

BEFORE THE INDIAN CLAIMS COMMISSION

THE NORTHERN PAIUTE NATION, et al.,)	
)	
Plaintiffs,)	
)	
v.)	Docket No. 87-A
)	
THE UNITED STATES OF AMERICA,)	
)	
Defendant.)	

Decided: April 25, 1973.

Appearances:

I. S. Weissbrodt,
Attorney for Plaintiffs.

Marvin E. Schneck, with whom was
Mr. Assistant Attorney General
Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION
ON PLAINTIFFS' MOTION PERTAINING TO PYRAMID LAKE WATER

Blue, Commissioner, delivered the opinion of the Commission.

This case is before us on plaintiffs' Motion for Interlocutory Order Pertaining to Issues of Liability on Claim for Depriving Pyramid Lake of Water. Plaintiffs ask that we issue an interlocutory order determining that there was reserved for the benefit of the Pyramid Lake Tribe the rights to sufficient water from the Truckee River to preserve the fisheries in the lake, and to supply other existing and future needs of the Pyramid Lake Reservation; and that defendant is liable to plaintiffs to the extent that it, by its actions or misfeasance, has deprived the Pyramid Lake Tribe of water rights reserved to it.

Defendant has not responded to plaintiffs' motion on the merits, but states that it must know plaintiffs' legal theory of damages before it can respond or develop factual information. Defendant cites no authority for this proposition. We are of the opinion that plaintiffs' theory of damages is not relevant when considering the legal issue of defendant's liability.

We feel that this issue is ripe for determination, and that a decision would materially accelerate this phase of this case. When the needless expenditure of resources can be avoided without prejudicing the rights of any party involved we shall do so. We note that separating the issues of liability and damages, even to the extent of separate trials, is common procedure in our federal courts. See, 5 Moore's Federal Practice § 42.03.

Returning to the motion before us, we feel that the motion should be granted to the following extent:

I. Reservation of Water.

The issue of whether rights to water were reserved to plaintiffs when the reservation was established in 1859 is determined by application of the Winters doctrine.

The case of Winters v. United States, 207 U.S. 564 (1908), is the germinal decision. This suit was brought by the United States to prevent settlers from constructing or maintaining dams or reservoirs, on the Milk River in the State of Montana, which in any manner prevented the water of the river or its tributaries from reaching the Fort Belknap Indian Reservation. On appeal from a permanent injunction restraining the

defendants from interfering with the use by the reservation of 5,000 inches of water of the river,^{1/} the Ninth Circuit ruled that when the Blackfeet Indians ceded much of their land to the United States, by agreement in 1884 they reserved not only the Fort Belknap Reservation but, by implication, the right to use the waters of the Milk River "at least to the extent reasonably necessary to irrigate their lands." Winters v. United States, 143 F. 740, 749 (9th Cir., 1906). In affirming, the Supreme Court noted that although the agreement ceding the lands to the United States was silent as to the water issue, it was impossible to believe that the Indians would cede the water necessary to make their reservation valuable or adequate. 207 U.S. at 576.

For our purposes there are two important aspects to the Winters case. The first is whether the reservation of water for the use of the Indians could be implied from the agreement establishing the reservation. In reviewing that agreement the Supreme Court noted (at p. 576) that:

The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people. It was the policy of the Government, it was the desire of the Indians, to change those habits and to become a pastoral and civilized people. If they should become such the original tract was too extensive, but a smaller tract would be inadequate without a change of conditions. The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government.

The Court thus recognized that the treaties and other agreements of cession of Indian lands were not to be read as mere conveyances limited

^{1/} 120 cubic feet per second..

to their express provisions, but as part of a broad governmental policy of cultural and economic changes to the Indian existence. Certain requirements to sustain the new Indian existence must necessarily be read into the agreement.

The second aspect came in response to the argument of the appellants that any reservation of water implicit in the agreement was repealed by the admission of Montana into the Union in 1889.

The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. Rio Grande Ditch & Irrigation Co.*, 174 U. S. 690, 702; *United States v. Winans*, 198 U. S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years. This was done May 1, 1888, and it would be extreme to believe that within a year Congress destroyed the reservation and took from the Indians the consideration of their grant, leaving them a barren waste--took from them the means of continuing their old habits, yet did not leave them the power to change to new ones. [Id. at 577].

