISANI, A CASE STUDY IN INTERSTATE RESOURCE MANAGEMENT: THE CALIFORNIA-NEVADA WATER CONTROVERSY, 1865-1955 1-6 (California Water Resources Center, Contribution No. 142, 1973) [hereinafter JACKSON].

7. 1870 Cal. Stat. ch. 513, at 771. Interestingly, section 5 of that statute required the dam to have a fish ladder or the franchise would be forfeited. Apparently, no fish ladder was included in the original dam.

8. *See* 30 OP. CAL. ATT'Y GEN. 262 (1957) (history and legal implications of regulation of Lake Tahoe levels).

9. Jackson, *supra* note 6, at 4-5. Two other California export schemes were proposed. In 1900, Luther Waggoner, Chief of the San Francisco Department of Public Utilities, considered a tunnel from Lake Tahoe to the North Fork American River, but dropped the scheme after surveying the area. *Id.* In 1908, James A. Waymire proposed a Tahoe aqueduct into the American River watershed at the Rubicon River to supply water and power. WAYMIRE, DIVERTING WATER FROM LAKE TAHOE FOR USE IN CALIFORNIA (1908).

10. 32 Stat. 388 (1902) (codified as amended at 43 U.S.C. §§ 471-616 (1982 & Supp. 1985)).

Today, only 63,000 acres are irrigated.[11] In 1926, the United States contracted with the Truckee-Carson Irrigation District to operate the Project.

In 1905, the first feature of the Project, Derby Diversion Dam, was constructed on the Truckee River. The Dam and the Truckee Canal diverted waters over to the Carson River for the reclamation project. At the outset, the Project relied on the natural flow of the Carson River and the Truckee Canal. However, experience indicated that a storage reservoir was necessary, and in 1915 Lahontan Dam and Reservoir was constructed to store the combined waters of the Carson and Truckee Rivers.[12]

2. Impact of the Newlands Project on Pyramid Lake.

In 1859, the Secretary of the Interior set aside 322,000 acres of land surrounding Pyramid Lake and the Lower Truckee River as an Indian reservation. Pyramid Lake was chosen so that the Indians could take advantage of the Lake's plentiful fishery and irrigate the land along the Lower Truckee River.[13]

The impact of the Newlands Project's diversion on Pyramid Lake was devastating. Prior to this development, the entire natural flow of the Truckee River went to Pyramid Lake. The Lake evaporates approximately four feet a year (approximately 440,000 acre feet).[14] After Derby Dam blocked the natural flow of the Truckee River, Pyramid Lake's level dropped to a point where a delta formed at the mouth of the Truckee River. By the late 1930s the Pyramid Lake subspecies of Lahontan Cutthroat trout became extinct. In the 1940s, the Lake was restocked with Cutthroat Trout. The Cui-ui barely survived by spawning along the edge of the Lake where the Truckee River water entered. The Secretary of the Interior listed

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11. *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION, FINAL ENVIRONMENTAL IMPACT REPORT FOR THE NEWLANDS PROJECT PROPOSED OPERATING CRITERIA AND PROCEDURES, at S-4 (Dec. 1987) [hereinafter OCAP EIS] (copy on file with the Department of Water Resources). The EIS states that 57,518 acres have legal Project water rights.

12. *See* Water and Power Resources Service, *Project Data*, at 685-90 (1981) (a complete technical description of the Newlands Project) (copy on file with the Department of Water Resources).

13. *See* KNACK AND STEWART, AS LONG AS THE RIVER SHALL RUN: AN ETHNOHISTORY OF THE PYRAMID LAKE INDIAN RESERVATION (Berkeley, 1984) (a detailed history of the Pyramid Lake Indian Reservaiton).

14. *See* Harding, *Recent Variations in the Water Supply of the Western Great Basin*, Water Resources Center Archives Report No. 16 (1965). The report provides a history of lake level fluctuations.

the Cui-Ui as endangered in 1967[15] and the Lahontan Cutthroat trout as threatened in 1975.[16] The Lake level has recovered in recent years to a point where fish again swim up to Marble Bluff Dam after the 1982-1983 wet years.

While Pyramid Lake receded over many years, its problems did not become a major component of the interstate water disputes until the 1970s, when the United States and the Tribe asserted claims to additional water to sustain the Lake's fishery under the *Winters* doctrine[17] and the Endangered Species Act[18].

3. *Use of Lake Tahoe Water for the Newlands Project and the Power Company*

The major interstate conflicts in the early Twentieth Century involved proposals to obtain more water from Lake Tahoe for the Newlands Project. The United States sought control over storage at Lake Tahoe and regulation of its release into the Truckee, either by gaining control of the dam or by getting the water out of Lake Tahoe by other means. The tables had turned; Californians began to object to water export schemes for Nevada.

By 1908, the Truckee River General Electric Company had purchased the Lake Tahoe Dam. This company was the predecessor of the Sierra Pacific Power Company. The agreement under which the dam was purchased established specified Truckee River flows generally known as the "Floriston Rates."[19] At the time, they assured sufficient water for power generation and for irrigation in Nevada. However, over the years, they have been a source of interstate controversy, because they contributed both to high water conditions

15. C.F.R. 4001 (1967) (codified at 50 C.F.R. § 17.11).

16. C.F.R. 29863 (1975) (codified at 50 C.F.R. § 17.11).

17. Winters v. United States, 207 U.S. 564, (1908) (water impliedly reserved under federal law for Indian reservations in amounts necessary to carry out the purposes of the reservations). The *Winters* claim for the fish was denied by the United States Supreme Court. Nevada v. United States, 463 U.S. 110 (1983). *See infra* notes 44-45 and accompanying text (discussion of the *Ditch* case).

18. Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984).

19. The original Floriston Rates required that there be a mean flow of water in the Truckee River of 500 cubic feet per second from March 1 to September 30 of each year, and 400 cubic feet per second between October 1 and February 28-29, as measured near the California-Nevada border. If necessary, water must be released from Lake Tahoe to maintain those rates of flow. *See* Sierra Pacific Power Company, *1985 - 2005 Water Resource Plan*, at 3-1 (October 1985) (a good description of the Floriston Rates, as modified) (copy on file with the Department of Water Resources) [hereinafter *Water Resource Plan*]. Preparation of this plan was ordered by the Public Service Commission of Nevada, Docket No. 84-1006.

in Lake Tahoe during wet years and low water conditions during the drought which occured during the 1920s and early 1930s.

In 1911, the Truckee River General Electric Company proposed to construct a diversion tunnel from Lake Tahoe to Washoe Lake and return the water to the Truckee River near Reno. This scheme was supported by the Reclamation Service. The Service argued that the tunnel was an improvement on the Lake's natural outlet and a more effective way of using the Lake's "surplus" waters.[20] The scheme was vehemently opposed by property owners around Lake Tahoe, and it was ultimately blocked by California. In the Autumn of 1912, the power company and the Reclamation Service sent a work crew with dredging equipment to cut down the Lake's rim, but property owners quickly obtained an injunction from a Placer County court.[21] The designs of the Reclamation Service and the Power Company at this time on the waters of Lake Tahoe undoubtedly led the California Conservation Commission to include its recommendation that California seek a U.S. Supreme Court adjudication.[22]

In 1915, The Reclamation Service obtained the dam from the power company in a consent decree, *United States v. Truckee River General Electric Co.*[23] The decree granted the United States control of the dam and the right to regulate the water level in Lake Tahoe. The decree also benefitted the power company by recognizing the Floriston Rates and by committing the United States to release water to satisfy them.

4. Lake Tahoe High Water, Low Water Disputes

High and low water levels in Lake Tahoe have also been a source of interstate controversy. Landowners complained about high water level flooding their littoral lands and causing damage to their property from winter storms. These complaints have continued to

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20. Jackson, *supra* note 6, at 8-9.
21. *Id.* at 7-11.
22. *See supra* note 2.
23. United States v. Truckee River Gen. Elec. Co., Civ. No. S-643-LKK (E.D. Cal. 1915) (as modified by the Truckee River Agreement and the Prosser Creek Reservoir Agreement) (on file at the *Pacific Law Journal*). The State of California was not a party to the consent decree and never assented to it. The California Attorney General's objections to the decree's effects on Lake Tahoe led to modifications of the decree in the 1935 Truckee River Agreement, which established a maximum permissible lake level of 6229.1 feet and lesser winter Floriston Rates when the Lake is below specified levels.

the present. Disputes have also involved pumping the Lake when its low water level fell below the natural rim. These pumping disputes occurred during the drought in the late 1920s and early 1930s. The pumping issue recurred in 1961 and again during the 1977 drought, when pumping the Lake became a possibility.[24]

While most high water disputes occurred after the United States acquired control of some of the Lake Tahoe dam in 1915, disputes preceded that date.[25] The years 1914-1917 were wet years and the Lake exceeded elevation of 6229.1 feet four times. In response to complaints from the California Attorney General and property owners, the Secretary of the Interior promised in 1919 to ask the United States Attorney General to bring legal actions to determine the United States' authority to operate the dam and to condemn whatever littoral interests were taken as the result of such operation. No condemnation action was ever instituted.[26]

The period between 1919 to 1934 was unusually dry. During this period, the low water level of the Lake dropped below the rim in 1924, and each year from 1929 to 1936.[27] When this occurred, no water could flow naturally into the Truckee River. A major legal concern was whether artificially lowering the level of the Lake, either through pumping or cutting the rim, might sever the riparian rights of the littoral owners. The California Attorney General repeatedly opposed proposals of the Reclamation Service to lower the rim.[28]

In 1924 and 1929, the State of California and the littoral owners permitted pumping of the Lake when it fell below the rim.[29] In

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24. Pumping negotiations between the two states occurred in August 1961. California demanded that Nevada assume responsibility for any damage to property owners in California and indemnify the State of California from liability to individual property owners as a result of giving its consent to pumping. *See* Letter from R.C. Price, Chairman, California Committee on Pumping from Lake Tahoe to W.W. White, Chairman, Nevada Committee on Pumping from Lake Tahoe (January 9, 1962) (copy on file with the Department of Water Resources). Pumping was again briefly considered in 1977, but no negotiations took place.

25. The highest water level of record - 6231 feet - occurred in 1907. In 1912, the State of California brought suit against the Truckee River General Electric Company seeking removal of the dam on the ground that raising and lowering the level of the Lake was an irreparable injury and without right as against the State. The suit never came to trial and was dismissed without prejudice in 1939. California v. Truckee River Gen. Elec. Co., Equity No. 304 (N. D. Cal. 1939). *See* 30 OP. CAL. ATT'Y GEN. at 265.

26. 30 OP. CAL. ATT'Y GEN. at 265.

27. The low water level also dropped below the rim in 1961-62 and 1977-78.

28. Jackson, *supra* note 6, at 12.

29. Water has been pumped from the Lake in four years. In 1924, pumping of 34,000 acre-feet occurred from August 2 to November 7; in 1929, 33,960 a.f., Aug. 6 - Dec. 11; in 1930, 25080 a.f., Aug. 21 - Nov. 16; In 1934, 24,610 a.f., Jul. 12 - Nov. 10. *Preliminary*

July, 1930, when the Lake again dropped below the rim, the littoral owners denied another pumping request. Nevadans sent a steam shovel and crew under police guard to Lake Tahoe in late July to dig a diversion trench at the rim.[30] The work crew was met by angry Tahoe residents. On July 29, a temporary restraining order preventing the excavation was obtained from the El Dorado County Superior court. Ultimately, this confrontation led to negotiations resulting a 1930 pumping agreement.[31]

In May, 1931, Nevada Governor Fred Balzar wrote to California Governor James Rolph, Jr. asking that an interstate committee be established to help resolve the pumping disputes. Governor Rolph agreed. Thus in June, 1931, the Lake Tahoe Interstate Water Conference Committee came into existence, consisting of three members from each State. While it had no statutory basis and was advisory only, the Committee facilitated negotiations of pumping agreements. With the return of wet years in the late 1930s and 1940s, the Committee served as a forum for high water disputes. The Committee also assisted in fixing the maximum and minimum levels of Lake Tahoe and saw them included in the 1935 Truckee River Agreement.[32]

5. The Truckee River Agreement.

In response to the drought in the 1930s, the Bureau of Reclamation developed plans for a dam and reservoir on the Little Truckee River at Boca to serve the irrigators in the Reno area, whose early rights were to natural flow only. To construct such a reservoir, an operating agreement was negotiated among the major water rights holders of the Truckee River.[33] The agreement requires operation of Lake Tahoe, and the then proposed Boca Reservoir, to maintain the Floriston Rates. The Floriston rates were modified so that rate of releases in the winter depends on levels in Lake

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Report of the Lake Tahoe Interstate Water Conference Committee (issued as a Public Service for the Information of Interested Tahoe Property Owners in the States of California and Nevada) (Aug. 4, 1952)) (copy on file at the *Pacific Law Journal*).

30. JACKSON, *supra* note 6, at 20.

31. *Id.* at 21-22.

32. *Id.* at 22-30.

33. *See Truckee River Agreement* (June 13, 1935) (copy on file at the *Pacific Law Journal*).

