No. 16-15507

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

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

REPLY BRIEF OF APPELLANT PYRAMID LAKE PAIUTE TRIBE

Don Springmeyer, Esq.
Christopher W. Mixson, Esq.
Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP
3556 East Russell Road
Las Vegas, Nevada 89120
(702) 341-5200
dspringmeyer@wrslawyers.com
cmixson@wrslawyers.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

OTHER AUTHORITIES

INTRODUCTION

The Truckee Carson Irrigation District's ("TCID") November 7, 2016, Answering Brief makes much of the fact that this litigation spans an impressive period of time. *See e.g.* Answering Brief at 1, 5 (noting that legislation authorizing this equitable action was approved by Congress in 1990, the original complaint was filed in 1995, bench trial occurred in 2002, the district court's final decision on TCID's liability was issued in 2003, the written judgment was issued in 2005, and this Court's first decision on appeal was issued in 2010). However, TCID's implication that due to the passage of time this Court should disregard the Tribe's request to correct the district court's error falls on the ears of a native people who have been on the receiving end of two and a half centuries of hardship at the hands of others.

Specifically relevant to the questions presented by this appeal, the diversions of water from the Truckee River to the Newlands Project began in 1902 and were not subjected to any limiting regulations until after the initial Operating Criteria and Procedures ("OCAP") were put in place in the late 1960s to attempt to reduce diversions in light of the decimation of the endemic Cui-ui fish and Lahontan Cutthroat Trout from the lower Truckee River and Pyramid Lake. Those initial OCAP were insufficient to protect the Tribe's interests, and litigation brought by the Tribe was successful in forcing better OCAP to further limit diversions of

water from the Truckee River to only what is absolutely necessary to serve the purpose of supplementing primary Carson River water for the Newlands Irrigation Project. *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252 (D.D.C. 1973) ("*Tribe v. Morton*"). From the inception of the OCAP, TCID refused to comply with any restrictions on its ability to take Truckee River water from the Pyramid Lake Paiute Tribe. This litigation at bar is the result of TCID's historic refusal to comply with that law. An additional passage of a few years to ensure that the correct equitable result is reached in this case is a small price to pay given the magnitude of harm to the Tribe from TCID's obstinate refusal to comply with the law restricting diversions of water from the Truckee River.

TCID's primary legal argument against this Court's review of the district court's decision denying any recoupment award for 1985 and 1986 is based on TCID's flawed analysis that the Tribe's arguments on appeal are barred by the doctrines of res judicata and/or law of the case. Neither of those doctrines applies here. Res judicata is applicable only to *separate new* actions based on the same claims by or against the same parties to a *prior* action. The doctrine of law of the case does not apply here because the district court's legal determination on remand that is the subject of this appeal is a subsequent extension and misapplication of dicta set forth in its 2003 decision on liability after trial, and was therefore not actually raised and ruled upon in either prior appeal of this case to this Court.

TCID also repeatedly argues that the evidentiary record from the trial is final and the Tribe should be foreclosed from appealing to equity to allow the use of limited trial evidence for purposes of calculating monthly diversions in excess of interim OCAP for the relevant periods in 1985 and 1986. However, TCID's arguments fail to provide any reasonable basis for the district court to have withheld exercising its broad discretion to allow the use of such trial evidence in light of the district court's finding that TCID willfully violated applicable OCAP to the substantial detriment of the Tribe.

ARGUMENT

I. THE TRIBE'S APPEAL OF THE DISTRICT COURT'S ORDERS ON REMAND DENYING RECOUPMENT FOR 1985 AND 1986 IS NOT BARRED

TCID incorrectly argues that the issues raised in the Tribe's Opening Brief regarding whether interim OCAPs applied to TCID's diversions of water in 1985 and 1986 are barred by both the doctrines of res judicata and law of the case because the issues were ruled upon by the district court's 2003 Decision and by this Court in one or both prior appeals in this case. TCID Answering Brief at 16, 18–22. TCID is incorrect.

Res judicata does not apply to any issues herein because it only applies to subsequent *new* legal actions, and does not apply to an appeal in an ongoing case from an order on remand, such as this. The doctrine of law of the case does not

apply here because the issues were not actually ruled upon by this Court in either prior appeal, which is required for the doctrine of law of the case to bar them now. In the immediate prior appeal in this case, Case No. 12-15474, TCID raised the issue of its purported excusal from compliance with valid OCAPs in 1985 and 1986 in its answering brief therein, and the Tribe (jointly with the United States) replied to TCID's arguments at that time. This Court did not rule on those arguments, but instead remanded the issue to the district court for determination in the first instance. The Tribe now appeals from the district court's rulings on remand. In the light of that procedural history, neither res judicata nor the law of the case doctrine precludes this appeal.