The federal reservation of water for the use of the Indians is thus insulated from later state action.

The Winters doctrine was extended to reservations not established by a treaty or agreement in United States v. Walker River Irr. Dist., 104 F. 2d 334 (9th Cir., 1939). That suit was brought by the United States on behalf of Indians living on the Walker River Indian Reservation (who are also among the plaintiffs herein) to restrain certain appropriators of water from the Walker River and its tributaries from interfering with the natural flow of the stream to and upon that reservation. The Walker River Reservation was established by departmental action on November 29, 1859, as was the Pyramid Lake Reservation.^{2/} The court felt

^{2/} 27 Ind. Cl. Comm. 39, 44 (1972).

that the basic question in the Winters case was whether the waters of the stream were intended to be reserved for the use of the Indians in addition to the reservation itself. Id. at 336. The court next stated:

. . . We see no reason to believe that the intention to reserve need be evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of intent. While in the Winters case the Court emphasized the treaty, there was in fact no express reservation of water to be found in that document. The intention had to be arrived at by taking account of the circumstances, the situation and needs of the Indians and the purpose for which the lands had been reserved. [Id.]

The above is equally applicable to the Pyramid Lake situation. We must take into account "the circumstances, the situation and the needs of the Indians and the purpose for which the lands have been reserved."

At this time there have been no exhibits admitted into evidence in this case. Plaintiffs have supplemented their motion with documents which are official papers or publications of defendant's.

On September 22, 1972, defendant filed in the Supreme Court of the United States a "motion for leave to file complaint, complaint, and brief in support of motion," against the States of Nevada and California, for the benefit of the Pyramid Lake Paiute Tribe of Indians, of which we take judicial notice. United States v. Nevada, No. 59, original. (U.S., Sept. 22, 1972) In its complaint defendant alleged the following (page 6):

VI

On November 29, 1859, the Department of the Interior directed that an area including Pyramid Lake and the lands surrounding the lake, together with the valley along the Truckee River from the mouth of the river upstream to a point approximately two miles south of Wadsworth, Nevada, be reserved and set aside from the public domain as the Pyramid Lake Indian Reservation.

This reservation was confirmed on March 23, 1874, by an executive order signed by President Grant. The area was reserved for members of the Pyramid Lake Paiute Tribe primarily because it constituted their aboriginal home and the lake provided a large fishery which was the principal source of the Tribe's livelihood.

VII

In establishing the Pyramid Lake Reservation in 1859, the United States, by implication, reserved for the benefit of the Pyramid Lake Indians sufficient water from the Truckee River for the maintenance and preservation of Pyramid Lake, for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish and for the other needs of the inhabitants of the Reservation such as irrigation and domestic use. The United States, for the Pyramid Lake Indians, claims these rights with a priority date of November 29, 1859.

This complaint was filed after the motion now before us and opposition thereto were filed. We can only assume that defendant now concedes at least the above. This language varies somewhat from that requested by plaintiff. However, we feel that it is substantially equivalent. It has the benefit of being couched in defendant's own words and, presumably, is acceptable to it.

Accordingly, we today hold, as a matter of law, that implicit in the creation of the Pyramid Lake Reservation was the reservation of sufficient water from the Truckee River for the maintenance and preservation of Pyramid Lake, for the maintenance of the lower reaches of the Truckee River as a natural spawning ground for fish, and for the other needs of the inhabitants of the reservation such as irrigation and domestic use.

We do not today reach the question of the specific measure of water reserved to plaintiffs. We cannot decide this issue without the benefit of a trial.

II. Liability of Defendant.

The Winters doctrine was expanded by the Supreme Court in Arizona v. California, 373 U. S. 546 (1962). In that case the Winters rights of Indians were deemed to include sufficient water to meet the future needs of the Colorado River Indian Reservation, that is, to include enough water to irrigate all of the practicably irrigable acreage on these reservations. Id. at 599-60.