Tahoe.[34] The Agreement recognizes the 1926 contract, which assigned operation of the Lake Tahoe Dam from the United States to the Truckee-Carson Irrigation District (TCID).[35] Maximum storage in Lake Tahoe cannot exceed 6229.1 feet, and water must be released insofar as practicable to prevent the Lake from exceeding that elevation.[36] Modications to the rim of the Lake or artifical outlets were prohibited without the consent of the California Attorney General. Pumping the Lake for sanitary and domestic purposes requires the public health officials of both States to file a certificate of necessity with the Attorney General of their respective states.[37] These provisions were added at the insistence of the California Attorney General, U.S. Webb. However, the States of California and Nevada are not parties to the Agreement.

The Truckee River Agreement was a major milestone in the adjudication which the United States had filed in 1913 to establish water rights for the Newlands Project and the Pyramid Lake Reservation—the *Orr Ditch* litigation.

C. *The Orr Ditch* Decree: Certainty Revisited.

1. The Orr Ditch Litigation.

While construction began on the Newlands Project in 1905, it did not come into full operation until after 1915. In the interval, a number of appropriations of water under Nevada law were initiated upstream. In addition, many people believed that the Pyramid Lake Indian Reservation had unquantified reserved water rights by virtue of the *Winters* Decision.[38] Therefore, in March, 1913, the United States initiated an adjudication of the water rights of the Truckee River to quantify the amount of water available for the Newlands

34. *Id.* at articles I (B), I (K), and III. The original rates, 500 cubic feet per second in the summer and 400 cubic feet in the winter, apply when the Lake is at or above 6226 feet. Between 6225.25 feet and 6226, the winter rates (Nov. 1 - Mar. 31) are 350 cubic feet per second. When the Lake is below 6225.25 feet, the flows are 300 cubic feet per second in winter.

35. *Id.* at article XVI.

36. *Id.* at article III (F).

37. *Id.* at article XXV (G).

38. Winters v. United States, 207 U.S. 564 (1908).

Project and the Pyramid Lake Indian Reservation.[39] The complaint named as defendants all water users on the Truckee River in Nevada.[40]

In 1924, the special master issued a report and proposed decree. The proposed decree awarded the Reservation an 1859 priority to a flow of 58.7 c.f.s. and 12,412 acre-feet of water annually to irrigate 3,130 acres. For the Newlands Project, the Reclamation Service was awarded a 1902 priority for 1,500 c.f.s. for the irrigation of up to 232,800 acres.[41] The Court accepted the Special Master's recommendation and issued a temporary restraining order to establish a trial period for the parties' water rights.

The 1929-1935 drought renewed interest in concluding the *Orr Ditch* litigation. Settlement negotiations began in 1934 and culminated in the 1935 Truckee River Agreement.

In the early phases of the *Orr Ditch* litigation, the United States represented the interests of both the Newlands Project and the Pyramid Lake Tribe. In the 1934-35 negotiations, the Newlands project was represented by the TCID.[42] In 1944, following completion of Boca reservoir, a final decree was entered which incorporated the Truckee River Agreement by reference.

2. *The Decree Reconsidered: Nevada v. United States.*

Shortly after the California-Nevada Interstate Compact was adopted, the United States sought leave to file a bill of complaint in the United States Supreme Court against Nevada and California seeking a declaration of their respective rights to the waters of the Truckee River.[43] The purpose of this action was to perfect a prior

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39. United States v. Orr Ditch Water Company, Equity No. A-3 (D. Nev. 1944). The decree is sometimes referred to as the "Truckee River Decree." *See* United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1290-96 (9th Cir. 1981) *rev'd*, Nevada v. United States, 468 U.S. 110 (1983) (the most detailed description of this litigation). *See also* Comment, *The Continuing Saga of Pyramid Lake: Nevada v. United States*, 24 NAT. RESOURCES J. 1067 (1984).

40. United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1291 (9th Cir. 1981). The *Orr Ditch* litigation and decree included only Nevada parties. However it quantifies certain water rights within California claimed by the Nevada parties, including the Lake Tahoe and Boca Reservoir storage and the power company's diversion rights for power generation.

41. *Id.* at 1292.

42. *Id.* at 1294.

43. United States v. Nevada and California, 412 U.S. 534 (1973). The suit was filed after the states had ratified the California-Nevada Interstate Compact, which the United States opposed as interfering with federal claims and powers.

water right to maintain the level of Pyramid Lake and its fishery. The Supreme Court denied the motion because, with the Compact pending before Congress, there was no controversy between the two states concerning the Truckee River. The Court noted that even though it had original jurisdiction, the jurisdiction was not exclusive.

In December 1973, after the Supreme Court denied the original jurisdiction motion, the United States filed an action in the United States District Court for Nevada against the TCID, the State of Nevada, other parties to the *Orr Ditch* decree, and other persons claiming Truckee River water rights in Nevada. The complaint alleged that the *Orr Ditch* decree only quantified the Reservation's reserved right to irrigation water. The decree did not quantify the right to sufficient flows to preserve Pyramid Lake and to maintain the lower Truckee River as a spawning habitat for the Lake's fish.[44] The Pyramid Lake Tribe intervened in support of the United States. All the defendants raised the affirmative defense of res judicata, claiming that the *Orr Ditch* decree barred the United States or the Tribe from claiming additional reserved water rights for Pyramid Lake.

The District Court held that the *Orr Ditch* decree was res judicata. It dismissed the United States and the Tribe's claims with prejudice.[45] The Ninth Circuit Court of Appeals affirmed in part but reversed the dismissal as to the Truckee-Carson Irrigation District. The decree was not res judicata for the Tribe and the Newlands Project because they had been represented by the United States attorneys in the *Orr Ditch* litigation, and their interests were not sufficiently adverse to one another to warrant the use of res judicata.[46]

The United States Supreme Court reversed, holding that the doctrine of res judicata barred the United States and the Tribe from litigating the reserved right claim against all defendants.[47] Writing for a unanimous Court, Justice Rehnquist rejected the argument that the United States breached its duty to the Tribe when it represented both the Reservation and the project. While the United

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44. *See* Nevada v. United States, 463 U.S. 110, 118-19 (1983). The complaint also sought water for the Stillwater Wildlife Refuge near Fallon, the Toiyabe National Forest, and for other purposes. *See Truckee-Carson Irrigation Dist.*, 649 F.2d at 1295.

45. United States v. Truckee-Carson Irrigation Dist., Civ. No. R-1897-JBA (D. Nev. 1977). *See* Note, *The Continuing Saga of Pyramid Lake*, Nevada v. United States, 24 NAT. RESOURCES J. 1063, 1071 (1984).

46. *Truckee-Carson Irrigation Dist.*, 649 F.2d at 1290-94.

47. Nevada v. United States, 463 U.S. 110 (1983).

States has a distinctive obligation in its dealings with Indian Tribes, Congress also imposed substantial obligations with respect to reclamation projects.

> It may well appear that Congress was requiring the Secretary of the Interior to carry water on both shoulders. . . . But Congress chose to do this, and it is simply unrealistic to suggest that the Government may not perform its obligation to represent Indian tribes in litigation when Congress has obligated it to represent other interests as well.[48]

Both the United States and the Tribe were bound by the *Orr Ditch* decree. The *Orr Ditch* defendants could assert the decree against the Government and the Tribe.[49] In addition, persons who were not parties to *Orr Ditch* may assert res judicata against the United States and the Tribe, if they relied on the decree in initiating their use of water. The Court recognized an exception from the general rule of mutuality of estoppel for general stream adjudications.[50]

> As we have already explained, everyone involved in *Orr Ditch* contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to. Thus, even though quiet title actions are *in personam* actions, water adjudications are more in the nature of *in rem* proceedings. Nonparties such as the subsequent appropriators in these cases have relied just as much on the *Orr Ditch* decree in participating in the development of western Nevada as have the parties to that case. We agree with the Court of Appeals that under 'these circumstances it would be manifestly unjust . . . not to permit subsequent appropriators' to hold the Reservation to the claims it made in *Orr Ditch*; '[a]ny other conclusion would make it impossible ever finally to quantify a reserved right' . . . .[51]

Nevada v. United States ended most of the uncertainty over reserved rights claims for Pyramid Lake, for persons who can show that they relied on the decree. However, some uncertainty remains as to the amount of unappropriated water available in both States.

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48. 463 U.S. 110, 128 (1983).
49. *Id.* at 140.
50. The res judicata doctrine bars a party and his privy from relitigating causes which were previously adjudicated or which could have been adjudicated in a prior proceeding. Under the traditional rule of mutuality of estoppel, the res judicata doctrine could not be asserted by one who was not a party to the original proceedings.
51. Nevada v. United States, 463 U.S. 110, 143-44 (1983).

On remand to the District Court, the Tribe sought leave to amend its original complaint to assert a reserved water right to all unappropriated water in the Truckee River. The District Court held in 1985 that undue delay in seeking to amend the complaint and prejudice to parties claiming rights to the water barred the new claim.[52]

3. The OCAP Litigation.

Most litigation affecting the Truckee River has direct interstate impacts or has involved California in some way. Up to now, the litigation over operating criteria and procedures (OCAP) for the TCID has involved only Nevada parties. It concerns the efficiency of the TCID's operations. It affects California to the extent that the Truckee and Carson Rivers are very limited resources with competing demands exceeding their supplies. The OCAP dispute is a part of increasingly competitive demands on the system, which could potentially affect all users.

Since 1967, the Secretary of the Interior has adopted annual regulations setting operating criteria and procedures for the Newlands project. Their purpose is to maximize use of Carson River water and minimize diversions from the Truckee River. The Pyramid Lake Paiute Tribe brought suit challenging these regulations. It alleged that the OCAP regulations delivered more water than the Newlands Project was entitled to under applicable decrees.

In *Pyramid Lake Paiute Tribe of Indians v. Morton,*[53] Judge Gesell held that waste was occurring in the Newlands Project and the Secretary's fiduciary obligations to the Tribe require delivery of all water to Pyramid Lake not otherwise obligated by court decrees or contracts. The court established a more rigorous OCAP than the Secretary had proposed.[54] The OCAP also required the Secretary to terminate the 1926 contract with TCID if it substantially violated the regulations. In 1973, the TCID deliberately diverted more water than allowed under the OCAP, and the Secretary proposed to

52. United States v. Truckee-Carson Irrigation Dist., 107 F.R.D. 377 (1985).

53. 354 F. Supp. 252 (D. D.C. 1973).

54. *Id.* at 260-66. These regulations established an OCAP for the Newlands Project, designed to promote efficiency and limit the amount of water the Truckee-Carson Irrigation District can divert from the Truckee River to 350,000 acre feet of water during the first year they went into effect.

terminate the contract. The United States District Court in Nevada and the Ninth Circuit Court of Appeals confirmed the authority of the Secretary to terminate the contract.[55]

Since the *Morton* decision, the Bureau of Reclamation has issued an "interim" OCAP each year, and it has often been the subject of litigation. The Bureau has proposed a final OCAP with a maximum annual Truckee River diversion of 338,000 acre feet for 1988 and with a gradual annual reduction to 320,000 acre feet by 1992. This would be an ultimate reduction of approximately 40-50,000 acre feet per year from past operations.[56] The proposed Final OCAP has been challenged by all interests. The issues in dispute are numerous. They include: the number of acres eligible to receive Project water,[57] duties of water on Project lands, compliance with past OCAP's, water requirements for the Stillwater Wildlife Management area, operation of Lahontan Reservoir to store Carson River flows, versus maintaining a high recreation pool, and adequacy of the draft and final OCAP EIS. Further litigation over the OCAP appears certain.

4. *Paiutes v. California*

On June 23, 1981, while the appeal in *United States v. Truckee Carson Irrigation District* was pending before the Ninth Circuit, the Tribe filed a separate class action against the State of California and seventeen water districts and companies holding California water rights. The Tribe sought a reserved water right with an 1859 priority to water for Pyramid Lake and its fishery.[58] The case is essentially a California counterpart to the Nevada action.

The California defendants asserted res judicata as an affirmative defense alleging that the Tribe's rights were adjudicated in the *Orr Ditch* decree. After *Nevada v. United States* was decided, California moved for summary judgment on the basis that the State and other

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55. Truckee-Carson Irrigation Dist. v. Secretary Dep't of Interior, 742 F.2d 527 (9th Cir. 1984).

56. The controversial nature of the OCAP is illustrated by 331 pages of comments on the draft EIS and responses. *See* OCAP EIS, *supra* note 11.

57. Recently, the District Court in Nevada rejected the Tribe's effort to prevent irrigation of farm acreage within the Fallon Navy Base. The land is leased and irrigated for dust control. *See* Pyramid Lake Paiute Tribe of Indians v. Department of the Navy, CV-R-86-115-BRT (D. Nev. 1987) (on file at the *Pacific Law Journal*).

58. Pyramid Lake Paiute Tribe of Indians v. State of California, No. Civ S-81-378 RAR (D. Cal. filed 1981) (on file at the *Pacific Law Journal*).

