

**No. 16-15507**

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA,  
*Plaintiff,*

and

PYRAMID LAKE PAIUTE TRIBE,  
*Intervenor-Plaintiff-Appellant,*

v.

BOARD OF DIRECTORS OF TRUCKEE-CARSON IRRIGATION DISTRICT,  
and TRUCKEE-CARSON IRRIGATION DISTRICT  
*Defendants-Appellees,*

and

DODGE BROTHERS and DODGE JR. FAMILY TRUST, et al.,  
*Intervenor-Defendants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA

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**OPENING BRIEF OF APPELLANT  
PYRAMID LAKE PAIUTE TRIBE**

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## **STATEMENT OF JURISDICTION**

The district court had jurisdiction under 28 U.S.C. § 1345. The district court entered the Second Amended Judgment on January 25, 2016, which was a final judgment that fully disposed of all parties' claims. Appellant Pyramid Lake Paiute Tribe timely filed its notice of appeal on March 24, 2016. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

## **ISSUES PRESENTED**

This is an action by the United States and the Pyramid Lake Paiute Tribe (Tribe) to recoup water that the Truckee Carson Irrigation District (TCID) unlawfully and willfully diverted from the Truckee River into the federal Newlands Reclamation Project between 1973 and 1987. Those diversions prevented the water from flowing into Pyramid Lake, which is the principal feature of the Pyramid Lake Paiute Tribe Reservation and which provides habitat for two species of fish listed under the Endangered Species Act (ESA) that are of critical cultural importance to the Tribe.

This is the third appeal from the district court in this action. In the first round of this litigation, the district court entered final judgment in 2005. The United States and the Tribe appealed, as relevant here, from the district court's award of only 197,152 acre-feet of water (compared with approximately 757,000 acre-feet sought). In that appeal, the United States and Tribe argued, among other

things, that the district court clearly erred in determining the amount of the unlawful diversions, and hence the amount of the recoupment award, by making across the board reductions from published U.S. Geological Survey (USGS) stream gage data based on the data's "confidence intervals," which the district court termed "gage error." This Court agreed with the United States and Tribe, holding in its first opinion in this action that there was "no evidentiary basis" for making such reductions. This Court thus "remand[ed] for the district court to recalculate the amount of the diversions based on the government's published quantities." *U.S. v. Bell*, 602 F.3d 1074, 1085 (9th Cir. 2010).

On remand from this Court's first opinion, the undisputed evidence showed that when the calculations were based on the published, unadjusted gage data, TCID's Truckee River diversions exceeded allowable annual levels in four additional years (1973, 1976, 1985, 1986) beyond what the district court had previously found. The district court, however, read this Court's opinion as precluding recoupment for these years. The district court's ruling reduced recoupment from 394,029 acre-feet to 309,480 acre-feet. The United States and Tribe appealed that ruling to this Court in 2012 (Case No. 12-15476). This Court agreed with the United States and the Tribe, withdrew its prior mandate in *U.S. v. Bell*, amended its opinion therein, vacated the district court's amended judgment, and remanded the action back to the district court with instructions to recalculate

the amount subject to recoupment in years 1973, 1976, 1985 and 1986.

However, this Court's second remand also stated that "[w]ith regard to 1985 and 1986, there may be merit to TCID's contention that there is an alternative ground in the record for the district court's finding that recoupment was unavailable or limited for those years [because] of deviation from the OCAP authorized by court order." It is these two years that are the subject of this appeal.

On remand, the district court 1) agreed with TCID that various historic court orders authorized TCID to divert Truckee River water without regard to Department of Interior regulations (the operating criteria and procedures, or "OCAP") for specific portions of 1985 and 1986, most importantly, even with respect to OCAP that were issued subsequent to such orders; and 2) refused to award any recoupment amounts even for the periods in 1985 and 1986 for which it determined OCAP were in effect—not because it found there were no excess diversions during those times, but because the government's case in chief at trial over a decade ago focused on total diversions in excess of OCAP's *annual* maximum allowable diversion limitations and did not focus on diversions in excess of OCAP's *monthly* limitations, and therefore refused to consider evidence of such monthly excess diversions.

The issues on appeal are therefore:

- I. Whether the district court erred in finding that historic court orders

prospectively excused TCID from compliance with subsequent valid OCAPs for the years 1985 and 1986, when those Court orders were of limited scope and duration, and did not by their terms preclude the subsequent issuance of valid OCAP.

II. If the district court did not err by excusing TCID from complying with OCAP during specific times in the years 1985 and 1986, whether it was proper for the district court to refuse to exercise its broad equitable powers to award recoupment for the times when it determined OCAP were in effect in 1985 and 1986 because the government's calculation of excess diversions at trial was based on annual excess diversions and not monthly excess diversions.

## **STATEMENT OF THE CASE**

### **A. Statement of Facts**

The background of this case is set forth in this Court's prior opinion. *See U.S. v. Bell*, 602 F.3d 1074 (9th Cir. 2010). The case arises out of disputes that began in the late 1960s and early 1970s over the operation of the federal Newlands Reclamation Project in Nevada. Water from the Truckee River, which would otherwise flow to Pyramid Lake, is diverted from the Truckee River and delivered to Lahontan Reservoir to supplement irrigation water for the Project that comes from the Carson River. Pyramid Lake is the principal feature of the Tribe's Reservation and provides habitat for two species of fish, the cui-ui and the

Lahontan cutthroat trout.<sup>1</sup> These fish are the focal point of the Tribe’s history and culture—in the native Numu language, members of the Tribe are referred to as *cui-ui ticutta*, the “cui-ui eaters.” As a result of the Project’s operations, the cui-ui and Lahontan cutthroat trout are listed as endangered and threatened respectively under the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* *Id.* at 1078.

Beginning in the 1970s, the United States and the Tribe sought to compel TCID, which operates the Project under contract with the United States, to limit diversions of Truckee River water in accordance with Interior Department regulations establishing OCAP for the Project. *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) (*Tribe v. Morton*); *Truckee-Carson Irrigation District v. Secretary of the Department of the Interior*, 742 F.2d 527 (9th Cir. 1984) (*TCID v. Secretary*). In 1984, the United States successfully concluded its court fight with TCID. *See TCID v. Secretary*, 742 F.2d at 503 (holding that “TCID intentionally violated [the OCAP] by diverting more water than the regulations permitted”). That same year, the Department of the Interior issued new interim OCAP and, in 1988, Interior issued long-term, court-approved OCAP, with which TCID agreed to comply. *See* 62 Fed. Reg. 66,442 (Dec. 18, 1997).

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<sup>1</sup> *See e.g.* ‘Lahontan Cutthroat Trout: A prehistoric legend returns,’ at <https://www.fws.gov/endangered/about/vp-166-2016.html> (video accessed Aug. 23, 2016).