However, not to be found in any of the Winters doctrine cases is whether the doctrine can be applied in an action for damages. In Gila River Pima-Maricopa Community v. United States, Docket No. 236-C, 29 Ind. Cl. Comm. 144, 158 (1972) we discussed this problem. We determined that the Winters doctrine defines the maximum extent of the tribe's water rights, but that under water rights law no user is entitled to more water than he can put to beneficial use, citing United States v. Ahantum Irrigation District, 236 F. 2d 321, 341 (9th Cir., 1957), cert. den., 352 U. S. 988 (1957). For that reason, in the Gila River case we considered that a ruling on the issue of liability was premature absent a showing that the plaintiff was in fact deprived of water it could have beneficially used.

However, in the instant case, we already have such a showing of deprivation. In the United States v. Nevada complaint, supra, the United States alleged (pp. 5 and 6):

In recent years the average flow into the lake from the Truckee River has been approximately 250,000 acre-feet, leaving an annual deficit of between 125 and 150

thousand acre-feet. As a result primarily of diversions of water from the Truckee River, the level of the lake has dropped more than 70 feet since 1906, destroying fisheries, threatening extinction of the species of trout native to the lake, increasing the salinity of the lake, causing land erosion and threatening the continued existence of the lake as a useful body of water.

Members of the Pyramid Lake Paiute Tribe of Indians have lived on the shores of Pyramid Lake from time immemorial. They have fished in the lake and have used the fish for food and for barter. They have aided their support by charging fees to sport fishermen for licenses to fish in the lake. They have relied upon water from the Truckee River for irrigation, for domestic uses, for maintenance of the level and quality of the lake, and for maintenance of the lower segment of the Truckee River as a natural spawning ground for lake fish. [Emphasis added.]

We conclude that the fact that the Pyramid Lake Tribe did not receive as much water as could have been beneficially used is incontrovertably clear.

It has been recognized that the United States may have a special duty of care to protect the resources reserved to its dependants. In Oneida Tribe v. United States, 165 Ct. Cl. 487 (1967), cert. den., 379 U. S. 946 (1965) (aff'g Docket 159, 12 Ind. Cl. Comm. 1 (1962)), it was held that the United States had the responsibility to attempt to save the timber resources of the Oneidas from theft. See also Menominee Tribe v. United States, 101 Ct. Cl. 22 (1944).

Discussing the Oneida case, in Gila River Indian Community v. United States, 190 Ct. Cl. 790 (1970), aff'g Docket No. 236-K, et al., 20 Ind. Cl. Comm. 131 (1968), the Court of Claims found that a special relationship

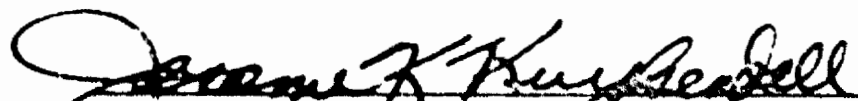
or obligation to the Indians is necessary in order to create liability on the part of the United States. However, we have noted in our earlier opinion in this case, 27 Ind. Cl. Comm. 39, 42 (1972), that defendant itself has sustained the contention that the Pyramid Lake Reservation was established for the purpose of reserving water for the Indians. We have observed above that defendant is currently maintaining the same argument in current litigation elsewhere. The reservation of water without a concomitant obligation to preserve the reserved water would be senseless.

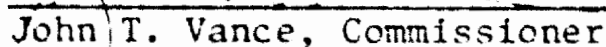
We conclude, therefore, as a matter of law, that under these circumstances, and in view of the Winters doctrine, there was established an obligation on the defendant in behalf of the plaintiffs with regard to the preservation of the Pyramid Lake waters and fisheries. Remaining to be determined is "did the Federal Government do whatever it was required to do, in the circumstances", (Oneida, supra, at 494) to preserve the Pyramid Lake water and fisheries, and, if not, the extent, if any, of the resultant damages.

The case will be ordered to proceed accordingly.

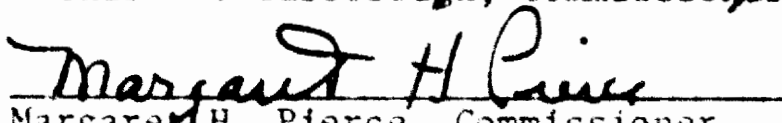
We concur:


 Brantley Blue, Commissioner


 Jerome K. Kuykendall, Chairman


 John T. Vance, Commissioner


 Richard W. Yarborough, Commissioner


 Margaret H. Pierce, Commissioner