California water users could assert res judicata in the same manner as Nevada users. Moreover, the State of California argued that it had relied on the *Orr Ditch* decree in administering its water rights system. The Tribe argued that only Nevada defendants could rely on *Orr Ditch*.

The District Court granted summary judgment for those parties holding California appropriative water rights who could establish reliance on the *Orr Ditch* decree. It denied summary judgment without prejudice for riparian water rights, finding that reliance had not been established.[59] The court also held that the State of California could not assert res judicata. Although the state took the *Orr Ditch* decree into account in determining the amount of water available for appropriation, the court found that the state had not changed its position with regard to unappropriated waters in reliance on the decree. The case was stayed pending resolution of the similar case in Nevada.[60] The litigation is currently on hold while possible settlements of all Truckee River litigation are pursued.

Had the California-Nevada Interstate Compact been in effect, the outcome of the *Paiutes* case may have been different. The State of California argued that there was no justiciable case or controversy with the Tribe. This was because California and Nevada were voluntarily complying with the proposed Compact for allocation of Truckee River water. Under the Compact, Nevada agreed to satisfy any valid Reservation rights out of Nevada's share of water.[61] The court rejected this argument finding that the Compact is only a "private agreement" since Congress has not yet approved it.

The *Paiutes* case illustrates the uncertainty that results from the lack of an equitable apportionment. The two states negotiated the Compact to assure that California, the upstream state, would have a certain amount of water for present and future needs. The Compact gave Nevada, the downstream state, certainty that California water users would not encroach on its supply beyond that allocated to California. Among other purposes, the Compact was intended to prevent individuals from one state interfering with water right administration in the other. From California's perspective, the heart of the Compact was the provision that federal uses of water would be charged to the state where the use occurs.

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59. *Id.* (order partially granting and denying summary judgment, March 29, 1985).
60. United States v. Truckee-Carson Irrigation Dist., Civ. No. R-2987-RCB (D. Nev. 1973).
61. *See* Interstate Compact *supra* note 2 at article III C.

D. *The Washoe Project Act, Stampede Reservoir, and Truckee River Fish Flows.*

1. *Interstate Disputes over the Proposed Washoe Project*

During the 1940s and early 1950s, the Bureau of Reclamation investigated several potential water supply development projects on the Truckee and Carson Rivers. These investigations culminated in a 1954 feasibility report proposing authorization of the Washoe Project.[62] The proposed project included a 126,000 acre foot reservoir on the Little Truckee River upstream from Boca Reservoir, and a reservoir on the Carson River, which would straddle the boundary between the states. All additional land opened to irrigation by the project would have been in Nevada. The Washoe Project plans were opposed by the State of California and California water users. The proposed project was perceived as a threat to future water uses within California.[63] When legislation authorizing the Washoe Project was introduced in Congress in 1955, California officials sought to amend it to protect California water interests. In hearings held in 1955 before the House Interior and Insular Affairs Committee, Harvey O. Banks, the California State Engineer, recommended that the Stampede Reservoir authorization be amended to allow for future expansion of the reservoir to meet future needs in California.[64] California's opposition to the Washoe Project legislation threatened to kill the Project and to bar any chance of negotiating an interstate water compact. Thus, the newly created interstate compact commissions of each state negotiated amendments addressing California's concerns. These amendments were subsequently incorporated into the Washoe Project Act.[65]

The California amendments provided that Stampede Reservoir be designed to allow future enlargement to 175,000 acre-feet for irri-

62. *See* H.R. Doc. No. 181, 84th Cong., 1st Sess. (1955).

63. Events leading to the Washoe project Act and negotiation of the California-Nevada Interstate Compact are set forth in more detail. *See* W. Jackson and D. Pisani, *A Case Study in Interstate Resource Management: the California-Nevada Water Controversy, 1955-1958*, (California Water Resources Center Contribution No. 147, 1974) [hereinafter Jackson & Pisani].

64. H.R. Doc. No. 181, 84th Cong., 1st Sess. at 200 (1955).

65. Washoe Project Act, Pub. L. No. 84-858, 70 Stat. 775 (codified at 43 U.S.C. § 614a (1956)).

gation of up to 12,000 acres in California.[66] The United States was prohibited from developing power on the Little Truckee River in a way that would impair future appropriation of water for consumptive use in California.[67] Finally, California water users in Alpine County were given the first opportunity to contract for yield from the proposed Watasheamu Reservoir on the Carson River before any water was offered for the development of new land in Nevada.[68] In 1966, the California Department of Water Resources was authorized to contract for yield from the Washoe project upon request of local agencies.[69]

2. Fishery Versus Urban Use of Stampede Storage: The Carson-Truckee Cases

When Stampede was completed in 1970, the Bureau of Reclamation proposed use of its water for domestic, municipal, and industrial purposes. However, the Secretary of the Interior has approved use of the reservoir's yield only for the Pyramid Lake fishery.

In 1958, the Carson-Truckee Water Conservancy District was created under Nevada law to enter into repayment contracts to purchase water from Stampede Reservoir.[70] The Bureau initially recommended execution of the contract, but no Secretary of the Interior has approved it. In 1967, the Secretary listed the Pyramid Lake Cui-ui as endangered.[71] In 1969, the Secretary notified the Carson-Truckee District that he no longer intended to operate Stampede for municipal and industrial purposes, and, until legal rights to the water were settled, he would operate Stampede only

66. *Id.* at 775-77. The State Water Rights Board issued Water Right Permits Nos. 11604 and 11605 pursuant to Decision No. 913 for Stampede Reservoir on October 27, 1956. It reserved to California water users the right to appropriate water not to exceed 30,000 acre-feet annually of the unappropriated water of the Truckee River system for use in the Truckee River Basin, limited annually to 30/156ths of the unappropriated water at the Stampede Dam site. The permit also included a condition requiring operation of the Stampede Reservoir to conform to any interstate compact covering distribution and use of the waters of the Truckee and Carson Rivers, if and when one is approved by the two states and Congress. The Bureau of Reclamation increased the design capacity of Stampede Reservoir to 226,500 acre-feet before it was constructed.

67. *Id.* § 2(e), 70 Stat. 775, 776.

68. *Id.* § 2(d), 70 Stat. 775, 776.

69. CAL. WATER CODE §§ 12050-57 (West 1971).

70. Water conservancy districts are established by court proceedings. *See* Chapter 541, Nev. Rev. Stat. Ann. §§ 541.010-541.420 (Michie 1986 & 1987 Supp.).

71. *See supra* note 18 and accompanying text.

for "flood control, recreation, and fish and wildlife benefits."[72]

The District and the Sierra Pacific Power Company brought a declaratory judgment action against the Secretary of the Interior. They contended that the Washoe Project Act obligated the Secretary to store water in Stampede for the benefit of the plaintiffs.[73] The Pyramid Lake Tribe intervened as a defendant. All parties agreed that the Secretary had obligations to the Tribe and under the Endangered Species Act. These obligations took precedence over the Secretary's responsbility to store water for municipal and industrial purposes.[74] The issue before the court was the degree to which fish should be preferred over the municipal and industrial uses. The court held that the Secretary had the duty to defer all other uses until the fish were no longer classified as endangered or threatened.[75] The court deferred to the Secretary's plan to release water from Stampede during the May-June spawning season of the Cui-ui. The court found that releases for the fish may require all of the storage in Stampede, leaving none for municipal and industrial uses during drought years.[76]

The Ninth Circuit affirmed the District Court's construction of the Endangered Species Act. The circuit court found that the act supported the Secretary's decision to use the yield of Stampede until the fish are no longer threatened. However, the court did not rule on whether the Secretary had an obligation to reimburse the depleted water.[77]

The effect of the *Carson-Truckee* decisions forced Westpac Utilities (the subsidiary of Sierra-Pacific) and Washoe County to search for alternative sources of water for the growing demands for the Reno-Sparks area. Westpac argued that it cannot rely on irrigation water alone in a drought. Stored water is needed to satisfy their needs.[78]

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72. Carson-Truckee Water Conservancy Dist. v. Watt, 537 F. Supp. 106, 109 (D. Nev. 1982), *aff'd*, 741 F.2d 257 (9th Cir. 1984). *See id.* at 107-10, Carson-Truckee Water Conservancy Dist. v. Watt, 549 F. Supp. 704, 706-08 (D. Nev. 1982) (background of the events leading up to the Stampede Reservoir litigation). *See also* 37 Fed. Reg. 19838 (Sept. 1972) (for the Secretary's decision to operate Stampede Reservoir for Pyramid Lake fish).

73. Carson-Truckee Water Conservancy Dist. v. Watt, 537 F. Supp. 106, 109 (D. Nev. 1982).

74. Carson-Truckee Water Conservancy Dist. v. Watt, 549 F. Supp. 704, 708 (D. Nev. 1982).

75. *Id.* at 710.

76. *Id.* at 711.

77. Carson-Truckee Conservancy Dist. v. Clark, 741 F.2d 257, 261 (9th Cir. 1984).

78. *Water Resource Plan*, *supra* note 20, at 3-14 - 3-16.

California's rights to stored water in Stampede are speculative as a result of the *Carson-Truckee* decisions. The California-Nevada Interstate Compact would have allocated California up to 6,000 acre-feet per year yield from Stampede for use in the Truckee Basin, or by exchange.[79] The Compact would not have obligated the Secretary to contract with California for water from Stampede, since the allocation was "subject to the execution of a contract or contracts therefor with the United States of America."[80] Thus, even with the Compact, California, like the Carson-Truckee District, may have been denied use of Stampede Storage.

The uncertainty over the availability of Stampede storage was one of the factors that led the Nevada Public Service Commission to require Westpac to prepare and update a water resource plan. Westpac's search for alternative sources of supply, some of which are in California, has rekindled arguments over allocation of interstate waters. The Counties of Lassen, Sierra, and Nevada have intervened in the Public Service Commission Docket protesting the plan's identification of California sources of water. One of these proposals would involve pumping on the Nevada side of the Honey Lake Ground Water Basin. Nevada has agreed to refain from acting on applications to export water from this Basin while the United States Geological Survey conducts a study of potential impacts of pumping on interstate groundwater supplies. Northeastern California local agencies are protesting water right applications, pending before the Nevada State Engineer, for the Honey Lake Basin and elsewhere. At the same time, California faces the prospect of the Tribe and other Nevada water users which are protesting water right applications pending before the State Water Resources Control Board.[81] Interstate disputes over water right proceedings led to the negotiation of the Compact. Prevention of these disputes was one

79. Interstate Compact, *supra* note 2, at art. VI B (3).

80. *Id.* California's testimony at Senate hearings on the Compact pointed out that the Compact did not compel the allocation of 6,000 acre-feet, but that the water could be obtained only if the Secretary approved a repayment contract. *See California-Nevada Interstate Compact: Hearings on S. 2457 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary* 99th Cong., 2d Sess., at 97-8, 106 (July 15, 1986) (Statement of David N. Kennedy) (a bill to grant the consent of Congress to the California-Nevada Interstate Compact) [hereinafter *S. 2457 Hearing*].

81. Since 1972, the State Water Resources Control Board has not permitted any new applications or extended time for completion of use of existing permits for the Truckee and Lake Tahoe Basins, pending approval of the Compact. *See* State Water Resources Control Board, *Report on Water Use and Water Rights, Lake Tahoe Basin* (1979).

of the major objectives of the Compact. However, the Compact has not been ratified by Congress.

3. *The Tahoe Dam Litigation: Floriston Rates Reconsidered?*

The *Carson-Truckee* decisions may have progeny. In September, 1987, the Tribe filed suit against the Secretary of the Interior and Bureau of reclamation seeking to enjoin repair of the dam at Lake Tahoe for alleged violations of NEPA and the Endangered Species Act.[82]

On September 28, Judge Karlton denied the Tribe's request for a preliminary injunction. However, he allowed the Tribe to amend its complaint to address consistency of current operation of the Lake Tahoe dam with the requirements of NEPA and the Endangered Species Act. In December, 1987, the Tribe filed an amended complaint. In addition to the federal violations, the complaint alleged violation of California's public trust doctrine and California Constitution Article X, section 2, which requires that diversion and uses of water be reasonable.

In March, the California Attorney General petitioned to intervene in the litigation, representing California's interests as *parens patriae*. Some California water agencies have also intervened. Other interveners include the State of Nevada, the Sierra Pacific Power Company, the Truckee-Carson Irrigation District, and the Sierra Club.

This litigation raises again the issue of whether the *Orr Ditch* decree fixes the rights of the respective parties because the Truckee River Agreement is incorporated by reference in the decree. If this hurdle is overcome, the case may develop into a reconsideration of the Floriston rates, particularly the winter rates.[83]

II. The California-Nevada Interstate Compact: Certainty Lost

82. Pyramid Lake Paiute Tribe of Indians v. Hodel, No. S-87-1281-LKK/JFM (E.D. Cal. 1987).

83. In various Truckee River negotiations, the Tribe has sought a modification of the operation of the Truckee River to limit winter releases to amounts needed for consumptive use; the water otherwise released during the winter for hydroelectric generation would be released instead in May and June, when it is needed for Lahontan Cutthroat Trout and Cui-ui spawning.