## **B. The Prior Appeals to This Court**

### **1. The District Court's Original 2005 Judgment**

In November 1990, Congress enacted the Truckee-Carson-Pyramid Lake Water Rights Settlement Act. *See* Pub. L. 101-618, 104 Stat. 3287, Title II (1990). That statute, among other things, directed the Secretary of the Interior to seek recoupment of the excess Truckee River water diverted by TCID in violation of the prior OCAPs. *Id.* § 209(j)(3). In December 1995, the United States filed suit against TCID seeking recoupment of more than one million acre-feet of Truckee River water (later reduced to 757,287 acre-feet) plus interest in-kind in the form of additional water. *Bell*, 602 F.2d at 1079. The Tribe subsequently intervened as a plaintiff, consistent with the Settlement Act. *Id.*

Following the four week trial in this case, the district court entered an order in favor of the United States and the Tribe on December 3, 2003. ER 469. The district court found that “[b]etween 1974 and 1981, the record clearly shows that TCID failed to comply with the OCAPs and repeatedly and publicly refused to comply although requested on numerous occasions to do so.” ER 483. It thus held TCID liable for recoupment of that water.

But as to the amount of recoupment, in 2003 the district court awarded only 197,152 acre-feet of water to be repaid to the Truckee River and Pyramid Lake. ER 488. That initial recoupment amount was based largely on trial testimony from

TCID's expert witness, Charles Binder, who had made across-the-board reductions in the published data from USGS gages used to measure the relevant water flows. The district court found that the reductions were necessary to account for the margin of error, or "confidence interval," in the published data. ER 490. Based on Binder's calculations, including his application of the so-called "gage error," the district court found that TCID owed recoupment for Truckee River water it had unlawfully diverted in excess of the OCAP only in 1974, 1975, 1978, and 1979. ER 487–88.

The district court also found that TCID owed recoupment for spills of Truckee River water when the Project's Lahontan Reservoir became too full, in 1979 and 1980. ER 487. The district court found that there were no spills subject to recoupment for the years 1973 through 1978 and 1985 through 1987. *Id.* The district court denied any recoupment, for either excess diversions or spills, for the years 1981 through 1984 because the United States had not revised the OCAP to account for changes made to Project water duties when the 1980 Alpine Decree governing the Carson River was entered in 1980. ER 491–93. The district court denied prejudgment interest but awarded post-judgment interest in-kind, in the form of additional Truckee River water. The parties cross-appealed.

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2. This Court's 2010 Opinion

This Court issued its first opinion in this matter in April 2010. *U.S. v. Bell*, 602 F.3d 1074. The case involved multiple, consolidated appeals and cross-appeals and nearly a dozen issues. This Court affirmed the district court's original 2005 judgment on all but three issues: interest, reduction of the recoupment calculation because of the adjusted gage data, and recoupment for spills from Lahontan Reservoir between 1981 and 1984.

First, on the question of interest, the Court reversed both the district court's denial of prejudgment interest and its award of post-judgment interest and remanded for further proceedings.

Second, regarding the district court's calculation of recoupment based on the downward adjustment in the USGS gauge data, this Court concluded that "[t]here was no evidentiary basis for preferring values at the lower bound of the margin of error to the government's published quantities." *Id.* at 1085. This Court found that the published data "were already adjusted to take account of river condition" and that TCID "never showed [the data] to be skewed in the Tribe's favor." *Id.* This Court thus "remanded for the district court to recalculate the amount of the diversions based on the government's published quantities and without regard to the confidence intervals." *Id.*

Finally, as to 1981 through 1984, this Court reversed the district court's

denial of recoupment for spills from Lahontan Reservoir during that period because the spills violated the OCAP requirement that the water be put to beneficial use. *Id.* This Court affirmed, however, the district court's denial of recoupment for excess diversions (as opposed to spills) during those years because the Department of the Interior had not revised the OCAP applicable during that period to reflect the new water duties established in the Alpine Decree. *Id.* at 1086.

In the conclusion to the opinion, this Court summarized its rulings on these three issues as follows:

For the foregoing reasons, the judgment of the district court with respect to prejudgment and postjudgment interest is vacated and remanded for further consideration. The judgment with respect to amounts of recoupment for excess diversions in 1974, 1975, 1978, 1979, and spills in 1979 and 1980 is vacated and remanded for recalculation of the effect of gauge error. The judgment with respect to spills from 1981–84 is vacated and remanded for a determination of the amount of water spilled during those years. The judgment of the district court is otherwise affirmed.

*Id.* at 1087.

3. The District Court's 2011 Amended Judgment

On remand from this Court's 2010 opinion, the United States submitted the expert declaration of Ali Shahroody as evidence of the amount of recoupment to be awarded pursuant to this Court's 2010 decision. ER 451. Shahroody simply revised the charts prepared by TCID's expert Charles Binder to remove the

downward adjustments of water diversion amounts Binder had made to the published USGS gage data. ER 453.

The calculations showed that use of the unadjusted gage data as ordered by this Court caused the recoupment amount to increase from 173,021 acre-feet to 350,589 acre-feet. ER 468. This consisted in part of an increase of 93,019 acre-feet for the years in which the district court had previously awarded recoupment for excess diversions (1974, 1975, 1978, and 1979). *Id.* But it also consisted of an additional 84,549 acre-feet for four years in which, under the proper data, excess diversions had occurred (1973, 1976, 1985, 1986) that were previously denied by the district court and mistakenly not included for recoupment analysis in this Court's remand instructions pursuant to this Court's 2010 opinion. *Id.*

Adding together the amount of recoupment for excess diversions (350,589 acre-feet) and the spills which were subject to recoupment pursuant to this Court's 2010 opinion (43,440 acre-feet), brought the total amount of recoupment to 394,029 acre-feet of Truckee River water. ER 456.

However, the district court declined to award the full 394,029 acre-feet to which the United States and the Tribe are due under those calculations. Rather, on remand in 2011, the district court awarded only 309,480 acre-feet in recoupment, explaining: "With respect to the amount of diversions and spills to be recalculated without regard to gauge error, the court concludes that the Ninth Circuit's mandate

directs recalculation for the specific years identified in its order: 1974, 1975, 1978, 1979, and 1980.” ER 448. The district court stated that it “accordingly calculates the total amount subject to recoupment in accordance with the remand order by adding the excess diversions for 1974, 1975, 1978, 1979 without regard to the confidence intervals and spills for 1979 and 1980 without regard to confidence intervals to the spills for years 1981, 1982, and 1983.” *Id.* In other words, the district court held that the gage data reductions that this Court had invalidated would be eliminated only for five years: 1974–1975 and 1978–1980.

Therefore, the district court omitted from its recoupment award the four additional years—1973, 1976, 1985, and 1986—in which Shahroody’s calculations demonstrated that there had been excess diversions after removing the reductions for alleged gage error in compliance with this Court’s opinion. The district court thus reduced the recoupment award by 84,549 acre-feet.

Once again, the United States and the Tribe appealed.

4. This Court’s 2013 Amended Mandate

The basis of the appeal from the district court’s October 2011 order on remand (ER 447) and January 2012 Amended Judgment (ECF No. 773) was that the district court erroneously denied recoupment for the additional years for which overdiversions only became evident after the erroneous gage error reductions were removed from the analysis. The United States and Tribe essentially argued that the

district court, in denying recoupment for 1973, 1976, 1985 and 1986, relied on an overly-strict reading of this Court's 2010 mandate. Because this is a case in equity, the equities favor including recoupment for all periods in which TCID diverted water in excess of the OCAP, including additional periods for which overdiversions were only made evident on remand after correcting the district court's initial erroneous reliance on alleged gage errors.