A. Res Judicata Does Not Apply Here

Res judicata only applies to bar *subsequent new legal actions* when the claims asserted and parties asserting them are the same as in a *prior action*. *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001) ("Res judicata, also known as claim preclusion, bars litigation *in a subsequent action* of any claims that were or could have been raised *in the prior action*.") (emphasis added) (quoting *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997)); *see also* Restatement (Second) of Judgments § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is

conclusive *in a subsequent action between the parties*, whether on the same or a different claim.") (emphasis added); *see also* 18 Wright, Miller & Cooper Fed. Prac. & Proc. Juris. § 4401 (2d ed. April 2016) ("Res judicata principles commonly involve the relationships between *two separate lawsuits*. Within the framework of a single action, reconsideration of matters already resolved ordinarily is referred to law-of-the-case theory.") (emphasis added); *Owens* at 714 ("The *central criterion* . . . is whether *the two suits* arise out of the same transactional nucleus of facts.") (emphasis added) (quoting *Frank v. United Airlines*, 216 F.3d 845, 851 (9th Cir. 2000)).

This Court has explained that "[t]hree elements constitute a successful res judicata defense. 'Res judicata is applicable whenever there is (1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties.'" *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003) (quoting *Stratosphere Litig. LLC v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 n.3 (9th Cir. 2002)). Specifically for purposes of TCID's argument, the 'identity of claims' element is only satisfied if the alleged identical claims are raised in a subsequent, new legal action in which the res judicata defense is then asserted. This Court looks to four factors to determine whether there is an identity of claims, all four of which expressly require comparison of *two separate actions*:

> (1) whether the *two suits* arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of *the second action*; (3) whether *the two suits* involve infringement of the same right; and (4) whether substantially the same evidence is presented *in the two actions*.

Garity v. APWU Nat'l Labor Org., 828 F.3d 848, 855 (9th Cir. 2016) (emphasis added); *see also Tahoe-Sierra* at 1078 ("[i]dentity of claims exists when *two suits* arise from the same transactional nucleus of facts.") (emphasis added; internal quotations omitted). If there are not two separate actions, the elements of res judicata simply cannot be satisfied.

Res judicata does not apply here because this is not a subsequent new action, it is an appeal from a district court order on remand. TCID makes absolutely no effort to provide the Court with any definition or description of the doctrine of res judicata or its elements. "The party asserting a claim preclusion argument 'must carry the burden of establishing all necessary elements.'" *Garity*, 828 F.3d at 855 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 907, 128 S.Ct.2161 (2008)).

Whether the preclusion defense is asserted in a subsequent new action, or whether it is asserted in an ongoing action in a subsequent appeal is precisely the difference between whether to apply the doctrine of res judicata or the doctrine of law of the case. Here, because this is a subsequent appeal in an ongoing action, res judicata cannot apply, and as will be shown below, while the law of the case

doctrine could apply to this case generally, it does not apply to the specific issues raised by the Tribe in this appeal.

B. The Law of the Case Doctrine Does Not Apply to the Issues in This Appeal

1. The law of the case doctrine only applies to issues actually raised and actually ruled upon in prior appellate proceedings

The law of the case doctrine operates to generally make binding on all future proceedings any issues that were actually raised and ruled upon on appeal. "Law of the case is a jurisprudential doctrine under which an appellate court does not reconsider matters resolved on a prior appeal. The law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case." *Jeffries v. Wood*, 114 F.3d 1484, 1488–89 (9th Cir. 1997) (en banc) (quoting *Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.)*, 77 F.3d 278, 281 (9th Cir. 1996)). The law of the case doctrine is discretionary, not mandatory. *Jeffries* at 1489; *see also Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991).