A. Disputes Directly Contributing to Compact Negotiations.

Protests of water right proceedings in one state by water users in the other are not new. The current interstate disputes over pending water right applications reflect similar disputes in the 1940s and 1950s.

Following the Second World War, Lake Tahoe experienced a new era of growth. Downstream Nevada water users protested water right applications made to the California State Engineer[84] and the Nevada State Engineer for domestic and municipal uses in the Lake Tahoe Basin. The two state engineers issued a joint report in 1949 which concluded that the granting of the pending applications, or those that would be filed in the foreseeable future, would have negligible impacts on the depletion of Lake Tahoe waters. The report recommended that it should be the policy of both states to continue to grant permits for applications for domestic and recreational uses of water in the Lake Tahoe Basin.[85]

The Joint Report failed to end continuing protests by downstream interests to Lake Tahoe water right applications. The Nevada State Engineer, Edmund Muth, and the California State Engineer, A.D. Edmonston, believed that an interstate compact was the best way of achieving certainty over the amount of water available for present and future uses in the Lake Tahoe Basin. It was their efforts, together with California's initial opposition to the Washoe Project, that directly led to negotiation of the California-Nevada Interstate Compact.

Several additional controversies contributed to the decision to negotiate an interstate compact. Continuing controversy over high and low water levels in Lake Tahoe was another issue proposed for resolution through an interstate compact. High water in 1942 and 1943 and low water in 1949-50 brought demands from Lake Tahoe residents for limits on Lake Tahoe levels.

In the late 1940s, the United States brought suit against the Sierra Valley Water Company, which diverts water from the Little Truckee River to the Sierra Valley. The United States sought a prior right for the Pyramid Lake Reservation and the Newlands Project. The

84. The State Engineer was the predecessor of the State Water Resources Control Board.

85. Nevada and California State Engineers, *Joint Report on the Use of Water in the Lake Tahoe Watershed* (1949) (copy on file with the Department of Water Resources).

suit was not settled until after Compact negotiations were under way.[86]

In the Carson River Basin, a general adjudication had been pending since 1925, when the United States brought suit to establish the rights of the Newlands Project. The suit, *United States v. Alpine Land and Reservior Co.*, sought to reconcile all claims in California and Nevada.[87] Similarly, in the Walker River Basin, a 1937 general adjudication of *United States v. Walker River Irrigation District*[88] established the respective rights of California and Nevada users. However, these rights were enforced in the 1950s in a new manner detrimental to California irrigators.

B. Negotiation of the Compact.

In 1955, California[89] and Nevada[90] enacted similar statutes creating separate compact commissions with the same name, the "California-Nevada Interstate Compact Commission." (When the two Commissions met, they were referred to collectively as the "Joint California-Nevada Interstate Compact Commission.") Both states appointed the commissions in 1955. That same year, the United States Congress gave its consent to the two states to "negotiate and enter into a compact with respect to the distribution and use of the waters of the Truckee, Carson, and Walker Rivers, Lake Tahoe, and tributaries of such rivers and lake in such States."[91] This consent was given on two conditions: (1) a federal representative appointed

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86. United States v. Sierra Valley Water Co., Civ. No. 5597 (N.D. Cal. 1958). The decree confirms the Company's right to divert up to 60 c.f.s. from the Little Truckee River, with a maximum flow set for Cold Stream Creek, into which the Truckee waters are diverted. Thus, the amount that can be diverted under the Sierra Valley right depends on whether the water year is wet or dry.

87. United States v. Alpine Land & Reservoir Co., Civ. No. D-183 BRT (D. Nev. Dec. 18, 1980) (final decree) *aff'd*, 697 F.2d 851 (9th Cir. 1983), *cert. denied*, 464 U.S. 863 (1983).

88. United States v. Walker River Irrigation Dist., No. C-125, (D. Nev. 1937) *aff'd*, 104 F.2d 334 (1939).

89. 1955 Cal. Stat., ch. 1810.

90. 1955 Nev. Acts, at 225 (codified as amended at NEV. REV. STAT. ANN. §§ 538.270-538.410 (Michie, 1986)).

91. Pub. L. No. 84-553, 69 Stat. 675 (1955). Advance consent of Congress to negotiate an interstate compact is not required by United States Constitution, article I, section 10, clause 3. Congress may give its consent before or after negotiation and execution of an interstate compact. However, advance consent to negotiation of an interstate water compact, with the requirement that the compact not become effective until later approved by Congress, is the accepted practice. *See* MUYS, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT 255-59 (1971).

by the President would participate in the negotiations, and (2) the Compact would not be binding on the states until ratified by the Legislature of each State and consented to by the Congress.

President Eisenhower appointed Robert J. Newell as the federal representative.[92] Newell served as the nonvoting chairman of the Joint Commission. The federal statute consenting to the compact negotiations called on the federal representative to "participate in such negotiations and . . . make a report to the President and to the Congress of such proceedings . . . ."[93] However, Newell's role and that of his federal legal advisor, Howard Stinson, was essentially passive. Newell did not assert federal claims or actively represent any federal interests during the negotiations.[94] A letter from the Secretary of the Interior to the members of both State Commissions advised that the negotiations should stay within the water right decrees on the Truckee River, including those in the *Orr Ditch* decree for Pyramid Lake.[95] Representatives from various federal agencies attended most Joint Commission meetings, as well as meetings of the committees which negotiated the allocations for each drainage basin. These representatives said little about federal claims or interests.

The United States was under no obligation to participate actively in the negotiations. Indeed, its historic posture was that it would not be a party to any interstate compact. As Muys has observed, where the United States participates in interstate water compact negotiations as a neutral, nonvoting chairman, its role "is in reality little more than an honored guest, an observer without obligation to see that federal plans for programs in the region do not clash with those of the states."[96] Nonetheless, the posture taken by the federal officials did nothing to signal the substantial opposition of

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92. Newell served through most of the negotiations until 1967. He was replaced by J.R. Ritter, from the Bureau of Reclamation in Denver. Ritter served until 1971. There was no federal representative until President Carter appointed John R. Little, Regional Solicitor, Denver, in 1979.

93. Pub. L. No. 84-553, 69 Stat. 675 (1955).

94. An undated memorandum from Stinson to Newell, apparently written early in 1957, describes the United States water rights for the reclamation project and the Indian reservations only in general terms. With respect to the Pyramid Lake reservation, the opinion assumes that the Tribe has a decreed right to 120 cubic feet per second with an 1859 priority. The opinion concludes that the United States may consent to be bound by limitations in the compact, if provided in the consent legislation (copy on file with the Department of Water Resources).

95. Minutes of the Joint Commission Meeting, December 21, 1956 (copy on file with the Department of Water Resources).

96. Muys, *supra* note 91, at 106.

the United States which would appear in 1965, after a draft of the Compact was substantially completed. Whether or not justified, the Compact negotiations appear to have relied on the general guidelines provided initially by the Secretary of the Interior and on the general silence of the federal representatives during the negotiations.

The negotiations began in 1956 and dragged on for nine years, until an agreement was reached on a draft Compact late in 1965.[97] The Lake Tahoe, Truckee and Walker river allocations proved difficult to negotiate because of a series of complex technical matters that had to be decided. In the Lake Tahoe Basin, a gross diversion figure of 34,000 acre-feet for present and future uses was agreed to. This reflects the relative water needs of the area, based on percentage of land in each State: 11,000 acre-feet per year for Nevada and 23,000 acre-feet for California.[98] The Truckee Basin was one of the most difficult agreements. After many deadlocks, many of the technical details of the ultimate California Truckee River allocation were left to the permanent Commission established to administer the Compact.[99] No basin allocations were made within Nevada, other than the Pyramid Lake Tribe's *Orr Ditch* decreed rights.[100] California's allocation had a priority second only to the Tribe's rights.

There was little disagreement among the Commission members of both States on the principle that federal uses of water should be charged to the state where the uses occur. The 1965 draft and the final version of the Compact contained a provision similar to several other western interstate water compacts: "The use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the state in which the use is made."[101] The Compact also provided that it would not be binding

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97. *See* Jackson & Pisani, *supra* note 63 (detailed history of the progress of the negotiations, including the initial positions of each State, and the progress toward the ultimate compromises).

98. *See* Interstate Compact, *supra* note 2, at art. V.

99. *E.g.*, Interstate Compact, *supra* note 2, at art. VI, B (depletion of the Stampede Reservoir allocation, and development of additional storage in the Truckee River Basin). The Compact allocated to California 10,000 acre feet per year direct diversion from the Truckee River, 6,000 acre feet per year from the yield of Stampede Reservoir, and a right to develop an additional yield of 10,000 acre feet per year in the Truckee Basin when the first two allocations are used.

100. Interstate Compact, *supra* note 2, at art. VI. A. and D.

101. *Id.* at article III C. *Compare id. with* the Pecos River Compact, Pub. L. 81-91, 63 Stat. 160 (1949) (between Texas and New Mexico). The Pecos River Compact provides:

> The consumptive use of water by the United States or any of its agencies, instru-

on either state unless the Congress provided in its consent legislation, or by separate legislation, that the allocations between the states shall be binding on the United States, its agencies, instrumentalities, and wards.[102]

The Commission members of both States felt that these provisions were vital for two reasons. First, the United States controlled virtually all the storage on the Truckee River and was its major water user. Second, the United States claimed substantial portions of the flow of the Carson and Walker Rivers. However, these two provisions ultimately proved fatal to the Compact.

C. Objections of the United States to the Compact

In October, 1965, the Joint Commission agreed on a provisional draft of the Compact, and the federal representative circulated it to the federal agencies for their formal comments. Given the low profile of the federal agencies during the negotiations, the formal comments were a surprise. They ranged from a "no comment" on behalf of the Department of the Army to substantial objections from the United States Department of Justice and the United States Department of the Interior. The main source of objection was the Compact's requirements in Article XXII that the United States be bound to the Compact's allocations and Article III C, charging federal uses to the state where they are made.[103] Most of the other

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> mentalities, or wards shall be charged as a use in the state in which the use is made; provided that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to the latter state.

Id. at 165.

See also Republican River Compact, 57 Stat. 86, 90 (1943) (between Colorado, Kansas and Nebraska) (article XI (a) requires that uses by the United States or "those acting under its authority" shall be made within the Compact's allocations). President Roosevelt vetoed earlier consent legislation, because the compact declared the Republican River non-navigable. *See* MUYS, *supra* note 91, at 432. A similar provision appears in the Yellowstone River Compact, Pub. L. No.82-231, 65 Stat. 663, (1951) (between Montana, North Dakota, and Wyoming) (article VII, D.); Belle Fourche River Compact Pub. L. No. 78-236, 58 Stat. 94 (1944) (between Wyoming and South Dakota).

102. Interstate Compact, *supra* note 2, at art. XXII.

103. The comments of the federal agencies on the October 1965 provisional draft of the Compact are summarized in a September 15, 1966, memorandum to Commission members in the Compact Commission files. The comments are also quoted, with the Commission's response to each comment in two undated documents titled *Comments of the United States Department of the Interior to the October 1965 Draft of the California-Nevada Interstate Compact and the Replies Thereto of the California-Nevada Interstate Compact Commission* (on file at the *Pacific Law Journal*) [hereinafter *Comments of the Department of Interior*], and *Comments*

comments were technical in nature. After another two years of negotiation, these comments either became no longer relevant or were specifically addressed in the final version of the Compact approved on July 25, 1968. However, the vexing problem of the Compact's effect on federal claims remained unresolved.

The Department of Interior comments on the 1965 provisional draft pointed out that making the allocations binding on federal agencies was without precedent and recommended that the binding requirement of Article XXII (3) be deleted. They also recommended the requirement that federal uses of water be a claim on the entire interstate stream system and not charged to the allocation of the state where the uses are made. The Commission's response to the latter comment was that the proposal "poses problems of great uncertainty insofar as the rights of the two states are concerned and could conceivably destroy the theory of the entire Compact."[104] The Department of Justice also questioned the binding effect on the federal government and suggested that the Commission furnish a statement of reasons in support of it.

The Commission prepared a long response to the objection to Article XXII (3), which was signed by the chairmen of both State commissions. The response pointed out that many of the sections objected to had been redrafted or deleted.

> The few remaining sections to which the two states desire that the United States be bound are justified basically upon the proposition that the United States is the major diverter or user of water, particularly the waters of the Truckee and Carson Rivers and Lake Tahoe, and that the Compact between the states could not be effective unless the United States agrees to the total quantity allocated for use within the respective states.
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> . . .
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> The Compact area is a water short area with very little surplus water existing over present use. These present uses are expressed in the compact in terms of allocations of water to the respective states. Unless the United States agrees that these allocations are proper and consents to be bound by them neither state would be assured by the Compact that these uses could be maintained. It is

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of the Department of Justice, Department of Commerce, Federal Water Pollution Control Administration, Federal Power Commission, to the October 1965 Draft of the California-Nevada Interstate Compact and the Replied (sic) Thereto of the California-Nevada Interstate Compact Commission (on file at the *Pacific Law Journal*) [hereinafter *Comments of the Department of Justice*].

104. *Comments of the Department of Interior, supra* note 103, at 5.