In its July 22, 2013 opinion, this Court agreed with the Tribe and United States, explaining that “this is not ordinary litigation. [\*\*\*] If the mistake is not corrected, then the immediate beneficiary will be the TCID, which is at fault for the excess diversions, and the ultimate loser will be [Pyramid] Lake, which the OCAPs are supposed to protect.” ER 443–44. While expressly excusing the district court from fault, this Court ruled, “[t]he equities thus strongly favor our fashioning a remedy to restore the proper balance between the TCID/agricultural and Tribal/environmental interests.” *Id.* This Court therefore withdrew and clarified its earlier mandate, and vacated the district court's Amended Judgment to allow calculation of recoupment for 1973, 1976, 1985, and 1986, in addition to the periods previously determined to be subject to recoupment. ER 445.

However, this Court also declined to address TCID's argument that an alternative basis exists for excusing excess diversions in 1985 and 1986, instead providing for the following:

With regard to 1985 and 1986, there may be merit to TCID's contention that there is an alternative ground in the record for the district court's finding that recoupment was unavailable or limited for those years, namely deviation from the OCAP authorized by court order. We leave to the district court to determine whether, and to what extent, this consideration affects the recoupment available for 1985 and 1986 once the gauge error is taken out of the equation.

ER 445.

### **C. The Second Remand to the District Court**

On remand from this Court's July 2013 opinion, the district court agreed with the United States and Tribe that recoupment is available for 1973 and 1976 after removing TCID's experts reductions due to alleged gage error, but, through a series of written orders culminating in a Second Amended Judgment, refused to award any recoupment whatsoever for 1985 and 1986. *See* ER 021 (Jan. 29, 2014 Order); ER 011 (May 11, 2015 Order); ER 004 (Jan. 25, 2016 Order); ER 001 (Jan. 25, 2016 Second Amended Judgment).

#### **1. The District Court's January 29, 2014 Order**

First, in its January 29, 2014 Order, the district court determined that after correcting for erroneous reductions based on alleged gage error, TCID's excess diversions in 1973 were 23,244 acre-feet, in 1976 were 3,204 acre-feet, in 1985 were 48,203 acre-feet, and in 1986 were 9,918 acre-feet. ER 023. However, the district court then ordered additional briefing as to TCID's arguments that it is not responsible for recoupment for 1985 and 1986 because of various court orders that excused it from complying with OCAPs in those years. ER 024. On August 1,

2014, TCID filed its brief setting forth its position that it was not subject to any recoupment in 1985 and 1986 because it was excused from complying with OCAP. ECF No. 838. The United States and Tribe filed a joint brief in response on September 29, 2014, and TCID filed a reply brief on November 13, 2014. ECF Nos. 843, 848.

2. The District Court's May 11, 2015 Order

After reviewing the briefs, but without holding a hearing, the district court issued its May 11, 2015 Order. ER 011. In this order, the district court reiterated its prior determination that OCAPs are “subordinate” to the river decrees and therefore any orders issued by the decree courts “supercede” inconsistent terms of the OCAPs. ER 014. That determination was not challenged in prior appeals and is, as TCID will likely argue, the law of the case. However, this time the district court went further, stating that this rule “holds true whether the OCAPs existed at the time of the court order *or whether they were subsequently adopted.*” ER 016 (emphasis added). On the basis of this legal determination, the district court found that a January 15, 1985 decree court order excused TCID from compliance with OCAP for the period January 15, 1985 to November 15, 1985, all without analyzing whether subsequently issued OCAP during that period were in fact inconsistent with the decree court's January 15, 1985 order. ER 017.

As to violations of OCAP in 1986, the district court held that a March 13, 1986 court order that allowed TCID to release water from Lahontan Reservoir for flood control purposes, but made no mention of OCAP or of diversions of Truckee River water, “had the effect” of exempting TCID from complying with valid OCAP for the period from March 13, 1986 through the end of June 1986. ER 018.

Based on these determinations, the district court’s May 11, 2015 order held that the only diversions subject to recoupment are those during the periods January 1–15, 1985; November 15, 1985 through March 13, 1986; and July 1, 1986 through the end of 1986. ER 020. The district court ordered additional briefing from the parties regarding their positions of the amount of excess diversions to be calculated pursuant to these rulings. *Id.* This order therefore necessitated the calculation of excess diversions in less than annual amounts.

3. The District Court’s January 25, 2016 Order and Second Amended Judgment

The United States, the Tribe, and TCID filed opening briefs in response to the district court’s May 11, 2015 Order, setting forth their respective positions regarding the amounts that should be awarded for recoupment of TCID’s overdiversions in the very limited periods allowed by the district court’s May 11, 2015 order. ECF Nos. 869, 870, 871, 876, 877. While at trial the recoupment amounts sought were based upon TCID’s annual overdiversions that exceeded the OCAP’s annual “maximum allowable diversion,” because the district court’s May

11, 2015 order limited the periods subject to recoupment to specific times within the years 1985 and 1986, a different analysis based on OCAP's monthly diversion limits instead of its total annual limit had to be used. Therefore, the United States submitted the supplemental declaration of its rebuttal expert witness Ali Shahroody. ER 043.

The only available evidence in the trial record from which to calculate recoupment amounts based upon the district court's rulings was Exhibit 430, which contained historical monthly data. ER 046. The government's expert witness used that historical data to calculate allowable diversions based upon OCAP operations during these limited times, and compared those diversions allowed by OCAP against TCID's actual diversions to determine amounts subject to recoupment. ER 046–047. OCAP determines monthly diversion amounts for the purpose of meeting Lahontan storage objectives based upon precipitation and existing Lahontan reservoir storage levels. ER 045; *see also* ER 524–41, 500–09.

Exhibit 430 had been admitted at trial only for a limited rebuttal purpose. ER 510–23. Based upon these evidentiary limitations, the United States employed a conservative approach to calculating excess diversions for the limited periods in 1985 and 1986 allowed by the district court's order, and took the position that the total amount subject to recoupment for the allowable periods in 1985 and 1986 is 20,500 acre-feet. ECF No. 870.

The Tribe filed a joinder to the United States' opening brief, taking the position that because of the equitable nature of the case and the consistent findings of the district court and this Court that TCID had in fact intentionally violated OCAP, it was unfair to the Tribe to hamstring the determination of the recoupment award in favor of TCID. ECF No. 871. In particular, because the district court's ruling was that TCID was only responsible for diversions in excess of OCAP for limited periods during 1986, the district court should exercise its broad equitable powers and approve of the government expert witness's use of the historical data found only in Exhibit 430 in order to determine the amount of excess diversions, even though that exhibit was admitted at trial only for a limited rebuttal purpose. *Id.* To hold otherwise would be to allow TCID's intentional overdiversions to go unrecouped.