TCID incorrectly argues that "[t]he unchallenged rulings of the district court embodied in its 2003 Decision, explicit or implicit, became law of the case with the affirmation of the district court's decision" on appeal. Answering Brief at 20. However, actual decision of an issue by an appellate court is required to establish the law of the case. *See* 18B Wright, Miller & Cooper Fed. Prac. & Proc. Juris. §

4478 (2d ed. Apr. 2016) ("actual decision of an issue is required to establish the law of the case.") (citing *U.S. v. Robinson*, 724 F.3d 878, 886 (7th Cir. 2013)); *see also Quern v. Jordan*, 99 S.Ct. 1139, 1148 n.18, 440 U.S. 332, 347 (1979) ("The doctrine of law of the case comes into play only with respect to issues previously determined."); *United Artists Theatre Circuit v. Township of Warrington*, 316 F.3d 392, 398 (9th Cir. 2003) ("Where there is substantial doubt as to whether a prior panel actually decided an issue, the later panel should not be foreclosed from considering the issue."); *U.S. v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) ("Because the purpose of the doctrine is to promote judicial finality, it necessarily follows that the law of the case acts as a bar *only when the issue in question was actually considered and decided by the first [appellate] court*.") (emphasis added); *see also Bone v. City of Lafayette*, 919 F.2d 64, 66 (7th Cir. 1990) ("Subjects an appellate court does not discuss, because the parties did not raise them, do not become the law of the case by default."); *American Ad Management, Inc. v. General Tel. Co.*, 190 F.3d 1051, 1055 n.4 (9th Cir. 1999) (an issue not raised in the first appeal is not impliedly decided).

Of the cases cited by TCID for its argument that the law of the case doctrine applies to "unchallenged" district court rulings "implicitly" upheld in prior

appeals[1], only *Little Earth* remotely supports that argument. However, that 8th Circuit case did not apply the law of the case doctrine as it pertains to district court rulings *implicitly decided by prior appeals*, but instead applied the law of the case doctrine to prior district court rulings *that had not been appealed at all*. *Little Earth*, 807 F.2d at 1437–38 ("HUD did not appeal from either the district court's November 8, 1983 order, or the orders of August 5 and 14, 1985, which clarified the November 8 order. [***] Consequently, HUD's present appeal is an untimely collateral attack on the district court's November 8 order, which is now the law of the case."). Putting aside that this case from the Eighth Circuit contradicts the clear law of this Ninth Circuit as set forth below, its fact pattern is also inapposite to the facts of this case. In particular, the issue of whether TCID was excused from compliance with 1985 and 1986 OCAP has never ceased to be a live and active issue, and was only finally ruled upon by the district court in the orders on remand appealed from herein.

Also, the relevant district court orders in *Little Earth* that the Eighth Circuit determined to be the law of the case were orders setting forth the terms of a receivership pending a final ruling on the merits, not final legal determinations. *Id*.

[1] In this section of its Answering Brief (pp.20–21), TCID cites *Meritt v. Mackey*, 932 F.2d 1137; *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 834 (9th Cir. 1982); and *Little Earth of the United Tribes, Inc. v. U.S. Dept. of Housing and Urban Dev.*, 807 F.2d 1433, 1438 (8th Cir. 1986).

at 1435. *Little Earth*'s holding contradicts at least one other case from the same circuit that held, like this Circuit, that the law of the case doctrine only applies to issues that were actually presented and expressly ruled upon in a prior appeal. *See e.g. Landscape Properties, Inc. v. Vogel*, 46 F.3d 1416, 1421 (8th Cir. 1995) (the prior appellate decision did not establish the law of the case since it "intimated no view on the merits of the . . . claim"). Finally, *Little Earth* was subject to a strong dissenting opinion, which argued that the majority's law of the case "rationale is flawed." *Id*. at 1445.

2. The issues presented in this appeal were not actually decided by this Court in either prior appeal

The law of the case doctrine does not apply to the issue presented in this appeal: whether TCID was excused from compliance with interim OCAP in 1985 and 1986. This issue, although raised by TCID's answering brief in a prior appeal (Case No. 12-15474) and by the Tribe's joint reply brief therein, was not actually decided by this Court, but was instead remanded to the district court for a ruling in the first instance on remand. ER 445 ("With regard to 1985 and 1986, there may be merit to TCID's contention that there is an alternative ground in the record for … deviation from the OCAP authorized by court order. We leave to the district court to determine whether … this consideration affects the recoupment available for 1985 and 1986. . . ."). The law of the case doctrine does not apply to issues that the appellate court expressly declines to reach. 18B Wright, Miller & Cooper

§ 4478 ("On the first appeal, the court suggested one theory but then expressly declined to reach the issue. The suggestion was not the law of the case, under the rule that mere dictum is not binding on a later appeal.") (citing *Christie v. Iopa*, 176 F.3d 1231, 1236 n.3 (9th Cir. 1999), cert. denied 528 U.S. 928 (1999)); *see also supra* at 7–8 (citing *Quern v. Jordan*, 440 U.S. at 347; *United Artists Theatre Circuit*, 316 F.3d at 398; *U.S. v. Cote*, 51 F.3d at 181; *City of Lafayette*, 919 F.2d at 66 (7th Cir. 1990); *American Ad Management, Inc.*, 190 F.3d at 1055 n.4).