> almost a certainty that what presently unused waters are available and could be developed in the future would entail the inclusion of the United States as a party to the development. These waters in excess of present use have also been allocated between the states. If the United States was the developer of a future project, which seems likely, and if the United States was not bound by the allocations of water made available by such future development, the agreement between the two states would be futile.[105]

The two states would make this argument throughout the time the Compact was pending before Congress. Similar arguments may be seen in their testimony in congressional hearings on two bills that would have provided the consent of Congress to the Compact.[106]

In 1969, the Secretary of the Interior amplified the Department's position with regard to the Compact. He wrote that it should be renegotiated to recognize the United States right to proceed with litigation to establish the reserved water rights for the Pyramid Lake Reservation.[107] He asserted that:

> Our position with regard to the Indian water rights is predicated upon the principles enunciated in *Winters* v. *United States*, 207 U.S. 564 (1908), and in *Arizona* v. *California*, 373 U.S. 546 (1963). We consider that all waters from Lake Tahoe and the Truckee River system, other than waters (1) appropriated by the United States for such other purposes as the Newlands Project, or (2) adjudicated to third parties in litigation to which the United States was a party, as in *United States* v. *Orr Water Ditch Co., et al.*, Nev. Equity No. A-3, D.C. Nev. September 8, 1944, are reserved for present and future development of the Pyramid Lake Indian Reservation.[108]

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105. Letter to J.M. Ritter, U.S. Bureau of Reclamation from Hubert Bruns, Chairman, California Commission and Roland D. Westergard, Chairman, Nevada Commission (Aug. 1, 1968) (copy on file with the Department of Water Resources). *See* MUYS, *supra* note 91, at 270-273 (text of most of the letter is reprinted herein).

106. *To Settle Claims Affecting the Pyramid Lake Paiute Indian Tribe of Nevada: Hearings on S. 1558 Before the Senate Select Comm., on Indian Affairs*, 99th Cong. 1st. Sess., 171-72 (1968) (Statement of Roland D. Westergard) [hereinafter cited as *S. 1558 Hearings*]. *See also S. 2457 Hearing*, *supra* note 80, at 65-66 (statement of Roland D. Westergard); 90, 95-96 (statement of David N. Kennedy).

107. The United States attempted to bring such an adjudication through its abortive original jurisdiction suit against Nevada and California. *See supra* note 43.

108. Letter from Walter Hickel, Secretary of the Interior to Robert P. Mayo, Director, Bureau of the Budget, (March 18, 1968). A similar letter had been sent from Stewart I. Udall, Secretary of the Interior, to Charles J. Zwick, Director of the Office of Management and Budget (January 14, 1969). *See S. 1558 Hearings*, *supra* note 106, at 540 (letter from Udall to Zwick is reprinted herein).

The effect of this claim, if taken at face value at the time it was made, would have been that California water users in the Lake Tahoe and Truckee Basins (except the Sierra Valley Water Co.) had no entitlements to water, if their uses were initiated after 1859! The *Orr Ditch* decree included, for the most part, only Nevada users.

It would be natural to conclude that the United States was playing a dog-in-the-manger role in the negotiations, since it only made its strong objections to the reserved rights claim after the Compact was negotiated. To some degree this conclusion is justified. However, the thirteen-year period during which the Compact was negotiated was the twilight of new interstate water compacts and the dawn of new concerns for the environment and civil rights, including Indian rights. The United States new position was the result of environmental concern about the deteriorating conditions at Pyramid Lake. However, it also reflected the expanded scope of reserved water rights for Indian lands set forth in the Supreme Court's decision in *Arizona v. California.*[109] *Arizona* and several other reserved rights cases were decided while the Compact negotiations dragged on.

D. Ratification of the Compact

In 1969, legislation ratifying the Compact was introduced in the Nevada and California legislatures. The Nevada legislation was passed by both houses and signed by Governor Laxalt.[110] Two bills were introduced in the California Legislature.[111] The California bills were opposed by the Pyramid Lake Paiute Tribe, the United States, and the Sierra Club. The Assembly Committee on Natural Resources killed the legislation. Thereafter, Assemblyman Chappie introduced House Resolution 443 calling for interim study of the Compact. This resolution was referred to the Assembly Committee on Water.

The Committee submitted a report on the matter in 1970, proposing certain modifications to the Compact.[112] The Committee did

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109. 373 U.S. 546 (1963). This case utilized the standard of "practicably irrigable acreage" to quantify an Indian reserved right, although the right was not limited exclusively to irrigation. Had that standard been used in the *Orr Ditch* litigation, the Pyramid Lake Reservation claim may have been based on 19,000 acres, rather than 5,875 acres. *See* United States v. Truckee-Carson Irrigation Dist. 649 F.2d 1286, 1294 (9th Cir. 1981).

110. Statutes of Nevada, at 69, 1259 (1969) (AB 60).

111. AB 58 (Chappie) and SB 149 (Teale) (1969).

112. *Cal. Assem. Comm. on Water, Report on the California-Nevada Interstate Compact,*

not attempt to resolve the objections of the United States, but it took the United States to task for its role during the Compact negotiations:

> First, we note that the United States was represented by a presidential appointee during the entire thirteen year Compact negotiation period. In view of this, the Committee finds it difficult to understand why the federal government did not voice its objections to the Compact until a Compact had been agreed to by the States of California and Nevada.
>
> We find the United States government's actions to be particularly unreasonable in view of the necessity of securing approval of a Compact at the earliest possible time and particularly in view of the fact that the federal legislation giving consent of Congress to the States of California and Nevada to negotiate and enter into a Compact specifically provided that "a representative of the United States, appointed by the President of the United States *shall participate in such negotiations. . . .* [113]

The Committee observed prophetically that "experience has shown that the federal agencies can be quite successful in delaying congressional consent to a proposed Compact if they have even minor objections to any of its provisions."[114] Accordingly, the Committee recommended that the two states make every effort to resolve the federal issues prior to forwarding the proposed Compact to Congress.

In 1970, legislation incorporating the Assembly Water Committee's recommendations was passed and signed by Governor Reagan.[115] The Nevada Legislature concurred in the California amendments to the Compact in 1971, and the bill was signed by Governor O'Callaghan.[116]

In 1972, the California State Water Resources Control Board adopted a "Policy for the Administration of Water Rights in the Lake Tahoe Basin." This policy assured that water use on the

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at 4-7 (copy on file at the *Pacific Law Journal*). The amendments added Article VI B. 4 (b) to limit California's right to develop additional yield in the Truckee River Basin to 10,000 acre feet, solely for domestic, municipal, and industrial purposes, and Article XVIII C., further clarifying that the Compact would not adversely affect rights to the use of water in either state.

113. *Id.* at 8-9 (emphasis added).

114. *Id.* at 10.

115. 1970 Cal. Stat. ch. 1480 (enacting CAL. WATER CODE § 5976). The Sierra Club dropped its opposition to the Compact because of the amendments recommended by the Committee. It stated that the problem was not the Compact but the Secretary of the Interior's mismanagement of the Newlands Project.

116. Statutes of Nevada, at 29 (1971).

California portion of the Basin stayed within the Compact's allocations.

It was intended to be an interim measure until the Compact became effective. The Policy is still in effect. It provides that issuance of new water right permits will be limited so that their aggregate face value, together with all other uses of water, including ground water, does not exceed 23,000 acre feet per year.[117]

The Nevada State Engineer also took steps to assure that water uses in the Nevada side of the Lake Tahoe Basin remained within the Compact allocations. However, one case put his authority to comply voluntarily with the Compact into question. In *Morales and Naify v. Westergard*,[118] the Nevada Supreme Court ordered the State Engineer to issue a permit for a condominium development, part of which was outside the Lake Tahoe Basin. The use of water ordered by the Nevada Supreme Court was not permitted by the Compact. The court avoided determining whether the permits were a violation of the compact. Instead the court found that most of the water would be returned by natural gravity to the Lake Tahoe Basin. The State Engineer responded to the order by making his approval expressly subject to the Compact and to the *United States v. Truckee-Carson Irrigation District* litigation.[119]

Voluntary compliance with the terms of the Compact has continued to the present day. With the exception of the *Morales* case, no significant breaches of the Compact allocations have occurred. This compliance demonstrates that the Compact's allocations are good evidence of an equitable apportionment, since the states have been working with the allocations since 1971.

E. Early Efforts to Secure the Approval of Congress.

Governors Laxalt and Reagan agreed with Secretary Hickel to establish a Pyramid Lake Task Force to investigate possible solu-

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117. The Policy is summarized in California State Water Resources Control Board, *Report on Water Use and Water Rights*, at 40-41 (October 1979). The S.W.R.C.B. prepared a controversial environmental impact report on revisions to the Policy, but no final EIR has been prepared, nor have any revisions been made to the 1972 policy. *See Draft Environmental Impact Report: Policy for Water Allocation in the Lake Tahoe Basin* (July 1984) (on file at the *Pacific Law Journal*).

118. 90 Nev. 189, 522 P.2d 1224 (1974).

119. Civ. No. R-2987 JBA (D. Nev. 1973), 649 F.2d 1286 (9th Cir. 1981), *rev'd*, Nevada v. United States, 463 U.S. 110 (1983).

tions to the Pyramid Lake problem.[120] They agreed not to attempt to secure the consent of Congress while the Task Force was at work. However, shortly after the California Legislature ratified the Compact, Representative Harold T. (Bizz) Johnson introduced consent legislation.[121] When the Task Force determined that the Compact only speaks to the division of waters between the two states and not to the allocation of waters to other interests within each state, the Governors decided to push Johnson's bill. While the two states supported the Johnson bill, no hearings were held on it. The opposition of the Tribe and the Departments of Interior and Justice was effective; six consent bills were introduced between 1971 and 1979, and none received a single committee hearing.[122]

Throughout this period, the United States continued to oppose ratification of the Compact. For example, during the Carter Administration, Interior Secretary Cecil D. Andrus recommended that the United States continue to oppose the Compact. Instead, he proposed negotiation of a new Compact, modeled after the Delaware River Basin Compact,[123] in which the United States would be a signatory.[124]

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120. *See* Pyramid Lake Task Force Final Report (Dec. 1971) (copy on file with the Department of Water Resources).

121. H.R. 6078 92d Cong. 1st Sess. (March 15, 1971). The Bill was referred to the House Judiciary Committee and never heard.

122. H.R. 6078 (Johnson) (March 15, 1971), S. 3703 (Bible) (June 13, 1972), S. 1202 (Laxalt) (March 17, 1975), H.R. 5694 (Johnson) (April 8, 1975), S. 668 (Laxalt) (Feb. 10, 1977), S. 1544 (Laxalt) (July 19, 1979).

123. Pub. L. No. 87-328, 75 Stat. 688 (1961). The Delaware River Basin Compact is between the United States and the States of New York, New Jersey, Pennsylvania, and Delaware. It confers broad governmental powers on a compact commission to perform planning functions, licensing of projects, coordination of federal, state, municipal and private water resources programs, and protection of water quality. The United States had misgivings about being a party to an interstate compact. However, with certain consent reservations, the Compact was approved. *See* MUYS, *supra* note 91, at 117-92.

124. *See Pyramid Lake Paiute and Truckee River Settlement Act of 1985: Hearings on S. 1558 Before the Senate Subcomm. on Public Lands, Reserved Water, and Resource Conservation of the Comm. on Energy and Natural Resources*, 99th Cong., 1st Sess., at 277-81 (letter from Cecil D. Andrus to James T. McIntyre, Director, Office of Management and Budget (May 25, 1979)) [hereinafter *S. 1558 Hearings (Energy Committee)]*. The letter stated:

> [T]he issues addressed in the proposed Compact are of extreme importance to the United States and the interest (sic) of the United States are not adequately recognized or protected in the provisions of the draft. In spite of this situation, the negotiations, format, and Congressional consent procedures followed in the proposal of this Compact are all based on the procedures used where there is little or no Federal interest involved. We believe that the circumstances in this matter are such that the United States should insist upon a Federal-interstate compact of the type pioneered by the Delaware River Basin Compact of 1961, wherein the United States is a signatory party of equal standing with the signatory states and entitled to equal voice in the administration of the Compact (footnote omitted).

Id. at 280.

The administration of California Governor Jerry Brown continued to support the Compact in principle, but the support was conditional. The Resources Agency and the Governor adopted a position which tied approval of the Compact to resolution of the Pyramid Lake problems. In 1982, the Nevada compact Commission requested Governor Brown to articulate the State's position. In response, the Governor stated:

> California has no interest in reopening or renegotiating the terms of the Compact. California intends to continue to observe its mutual understanding with the State of Nevada that we will administer our water rights programs in accordance with the allocations made by the Compact pending congressional ratification. At the same time, we recognize that it would not be responsible to support ratification without addressing two issues left unresolved by the Compact. These are: [(1)] preservation of Pyramid lake[; and (2)] maintenance of conditions in the lower Truckee River which support the Lahontan Cutthroat Trout and Cui-ui fisheries in the River and in Pyramid Lake for the benefit of the Pyramid Lake Paiute Tribe of Indians.
>
> Protection of these resources is a matter of national concern. Accordingly, while California would like the Compact to become effective, we can support congressional ratification only if the legislation ratifying the Compact also assures adequate protection for Pyramid Lake and for the fisheries in the Truckee River.[125]

Nevada officials regarded this position as being tantamount to *de facto* opposition to the Compact. Ironically however, the Brown Administration's position bears some similarities to S. 1558, a 1985 settlement bill negotiated among the Nevada parties. This bill linked consent to the Compact to settlement of most of the outstanding lawsuits and implementation of various physical solutions.