Not surprisingly, TCID's position is that it is not responsible for any recoupment in 1985 and 1986 because there is not sufficient evidence in the trial record upon which to base an award for the limited periods set forth in the district court's May 11, 2015 order. ECF Nos. 869, 876. TCID moved to strike Mr. Shahroody's supplemental declaration on the basis that its reliance on trial exhibit 430 is misplaced due to the district court's limited admission of that exhibit at trial. ECF No. 873. The Tribe and United States opposed to motion in their Joint Response Brief . ECF No. 877.

On January 25, 2016, the district court, without the benefit of a hearing, issued separate orders striking the supplemental Shahroody declaration, denying any recoupment amounts for 1985 or 1986, and issuing its January 25, 2016 Second Amended Judgment pursuant thereto and to its orders of January 29, 2014 and May 11, 2015. ER 008, ER 004, ER 001. The district court held simply that “there is insufficient evidence that was admitted in the government’s case in chief which supports any recoupment for 1985 and 1986.” ER 006. The district court denied the United States’ and Tribe’s requests that the district court consider Mr. Shahroody’s calculations of excess diversions based on rebuttal Exhibit 430 from the trial on the ground that “calculating recoupment based on that data would require an entirely different methodology than that adopted by the court.” ER 006–07; *see also* ER 009 (denying the use of Exhibit 430 on remand because “[t]he determination as to how much recoupment, if any, is available for the designated time periods in 1985 and 1986 should be made on the basis of evidence presented during the government’s case-in-chief.”). Yet the district court’s order does not explain how or why adoption of a such a methodology and use of Exhibit 430, which is consistent and in fact required by the district court’s May 11, 2015 order, would be impermissible, particularly in light of the district court’s broad and expansive equitable powers in this case to fashion a remedy for the recoupment of water intentionally diverted by TCID in excess of valid OCAP.

The Tribe therefore appeals from the district court's rulings, orders and Second Amended Judgment that deny any recoupment award for TCID's overdiversions of Truckee River water in 1985 and 1986.

### **STANDARD OF REVIEW**

Questions of law are reviewed *de novo*. *Pakootas v. Teck Cominco Metals, Ltd.*, 452 F.3d 1066, 1073 (9th Cir. 2006). The district court's factual findings are reviewed for clear error. *Minidoka Irrigation Dist. v. U.S. Dept. of the Interior*, 406 F.3d 567, 572 (9th Cir. 2005). Mixed questions of law and fact are reviewed *de novo*. *Mathews v. Chevron Corp.*, 362 F.3d 1172, 1180 (9th Cir. 2004).

Evidentiary rulings are reviewed for abuse of discretion and will be reversed if the exercise of discretion is both erroneous and prejudicial. *Wagner v. County of Maricopa*, 747 F.3d 1048, 1052 (9th Cir. 2012).

### **SUMMARY OF THE ARGUMENT**

First, pursuant to the district court's 2003 ruling that decree court orders take precedence over OCAP if the OCAP are inconsistent with the orders, the district court erroneously ruled on remand that interim OCAP for 1985 and 1986 were not effective even though validly issued *after* specific decree court orders. This ruling should be reversed because the relevant interim OCAP were valid and the district court failed to analyze whether they were actually in conflict with either the decrees themselves or the prior decree court orders allowing TCID to temporarily

deviate from OCAP. The district court’s blanket and summary conclusion that interim OCAP in 1985 did not govern TCID’s Truckee River diversions lacks any foundation in the record and lacks any analysis in the district court’s rulings on remand from which the Tribe now appeals. Furthermore, the so-called “spreading order” issued in 1986 did not, either by its terms or explicitly, excuse TCID’s diversions from OCAP for 1986—it dealt only with releases from Lahontan Reservoir, not diversions from the Truckee River to Lahontan Reservoir.

Second, even if the district court properly determined that TCID was excused from OCAP and therefore recoupment was available for only limited periods of time in 1985 and 1986, the district court erred by failing to exercise its broad equitable authority to consider rebuttal trial evidence on remand for the purpose of determining monthly OCAP overdiversions, in compliance with the district court’s own order on remand requiring such analysis.

## **ARGUMENT**

### **I. TCID WAS NOT EXCUSED FROM COMPLYING WITH OCAP IN 1985 AND 1986**

The district court erred as a matter of law by ruling that TCID was excused from complying with OCAP in 1985 and 1986. The United States issued valid interim OCAP that were in place from March 20, 1985 to September 30, 1985, and after November 15, 1985, and the district court’s ruling that a court order excusing TCID from complying with existing OCAP remains in force even after

Reclamation issues subsequent valid OCAP lacks any legal support. The district court also erred by ruling that a 1986 decree court order approving of flood control releases from Lahontan Reservoir onto Newlands Project farmlands excused TCID's compliance from valid 1986 interim OCAP. The Tribe (and United States) are therefore entitled to recoup excess diversions made by TCID during periods when valid OCAP were issued and in effect.

**A. Valid Interim OCAP Controlled Diversions Between March 20 and September 30, 1985**

The Tribe is entitled to recoup water that TCID illegally diverted in violation of the interim OCAP instructions issued by Reclamation beginning on March 20, 1985, and in effect through September 30, 1985. However, the district court erroneously accepted TCID's argument that an Order issued by the Honorable Walter E. Craig on January 15, 1985, in *United States v. Orr Water Ditch Co.*, No. A- 3 Equity ("January 15 Order" or "Judge Craig's Order," ER 260)<sup>2</sup> excused diversions from complying with OCAP *for almost an entire year*, between January 15 and November 15, 1985. That argument ignores that the interim OCAP promulgated after Judge Craig's Order were not contrary to Judge Craig's order,

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<sup>2</sup> The trial exhibits, including historic judicial orders, relevant to this issue were provided to the district court on remand as an "Appendix" to the Joint Brief of the Tribe and United States on Remand, and that entire Appendix is reproduced and provided to this Court at ER 055–429.

were not inconsistent with the governing decrees, and were therefore in effect from March 20 to September 30, 1985.

TCID was obligated both by the Orr Ditch Decree and the terms of its operations contract with the United States to comply with those interim OCAP in 1985, which is not inconsistent with Judge Craig's Order. Despite previously finding that TCID was required to abide by the 1985 and 1986 interim OCAPs, the district court's ruling on remand herein erroneously, and without analysis, summarily determined that OCAP that were properly issued subsequent to Judge Craig's Order were nonetheless categorically invalid. ER 016 ("the court concludes that court orders in effect in 1985 authorized deviation from any and all OCAPs from January 15, 1985, until November 15, 1985."). However, Judge Craig's Order did not expressly by its terms, and was not intended to, prospectively override properly issued subsequent interim OCAP in 19985; it was only intended to allow TCID to commence winter, non-irrigation diversions of Truckee River water to Lahontan Reservoir for carryover storage into the spring 1985 growing season. ER 260 (stating only that the Water Master "is hereby authorized to commence diversions to the Newlands Project pursuant to the Final Decree entered September 8, 1944.").