As set forth in detail in the Tribe's Opening Brief in this appeal, the district court ordered written briefing from the parties and issued a written order upon precisely the issues which this Court remanded to it. And it is those rulings and decisions of the district court on remand that the Tribe now asks this Court to review for the first time. This Court expressly did not reach, and left to the district court to review on remand, TCID's alternative defense to the Tribe's claims of excess diversions in 1985 and 1986; the district court did so, and the Tribe now appeals from those remand orders.

If the district court's statement from the 2003 Decision were law of the case, this Court would not have provided direction to the district court on remand to address these issues, and the district court would not have done so by way of an order directing briefing from the parties and a final order deciding the issue on the merits. In its briefing to the district court on the second remand, TCID admitted as

much: "The 2013 Remand permitted this [District] Court to consider the effect of any standing district court orders in 1985 and 1986 on TCID's obligation to comply with OCAP." Dist. Court ECF No. 876 at 3:19–21.

Likewise, TCID's argument that the law of the case doctrine prevents review of the district court's refusal to consider rebuttal trial Exhibit No. 430 on remand must fail. The law of the case doctrine, unlike res judicata and collateral estoppel, does not apply to issues that were not actually raised and ruled upon in a prior appeal. In neither prior appeal to this Court in this case was the issue—whether the district court should exercise its formidable equitable powers to employ rebuttal Exhibit 430 to quantify the recoupment award—ever presented to, or decided by, this Court. Having not considered or decided this issue, this Court is not barred under the law of the case doctrine from considering it now.

Finally, TCID argues that the issue of whether the district court should have exercised its broad equitable powers to consider trial Exhibit 430 for determining TCID's excess diversions for the limited periods in 1985 is foreclosed by the law of the case doctrine because it was implicitly decided in this Court's prior rulings on appeal. That argument fails as well.

The law of the case doctrine applies to issues expressly decided, and those decided by "necessary implication," in prior appeals. *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993). But this particular issue was not implied by this Court's

prior appeal directing the district court to determine in the first instance on remand whether TCID's alternate grounds for not complying with interim OCAP in 1985 and 1986 had merit. Quite the opposite, in fact: whether to employ Exhibit 430 for calculation of limited periods of excess diversions in 1985 *could not* have been implied by this Court's prior decision precisely because this Court's prior decision expressly left for the district court to decide in the first instance on remand whether TCID had illegally overdiverted water in those years, implying that quantification of excess diversions was not ripe until after liability was first established.

Because neither res judicata nor the law of the case apply to the issues raised by the Tribe's Opening Brief (whether interim OCAPs in 1985 were inconsistent with the relevant river decrees and whether the district court should have exercised its broad equitable powers to calculate TCID's overdiversions for limited periods in 1985 and 1986), TCID's estoppel defenses must be denied, and this Court is free to consider those issues on their merits.

II. THE 1985 AND 1986 INTERIM OCAP WERE VALID AND WERE NOT INCONSISTENT WITH THE ORR DITCH AND ALPINE DECREES

A. Judge Craig's January 1985 Order Did Not Prospectively Preclude Subsequent Valid OCAP

The primary disagreement regarding whether TCID was excused from compliance with all interim OCAPs in 1985, as evidenced by the Tribe's Opening Brief and TCID's Answering Brief, is whether Judge Craig's January 15, 1985

Order allowed for subsequent interim OCAP, or whether it instead precluded any subsequent OCAP in 1985 from taking effect. That order does not expressly preclude subsequent OCAP from being issued for 1985, so the only way to reach TCID's (and the district court's) conclusion is to read such an implication into the order's language. This is not possible, and the trial record demonstrates it was not the parties' understanding or Judge Craig's intent at the time.