F. Final Efforts in Congress: The Compact Abandoned

Three events led to renewed efforts to secure the consent of Congress to the Compact. Some progress had been made in settlement negotiations, California revised the Brown Administration's

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125. Letter from Governor Edmund G. Brown Jr. to Peter G. Morros, Nevada State Engineer (Aug. 16, 1982) (on file at the *Pacific Law Journal*).

position, and the United States Supreme Court decided *Nevada v. United States.*[126]

Senator Laxalt introduced S. 1558[127] in 1985. S. 1558 was the culmination of four years of intensive negotiations among the principal Nevada water users. In the late 1970s, the Reagan Administration encouraged settlement negotiations to resolve outstanding Truckee River litigation. California was not invited to participate in the negotiations, and it did not insist on being a party. California officials viewed the Truckee River disputes as an internal Nevada matter.

During these negotiations, Nevada Governor Bryan notified the California governor that Nevada intended to proceed with legislation to secure consent to the Compact and urged California's support. Governor Deukmajian's reply expressed unqualified support for the Compact, indicating that California would also support federal funding for water conservation measures for areas served from the Lower Truckee River.[128] California no longer coupled its support for the Compact with legislation providing for physical solutions.

Nevada's interest in pushing for consent legislation was heightened after the United States Supreme Court decided *Nevada* v. *United States.*[129] During the settlement negotiations it insisted that approval of the Compact was a *sine qua non* of any settlement.[130] After the Supreme Court decision, Nevada urged California to join in seeking early ratification of the Compact.

In July 1985, the settlement negotiations produced a working draft of proposed legislation. The draft was introduced by Senator Laxalt as S. 1558.[131] Senator Laxalt's staff believed that a bill had to be introduced, if legislation was to be considered in 1985. However, there is a difference of opinion as to whether the printed bill represented the agreement. The Nevada water users claimed that it was agreed upon. The Tribe claimed that the bill represented an earlier negotiating draft.[132]

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126. *See supra* notes 17 & 47 and accompanying text.

127. S. 1558, 99th Cong., 1st. Sess. (1985) (on file at the Department of Water Resources).

128. Letter from Governor Richard Bryan to Governor George Deukmajian (Feb. 14, 1984) (on file at the *Pacific Law Journal*); Letter from George Deukmajian to Richard Bryan (April 13, 1984) (on file at the *Pacific Law Journal).*

129. 463 U.S. 110 (1983).

130. Nevada had initially insisted that the Compact be approved before any settlement legislation was introduced. *See S. 1558 Hearing, supra* note 106, at 176 (testimony of Roland D. Westergard).

131. *See supra* note 129 and accompanying text. A companion bill, H.R. 3213 (Vucanovitch and Reid), was introduced in the House during the second session of the 99th Congress.

132. *See S. 1558 Hearings, supra* note 106, at 241-49 (statement of Wilfred Shaw). The

S. 1558 would have consisted of two titles. Title I would have contained the settlement agreement. Title II would have provided the consent of Congress to the Compact. Title II would have provided Congressional consent only if a series of conditions precedent in Title I occurred. Title I would have provided funding for fish restoration programs at Pyramid Lake, and guaranteed lake elevations. Title I would have also required the United States to pay damages to the Tribe if Pyramid Lake water levels could not be maintained. The bill also provided a supply of water for Reno from Stampede Reservoir during critical drought years. However, these provisions would become operative only if all the pending Truckee River lawsuits were dismissed with prejudice.[133] The other provisions of Title I were conditioned upon these dismissals occurring within a year.

The compromise in S. 1558 went farther toward resolution of Truckee River disputes than any other prior or subsequent efforts to bring peace to the River. However, its resolution of the issues was illusory, because several major issues remained unresolved. The parties had to agree on an OCAP for the Truckee-Carson Irrigation District, a matter which remains in bitterly contested litigation. They also had to agree on revised flows and operation of reservoirs for the Truckee River. To a large degree, S. 1558 set aside the most difficult issues for subsequent negotiations. Finally, there was no agreement on the Compact, even though it was included in the bill.

S. 1558 accomplished one thing the states and Senator Laxalt had wanted: hearings on the Compact. Three hearings were held during 1985. The Senate Select Committee on Indian Affairs held hearings on October 2.[134] The Senate Subcommittee of Public Lands, Reserved Water, and Resource Conservation of the Committee on Energy and Natural Resources held hearings on October 21.[135] The House Committee on Interior and Insular Affairs held hearings on October 3 on a companion bill, H.R. 3213. None of these hearings resulted in legislation being reported out of any committee.

The settlement agreement and S. 1558 ultimately foundered over disagreements on the California-Nevada Interstate Compact. The

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Tribe referred to a later August 20 version of the settlement agreement which was different from the printed version of S. 1558. This version appears in the testimony of the Tribe's attorney, Michael Thorp. *Id.* at 278-98. Most parties sought some amendments to the bill.

133. S. 1558, 99th Cong., 1st Sess. (1985) (on file at the Department of Water Resources). The cases included the then pending litigation affecting the waters of the Truckee and Carson rivers, except for three suits involving discharges from the Reno sewage treatment facilities.

134. *See S. 1558 Hearings, supra* note 106 and accompanying text.

135. *S. 1558 Hearings (Energy Committee), supra* note 124 and accompanying text.

Tribe testified that it remained opposed to congressional approval of the Compact.[136] The Tribe's stated preference was to drop the Compact from the bill. However, the Tribe would drop its opposition to the bill disclaimer if a provision were added stating that the settlement agreement in Title I of the bill, and actions taken pursuant to it, would take precedence over anything to the contrary in the Compact.[137]

Nevada refused to consider any condition potentially limiting the Compact. In response to a question, Governor Bryan said:

> [I]n our judgment, . . . the importance of the compact, the negotiations that took more than a decade to consummate in terms of agreement, . . . cannot in any way be diminished, compromised, or altered, in my judgment, without jeopardizing the prospect of the totality of settlement which is essentially the purpose of this legislation.[138]

The position of the Department of the Interior was ambiguous. On the one hand, they stated that they supported ratification of the Compact as a part of the over-all settlement.[139] On the other, they stated that "clarifying language" should be added to the consent provisions requiring that the Compact be "construed in harmony" with Title I, the Settlement Act.[140] In the other Senate committee hearing, the U.S. Department of Justice telegraphed its concern over the Compact more clearly. It urged amending the consent provisions to require that the provisions of Title I would supersede the Compact.[141]

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136. The Tribe's attorney, Michael Thorp, argued that the Tribe had not been represented in the Compact negotiations and had assumed that the Compact would include the usual disclaimers of impact on federal and Indian rights. The Compact's binding the United States and the Tribe would defeat efforts to save Pyramid Lake and would violate the basic tenant of federal Indian policy that Tribes participate in governmental decisions that affect them. The Tribe also argued that the Compact was obsolete because of intervening events, including the *Alpine* decree, the National Environmental Policy Act, and the Endangered Species Act. *See S. 1558 Hearings, supra* note 106, at 270-276. The Compact provisions were also opposed by the Walker River Paiute Tribe. *Id.* at 438-511 (statement of Elvin Willie, Jr.), and the Washoe Tribe of Nevada and California. *Id.* at 521-70 (statement of A. Brian Wallace).

137. The disclaimer read: "Nothing contained in this title (consenting to the Compact) shall be construed to prevent the implementation of any agreements that are entered into or measures taken pursuant to Title I of this Act. The provisions of the Compact shall be construed in a manner consistent with the purposes of Title I of this Act." *Id.* at 208.

138. *Id.* at 98-99. No California witness testified at either hearing on S. 1558. However, California concurred in Nevada's position.

139. *Id.* at 137 (statement of Robert N. Broadbent).

140. *Id.* at 115.

141. *S. 1558 Hearings (Energy Committee), supra* note 124, at 73-83 (written statement of Philip M. Brady). The Department of Justice also raised a new and rather strange argument

The impasse over the Compact could not be broken, and S. 1558 and the entire approach to a comprehensive settlement died. The failure of S. 1558 hardened the positions of all the parties to the negotiations. Nevada determined to push a bill providing only for consent to the Compact. California indicated that it would support such a bill.

In 1986, Senator Laxalt introduced a Compact-only bill, S. 2457.[142] California joined Nevada in actively supporting passage of the bill. Senator Laxalt got the bill referred to the Senate Judiciary Subcommittee on the Constitution, which held hearings on the bill on July 15, 1986.[143] The testimony of the supporters and opponents of the Compact was similar to the S. 1558 hearings the year before. The United States was less "supportive" of the Compact.[144] In effect, they wanted to write article XXII out of the Compact and make all rights recognized under state law junior in priority to any federal rights, including those perfected in the future. The Department of the Interior was maintaining the fiction that the Reagan Administration supported the Compact. In reality, there was little, if any change in the fundamental objections of the United States to being constrained by the interstate allocations.

Senator Laxalt made one last try. In September 1986, in the waning days of the 99th Congress, he attempted a quick slam-dunk. He amended a single sentence in a Department of Commerce appropriation. The sentence simply stated:

> Sec. 609. "The consent of Congress is hereby given to the California-Nevada interstate Compact, and the United States, its agencies, wards, and instrumentalities agree to be bound by its terms."[145]

This effort touched off a last minute flurry of negotiations on disclaimer language for federal rights. One interesting concept in

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that the Compact may violate the Appointments Clause of the United States Constitution, because the Compact Commission members would have jurisdiction over federal rights and obligations but not be appointed by the President, as required by the Appointments Clause. *Id.* at 82-83.

142. S. 2457, 99th Cong., 2d Sess. (1986) (on file at the Department of Water Resources). (to grant the consent of Congress to the California-Nevada interstate Compact).

143. *See supra* note 80 and accompanying text.

144. They again stated that they support the Compact, but subject to an amendment making the terms of the Compact subject to all present or future rights and obligations of the United States. Another disclaimer made the Compact's allocations subject to "the availability of water from those sources after all rights to water existing on the date of enactment of this act as well as those rights which may hereafter be decreed to the United States, its agencies, wards, and instrumentalities have been satisfied." *S. 2457 Hearings*, *supra* note 80, at 111 (statement of Wayne Marchant).

145. H.R. 5161, 99th Cong., 2d Sess. (1986).

the efforts was a grant of authority to the Secretary to acquire replacement water if it perfects a claim to reserved water rights.

Senator Laxalt and his staff had tried their best to put a last minute deal together, even getting an advance funding commitment from the Office of Management and Budget. However, Nevada remained adamant that the Compact not be altered, and on September 30, the Senator withdrew the consent language from the Continuing Resolution. He decided not to make any further efforts to secure the consent and approval of Congress to the California-Nevada Interstate Compact. He retired from the United States Senate at the end of the 99th Congress.

With the failure of Senator Laxalt's efforts in 1965 and 1966 to secure the approval of Congress, both states came to the conclusion that the Compact was dead and further efforts to secure the approval of Congress would be fruitless.

California has indicated on several occasions that it may bring an original jurisdiction suit against Nevada in the United States Supreme Court seeking an equitable apportionment of the waters of Lake Tahoe and the Truckee and Carson Rivers.[146] It has held off while several settlement options have been explored.

In March 1987, Interior Department officials proposed that the United States facilitate comprehensive settlement negotiations. Aside from alleging that the Stillwater Wildlife Area requires more water, the 1987 efforts accomplished nothing. Essentially, the Department of the Interior had to channel all its efforts into the bitterly contested OCAP litigation and Final Environmental Impact Statement. It had no time for settlement.

One of the problems with the 1987 effort is that the United States tried to "facilitate" agreements without negotiating its own demands, responsibilities and rights. Facilitation accomplished nothing because so much of the Truckee River system is affected by federal claims and projects. Until the United States again directly participates in some sort of negotiation or proceeding in which its rights

146. In the S. 2457 hearings, Senator Laxalt asked David Kennedy, Director of the California Department of Water Resources, what the future would be if the Compact were not approved:

> *Mr. Kennedy.* We have given that increasing thought. We certainly do not mean to threaten anybody, but we are now in Federal court with the Pyramid Lake Indians and we have about concluded that our only alternative is to initiate an action in the U.S. Supreme Court with Nevada and try to let that court determine once and for all who owns what on these various stream systems.

S. 2427 Hearings, supra note 80, at 110.

are quantified, or at least limited to the state where they are exercised, there will be no certainty in this troubled interstate water system.