1. Events Leading to Judge Craig's January 15, 1985 Order

Diversions of Truckee River water to the Newlands Project were not authorized under OCAP at the beginning of 1985. Following this Court's 1983 opinion, which largely affirmed entry of a final decree for the Carson River in *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 857 (9th Cir. 1983), Reclamation began issuing interim OCAP instructions in 1984 to regulate Truckee River diversions to the Project pending the development of new, long term OCAP. *See e.g.* ER 057 (Mar. 15, 1984 letter from Reclamation to TCID explaining that interim OCAP will continue in effect for 1984 and 1985 pending final OCAP).

Subsequently, Reclamation advised TCID in a letter dated September 27, 1984, of district court Judge Gerhard Gesell's order in *Pyramid Lake Paiute Tribe v. Clark* declaring null and void interim OCAP instructions that Reclamation had issued on July 30, 1984. ER 199. In accordance with Judge Gesell's order, Reclamation rescinded those instructions and directed TCID

to cease immediately any diversions from the Truckee River for the purposes of carryover storage in Lahontan Reservoir, and henceforth all diversions from the Truckee River shall be in accordance with the March 15, 1984 interim operating instructions with the modification that *diversions from the Truckee River for carryover storage in Lahontan Reservoir be terminated until further notice.*

*Id.* (emphasis added).

Thus, as of January 1, 1985, diversions of Truckee River water to Lahontan Reservoir were not authorized and were not occurring. ER 203, ER 260; *see also*

ER 200–202 (memorandum from Reclamation Mid-Pacific Regional Director to Commissioner of Reclamation explaining that Truckee River diversions to the Newlands Project were not warranted in January 1985 based on forecast data). On January 1, 1985, Lahontan Reservoir contained approximately 149,000 acre-feet of water, with the expectation that it would receive inflow from the Carson River in January and February. *Id.* Reclamation’s Regional Director observed that, by not diverting Truckee River water to Lahontan Reservoir in January 1985, “more storage space in Lahontan Reservoir is available for Carson River water.” *Id.* Target storage could then be recomputed in February, taking account of actual January inflow into Lahontan Reservoir from the Carson River, thereby minimizing spills later in the year and “allowing more water to remain in the Truckee River.” *Id.*

Nevertheless, a group of Newlands Project water users approached the federal Water Master in January 1985 and asked that he personally open the gates at Derby Dam so that diversions of Truckee River water to Lahontan Reservoir could begin. ER 407–410. Following a hearing before Judge Craig at which he directed the Secretary to cooperate with the Water Master “in any regulations that are proposed by the Secretary with respect to the Newlands Project,” ER 261, Judge Craig issued his January 15 Order, which allowed the commencement of off-season diversions of Truckee River water to storage for later use during the 1985

irrigation season. ER 260. Judge Craig's order did not by its terms preclude the promulgation of future interim OCAP in 1985, nor was that its intent.

2. Reclamation Issued Valid Interim OCAP in 1985 After Judge Craig's January 15, 1985 Order

On March 20, 1985, Reclamation issued the first of several interim OCAP instructions for the 1985 irrigation season in the Newlands Project. ER 81. Those interim OCAP instructions were in effect and governed diversions of Truckee River water to the Project from March 20, 1985 to September 30, 1985. The district court's determination to the contrary in its May 11, 2015 Order on remand was not based on any analysis or finding that these 1985 interim OCAP were deficient or invalidly issued. The district court simply held that Judge Craig's January 15, 1985 Order allowing diversions to commence for carryover storage in Lahontan Reservoir, despite lacking any such specific language or intent, had the legal effect of prospectively invalidating any future OCAP. ER 016 ("This court's prior holding that orders entered by the decree court supersede inconsistent terms of the OCAP holds true whether the OCAPs existed at the time of the court order *or whether they were subsequently adopted.*") (emphasis added).

As evidence that at the time there was no knowledge that Judge Craig's January 1985 Order was intended to prospectively invalidate future OCAP, Reclamation published in the Federal Register a notice of intent to implement revised OCAP for the operation of the Newlands Project in 1985, and of the

availability of an environmental assessment on those proposed OCAP. 50 Fed. Reg. 5934 (Feb. 12, 1985), ER 60. Pursuant to that Federal Register notice, Reclamation thereafter issued three interim OCAP instructions in 1985. These interim OCAPs became effective because they were approved in writing by the Tribe, in accordance with the Order and Decree in the *Tribe v. Morton* litigation. See 354 F. Supp. at 262 (allowing changes to OCAP to be made either by agreement of the United States and the Tribe or pursuant to court order after notice).

On March 20, 1985, Reclamation issued the first of these interim OCAP to TCID, which were valid because the Tribe concurred. ER 75 (Tribe concurrence); ER 81 (notice to TCID). These interim OCAP governed Truckee River diversions for the months of March through June 1985 while Reclamation prepared final OCAP for 1985. ER 82. In late June 1985, the Tribe concurred in further supplemental interim OCAP, which covered July 1985 diversions. ER 86. The Tribe also concurred in interim OCAP issued to TCID on July 30, 1985, which were in effect for August and September 1985. ER 89.

There is no question that the Secretary had authority to issue these interim OCAP under the final decree governing diversions of Truckee River water to the Newlands Project. As Judge Thompson had ruled in 1983,

The Orr Ditch Decree granted the United States the right to divert water from the Truckee River for irrigation of the [Newlands] project.

This water is “under such control, disposal and regulation as the [United States] may make or desire.” The only limitation on the Secretary’s ability to regulate the water supply is an upper limit.

ER 395 (*TCID v. Sec’y of the Interior*, Civil R-74-34-BRT, slip. op. at 13 (D. Nev. Aug. 18, 1983), aff’d 742 F.2d 527 (9th Cir. 1984)). The interim OCAP covering March 20 to September 30, 1985, were all validly issued because they were approved by the Tribe in writing. *See Tribe v. Morton*, 354 F. Supp. at 262. TCID was notified of and directed to comply with each of these interim OCAP. *See e.g.* ER 224 (confirmation by Reclamation “of the interim instructions issued to [TCID] on March 20, June 28 and July 31, 1985.”). There is no support, legally or in the record, for the district court’s erroneous ruling that Judge Craig’s January 1985 Order prospectively excused TCID from complying with all future OCAP—issued in accordance with the above and other authorities—throughout the entirety of 1985.

3. The District Court Approved Valid Interim OCAP From November 15, 1985 through the End of 1986

In late September 1985, the United States again sought the concurrence of the Tribe on a further set of interim OCAP. This time the Tribe did not concur. ER 224–25. Therefore, the United States moved the decree court to approve interim OCAP for the period October 1, 1985, to March 15, 1986. *Id.*; *see also* ER 267. That court was not able to hear the United States’ motion before November 15, 1985. ER 225. On October 28, 1985, the district court issued an order reinstating

Judge Craig's January 15 Order because the July 30, 1985 OCAP, which were in place until September 30, 1985, had expired by their own terms. Therefore, the Court reinstated Judge Craig's January 15 Order until it could review the United States' motion seeking approval of the new interim OCAP submitted in early October 1985. ER 267.

Judge Thompson approved these October 1985 interim OCAP in a November 15, 1985 minute order. ER 093. This minute order states that the interim OCAP were valid from the date of the order to March 15, 1986. *Id.* On March 11, 1986, Reclamation issued new interim OCAP for 1986. ER 099 *United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 209, 210 (9th Cir. 1989).