First, TCID argues that the Tribe's Opening Brief failed to quote or even analyze Judge Craig's January 15, 1985 Order. TCID Answering Brief at 29. However, the Tribe quotes directly from Judge Craig's Order on p.22 and p.29 of its Opening Brief, and also discusses that order, and the events leading up to it, at length throughout pp. 23–25 of its Opening Brief. In fact, the portion of that order quoted in the Tribe's Opening Brief at p.22 and p.29 is the exact same portion quoted in TCID's Answering Brief at p.29: "the Water Master, GARRY STONE, is hereby authorized to commence diversions to the Newlands Project pursuant to the Final Decree entered September 8, 1944." ER 260. That language, and only that language, gives rise to the entire disagreement regarding whether subsequent interim OCAP in 1985 were binding on TCID.

By its terms, it clearly does not preclude the validity of subsequent OCAP. In fact, at a later hearing on February 12, 1985, Judge Craig's statements make clear that he did not intend to prohibit Reclamation from issuing subsequent valid

OCAP when he ordered "that the Secretary of the Interior is to cooperate with the water Master regarding the Newlands project. In this respect, the Secretary and water Master are to cooperate concerning workable and reasonable rules and regulations regarding the Newlands Project." ER 263.

Perhaps the heart of the dispute is TCID's incorrect and unsupported assumption that any subsequent interim OCAP in 1985 would have been required to have been submitted to Judge Craig for approval in order for them to be valid and binding on TCID. TCID Answering Brief at 30 ("Although the Bureau of Reclamation attempted to issue several OCAPs over the next several months, neither the United States nor the Tribe ever returned to the decree court to have those OCAPs approved and the January 15, 1985 order vacated until October 1985."). There is no support for TCID's assumption that subsequent interim OCAP in 1985 had to be approved by Judge Craig.

That assumption is contrary to the instructions set forth in *Tribe v. Morton* for Reclamation to issue valid OCAP. Therein, the United States District Court for the District of Columbia explained that subsequent interim OCAP would be valid and binding if "agreed between the parties, in writing, *or* ordered by the Court, after notice." *Tribe v. Morton*, 354 F.Supp. 2d at 262 (emphasis added). The Tribe discussed this specific provision for implementation of interim OCAP in its Opening Brief at p.26, 27 and 32—and TCID's Answering Brief completely

ignores this fundamental concept from *Tribe v. Morton* that interim OCAP were valid if promulgated by Reclamation *and agreed to by the Tribe*. TCID even goes so far as to quote this operative language from *Tribe v. Morton* at p.35 of its Answering Brief, but it omits from the quote the specific language referencing the Tribe's agreement as a sufficient condition of interim OCAP validity.

Under this clear mandate of the court in *Tribe v. Morton*, the first three interim OCAP for 1985 were valid because they were agreed to by the Tribe in writing. *See* Tribe Opening Brief at 26 (discussing ER 75 (Tribe concurrence re March–June 1985 interim OCAP), ER 86 (Tribe concurrence in July 1985 interim OCAP), ER 89 (Tribe concurrence in August–September 1985 interim OCAP)). TCID fails to discuss these documents in any way whatsoever in its Answering Brief.

Thereafter, as discussed at pp.27–28 of the Tribe's Opening Brief, the Tribe refused to concur in interim OCAP for the remainder of 1985, and the United States therefore moved the decree court for approval, consistent with *Tribe v. Morton*. As explained by the Bureau of Reclamation in a letter to TCID at the time:

> The most recent of the interim instructions expired on September 30 [1985]. Therefore, late in September we asked the Tribe to consent to interim instructions which would have been applicable from October 1 through March 15, 1986. The Tribe, however, refused, and on October 3, the Justice Department filed a motion in Reno seeking the court's approval of our interim instructions.

ER 224–25.

The district court's order on appeal herein, and TCID's assumption that the United States was required to affirmatively seek Judge Craig's approval to implement interim OCAP in 1985, both fail to provide any reasonable explanation for the substantial procedural steps undertaken by the Bureau of Reclamation in order to implement interim OCAP in 1985—prepare the above-referenced interim OCAP, publish a notice of intent in the Federal Register in 1985 and prepare an environmental assessment (ER 60–74), and obtain the Tribe's concurrence (or barring that file a motion with the decree court)—if the purpose of all of that effort was barred not by the express language of Judge Craig's January 15, 1985 single-paragraph Order, but by implication.