III. The Quest For An Interstate Allocation: Future Choices

The thirteen years of interstate compact negotiations may not be a total waste. The record is replete with statements by the water officials of both states that they have voluntarily complied with the Compact's allocations.[147] Fifteen years of compliance with the Compact allocations indicates that they form the basis of a reasonable equitable apportionment. The problem at this point does not seem to be hammering out an agreement on the quantities. The difficulty the states face is finding a way to obtain certainty as to the allocations,[148] as to persons desiring to export water from one state to the other,[149] and as to the United States and Indian tribes.

The traditional view is that there are only two constitutional ways to divide water between two or more states. One is an interstate compact; the other is a suit brought under the original jurisdiction of the United States Supreme Court.[150]

A greater number of methods of allocations may be available. These methods would include: (1) The traditional interstate compact, e.g., the California-Nevada Interstate Compact; (2) the Federal Interstate Compact, e.g., the Delaware River Basin Compact; (3) congressional apportionment, e.g., *Arizona v. California* and the Boulder Canyon Project Act;[151] (4) congressionally created "compacts", e.g., the Pacific Northwest Electric Power and Conservation Planning Council;[152] (5) congressionally approved negotiated settle-

147. *See, e.g.*, the 1979 S.W.R.C.B. *Lake Tahoe Basin Report*, *supra* note 117.

148. *See* Morales & Naify v. Westergard, 90 Nev. 189, 522 P.2d 1224 (1974).

149. *See* Sporhase v. Nebraska, 458 U.S. 941 (1982) (holding that water is an item in interstate commerce subject to congressional regulation, and the states may not impermissibly restrict its export to another state).

150. *See generally* Frankfurter & Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L. J. 685 (1925); Stinson, *Western Interstate Water Compacts*, 45 Calif. L. Rev. 665 (1957) (Stinson was the first legal advisor to the Federal Representative on the Joint California-Nevada Compact Commission); Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 St. John's L. Rev. 1 (1985).

151. 43 U.S.C. §§ 617-618 (1982 & Supp. III 1985).

152. Pub. L. No. 96-501, 94 Stat. 2697 (1980) (codified at 16 U.S.C. §§ 839839h (1982 & Supp. IV 1986).

ments, e.g., the Southern Arizona Water Rights Settlement Act;[153] (6) administrative interstate agreements, which are not approved by Congress; and (7) an original jurisdiction United States Supreme Court suit. Each of these allocation mechanisms except administrative agreements and a Supreme Court suit requires action by the Congress and the President. All except administrative agreements could be utilized with varying degrees of success to address the Lake Tahoe, Truckee River, and Pyramid Lake controversies. Administrative Agreements could be used to avoid related concerns over interstate ground water basins, which do not involve federal issues.

A. Interstate Compact Options.

1. The Traditional Interstate Compact

Article III, section 10, clause 3 of the United States Constitution provides that "No State shall, without the consent of Congress . . . enter into any agreement or compact with another State or with a foreign power." The prohibition on entering into "any agreement or compact" appears to be absolute. However, the Supreme Court has determined that the consent requirement applies only to those agreements which would tend to increase the political power or influence to the states, and thus encroach upon the full exercise of federal authority.[154] The critical test is whether an agreement would operate to enhance the power of a state over what it could exercise in the absence of the agreement.[155]

It is generally conceded that interstate water compacts must have the consent of Congress, because they encroach on a number of federal prerogatives, including commerce, navigation, flood control, Indians, and reclamation.[156] All of these federal interests, and probably more, can be found in the waters of Lake Tahoe, the

153. Pub. L. No. 97-293, 96 Stat. 1261 (1982).

154. Virginia v. Tennessee, 148 U.S. 503 (1893); New Hampshire v. Maine, 426 U.S. 363 (1976).

155. *See* United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452 (1978) (interstate tax compact held not to require congressional consent because member states could exercise the same powers in its absence).

156. *See* MUYS, *supra* note 91, at 252-53.

Truckee River,[157] and Pyramid Lake. The United States controls the top and bottom of the system. No agreement can divide these waters without substantially affecting federal interests, as the negotiators of the California-Nevada Interstate Compact realized. Congressional action is necessary for any effective agreement. As the history of the Compact demonstrates, full participation of the federal government and the Tribe is also essential.

Interstate Compacts can serve an important purpose not considered when the original Compact was negotiated, namely regulating export of water from one state to another. The potential shortage of water in Reno in the event of a severe drought has both Washoe County and Westpac Utilities considering possible purchases or development of water within California. The affected California counties have demanded protection against depletion of their water resources.

The United States Supreme Court held in *Sporhase v. Nebraska*[158] that water was an article of interstate commerce. A state cannot restrict the export of water to another state, absent considerations of severe shortage. However, in *Sporhase*, the Court stated in *dicta* that equitable apportionment decrees and interstate compacts may restrict water within the boundaries of a state.[159] One scholar has argued that there is a fundamental difference between equitable apportionment which gives a preference to a resource to the residents of states involved in the apportionment[160] and the negative impact

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157. Except Navigability. The Truckee River was held to be non-navigable for federal commerce purposes, because it lacked interstate linkage by water. The river dropped too quickly with too many obstacles to carry logs or commerce between the states. Sierra Pac. Power Co. v. Federal Energy Regulatory Comm'n, 681 F.2d 1134 (9th Cir. 1982).

158. 458 U.S. 944 (1982).

159. *Id.* at 957. The Court expressed a reluctance to "condemn as unreasonable, measures taken by a State to conserve and preserve for its own citizens this vital resource [water] in times of severe shortage." One example of these measures cited by the Court was:

> [t]he legal expectation that under certain circumstances each state may restrict water within its borders has been fostered over the years not only by our equitable apportionment decrees (citation omitted) but also by the negotiation and enforcement of interstate compacts. Our law, therefore has recognized the relevance of state boundaries in the allocation of scarce water resources.

Id. at 956.

160. The term "equitable apportionment" has been applied almost exclusively to water. However, in *Idaho ex rel. Evans* v. *Oregon and Washington*, 462 U.S. 1017 (1983), the Court held that the doctrine of equitable apportionment is applicable to anadramous fish in the Columbia-Snake River system:

> Although that doctrine has its roots in water rights litigation, see *Kansas* v. *Colorado*, 206 U.S. 46, 98, 27 S. Ct. 655, 667, 51 L. ed. 956 (1907), the natural resource of anadramous fish is sufficiently similar to make equitable apportionment an appropriate mechanism for resolving allocative disputes.

Id. at 1024.

of the commerce clause on the power of states to restrict the free interstate flow of resources.[161]

One case, however, expressly holds that interstate movement of water may be barred, if it is prohibited by an interstate compact. *Intake Water Co. v. Yellowstone River Compact Commission*[162] involved a proposal to divert water outside the Yellowstone River Basin in violation of article X of that Compact.[163] Intake argued that the Compact was state law which impermissibly burdened interstate commerce. The Ninth Circuit held that the Compact was federal law for purposes of the commerce clause. "When Congress approved this Compact, Congress was acting within its authority to immunize state law from some constitutional objections by converting it into federal law."[164] Thus, unless the Supreme Court backs away from its dicta in *Sporhase*, it appears that an approved interstate compact may restrict interstate commerce of water in ways that would be impermissible under state law. This principle will become increasingly important to apportioning the Truckee River, in view of Reno's water problems.

While an interstate compact would bind the states and probably eliminate any potential *Sporhase* problems, it would not resolve the concerns about federal and Indian uses. A compact simply between the states may not protect California from future federal claims for water use in Nevada. The history of the California-Nevada Interstate compact demonstrates that greater participation by the United States and the Tribe is necessary to achieve an effective and complete interstate allocation of water. The twenty year history of federal objections to the Compact demonstrates the futility of convincing Congress to bind the United States over the objections of Indian tribes and federal agencies.

An interstate compact may be an ill-suited vehicle to accommodate federal interests because of the United States' historic reluctance to entangle federal interests with state law. Even with the participation of Indian tribes and the United States in allocation negotiations, it is doubtful that any agreement could be concluded in the form of an interstate compact. It would be too difficult to accommodate traditional notions of federal and tribal sovereignty and to subject

161. *See* Sims & Davis, *Water Transfers Across State Systems*, 31 ROCKY MTN. MIN. L. INST. 22-1 (1985).
162. 769 F.2d 568 (9th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).
163. Pub. L. No. 82-231, 65 Stat. 663 (1951).
164. 769 F.2d at 570.

that sovereignty to an independent governmental organization created by a bistate compact. Other forms of federal settlement legislation would avoid the institutional concerns inherent in negotiating and ratifying another interstate compact.

2. Federal Interstate Compacts

The Department of the Interior and the Tribe criticized the California-Nevada Interstate Compact because, among other reasons, they did not fully participate in its negotiation (for whatever reasons). They also objected because they were not equally represented on the Commission that administered it. One federal commentator suggested an alternative compact be negotiated and drafted along the lines of the Delaware River Basin Compact.[165]

Two interstate compacts, the Delaware River Basin Compact,[166] and the Susquehana River Basin Compact,[167] have fully participating federal representatives on the commissions that administer them. Both exercise broad powers to plan, develop, and manage the river basins for flood control, water supply, and pollution control.

The fundamental purpose of negotiating the Delaware River Basin Compact was to overcome the overlapping and uncoordinated administration of forty-three state agencies, fourteen interstate agencies, and nineteen federal agencies having jurisdiction of some portion of the river basin.[168] The Compact is intended to require local, state and federal agencies to conform their projects to the Delaware River Basin Commission's comprehensive plan. However, consent reservations agreed upon by federal agencies and the states make an element of the plan binding on federal agencies only when the federal representative concurred in its adoption. In addition, the President of the United States may suspend, modify, or delete any provision of the plan affecting federal interests when he finds that the national interest so requires.[169]

A similar comprehensive approach could be taken to the regional water problems of the Lake Tahoe and Truckee River Basins,

165. *See supra* note 124 and accompanying text (letter from Cecil Andrus to James McIntyre).
166. *See supra* note 123 and accompanying text.
167. Pub. L. No. 91-525, 84 Stat. 1509 (1970).
168. MUYS, *supra* note 91, at 153.
169. *Id.* at 154.

because the disputes involve some elements of water quality,[170] flood control, and efficient operation of existing facilities. However, if achieving a satisfactory compromise on a comprehensive settlement agreement was difficult, achieving the compromises necessary for such a federal interstate compact would be almost impossible. It would involve sovereignty compromises for all participants. In addition to the traditional federal concerns, comprehensive planning and management of the water resources would also involve compromises on the states' closely guarded sovereignty over water rights administration.[171] Furthermore, the Lake Tahoe and Truckee River problems do not involve duplication and overlap of programs, as much as they involve the insufficiency of water to satisfy all competing present and future demands. They do not require such a comprehensive and complex solution. If the inter- and intrabasin allocation problems can be resolved, existing agencies could administer the water resources without the duplication and overlap that gave rise to the Delaware Compact.

The other model of a federal interstate compact is the Pacific Northwest Electric Power and Conservation Planning Council.[172] This is a "compact" cut from whole cloth by Congress. While Congress consented to it and the states agreed to participate in it, the legislation creating it was drafted in Congress, rather than being negotiated among the states.[173] It has been upheld by the Ninth Circuit Court of Appeals,[174] but the case has been criticized as being constitutionally suspect.[175] If an interstate agency were deemed necessary, one established through prior negotiations between the States, the United States, and the Indians would be far preferable to one created by congressional fiat.

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170. The Pyramid Lake Paiute Tribe has several pending suits concerning wastewater treatment in Reno. California's Lahontan Regional Water Quality Control Board is concerned about the water quality impacts of shoreline erosion when the level of Lake Tahoe is near its maximum.

171. Following *California* v. *United States*, 438 U.S. 645 (1978), the Western states are even more resistant to encroachments on Congress' historic deference to state water rights administration.

172. The member states in the Pacific Northwest Electric Power Planning and Conservation Council include Washington, Oregon, Montana and Idaho. *See* Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1362 (9th Cir. 1986).

173. *See* Comment, *The New Interstate Compact, a Congressional Tool:* Seattle Master Builders Ass'n. v. Pacific Northwest Electric Power 60 ST. JOHN'S L. REV. 813, 814-15.

174. *Seattle Master Builders*, 786 F.2d at 1371.

175. *See supra* note 173, at 814-15. *See also* Heron, *supra* note 150.

B. Equitable Apportionment by the Supreme Court

The failure of the California-Nevada Interstate Compact caused officials in both California and Nevada to refer to an original jurisdiction lawsuit in the United States Supreme Court as the only other option which can divide the waters of Lake Tahoe and the Truckee and Carson Rivers between the two states.[176]

Equitable apportionment is a doctrine of federal common law that determines the extent and limitations of two or more states' rights to share in a common natural resource.[177] Under equitable apportionment, the court divides interstate water so that each state may enjoy the benefits from the use of the water. The water is divided on the principle of fairness; each state is entitled to a just and equitable allocation.[178] Where both states recognize the doctrine of prior appropriation, priority becomes the "guiding principle" in fashioning an allocation.[179] However, the courts have departed from state law where other relevant facts made it necessary.[180] *Nebraska v. Wyoming* summarizes some of the criteria used in equitable apportionment:

> Apportionment calls for the exercise of informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors.[181]

In effect, the Court gave weight to appropriation priorities, but they are not controlling.