Thus, valid interim OCAP were in place from March 20 to September 30, 1985, and from November 15, 1985, through the end of 1986.

**B. TCID Was Required to Comply With the Interim OCAP in Effect From March 20 to September 30, 1985 and from November 15, 1985 through the end of 1986**

The series of interim OCAP cited above regulated diversions at Derby Dam from March 20 to September 30, 1985, and again from November 15, 1985, through the end of 1986. The district court erroneously held that Judge Craig's Order controlled from January 15 to November 15, 1985, but nothing in that Order purported to modify the terms of the Orr Ditch Decree, which plainly authorized the United States to issue regulations governing the diversion of Truckee River

water to the Newlands Project. *See e.g.* ER 473 (pursuant to the Orr Ditch Decree, the United States’ right to divert water from the Truckee River to the Newlands Project for the benefit of the farmers “was expressly made subject to ‘such control, disposal and regulations as the Plaintiff United States may make or desire. . . .’”). Nothing in Judge Craig’s Order prevented Reclamation from issuing subsequent OCAP on an interim basis while Reclamation developed long-term OCAP. The Orr Ditch Decree and TCID’s 1984 contract with the United States also required TCID to comply with OCAP. *Id.* (“The Secretary expressly reserved the right to make reasonable rules and regulations consistent with the provisions of the contract with TCID and TCID agreed to fully adhere to the rules and regulations in its operation of the transferred facility.”).

The record demonstrates that the January 15 Order was not meant to preclude subsequent validly issued OCAP. Nothing in the language of the January 15 Order indicates that Judge Craig intended to prevent Reclamation from issuing OCAP; the Order merely states that good cause appearing, the Water Master “is hereby authorized to commence diversions to the Newlands Project pursuant to the Final Decree entered September 8, 1944.” ER 260. As noted above, at the time the January 15 Order was issued, no diversions of Truckee River water to Lahontan Reservoir were occurring. Judge Craig’s Order merely allowed those diversions to begin.

Additional evidence in the record demonstrates that Judge Craig did not intend his January 15 Order to preclude the subsequent issuance of OCAP, interim or otherwise. For example, at a February 12, 1985 hearing, Judge Craig ordered “the Secretary to cooperate with the Water Master in any regulations that are proposed by the Secretary with respect to the Newlands Project.” ER 261; ER 258 (same). Judge Craig noted that “the Water Master and the Secretary together *can work out workable and reasonable rules and regulations concerning the Newlands Project.*” *Id.* The minutes of Judge Craig’s court from that date also reflect these instructions. ER 262–63. Accordingly, Judge Craig clearly expected Reclamation to issue OCAP that would regulate diversions of Truckee River water at Derby Dam, *after* the January 15 Order, and contrary to the ruling of the district court here that the January 15 Order prospectively precluded the effectiveness of all subsequently issued valid OCAP.

Pursuant to Judge Craig’s intent, Reclamation did in fact consult with the Water Master in developing the 1985 interim OCAP after the issuance of Judge Craig’s January 15, 1985 Order, as demonstrated by the record. ER 264 (“A meeting was held [by Reclamation] with the Federal Watermaster and his Deputy to discuss the Draft OCAP. We went through the document paragraph by paragraph. . . .”); *see also* ER 266. The Water Master at the time, Garry Stone, testified at the trial herein that he was consulted when Reclamation developed the

interim OCAP. ER 411–13. Had TCID believed at the time that Judge Craig’s January 15 Order prospectively overrode the subsequent interim OCAP issued in March and July 1985, TCID could have challenged the interim OCAP in court on that basis at that time. TCID did not.

The OCAP represent Reclamation’s rules and regulations governing diversions at Derby Dam for the Newlands Project, and TCID was bound to comply with them. ER 484 (“TCID, during the 1973 period forward, was obligated by the terms of the Orr Ditch Decree, Nevada law and the 1926 Contract to comply with the rules and regulations issued by the Secretary for the Project.”). None of the court orders at issue here purported to override the Orr Ditch Decree or supplant the Secretary’s authority under that Decree to issue rules and regulations.

TCID was also bound to comply with the interim OCAP under its contract with the United States. *See* ER 484–85 (stating that the Secretary’s authority to issue OCAPs “was expressly recognized and reserved in both the 1926 Contract and Claim 3 of the Orr Ditch Decree” and discussing contractual requirements). “The 1926 contract, for example, explicitly stated that the Secretary had the authority to adopt regulations concerning the operation of the project and that he could terminate the contract if the regulations were violated.” *TCID v. Dept. of Interior*, 742 F.2d at 531. The 1926 contract was cancelled, but a temporary

contract between Reclamation and TCID was executed and in effect beginning on February 4, 1984. ER 245. This contract contained a similar provision that required TCID to comply with “the applicable rules and regulations of the Secretary now in force or hereafter promulgated,” as well as “court orders and decrees,” including the Orr Ditch Decree. ER 246. Given that TCID’s contract with the United States to manage the Newlands Project explicitly required TCID to abide by OCAP, the United States and the Tribe are entitled to recoup water diverted in excess of the interim OCAP.

Thus, while there may have been court orders that excused diversions from the Truckee River to the Newlands Project from compliance with OCAP during some limited periods in 1985, those orders also contemplated that Reclamation could issue subsequent OCAP— which Reclamation did. The Orr Ditch Decree gives the Secretary the authority to regulate diversions at Derby Dam, and Reclamation issued interim OCAP in accordance with the parameters established by *Tribe v. Morton*. None of the court orders relied upon by TCID and the district court amended the Orr Ditch Decree or otherwise removed the Secretary’s authority to regulate diversions at Derby Dam. None of them specifically precluded Reclamation from issuing subsequent OCAP, or specifically excused TCID from complying with subsequently issued OCAP. And the district court’s

blanket ruling that they did so with prospective effect is without support or explanation.

Accordingly, when there were valid interim OCAP in place, such as between March 20 and September 30, 1985, those OCAP regulated diversions. The court orders did not take precedence over the validly issued interim OCAP, and the United States and the Tribe are entitled to recoup diversions or deliveries made by TCID in excess of the interim OCAP.

**C. The District Court Erroneously Reversed Its Prior Finding That TCID Was Required To Abide By The 1985 and 1986 Interim OCAPs**

Not only does the district court's ruling below lack any support in the law or in the record, it also reversed its own prior findings. Prior to its ruling on remand from which the Tribe now appeals, the district court previously found that the interim OCAP were valid, were operative during 1985 and 1986, and were expressly approved by the Alpine Decree court for most of that period.

Specifically, the district court explained:

[I]n 1985, the Bureau of Reclamation entered interim OCAPs in the form of a series of instructions which set a new maximum project diversion and criteria for diversions of water from the Truckee River to the Lahontan Reservoir for the remainder of the year pending completion of a long term OCAP. This 1985 interim OCAP was extended through March 14, 1986 by order of the court. Then on March 11, 1986, the Department approved new interim OCAPs for the remainder of 1986.