B. Judge Thompson's October 1985 Order Is Not Evidence That TCID's Diversions Were Free From OCAP Restrictions Throughout All of 1985

Similarly, TCID asks this Court, despite the above processes of the Bureau of Reclamation to implement valid interim OCAP, to assume that "unfettered diversions" were legally taking place throughout all of 1985, and that Judge Thompson's October 28, 1985 Order (ER 267) can be reasonably read to "import" as much. TCID Answering Brief at 31. In proper context, Judge Thompson's October 1985 order, like Judge Craig's January 1985 order, allowed diversions into the Truckee Canal to begin *because interim OCAP had expired by their terms*

causing Reclamation to order TCID to stop all diversions until new interim OCAP could be implemented. *See e.g.* ER 225 (Oct. 1985 letter from Reclamation to TCID explaining that "[b]ecause there are no rules or other instructions in effect that allow diversions from the Truckee River, or any deliveries through project facilities to serve project lands, and because we cannot lawfully issue such rules at this time [because the Tribe refused to consent to the October 1985 interim OCAP], we are forced to hereby further direct that TCID cease all such diversions and deliveries immediately"). In other words, it was the absence of any interim OCAP that caused both Judge Craig (in January 1985) and Judge Thompson (in October 1985) to allow TCID to divert without restriction, but only for short periods until interim OCAP could be implemented via either the written consent of the Tribe or barring that, by Court approval.

TCID waits until the final lines of its Answering Brief to grapple with the peculiar problem with its positions in support of the expansion of the district court's original 2003 ruling that OCAP cannot be in conflict with the relevant water rights decrees to the new ruling that *subsequently adopted* OCAP are *de facto* inconsistent with the decrees. The district court in its orders below, and TCID in its Answering Brief, fail entirely to undertake any analysis of the 1985 interim OCAP to determine if in fact they are inconsistent with either the *Orr Ditch* or *Alpine* water rights decrees. They are not.

C. The 1986 Water Spreading Order Did Not Excuse TCID From Complying with Valid OCAP

TCID argues that the March 13, 1986 "water spreading" order of Judge Thompson (ER 269) allowed TCID not only to release water from Lahontan Reservoir without regard to the farmers' annual entitlements, but also to divert water from the Truckee River without regard to OCAP's limitations. Answering Brief at 32–34. TCID's argument is based upon its statement that releases from Lahontan Reservoir for flood control purposes "would not normally be allowed under the OCAP without those releases counting toward the annual MAD as part of deliveries of irrigation water to such lands." Answering Brief at 32. That is not correct.

Precautionary releases from Lahontan Reservoir for flood protection were allowed under the express language of OCAP, and such releases were expressly accounted for in the MAD. The 1986 OCAP states:

> The District will write to the Bureau's Lahontan Basin Projects Office requesting authority for precautionary drawdown to limit potential flooding along the Carson River. Such requests will include all data necessary for the Bureau to make a decision on granting of such authority. *Any uncontrolled spill or authorized precautionary drawdown from Lahontan Reservoir will not be charged to the entitlement.*

ER 156 (emphasis added); *see also* ER 151 (the MAD is determined by, among other factors, "subtracting . . . [s]pills and precautionary releases at Lahontan Dam that are made in conformance with approved criteria."). Therefore, directly

contrary to TCID's argument, any precautionary releases of water from Lahontan Reservoir to protect downstream areas of the Carson River from flooding were expressly accounted for in calculating Newlands Project diversions.

TCID admits that as of March 13, 1986, the date of both its Memorandum Re: Water Spreading (ER 270) and Judge Thompson's water spreading order (ER 269), Lahontan Reservoir was full and was already spilling. *See e.g.* ER 270 ("At the present time, Lahontan Reservoir is full and spilling"). OCAP do not allow any diversions of Truckee River water to Lahontan Reservoir when its actual storage levels are higher than OCAP's storage targets. *See e.g.* ER 066–68. OCAP storage targets are always significantly lower than the full storage level of Lahontan Reservoir (approximately 317,000 acre-feet). Nonetheless, TCID continued to divert Truckee River water to Lahontan Reservoir after March 13, 1986, which was not allowed by OCAP. TCID's excess diversions in 1986 total 9,918 acre-feet. ER 464 (column 16).

TCID argues that recoupment may only be calculated by determining whether total diversions to the combined Carson and Truckee Divisions of the Newlands Project exceed OCAP's MAD in any year. TCID Answering Brief at 6, 33 (citing *U.S. v. Bell*, 602 F.3d 1074, 1086 (9th Cir. 2010)). TCID misreads *Bell*. This Court did not limit recoupment calculations to only excess diversions beyond the annual MAD; its language is more broad, and encompasses diversions in

excess of any OCAP limitations, not just the annual MAD. *Id*. (plaintiffs' burden is "to establish that TCID permitted diversions in excess of a properly calculated OCAP").

III. THE DISTRICT COURT SHOULD HAVE EXERCISED ITS BROAD EQUITABLE POWERS TO CONSIDER LIMITED REBUTTAL EVIDENCE IN FASHIONING AN APPROPRIATE REMEDY FOR TCID'S WILLFUL VIOLATIONS

In its Opening Brief, the Tribe requests that this Court reverse the district court's refusal to exercise its broad equitable authority to fashion a remedy for the undeniable wrongs perpetrated by TCID in willfully refusing to comply with applicable OCAP in 1985 and 1986. Specifically, the Tribe asks this Court to reverse the district court's refusal to consider trial rebuttal Exhibit 430 because that exhibit is the only evidence available from the trial for determining TCID's excess diversions for the limited periods for which the district court found that interim OCAP were in effect in 1985 and 1986. *See generally* Opening Brief at 39–40.

Exhibit 430 was admitted at trial only for limited rebuttal purposes which fall outside the purposes for which the Tribe and United States requested that it be employed on the second remand. Hence the appeal to the district court's broad equitable powers. *See generally* Opening Brief at 41–44. It was, after all, the district court's own determination on remand in its May 2015 Order that recoupment is only available for limited periods in 1985 and 1986 that necessitated

determining overdiversions on a monthly basis rather than on the annual basis pursued in the plaintiffs' case in chief at trial.

TCID responds to this by attempting, throughout its brief, to reframe the Tribe's argument as a request to "reopen its case in chief based on a new theory of damages." *See e.g.* Answering Brief at 4 (issue 3). There is, however, no new theory of damages pursued by the Tribe. The damages suffered by the Tribe have always been TCID's excess diversions of Truckee River water into the Newlands Project because of TCID's willful refusal to comply with OCAP. The Tribe is simply asking that instead of quantifying those damages based upon total annual diversions to the Truckee and Carson Divisions of the project in excess of OCAP's MAD in 1985 and 1986, that instead the damages be quantified by calculating TCID's diversions in excess of OCAP's monthly diversion limits, as required by the district court's own order on remand that recoupment is only available for certain limited portions of these two years.

TCID argues that the district court's equitable authority does not "cancel out the district court's inherent discretion to consider and reject a suspect expert opinion." Answering Brief at 28. The district court, however, refused to accept the use of Exhibit 430 to calculate TCID's excess monthly diversions in 1985 and 1986 because "calculating recoupment based on that data would require an entirely different methodology than that adopted by the court." ER 007. But that different

methodology is necessary precisely because the district court asked the parties to submit briefs setting forth their positions regarding the amounts of TCID's excess diversions for those limited monthly periods. ER 006 ("The parties were directed to meet and confer to determine whether they could agree on an amount subject to recoupment for those time periods in 1985 and 1986. They could not. Presently before the court, then, are the parties' briefs regarding the amount of recoupment, if any, each believes should be awarded for 1985 and 1986."). The district court therefore abused its broad equitable discretion by ordering the parties to set forth their calculations of monthly recoupment amounts for 1985 and 1986, and then refusing to consider the only trial evidence available for such calculations.

To the extent TCID also argues that res judicata and/or the doctrine of law of the case bar the Tribe's appeal of the district court's order refusing to exercise its broad equitable authority to allow use of Exhibit 430 to determine recoupment amounts for 1985 and 1986, those doctrines are not applicable to this issue for the reasons set forth above.

/ / /

/ / /

/ / /

/ / /

/ / /

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 1986, or in the alternative in the amount of 356,408 acre-feet to include recoupment for the limited periods that the district court determined OCAP were in effect in 1985 and 1986.

CERTIFICATE OF COMPLIANCE

This brief complies with the type size and type face requirements of FRAP 32(a)(5) and (6) and the page limitation of FRAP 32(a)(7)(B) because it is 5,885 words, excluding the portions exempted by FRAP 32(a)(7)(B)(iii), if applicable.

DATED: December 20, 2016

Respectfully submitted,

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

By: /s/ *Chris Mixson*
DON SPRINGMEYER
CHRISTOPHER W. MIXSON

Attorneys for Appellant
Pyramid Lake Paiute Tribe

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 December 20, 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