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176. The future of the Walker River is uncertain. There is some thinking that it could be the subject of a separate compact or equitable apportionment lawsuit.

177. *See* Kansas v. Colorado, 206 U.S. 46 (1907). The doctrine was most recently explained in *Colorado v. New Mexico*, (*Colorado I*) 459 U.S. 176, 183-88 (1982). Except for *Idaho* v. *Oregon and Washington* 462 U.S. 1017 (1983), the doctrine has been used only in interstate water rights litigation.

178. Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

179. *Id.*, Wyoming v. Colorado 259 U.S. 419, 469-71 (1922). The "guiding principle" may be less compelling in a dispute between Nevada, which recognizes only prior appropriation, and California, which recognizes both appropriative and riparian water rights.

180. Connecticut v. Massachusetts, 282 U.S. 660, 670-71 (1931); *Colorado I*, 459 U.S. at 186-88.

181. Nebraska v. Wyoming, 325 U.S. at 618.

In the first of two *Colorado* v. *New Mexico* decisions,[182] the Court further reduced its emphasis on priority. Under strict priority, any diversion of the Vermejo River by Colorado would have been subject to call by senior New Mexico users. However, while recognizing the importance of protecting established uses the Court stated:

> Under some circumstances, however, the countervailing equities supporting a diversion for future use in one state may justify the detriment of existing users in another state. This may be the case, for example, where the state seeking a diversion demonstrates by clear and convincing evidence that the benefits of the diversion substantially outweigh the harm that may result. In the determination of whether the state proposing the diversion has carried this burden, an important consideration is whether the existing users could offset the diversion by reasonable conservation measures to prevent waste.[183]

In the second *Colorado* v. *New Mexico* decision (*Colorado II*),[184] the Court backed away from the consideration of efficiency of use in equitable apportionment. It imposed a high standard of proof which it found that Colorado had not met. It explained that the clear-and-convincing standard is a high one and unique to equitable apportionment:

> The standard reflects this Court's long-held view that a proposed diverter should bear most, though not all, of the risks of an erroneous decision: "The harm that may result from disrupting the established use is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote (citation omitted).[185]

Colorado II does not represent a complete negation of the efficiency concept of *Colorado I*. While the Court did not allow a junior appropriation in Colorado to jeopardize senior uses in New Mexico, this result may have obtained, in part, because Colorado had no specific plans for the water. All Colorado established was that a steel corporation needed the water whenever it built a plant. (The site had not been selected.) In comparison, New Mexico had completed some long-range plans to support its claim.

> Long-range planning and analysis will, we believe, reduce uncertainties with which equitable apportionment judgments are made.

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182. Colorado v. New Mexico, 459 U.S. 176 (1982).
183. *Id.* at 187-88.
184. 467 U.S. 310 (1984).
185. 467 U.S. at 316.

> If New Mexico can develop evidence to prove that its existing economy is efficiently using water, we see no reason why Colorado cannot take similar steps to prove that its future economy could do better.[186]

The Court also rejected the special master's finding that the equities were with Colorado's proposed diversion because three-fourths of the water of the Vermejo River arises in Colorado. The Court stated that the equitable apportionment of appropriated rights should turn on benefits, harms, and efficiencies of competing uses. The source of the Vermejo River's water was held to be irrelevant.[187] In other words, the area-of-origin preference carries no water with the Supreme Court.

It is probable that an equitable apportionment of Lake Tahoe and the Truckee River would be governed by considerations of efficiencies and long-range planning, rather than a strict adherence to priorities. The allocation to each state under the California-Nevada Interstate Compact is evidence of an equitable apportionment since both states have conducted their long-range planning around their allocation, especially in the Lake Tahoe Basin. Given the efforts made by both states to adhere to the Compact's Lake Tahoe allocations, they are a more equitable allocation than the results of a strict adherence to prior appropriation. Efficiencies of use in the Truckee-Carson Irrigation District are already being challenged in the OCAP litigation. The Truckee River system, with its competing irrigation, fish and wildlife, domestic, municipal, industrial, and recreational uses of water, may be a good candidate for a reconsideration of the importance of relative efficiencies, especially because the Newlands Project is an older system with relatively inefficient uses of water. While the Court discussed the various equitable apportionment principles in *Colorado I*, its discussion of these principles does not give a clear indication of how they would apply to the Truckee River.

Uncertainties, in addition to the uncertain equitable apportionment criteria, lurk in a Supreme Court adjudication of Lake Tahoe and the Truckee River. In reality, the Court has equitably apportioned only three river systems.[188] The other cases have denied

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186. *Id.* at 322.
187. *Id.* at 323.
188. The North Platte River, (*Nebraska* v. *Wyoming*, 325 U.S. 589 (1945)) the Delaware River (*New Jersey* v. *New York*, 283 U.S. 336 (1922)), and the Laramie River (*Wyoming* v. *Colorado*, 259 U.S. 419 (1922)).

equitable apportionment because no injury was established[189] or because the burden of proof had not been satisfied.[190] In requiring proof of actual injury, the Court in effect declines to issue declaratory judgments. This may limit the usefulness of equitable apportionment in dealing with future uses.[191]

Another problem with equitable apportionment of the Lake Tahoe and Truckee River system is the issue of whether the United States is an indispensable party, unjoinable without its consent. The Court has denied motions to bring original jurisdiction actions in instances where the United States was an indispensable party but did not waive sovereign immunity.[192] In *State of Idaho ex rel Evans v. Oregon and Washington*,[193] the Court rejected the special master's initial finding that the United States was an indispensible party to an equitable apportionment of the fish of the Columbia-Snake River system. Applying the criteria for indispensible parties under Rule 19(b) of the Federal Rules of Civil Procedure, the Court found that it would be possible to fashion a decree without joinder of the United States because Idaho's complaint did not affect operation of federal dams or fish treaties. A similar dilemma may face an equitable apportionment of Lake Tahoe and the Truckee River unless the United States intervenes or the Court allows the case to go to trial, as it did in the *Idaho* case. However, the uncertainties of an equitable apportionment suit, together with its cost and complexity, make one last settlement effort worthwhile.

C. *Equitable Apportionment Through Negotiated Settlement Legislation*

S. 1558 had the earmarks of a comprehensive negotiated settlement of outstanding water rights disputes concerning the waters of Lake Tahoe, the Truckee River and, to a lesser degree, the Carson River. Its fatal flaw was the inconsistency of the states' and the United States' expectations concerning the interstate water allocation

189. *See, e.g.*, Kansas v. Colorado, 296 U.S. 46 (1907); Connecticut v. Massachusetts, 282 U.S. 660 and Washington v. Oregon, 297 U.S. 517 (1936).

190. *Colorado II*, 467 U.S. 310 (1984).

191. *See generally* Comment, *Is There a Future for Proposed Water Uses in Equitable Apportionment Suits?*, 25 NAT. RESOURCES J., 791 (1985).

192. *See* Arizona v. California, 298 U.S. 558, 571-72 (1936); Texas v. New Mexico, 352 U.S. 991 (1957).

193. 444 U.S. 380 (1980).

issue. The states expected that an equitable apportionment could be achieved through the Compact as originally negotiated. On the other hand, the Tribe's and the United States' expectations were that the consent legislation would either include disclaimers to accommodate federal claims or the settlement would proceed without the Compact.

It may be possible to satisfy these expectations through a different approach to settlement legislation. Congress' powers under the commerce clause includes the power to regulate and apportion interstate streams, subject only to the fifth and fourteenth amendments. It has not done so because the history of western water allocation has been one of deference to state water law.[194] However, it did so once. *Arizona v. California*[195] held that in enacting the Boulder Canyon Project Act, Congress intended to and did apportion the Lower Colorado River among California, Nevada, and Arizona, leaving the tributaries under state jurisdiction. Accordingly, the apportionment of the Lower Basin is not controlled by the doctrine of equitable apportionment or the 1922 Colorado River Compact.[196]

Negotiated settlement legislation for the Truckee River litigation could include provisions agreed to by both states that would permit Congress to allocate the waters of Lake Tahoe and the Truckee River between California and Nevada. Because it would be an act of Congress, its allocations would be secure from commerce clause challenges under *Sporhase*. It would be the first Indian and federal water rights settlement act since the Boulder Canyon Project Act to include an interstate apportionment.[197] Other Indian water rights disputes have been settled through agreements which have either been ratified[198] or are still pending before Congress.[199] Settlements can work, if they are voluntary and consensual.

Negotiated settlement of water rights disputes can provide a flexible process which can accommodate some or all of the major

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194. California v. United States, 438 U.S. 645 (1978).
195. 373 U.S. 546 (1963).
196. *Id.* at 565-66.
197. The Boulder Canyon Project Act did not quantify Indian rights, but the Court held that Indian and federal uses of mainstream water in a state are to be charged against that state's apportionment. *Id.* at 601.
198. *See, e.g.*, Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, 96 Stat. 1274 (1982).
199. *See, e.g.*, S. 795, 100th Cong., 2d Sess. (1988) (the San Luis Rey Indian Water Rights Settlement Act).

concerns of the major parties. They can be tailored to fit the facts and circumstances of each dispute. The inherent flexibility of a negotiated settlement allows it to better accommodate federal and tribal sovereignty. Any successful negotiation must include participation and funding by the United States, because of its responsibilities and its participation in reclamation projects. While financial participation by others may be included in a settlement,[200] the federal government must bear a large percentage if the necessary funding to implement a settlement agreement. Increasingly, the western states are supporting the concept of negotiated settlements with full federal participation in the negotiations and funding of solutions.[201]

One guiding principle, however, should be that federal and Indian uses be charged to the state where the uses are made.[202] From California's perspective, such a principle would be essential to protect its allocation, which, under the Compact, was less than ten percent of the total flow of the Truckee River.

There are several major drawbacks to negotiated settlements. One is that, after the agreement is negotiated, legislation often must be enacted by Congress. At this point, the deal can unravel if any party attempts to get more than the original bargain. Even if all parties concur, others may seek modifications not negotiated or agreed to by the parties.[203] Another drawback is that a settlement bill does not provide as much certainty as a Supreme Court decree or an interstate compact. Congress may unilaterally amend or repeal it. On the other hand, Congress may also rescind its approval of an interstate compact. Equitable apportionment decrees may be reopened. Certainty in interstate allocations may be relative.

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200. The State of Nevada had agreed to contribute $8 million to the S. 1558 settlement.

201. *See, e.g., Resolution of the Western States Water Council Supporting Negotiated Settlements of Indian Water Rights Disputes* (April 11, 1986) (copy on file with the Department of Water Resources). The Western Governors Association has also supported the approach of negotiated settlements. *See* Resolution of July 7, 1987 (copy on file with the Department of Water Resources).

202. *See* Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights,* 22 LAND & WATER L. REV. 631, 653, 670 (1987). Tarlock argues that Indian water rights should be treated as water allocated to another state by an interstate Compact. They should be assigned to the state in which the reservation exists, and state-created water rights should be subordinated to Indian water rights, just as state-created water rights are subordinated to interstate compact allocations. *See* Hinderlinder v. La Plata & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

203. For example, the San Luis Rey Indian Water Rights Settlement Act provides some federal Central Valley Project water as a part of the package. It would be transported to the reservations near San Diego via the California Aqueduct and the Metropolitan Water District facilities. This provision is opposed by CVP users in the San Joaquin Valley who fear that this agreement may create a precedent.

IV. Conclusion

The Truckee River is a relatively small interstate river, compared with those involved in many other interstate water disputes, but it has had more than its share of litigation and controversy. It is probable that few other interstate rivers have had as much federal involvement in the origins of intra- and interstate disputes. The United States created both the Pyramid Lake Reservation and the Newlands Project, and it regulates Lake Tahoe. It authorized and constructed the Washoe Project to provide additional water supplies. Over the years, expectations backed by conflicting legal theories have arisen over the waters of this interstate system, and the expectations and theories far exceed the amount of water available from the system. Most problems have arisen because the water necessary to fully satisfy a particular set of expectations is not available, except at the expense of another set of expectations. The United States has fostered some of these expectations through the construction and operation of water projects and through expressed or implied promises of water. In sum, it did not have enough water for all its constituencies.

Resolving the disputes will take the full participation of the federal government, both with respect to clarifying its responsibilities to the various water users and to providing financing for physical solutions to make the Truckee River supply serve as many uses as possible. The history of the Compact underscores the futility of attempting to resolve the problems of Lake Tahoe and the Truckee River without the full participation of the United States. It can only be hoped that the necessary federal leadership and cooperation will be forthcoming, as it has not always been in the past.

The best hope for bringing peace to the river would be a comprehensive negotiated settlement. The interstate allocations could be negotiated or litigated separately from the other problems, but in the past they have been unavoidably linked to other issues. A comprehensive negotiated settlement would offer the best opportunity for more flexible resolution of the system's interrelated problems. Over the years, litigation has resolved a few issues, but it has not brought certainty. 1988 is the diamond jubilee of the Conservation Commission's recommendation that the waters of Lake Tahoe be equitably apportioned. Perhaps it is time for a new attempt.