ER 482–83. The district court’s recent ruling that court orders precluded recoupment during 1985 and 1986 is negated by the same court’s prior finding that the 1985 OCAP “was extended through March 14, 1986 by order of the court,” after which Interior approved new OCAP for the remainder of 1986. ER 482. The district court’s findings were correct in 2003 and it failed to provide any rationale for its reversal in the orders appealed from.

The district court also recognized that the interim OCAP during these years established valid and binding diversion limitations:

Under the 1985 interim OCAP, which took into account the final Alpine Decree, the maximum allowable project diversion was 335,000 acre-feet. Under the 1986 interim OCAP the maximum allowable project diversion was 350,000 acre-feet.

ER 483. And the district court then affirmed the validity of the interim OCAP, stating that “[t]he OCAPs were valid and binding on TCID between 1973 through 1980, as were the 1985, 1986, and 1987 OCAPs.” ER 495. Thus, the district court originally held that TCID was required to comply with the 1985 and 1986 interim OCAPs, and the annual maximum allowable diversion amounts in the 1985 and 1986 interim OCAPs were enforceable limits against which TCID’s diversions of Truckee River water in those years were generally to be measured.

There is no support in the record for the district court’s finding that Judge Craig’s January 15, 1985 Order excused TCID from complying with OCAP that

were validly issued and approved *subsequent* to that order.<sup>3</sup> The district court's barebones conclusory ruling that "orders entered by the decree court supersede inconsistent terms of the OCAP holds true whether the OCAPs existed at the time of the court order or whether they were subsequently adopted," ER 016, does not pass muster because the district court failed to analyze or determine whether, in fact, subsequent OCAP were inconsistent with the terms of the decrees or any court orders. Furthermore, its recent determination that the January 1985 Order excused TCID from compliance with subsequent interim OCAP is impossible to square with its original determination in 2003 that those interim OCAP were, in fact, valid and binding.

Because the interim OCAP issued in 1985 were valid and TCID was obligated to abide by the OCAP in 1985 and 1986, the United States and the Tribe are entitled to recoup diversions TCID made in excess of those interim OCAP instructions between March 20 and September 30, 1985, and from November 15, 1985 through the end of 1986.

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<sup>3</sup> The district court's citation of the single sentence in its 2003 decision on liability that the 1985 decree court orders take precedence over interim OCAPs (ER 493) does not specifically contradict its multiple other rulings in that same decision, quoted above, that the 1985 and 1986 interim OCAP were valid and in effect. The Tribe does not here take issue with the notion that the decree court may excuse TCID from complying with OCAP that are inconsistent with the decree, the issue here is the extent to which such orders have prospective effect over subsequent *valid* OCAP that are fully consistent with decree entitlements.

**II. THE ‘WATER SPREADING’ ORDER DID NOT BY ITS TERMS OR BY IMPLICATION EXCUSE TCID FROM OCAP’S LIMITATIONS ON TRUCKEE RIVER DIVERSIONS IN 1986**

On March 13, 1986, district court Judge Thompson issued an order authorizing “water spreading” in the Newlands Project during the irrigation season that year. ER 269. The “spreading order” was issued in response to a one-time extreme weather event and simply provided that water *released from Lahontan Reservoir* during the 1986 irrigation season and spread onto project lands by TCID to avoid flooding of downstream properties would not be considered as irrigation releases and would not be charged against the decreed entitlement of those farmers who consented to “spread” water released as precautionary drawdown from Lahontan Reservoir on their lands. By its own terms, the order applies only to releases from Lahontan Reservoir to avoid flooding on the Carson River. ER 269.

The spreading order says nothing about diversions from the Truckee River during the same time period, and does not mention OCAP. In other words, while the spreading order authorized releases from Lahontan to prevent flooding *on the Carson River*, it did not authorize unlimited diversions from the Truckee River in violation of applicable OCAP.

The Truckee River is intended to provide only a supplemental source of water supply for the Newlands Project. *See TCID v. Secretary*, 742 F.2d at 530. In a year when there was so much water in the Carson River that TCID had to release

water from Lahontan Dam in order to prevent flooding, the OCAP monthly storage targets for Lahontan Reservoir restricted diversions of Truckee River water to the Carson Division in part because irrigation demand in the Carson Division could be met that year largely from the Carson River alone.

Reclamation promulgated OCAP in March 1986, and TCID filed a motion to vacate the specific provision of the OCAP requiring the use of Reclamation's map to classify bench/bottom lands and their respective water duties. *Alpine Land & Reservoir Co.*, 887 F.2d at 210. Thus, in 1986 TCID sought to challenge a portion of the very 1986 OCAP that TCID argued below, and the district court erroneously agreed, were not in effect that year because of the water spreading order. ER 18–19. Although Judge Thompson's March 13, 1986 spreading order provided that water released from Lahontan Reservoir and spread onto farmlands to avoid flooding would not count toward individual landowner entitlements in the decrees, it did not purport to override OCAP's Truckee River diversion limitations, the annual MAD amount, or monthly Lahontan Reservoir storage targets.

In its January 29, 2015 Order, ER 023, the district court determined the amounts of water subject to recoupment by using Defendant TCID's expert witness report from trial, as modified by Plaintiff's expert witness Ali Shahroody in his 2011 Declaration, ER 451, to remove the adjustment for alleged gauge error in conformity with the remand instructions from this Court. As modified to remove

alleged gauge error adjustments, the trial evidence shows excess diversions of Truckee River water to the Newlands Project in 1986 were 9,918 acre-feet. ER 464 (Column 16). The United States and the Tribe are entitled to recoup that amount.

**III. IF THE DISTRICT COURT’S RULING STANDS, IT WAS ERROR TO REFUSE ANY RECOUPMENT AMOUNTS FOR EVEN THE LIMITED PERIODS IN 1985 AND 1986 WHEN THE DISTRICT COURT FOUND OCAP WERE IN EFFECT**

**A. The District Court Refuses To Consider Evidence of Excess Diversions For 1985 and 1986**

Although the district court found that historic orders excused TCID from complying with subsequent valid OCAP, a legal determination with which the Tribe disagrees as explained *supra*, it nonetheless found that OCAP were in effect during the following periods in 1985 and 1986: November 15, 1985 through March 13, 1986, and July 1, 1986 through December 31, 1986. ER 019–20; *see also* ER 006. The district court therefore directed the parties to meet and confer to attempt to provide the district court a stipulation setting forth a mutually agreed amount of excess diversion for those limited periods in 1985 and 1986, or otherwise to submit briefing regarding the amounts of recoupment based on alleged overdiversions during these limited periods within 1985 and 1986. ER 020. The parties were not able to agree, and briefing was submitted to the district court.

In their briefs, the Tribe and United States explained that the district court's ruling limiting recoupment for only specific periods in 1985 and 1986 requires an examination of TCID's overdiversions on a monthly basis; however, the case in chief at the time of trial was based on *annual* overdiversions, in excess of the annual "Maximum Allowable Diversion" pursuant to OCAP. The only trial evidence for determining overdiversions on a monthly basis for 1985 and 1986 as required by the district court's ruling on remand is Trial Exhibit No. 430, which contains historic data of TCID's monthly diversions for the entire time period for which the United States and Tribe allege TCID refused to comply with OCAP. *See e.g.* ER 046. Trial Exhibit No. 430 was admitted by the district court at trial only for rebuttal purposes, so the Tribe and United States requested that the district court exercise its broad equitable power to accept the use of Exh. 430 for calculation of excess diversions for the limited periods allowed by the district court on remand. ECF No. 870.

Exhibit 430 was used by the government's expert witness Ali Shahroody on remand to determine the amount of TCID's excess diversions for the limited periods allowed by the district court's May 11, 2015 order on remand. ER 46–47. Mr. Shahroody followed the procedures set forth in the Nov. 15, 1985 Interim OCAP and the March 15, 1986 Interim OCAP to determine whether TCID's diversions of Truckee River water during those limited periods exceeded amounts

allowed under the interim OCAP applicable during those periods. *Id.* In making that analysis, Mr. Shahroody used Exhibit 430 as a source of historical diversion data. ER 047. At trial, the district court did not admit Exhibit 430 as a basis for determining recoupment amounts, but did it admit it for limited rebuttal purposes. ER 513–23. Exhibit 430 is the only trial evidence available from which Mr. Shahroody was able to calculate TCID’s diversions in excess of the OCAP for the limited periods requested by the district court’s May 11, 2015 order on remand.

The district court refused to accept Exh. 430 for this purpose, holding in a two and one-half page order that “calculating recoupment based on that data [in Exh. 430] would require an entirely different methodology than that adopted by the court.” ER 006–07. The district court’s sole reasoning, which did not address the Tribe’s argument that the district court has broad equitable power to shape the remedy in this case, was that at trial “the court observed that it was not persuaded by the data submitted by Shahroody,” and implying that it was not “inclined to modify the methodology to a monthly rather than yearly analysis.” *Id.* All of this despite the fact that it was the district court’s own prior ruling that found OCAP were only in effect for limited periods during 1985 and 1986 and expressly directed the parties to attempt to quantify TCID’s excess diversions for those limited periods.

**B. The Court Erred By Refusing to Exercise Its Broad Equitable Powers to Accept Evidence of Excess Diversions For Limited Periods in 1985 and 1986**

The district court, sitting in equity as it does in this matter, has wide discretion to use its equitable powers to fashion the relief necessary to right the wrongs perpetrated against the Tribe and the United States by TCID. *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (“A district court has ‘broad latitude in fashioning equitable relief when necessary to remedy an established wrong.’”) (quoting *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 641 (9th Cir. 2004)); *Natural Res. Def. Council v. Southwest Marine, Inc.*, 236 F.3d 985, 999 (9th Cir. 2000) (same); *Alaska Ctr. for the Env’t v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) (same). A court does not abuse its discretion “[s]o long as [its] equitable measures are reasonably calculated to ‘remedy an established wrong’ . . . .” *Natural Res. Def. Council* at 1000 (quoting *Alaska Ctr. for the Env’t* at 986).

Furthermore, the doctrine of unclean hands “gives wide range to the equity court’s use of discretion in refusing to aid the unclean litigant.” *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 815 (1945). This doctrine “is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.” *Id.* at 814. “He who comes into equity must come with clean hands.”

*Id.* at 815. The unclean hands doctrine “is rooted in the historical concept of a court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith.” *Id.* Here, TCID did not act equitably and it certainly does not have clean hands, and it should therefore not benefit because the district court’s ruling required a determination of overdiversions for limited periods in 1985 and 1986 but the trial record was focused on annual excess diversions and not monthly excess diversions.

In its finding of facts at the conclusion of the trial, the district court determined that TCID purposefully refused to comply with applicable OCAP. “It is clear to the court that TCID at all relevant times to this litigation was aware of the potential consequences of any conduct on its part in refusing to comply with the OCAPs.” ER 479. Furthermore, the district court described how “TCID had deliberately violated the maximum allowable diversions under the 1973 OCAP. . . , made no attempt to comply with the operating criteria. . . , and [its] attitude of complete defiance is incomprehensible.” *Id.* (quoting *TCID v. Secretary*, Case No. 74-34-BRT (D. Nev. 1983), *aff’d* 742 F.2d 527 (9th Cir. 1985)). Further, “[b]etween 1974 and 1981, the record clearly shows that TCID failed to comply with the OCAPs and repeatedly and publically refused to comply although requested on numerous occasions to do so.” ER 483. As demonstrated at trial and found by the district court, this conduct continued through 1986.

The unclean hands doctrine assumes even “wider and more significant proportions” where, as here, a suit in equity concerns the public interest. *Precision Mfg.* at 815. Here, “[t]he court has previously concluded and reaffirms that the United States is bringing this action to protect a public interest.” ER 487.

Therefore, in its 2003 Decision, the district court

conclude[d] that the United States has properly invoked the equity jurisdiction of this court to seek recoupment of water diverted in excess of the amounts allowed by the OCAPs as directed by the Settlement Act. When the United States is seeking equitable remedies for violation of federal statutes or regulations, *the court’s full equitable powers are available in fashioning such relief unless Congress has specifically provided otherwise.*

ER 489–87 (emphasis added) (citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398–99 (1946)).

The district court’s refusal to consider the Tribe’s and United States’ evidence of TCID’s diversions in excess of those allowed by OCAP also goes against the policy of Congress in passing the Settlement Act. As this Court previously explained,

[T]he statutory language is mandatory, and the purpose of the Act was to remedy past violations. Section 202 declares the purpose of the Act to promote the “recovery of the Pyramid Lake fishery.” The stated purpose demonstrates that Congressional intent was to restore the Lake, not to maintain the status quo.

*Bell*, 602 F.3d at 1080.

Because this Court and the district court, sitting in equity, have already determined that TCID intentionally violated applicable OCAP, it would be unfair and inequitable for TCID to benefit in the form of a significantly reduced recoupment award because of the happenstance that the trial record is primarily focused on annual excess diversions but the district court's May 2015 Order requires a monthly analysis of excess diversions for 1986. The district court's decision in its January 2015 Order to refuse to consider the United States' and Tribe's request that it exercise its broad equitable authority to accept evidence of TCID's excess diversions for limited periods in 1985 and 1986 is based only on the district court's conclusion that the trial rebuttal evidence presented by the United States and Tribe "would require an entirely different methodology" without any explanation for why it refused to do so. Because that decision is an abuse of the court's broad equitable discretion in light of its prior determinations that TCID willfully violated the OCAP to the detriment of the Tribe, it should be reversed.

### **CONCLUSION**

For the foregoing reasons, the district court's second amended judgment as to the amount of recoupment should be vacated and the case remanded with instructions to the district court to enter judgment for the Tribe and the United States in the amount of 394,029 acre-feet of water to include recoupment for diversions in excess of the annual maximum allowable diversions for 1985 and



**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system on September 6, 2016.

I further certify that I electronically filed the three-volume Appellant's Excerpts of Record with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by the using the CM/ECF system on September 6, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Christie Rehfeld  
An employee of  
Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP